SUPPLEMENT

TO THE

CODE OF IOWA

1913

CONTAINING

ALL LAWS OF A GENERAL AND PERMANENT NATURE

ENACTED BY

THE TWENTY-SEVENTH, TWENTY-EIGHTH, TWENTY-NINTH, THIRTIETH, THIRTY-FIRST, THIRTY-SECOND REGULAR AND EXTRA SESSIONS, THIRTY-THIRD, THIRTY-FOURTH AND THIRTY-FIFTH GENERAL ASSEMBLIES, WITH ANNOTATIONS TO THE CODE AND SUPPLEMENT, DOWN TO AND INCLUDING DECISIONS RENDERED AT THE MAY TERM, 1913, OF THE SUPREME COURT, TOGETHER WITH

RULES OF THE SUPREME COURT

EDITED BY

CHARLES S. WILCOX

OF THE DES MOINES BAR

PUBLISHED BY AUTHORITY OF THE STATE

DES MOINES, IOWA.
Robert Henderson, State Printer
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1914

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INTRODUCTORY STATEMENT

The compilation of our statutory law is a matter deserving careful consideration. It is highly important that the supplement to the code be accurately compiled and it was the opinion of your committee that all things should be done, which could be done, to make it easy and convenient for the members of the bench and bar to find the law. Many new features, which are somewhat specifically set forth in the editor's preface, have been incorporated in the supplement here presented and it is hoped will meet with approval.

As has been the case with supervising committees of previous compilations, it was found that insufficient time had been allotted for the work in hand. It seemed especially advisable that an entirely new index for both the code and supplement be compiled, and while such an undertaking has involved a greater expenditure of time and effort than was perhaps contemplated by the act authorizing this supplement, your committee has felt amply justified in having the work done.

Mr. Charles S. Wilcox was selected editor and all of the work has been done by him, aided by his capable office force, with the exception of the annotations which were furnished by Hon. Emlin McClain. This book is evidence of their ability and painstaking care.

The relations which have existed between your committee and the state printer, Mr. Robert Henderson, and the state binder, Mr. John M. Jamieson, to whom the respective contracts were let, have been most satisfactory.

Your code supplement supervising committee presents this compilation of the statute law with the hope that it may fully meet the approval which the excellence of the book deserves.

JOHN B. SULLIVAN,
LE MERTON E. CRIST,
GUY M. GILLETTE,
HERBERT C. RING,
THOMAS F. GRIFFIN,
ERNEST R. MITCHELL,
Committee.

EDITOR'S PREFACE

This supplement takes the place of prior supplements and contains all general and permanent laws enacted since the date of the code. No section number of the code or prior supplement has been changed except to correct an error. If a section of the code or prior supplement has been repealed, the repeal will always be found under the same section number of this supplement or an editorial note will show where the repeal may be found, as illustrated at section forty-nine hundred eighty-two. Complete citations of prior codes or session laws follow each section. The annotations cover the period between the date of the code and the close of the May, nineteen hundred thirteen, term of the supreme court. All amendments to the Constitution of Iowa and the Constitution of the United States are shown, as are also the Naturalization Laws and Regulations of the United States.

The supplement section number of any section of a session law can be readily found by reference to the tables beginning on page nineteen hundred sixty-five. A section of the Code of 1851 can be quickly traced through subsequent codes to the Code of 1897 by the use of the table beginning on page two thousand and four; likewise a section of the Revision of 1860 by the table on page two thousand and fifty-three, a section of the Code of 1873 by the table on page two thousand and ninety, and a section of McClain's Code of 1888 by the table on page twenty-one hundred twenty-nine.

Citations of prior rules have been added to each of the Statutes and Rules of the Supreme Court and an early rule may be easily traced through succeeding rules to the present rule by means of the series of tables beginning on page nineteen hundred sixty-two.

Proof-read copies of the enrolled bills of the thirty-second extra to the thirty-fifth sessions, inclusive, of the general assembly have been used in the compilation of the text of this book. The record of every bill has been verified, numerous errors found and notes made thereof as illustrated at sections twenty-four hundred seventy-eight and forty-nine hundred forty-four-h.

Citations following sections have been rearranged in chronological order beginning with the latest and ending with the earliest as shown at section twenty-seven hundred fifty-four; many citations have been picked up from various sources and inserted as shown at sections twenty-seven hundred fifty-seven and thirty-five hundred twenty-nine; and corrections of citations made as illustrated at section thirty-five hundred forty-three where an erroneous reference to the Revision of 1860 has heretofore been shown.

Wherever in the text of a section a reference is made to a section of a session law the same has been identified by a note such as shown at sections five hundred ninety-two-a and seven hundred forty-one-n except in cases where identification is otherwise made easy. Wherever acts conflicting with a section have been repealed the fact is shown by a note as at section eighteen hundred ninety-eight-d. Wherever a note calling attention to similar statutes has seemed advisable the same has been appended as shown at sections twenty-four hundred seventy-seven-a and ten hundred eighty-seven-a twenty-five a, and many cross reference notes have been inserted as illustrated at section twenty-seven hundred twenty-four. In

every instance where a section of this supplement has been made applicable to cities acting under special charter the section is followed by a note showing that fact, as illustrated at section seven hundred twenty-nine, and if a section of the code is thus made applicable by another section of the code the fact is easily found in the index, as hereinafter explained.

There are fourteen thousand annotations in this book, every one of which has been compared with the opinion as reported. A large number of errors were discovered and corrected. Corresponding references to the Northwestern Reporter have been added and all notes from unofficial opinions dropped.

All tables are new. The tables of corresponding sections of Iowa codes, compiled from the texts of the various codes, and making it easy to trace a section of an early code through succeeding codes, are distinct innovations.

The text has been conformed to the style of the code by the elimination of figures, signs and characters.

The index covers both the code and supplement and is entirely new. The general plan thereof contemplates complete alphabetical referencing under principal topics with cross references thereto under minor titles. As all important topics show alphabetical subdivisions and the references thereunder are also alphabetically arranged, it is easy to find topics to which cross references are made. This is illustrated at "Exemptions" where there is a cross reference "See Taxation" and under "Taxation" the subdivision "Exemptions." Synonymous titles are indexed under one of the titles only and cross references made thereto. References are to section numbers only, except where page numbers conduce to brevity, in which cases the numbers are preceded by the letter p. The letter S indicates a section of this supplement.

The index to cities under special charter is as complete as that to cities and towns organized under the general law. Every index reference to each section of the law respecting cities and towns which is made applicable to cities acting under special charter by any other section is duplicated under the title "Cities Under Special Charter" and the number of the section making it applicable cited. Such an illustration is found under the subdivision "Elections" under "Cities Under Special Charter" as follows: "Annexation of territory, 610 by 935." If one desires to know whether section six hundred ten is anywhere made applicable to special charter cities it is only necessary to turn to the index "Cities Under Special Charter" and under the subdivision "Sections or Parts Thereof Made Applicable" he will find the following: "610 by 935." Every such section is likewise accounted for unless at the section itself an editorial note states the fact, as illustrated at section seven hundred twenty-nine. It is, therefore, quite as easy to find the powers of a special charter city, the duties of its various officers, provisions respecting its bonds, elections, streets, etc., as it is to find like provisions respecting other cities.

In indexing such a section as twelve hundred ninety-three-a, most thorough analysis thereof has been made. The section vitally affects forty-four sections of the code and supplement. It has been indexed as though it were a part of each of the sections affected.

I have had excellent assistance in this work. The services of Mrs. Mary E. Hammel, assistant editor, have been invaluable. The services of Miss Lillian Leffert in the correction of errors in annotations, of Miss Rose E. Tilden in the preparation of tables, of Miss Amy Byram, Miss Mary A. Reid, Miss Harriett E. King and Mrs. Clara A. Neidig in the compilation and proof reading of the text and index have been of the very

highest order, and the work of others in less important positions has been exceptionally well done.

As has been the case in former code and supplement work, ably chronicled by Mr. Clifford Powell in his articles on "History of the Codes of Iowa Law" published in The Iowa Journal of History and Politics, the element of time has been an embarrassment. I have regarded the work as too important to warrant sacrifice of thoroughness for expedition.

I acknowledge deep appreciation of the confidence reposed in me by the Code Supplement Supervising Committee, for the interest Judge Emlin McClain has manifested in having as nearly accurate as possible the new annotations furnished by him, and for the courtesies extended me by Mr. C. N. Jepson, Editor of the Supplement of 1907, and by many other members of the bench and bar.

CHARLES S. WILCOX.

Des Moines, Iowa, December, 1914.

ABBREVIATIONS

C 51	Code of 1851
C '73	Code of 1873
ch	Chapter
Const	Constitution
et seq	And sections following
Fed	Federal Reporter
G A	General Assembly
G Gr	George Greene's Iowa Reports
Ibid	Same reference
Mor	Morris' Iowa Report
N W	Northwestern Reporter
p	Page
¶ or Par	Paragraph
R or Rev	Revision of 1860
R S or Rev Stat	Revised Statutes of 1843
R (in index)	Section of Rules of Supreme Court
S (in index)	Supplement
s c	Same case
§ or Sec	Section

Volumes of the regular series of Iowa Reports are referred to by giving the numbers of the volume and page separated by a dash (—)

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PROVISIONS

RELATING TO CODE AND SUBSEQUENT STATUTES.

SECTION 16. That section sixteen of chapter twenty of the acts of the extra session of the twenty-sixth general assembly, as the same appears on page four of the prefix to the code, be repealed and the following enacted in lieu thereof:

"As soon as five hundred copies of the code are printed and bound to the satisfaction of the editor and code supervising committee, the same shall be deposited with the secretary of state, and so on until all have been completed, and the secretary of state shall be the custodian thereof, and shall distribute the same as follows: To the state library for exchange purposes, one hundred fifty copies; to the law library of the state university for exchange purposes with the law libraries of other state and territorial universities or colleges, fifty copies; to the state historical department and the state historical society, each ten copies; to all judges of the supreme and district courts of Iowa and judges of the United States circuit and district courts in Iowa, one copy each; to the clerk of the supreme court of Iowa, to each clerk of the district court of Iowa, and to each clerk of the United States circuit and district court in Iowa, one copy each for use in term time; to the state institutions and state officers, two copies each; to the separate departments of the principal state offices, members of the permanent state boards and commissions, offices of the permanent state boards and commissions when maintained at the seat of government, members of the thirty-fourth and succeeding general assemblies, chief clerk of the house, secretary of the senate, judges of the superior courts, college and public libraries within the state, state or territorial libraries in the United States, county officers, mayor of each city or town, justices of the peace, and township clerks, each one copy. Said code shall be sold to the public generally at the uniform price of not more than five dollars per copy, the price to be fixed by the executive council." [33 G. A., ch. 1, § 1.] [26 G. A., Ext. Ses., ch. 20, § 16.]

SEC. 17. That section seventeen of chapter twenty of the acts of the extra session of the twenty-sixth general assembly, as same appears on page four of the prefix to the code, be repealed and the following enacted in lieu thereof:

"For the convenience of distribution, the county auditor shall make requisition on the secretary of state for the number of copies needed for sale and gratuitous distribution in his county, and the secretary of state shall deliver to the county auditor the number so ordered, charging him therewith on the books of his office. Upon receipt thereof, the county auditor shall execute his receipt in duplicate therefor, one of which shall be filed in his office and the other immediately forwarded to the secretary of state. The county auditor shall deliver a copy to each of the county, township and city or town officers entitled thereto under the provisions of section sixteen hereof and take receipts in duplicate therefor, one of which shall be filed in his office and the other forwarded to the secretary of state along with the annual report provided for in section nineteen hereof." [33 G. A., ch. 1, § 2.] [26 G. A., Ext. Ses., ch. 20, § 17.]

SEC. 18. That section eighteen of chapter twenty of the acts of the twenty-sixth general assembly, as amended by chapter one of the acts of the thirty-first general assembly and as same appears on page five of the prefix to the supplement to the code, 1907, be repealed and the following enacted in lieu thereof:

"The secretary of state and the county auditor shall sell copies of the code at the price fixed under the provisions of section sixteen hereof, at not more than five dollars per copy. The secretary of state shall pay the proceeds arising from all such sales made by him into the state treasury each month. The county auditor shall pay the proceeds arising from such sales made by him into the county treasury for the use of the state revenue, on or before the first Monday of January in each year, taking receipt in duplicate therefor, one of which shall be immediately forwarded to the secretary of state." [33 G. A., ch. 1, § 3.] [31 G. A., ch. 1; 26 G. A., Ext. Ses., ch. 20, § 18.]

SEC. 19. That section nineteen of chapter twenty of the acts of the twenty-sixth general assembly, as amended by chapter one of the acts of the thirty-first general assembly and as same appears on page five of the prefix to the supplement to the code, 1907, be repealed and the following enacted in lieu thereof:

"The county auditor shall keep an accurate account of the codes received, sold and distributed, and shall annually on or before the first Monday of January of each year make out in writing under oath a report, showing the number of codes on hand at the beginning of the annual period, the number received, the number sold and the number gratuitously distributed during the year, the number on hand at the date of the report and the amount paid into the county treasury, and transmit said report to the secretary of state, who in turn shall certify to the auditor of state on or before the fifteenth day of January in each year the amount paid into the county treasury by the county auditor as shown by said report and the receipt of the county treasurer. The auditor of state shall thereupon charge the county treasurer with the amount so certified. The secretary of state shall credit the county auditor with the number sold and otherwise disposed of during the year as shown by said report and the receipts accompanying it." [33 G. A., ch. 1, § 4.] [31 G. A., ch. 1; 26 G. A., Ext. Ses., ch. 20, § 19.]

SEC. 20. That section twenty of chapter twenty of the acts of the extra session of the twenty-sixth general assembly, as same appears on page four of the prefix to the code, be repealed and the following enacted in lieu thereof:

"When a secretary of state goes out of office, having any such copies remaining, he shall deliver them to his successor, taking his receipt therefor in duplicate, one of which shall be filed in the office of the secretary of state, which shall be his sufficient discharge for the same. When a county auditor goes out of office having any such copies remaining, he shall deliver them to his successor, taking his receipt in duplicate therefor, one of which shall be forwarded to the secretary of state, which shall be his sufficient discharge for the same; and every county officer, justice of the peace, mayor of city or town and township clerk, receiving a copy shall give his receipt in duplicate therefor, and shall pass the copy to his successor, or deliver it to the county auditor for the use of subsequent officers, and each shall be liable therefor on his official bond." [33 G. A., ch. 1, § 5.] [26 G. A., Ext. Ses., ch. 20, § 20.]

SEC. 24. Repealed. [35 G. A., ch. 1, § 16.]

[See "Provisions relating to supplement to the code, 1913", Sec. 16.]

SEC. 27. The code, as herein provided to be published and distributed, shall be the official edition and the only authoritative publication of the existing laws of the state, and no other publication of the laws of the state shall be used in the courts or referred to in the decisions, by title, chapter or section, in the reports of the same; and the secretary of state and all other persons are hereby prohibited from delivering or permitting to be copied any acts or resolutions, or copies thereof passed at this special session of the general assembly, except as herein provided, until after the code goes into effect; and the code or any part thereof shall be published only in the manner herein or hereafter provided by the general assembly; and the rules of the supreme court providing for the citations of sections of the laws of this state shall designate the same as contained and numbered in the official code of 1897. No public money shall be paid or expended for any publication of the laws of the state except for those published by authority of the state, and any such purchase or publication herein prohibited shall be a misdemeanor. But this section shall not prohibit the publication by the several state officers and commissions in their annual or biennial reports of extracts from the laws pertaining to their respective departments. Such extracts may be published in pamphlet form by such officers or commissions with the consent of the executive council and the same shall be paid for under the provisions of section one hundred twenty of the code. The executive council may also authorize the publication by private individuals of extracts from the laws. [31 G. A., ch. 2; 28 G. A., ch. 1; 27 G. A., ch. 1; 26 G. A., Ext. Ses., ch. 20, § 27.]

[The amendment by the 31 G. A., ch. 2, ignored the code supplement of 1902, but amended ch. 1 of the acts of 27 G. A. where the matter stricken, and supplanted by new matter, appears in lines 12 and 13, while in the section as it appeared in the supplement of 1902 the same was in lines 20 and 21. EDITOR.]

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

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

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

AN ACT to provide for the publication of an edition of seventy-five hundred copies of the code.

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

SECTION 1. That the code supplement supervising committee appointed under the provisions of "An act to provide for the compilation of the laws of the twenty-seventh, twenty-eighth and twenty-ninth general assemblies, to annotate the same and code and rules of the supreme court to and including the May term, nineteen hundred and two, of the supreme court and to publish said compilation and annotations as a supplement to the code, and to provide for the appointment of a supervising committee, and

making an appropriation therefor," enacted by the twenty-ninth general assembly of the state of Iowa, shall cause to be published an edition of seventy-five hundred copies of the code, in accordance with the provisions of "An act to provide for the annotation, indexing, distribution and sale of the code and statutes hereafter enacted, and the appointment of a supervising committee, and the election of an editor and prescribing their duties," enacted by the twenty-sixth general assembly, extra session, and which took effect May fifth, eighteen hundred ninety-seven, so far as applicable. Said committee may cause the plates to be corrected where errors in print occur, also may change the citations therein from Northwestern Reporter to Iowa Reports, and may print therewith the new index prepared for the supplement to the code or omit the index and may publish therewith references to amendments and subsequent enactments. [29 G. A., ch. 211, § 1.]

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

Approved March 22, 1902.

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

W. B. MARTIN,
Secretary of State.

PROVISIONS

RELATING TO THE CODE SUPPLEMENT OF 1902.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

SEC. 11. An edition of fifteen thousand copies of said code supplement shall be printed, and the first copies shall be bound and ready for distribution on or before September first, nineteen hundred and two.

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

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

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

SEC. 15. This act being deemed of immediate importance shall take effect and be in force from and after its passage and publication in the Iowa State Register and Des Moines Leader, newspapers published at Des Moines, Iowa. [29 G. A., ch. 194.]

Approved February 24, 1902.

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

W. B. MARTIN,
Secretary of State.

PROVISIONS

RELATING TO THE SUPPLEMENT TO THE CODE, 1907.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

SEC. 15. This act, being deemed of immediate importance, shall take effect and be in force from and after its passage and publication in the Register and Leader and Des Moines Capital, newspapers published in Des Moines, Iowa. [32 G. A., ch. 221.]

Approved February 19, A. D. 1907.

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

W. C. HAYWARD,
Secretary of State.

PROVISIONS

RELATING TO THE SUPPLEMENT TO THE CODE, 1913.

AN ACT to provide for the compilation of the laws of the thirty-third, thirty-fourth and thirty-fifth general assemblies and the laws as they appear in the supplement to the code, 1907; to annotate same and the code and rules of the supreme court, to and including May term, nineteen hundred thirteen, of the supreme court, and to publish the said compilation and annotations as a "supplement to the code, 1913," and to provide for the appointing of a supervising committees, the election of an editor of such supplement to the code and to establish a salary for such editor, and making an therefor, and repealing section twenty-four of chapter twenty of the acts of the appropriation therefor, and repealing section twenty-four of chapter twenty of the acts of the twenty-sixth general assembly, extra session, as same appears on page five of the prefix to the code.

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

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

SEC. 2. Said committee shall have general supervision of the work of compiling the acts of a general and permanent nature of the thirty-third, thirty-fourth and thirty-fifth general assemblies and the laws as they appear in the supplement to the code, 1907, annotating the same and the code and the rules of the supreme court, and indexing and publishing such compilations as hereinafter provided. The committee shall elect some competent and suitable person as editor, whose duties shall be as hereinafter defined. In case of neglect or inability to act on the part of the editor, said committee may discharge him and elect another in his stead.

SEC. 3. The editor shall prepare the compilation of the supplement to be published under this act and the index and the annotations and have the copy ready for the printer by October first, nineteen hundred thirteen. He shall also have general supervision of the work under the direction of the committee. His compensation shall be twenty-five hundred dollars. The secretary of state shall deliver to the editor the enrolled bills for use in proof reading, which shall be by the enrolled bills. The compilation shall be known and designated as "Supplement to the Code, 1913." The editor shall copyright the said supplement, its indices, numbers, chapters, sections, annotations and its entire arrangement and publication and assign such copyright to the state of Iowa.

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

SEC. 5. Sections of the code and laws of the subsequent general assemblies, which have been amended, shall be given in said compilation as

amended. Where additional sections have been added to any section, chapter or title the same shall be appropriately placed and numbered thus: "Section 51-a, 51-b, 51-c," as the case may be. If there be neither amendment nor annotations to a section of the code, the number thereof may be omitted in such compilation.

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

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

SEC. 8. The committee shall cause the said supplement to[1] the code to be well made of first-class material, printed in clear, legible type face, sewed and bound in legal buckram and in accordance with the best workmanship and methods of publishing law books. In size, type, catchwords, numbering, paper, binding and other materials, the same shall conform as near as may be to the statutes of the state.

[1"of" in enrolled bill. EDITOR.]

SEC. 9. The said supplement shall be distributed to persons, sold and accounted for, except as to price, in the manner provided in sections sixteen to twenty, inclusive, of an act of the twenty-sixth general assembly, extra session, entitled "An act to provide for the annotation, indexing, publication, distribution and sale of the code and statutes hereafter enacted, the appointing of a supervising committee and the election of an editor, and prescribing their duties," which took effect May fifth, eighteen hundred ninety-seven, as amended by chapter one of the acts of the thirty-first general assembly and chapter one of the acts of the thirty-third general assembly. The distribution to the members of the general assembly shall commence with the thirty-fifth general assembly.

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

SEC. 11. An edition of twelve thousand copies of the code supplement shall be printed, nine thousand of which shall be bound for immediate use and ready for distribution as soon as possible after the printing and binding of the same has been completed; the remaining three thousand shall be folded, gathered and stored away in the paper storage room to be bound upon the orders of the executive council.

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

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

SEC. 14. There is hereby appropriated out of the treasury from funds not otherwise appropriated, a sum sufficient to pay the cost and expenses of preparing, publishing and distributing said supplement to[1] the code.

[1"of" in enrolled bill. EDITOR.]

SEC. 15. The thirty-eighth general assembly and each third general assembly thereafter shall provide for the compilation, annotation and publication of the statutes of a general or permanent nature enacted since the adoption of the code and for the selection, as provided in this act, of some competent and suitable person to compile, annotate and superintend such publication.

SEC. 16. Section twenty-four of chapter twenty of the acts of the twenty-sixth general assembly, extra session, as the same appears on page five of the prefix to the code is hereby repealed.

SEC. 17. This act being deemed of immediate importance shall take effect and be in force from and after its publication in the Register and Leader and the Des Moines Capital, newspapers published at Des Moines, Iowa. [35 G. A., ch. 1.]

Approved April 9, A. D. 1913.

I hereby certify that the foregoing act was published in the Register and Leader April 14, 1913, and in the Des Moines Capital April 12, 1913.

W. S. ALLEN,
Secretary of State.

THE CONSTITUTION

OF THE UNITED STATES OF AMERICA AS AMENDED TO MAY 1, 1913.

AMENDMENTS TO THE CONSTITUTION.

[*Proposed by congress, and ratified by the legislatures of the several states, pursuant to the fifth article of the original constitution. For dates of ratification see foot notes * and **.*]

SUMMARY.

ARTICLE XVI.

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

ARTICLE XVII.

[1] The senate of the United States shall be composed of two senators from each state, elected by the people thereof, for six years; and each senator shall have one vote. The electors in each state shall have the qualifications requisite for electors of the most numerous branch of the state legislatures.

[2] When vacancies happen in the representation of any state in the senate, the executive authority of such state shall issue writs of election to fill such vacancies: provided, that the legislature of any state may empower the executive thereof to make temporary appointment until the people fill the vacancies by election as the legislature may direct.

[3] This amendment shall not be so construed as to affect the election or term of any senator chosen before it becomes valid as part of the constitution.

*The sixteenth amendment to the constitution of the United States was proposed to the legislatures of the several states by the sixty-first congress on the 12th day of July, 1909, and was declared, in an announcement by the secretary of state, dated February 25, 1913, to have been ratified by the legislatures of the following thirty-eight of the forty-eight states. The dates of these ratifications were: Alabama, August 17, 1909; Kentucky, February 8, 1910; South Carolina, February 23, 1910; Illinois, March 1, 1910; Mississippi, March 11, 1910; Oklahoma, March 14, 1910; Maryland, April 8, 1910; Georgia August 3, 1910; Texas, August 17, 1910; Ohio, January 19, 1911; Idaho, January 20, 1911; Oregon, January 23, 1911; Washington, January 26, 1911; California, January 31, 1911; Montana, January 31, 1911; Indiana, February 6, 1911; Nevada, February 8, 1911; Nebraska, February 11, 1911; North Carolina, February 11, 1911; Colorado, February 20, 1911; North Dakota, February 21, 1911; Michigan, February 23, 1911; Iowa, February 27, 1911; Kansas, March 6, 1911; Missouri, March 16, 1911; Maine, March 31, 1911; Tennessee, April 11, 1911; Arkansas, April 22, 1911; Wisconsin, May 26, 1911; New York, July 12, 1911; South Dakota, February 3, 1912; Arizona, April 9, 1912; Minnesota, June 12, 1912; Louisiana, July 1, 1912; Delaware, February 3, 1913; Wyoming, February 3, 1913; New Jersey, February 5, 1913; New Mexico, February 5, 1913. The states of Connecticut, New Hampshire, Rhode Island, and Utah rejected this amendment. The states of Vermont, Massachusetts, New Hampshire and West Virginia ratified the sixteenth amendment subsequent to the announcement by the secretary of state.

**The seventeenth amendment to the constitution of the United States was proposed to the legislatures of the several states by the sixty-second congress on the 16th day of May, 1912, and was declared, in an announcement by the secretary of state, dated May 31, 1913, to have been ratified by the legislatures of the following thirty-six of the forty-eight states. The dates of these ratifications were: Massachusetts, May 22, 1912; Arizona, June 3, 1912; Minnesota, June 10, 1912; New York, January 15, 1913; Kansas, January 17, 1913; Oregon, January 23, 1913; North Carolina, January 25, 1913; California, January 28, 1913; Michigan, January 28, 1913; Idaho, January 31, 1913; West Virginia, February 4, 1913; Nebraska, February 5, 1913; Iowa, February 6, 1913; Montana, February 7, 1913; Texas, February 7, 1913; Washington, February 7, 1913; Wyoming, February 11, 1913; Colorado, February 13, 1913; Illinois, February 13, 1913; North Dakota, February 18, 1913; Nevada, February 19, 1913; Vermont, February 19, 1913; Maine, February 20, 1913; New Hampshire, February 21, 1913; Oklahoma, February 24, 1913; Ohio, February 25, 1913; South Dakota, February 27, 1913; Indiana, March 6, 1913; Missouri, March 7, 1913; New Mexico, March 15, 1913; New Jersey, March 18, 1913; Tennessee, April 1, 1913; Arkansas, April 14, 1913; Connecticut, April 15, 1913; Pennsylvania, April 15, 1913; Wisconsin, May 9, 1913.

NATURALIZATION LAWS AND REGULATIONS

AUGUST 20, 1913.

ACT OF JUNE 29, 1906 (34 STAT. L., PART 1, P. 596), AS AMENDED IN SECTIONS 16, 17, AND 19, BY THE ACT OF CONGRESS APPROVED MARCH 4, 1909 (35 STAT. L., PART 1, P. 1102); IN SECTIONS 4 AND 13, BY THE ACT OF CONGRESS APPROVED JUNE 25, 1910 (36 STAT. L., PART 1, P. 829); AND BY THE ACT OF CONGRESS APPROVED MARCH 4, 1913 (37 STAT. L., PART 1, P. 736), CREATING THE DEPARTMENT OF LABOR.

AN ACT to provide for a uniform rule for the naturalization of aliens throughout the United States, and establishing the bureau of naturalization.

[Portion of act creating the department of labor.]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That there is hereby created an executive department in the government to be called the department of labor, with a secretary of labor, who shall be the head thereof, to be appointed by the president, by and with the advice and consent of the senate; * * *

* * * * * * *

SECTION 3. That the following named offices, bureaus, divisions, and branches of the public service now and heretofore under the jurisdiction of the department of commerce and labor, and all that pertains to the same, known as * * * the bureau of immigration and naturalization, * * * the division of naturalization, * * * be, and the same hereby are, transferred from the department of commerce and labor to the department of labor, and the same shall hereafter remain under the jurisdiction and supervision of the last named department. The bureau of immigration and naturalization is hereby divided into two bureaus, to be known hereafter as the bureau of immigration and the bureau of naturalization, and the titles chief division of naturalization and assistant chief shall be commissioner of naturalization and deputy commissioner of naturalization. The commissioner of naturalization or, in his absence, the deputy commissioner of naturalization, shall be the administrative officer in charge of the bureau of naturalization and of the administration of the naturalization laws under the immediate direction of the secretary of labor, to whom he shall report directly upon all naturalization matters annually and as otherwise required, * * *.

[Act of June 29, 1906, as amended by the acts above referred to.]

That the bureau of naturalization, under the direction and control of the secretary of labor, shall have charge of all matters concerning the naturalization of aliens. That it shall be the duty of the bureau of immigration to provide, for use at the various immigration stations throughout the United States, books of record, wherein the commissioners of immigration shall cause a registry to be made in the case of each alien arriving in the United States from and after the passage of this act of the name, age, occupation, personal description (including height, complexion, color of hair and eyes), the place of birth, the last residence, the intended place of residence in the United States, and the date of arrival

of said alien, and, if entered through a port, the name of the vessel in which he comes. And it shall be the duty of said commissioners of immigration to cause to be granted to such alien a certificate of such registry, with the particulars thereof.[1]

[1See rule 5 of the regulations.]

SEC. 2. (This section is omitted as it authorized the secretary of commerce and labor to provide the necessary offices in the city of Washington and take the necessary steps for the proper discharge of the duties imposed by the act of June twenty-ninth, nineteen hundred and six.)

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

United States circuit[1] and district courts now existing, or which may hereafter be established by congress in any state, United States district courts for the territories of Arizona,[2] New Mexico,[2] Oklahoma,[2] Hawaii, and Alaska, the supreme court of the District of Columbia, and the United States courts for the Indian Territory;[2] also all courts of record in any state or territory now existing, or which may hereafter be created, having a seal, a clerk, and jurisdiction in actions at law or equity, or law and equity, in which the amount in controversy is unlimited.

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

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

[1United States circuit courts abolished December 31, 1911, by act of congress approved March 3, 1911 (36 Stat. L., part 1, p. 1167).]

[2United States territorial courts abolished by acts of congress conferring statehood.]

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

First. He shall declare on oath before the clerk of any court authorized by this act to naturalize aliens, or his authorized deputy, in the district in which such alien resides, two years at least prior to his admission, and after he has reached the age of eighteen years, that it is bona fide his intention to become a citizen of the United States, and to renounce forever all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty, and particularly, by name, to the prince, potentate, state, or sovereignty of which the alien may be at the time a citizen or subject. And such declaration shall set forth the name, age, occupation, personal description, place of birth, last foreign residence and allegiance, the date of arrival, the name of the vessel, if any, in which he came to the United States, and the present place of residence in the United States of said alien: provided, however, that no alien who, in conformity with the law in force at the date of his declaration, has declared his intention to become a citizen of the United States shall be required to renew such declaration: provided, further, that any person belonging to the class of persons authorized and qualified under existing law to become a citizen of the United States who has resided constantly in the United States during a period of five years next preceding May first, nineteen hundred ten, who, because of misinformation in regard to his citizenship or the requirements of the law governing the naturalization of citizens has labored and acted under the impression that he was or could become a citizen of the United States and has in good faith exercised the rights or duties of a citizen or intended citizen of the United States because of such wrongful information and belief may, upon making a showing of such facts satis-

factory to a court having jurisdiction to issue papers of naturalization to an alien, and the court in its judgment believes that such person has been for a period of more than five years entitled upon proper proceedings to be naturalized as a citizen of the United States, receive from the said court a final certificate of naturalization, and said court may issue such certificate without requiring proof of former declaration by or on the part of such person of their intention to become a citizen of the United States, but such applicant for naturalization shall comply in all other respects with the law relative to the issuance of final papers of naturalization to aliens.[1]

[1Last proviso added by act of June 25, 1910.]

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

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

The petition shall also be verified by the affidavits of at least two credible witnesses, who are citizens of the United States, and who shall state in their affidavits that they have personally known the applicant to be a resident of the United States for a period of at least five years continuously, and of the state, territory, or district in which the application is made for a period of at least one year immediately preceding the date of the filing of his petition, and that they each have personal knowledge that the petitioner is a person of good moral character, and that he is in every way qualified, in their opinion, to be admitted as a citizen of the United States.

At the time of filing his petition there shall be filed with the clerk of the court a certificate from the department of labor, if the petitioner arrives in the United States after the passage of this act, stating the date, place, and manner of his arrival in the United States,[1] and the declaration

of intention of such petitioner, which certificate and declaration shall be attached to and made a part of said petition.

[1See rule 5 of the regulations.]

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

Fourth. It shall be made to appear to the satisfaction of the court admitting any alien to citizenship that immediately preceding the date of his application he has resided continuously within the United States five years at least, and within the state or territory where such court is at the time held one year at least, and that during that time he has behaved as a man of good moral character, attached to the principles of the constitution of the United States, and well disposed to the good order and happiness of the same. In addition to the oath of the applicant, the testimony of at least two witnesses, citizens of the United States, as to the facts of residence, moral character, and attachment to the principles of the constitution shall be required, and the name, place of residence, and occupation of each witness shall be set forth in the record.

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

Sixth. When any alien who has declared his intention to become a citizen of the United States dies before he is actually naturalized the widow and minor children of such alien may, by complying with the other provisions of this act, be naturalized without making any declaration of intention.

SEC. 5. That the clerk of the court shall, immediately after filing the petition, give notice thereof by posting in a public and conspicuous place in his office, or in the building in which his office is situated, under an appropriate heading, the name, nativity, and residence of the alien, the date and place of his arrival in the United States, and the date, as nearly as may be, for the final hearing of his petition, and the names of the witnesses whom the applicant expects to summon in his behalf; and the clerk shall, if the applicant requests it, issue a subpœna for the witnesses so named by the said applicant to appear upon the day set for the final hearing, but in case such witnesses can not be produced upon the final hearing other witnesses may be summoned.

SEC. 6. That petitions for naturalization may be made and filed during term time or vacation of the court and shall be docketed the same day as filed, but final action thereon shall be had only on stated days, to be fixed by rule of the court, and in no case shall final action be had upon a petition until at least ninety days have elapsed after filing and posting the notice of such petition: provided, that no person shall be naturalized nor shall any certificate of naturalization be issued by any court within thirty days preceding the holding of any general election within its territorial jurisdiction. It shall be lawful at the time and as a part of the naturalization of any alien, for the court, in its discretion, upon the petition of such alien, to make a decree changing the name of said alien, and his certificate of naturalization shall be issued to him in accordance therewith.

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

SEC. 8. That no alien shall hereafter be naturalized or admitted as a citizen of the United States who can not speak the English language: provided, that this requirement shall not apply to aliens who are physically unable to comply therewith, if they are otherwise qualified to become citizens of the United States: and provided further, that the requirements of this section shall not apply to any alien who has prior to the passage of this act declared his intention to become a citizen of the United States in conformity with the law in force at the date of making such declaration: provided further, that the requirements of section eight shall not apply to aliens who shall hereafter declare their intention to become citizens and who shall make homestead entries upon the public lands of the United States and comply in all respects with the laws providing for homestead entries on such lands.

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

SEC. 10. That in case the petitioner has not resided in the state, territory, or district for a period of five years continuously and immediately preceding the filing of his petition he may establish by two witnesses, both in his petition and at the hearing, the time of his residence within the state, provided that it has been for more than one year, and the remaining portion of his five years' residence within the United States required by law to be established may be proved by the depositions of two or more witnesses who are citizens of the United States, upon notice to the bureau of naturalization and the United States attorney for the district in which said witnesses may reside.

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

SEC. 12. That it is hereby made the duty of the clerk of each and every court exercising jurisdiction in naturalization matters under the provisions of this act to keep and file a duplicate of each declaration of intention made before him and to send to the bureau of naturalization at Washington, within thirty days after the issuance of a certificate of citizenship, a duplicate of such certificate, and to make and keep on file in his office a stub for each certificate so issued by him, whereon shall be entered a memorandum of all the essential facts set forth in such certificate. It shall also be the duty of the clerk of each of said courts to report to the said bureau, within thirty days after the final hearing and decision of the court, the name of each and every alien who shall be denied naturalization, and to furnish to said bureau duplicates of all petitions

within thirty days after the filing of the same, and certified copies of such other proceedings and orders instituted in or issued out of said court affecting or relating to the naturalization of aliens as may be required from time to time by the said bureau.

In case any such clerk or officer acting under his direction shall refuse or neglect to comply with any of the foregoing provisions he shall forfeit and pay to the United States the sum of twenty-five dollars in each and every case in which such violation or omission occurs, and the amount of such forfeiture may be recovered by the United States in an action of debt against such clerk.

Clerks of courts having and exercising jurisdiction in naturalization matters shall be responsible for all blank certificates of citizenship received by them from time to time from the bureau of naturalization, and shall account for the same to the said bureau whenever required so to do by such bureau. No certificate of citizenship received by any such clerk which may be defaced or injured in such manner as to prevent its use as herein provided shall in any case be destroyed, but such certificate shall be returned to the said bureau; and in case any such clerk shall fail to return or properly account for any certificate furnished by the said bureau, as herein provided, he shall be liable to the United States in the sum of fifty dollars, to be recovered in an action of debt, for each and every certificate not properly accounted for or returned.

SEC. 13.[1] That the clerk of each and every court exercising jurisdistion in naturalization cases shall charge, collect, and account for the following fees in each proceeding:

For receiving and filing a declaration of intention and issuing a duplicate thereof, one dollar.

For making, filing, and docketing the petition of an alien for admission as a citizen of the United States and for the final hearing thereon, two dollars; and for entering the final order and the issuance of the certificate of citizenship thereunder, if granted, two dollars.

The clerk of any court collecting such fees is hereby authorized to retain one half of the fees collected by him in such naturalization proceeding; the remaining one half of the naturalization fees in each case collected by such clerks, respectively, shall be accounted for in their quarterly accounts, which they are hereby required to render the bureau of naturalization, and paid over to such bureau within thirty days from the close of each quarter in each and every fiscal year, and the moneys so received shall be paid over to the disbursing clerk of the department of labor, who shall thereupon deposit them in the treasury of the United States, rendering an account therefor quarterly to the auditor for the state and other departments, and the said disbursing clerk shall be held responsible under his bond for said fees so received.

In addition to the fees herein required, the petitioner shall, upon the filing of his petition to become a citizen of the United States, deposit with and pay to the clerk of the court a sum of money sufficient to cover the expenses of subpœnaing and paying the legal fees of any witnesses for whom he may request a subpœna, and upon the final discharge of such witnesses they shall receive, if they demand the same from the clerk, the customary and usual witness fees from the moneys which the petitioner shall have paid to such clerk for such purpose, and the residue, if any, shall be returned by the clerk to the petitioner: provided, that the clerks of courts exercising jurisdiction in naturalization proceedings shall be permitted to retain one half of the fees in any fiscal year up to the sum of three thousand dollars, and that all fees received by such clerks in naturalization proceedings in excess of such amount shall be accounted for and paid over to said bureau as in case of other fees to which the United States may be

entitled under the provisions of this act. The clerks of the various courts exercising jurisdiction in naturalization proceedings shall pay all additional clerical force that may be required in performing the duties imposed by this act upon the clerks of courts from fees received by such clerks in naturalization proceedings.

And in case the clerk of any court exercising naturalization jurisdiction collects fees in excess of the sum of six thousand dollars in any fiscal year the secretary of labor may allow salaries, for naturalization purposes only, to pay for clerical assistance, to be selected and employed by that clerk, additional to the clerical force, for which clerks of courts are required by this section to pay from fees received by such clerks in naturalization proceedings, if in the opinion of said secretary the naturalization business of such clerk warrants further additional assistance: provided, that in no event shall the whole amount allowed the clerk of a court and his assistants exceed the one half of the gross receipts of the office of said clerk from naturalization fees during such fiscal year: provided further, that when, at the close of any fiscal year, the business of such clerk of court indicates in the opinion of the secretary of labor that the naturalization fees for the succeeding fiscal year will exceed six thousand dollars the secretary of labor may authorize the continuance of the allowance of salaries for the additional clerical assistance herein provided for and employed on the last day of the fiscal year until such time as the remittances indicate in the opinion of said secretary that the fees for the then current fiscal year will not be sufficient to allow the additional clerical assistance authorized by this act.

That payment for the additional clerical assistance herein authorized shall be in the manner and under such regulations as the secretary of labor may prescribe.

[1Section 13 as amended by act of June 25, 1910.]

SEC. 14. That the declarations of intention and the petitions for naturalization shall be bound in chronological order in separate volumes, indexed, consecutively numbered, and made part of the records of the court. Each certificate of naturalization issued shall bear upon its face, in a place prepared therefor, the volume number and page number of the petition whereon such certificate was issued, and the volume number and page number of the stub of such certificate.

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

If any alien who shall have secured a certificate of citizenship under the provisions of this act shall, within five years after the issuance of such certificate, return to the country of his nativity, or go to any other foreign country, and take permanent residence therein, it shall be considered prima-facie evidence of a lack of intention on the part of such alien to become a permanent citizen of the United States at the time of filing his

application for citizenship, and, in the absence of countervailing evidence, it shall be sufficient in the proper proceeding to authorize the cancellation of his certificate of citizenship as fraudulent, and the diplomatic and consular officers of the United States in foreign countries shall from time to time, through the department of state, furnish the department of justice with the names of those within their respective jurisdictions who have such certificates of citizenship and who have taken permanent residence in the country of their nativity, or in any other foreign country, and such statements, duly certified, shall be admissible in evidence in all courts in proceedings to cancel certificates of citizenship.

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

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

SEC. 16. [Superseded by act of March 4, 1909. See section 74 thereof.]

SEC. 17. [Superseded by act of March 4, 1909. See section 75 thereof.]

SEC. 18. That it is hereby made a felony for any clerk or other person to issue or be a party to the issuance of a certificate of citizenship contrary to the provisions of this act, except upon a final order under the hand of a court having jurisdiction to make such order, and upon conviction thereof such clerk or other person shall be punished by imprisonment for not more than five years and by a fine of not more than five thousand dollars, in the discretion of the court.

SEC. 19. [Superseded by act of March 4, 1909. See section 77 thereof.]

SEC. 20. That any clerk or other officer of a court having power under this act to naturalize aliens, who wilfully neglects to render true accounts of moneys received by him for naturalization proceedings or who wilfully neglects to pay over any balance of such moneys due to the United States within thirty days after said payment shall become due and demand therefor has been made and refused, shall be deemed guilty of embezzlement of the public moneys, and shall be punishable by imprisonment for not more than five years, or by a fine of not more than five thousand dollars, or both.

SEC. 21. That it shall be unlawful for any clerk of any court or his authorized deputy or assistant exercising jurisdiction in naturalization proceedings to demand, charge, collect, or receive any other or additional fees or moneys in naturalization proceedings save the fees and moneys herein specified; and a violation of any of the provisions of this section or any part thereof is hereby declared to be a misdemeanor and shall be punished by imprisonment for not more than two years, or by a fine of not more than one thousand dollars, or by both such fine and imprisonment.

SEC. 22. That the clerk of any court exercising jurisdiction in naturalization proceedings, or any person acting under authority of this act, who shall knowingly certify that a petitioner, affiant, or witness named in an affidavit, petition, or certificate of citizenship, or other paper or writing required to be executed under the provisions of this act, per-

sonally appeared before him and was sworn thereto, or acknowledged the execution thereof or signed the same, when in fact such petitioner, affiant, or witness did not personally appear before him, or was not sworn thereto, or did not execute the same, or did not acknowledge the execution thereof, shall be punished by a fine not exceeding five thousand dollars, or by imprisonment not to exceed five years.

SEC. 23. That any person who knowingly procures naturalization in violation of the provisions of this act shall be fined not more than five thousand dollars, or shall be imprisoned not more than five years, or both, and upon conviction the court in which such conviction is had shall thereupon adjudge and declare the final order admitting such person to citizenship void. Jurisdiction is hereby conferred on the courts having jurisdiction of the trial of such offense to make such adjudication. Any person who knowingly aids, advises, or encourages any person not entitled thereto to apply for or to secure naturalization, or to file the preliminary papers declaring an intent to become a citizen of the United States, or who in any naturalization proceeding knowingly procures or gives false testimony as to any material fact, or who knowingly makes an affidavit false as to any material fact required to be proved in such proceeding, shall be fined not more than five thousand dollars, or imprisoned not more than five years, or both.

SEC. 24. That no person shall be prosecuted, tried, or punished for any crime arising under the provisions of this act unless the indictment is found or the information is filed within five years next after the commission of such crime.

SEC. 25. That for the purpose of the prosecution of all crimes and offenses against the naturalization laws of the United States which may have been committed prior to the date when this act shall go into effect, the existing naturalization laws shall remain in full force and effect.

SEC. 26. That sections twenty-one hundred sixty-five, twenty-one hundred sixty-seven, twenty-one hundred sixty-eight, twenty-one hundred seventy-three of the Revised Statutes of the United States of America, and section thirty-nine of chapter one thousand twelve of the Statutes at Large of the United States of America for the year nineteen hundred and three, and all acts or parts of acts inconsistent with or repugnant to the provisions of this act are hereby repealed.

SEC. 27. That substantially the following forms shall be used in the proceedings to which they relate:

DECLARATION OF INTENTION.

(Invalid for all purposes seven years after the date hereof.)

....., SS:

I, ..., aged.....years, occupation....., do declare on oath (affirm) that my personal description is: Color....., complexion....., height....., weight....., color of hair....., color of eyes....., other visible distinctive marks.....; I was born in.....on the.....day of....., anno Domini.....; I now reside at.....; I emigrated to the United States of America from .....on the vessel.....; my last foreign residence was..... It is my bona fide intention to renounce forever all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty, and particularly to....., of which I am now a citizen (subject); I arrived at the (port) of....., in the State (Territory or District) of....., on or about the.....day of....., anno Domini.....; I am not an anarchist; I am not a polygamist nor a believer in the practice of

polygamy; and it is my intention in good faith to become a citizen of the United States of America and to permanently reside therein. So help me God.

(Original signature of declarant).....

Subscribed and sworn to (affirmed) before me this.....day of ....., anno Domini.....

[L. S.] .....,
(Official character of attestor.)

PETITION FOR NATURALIZATION.

.....Court of.....

In the matter of the petition of.....to be admitted as a citizen of the United States of America.

To the.....Court:

The petition of.....respectfully shows:

First. My full name is.....

Second. My place of residence is number.....street, city of....., State (Territory or District) of.....

Third. My occupation is.....

Fourth. I was born on the.....day of.....at.....

Fifth. I emigrated to the United States from....., on or about the.....day of....., anno Domini....., and arrived at the port of....., in the United States, on the vessel.....

Sixth. I declared my intention to become a citizen of the United States on the.....day of....., at....., in the.....court of .....

Seventh. I am.....married. My wife's name is..... She was born in..... and now resides at..... I have.....children, and the name, date, and place of birth and place of residence of each of said children is as follows: .....; .....; .....

Eighth. I am not a disbeliever in or opposed to organized government or a member of or affiliated with any organization or body of persons teaching disbelief in organized government. I am not a polygamist nor a believer in the practice of polygamy. I am attached to the principles of the Constitution of the United States, and it is my intention to become a citizen of the United States and to renounce absolutely and forever all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty, and particularly to....., of which at this time I am a citizen (or subject), and it is my intention to reside permanently in the United States.

Ninth. I am able to speak the English language.

Tenth. I have resided continuously in the United States of America for a term of five years at least immediately preceding the date of this petition, to wit, since....., anno Domini....., and in the State (Territory or District) of.....for one year at least next preceding the date of this petition, to wit, since.....day of....., anno Domini.....

Eleventh. I have not heretofore made petition for citizenship to any court. (I made petition for citizenship to the.....court of..... at....., and the said petition was denied by the said court for the following reasons and causes, to wit, ..., and the cause of such denial has since been cured or removed.)

Attached hereto and made a part of this petition are my declaration of intention to become a citizen of the United States and the certificate from

the department of labor required by law. Wherefore your petitioner prays that he may be admitted a citizen of the United States of America.

Dated.....

(Signature of petitioner).....

....., ss:

....., being duly sworn, deposes and says that he is the petitioner in the above-entitled proceeding; that he has read the foregoing petition and knows the contents thereof; that the same is true of his own knowledge, except as to matters therein stated to be alleged upon information and belief, and that as to those matters he believes it to be true.

Subscribed and sworn to before me this.....day of....., anno Domini.....

[L. S.] .....,

Clerk of the.....Court.

AFFIDAVIT OF WITNESSES.

.....Court of.....

In the matter of the petition of.....to be admitted a citizen of the United States of America.

....., ss:

....., occupation....., residing at....., and..... ....., occupation....., residing at....., each being severally, duly, and respectively sworn, deposes and says that he is a citizen of the United States of America; that he has personally known....., the petitioner above mentioned, to be a resident of the United States for a period of at least five years continuously immediately preceding the date of filing his petition, and of the State (Territory or District) in which the above-entitled application is made for a period of.....years immediately preceding the date of filing his petition; and that he has personal knowledge that the said petitioner is a person of good moral character, attached to the principles of the Constitution of the United States, and that he is in every way qualified, in his opinion, to be admitted as a citizen of the United States.

.....

.....

Subscribed and sworn to before me this.....day of....., nineteen hundred and.....

[L. S.] .....,

(Official character of attestor.)

CERTIFICATE OF NATURALIZATION.

Number.....

Petition, volume....., page.....

Stub, volume....., page.....

(Signature of holder).....

Description of holder: Age, ...; height, ...; color, ...; complexion, ...; color of eyes, ...; color of hair, ...; visible distinguishing marks, ... Name, age, and place of residence of wife, ..., ..., ... Names, ages, and places of residence of minor children, ..., ..., ...; ....., ..., ...; ....., ..., ...

....., ss:

Be it remembered, that at a.....term of the.....court of ....., held at.....on the.....day of....., in the

year of our Lord nineteen hundred and....., ..., who previous to his (her) naturalization was a citizen (or subject) of....., at present residing at number.....street, ...city (town), ...(State Territory or District), having applied to be admitted a citizen of the United States of America pursuant to law, and the court having found that the petitioner had resided continuously within the United States for at least five years and in this state for one year immediately preceding the date of the hearing of his (her) petition, and that said petitioner intends to reside permanently in the United States, had in all respects complied with the law in relation thereto, and that.....he was entitled to be so admitted, it was thereupon ordered by the said court that....he be admitted as a citizen of the United States of America.

In testimony whereof the seal of said court is hereunto affixed on the.....day of....., in the year of our Lord nineteen hundred and.....and of our independence the.....

[L. S.] .....,
(Official character of attestor.)

STUB OF CERTIFICATE OF NATURALIZATION.

No. of certificate, ...
Name.....; age, ...
Declaration of intention, volume....., page.....
Petition, volume....., page.....
Name, age, and place of residence of wife, ..., ..., ...
Names, ages, and places of residence of minor children, ..., ..., ...; ....., ..., ..., ...; ....., ..., ...; ....., ..., ..., ..., ..., ..., ...; ....., ..., ...; ....., ..., ...
Date of order, volume....., page.....
(Signature of holder).....

SEC. 28. That the secretary of labor shall have power to make such rules and regulations as may be necessary for properly carrying into execution the various provisions of this act. Certified copies of all papers, documents, certificates, and records required to be used, filed, recorded, or kept under any and all of the provisions of this act shall be admitted in evidence equally with the originals in any and all proceedings under this act and in all cases in which the originals thereof might be admissible as evidence.

SEC. 29. That for the purpose of carrying into effect the provisions of this act there is hereby appropriated the sum of one hundred thousand dollars, out of any moneys in the treasury of the United States not otherwise appropriated, which appropriation shall be in full for the objects hereby expressed until June thirtieth, nineteen hundred and seven; and the provisions of section thirty-six hundred seventy-nine of the Revised Statutes of the United States shall not be applicable in any way to this appropriation.

SEC. 30. That all the applicable provisions of the naturalization laws of the United States shall apply to and be held to authorize the admission to citizenship of all persons not citizens who owe permanent allegiance to the United States, and who may become residents of any state or organized territory of the United States, with the following modifications: The applicant shall not be required to renounce allegiance to any foreign sovereignty; he shall make his declaration of intention to become a citizen of the United States at least two years prior to his admission; and residence within the jurisdiction of the United States, owing such permanent

allegiance, shall be regarded as residence within the United States within the meaning of the five years' residence clause of the existing law.

SEC. 31. That this act shall take effect and be in force from and after ninety days from the date of its passage: provided, that sections one, two, twenty-eight, and twenty-nine shall go into effect from and after the passage of this act.

Approved, June 29, 1906.

ACT OF FEBRUARY 24, 1911 (36 STAT. L., PT. 1, P. 929).

AN ACT providing for the naturalization of the wife and minor children of insane aliens making homestead entries under the land laws of the United States.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That when any alien, who has declared his intention to become a citizen of the United States, becomes insane before he is actually naturalized, and his wife shall thereafter make a homestead entry under the land laws of the United States, she and their minor children may, by complying with the other provisions of the naturalization laws, be naturalized without making any declaration of intention.

Approved, February 24, 1911.

[In regard to the acquisition of citizenship by other means than naturalization, see secs. 1992, 1993, and 1995 of the United States Revised Statutes, page 28 of the Iowa code.]

UNITED STATES REVISED STATUTES.

CITIZENSHIP, TITLE XXV.

SECTION 1994. Citizenship of women by marriage.

[Same as found on page 28 of the code.]

NATURALIZATION,[1] TITLE XXX.

[[1]For list of sections repealed see sec. 26 of act of June 29, 1906.]

SEC. 2166. Honorably discharged soldiers exempt from certain formalities.

[Same as found on page 31 of the code.]

SEC. 2169. (As amended, 1875.) Aliens of African nativity and descent.

[Same as found on page 32 of the code.]

SEC. 2170.[1] Residence within the United States required for five years continuously.

[Same as found on page 32 of the code.]

[[1]The United States circuit court of appeals has held that this section was not repealed by the naturalization act of June 29, 1906. (See *United States v. Rodiek*, 162 Fed. 469.)]

SEC. 2171. Naturalization to alien enemies prohibited.

[Same as found on page 32 of the code.]

SEC. 2172. Children of persons naturalized under certain laws to be citizens.

[Same as found on page 32 of the code.]

SEC. 2174. Alien seamen of merchant vessels.

[Same as found on page 32 of the code.]

TWENTY-SECOND STATUTES AT LARGE, PAGE 61.

[Act of May 6, 1882.]

SECTION 14. Naturalization of Chinese prohibited. That hereafter no state court or court of the United States shall admit Chinese to citizenship; and all laws in conflict with this act are hereby repealed.

TWENTY-EIGHTH STATUTES AT LARGE, PAGE 124.

[Act of July 26, 1894.]

Aliens honorably discharged from service in navy or marine corps.

[Same as found on page 33 of the code under the caption, "naturalization of aliens serving in navy or marine corps."]

THIRTY-FOURTH STATUTES AT LARGE, PAGE 1228.

[Act of March 2, 1907.]

AN ACT in reference to the expatriation of citizens and their protection abroad.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the secretary of state shall be authorized, in his discretion, to issue passports to persons not citizens of the United States as follows: Where any person has made a declaration of intention to become such a citizen as provided by law and has resided in the United States for three years a passport may be issued to him entitling him to the protection of the government in any foreign country: provided, that such passport shall not be valid for more than six months and shall not be renewed, and that such passport shall not entitle the holder to the protection of this government in the country of which he was a citizen prior to making such declaration of intention.

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

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

SEC. 3. That any American woman who marries a foreigner shall take the nationality of her husband. At the termination of the marital relation she may resume her American citizenship, if abroad, by registering as an American citizen within one year with a consul of the United States, or by returning to reside in the United States, or, if residing in the United States at the termination of the marital relation, by continuing to reside therein.

SEC. 4. That any foreign woman who acquires American citizenship by marriage to an American shall be assumed to retain the same after the termination of the marital relation if she continue to reside in the United States, unless she makes formal renunciation thereof before a court having jurisdiction to naturalize aliens, or if she resides abroad she may retain her citizenship by registering as such before a United States consul within one year after the termination of such marital relation.

SEC. 5. That a child born without the United States of alien parents shall be deemed a citizen of the United States by virtue of the naturalization of or resumption of American citizenship by the parent: provided, that such naturalization or resumption takes place during the minority of such child: and provided further, that the citizenship of such minor child shall begin at the time such minor child begins to reside permanently in the United States.

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

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

ACTS TO VALIDATE CERTAIN CERTIFICATES OF NATURALIZATION.

[Act of June 29, 1906.]

THIRTY-FOURTH STATUTES AT LARGE, PAGE 630.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That naturalization certificates issued after the act approved March third, nineteen hundred and three, entitled "An act to regulate the immigration of aliens into the United States," went into effect, which fail to show that the courts issuing said certificates complied with the requirements of section thirty-nine of said act, but which were otherwise lawfully issued, are hereby declared to be as valid as though said certificates complied with said section: provided, that in all such cases applications shall be made for new naturalization certificates, and when the same are granted, upon compliance with the provisions of said act of nineteen hundred and three, they shall relate back to the defective certificates, and citizenship shall be deemed to have been perfected at the date of the defective certificate.

SEC. 2. That all the records relating to naturalization, all declarations of intention to become citizens of the United States, and all certificates of naturalization filed, recorded, or issued prior to the time when this act takes effect in or from the criminal court of Cook county, Illinois, shall for all purposes be deemed to be and to have been made, filed, recorded, or issued by a court with jurisdiction to naturalize aliens, but shall not be by this act further validated or legalized.

[Act of August 24, 1912.]

THIRTY-SEVENTH STATUTES AT LARGE, PART I, PAGE 487.

SEC. 9. All of the records relating to naturalization or declarations of intention to become citizens of the United States and all certificates of naturalization filed, recorded, or issued prior to an act to validate certain certificates of naturalization approved June twenty-ninth, nineteen hundred and six, in or from the Louisville city court, sometimes called the Louisville police court, Kentucky, shall for all purposes be deemed to be and to have been made, filed, recorded, or issued by a court with jurisdiction to naturalize aliens, but shall not be by this act further validated or legalized.

[Act of June 23, 1913, Public No. 3.]

SEC. 4. That all of the records relating to naturalization or declarations of intention to become citizens of the United States and all certificates of naturalization filed, recorded, or issued prior to an act to validate certain certificates of naturalization approved June twenty-ninth, nineteen hundred and six, in or from the county court of Davidson county, Tennessee, shall for all purposes be deemed to be and to have been made, filed, recorded, or issued by a court with jurisdiction to naturalize aliens, but shall not be by this act further validated or legalized.

[The following sections repeal sections 16, 17, and 19 of the act of June 29, 1906.]

THIRTY-FIFTH STATUTES AT LARGE, PAGE 1102.

[Act of March 4, 1909.]

AN ACT to codify, revise, and amend the penal laws of the United States.

SECTION 74. Whoever shall falsely make, forge, or counterfeit, or cause or procure to be falsely made, forged, or counterfeited, or shall knowingly aid or assist in falsely making, forging, or counterfeiting any certificate of citizenship, with intent to use the same, or with the intent that the same may be used by some other person, shall be fined not more than ten thousand dollars, or imprisoned not more than ten years, or both.

SEC. 75. Whoever shall engrave, or cause or procure to be engraved, or assist in engraving, any plate in the likeness of any plate designed for the printing of a certificate of citizenship; or whoever shall sell any such plate, or shall bring into the United States from any foreign place any such plate, except under the direction of the secretary of labor or other proper officer; or whoever shall have in his control, custody, or possession any metallic plate engraved after the similitude of any plate from which any such certificate has been printed, with intent to use or to suffer such plate to be used in forging or counterfeiting any such certificate or any part thereof; or whoever shall print, photograph, or in any manner cause to be printed, photographed, made, or executed, any print or impression in the likeness of any such certificate, or any part thereof; or whoever shall sell any such certificate, or shall bring the same into the United States from any foreign place, except by direction of some proper officer of the United States; or whoever shall have in his possession a distinctive paper which has been adopted by the proper officer of the United States for the printing of such certificate, with intent unlawfully to use the same, shall be fined not more than ten thousand dollars, or imprisoned not more than ten years, or both.

SEC. 76. Whoever, when applying to be admitted a citizen, or when appearing as a witness for any such person, shall knowingly personate any person other than himself, or shall falsely appear in the name of a deceased person, or in an assumed or fictitious name; or whoever shall falsely make, forge, or counterfeit any oath, notice, affidavit, certificate, order, record, signature, or other instrument, paper, or proceeding required or authorized by any law relating to or providing for the naturalization of aliens; or whoever shall utter, sell, dispose of, or shall use as true or genuine, for any unlawful purpose, any false, forged, antedated, or counterfeit oath, notice, certificate, order, record, signature, instrument, paper, or proceeding above specified; or whoever shall sell or dispose of to any person other than the person for whom it was originally issued any certificate of citizenship or certificate showing any person to be admitted a citizen, shall be fined not more than one thousand dollars, or imprisoned not more than five years, or both.

SEC. 77. Whoever shall use or attempt to use, or shall aid, assist, or participate in the use of any certificate of citizenship, knowing the same to be forged, counterfeit, or antedated, or knowing the same to have been procured by fraud or otherwise unlawfully obtained; or whoever, without lawful excuse, shall knowingly possess any false, forged, antedated, or counterfeit certificate of citizenship purporting to have been issued under any law of the United States relating to naturalization, knowing such certificate to be false, forged, antedated, or counterfeit, with the intent unlawfully to use the same; or whoever shall obtain, accept, or receive any certificate of citizenship, knowing the same to have been procured by fraud or by the use or means of any false name or statement given or made with the intent to procure, or to aid in procuring, the issuance of such certificate, or knowing the same to have been fraudulently altered or antedated; or whoever, without lawful excuse, shall have in his possession any blank certificate of citizenship provided by the bureau of naturalization with the intent unlawfully to use the same; or whoever, after having been admitted to be a citizen, shall, on oath or by affidavit, knowingly deny that he has been so admitted, with the intent to evade or avoid any duty or liability imposed or required by law, shall be fined not more than one thousand dollars, or imprisoned not more than five years, or both.

SEC. 78. Whoever shall in any manner use, for the purpose of registering as a voter, or as evidence of a right to vote, or otherwise unlawfully, any order, certificate of citizenship, or certificate, judgment, or exemplification, showing any person to be admitted to be a citizen, whether heretofore or hereafter issued or made, knowing that such order, certificate, judgment, or exemplification has been unlawfully issued or made; or whoever shall unlawfully use, or attempt to use, any such order or certificate, issued to or in the name of any other person, or in a fictitious name, or the name of a deceased person, shall be fined not more than one thousand dollars, or imprisoned not more than five years, or both.

SEC. 79. Whoever shall knowingly use any certificate of naturalization heretofore or which hereafter may be granted by any court, which has been or may be procured through fraud or by false evidence, or which has been or may hereafter be issued by the clerk or any other officer of the court without any appearance and hearing of the applicant in court and without lawful authority; or whoever, for any fraudulent purpose whatever, shall falsely represent himself to be a citizen of the United States without having been duly admitted to citizenship, shall be fined not more than one thousand dollars, or imprisoned not more than two years, or both.

SEC. 80. Whoever, in any proceeding under or by virtue of any law relating to the naturalization of aliens, shall knowingly swear falsely in any case where an oath is made or affidavit taken, shall be fined not more than one thousand dollars and imprisoned not more than five years.

SEC. 81. The provisions of the five sections last preceding shall apply to all proceedings had or taken, or attempted to be had or taken, before any court in which any proceeding for naturalization may be commenced or attempted to be commenced, and whether such court was vested by law with jurisdiction in naturalization proceedings or not.

[By the terms of section 341 of the act referred to above the foregoing sections specifically repealed sections 5395, 5424, 5425, 5426, 5428, and 5429 of the Revised Statutes of the United States, as well as sections 16, 17, and 19 of the act of June 29, 1906 (34 Stat. L., pt. 1, ch. 3592, p. 596).]

NATURALIZATION REGULATIONS.

These regulations supersede those of November 11, 1911.

DEPARTMENT OF LABOR,
OFFICE OF THE SECRETARY,
Washington, August 20, 1913.

1. Since September twenty-sixth, nineteen hundred and six, naturalization jurisdiction of state courts is confined to such as have "a seal, a clerk, and jurisdiction in actions at law or equity, or law and equity, in which the amount in controversy is unlimited."

2. Any alien who prior to September twenty-seventh, nineteen hundred and six, has declared his intention in conformity with the law in force at the date of his declaration, shall not be required to renew such declaration.

3. Aliens who lawfully declared their intention on and after June twenty-ninth, nineteen hundred and six, and prior to September twenty-seventh, nineteen hundred and six, must comply with all of the requirements of the naturalization act of June twenty-ninth, nineteen hundred and six, in petitioning for naturalization, with the exception that those arriving prior to June twenty-ninth, nineteen hundred and six, are not required to furnish certificates of arrival.

Aliens who declared their intention prior to June twenty-ninth, nineteen hundred and six, in accordance with the requirements of law, must comply with all of the requirements of the naturalization act of June twenty-ninth, nineteen hundred and six, in petitioning for naturalization, except that they will not be required to file certificates of arrival, sign their petitions in their own handwriting, or to speak the English language.

4. Any alien who declares his intention after June twenty-ninth, nineteen hundred and six, and files his petition thereon, must sign said petition in his own handwriting, and must be able to speak the English language, unless excepted by the provisos in section eight of the naturalization act. If an alien is physically unable to speak, that fact should be stated in his petition in lieu of the statement, "I am able to speak the English language." Aliens who arrive in the United States before reaching eighteen years of age cannot obtain citizenship without making declaration of intention, which may be made in a court having naturalization jurisdiction over the place of their established residence after reaching that age.

5. Blank forms "Facts for declaration of intention" (form 2213) and "Facts for petition for naturalization" (form 2214) are provided clerks of courts for the preliminary use of persons making declaration of intention or petition for naturalization, and may be taken away from the office of the clerk in order that the information called for may be obtained in full. When either of said forms is returned to the clerk he shall examine it to see that all the information required is furnished before proceeding to make out a declaration or petition.

In all cases where aliens have arrived in this country after June twenty-ninth, nineteen hundred and six, they should be given the form, "Application for certificate of arrival", form 2226, at the time they desire to file petitions for naturalization, instead of form 2214. This application has attached to it the facts required in a petition for naturalization. The application and other blanks on the form should all be carefully filled out

by the alien and mailed with his triplicate declaration of intention to the commissioner of naturalization to enable him to obtain and transmit the required certificate of arrival (form 526 or 526a) to the clerk of court for filing with the petition. The clerk of the court should not commence the execution of the petition until he has received the certificate of arrival prescribed by this regulation. The certificate of arrival will contain its serial number in the upper right-hand corner, which the clerk of the court will insert in the petition for naturalization at the place indicated.

6. Declarations of intention will be furnished in bound volumes (form 2202, 50 leaves; 2202A, 150 leaves; or 2202B, 250 leaves) as a court record, varied in number of pages according to the requirements of the court. In addition to the bound records, the duplicate and triplicate declarations of intention (form 2203) will be furnished as loose sheets attached together and perforated, so that they can be readily torn apart, the triplicate to be given to the declarant and the duplicate to be forwarded to the bureau of naturalization. Each bound record will contain an index in addition to the original declarations of intention, and will be paged in consecutive order. At the time the original declarations of intention in the bound volumes are filled out and signed the names of the declarants must be entered in the index. The declarations shall be numbered consecutively, beginning with No. 1 in volume 1 and continuing the sequence from volume to volume.

7. The originals of the petitions for naturalization will also be furnished in bound volumes (form 2204, 100 leaves, or 2204B, 250 leaves) paged in consecutive order and provided with an index. The duplicate petitions (form 2205) will be furnished as loose sheets, and when executed must be forwarded to the bureau of naturalization by registered mail, as provided in rule 22 of these regulations. The original petitions for naturalization in the bound volumes must be filled out and signed, the names of the petitioners entered in the index, and retained as part of the permanent records of the office in which filed. Petitions shall be numbered consecutively, beginning with No. 1 in volume 1 and continuing in order in the following volumes. The first petition in volume 2 must not be numbered "1", but shall receive the number following that given the last petition in volume 1.

8. Certificates of naturalization (form 2207) will be supplied in bound volumes consisting of original and duplicate certificates and stubs. Each original and duplicate certificate and the stub will be given the same serial number, the stub to the original certificate bearing a page number in addition to its serial number. The original certificate will be given to the petitioner in accordance with the final order of the court, and the duplicate shall be forwarded to the bureau of naturalization by registered mail, as provided in rule 22 of these regulations, the stub to the original constituting a part of the permanent records of the court. The bound volumes, containing the declarations, petitions, and certificates, constitute the "records" and dockets required by sections 6 and 14 of the naturalization act. The department requires no other dockets to be kept.

9. No certificate of naturalization shall be issued to a petitioner until after the judge of the court granting naturalization has signed the order to that effect.

10. Clerks of courts will be furnished with requisition blanks (form 2201) on which are listed, by number and title, all blank forms, including record and order books, to be used in the naturalization of aliens, and these forms must be obtained exclusively from the bureau of naturalization, department of labor, none other being official. Manila envelopes or jackets (form 2211) will be furnished to clerks in which to place the triplicate declaration of intention or the original certificate of naturaliza-

tion before delivering it to the person making the declaration or to the person naturalized.

11. The first supply of blank forms will be furnished upon the written application of the clerks of courts having jurisdiction to naturalize aliens, accompanied, in the case of clerks of state courts, by authoritative evidence (preferably the certificate of the attorney-general of the state) that the courts of which such clerks are officers have "a seal, a clerk, and jurisdiction in actions at law or equity, or law and equity, in which the amount in controversy is unlimited". Subsequent supplies of such blank forms will be furnished the clerks of courts having jurisdiction to naturalize aliens upon the receipt by the bureau of naturalization of requisitions made on form 2201.

12. Clerks of courts when first making application to the bureau of naturalization for the supplies of the blank forms required in the naturalization of aliens shall state whether any declarations of intention have been filed or orders of naturalization made by their courts since September twenty-sixth, nineteen hundred and six. They should also state the number of certificates of naturalization issued by the court since June first, nineteen hundred and three, if such certificates fail to comply with the requirements of the immigration act of March third, nineteen hundred and three.

13. Where the same court holds sessions at different places, whether a clerk is appointed at each of said places or the one clerk is required to transact the business of the court wherever it may sit, separate supplies shall be kept, in order to comply with the requirements of section 14 of the naturalization act, which provides that the bound declarations of intention and of petitions for naturalization shall be in chronological order.

14. In every case in which the name of a naturalized alien is changed by order of court, as provided in section 6, the clerk of the court is required to report both the original and the new name of the said person to the bureau of naturalization when transmitting to it the duplicate of the certificate of naturalization of the alien whose name is changed.

15. On the first working day of each month the clerk shall inform the bureau of naturalization on form 2209 of the date of posting notice on form 2206, as required by section five, and of the day, month, and year, as near as may be, for the final hearing of each and every petition for naturalization filed and posted during the preceding month. These reports on form 2209 must specify only the petitions filed in the month to which the report relates and no others. In continued cases notice on form 2206 must be amended to show the postponed date and remain posted until final action is had.

16. On the first working day of each month following the sitting of a court in naturalization cases the clerk of such court shall forward to the bureau of naturalization on form 2210 a list containing the name of each and every alien who, during such sitting of court, has been denied naturalization and shall state the reason or reasons for such denial.

17. Applications for lost or destroyed naturalization papers issued prior to September twenty-seventh, nineteen hundred and six, should be disposed of in accordance with the rules in force in the court at the time of the issuance of the papers.

The following rule applies exclusively to naturalization papers issued since September twenty-sixth, nineteen hundred and six:

Applications for the issuance of declarations of intention (form 2203) or certificates of naturalization (form 2207), in lieu of declarations of intention or certificates of naturalization claimed to have been lost or destroyed, shall be submitted in affidavit form to the clerk of the court by which any such declarations of intention or certificates of naturalization

were originally issued, and shall contain full information in regard to the lost or destroyed papers, and as to the time, place, and circumstances of such alleged loss or destruction. (Form 2225 prepared for this purpose may be obtained from the clerk of any naturalization court.) The clerk shall forward to the bureau of naturalization the above-mentioned applications, together with such information as he may have bearing upon the merits thereof, for investigation, and no such paper so applied for shall be issued until the bureau of naturalization reports the results of its investigation as to the merits of the application.

In every case in which the clerk of the court issues, in accordance with the foregoing, a declaration of intention (form 2224) or a certificate of naturalization (form 2207), upon proof of the loss or destruction of the original, he shall make an entry on the original declaration showing the issuance of a certified copy, or on the stubs of both the new and the old certificates of naturalization, showing the issuance of a new certificate, giving the numbers of the new and old certificates, and shall immediately thereafter forward to the bureau of naturalization the duplicate of any such paper so issued.

One certified copy of declaration of intention (form 2215) or certificate of naturalization (form 2216) may be furnished by the clerk of the issuing court under his hand and the seal of the court for the use only of the person concerned to establish his citizenship status in connection with any entry under the public land laws of the United States. When issued these forms must be made in duplicate, one to be given to the person applying therefor and the duplicate forwarded with other naturalization papers on the first working day of the succeeding month to the bureau of naturalization. Unless the applicant presents to the clerk his original declaration or certificate for comparison, these forms can under no conditions be issued. In case the alien makes a second land entry he may support his second entry by describing the first land claim with which his declaration or certificate is filed.

The fees to be collected for the issuance of each of the copies of declarations of intention and of certificates of naturalization described in this regulation, and the disposal to be made of such fees when collected, will be determined in accordance with the law and the rules in force in the respective courts. No part of these fees is required to be forwarded to this department. Clerks are, however, required to make quarterly reports, on form 2217, on the first working day of January, April, July, and October, of the number of such papers issued during the preceding quarter.

18. Original declarations of intention, or certificates of naturalization, issued subsequent to September twenty-sixth, nineteen hundred and six, and surrendered to the general land office in support of entries upon public land, may be returned upon proper application. In cases of declarations of intention the clerk will forward the application to the bureau of naturalization, accompanied by a certified copy on form 2215. In cases of certificates, the application will be accompanied by a personal description of the applicant. In both instances a description of the land should be included, giving the section, township, and range, together with the date and place of making the entry. The originals will then be procured from the general land office and returned to the clerk of the court.

19. For recording the affidavits of substituted witnesses under section five of the act of June twenty-ninth, nineteen hundred and six, blank forms (form 2218) have been prepared as pasters to be affixed to the backs of petitions in the bound volume, following the "Order of court admitting petitioner." Copies of this form may be procured by the usual requisition (form 2201). Do not send copies of this form to the bureau of naturalization.

20. Aliens making declaration of intention, or filing petitions for naturalization, must sign their names in full and without abbreviation in the appropriate places on the various blank forms, and the entries of their names by the clerk must correspond in every particular. Where a name contains an initial which is used only to distinguish one individual from another with the same surname, that fact should be noted on the paper.

21. Clerks of courts shall not receive declarations of intention (form 2202) or file petitions for naturalization (form 2204) from other aliens than white persons and persons of African nativity or of African descent. Any alien, other than a Chinese person, who claims that he is a white person in the sense in which that term is used in section 2169, R. S., U. S., should be allowed, if he insists upon it after an explanation is made showing him the risk of denial, to file his declaration or his petition, as the case may be, leaving the issue to be determined by the court.

Declarations should not be received from, nor petitions for naturalization filed by, persons not residing in the judicial district within which the court is held.

22. On the first working day of each and every month, and not otherwise, clerks of courts shall forward to the bureau of naturalization duplicates of all declarations of intention, petitions for naturalization, and certificates of naturalization filed or issued during the preceding month. Duplicate petitions for naturalization and duplicate certificates of naturalization shall be forwarded by registered mail; and duplicate declarations of intention as well as other papers may be inclosed therewith provided the combined weight of the documents does not exceed four pounds, otherwise they shall be forwarded separately by unregistered mail. The same course should be followed in forwarding naturalization papers to the bureau which have been returned for correction. Each clerk making a shipment of naturalization papers other than papers returned for correction is required to forward therewith a report on form 2208 showing the number of such papers filed or issued during the month reported. Where petitions for naturalization have been filed the report on form 2209 showing the approximate dates of final hearings shall also be inclosed with such shipment. When no naturalization business has been transacted during any month it is unnecessary to render monthly reports to that effect, but report should be made as prescribed in rule 23.

23. All fees provided for in section thirteen of the act of June twenty-ninth, nineteen hundred and six, shall be accounted for on the "Abstract of collections" (form 2212) within thirty days after the close of each quarter of a fiscal year. These quarters end September thirtieth, December thirty-first, March thirty-first, and June thirtieth, respectively. One half of all moneys so collected, up to $6,000, and all in excess thereof, shall be remitted to the commissioner of naturalization, bureau of naturalization, with said quarterly account, such remittance to be made payable to the order of the "secretary of labor," preferably by draft. The comptroller of the treasury has decided that section thirteen requires the collection of the final fee of $2 whether the certificate of naturalization be issued or denied.

In cases where no naturalization business is transacted during any quarter, form 2212 shall be forwarded as aforesaid with the words "No transactions" noted thereon.

24. (a) Where a petition for naturalization is filed under section 2166, R. S., U. S., exempting honorably discharged soldiers from the necessity for filing declarations of intention and proving more than one year of residence in the United States in addition to good moral character, insert in lieu of the information regarding declaration of intention: "Petitioner is an honorably discharged soldier and applies for citizenship

under section 2166, R. S., U. S. He enlisted in the (name of organization) on the (day, month, and year)." (Complete the petition according to paragraph 3 of this rule.)

(b) Where an alien files his petition for naturalization under the act of July twenty-sixth, eighteen hundred ninety-four, and claims exemption from the necessity for filing a declaration of intention on account of service in the United States navy or marine corps, the words having reference to declaration of intention in the petition should be struck through and in lieu thereof the following inserted: "Petitioner is an honorably discharged member of the navy (or member of the marine corps, if that be the case) and applies for citizenship under the act of July twenty-sixth, eighteen hundred ninety-four. He enlisted on the (day, month, and year) and was discharged on the (day, month, and year)." Each enlistment of the applicant and his discharge therefrom should be shown. (Complete the petition according to paragraph 3 of this rule.)

In executing petitions under the two foregoing exemptions, that portion of the last paragraph preceding the signature of the petitioner relating to the declaration of intention and certificate of arrival should be struck through when the alien arrived on or prior to June twenty-ninth, nineteen hundred and six. When the arrival was after that date, only the words "my declaration of intention to become a citizen of the United States and" should be struck through. The statement following the signature of the petitioner to the body of the petition should be struck through entirely in cases of aliens arriving on or before June twenty-ninth, nineteen hundred and six; but for those arriving after that date only the words "declaration of intention" should be struck through, and in both cases the entry in lieu thereof should be made "Honorable discharge certificate of petitioner was exhibited to me this ——— day of ———." An appropriate note should also be entered upon the stub of the certificate issued to said applicant.

(c) Certain aliens are permitted to petition for naturalization under the terms of the act of June twenty-fifth, nineteen hundred ten, without proof of previous declarations of intention. Clerks of courts should state in lieu of the information regarding the declaration of intention "Filed under provisions of section 3 of the act of congress approved June twenty-fifth, nineteen hundred ten," and the statement following the first signature of the petitioner should be changed so as to read "Declaration of intention omitted under the terms of the act of June twenty-fifth, nineteen hundred ten." Affidavit, form 2227, setting forth particulars as to the reason for the exemption claimed must be signed and sworn to by the petitioner before the clerk of the court or his authorized deputy. In the event this form is not presented by an officer in the naturalization service it will be forwarded to the clerk of the court for use in any case to which it relates, upon examination of the duplicate petition in the bureau.

(d) Petitions for naturalization under the sixth subdivision of section four may be legally filed by children of a deceased declarant only after such children have attained their majority and who were minors at the time of the death of the father. Where a petition is filed by a child under the foregoing conditions, the fifth assertion should be altered to read: "My father declared his intention to become a citizen of the United States on the ——— day of ———, A. D. ———, and died on the ——— day of ———, A. D. ———."

Where a petition for naturalization is filed under this subdivision by the widow of a deceased declarant, the fifth assertion should be altered to correspond to the foregoing in relation to the child, with the exception that the word "husband" should be inserted instead of the word "father."

In the last two cases referred to the words in the paragraph immediately preceding petitioner's first signature should be altered to show that the father's or husband's declaration (as the case may be), or a certified copy thereof, is attached to the original petition, and the statement of the clerk of the court immediately below the first signature of the petitioner should be changed to show the facts. If the petitioner arrived in the United States prior to June twenty-ninth, nineteen hundred and six, the words in statement immediately preceding the first signature of petitioner and thereafter having reference to the certificate of arrival should also be struck through. If the petitioner arrived in the United States after June twenty-ninth, nineteen hundred and six, certificate of arrival must be obtained in accordance with rule five of these regulations, and the words in the two statements above referred to should remain unaltered with the exception that the last statement should include the number of the certificate of arrival appearing in the upper right-hand corner thereof.

(e) Where a petition for naturalization is filed by the widow of an alien, based upon her own declaration of intention, the date of her husband's demise should be shown in the fifth assertion.

Naturalization papers may be legally filed by any unmarried woman who is otherwise qualified, or the widow of a foreign-born person not naturalized, but not by a woman during the existence of the marital relation. Notation of the facts in each case should be made upon the face of each paper before it is issued.

25. So far as practicable the clerks of courts having jurisdiction under the provisions of the naturalization laws will be furnished, upon requisition therefor on form 2201, with appropriately addressed envelopes for communicating with the bureau. When not using such envelopes, however, all communications, in addition to the other necessary address, should be plainly marked "Bureau of Naturalization."

26. Clerks of courts having jurisdiction to naturalize under the provisions of the act of June twenty-ninth, nineteen hundred and six, are requested, in case the foregoing rules and regulations fail to remove from their minds doubt as to the proper course of action in any case, to write to the commissioner of naturalization, bureau of naturalization, for instructions before taking such action.

(Signed) W. B. WILSON,
Secretary.

CONSTITUTION OF IOWA

Boundaries.

The boundary between Iowa and Missouri reëstablished. *Missouri v. Iowa*, 165 U. S., 118.

As to jurisdiction over boundary rivers, see notes to code § 3 in this supplement.

ARTICLE 1.—BILL OF RIGHTS.

Rights of persons. SECTION 1.

Courts have an undoubted right to inquire into the objects of a tax and to declare invalid all taxes that are levied for other than governmental purposes, and a tax may be held invalid on account of some implied prohibition of the constitution, but a court will not interfere unless it is clear that the legislature has exceeded its power. *Youngerman v. Murphy*, 107–686, 76 N. W. 648.

A right of contract exists as a necessary inference from the express guaranty of property rights, but this right, like all others, is held subject to such reasonable restrictions and regulations as may be imposed for the public good. *McGuire v. Chicago, B. & Q. R. Co.*, 131–340, 108 N. W. 902.

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

The provisions of code § 2071, forbidding any contract between a railroad company and its employe, limiting its liability for injuries resulting from negligence of a co-employe, are not unconstitutional as interfering with freedom of contract. *Mumford v. Chicago, R. I. & P. R. Co.*, 128–685, 104 N. W. 1135.

Political power. SEC. 2.

The declaration that government is instituted for the protection, security and benefit of the people has no immediate bearing upon the restraint on the legislative department of government, but is, rather, a declaration of the reserved or natural right of the people to alter or amend their form or scheme of government whenever in their judgment such alteration or amendment will promote the general good. No law has ever yet been declared unconstitutional simply because it works a public wrong or injury unless that wrong or injury be one against which some specific constitutional inhibition may be pointed out. *Campbell v. Jackman*, 140–475, 118 N. W. 755.

The constitution operates, not as a grant of power unto the state or its general assembly, but as a limitation thereon, and all powers not expressly or impliedly withheld may be constitutionally exercised. The so-called unwritten constitution or the spirit of the constitution cannot be relied on for holding statutes to be invalid. *Ibid.*

Religious test. SEC. 4.

The constitution does not fix the qualifications for municipal office but it does provide that no religious qualification shall be required for any office of public trust. There is no absolute right to hold office or to be a candidate therefor. *State ex rel. Jones v. Sargent*, 145–298, 124 N. W. 339.

Laws uniform. SEC. 6.

Uniformity of operation of general laws: The constitutional requirement that all laws of a general nature shall have a uniform operation means that every law shall have a uniform operation upon all citizens, persons or things of any class upon which it purports to act, and that there shall not be granted to any person or class of persons privileges which upon the same terms may not be enjoyed by all. But the legislature may classify the subjects of legislation, provided such classification is not purely arbitrary or unreasonable. *Des Moines v. Bolton*, 128–108, 102 N. W. 1045.

A law is uniform which applies to every one of a defined class of cases, provided the classification is reasonable. *Wooster v. Bateman*, 126–552, 102 N. W. 521.

Special privileges and monopolies are always obnoxious, and discriminations against persons or classes still more so. Exclusive privileges and franchises cannot be granted except when absolutely necessary. Therefore held that the exception in code § 2508, relating to the use of the "Welsbach Hydrocarbon Incandescent Lamp" in burning the lighter forms of petroleum was unconstitutional. *State v. Santee*, 111–1, 82 N. W. 445.

A statutory provision, operating alike upon all persons in like situation, is of uniform operation within the language of constitutional provisions. *Cook v. Marshall County*, 119–384, 93 N. W. 372.

A statute giving to a land owner double damages for trespass in removing coal from his land is not unconstitutional as amounting to class legislation. *Mier v. Phillips Fuel Co.*, 130–570, 107 N. W. 621.

The provisions of code § 2579 as to required qualifications for the practice of medicine are not unconstitutional under this section. *State v. Bair*, 112–466, 84 N. W. 532.

The provisions of code § 4764, making it criminal for a man who shall marry a woman for the purpose of escaping prosecution for seduction to afterwards desert her without good cause, is not open to the objection of want of uniformity in its operation. *Morris v. Stout*, 110–659, 78 N. W. 843.

The statute (27 G. A. ch. 108) regulating the admissibility of evidence of husband and wife in actions to set aside fraudulent conveyances from one to the other, is not unconstitutional as class legislation since it applies to every person coming within the relation and circumstances provided for. *Burk v. Putman*, 113–232, 84 N. W. 1053.

The right to hold office is not a natural or personal right in such sense that the statute granting preference to honorably discharged veterans of the civil war in the appointment to minor offices is unconstitutional. *Shaw v. Marshalltown*, 131–128, 104 N. W. 1121.

The provisions of code § 1347, requiring all peddlers carrying on a business outside of any city or town to secure a license from the county auditor and pay a tax therefor, but exempting from the payment of such tax persons who have served in the Union army or navy, is unconstitutional because not of uniform operation. *State v. Garbroski*, 111–496, 82 N. W. 959.

An ordinance requiring persons riding bicycles on the streets at night to carry a light is not unconstitutional, although no similar provision is made as to persons on other silently running vehicles. *Des Moines v. Keller*, 116–648, 88 N. W. 827.

An ordinance as to rates of fare on a street railway providing lower fares by way of commutation tickets to citizens of the city, not to be enjoyed by other citizens of the state, held invalid by reason of want of uniformity of operation. *State ex rel. v. Omaha & Council Bluffs R. & B. Co.*, 113–30, 84 N. W. 983.

The provisions as to jurisdiction of superior courts are not unconstitutional under this section. *Page v. Millerton*, 114–378, 86 N. W. 440.

A curative statute legalizing the exercise in a particular case of authority given to counties in general held not to be invalid under this section. *Witter v. Board of Supervisors*, 112–380, 83 N. W. 1041.

Corporations: While a corporation is not a citizen, it is a person, and as such may not rightfully be denied the protection of the laws of the state upon equal terms with all other persons upon like circumstances and conditions. *McGuire v. Chicago, B. & Q. R. C.*, 131–340, 108 N. W. 902.

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

Legislation imposing upon railway companies special restrictions, obligations and liabilities not generally applicable to other persons or corporations, is not a denial of the equal protection of the laws. *Ibid.*

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

It is not necessary that the law should apply alike to all persons or all corporations in the state. If it is applicable to every person or corporation brought within the relations and circumstances provided for by the law, it is constitutional. *Scottish U. & N. Ins. Co. v. Herriott*, 109–606, 80 N. W. 665.

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

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

A statute making special provision as to the rate of charge for loans by building and loan associations is not unconstitutional. *Iowa Sav. & L. Assn. v. Heidt*, 107–297, 77 N. W. 1050.

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

The requirement as to uniformity of laws does not prevent provisions as to the business of unincorporated associations which are different from those applicable

to the same business conducted by corporations. *Brady v. Mattern*, 125–158, 100 N. W. 358.

A statute authorizing cities to require licenses from itinerant physicians is not unconstitutional as a law not uniform in its operations. *Fairfield v. Shallenberger*, 135–615, 113 N. W. 459.

It is within the legislative discretion to make provision for the continuance in employment of a veteran until he shall be removed on charges and investigation, although no such provision is made with reference to other officers or employes. *Kitterman v. Board of Supervisors*, 137–275, 115 N. W. 13.

The statute providing for a commission form of government in certain cities is not unconstitutional as not uniform in operation. *Eckerson v. Des Moines*, 137–452, 115 N. W. 177.

In fixing the qualifications for an office not provided for by the constitution the legislature may require that the officers to be appointed shall be from different political parties. *State ex rel. Jones v. Sargent*, 145–298, 124 N. W. 339.

Legislation which affects alike all persons similarly situated is not class legislation, and if a classification adopted in the statute is upon some apparent natural reason, some reason suggested by necessity, by such a difference in the situation and circumstances of the subjects placed in different classes as suggest the necessity or propriety of different legislation with respect to them, it is not open to the objection that it violates the provision as to uniform legislative power. *Hubbell v. Higgins*, 148–36, 126 N. W. 914.

While classifications, to be valid as against an objection on account of want of uniformity, must be based upon some substantial distinction by which one class of cases is so different from another as to suggest the necessity of different legislation with respect to such two classes, yet the legislature may take into consideration matters of common knowledge as to the methods in which business is conducted which may involve evil practices in one class of cases which are not to be anticipated in another. *State v. Fairmont Creamery Co.*, 153–702, 133 N. W. 895.

The rule as to uniformity does not preclude the granting of exclusive privilege to operate a street railway over city streets, but such franchise cannot be granted in perpetuity in the absence of legislative authority. *State v. Des Moines City R. Co.*, 140 N. W. 437.

Taxation: The legislature has plenary power in classifying property for taxation, and may make this classification dependent not only upon use, but upon ownership as well. *Waterloo & C. F. R. T. Co. v. Board of Supervisors*, 131–237, 108 N. W. 316.

The legislature may impose a higher rate of tax upon foreign corporations than it does upon corporations organized under the laws of the state. *Scottish U. & N. Ins. Co. v. Herriott*, 109–606, 80 N. W. 665.

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

Liberty of speech and the press. SEC. 7.

Freedom of speech must be exercised with due regard for the rights of all people. *State v. Heacock*, 106–191, 76 N. W. 654.

While the press enjoys the utmost latitude in reviewing the action of the courts and may after the particular litigation is ended assail with just criticism opinions, rulings and judgments with the weapons of reason, ridicule or sarcasm, it is an act of contempt to publish and distribute in such way that it is likely to fall into the hands of jurors and witnesses matter which reflects upon one of the parties to the litigation and is intended to indicate the result which should be reached. *Field v. Thornell*, 106–7, 75 N. W. 685.

The truth can be shown as a defense only when the publication is made with good motives and for justifiable ends. Except as thus modified the common law relating to libel governs. *State v. Haskins*, 109–656, 80 N. W. 1063.

The right to plead the truth of a libel is restricted to publications made with good motives and for justifiable ends. The liberty of the press does not mean that the publisher of a newspaper shall be any less responsible than another person would be for publishing otherwise the same libelous matter. *Morse v. Times-Republican Printing Co.*, 124–707, 100 N. W. 867.

Personal security. SEC. 8.

Searches and seizures: The guaranty against search, except on warrant issued on probable cause, applies to the person of the defendant in a criminal case as well as to his papers, and while it is well settled that when one is charged with an offense the officers may, without further legal procedure, seize the weapons with which the crime is committed, property which has been obtained by means of the criminal act, or articles which may give a clue to the commission of the crime or identification of the criminal, and that the officer making such search may testify as

to any facts, even though criminating, which were discovered thereby, yet compulsory examination of the person of the defendant is not authorized, and evidence procured by means of such compulsory examination should be excluded. *State v. Height*, 117–650, 91 N. W. 935.

Evidence obtained by search of defendant's house under a search warrant unlawfully issued is inadmissible as against the defendant in a criminal prosecution. *State v. Sheridan*, 121–164, 96 N. W. 730.

A description which points out or identifies the place to be searched with such reasonable identity as will obviate any mistake in locating it is all that is required. *State v. Moore*, 125–749, 101 N. W. 732.

The invasion of a dwelling without lawful reason or proper procedure is a wrong for which recovery may be had in damages, unless the owner has voluntarily consented to such invasion. *McClurg v. Brenton*, 123–368, 98 N. W. 881.

A violation of this constitutional right without reasonable ground therefor gives the injured party a right of action for damages. *Krehbiel v. Henkle*, 142–677, 121 N. W. 378.

The protection afforded by the constitution against unreasonable search and seizure has no reference to regularly prescribed and orderly proceedings in a court for obtaining evidence. *Finn v. Winneshiek Dist. Court*, 145–157, 123 N. W. 1066; *Iowa Loan & Trust Co. v. District Court*, 149–66, 127 N. W. 1114.

When a defendant is arrested, it is the duty of the sheriff to take and care for his property and if the property so taken, in itself or when considered with other circumstances, furnishes some evidence of defendant's guilt, he cannot complain on the ground of a search and seizure by which such evidence has been obtained. *State v. Hassan*, 149–518, 128 N. W. 960.

As a basis for a lawful search and seizure, an information or affidavit is not sufficient if predicated only on information and belief; but one who questions the sufficiency of a warrant on this ground must make his objection to the warrant and not to the information or affidavit on which it is predicated. *Koch v. District Court*, 150–151, 129 N. W. 740.

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

Jury trial: It is no violation of the general constitutional provision as to due process of law to provide that an appeal from the action of the board of supervisors on an application to secure a drainage of wet lands, shall be tried without a jury. It is only as to damages that there is a constitutional right to jury trial. *In re Bradley*, 108–476, 79 N. W. 280.

Within the meaning of the constitution the right of trial by jury extends only to those cases where a jury was necessary according to the course of procedure at common law. Therefore jury trial is not essential in a proceeding by appeal to question the legality of special assessments for public ditches. *Sisson v. Board of Supervisors*, 128–442, 104 N. W. 454.

As there is a right to a jury trial in a proceeding to determine the right of possession of land, a court of equity will not by injunction interfere to disturb the possession unless there is some peculiar ground to justify equitable relief. *Hall v. Henninger*, 145–230, 121 N. W. 6.

The right of an incumbent to his office is not a right of property and a statutory provision for removal from office without a jury trial as to the grounds of the removal is not a violation of the guaranty of a trial by jury. *State v. Henderson*, 145–657, 124 N. W. 767.

Due process: The privilege of pleading usury is not a vested right which cannot be taken away by subsequent legislation. So held as to an act legalizing loans by building and loan associations providing for the payment of more than lawful interest on the sum borrowed. *Iowa Sav. & L. Assn. v. Heidt*, 107–297, 77 N. W. 1050.

The right of the owner of the bed of a nonnavigable stream to fish over his own land is subject to legislative control. *State v. Beardsley*, 108–396, 79 N. W. 138.

The legislature cannot, by a change in the statute as to limitation of actions, cut off instanter the remedy by suit upon an existing cause of action. A reasonable time must be given within which to prosecute the action under the new statute. *Cassady v. Grimmelman*, 108–695, 77 N. W. 1067.

Confiscation of property without a judicial hearing, after due notice, is not due process of law, and a collateral inheritance tax authorized to be imposed without notice to those claiming the inheritance is invalid, where such a tax is in effect a property tax, and not a tax upon the right of succession. But such a tax may be rendered valid where the estate has not yet been fully settled by a curative act providing for such notice. *Ferry v. Campbell*, 110–290, 81 N. W. 604.

The legislature cannot by a retrospective statute require payment of higher fees in case of renewal of a corporation than those provided for by law at the time the legal steps for renewal were taken and tender of the fees then required by law was made. *Lamb v. Dobson*, 117–124, 90 N. W. 607.

The right to an appeal from one court or tribunal to another has never been held to be in itself a denial of due process of law. *Ross v. Board of Supervisors*, 128–427, 104 N. W. 506.

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

cases where there are two divisions of the county for district court purposes, does not render the statutory provisions as to superior courts unconstitutional under this section. *Page v. Millerton*, 114-378, 86 N. W. 440.

The salary of an officer is property for which he is entitled to the protection of due process of law. *State v. Miller*, 132-587, 109 N. W. 1087.

No person has a vested right in a particular remedy, provided an adequate remedy be given. *Rice v. Crozier*, 139-629, 117 N. W. 984.

While the legislature may not arbitrarily cut off a remedy by providing a limitation of action as to a cause of action already accrued, it may require such action to be brought within a specified time if such limitation allows a reasonable time for instituting the action. *Collier v. Smaltz*, 149-230, 128 N. W. 396.

Due process of law does not require that any particular form of proceedings should be observed but only that they be regular proceedings in which notice is given of the claim asserted and an opportunity be afforded to defend against it. *Smith v. State Board of Med. Exam.*, 140-66, 117 N. W. 1116.

A provision authorizing the board of medical examiners to revoke a certificate for bad moral character or incompetency, upon a hearing, is not invalid. *Ibid.*

As the legislature has the power in the first instance to absolve a county officer from liability for certain acts in the discharge of the duties of his office, there is no constitutional objection to retroactive laws relieving him from liability for such acts. *McSurely v. McGrew*, 140-163, 118 N. W. 415.

A judgment *in personam* on personal service outside the state, although made on one who is a resident of this state, is unconstitutional as amounting to denial of due process of law. *Raher v. Raher*, 150-511, 129 N. W. 494.

Due process of law requires notice to a party and opportunity to defend; yet where notice has once been duly given of the institution of any legal proceeding, the constitutional requirement is satisfied, and in the absence of any statute requiring further notice, every party to such proceeding will be treated as in court at each successive stage of the case, whether in the trial court or on appeal. *Jones v. Mould*, 151-599, 132 N. W. 45.

In a matter over which the state superintendent has exclusive jurisdiction on appeal from a school board, compliance of the board with the orders of the state superintendent may be enforced by mandamus without violation of the constitutional provision as to due process of law. *State v. Thomas*, 152-500, 132 N. W. 842.

The provision of code supp. § 325 that in a disbarment proceedings commenced on the court's own motion, the court must direct some attorney to draw up the accusation and that in such case no allowance of costs shall be made for the payment of attorney's fees, is not unconstitutional. *Brown v. Warren County*, 156-20, 135 N. W. 4, 137 N. W. 474.

A statute authorizing any officer on his own judgment and without notice to the owner, to kill a horse which is disabled or unfit for further use, is unconstitutional as applied to the case of an animal suffering from disease which is not contagious or infectious. *Waud v. Crawford*, 141 N. W. 1041.

The statute prohibiting the issuance of free passes by railroads, held not unconstitutional under this section. *Schulz v. Parker*, 157—, 139 N. W. 173.

As to legalizing acts see notes to const. art. 1, § 21.

In criminal cases: Due process of law, as guaranteed by the constitution, has received a very broad and liberal interpretation. Everyone is entitled to the protection of those principles of liberty and justice which lie at the basis of all our civil and political institutions. *State v. Height*, 117-650, 91 N. W. 935.

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

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

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

The provision for the trial and punishment of constructive contempts by the court without a jury does not deprive a person charged with such contempt of his liberty or property without due process of law. *Drady v. District Court*, 126-345, 102 N. W. 115.

Presence of the judge in the court room in a criminal case is essential unless waived by defendant. *State v. Hammer*, 116-284, 89 N. W. 1083.

To admit as against a defendant in a criminal prosecution evidence procured by an unlawful search of his premises under a pretended search warrant would amount to a denial of due process of law. *State v. Sheridan*, 121-164, 96 N. W. 730.

A corporation is a person within the constitutional provisions as to due process of law, and a statutory provision prohibit-

ing agreements between insurance companies as to the rates of commissions to agents is unconstitutional as depriving them of the right of contract. *Greenwich Ins. Co. v. Carroll*, 125 Fed. 121.

The statutory provision imposing upon relatives the expense of the maintenance of an insane person at the state hospital is not unconstitutional as depriving a person upon whom such obligation is imposed of his property without due process of law. *Guthrie County v. Conrad*, 133–171, 110 N. W. 454.

Laws providing for the prevention and detection of frauds are generally held to be free from constitutional objection. *State v. Holton*, 148–724, 126 N. W. 1125.

Taxation and assessments: The treasurer may be authorized to assess the tax due on property which the owner has failed to disclose to the assessor. *Galusha v. Wendt*, 114–597, 87 N. W. 512.

Although the treasurer is allowed a commission on taxes collected he is not thereby disqualified from acting under code § 1374 in enforcing payment of taxes on omitted property. *Beresheim v. Arnd*, 117–83, 90 N. W. 506.

A statute is not unconstitutional which provides for the collection of a tax by summary proceedings. *Hodge v. Muscatine County*, 121–482, 96 N. W. 968.

The taxation of corporate property in the state in which the corporation is created and of the shares of stockholders in the states of their residence does not constitute such double taxation as is prohibited under the guaranties of due process of law and of uniform operation of the laws. *Judy v. Beckwith*, 137–24, 114 N. W. 565.

In a proceeding for the establishment of a county ditch a landowner whose property has been included within the drainage district and which is generally benefited by the improvement may be assessed for the cost thereof, although his property is not directly benefited by the specific improvement. *Oliver v. Monona County*, 117–43, 90 N. W. 510.

A statute providing for the assessment of the expenses of constructing a ditch upon lands not abutting, the owners of which have received no notice of the proceedings, is unconstitutional as depriving such owners of their property without due process of law. *Beebe v. Magoun*, 122–94, 97 N. W. 986.

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

The provisions of § 3, ch. 118, acts 33 G. A. authorizing notice by publication even as to residents of the county in a proceeding to establish a drainage district are not unconstitutional. *Johnson v. Board of Supervisors*, 148–539, 126 N. W. 153.

If a statute provides for the superior lien on land as the result of special assessment, the mortgagee of such land has no ground for complaint although he is not by notice or otherwise made a party to the proceedings in which the assessment is levied. *Fitchpatrick v. Botheras*, 150–376, 130 N. W. 163.

The fact that the officers who levy special assessments in a drainage district are not elected by the electors of the drainage district does not render the statute invalid as providing for taxation without representation. *Munn v. Board of Supervisors*, 141 N. W. 711.

Rights of persons accused. SEC. 10.

Copy of indictment: Where a copy of the indictment is delivered to an attorney for the defendant there is a sufficient compliance with the constitutional requirement that defendant be furnished with a copy of the indictment against him. *State v. McClain*, 130–73, 106 N. W. 376.

Whether the copy of the indictment delivered to the defendant is a correct copy is a matter to be determined by the trial court when any question is raised with reference thereto. *State v. Hatlestad*, 132–188, 109 N. W. 613.

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

Public trial: It rests within the sound discretion of the trial court to exclude the witnesses and send the jury from the room pending argument on a question. The constitutional guaranty is for the purpose of securing to the accused a fair and honest consideration by the jury of the charges made against him. *State v. Worthen*, 124–408, 100 N. W. 330.

Speedy trial: It is not competent on appeal in a criminal case for the supreme court to dismiss the proceeding on the ground that the defendant had not been given a speedy trial. *State v. Sloan*, 131–676, 109 N. W. 190.

Issue of fact: The court has no power to instruct that an essential fact is established notwithstanding all the evidence tends to prove such fact. *State v. Lightfoot*, 107–344, 78 N. W. 41. And on this point see also notes to code § 5386.

Waiver: The defendant in a criminal case may waive the benefit of a statutory provision intended for the protection of his rights. *State v. Smith*, 132–645, 109 N. W. 115.

Constitutional provisions for the benefit of persons accused may be waived and the conviction based on such waiver will be valid, provided it is pronounced by a court having jurisdiction and duly constituted to try the case. *Busse v. Barr*, 132–463, 109 N. W. 920.

Waiver of trial by jury: On an appeal to the district court from a conviction before the mayor for violation of a city ordinance, the defendant may waive a jury trial. *Lovilia v. Cobb*, 126–557, 102 N. W. 496.

The court is wholly without jurisdiction to hear or try an issue of fact in a criminal case without the aid of a jury, and consent or waiver of the defendant does not estop him from taking advantage of the error. *State v. Rea*, 126–65, 101 N. W. 507.

Confronting witnesses: Defendant is not deprived of privilege of confronting witnesses by provision for admitting testimony of absent witnesses as set out in application for continuance. *State v. Wiltsey*, 103–54, 72 N. W. 415.

The right of the defendant to be confronted with the witnesses against him in a criminal case is one which may be waived. *State v. Smith*, 124–334, 100 N. W. 40.

A proceeding to disbar an attorney is not a criminal prosecution, and the requirement that accused be confronted by the witnesses against him has no application. *State v. Mosher*, 128–82, 103 N. W. 105.

The right to be confronted by a witness against him may be waived by defendant, as for instance by a stipulation for the admission of a transcript of the evidence taken on a former trial. *State v. Olds*, 106–110, 76 N. W. 644.

The opportunity which defendant had for cross-examination, impeachment and contradiction when a witness testified on a former trial obviates any objection on account of not being confronted with the witness, if on account of the intervening death of such witness he cannot be produced on the second trial. *State v. Kimes*, 152–240, 132 N. W. 180.

The testimony of a witness for the prosecution on the first trial of a criminal case which has been preserved as provided in code supp. § 245-a, may be used on the second trial of the case where the witness has gone beyond the reach of subpoena, without violation of this constitutional provision. *State v. Brown*, 152–427, 132 N. W. 862.

Swearing of witnesses: To allow a material witness for prosecution to give testimony without being sworn is ground for new trial. *State v. Lugar*, 115–268, 88 N. W. 333.

Attendance of witnesses: The statutory provision that defendant asking for a continuance on the ground of the absence of a witness must set out what he expects to prove by such witness, and that a continuance shall not be granted if the opposite party admits the testimony thus set out, is not unconstitutional as depriving defendant in a criminal case of the right to have his witnesses present. *State v. Wiltsey*, 103–54, 72 N. W. 415.

Assistance of counsel: Although the constitution guarantees to the defendant the right to the assistance of counsel, it is competent for the legislature to reasonably regulate and prescribe the manner of the appointment of such counsel. *Korf v. Jasper County*, 132–682, 108 N. W. 1031.

When indictment necessary. SEC. 11.

Constitutional provisions for the benefit of persons accused may be waived, and the conviction based on such waiver will be valid, provided it is pronounced by a court having jurisdiction, and duly constituted to try the case. *Busse v. Barr*, 132–463, 109 N. W. 920.

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

Jurisdiction of justice of the peace: A statute providing for the punishment of an offense before a justice of the peace may provide for charging different violations in separate counts, although the aggregate fines which may be imposed under such information may exceed $100. *State v. Denhardt*, 129–135, 105 N. W. 385.

Where an ordinance provided for cumulative penalties for a continuing act, which might amount to more than $100, held that the offense was not one within the jurisdiction of a justice of the peace. *State v. Babcock*, 112–250, 83 N. W. 908.

A statute authorizing amendment of the indictment in matters of form is constitutional. *State v. Mullen*, 151–392, 131 N. W. 679.

Twice tried—bail. SEC. 12.

An act may constitute two offenses, one against the state and the other against a city or town; and conviction of one may not be pleaded as constituting former jeopardy in a prosecution for the other. *Neola v. Reichart*, 131–492, 109 N. W. 5.

While in general an acquittal in a criminal case is not a bar to a subsequent civil action founded on the same facts, yet, where the civil action is to secure a forfeiture which would have been a part of the penalty to be imposed in the criminal proceeding, and is between the same parties, the previous acquittal is a bar. *State v. Meek*, 112–338, 84 N. W. 3.

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

can only again be put on trial for the offense of which he was convicted, and he is only entitled to the number of peremptory challenges allowed in case of a prosecution for such offense. *State v. Smith*, 132–645, 109 N. W. 115.

The rule as to former jeopardy has no application in a contempt proceeding. *Gibson v. Hutchinson*, 148–139, 126 N. W. 790.

Bail—punishments. SEC. 17.

The habitual criminal act is not unconstitutional as imposing cruel or unusual punishment. *State v. Dowden*, 137–573, 115 N. W. 211.

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

[AMENDMENT.] The general assembly, however, may pass laws permitting the owners of lands to construct drains, ditches and levees for agricultural, sanitary or mining purposes across the lands of others, and provide for the organization of drainage districts, vest the proper authorities with power to construct and maintain levees, drains and ditches and to keep in repair all drains, ditches and levees heretofore constructed under the laws of the state, by special assessments upon the property benefited thereby. The general assembly may provide by law for the condemnation of such real estate as shall be necessary for the construction and maintenance of such drains, ditches and levees, and prescribe the method of making such condemnation.

[By proper action of the legislature (31 G. A., joint resolution No. 1, and 32 G. A., joint resolution No. 2) the foregoing paragraph was submitted to the electors at the general election in 1908 as a proposed amendment to the constitution and was by them adopted.]

The power of taking private property for public use may be delegated through an act of the legislature, and it is for that body to determine in the first instance what are the public uses to subserve which a grant of power may properly be made. Interference on the part of the courts with the exercise of this legislative power will not be warranted except where there is a clear, plain and palpable transgression of the constitutional rule. *Sisson v. Board of Supervisors*, 128–442, 104 N. W. 454.

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

The substitution of one public use to the exclusion of other public uses is not an invasion of a right of property; therefore held that a statute giving to the board of park commissioners of Des Moines jurisdiction over the banks and bed of the river authorized such board to regulate the taking of ice from the river within such limits. *Board of Park Commissioners v. Diamond Ice Co.*, 130–603, 105 N. W. 203.

An ordinary servitude for a street railway is not an additional use of streets dedicated to public purposes. *Snyder v. Ft. Madison Street R. Co.*, 105–284, 75 N. W. 179.

Consequential injury to the property owner's entire premises, due to the taking of a portion thereof as a part of the site for a public school building, should be considered in estimating the damages resulting from the taking of his property. *Haggard v. Independent Sch. Dist.*, 113–486, 85 N. W. 777.

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

Benefits from the improvement are not to be considered. *Lough v. Minneapolis & St. L. R. Co.*, 116–31, 89 N. W. 77.

A statute requiring the construction of fishways in dams already constructed or owned by authority of the state, is not unconstitutional. *State v. Meek*, 112–338, 84 N. W. 3.

In determining, as between the state and a telephone company, the right to use the public highways, the question of damages to abutting owners will not be considered. *State v. Nebraska Tel. Co.*, 127–194, 103 N. W. 120.

The provision in the statute for special assessments for public ditches, that the damages shall be secured to be paid upon such terms and conditions as the county auditor may deem just and proper is not unconstitutional. *Sisson v. Board of Supervisors*, 128–442, 104 N. W. 454.

A tax for a combination railroad and toll bridge is not unconstitutional. *Pritchard v. Magoun*, 109–364, 80 N. W. 512.

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

The improvement of a street to the damage of an abutting property owner does not constitute a taking of private property without compensation, although no provision is made for the reimbursement of such owner for the damage suffered, even though by excavation in the street to its full width his property is deprived of lateral support. *Talcott v. Des Moines*, 134–113, 109 N. W. 311.

In estimating the damages for the taking of land for a drainage ditch the owner is entitled to recover the fair market value of the land taken without regard to the benefits which may accrue to the entire tract of land through which the ditch is located. *Gish v. Castner, etc., Drainage Dist.*, 137–711, 115 N. W. 474.

In condemnation proceedings the benefits to the property by reason of the improvement cannot be taken into consideration. But in assessing damages to abutting property on account of the construction of a viaduct in the street, if benefits may be considered, they should not be allowed to entirely deprive the property owner or lessee of all damages. *Western Newspaper Union v. Des Moines*, 140 N. W. 367.

Provisions for the establishment of a drainage district on notice by publication to owners of property residing within the county are not unconstitutional. *Johnson v. Board of Supervisors*, 148–539, 126 N. W. 153.

The question of power to condemn land is judicial, but the question of necessity is legislative. *Hagerla v. Mississippi River Power Co.*, (D. C.) 202 Fed. 776.

The award, when made in a condemnation proceeding, though only preliminary, is final and binding unless there is an appeal. *Ibid.*

Milldam acts have quite generally been held constitutional in the exercise of the power of eminent domain. *Ibid.*

Imprisonment for debt. SEC. 19.

A statutory provision that failure to pay an inspection fee shall be punished as a misdemeanor is unconstitutional as authorizing an imprisonment for debt. *Hubbell v. Higgins*, 148–36, 126 N. W. 914.

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

Ex post facto: A statute which increases the punishment of an offense already committed is unconstitutional. Therefore held that a statute by which an offense previously punishable as petit larceny on information before a justice of the peace was made indictable on account of three previous convictions was not applicable to an offense committed before the statute went into effect. *State v. Dale*, 110–215, 81 N. W. 453.

The habitual criminals act is not *ex post facto* as applied to a case in which the previous conviction relied upon as increasing the punishment antedated the passage of the statute. *State v. Dowden*, 137–573, 115 N. W. 211.

Change in the method of selecting grand jury lists is not unconstitutional as applied to a crime already committed. *State v. Pell*, 140–655, 119 N. W. 154.

The statute conferring authority on the board of parole to mitigate sentences and grant paroles to persons convicted before the law took effect is not objectionable as *ex post facto*. *Ware v. Sanders*, 146–233, 124 N. W. 1081.

Retroactive laws: A statute affecting the remedy only is not unconstitutional as applied to a right existing before the statute is passed. *Allerton v. Monona County*, 111–560, 82 N. W. 922.

The constitution does not forbid the enactment of retroactive laws, and the validity of such statutes has frequently been upheld. *Ross v. Board of Supervisors*, 128–427, 104 N. W. 506.

A statute relating simply to the remedy, such as the statute of limitations, may apply to causes of action previously existing, but a statute affecting the terms of a previous contract, for instance, one which extends the term of limitation of action fixed in a policy of insurance, will not be applied to contracts already made. *Farmers' Co-op. Creamery Co. v. Iowa State Ins. Co.*, 112–608, 84 N. W. 904.

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

Statutory provisions as to collection of taxes on omitted property are not unconstitutional, though given retrospective operation. *Galusha v. Wendt*, 114–597, 87 N. W. 512.

One who acquires by grant from the state the right to maintain a dam already erected by the state, takes such right subject to the police power of the state to require the construction of a fishway. *State v. Meek*, 112–338, 84 N. W. 3.

Legalizing acts: A curative act may be valid. *Iowa Savings & Loan Assn. v. Selby*, 111–402, 82 N. W. 968.

The bringing of suit vests no right in a particular decision, and a curative act may be effectual to obviate the effect of defective or unauthorized proceedings of a municipal corporation, even after the

bringing of suit in which the legality of the corporate act is brought in question, provided no contract or vested right is affected. *Windsor v. Des Moines*, 110–175, 81 N. W. 476.

The defect in the collateral inheritance tax law, consisting of failure to provide for notice to those taking the inheritance, held cured by a restrospective statute providing for notice, so that in a case where the estate was not settled the supreme court might on appeal reverse the judgment entered in the lower court based on the failure of the law to provide for such notice. *Ferry v. Campbell*, 110–290, 81 N. W. 604.

The legislature may legalize the recording of instruments defectively acknowledged, and held that such a statute was applicable to an instrument of adoption. *Bresser v. Saarman*, 112–720, 84 N. W. 920.

The legislature may legalize any act which it might lawfully have authorized in the first instance, and held that it could provide retrospectively that a notice to nonresidents by publication was valid, a proceeding in which such notice might have been authorized. *Fair v. Buss*, 117–164, 90 N. W. 527.

The legislature may by amendment cure a constitutional defect in a statute, the main purpose of which is within the scope of legislative power, and give such amendment retroactive effect upon cases already begun and pending. *Ross v. Board of Supervisors*, 128–427, 104 N. W. 506.

Where a curative act has removed the invalidity of a contract, such invalidity is not restored by repeal. *Edworthy v. Iowa Sav. & L. Assn.*, 114–220, 86 N. W. 315.

A legalizing act is not unconstitutional which simply makes effectual between parties a conveyance which otherwise would have been ineffectual on account of some irregularity or omission not involving substantial rights. *Swartz v. Andrews*, 137–261, 114 N. W. 888.

Those claiming under a transaction taking place after the passage of the curative act cannot assert any right which the parties themselves could not have asserted. *Ibid.*

Obligation of contracts: Where city warrants are issued at a time when the statutes required their payment in the order of presentation, such provision is a part of the warrant, and subsequent legislation subordinating prior warrants to those for subsequent years would be unconstitutional as to warrants issued before the statute went into effect. *Phillips v. Reed*, 109–188, 80 N. W. 347.

A statute which is found in its application to a particular case to impair the obligation of a contract, may be held unconstitutional in that respect, although valid in other cases. *Brady v. Mattern*, 125–158, 100 N. W. 358.

A judgment rendered upon a tort or other cause of action not entitled to protection as a contract may be impaired without violating the constitutional inhibition. *Ferry v. Campbell*, 110–290, 81 N. W. 604.

Whether a judgment is a contract within the constitutional provision, *quaere*. *Wooster v. Bateman*, 126–552, 102 N. W. 521.

Change of judicial decision cannot constitute the impairment of the constitutional obligation of contracts. *Swanson v. Ottumwa*, 131–540, 106 N. W. 9.

The period of limitation may be reduced without impairing the obligation of an existing contract, provided a reasonable period within which to maintain action on such contract is preserved. *Wooster v. Bateman*, 126–552, 102 N. W. 521.

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

Where there is a contract to pay for services out of a specified fund of a building and loan association, such associations being expressly made subject to legislative control, the act of the legislature in abolishing the fund from which payment could be made is not invalid as impairing the obligation of a contract. *Wood v. Iowa Bldg. & Loan Assn.*, 126–464, 102 N. W. 410.

As corporate charters are subject to legislative control, the provision in a franchise granted to a street railway company that it shall not be liable for the expense of street improvements otherwise than as specified in such franchise, does not prevent subsequent regulations imposing additional obligations on such company. *Marshalltown Light, P. & R. Co. v. Marshalltown*, 127–637, 103 N. W. 1005.

Where a county had contracted with agents to discover property omitted or concealed from taxation, for a compensation to be determined by a percentage of the taxes collected from such property, held that a subsequent statute limiting the percentage which could thus be contracted for was not valid as to services previously rendered under a valid contract. *Shinn v. Cunningham*, 120–383, 94 N. W. 941.

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

The legislature may impose conditions on a corporation with reference to its continuance in business which may affect its enforcement of contracts already entered into. *St. John v. Iowa Business Men's B. & L. Assn.*, 136–448, 113 N. W. 863.

A school corporation acquires no vested rights or franchises by its creation. *State v. Grefe*, 139–18, 117 N. W. 13.

Liability of an officer to county or municipal corporations on account of his acts may be relinquished by retrospective legislation. A municipal corporation has no vested right in such case. *McSurely v. McGrew*, 140–163, 118 N. W. 415.

ARTICLE 2.—RIGHT OF SUFFRAGE.

Electors. SECTION 1.

The right of suffrage is not a natural or personal right, and does not come within the scope of constitutional guaranties as to equal privileges. *Shaw v. Marshalltown*, 131–128, 104 N. W. 1121.

The statute providing for primary elections in cities adopting the commission form of government is not unconstitutional as depriving the electors of the power to vote for the candidates of their choice. *Eckerson v. Des Moines*, 137–452, 115 N. W. 177.

The provision as to appointment of police commissioners from different political parties (code supp. § 679-d) are not unconstitutional as interfering with freedom of elections or the rights of electors. The office not being one provided for by the constitution, but municipal in character, the legislature may regulate the qualifications for such office. *State ex rel. Jones v. Sargent*, 145–298, 124 N. W. 339.

As this section designates the precise qualifications of electors it necessarily disqualifies others from exercising the elective franchise and if the legislature provides for elections other than those expressly referred to in the constitution, the electors must be as here specified. But the statute authorizing women to vote at municipal elections on the question of issuing bonds or increasing taxes does not provide for the voting by women at an election, as the vote on such questions is advisory only. *Coggeshall v. Des Moines*, 138–730, 117 N. W. 309.

The legislature cannot add to or take from the qualifications of this section; and while the legislature may authorize women to vote on questions of public policy or administration submitted to the popular vote, but not including the election or choice of officers, such legislation does not make women qualified electors. *In re Application of Carragher*, 149–225, 128 N. W. 352.

The legislature has the power to regulate the exercise of the right of suffrage and to provide a method for determining whether persons offering to vote possess the required qualifications. *Lane v. Mitchell*, 153–139, 133 N. W. 381.

Ballot. SEC. 6.

Voting by means of a voting machine is voting by ballot. The constitutional provision that elections shall be by ballot was intended to require and protect the secrecy of the ballot, with the general purpose of guarding against intimidation, securing freedom in the exercise of the elective franchise, and reducing to a minimum the incentives to bribery. *United States Standard Voting Mch. Co. v. Hobson*, 132–38, 109 N. W. 458.

General election. [SEC. 7.]

The biennial election amendment was properly submitted as one proposition, although it involved changes in different sections of the constitution. *Lobaugh v. Cook*, 127–181, 102 N. W. 1121.

ARTICLE 3.—OF THE DISTRIBUTION OF POWERS.

LEGISLATIVE DEPARTMENT.

General assembly. SECTION 1.

A statute authorizing the county auditor to exercise judicial powers in the assessment of property for taxation is not open to attack on the ground that it is in contravention of the constitutional provision distributing the powers among the three departments. *Clark v. Horn, Auditor*, 122–375, 98 N. W. 148.

The delegation by the legislature of the power to tax may be made to a municipal corporation, but not to other agencies, and such power cannot be vested in a board of trustees not elected by the people of the municipality. *State ex rel. v. Mayor of Des Moines*, 103–76, 72 N. W. 639.

The legislature may give to executive officers a discretion in determining the conditions to be imposed on the conducting of a business which is subject to legislative control. *Brady v. Mattern*, 125–158, 100 N. W. 358.

The legislature may prescribe for the punishment as a misdemeanor of the offense of violating the rules of the state board of health, adopted and published as authorized by statute. *Pierce v. Doolittle*, 130–333, 106 N. W. 751.

The statute authorizing cities of a certain description to adopt the commission form of government on the vote of the electors is not unconstitutional as a delegation of legislative power. The statute is not dependent on the vote of the electors; the only question to be submitted being whether the city shall avail itself of the provision of the statute. *Eckerson v. Des Moines*, 137–452, 115 N. W. 177.

Such statute is not unconstitutional on

account of the provisions for initiative, referendum and recall. *Ibid.*

The statutory provisions as to a state board of medical examiners are not a violation of the constitutional provision that the legislative authority of a state is vested in the general assembly. *Smith v. State Board of Med. Exam.*, 140–66, 117 N. W. 1116.

The legislature may exercise all powers not forbidden by the constitution or delegated by the people to the federal government or prohibited by the constitution of the United States. *McSurely v. McGrew*, 140–163, 118 N. W. 415.

Authority vested in a board of supervisors which is in its nature legislative and not judicial cannot be exercised on appeal by a court authorized only to exercise judicial functions. *Denny v. Des Moines County*, 143–466, 121 N. W. 1066.

The legislature in exercising the power to legislate in the interest of public welfare may grant to commissioners and other subordinate officers power to ascertain and determine appropriate facts as a basis for procedure in the enforcement of the law, and the granting of such authority is not a delegation of legislative power. *Hubbell v. Higgins*, 148–36, 126 N. W. 914.

When action has once been commenced in a court the question of jurisdiction is purely a judicial one, and the legislature cannot by retroactive legislation affect the determination of that question. *McSurely v. McGrew*, 140–163, 118 N. W. 415.

While the power of taxation is legislative, the determination of questions of fact as to whether particular property comes within the statutory description and particular persons are persons required to pay taxes on property, as well as the determination of the correctness of the method pursued in any particular case, is often strictly judicial. *In re assessment of Sioux City Stock Yards Co.*, 149–5, 127 N. W. 1102.

The legislature may delegate the power of releasing county officials from liability to the board of supervisors. Such a provision does not confer legislative powers on another body than the legislature. *McSurely v. McGrew*, 140–163, 118 N. W. 415.

Approval. SEC. 16.

A bill passed and signed in the method provided for in the constitution becomes a law notwithstanding a failure to observe some joint rule of the legislature relating to the method of procedure in the enactment of statutes. *Miller v. Oelwein*, 155–706, 136 N. W. 1045.

Who liable to—judgment. SEC. 20.

The general subject of the removal of county and city officers may be provided for by statute. *Eckerson v. Des Moines*, 137–452, 115 N. W. 177.

The act relating to the removal from office of officers for misconduct etc., including intoxication (33 G. A. ch. 78) is not unconstitutional as in violation of the provisions of this section. *State v. Henderson*, 145–657, 124 N. W. 767.

Laws, when to take effect—publication. SEC. 26.

The date of the passage of a statute may be given effect as limiting an exemption therein provided for although it does not take effect until a subsequent date. *Sawyer v. Gallagher*, 151–64, 130 N. W. 173.

Divorce. SEC. 27.

As the jurisdiction of the legislature to grant divorces is denied, the courts are given general jurisdiction in such cases. *Gelwicks v. Gelwicks*, 142 N. W. 409.

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

Title of statute—one subject: The intention of this constitutional provision is to prevent the union in the same act of incongruous matter, but it is a unity of object which is to be looked for in the ultimate purpose to be attained and not in the details for accomplishing such purpose. *Beresheim v. Arnd*, 117–83, 90 N. W. 506.

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

The subject of an act is required to be expressed in the title only by the use of general terms. But where the purpose is not so expressed the act is void. *Rex Lumber Co. v. Reed*, 107–111, 77 N. W. 572.

In the absence of any showing of defects in the enactment of the code, either as a whole or by titles and chapters, the court is not justified in holding that any section or chapter of the code is void because the subject matter is not embraced in the title. *State v. Schlenker*, 112–642, 84 N. W. 698.

The requirement is that the act shall embrace but one subject and matters properly connected therewith. *Guaranty S. & L. Assn. v. Ascherman*, 108–150, 78 N. W. 823.

Provisions relating to the means and manner of making effective the general purpose of the act as expressed in the title do not render the act invalid because such provisions are not included therein. *Boggs v. School Township*, 128–15, 102 N. W. 796.

The intention of the constitutional provision was to prohibit the insertion in an act of incongruous matter having no connection or relation with the general subject as expressed in the title. Accordingly the title is sufficient, although confined to general terms, if it answers as a key to the subject-matter of the act. *Sisson v. Board of Supervisors*, 128–442, 104 N. W. 454.

It is the subject of the act and not all matters properly connected therewith which is to be expressed in the title. *Newton v. Board of Supervisors*, 135–27, 112 N. W. 167.

The title of an act (24 G. A., ch. 36) relating to counterfeiting of union labels, held sufficient to cover provisions of the act relating to damages or penalty for violation thereof. *Beebe v. Tolerton & Stetson Co.*, 117–593, 91 N. W. 905.

The provision that every act shall embrace but one subject and matters properly connected therewith, which subject shall be expressed in the title, does not render invalid the provisions of code §§ 5006–7 with reference to the sale of cigarettes, by which it is provided that it shall be criminal for any one to make such sale who has not paid a mulct tax, notwithstanding the fact that this provision is contained in the title of the code relating to crimes and punishments. *Cook v. Marshall County*, 119–384, 93 N. W. 372.

The title of the code, "Of the practice of medicine," sufficiently covers professing relating to itinerant physicians professing or attempting to treat, cure or heal diseases. *State v. Edmunds*, 127–333, 101 N. W. 431.

The constitutional provision is not intended to prohibit the uniting in one bill of any number of provisions having one general object fairly indicated by its title. The unity of the objects must be sought in the end which the legislature purposes to accomplish. It is admissible to include in the statute means which are reasonably adapted to secure the objects intended by the title. *Beaner v. Lucas*, 138–215, 112 N. W. 772.

The title of an act is to be liberally construed in determining whether it covers the subject matter. *State v. Grefe*, 139–18, 117 N. W. 13.

It is not necessary that the details of the subject-matter be set forth in the title. It is sufficient if the title affords a fair "key" to the contents of the act. *State v. Fairmont Creamery Co.*, 153–702, 133 N. W. 895.

The title of an act, though confined to general terms, is sufficient if it answers as a key to the subject-matter. *Schulz v. Parker*, 157——, 139 N. W. 173.

Amendments: A title which simply names or describes an amending act as such without stating the specific character or subject of the amendment is sufficient. It is only the general purpose which is to be expressed in the title, and not the methods or provisions by which that purpose is to be accomplished. *McGuire v. Chicago, B. & Q. R. Co.*, 131–340, 108 N. W. 902.

The amendment of an act in general, or of a particular section thereof, implies merely a change of its provisions upon the same subject to which the act or section relates. *State v. Bristow*, 131–664, 109 N. W. 199.

A provision for issuance of bonds by any city of a certain class for the erection of a city hall, held sufficiently embraced within the title of the act which authorized the erection of a city hall and the levy of a special tax therefor. *Beaner v. Lucas*, 138–215, 112 N. W. 772.

The title, "An act to amend § 1898 of the code relating to building and loan associations," held sufficient to cover curative provisions relating to such associations. *Iowa Savings & Loan Assn. v. Selby*, 111–402, 82 N. W. 968.

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

General and special laws: Where a general law could not have been made applicable to remedy the difficulty to be cured by legislation a special statute is not unconstitutional. *McCain v. Des Moines*, 128–331, 103 N. W. 979.

The legislature may legalize a defective notice in proceedings for establishment of a highway without making such legalizing act applicable to other cases. Such a statute cannot be made of general application. *Fair v. Buss*, 117–164, 90 N. W. 527.

Curative acts are not subject to the requirement as to uniformity of operation. *McSurely v. McGrew*, 140–163, 118 N. W. 415.

For incorporation of cities and towns: It was not intended by the provision of the constitution of 1857 forbidding the granting of special charters to cities to render invalid the charters already granted. *Ulbrecht v. Keokuk*, 124–1, 97 N. W. 1082.

Municipal corporations: A curative statute legalizing the exercise in a particular case of authority given to counties in general held not to be invalid under this section. *Witter v. Board of Supervisors*, 112–380, 83 N. W. 1041.

A statute making special provisions as to one particular city with reference to the granting of a franchise to own and operate waterworks, is invalid. *Cedar Rapids Water Co. v. Cedar Rapids*, 118–234, 91 N. W. 1081.

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

The constitutional provision seems to have been framed with special reference to the preservation of merely local interests from legislative interference, except through the medium of general laws having a uniform operation throughout the state. *Ibid.*

A statute applicable only to cities under special charter is not invalid for want of uniformity of operation. *Ulbrecht v. Keokuk*, 124–1, 97 N. W. 1082.

An act is not local or special if it brings all municipalities similarly conditioned, then existing and thereafter to come into existence, into a class, and in respect of each of which the act thus designated is to have uniform operation. *Eckerson v. Des Moines*, 137–452, 115 N. W. 177.

A classification of cities by population and the enactment of provisions for one which are not applicable to another does not interfere with the uniform operation of the laws. *State v. Grefe*, 139–18, 117 N. W. 13.

Uniform operation: An inheritance tax imposed on the value of the estate of the decedent above a certain exemption and applicable to that part of such estate not distributed to certain named relatives is not unconstitutional because not of uniform operation. *In re McGhee's Estate*, 105–9, 74 N. W. 695.

Discriminations between unincorporated associations and corporations conducting the same business when based on a reasonable distinction involving the public welfare are not prohibited. *Brady v. Mattern*, 125–158, 100 N. W. 358.

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

The fact that female suffrage is limited to questions involving the issuance of bonds, borrowing money and increasing of taxes at municipal elections does not render the statutory provision in that respect unconstitutional as lacking uniformity. *Coggeshall v. Des Moines*, 138–730, 117 N. W. 309.

A discrimination between the sexes in regard to the right to sell intoxicating liquors is not unconstitutional. *In re Application of Carragher*, 149–225, 128 N. W. 352.

Taxation—what is: The license which a city may impose on vehicles using its streets is authorized under the police power, if the fee is only such as will cover the expense of enforcing the regulation as to a particular calling, but when the fee is larger than is necessary for such purpose and is exacted for the purpose of revenue, the license is issued under the taxing power. *Des Moines v. Bolton*, 128–108, 102 N. W. 1045.

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

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

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

[By proper legislative action (29 G. A., joint resolution No. 2, and 30 G. A., joint resolution No. 2) a proposed amendment repealing sections 34, 35 and 36 of Article III, and adopting the three preceding sections in lieu thereof, was submitted to the electors at the general election in 1904 and adopted.]

ARTICLE 4.—EXECUTIVE DEPARTMENT.

Pardons. SECTION 16.

A pardon may be conditional and may be revoked without a judicial proceeding on breach of the condition, such revocation being provided for in the pardon itself. But the acceptance of a conditional pardon does not bind the prisoner to forfeiture of his statutory right to diminution of his term of imprisonment on account of good conduct so far as the right to diminution has accrued prior to the granting of the conditional pardon. *State v. Hunter*, 124–569, 100 N. W. 510.

The power of the governor to pardon or reprieve or to commute a sentence is in no way abrogated, restricted or removed by the statute providing for a board of parole. (Code supp. § 5718-a18.) *Ware v. Sanders*, 146–233, 124 N. W. 1081.

The parole of prisoners under the provisions of the indeterminate law is not an infringement on the constitutional right of the governor in granting pardons and reprieves. *State v. Duff*, 144–142, 122 N. W. 829.

Until fines are paid the matter of their collection is under the control of those upon whom rests the responsibility for the enforcement of the laws of the state. The governor only may remit fines and forfeitures. *Gunn v. Mahaska County*, 155–527, 136 N. W. 929.

ARTICLE 5.—JUDICIAL DEPARTMENT.

Courts. SECTION 1.

The establishment of superior courts is not in contravention of the provisions of this section. *Page v. Millerton*, 114–378, 86 N. W. 440.

A court cannot be authorized to perform a nonjudicial function not connected with the exercise of its judicial power. Therefore held that a statute authorizing the judges of the district court to appoint trustees of city waterworks, to control and operate such works for the city, was unconstitutional. *State ex rel. v. Barker*, 116–96, 89 N. W. 204.

Although the power to punish for contempt is inherent in the courts, it is within the province of the legislature to regulate the procedure. *Drady v. District Court*, 126–345, 102 N. W. 115.

Courts interfere with legislative action on the ground that it is unconstitutional only when some provision of the fundamental law is violated or when the act is clearly in violation of some implied prohibition of the constitution. *Youngerman v. Murphy*, 107–686, 76 N. W. 648.

A court deriving its authority from the provisions of this section cannot be vested with the authority to review the action of a board of supervisors in a matter which is by the statute within the legislative discretion of such board. *Denny v. Des Moines County*, 143–466, 121 N. W. 1066.

The district court may be authorized by statute to ascertain on an appeal from the taxation board whether particular property is subject to taxation and particular persons are required to pay taxes on such property, as well as to determine the correctness of the methods pursued in any particular case. Judicial questions for determination by the courts may arise in the exercise of executive and legislative powers. *In re Assessment of Sioux City Stock Yards Co.*, 149–5, 127 N. W. 1102.

Judges elected. SEC. 3.

It was not improper to embody the provision for changing the method for determining who should be chief justice of the supreme court in the amendment providing for biennial elections. *Lobaugh v. Cook*, 127–181, 102 N. W. 1121.

Jurisdiction. SEC. 4.

The supreme court has no jurisdiction to correct findings of fact made by the jury, and it cannot consider the question whether the verdict is supported by the evidence unless that question has been presented to the lower court. *Schulte v. Chicago, M. & St. P. R. Co.*, 124–191, 99 N. W. 714.

The supreme court, being given supervisory control over all inferior judicial tribunals, has the power to revise the action of such tribunal where no appeal is provided for. *Home Sav. & T. Co. v. District Court*, 121–1, 95 N. W. 522.

The jurisdiction conferred by the constitution in equity suits is that possessed by chancery courts at the time of the adoption of the constitution, and, in the absence of restriction, an appeal brings the whole case before the supreme court for review and retrial of facts as well as of law. *Lessenich v. Sellers*, 119–314, 93 N. W. 348.

It seems to be within the implied powers of the supreme court to issue a writ of habeas corpus in the exercise of its appellate jurisdiction. *Ware v. Sanders*, 146–233, 124 N. W. 1081.

The legislature having provided the manner and method by which a party to an equitable action may preserve evidence that is essential to a hearing *de novo* on appeal, a failure to pursue the manner or method prescribed, even though as the result of unavoidable casualty or misfortune, does not entitle him to a new trial in order to secure the presentation of his case on appeal. *Dumbarton Realty Co. v. Erickson*, 143-677, 120 N. W. 1025.

It is not a constitutional right to have a case, which is triable *de novo* in the supreme court, tried on depositions in the lower court. *Tuttle v. Pockert*, 147-41, 125 N. W. 841.

As to the power of the supreme court to issue a restraining order, see notes to code § 4128.

Style of process. SEC. 8.

Where the mode of enforcing an ordinance is prescribed by charter, that mode should be pursued, and if thus authorized the prosecution may be in the name of the state. *State v. Wilson*, 109-93, 80 N. W. 230.

ARTICLE 7.—STATE DEBTS.

Tax imposed distinctly stated. SECTION 7.

Statutory provisions authorizing cities to impose a tax for waterworks, to be constructed under contracts to be made in the future on approval of the electors, are not in violation of this section. *Youngerman v. Murphy*, 107-686, 76 N. W. 648.

It is doubtful whether the provision of the constitution relating to laws which embody taxes has any application to license taxes. *State v. Edmunds*, 127-333, 101 N. W. 431.

The provisions requiring relatives of an insane person to pay for the support of such person at the hospital for the insane do not constitute the imposition of a tax. *Guthrie County v. Conrad*, 133-171, 110 N. W. 454.

ARTICLE 8.—CORPORATIONS.

Property taxable. SECTION 2.

The provision of code § 1333 for payment by insurance companies of a per cent. of gross earnings in lieu of all other state, county and local taxes, except taxes on real estate and special assessments, is unconstitutional, as in violation of the provisions of this section. *Hawkeye Ins. Co. v. French*, 109-585, 80 N. W. 660.

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

A provision by which telegraph and telephone companies are required to pay taxes directly to the state and in so far were exempted from local taxes, was held to be invalid as providing for the taxation of the property of corporations on a different basis from that of individuals. *Layman v. Iowa Telephone Co.*, 123-591, 99 N. W. 205.

It is not required that taxes on business or on privileges shall be uniform, and the state may impose a special tax on the business of foreign insurance companies within the state. *Scottish U. & N. Ins. Co. v. Herriott*, 109-606, 80 N. W. 665.

The provision of the constitution that the property of all corporations for pecuniary profit shall be subject to taxation the same as that of individuals has no application to a business or license tax, such as the taxation of an insurance company based on its gross receipts. *Iowa Mut. Tornado Ins. Assn. v. Gilbertson*, 129-658, 106 N. W. 153.

The property of foreign corporations is assessable the same as that of individuals. *Morril v. Bentley*, 150-677, 130 N. W. 734.

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

The terms of a franchise granted to a street railway company are subject to modification by subsequent legislation. *Marshalltown Light, P. & R. Co. v. Marshalltown*, 127-637, 103 N. W. 1005.

Special privileges being obnoxious and monopolies odious, a city council cannot grant a perpetual franchise for the use of the city street by a street railway company, but may fix the duration of the franchise at a reasonable length of time in the absence of any special provisions on the subject by the legislature. *State v. Des Moines City Ry. Co.*, 140 N. W. 437.

While the legislature cannot by the amendment of a corporate charter render invalid a contract executed by a corporation, it may require that the corporation continue in business only on compliance with new conditions imposed, even though that involves a modification of its contract rights. *St. John v. Iowa Business Men's B. & L. Assn.*, 136-448, 113 N. W. 863.

ARTICLE 9.—EDUCATION AND SCHOOL LANDS.

1.—Education.

Board may be abolished. SECTION 15.

The general authority to regulate the conduct of pupils is vested in the school board as representing the school district. *Kinzer v. Independent School District*, 129-441, 105 N. W. 686.

2.—School Funds and School Lands.

Fines, etc., how appropriated. SEC. 4.

In the absence of any statutory authority the board of supervisors cannot agree to pay a percentage of fines to a person authorized by it to collect such fines. *Gunn v. Mahaska County*, 155-527, 136 N. W. 929.

ARTICLE 10.—AMENDMENTS TO THE CONSTITUTION.

How proposed—submission. SECTION 1.

A proposed amendment providing for biennial elections held not constitutionally adopted because not entered in full on the house journal. *State ex rel. v. Brookhart*, 113-250, 84 N. W. 1064.

More than one. SEC. 2.

The purpose of the provision as to submission of amendments is to exact the submission of each amendment to the constitution on its merits alone, and to secure the free and independent expression of the will of the people as to each; but if one change necessitates other corresponding changes in the constitution they may all be embodied in one proposition to amend. *Lobaugh v. Cook*, 127-181, 102 N. W. 1121.

ARTICLE 11.—MISCELLANEOUS.

Jurisdiction of justice of the peace. SECTION 1.

The action of forcible entry and detainer is a summary proceeding involving only the fact of possession, and not necessarily the right of possession, and it may therefore be properly maintained before a justice of the peace. *Herkimer v. Keeler*, 109-680, 81 N. W. 178.

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

If the notice of action in the court of a justice of the peace requires the defendant to appear or judgment will be rendered against him for $100 and interest, the justice does not acquire jurisdiction. *Evans v. Murphy*, 133-550, 110 N. W. 1025.

Indebtedness of political or municipal corporations. SEC. 3.

What indebtedness excessive: All property within the corporate limits, whether subject to assessment for city purposes or not, is to be taken into account in determining whether the indebtedness exceeds the five per cent. limit. *Windsor v. City of Des Moines*, 110-175, 81 N. W. 476.

The limitation has reference to the actual value and not to the value at which the property is to be assessed under code § 1305, providing for assessment at twenty-five per cent. of the actual value at which it is listed. *Halsey v. Belle Plaine*, 128-467, 104 N. W. 494.

This provision of the constitution is mandatory. *Nash v. Council Bluffs*, (C. C.) 174 Fed. 182.

The valuation furnishing the basis for determining whether the limit of indebtedness has been exceeded is that placed upon the property by the assessor and not the taxable value of twenty-five per cent. of the actual value as provided in code § 1305. *Ibid.*

A county may not incur pecuniary liability by bonds or notes or by express or implied promises in excess of the constitutional limitation of liability. *Reynolds v. Lyon County*, 121-733, 96 N. W. 1096.

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

A judgment in the federal court in an

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

If the city has on hand or in prospect at the time of the issue of warrants funds with which to meet them without trenching on the rights of creditors for current expenses of the city, such warrants are valid although such funds may afterwards have been wrongfully applied to other purposes. *Phillips v. Reed*, 107–331, 76 N. W. 850, 77 N. W. 1031; *Phillips v. Reed*, 109–188, 80 N. W. 347.

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

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

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

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

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

This section does not prevent a city already indebted to the constitutional limit from becoming liable to a contractor for improvements, the cost of which is to be assessed to abutting owners and payment for which is to be made by special assessments, if the city fails to make valid assessments against the abutting property. The constitutional prohibition does not apply to a liability arising from such wrongful act of the city. *Ft. Dodge Elec. L. & P. Co. v. Ft. Dodge*, 115–568, 89 N. W. 7.

If warrants are only drawn where there is an appropriation to meet them, outstanding warrants are not to be included in estimating the indebtedness of a city. *Windsor v. Des Moines*, 110–175, 81 N. W. 476.

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

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

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

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

Recovery cannot be had upon a series of bonds which of themselves exceed the constitutional limitation by simply saying that the series were sold for cash and that if the county official had properly used the proceeds in payment of existing indebtedness the total debt of the corporation would not have been increased. The party advancing money under such bonds is bound to take notice of the constitutional limitation and is charged with the knowledge that, to create a valid claim against the corporation, the money he advances must be used in payment of valid indebtedness. *Aetna L. Ins. Co. v. Lyon County*, 82 Fed. 929.

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

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

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

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

tion being in favor of the validity of the bonds. *Ibid.*

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

Warrants for ordinary current expenses which, together with other like expenses, are within the limit of the current revenue of such special taxes as the municipality may legally and in good faith have levied, do not constitute an indebtedness within the meaning of the constitutional provision. *Cedar Rapids v. Bechtel*, 110–196, 81 N. W. 468.

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

The provisions of code § 745, as amended by 27 G. A., ch. 23, and code § 894, with reference to contracting for the erection of waterworks, contemplate the levying of a tax to be paid in installments in the future and an appropriation of the proceeds of such tax to the erection or procuring of waterworks, and do not involve the assumption of any indebtedness on the part of the city, and they are not therefore unconstitutional as in violation of the provision limiting municipal indebtedness. *Swanson v. Ottumwa*, 118–161, 91 N. W. 1048. (Contra: *Ottumwa v. City Water Supply Co.*, 119 Fed., 315; *City Water Supply Co. v. Ottumwa*, 120 Fed. 309.)

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

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

A tax, in the legal sense, is not a debt within the meaning of the constitutional provision limiting municipal indebtedness. *Grunewald v. Cedar Rapids*, 118–222, 91 N. W. 1059.

A contract by a city to pay rentals for fire hydrants at stated times in the future is one for a current expenditure and does not create an indebtedness. *Centerville v. Fidelity Trust & Guar. Co.*, 118 Fed. 332.

Where the city assumes liability to the contractor for cost of street improvement, such liability becomes the indebtedness of the city. *Allen v. Davenport*, 107–90, 77 N. W. 532.

Contracts for street improvements to be paid for by certificates of assessments on abutting property are not to be considered as involving municipal indebtedness, even if any deficiency is to be paid out of a fund raised by taxation. *Cory v. Ft. Dodge*, 133–666, 111 N. W. 6.

In the absence of any statutory provision expressly applicable to special charter cities, held that the limitation of their indebtedness is that fixed by the constitutional provision. *Reed v. Cedar Rapids*, 136–191, 113 N. W. 773.

The fact that warrants issued in excess of the constitutional limit are included in a judgment against a city does not alone impair its validity. That is a matter of defense. But parties cannot by acquiescence in a judgment for an indebtedness in excess of the constitutional limit give greater validity to such judgment than possessed by the indebtedness on which it was based. If only a part of the indebtedness is invalid, the judgment is not invalid *in toto*. *Rankin v. Chariton*, 139 N. W. 560, 141 N. W. 424.

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

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

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

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

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

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

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

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

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

Estoppel: Possibly the county may be estopped from denying the validity of bonds executed for refunding purposes, the proceeds of which are actually used in satisfying existing debts within the constitutional limit. *Reynolds v. Lyon County*, 121-733, 96 N. W. 1096.

The corporation will not be estopped by the action of its officers in acknowledging the validity of warrants, although in good faith, from interposing the defense that such warrants are in excess of the constitutional limitation of liability. Nor will a taxpayer be estopped from interposing such defense if the officers refuse to do so. *Farmers' Savings Bank v. Independent School District*, 122-99, 97 N. W. 988.

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

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

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

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

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

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

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

A paving contract, obligating the city to pay the cost of paving certain street intersections, is not wholly void, although the city is already indebted beyond its constitutional limit, and the contractor may take advantage of any portion of the contract which the city had power to make. *Ft. Dodge Elec. L. & P. Co. v. Ft. Dodge*, 115-568, 89 N. W. 7.

An issue of bonds which is in excess of the constitutional limit is valid so far as the amount thereof is not in excess of the limit. *Reynolds v. Lyon County*, 121-733, 96 N. W. 1096.

Personal liability of officers: City officials, contracting within the general scope of their jurisdiction in behalf of the city, and for a lawful purpose, do not render themselves personally liable, although the indebtedness is in excess of the constitutional limitation. *Lough v. Estherville*, 122-479, 98 N. W. 308.

Oath of office. SEC. 5.

One who is appointed treasurer of a commission created by law, no such officer of the commission being provided for by statute, is not a public officer. *State v. Spaulding*, 102-639, 72 N. W. 288.

How vacancies filled. SEC. 6.

One who is appointed by the court to discharge the duties of its clerk until a vacancy in the office shall be filled (code § 1272) is not entitled to hold until the next general election and until his successor is elected and qualified. *State v. Brown*, 144-739, 123 N. W. 779.

ARTICLE 12.—SCHEDULE.

Biennial elections. SECTION 16. The first general election after the adoption of this amendment shall be held on the Tuesday next after the first Monday in November in the year nineteen hundred and six, and general elections shall be held biennially thereafter. In the year nineteen hundred and six there shall be elected a governor, lieutenant governor, secretary of state, auditor of state, treasurer of state, attorney-general, two judges of the supreme court, the successors of the judges of the district court whose terms of office expire on December thirty-first, nineteen hundred and six, state senators who would otherwise be chosen in the year nineteen hundred and five, and members of the house of representatives. The terms of office of the judges of the supreme court which would other-

wise expire on December thirty-first, in odd-numbered years, and all other elective state, county and township officers, whose terms of office would otherwise expire in January in the year nineteen hundred and six, and members of the general assembly whose successors would otherwise be chosen at the general election in the year nineteen hundred and five, are hereby extended one year and until their successors are elected and qualified. The terms of office of senators whose successors would otherwise be chosen in the year nineteen hundred and seven are hereby extended one year and until their successors are elected and qualified. The general assembly shall make such changes in the law governing the time of election and terms of office of all other elective officers as shall be necessary to make the time of their election and terms of office conform to this amendment, and shall provide which of the judges of the supreme court shall serve as chief justice. The general assembly shall meet in regular session on the second Monday in January, in the year nineteen hundred and six, and also on the second Monday in January in the year nineteen hundred and seven, and biennially thereafter.

[By proper legislative action (29 G. A., joint resolution No. 5 and 30 G. A., joint resolution No. 1) a proposed amendment, adding the foregoing section numbered 16 to Article XII, was submitted to the electors at the general election in 1904, and adopted. Practically the same amendment was adopted by the people November 6, 1900, but the supreme court February 1, 1901, in the case of the *State of Iowa ex rel. Marsh W. Bailey v. S. W. Brookhart, respondent, appellant*, 113 Iowa 250, held that the amendment, section 16, was not proposed and adopted as required by the constitution, and did not become a part thereof.]

This act applies only to general elections. *Lobaugh v. Cook*, 127–181 N. W. 102§1121.

SUPPLEMENT

TO

The Code of Iowa

1913.

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

PART FIRST.

PUBLIC LAW.

TITLE I.

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

CHAPTER 1.

OF THE SOVEREIGNTY AND JURISDICTION OF THE STATE.

SECTION 3. Concurrent jurisdiction.

The concurrent jurisdiction referred to in this section does not apply to a slough wholly within the boundaries of this state connected at each end with the Mississippi river and to some extent supplied with waters from it. *Little v. Green*, 144-492, 123 N. W. 367.

While the actual boundary line between this state and Illinois is the middle thread of the main channel, the entire body of a navigable river is the physical, tangible, practical boundary over which both states may exercise authority so far as is necessary to protect the rights of all persons thereon. *Ibid.*

The jurisdiction of the state over boundary rivers is dependent upon the act of Congress admitting the state into the Union. It is within the jurisdiction thus conferred to provide by statute for the regulation of fishing within such boundary rivers without regard to the center of the main channel. *State v. Moyers*, 155-678, 136 N. W. 896.

The title of riparian owners upon the shores of a navigable stream extends to

high-water mark only, and the state is the owner of the beds of such streams. *State v. Carr*, (C. C. A.) 191 Fed. 257; *State v. Creighton R. E. & T. Co.*, (C. C. A.) 191 Fed. 270.

The title to an island which springs up in the bed of a navigable stream vests in the owner of that part of the bed upon which the land forms. *Ibid.*

Where, by avulsion, a navigable river suddenly abandons its former channel and never returns to it, the title to the island in the abandoned channel, and to the bed and banks of such channel, remain fixed where they were at the time of such avulsion. *Ibid.*

The title of a state to the bed of a boundary river between the thread of the stream and the high-water mark is held by it in trust for navigation and commerce and other public uses. *Hagerla v. Mississippi River Power Co.*, (D. C.) 202 Fed. 776.

Congress alone has power to legislate for the improvement of navigation and its discretion is not subject to judicial control. *Ibid.*

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

SEC. 4-b. **Consent to acquisition of lands by United States.** That the consent of the state of Iowa is hereby given, in accordance with the seventeenth clause, eighth section, of the first article of the constitution of the United States, to the acquisition by the United States, by purchase, condemnation, or otherwise, of any land in this state required for sites for customhouses, courthouses, post offices, arsenals, or other public buildings whatever, or for any other purposes of the government. [29 G. A., ch. 213, § 1.]

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

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

CHAPTER 2.

OF THE GENERAL ASSEMBLY.

SECTION 12. **Compensation of members.** The compensation of the members of the general assembly shall be: To every member, for each full regular session one thousand dollars, and for each extra session the same compensation per day while in session, to be ascertained by the rate

per day of the compensation of the members of the general assembly at the preceding regular session; and in going to and returning from the place where the general assembly is held, five cents per mile, by the nearest traveled route; but in no case shall the compensation for any extra session exceed ten dollars per day, exclusive of mileage. When a vacancy occurs during the session of the general assembly, and by reason thereof the term of office of any member does not cover the entire session [,] such members shall be paid as follows: To members whose term of office covers fifteen session days, or less, three hundred dollars; to members whose term of office covers more than fifteen session days, and less than thirty-one such days, five hundred dollars; to members whose term of office covers more than thirty session days, and less than fifty-one such days, seven hundred dollars; and to members whose term of office covers more than fifty session days, one thousand dollars. [35 G. A., ch. 2, § 1; 34 G. A., ch. 1, § 1.] [19 G. A., ch. 52, § 2; 18 G. A., ch. 38, § 2; C., '73, § 12; R., § 18; C., '51, § 11.]

SEC. 30-a. **Canvass of votes—oath—message of governor.** The general assembly shall meet in joint session on the second Tuesday of January or as soon thereafter as both houses have been organized after the biennial election, and canvass the votes cast for governor and lieutenant governor and determine the election; and when the canvass is completed, the oath of office shall be administered to the persons so declared elected and the governor shall deliver to the joint assembly any message he may deem expedient. [35 G. A., ch. 2, § 1.]

CHAPTER 3.

OF THE STATUTES.

SECTION 34. **Acts—where deposited.**

It is doubtful if the courts can properly go behind the enrolled bill to scrutinize the details of its legislative history for grounds upon which to hold it invalid, and held that failure of the journal to show what action was taken on certain amendments proposed will not invalidate the statute, the reasonable presumption being that the amendments not appearing upon the record of the proceedings have been rejected and not adopted. *Conly v. Dilley*, 153–677, 133 N. W. 730.

The enrolled bills duly signed and deposited with the secretary of state constitute the ultimate proof of their regular enactment, irrespective of the observation of the joint rules of the legislature which is a matter entirely within the control of the two houses and not subject to review by the courts. *Miller v. Oelwein*, 155–706, 136 N. W. 1045.

SEC. 36. **Acts taking effect by publication—secretary of state may designate other papers.** Acts which are to take effect from and after publication in newspapers shall be published in two or more papers, one at least of them at the seat of government, and in case either or both of the papers named in the act should fail or decline to publish said act as required therein, the secretary of state may designate another paper or papers in which publication shall be made and if such papers are not designated in the act, the same may be designated by the secretary of state, and the act published accordingly. All such acts shall take effect from and after the date of the last publication, and the secretary of state shall make and sign on the original roll of each of such acts a certificate, stating in what papers it was published, and the date of the last publication in each of them, which certificate and the printing thereof at the foot of the act

shall be presumptive evidence of the facts therein stated. [32 G. A., ch. 1; C., '73, § 33; R., § 24; C., '51, § 21.]

Where the publication clause provided for publication in "The Jefferson Souvenir," held that publication in a paper known as the "Souvenir," published at Jefferson, was sufficient. *District Township v. Wiggins*, 110-702, 80 N. W. 432.

Where it is provided that a statute shall take effect from and after its publication, it does not take effect on the day of such publication. *Arnold v. Board of Supervisors*, 151-155, 130 N. W. 816.

SEC. 36-a. **Certified copies on file with clerk of district court.** Whenever an act of the general assembly of a general nature shall take effect by publication the secretary of state shall forthwith send by mail to each clerk of the district court a certified copy thereof. Upon the receipt of such copies of such laws the clerk shall file the same in his office and preserve same for a period of not less than six months. All persons shall have access to such copies of laws when so filed and the clerk shall furnish copies thereof on request and may charge and receive therefor ten cents for every one hundred words. [33 G. A., ch. 2, § 1.]

[The enrolled bill, ch. 2, 33 G. A. (H. F. 130) does not appear to be signed by the president of the senate. EDITOR.]

SEC. 37. **Acts of public nature—when take effect.**

By the express language of a statute, an exemption therein referred to may be determined by the date of the passage of the statute although it does not take effect until a subsequent date. *Sawyer v. Gallagher*, 151-64, 130 N. W. 173.

SEC. 41. **Amendments—reference to amended act—repealed.** [27 G. A., ch. 2.]

[See § 41-a.]

SEC. 41-a. **Amendatory and repealing acts—how drawn.** That the law relating to the amendment and repeal of statutes, which appears as chapter two, of the laws of the twenty-seventh general assembly, and as section forty-one-a, of the supplement to the code, [1902] be and the same is hereby repealed, and the following enacted in lieu thereof:

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

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

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

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

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

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

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

7. Whenever reference is made to any section, chapter or title, as hereinbefore provided, the number of the same shall be expressed in

words followed by the figures in parentheses." [30 G. A., ch. 1, § 1; 27 G. A., ch. 2.]

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

SEC. 42. **Distribution of laws by secretary of state.** That section forty-two of the code be repealed and the following enacted in lieu thereof:

"The secretary of state shall distribute the laws aforesaid as follows: To the state library for exchange purposes, one hundred fifty copies; to the law library of the state university for exchange purposes with the law libraries of other state and territorial universities or colleges, fifty copies; to the state historical department and the state historical society, each ten copies; to all judges of the supreme and district courts of Iowa and judges of the United States circuit and district courts in Iowa, one copy each; to the clerk of the supreme court of Iowa, to each clerk of the district court of Iowa, and to each clerk of the United States circuit and district court in Iowa, one copy each for use in term time; to the state institutions and state officers, two copies each; to the separate departments of the principal state offices, members of permanent state boards or commissions, offices of permanent state boards or commissions when maintained at the seat of government, members of the thirty-fourth and succeeding general assemblies, chief clerk of the house, secretary of the senate, judges of the superior courts, colleges and public libraries within the state, state and territorial libraries in the United States, each one copy: all of the foregoing to be bound in law sheep, the copies for distribution to the county auditors upon their requisition to be bound in board." [33 G. A., ch. 1, § 6.] [17 G. A., ch. 123, § 1; 16 G. A., ch. 132; C., '73, § 39.]

SEC. 43. **Distribution by county auditors—accounting.** That section forty-three of the code be repealed and the following enacted in lieu thereof:

"Each county officer, justice of the peace, township clerk and mayor of city or town shall be supplied with a copy of the laws for the use of his office. The county auditor shall make requisition upon the secretary of state for the number of copies needed for gratuitous distribution and for sale purposes, and the secretary of state shall deliver to the county auditor the number so ordered, charging him therewith upon the books of his office. Upon receipt thereof the county auditor shall execute his receipt in duplicate therefor, one of which shall be filed in his office and the other immediately forwarded to the secretary of state. The county auditor shall deliver a copy of the laws to each of the officers entitled thereto under the provisions of this section and take receipts in duplicate therefor, one of which shall be filed in his office and the other forwarded to the secretary of state along with the annual report provided for in section forty-five hereof." [33 G. A., ch. 1, § 7.] [17 G. A., ch. 123, § 2; 16 G. A., ch. 132; C., '73, § 40.]

SEC. 44. **Sales—proceeds.** That section forty-four of the code be repealed and the following enacted in lieu thereof:

"The secretary of state and the county auditor shall sell the board-bound copies at fifty cents each. The secretary of state may sell any sheep-bound copies remaining in his possession after making distribution thereof as provided in section forty-two hereof at the rate of one dollar per copy.

The secretary of state shall pay the proceeds arising from all such sales made by him into the state treasury each month. The county auditor shall pay the proceeds arising from all such sales made by him into the county treasury for the use of the state revenue, on or before the first Monday of January in each year, taking a receipt in duplicate therefor, one of which shall be immediately forwarded to the secretary of state." [33 G. A., ch. 1, § 8.] [C., '73, § 41.]

SEC. 45. **Accounting—reports.** That section forty-five of the code be repealed and the following enacted in lieu thereof:

"The county auditor shall keep an accurate account of the laws received, sold and distributed, and shall annually on or before the first Monday of January in each year make out in writing under oath, a report, showing the number of laws on hand at the beginning of the annual period, the number received, the number sold and the number gratuitously distributed during the year, and the number on hand at the date of the report, and the amount paid into the county treasury, and transmit said report to the secretary of state, who in turn shall certify to the auditor of state on or before the fifteenth day of January in each year the amount paid to the county treasurer by the county auditor as shown by said report and the receipt of the county treasurer. The auditor of state shall thereupon charge the county treasurer with the amount so certified. The secretary of state shall credit the county auditor with the number of laws sold and otherwise disposed of as shown by the said report and by the receipts accompanying it." [33 G. A., ch. 1, § 9.] [C., '73, § 42.]

SEC. 46. **Copies to be delivered to successors.** That section forty-six of the code be repealed and the following enacted in lieu thereof:

"When a secretary of state goes out of office, having any copies of the laws remaining, he shall deliver them to his successor, taking his receipt therefor in duplicate, one of which shall be filed in the office of the secretary of state, which shall be his sufficient discharge for the same. When a county auditor goes out of office, having any such copies remaining, he shall deliver them to his successor, taking his receipt in duplicate therefor, one of which shall be immediately forwarded to the secretary of state, which shall be his sufficient discharge for the same; and every county officer, justice of the peace, mayor of city or town, and township clerk, receiving a copy shall give his receipt in duplicate therefor, and shall pass the copy to his successor, or deliver it to the county auditor for the use of subsequent officers, and each shall be liable therefor on his official bond." [33 G. A., ch. 1, § 10.] [C., '73, § 43.]

SEC. 46-a. **Not applicable to earlier laws—gratuitous distribution.** The provisions of the law relative to the sale of and accounting for the session laws shall not be applicable to the session laws of the twenty-sixth and preceding general assemblies. The secretary of state and the county auditors are hereby authorized to distribute gratuitously to attorneys, libraries and other interested persons or associations the session laws of the twenty-sixth and previous general assemblies, provided that the secretary of state shall maintain the number of copies of the acts of each of said general assemblies in reserve as may be fixed by the executive council in accordance with the provisions of section one hundred twenty-six-d of the supplement to the code, nine hundred and seven. [33 G. A., ch. 1, § 11.]

SEC. 48. **Construction.**

Par. 1. **Repeal—effect of;** A statute relating simply to the remedy, such as the statute of limitations, may apply to causes of action previously existing, but a

statute affecting the terms of a previous contract, for instance, one which extends the term of limitation of action fixed in a policy of insurance, will not be applied to contracts already made. *Farmers' Co-op. Creamery Co. v. Iowa State Ins. Co.*, 112–608, 84 N. W. 904.

Where by curative act the defense of usury to certain loans of building and loan associations was removed, held that such act did not repeal the usury laws as to such loans, and the repeal of the curative act left the statutes as to usury applicable as before. *Edworthy v. Iowa Sav. & Loan Assn.*, 114–220, 86 N. W. 315.

The repeal of prior tax laws and the simultaneous reënactment of substantially similar ones, held not to relieve a taxpayer from any duty under the former law. *Robinson v. Ferguson*, 119–325, 93 N. W. 350.

Repeals by implication are not favored. *State v. Higgins*, 121–19, 95 N. W. 244.

Par. 2. Words and Phrases: Where a statute made special provision as to the use of a certain lamp by name by which it was admitted described that lamp only, held that it was not competent to extend the provision so as to include other lamps constructed on the same principle. *State v. Santee*, 111–1, 82 N. W. 445.

Words having an appropriate meaning in law should be construed in accordance with that meaning. *Jewell v. Board of Trustees*, 113–47, 84 N. W. 973.

Section applied. *Chicago, R. I. & P. R. Co. v. Ottumwa*, 112–300, 83 N. W. 1074.

Words and phrases are to be construed together according to the context and approved usage of language, but technical words and phrases and such words as may have acquired appropriate and peculiar meaning in law should be construed according to such meaning. *In re Appeal of Bailies*, 127–124, 102 N. W. 813.

While in statutory construction the word "may" has sometimes a meaning equivalent to the word "must" in its ordinary acceptation, such a construction should not be given if it would be inconsistent with the manifest intention of the legislature or repugnant to the text of the statute. *State v. Hortman*, 122–104, 97 N. W. 981.

Words and phrases are to be construed according to the context and approved usage of the language. *Rohlf v. Kasemeier*, 140–182, 118 N. W. 276.

The word "owner" as used in code § 2340 relating to liability for injuries by dogs is not of technical significance and is to be construed according to the context and approved usage of the language. *Alexander v. Crosby*, 143–50, 119 N. W. 717.

In construing words used in a statute the court will look at the context and the approved usage of the language in order to determine their proper construction and may also consider the fact that they have acquired a peculiar or appropriate meaning in the law. *Webster City v. Wright County*, 144–502, 123 N. W. 193.

Par. 3. Number and gender: The statutory phrase "to any person" held applicable to include more than one person, when such construction was required to give the statute the effect it was intended to have. *In re McGhee's Estate*, 105–9, 74 N. W. 695.

Words importing the plural number may be applied to one person or thing. *Grunewald v. Cedar Rapids*, 118–222, 91 N. W. 1059.

Par. 5. Highway—road: The terms "highway" and "road" include a street in a city. All streets are highways. And a highway or a street includes bridges therein. *Sachs v. Sioux City*, 109–224, 80 N. W. 336.

The term "road" as used in the code means any public highway unless otherwise specified. *Nichols v. Chicago, M. & St. P. R. Co.*, 125–236, 100 N. W. 1115.

When the incorporation of a town is abandoned the control of its streets and alleys reverts to the board of supervisors. *Chrisman v. Brandes*, 137–433, 112 N. W. 833.

Par. 6. Insane: The term "insane persons" employed in code § 3453 relating to limitation of actions includes persons of unsound mind. *Jefferson v. Rust*, 149–594, 128 N. W. 954.

Par. 7. Issue: In construing statutes, the word "issue" as applied to descent of estates, includes all lawful lineal descendants. *Rice v. Burkhart*, 130–520, 107 N. W. 308.

Par. 8. Land—real estate: A statute conferring a right upon the "owner" of land may be construed as covering the interest of a tenant therein. *Chiesa v. Des Moines*, 138 N. W. 922.

Par. 9. Personal property: Promissory notes are evidences of debt, and things in action are therefore personal property, within the statutory definition of the term. *Nordyke v. Charlton*, 108–414, 79 N. W. 136.

Par. 11. Month — year — A. D.: The word "year" is presumptively equivalent to "year of our Lord," that is, a calendar year. *Sawyer v. Steinman*, 148–610, 126 N. W. 1123.

Par. 13. Person: Corporations are included in the word "persons" as used in the statute. *Swartley v. Oak Leaf Creamery Co.*, 135–573, 113 N. W. 496.

Par. 21. Executor — administrator: This section applied. *Ellyson v. Lord*, 124–125, 99 N. W. 582.

Par. 23. Computing time: Where proof of loss under a policy of insurance was mailed on Saturday, the last day for making the same being Sunday, and it was received by the insurance company on Monday, held that it was on time. *McKibban v. Des Moines Ins. Co.*, 114–41, 86 N. W. 38.

While for some purposes the law does not recognize fractions of a day in computing time, this principle is not universal. If the exact time is an important element in determining a right of action, the exact time will be considered. *Roelefsen v. Pella*, 121–153, 96 N. W. 738.

In determining whether the defendant has had four days' notice of proposed evidence in a criminal case under code § 5373, Sunday is not to be excluded from the computation. *State v. Clark*, 145–731, 122 N. W. 957.

A statute taking effect from and after its publication is not in effect on the day of such publication. *Arnold v. Board of Supervisors*, 151–155, 130 N. W. 816.

CHAPTER 4.

OF THE CODE AND ITS OPERATION.

SECTION 49. Citations—repeal of prior statutes.

Section applied. *Greaves v. Posner*, 111–651, 82 N. W. 1022.

This section is an express repeal of statutes previously in force. *West v. Bishop*, 110–410, 81 N. W. 696.

SEC. 51. Existing rights not affected.

The proceedings in pending actions are to be conformed to the provisions of the new code as far as consistent. *State v. Dorland*, 106–40, 75 N. W. 654.

This provision saves rights, not remedies, except where suit or proceeding has been had or commenced. No one has a vested right in a particular remedy. Therefore held that the provision of code § 1744, by which the time after a loss under a fire insurance policy before suit could be brought thereon was reduced from 90 to 40 days was applicable to an action brought after the taking effect of the code on a loss sustained prior to the time when the code took effect. *Jones v. German Ins. Co.*, 110–75, 81 N. W. 188.

The assessment of an attorney's fee in a liquor prosecution relates solely to the remedy and is to be regulated by the provisions of this code, even in proceedings already commenced before the code took effect. *Carter v. Bartel*, 110–211, 81 N. W. 462.

The right to sell intoxicating liquors, notwithstanding the prohibitory law, resulting from compliance with the provisions of the mulct law in force prior to the taking effect of the present code, was not a right accruing, or which had accrued so as to be preserved from the effect of the repeal of prior laws resulting from the adoption of such code. *West v. Bishop*, 110–410, 81 N. W. 696.

A limitation of action is not a vested right which remains unaffected by subsequent change of the statute, but so far as such limitation affects an obligation already accrued it is not affected by such repeal. *Norris v. Tripp*, 111–115, 82 N. W. 610.

A statute affecting the remedy only is not unconstitutional as applied to a right existing before the statute is passed. *Allerton v. Monona County*, 111–560, 82 N. W. 922.

So far as code § 2978 restricts the extent of a homestead within a town plat it is not applicable to homesteads already existing. *Sayers v. Childers*, 112–677, 84 N. W. 938.

Where the prior statute gives a mere privilege and not a contract or vested right, such privilege is not preserved by this section after the repeal of the statute by the adoption of the code. *Miller v. Hageman*, 114–195, 86 N. W. 281.

A mere change in the mode of redemption from a mortgage foreclosure is applicable to a right to redeem already existing, notwithstanding the provision of this section. *Jack v. Cold*, 114–349, 86 N. W. 374.

Liability of parties with reference to work done under ordinance authorizing special improvements at the expense of abutting property owners is not affected by the repeal by the code of the statutes under which such ordinance was passed. *Ft. Dodge Elec. L. & P. Co. v. Ft. Dodge*, 115–568, 89 N. W. 7.

Prior to the adoption of the code of '73, the period of limitation in an action on a judgment was twenty years; held, that the adoption of that code by which it was provided that no action on a judgment should be brought within fifteen years after its rendition did not apply to extend the period of limitation applicable to judgments rendered before that time. *Wilson v. Tucker*, 105–55, 74 N. W. 908.

The repeal of existing statutes by enactment of the code did not affect any act done before such repeal took effect. *State v. Taylor*, 140–138, 118 N. W. 301.

CHAPTER 5.

SUBMISSION OF CONSTITUTIONAL AMENDMENTS.

SECTION **55. Publication—record kept.** Whenever any proposition to amend the constitution has passed the general assembly and been referred to the next succeeding legislature, the secretary of state shall cause the same to be published, once each week, in two newspapers of general circulation in each congressional district in the state, for the time required by the constitution; and proof of the publication shall be made by the affidavits of the publishers thereof, and such affidavits, with the certificate of the secretary of state of the selection of such newspapers therefor, shall be filed in his office, recorded in a book kept for that purpose, and preserved, and he shall report to the following legislature his action in the premises. [30 G. A., ch. 2, § 1; 16 G. A., ch. 114, § 1.]

TITLE II.

OF THE EXECUTIVE DEPARTMENT.

CHAPTER 1.

OF THE GOVERNOR.

SECTION 62. May offer rewards for arrests.

A reward may be offered by way of proclamation. *McPeek v. Western U. Tel. Co.*, 107-356, 78 N. W. 63.

Such proclamation may be deposited with the secretary of state and may be proved by the record in his office. *Ibid.*

SEC. 64-a. **May direct attorney-general to appear—validity of bridge patents.** The governor, whenever he deems such action to be in the interest of the public, shall have power to direct the attorney-general to appear for and on behalf of any county, city, town or other municipality of this state or for and on behalf of any officer thereof or contractor therewith, whenever any such county, city, town or other municipality or officer or contractor is a party to any action or proceeding in any court wherein is involved the validity of any alleged patent on any matter or thing entering into highway, bridge or culvert construction, or on any parts thereof, and may employ such legal assistance in addition to the attorney-general as he may deem necessary and may pay for the same out of any fund in the state treasury not otherwise appropriated. Whenever the attorney-general is so directed by the governor it shall be his duty to comply therewith. [35 G. A., ch. 4, § 1.]

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

CHAPTER 2.

OF THE SECRETARY OF STATE.

SECTION 66. Duties—records to be kept.

A proclamation by the governor should be preserved in the office of the secretary of state and a certified copy thereof is admissible in evidence in lieu of the original. *McPeek v. Western U. Tel. Co.*, 107-356, 78 N. W. 63.

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

SEC. 69. **Must report criminal statistics—repeal.** That section sixty-nine of the code be and the same is hereby repealed.[1] [33 G. A., ch. 3, § 5.]

[1]All of ch. 3, 33 G. A., which included this repealing clause, was repealed by ch. 33 of the 35 G. A. EDITOR.]

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

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

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

Whenever a question arises as to the character of land which is claimed by the state under the swamp land grant, it is competent for the governor to submit the matter to the land department, and the finding of that department that the land is swamp land is conclusive. *Rood v. Wallace*, 109–5, 79 N. W. 449.

SEC. 86. **Salary of secretary.** The salary of the secretary of state shall be thirty-six hundred dollars per annum. [35 G. A., ch. 7, § 1.] [C., '73, § 3756; R., § 58; C., '51, § 42.]

SEC. 86-a. **No additional compensation.** No other or additional compensation shall be paid by the state of Iowa to any of the officers herein named for services rendered to the state. [35 G. A., ch. 7, § 6.]

SEC. 87. **Deputy—qualification—bond—duties—salary.** He may appoint, in writing, any person, except one holding a state office, as deputy, for whose acts he shall be responsible, and from whom he shall require bonds, which appointment and bond must be approved by the officer having the approval of the principal's bond, and such appointment may be revoked in the same manner; both the appointment and revocation to be filed with and kept by such officer. The deputy shall qualify by taking the oath of the principal, to be indorsed upon and filed with the certificate of appointment, and when so qualified he shall, in the absence or disability of the secretary, perform all the duties of the secretary pertaining to his office, and shall receive a salary of eighteen hundred dollars a year. [32 G. A., ch. 2, § 2; 21 G. A., ch. 118, § 2; C., '73, §§ 766-8, 770, 3756; R., §§ 642-4, 647; C., '51, §§ 411, 412, 413, 416.]

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

CHAPTER 3.

OF THE AUDITOR OF STATE.

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

1. *To keep accounts with others.* To keep and state all accounts between the state and the United States, or any other state, or any public officer of the state, or person indebted to the state or intrusted with the

collection, disbursement or management of funds belonging to the same, when they are payable to or from the state treasury;

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

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

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

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

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

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

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

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

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

11. *To report fiscal condition of state.* To report to the governor before each regular session of the general assembly a complete statement of the revenue, funds, income, taxable property and other resources and property of the state, and of the public revenues and expenditures since his last report, with a detailed statement of the expenditures to be defrayed from the treasury for the term following that covered by his report,

specifying each object of expenditure, and distinguishing between such as are provided for by appropriations and such as are not, and showing the probable deficiency of any former appropriations;

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

SEC. **98. Salary of auditor.** The salary of the auditor of state shall be thirty-six hundred dollars per annum. [35 G. A., ch. 7, § 2.] [C., '73, § 3757; R., § 70; C., '51, § 49.]

[For prohibition of additional compensation, see § 86-a. EDITOR.]

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

SEC. **100-a. State examiners for counties—qualifications—compensation.** That within thirty days from and after the taking effect of this act, the auditor of state shall appoint not less than four nor more than eight state examiners for counties, hereinafter referred to in this act as "examiners," who shall be suitable persons of recognized skill, familiar with the system of accounting used in county offices, and versed in the laws relating to county affairs, who shall, at all times, be subject to the control and under the direction and supervision of the auditor of state. They shall hold office for a term of four years, and be subject to removal for cause by the auditor of state. They shall receive as compensation the sum of six dollars per day when actually employed, and shall be paid in addition, their actual and necessary expenses incurred in the performance of the duties of their office. The auditor of state shall appoint such additional clerks and assistants as are needed, and shall fix a reasonable compensation therefor, and he may contract such other expenses as shall be necessary in the performance of the duties provided by this act, but the total amount to be expended for all purposes incurred under the provision of this act shall not exceed twenty thousand dollars annually. Such compensation and other expenses as indicated herein shall be paid by warrants drawn by the auditor of state upon the state treasurer, and there is hereby appropriated out of any money in the state treasury, and not otherwise appropriated, the sum of five thousand dollars or so much thereof as may be necessary. Before the compensation or expenses of any examiner, clerk or assistant, shall be paid, a detailed and itemized statement shall be prepared by said examiner, and duly verified, which verification shall aver that the account is just, reasonable, and wholly unpaid. Said claims shall be approved by the auditor of state and afterwards presented

and allowed by the executive council. As soon as an examination for any county has been completed, and the expenses thereof paid by this state, the auditor of state shall forthwith file with the auditor of the county so examined, a claim for the full amount so paid by this state; which claim, when so filed, shall become a legal and valid claim against the county, payable from its general funds, as all other claims are paid. Before entering upon the discharge of the duties of his office, each examiner shall give a bond in the penal sum of two thousand dollars conditioned as provided in section eleven hundred eighty-three of the code, the same to be approved and filed as are the bonds of other state officers. [35 G. A., ch. 8, § 1.]

SEC. **100-b. Uniform system of accounting.** The auditor of state shall formulate, prescribe, approve, and install a system of books, blanks, records, vouchers, receipts, and all other forms necessary to secure a complete system of accounting for county officers, which system shall be uniform for all accounts of the same class, and they shall, from time to time, formulate, prescribe, and install such changes in the system of bookkeeping and accounting as shall be necessary in order to conform to changes in the law; and it is hereby made the express duty of the examiners to assist the respective officers in installing such systems in each of the counties throughout the state. [35 G. A., ch. 8, § 2.]

SEC. **100-c. Date of adoption—refusal—penalty—mandamus.** That in order to secure uniformity, all county officers are hereby directed to adopt, on or before July first, nineteen hundred fourteen, the system formulated for said county office by the state auditor, and in case of refusal or neglect to comply with this provision of the law within thirty days after request from the auditor of state, the official so delinquent shall forfeit to the state the sum of one hundred dollars, to be recovered by the state of Iowa, in an action brought against the delinquent official and his bondsmen by the county attorney of said county; and one half of said penalty when recovered shall be paid into the treasury of the county, and the other half into the treasury of the state of Iowa. An action in mandamus may be brought by the county attorney, or by any citizen of the county, to secure a compliance with the provisions of this statute. [35 G. A., ch. 8, § 3.]

SEC. **100-d. Examination of offices and accounts—powers of examiners—reports—removal.** That it shall be the duty of the auditor of state to examine or cause to be examined, at least once each year, and oftener if in his judgment conditions require, all county officers and offices receiving or disbursing public funds, and he is hereby given full power to examine personally, or through his examiners, all accounts and all official affairs of every county office and officer receiving or disbursing public funds. On every such examination inquiry shall be made as to the financial condition and resources of each county; whether the first cost prices paid for improvements, materials, supplies, merchandise, etc., are in excess of the first cost prices paid for the same character of improvements, materials, supplies and merchandise by other counties of the state; whether the laws of the state and the requirements of the auditor of state have been complied with; also into the methods and accuracy of the accounts and reports of the office so examined. Such examination shall be made without notice. The auditor of state, or any examiner, when engaged in making any examination provided for in this act, or when engaged in any official duty devolving upon him as such, shall have, for the purpose of making an examination or inventory, the right to enter into any county office and examine any books, papers, or documents contained therein, or belonging thereto, and shall have access, in the presence of the custodian

thereof or his deputy, to the cash drawers and cash in the custody of such officer, and they shall also have the right, during business hours, to examine the public accounts of the municipality under examination, in any depository which has such public funds in its custody pursuant to the laws of this state. The state auditor, or any of his examiners, when engaged in making any examination of any office, officer, board, or institution, or any other examination authorized by this act, is hereby empowered to issue subpœnas for witnesses to appear before him in person, or to produce books and papers before him for inspection and examination. Such subpœna shall be served by any person authorized to serve civil process from any court in this state. In case any witness duly subpœnaed refuses to attend, or refuses to produce documents, books and papers as required in subpœna, or shall attend and refuse to make oath or affirmation, or being sworn or affirmed and shall refuse to testify when called upon so to do, then the state auditor or the examiner may apply to the district court, or any judge of said district having jurisdiction thereof, for the enforcement of attendance and answers to questions as provided by law in the matters of taking depositions. They shall also have the authority to administer oaths and to examine such witnesses under oath orally or by interrogatories propounded touching the matters under investigation and examination, and such oral examination may be taken in shorthand, and transcribed, and the reasonable expense thereof shall be paid in the same manner as the expenses of the examiner are[1] paid. Wilful false swearing in such examination shall be perjury, and shall be punishable as such. A report of such examination shall be made in triplicate, signed, and verified under oath by the officer making the examination; one copy to be filed with the auditor of state; one copy with the officer under investigation, and one copy with the auditor of the county whose officer is under investigation. In the event that such examination discloses any of the grounds of removal mentioned in section one, chapter seventy-eight of the acts of the thirty-third general assembly, a fourth copy shall be provided and filed by the auditor of state in the office of the attorney-general of the state, and the attorney-general shall thereupon take such action as, in his judgment, the facts and circumstances warrant. It shall be unlawful for any examiner to make any disclosure of the result of any investigation, except as he shall make the same to the auditor of state, county auditor or to any court, and a violation of this provision shall be ground for removal. [35 G. A., ch. 8, § 4.]

[1"is" in enrolled bill. EDITOR.]

SEC. 100-e. **Examination upon petition.** Any township, school, or municipal corporation may secure an examination of its financial transactions and the condition of its funds, and a report thereon by the auditor of state or one of his examiners, upon application to the auditor of state, provided said application is accompanied by a petition signed by twenty-five or more taxpayers of the township, school or municipal corporation desiring an investigation and requesting such an examination and setting forth facts which, in the opinion of the state auditor, shall justify such action. As soon as examination for any such municipal corporation has been completed, and the expenses thereof paid by this state, the auditor of state shall forthwith file a claim against the municipal corporation so examined; which claim when so filed shall become a legal and valid claim against said municipal corporation, payable from its general funds as all other claims are paid. [35 G. A., ch. 8, § 5.]

SEC. 100-f. **Acts in conflict repealed.** All acts or parts of acts inconsistent with this act are hereby repealed. [35 G. A., ch. 8, § 6.]

CHAPTER 4.

OF THE TREASURER OF STATE.

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

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

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

SEC. 115. **Salary of treasurer.** The salary of the treasurer of state shall be thirty-six hundred dollars per annum. [35 G. A., ch. 7, § 3.] [C., '73, § 3758; R., § 82; C., '51, § 61.]

[For prohibition of additional compensation, see § 86-a. EDITOR.]

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

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

CHAPTER 4-A.

OF THE TIME AT WHICH ALL ANNUAL APPROPRIATIONS SHALL BEGIN.

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

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

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

SEC. 116-c1. **Certain appropriations prohibited.** No further appropriations shall hereafter be made to any institution not wholly under the control of the state. [31 G. A., ch. 189, § 4.]

[The above, which is a part of an act appropriating money to a charitable institution, did not appear in the 1907 supplement. It has been thought advisable to include it in this work, and no more appropriate place could be found for it. EDITOR.]

CHAPTER 4-B.

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

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

SEC. 116-e. **Duties of county authorities.** Upon receipt of such information the county auditor as clerk of the board of supervisors shall communicate such information to the supervisors of his county at their first regular meeting thereafter; and the board of supervisors shall thereupon authorize by resolution the county treasurer to present an order to the treasurer of state for the aforesaid money belonging to their county. Upon the presentation of such order accompanied by a copy of the resolution of the board duly certified to by the clerk of the board under the seal of said county, together with receipts therefor in duplicate, the treasurer of state shall issue his check payable to said county treasurer for the

amount of the swamp land indemnity fund awarded to said county by the land commissioner of the government of the United States, the proceeds thereof to be applied by the authorities of the [county] receiving the same as directed by the provisions of chapter one hundred sixty, acts of the ninth general assembly, and chapter seventy-nine of the acts of the eleventh general assembly, or other acts relating thereto. [28 G. A., ch. 146, § 2.]

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

CHAPTER 4-C.

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

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

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

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

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

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

CHAPTER 5.

OF THE PUBLIC PRINTING AND BINDING.

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

SEC. 119. **Printing—how ordered and delivered.** No work shall be ordered of the state printer except upon a regular form of blank furnished by the secretary of executive council and kept in his office. Whenever printing is ordered by either house of the general assembly, the secretary or clerk thereof shall immediately notify the secretary of executive council of such order, and when such printing is done, the same shall be delivered to the secretary of executive council for distribution, subject to the instructions of the house ordering the printing. [29 G. A., ch. 4, § 2; 22 G. A., ch. 82, § 5.]

SEC. 120. **Secretary of state to examine and certify work.** The secretary of state, upon the completion of any printing or binding for the state, or the presentation of any bill for such printing or binding, shall make examination of the work done and ascertain whether it has been done in accordance with the provisions of this chapter. If he finds there has been a compliance herewith, he shall certify the same, stating the amount to which the officer presenting the bill is entitled. In case such work has not been properly done, or any item of said bill has not in his judgment been earned, he shall refuse to certify as to such item, or shall state what reduced amount, if any, the officer is entitled to as compensa-

tion for such defective work. The secretary of state shall certify quarterly to each state department, board or commission the character of the printing and binding ordered and completed during that quarter for such department, board or commission, giving the amounts paid therefor to the state printer for composition, press work and stock, and to the state binder for binding and extras; which certificate shall be official notice to such department, board or commission of its expenditures for printing and binding, and shall be used by such department, board or commission in preparing the biennial report of expenditures to the executive council in accordance with the provisions of chapter six of the acts of the twenty-eighth general assembly. The secretary of state shall make a certified report to each department of the cost of printing and binding done from and after July first, nineteen hundred and one, to the date this enactment becomes operative. [29 G. A., ch. 5, § 1; 22 G. A., ch. 82, § 6.]

While the determination by the secretary of state that public printing and binding had been done in compliance with law is not subject to collateral attack, yet he has no authority to authorize compensation to be paid in accordance with qualifications not corresponding to the statutory provisions; and payments made at a higher rate than that authorized by law may be recovered back. *State v. Young*, 134–505, 110 N. W. 292.

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

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

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

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

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

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

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

SEC. **123. Biennial fiscal term—reports to cover.** The biennial fiscal term of the state ends on the thirtieth day of June in each odd-numbered year, and the succeeding fiscal term begins on the day following; and the reports required in the preceding section shall cover the period thus indicated, except when otherwise provided by law, and shall show the condition of such offices and institutions, respectively, on that day. The maximum amount named as appropriations made for the support of inmates or for pay of officers or teachers or for any other purpose whatever connected with the operating of any state institution under the control of the board of control of state institutions shall be available until used for the purpose for which said appropriation was made, and no part of the same shall be by the auditor of state or treasurer of state charged off as

an unexpended balance unless said officers shall be notified in writing by said board that said balance so unexpended will not be needed, and any sums charged off as unexpended balance by the auditor or treasurer of state, since chapter one hundred eighteen, acts of the twenty-seventh general assembly, took effect, shall still be available and subject to the provisions of this section. [28 G. A., ch. 3, § 1; 22 G. A., ch. 82, § 9.]

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

SEC. 125. **Reports—number of copies to be printed.** That the law as it appears in section one hundred twenty-five of the supplement to the code [1902] be and the same is hereby repealed and the following enacted in lieu thereof:

"There shall be printed of the various public documents the number of copies hereinafter designated, to wit: Of the biennial message, twenty-five hundred copies; of the inaugural address, two thousand copies; of the biennial report of the auditor of state, twenty-five hundred copies; of the biennial report of the treasurer of state, two thousand copies; of the report of the superintendent of public instruction, four thousand copies; of the report of the agricultural college and of the report of the state board of health, twenty-five hundred copies each; of the report of the bureau of labor statistics, thirty-five hundred copies; of the annual reports of the auditor of state upon insurance, forty-five hundred copies each; of the report of the commissioners of pharmacy, twenty-five hundred copies; of the report of the railroad commissioners, three thousand copies, of which two thousand copies shall be bound in cloth; of the report of the board of control, three thousand copies, of which two thousand copies shall be bound in cloth; of the annual report of the geological survey, three thousand copies, of which twenty-two hundred copies shall be bound in cloth; of the report of the annual assessment of railway property, two thousand copies; of the report of the secretary of state pertaining to lands, of the report of the secretary of state pertaining to the inspection of oils, of the state dairy commissioner's report four thousand copies, to be bound in paper covers, and of the report of the state board of dental examiners, fifteen hundred copies each; of the proceedings of the pioneer lawmakers' association, twelve hundred copies, of which five hundred copies shall be delivered to the association; of the auditor's report pertaining to the financial statements of cities and towns, two thousand copies, of which five hundred copies shall be bound in cloth; and of all other reports not herein or otherwise specified, fifteen hundred copies each, unless the executive council shall direct a greater number to be printed, not exceeding four thousand. The executive council shall reduce the number of copies of any report herein provided, whenever the books of the document accountant in the office of the secretary of state show that a less number will supply all the necessary needs for such publication. Of said reports five hundred copies each of the biennial message, inaugural address, auditor's biennial report, treasurer's biennial report, attorney-general's biennial report, the report of the superintendent of public instruction, agricultural college, board of health, commissioners of pharmacy, secretary of state pertaining to lands, secretary of state's report of criminal convictions, the auditor's annual reports pertaining to insurance, the report of the bureau of labor statistics, the report of the state librarian and the report of the adjutant general, shall be bound in cloth, all other reports shall be bound in paper covers." [33 G. A., ch. 4, § 1.] [32 G. A., ch. 3, § 1; 31 G. A., ch. 3, § 3; 29 G. A., ch. 6, § 1; 28 G. A., ch. 4, § 1; 23 G. A., ch. 52, § 1; 22 G. A., ch. 82, § 11.]

[By § 1, ch. 3, the 32 G. A. attempted to amend the above section by striking out the word "two" in the twenty-second line and inserting in lieu thereof the word "four." The word two does not occur in the twenty-second line, but does appear in the twenty-seventh line, and the change has been made there, as it is manifest that such was the intent of the general assembly.]

SEC. 126. **Distribution of reports and documents—by and to whom.** That the law as it appears in section one hundred twenty-six of the supplement to the code [1902] and as amended by chapter five of the acts of the thirtieth general assembly, be and the same is hereby repealed and the following enacted in lieu thereof:

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

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

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

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

4. He shall furnish to the library of congress two copies of all legislative journals and reports of state officers, immediately upon their publication." [32 G. A., ch. 3, §§ 2, 3; 31 G. A., ch. 3, § 4; 30 G. A., ch. 5, § 5; 29 G. A., ch. 6, § 2; 27 G. A., ch. 4, § 1; 23 G. A., ch. 52, § 2; 22 G. A., ch. 82, § 12; C., '73, § 64.]

SEC. 126-a. **Secretary of state to act as custodian.** It shall be the duty of the secretary of state to act as custodian of all state documents

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

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

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

SEC. 126-d. **Report—reserve list—biennial report.** The secretary of state shall, when the systematic arrangement is completed as contemplated in the preceding section, make a full and complete report to the executive council showing number, kind and date of all publications on hand. The executive council may fix the number of all documents, reports and publications that are now on hand or are hereafter published, that shall be known as the reserve list, to be thereafter distributed only upon requisition approved by the executive council. The secretary of state shall on January first preceding the convening of the legislature make a biennial report to the governor of all documents, reports and publications on hand. [30 G. A., ch. 5, § 4.]

SEC. 136. **Report of academy of sciences—distribution.** There shall be published, with necessary illustrations and bound in boards, in the same form as the acts of the general assembly are, by the state and under the supervision of the Iowa academy of sciences, one thousand copies of its annual report, to contain not more than three hundred pages, to be distributed as follows: To the governor, lieutenant governor, secretary of state, auditor of state, state treasurer, each member of the general assembly, horticultural society, agricultural society, state library, university, agricultural college and the normal school, one copy each; to each public library and each incorporated college of the state, one copy; the remainder to be distributed by the secretary of state as directed by the secretary of said academy, for exchange and such other purposes as the academy may

specify, the exchanges and reports received to be preserved in the capitol for the benefit of the state at large. [32 G. A., ch. 4; 29 G. A., ch. 7, § 1; 28 G. A., ch. 5, § 1; 25 G. A., ch. 86.]

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

SEC. 137. **Proceedings of state teachers' association—distribution.** That section one hundred thirty-seven of the code be and the same is hereby repealed and the following enacted in lieu thereof:

"That there shall be published annually by the state, under the supervision of the superintendent of public instruction, a sufficient number of copies, such number to be fixed by the executive council, of not to exceed three hundred pages each, of the proceedings of the state teachers' association, to be distributed as follows: One copy each to the governor, lieutenant governor, auditor of state, secretary of state, treasurer of state, each member of the general assembly, each enrolled member of the state teachers' association, each public library in the state; one hundred copies for the executive council for reserve and one hundred copies for distribution by the superintendent of public instruction." [31 G. A., ch. 6; 25 G. A., ch. 87.]

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

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

1. For hand composition on laws, journals, reports and all other printed matter, except blanks, forty-eight cents per thousand ems, and sixty cents per thousand for figure work when figures are arranged in columns, and three or more justifications are required, and eighty cents per thousand ems for rule and figure work. But plain indexes, such as those of the statutes of this state, shall be reckoned as ordinary composition;

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

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

4. For printing twelve hundred copies or less of the docket for the supreme court, including press work and composition, the docket page to conform in size and form with the dockets of eighteen hundred ninety-six, two dollars for each printed page contained in a single volume thereof. For printing senate or house bills, five hundred or less, including composition and press work, two dollars and twenty-five cents for each printed page contained in a single bill, and for each additional one hundred, twenty-five cents for each form of four pages or less; provided that where type set for a bill in one house shall be used in printing the same bill for the other house, the number of copies ordered of said same bill shall be considered additional copies and paid for accordingly, and for reimposing the first form of four pages or less of said same bill the sum of fifty cents shall be allowed. For briefs to the supreme court, fifty copies or less, of size and form prescribed by the rules of the supreme court, ninety cents per printed page contained in a single volume. For letterheads, envelopes, labels and postal cards, including composition and press work, one dollar and fifty cents for each one thousand impressions or less, and one dollar and twenty-five cents for each additional thousand; and when postal cards are printed upon both sides, two press works shall be paid for. [33 G. A., ch. 5, § 1.] [31 G. A., ch. 7; 22 G. A., ch. 82, § 23.]

SEC. **139. Conditions of payment.** No charges of any kind shall be allowed the state printer, except as the same are expressly provided by this chapter. He shall be allowed only for press work done and type actually set up and imposed, or for paper actually printed, and he shall file with the secretary of state a copy of each job of work, on which each item of charge is made, at the time of rendering his account. Before the secretary can issue him the receipt contemplated by this chapter, the actual number of ems and number of impressions of press work in each job shall be specified, with a statement that the law has been strictly complied with, and that no unlawful charges are embraced in his account, as rendered, which statement shall be verified by the affidavit of the state printer. Where type set for house or senate journals, messages, reports or documents shall be used twice, the state printer shall have pay for the same but once, but he shall be allowed one dollar and fifty cents [for] each sixteen-page document form or its equivalent where it is to be used a second time. [33 G. A., ch. 5, § 2.] [22 G. A. ch. 82, § 24.]

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

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

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

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

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

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

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

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

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

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

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

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

SEC. **144. Not retroactive—repealed.** [27 G. A., ch. 5, § 1.]

[See § 144-a.]

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

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

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

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

CHAPTER 6.

OF THE CUSTODIAN OF PUBLIC BUILDINGS.

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

SEC. 150. **Record to be kept—contents—report.** He shall keep in his office a complete record containing an itemized list of all property of the state under his care and control, with accurate plans and surveys of the public grounds at the seat of government. He shall make a report to the governor on or before the last day of September preceding each regular session of the general assembly, which report shall cover all transactions for the preceding biennial period. He shall perform all other duties imposed by law, or order of the executive council. [33 G. A., ch. 6, § 1.] [21 G. A., ch. 148, § 7.]

SEC. 151. **Contents of report.** Said report shall show in detail all expenditures made on account of the department of public buildings and property; an itemized statement of all money received for property sold or collections made; the condition of all real and personal property of the state under his care or control, together with a report of any loss or destruction, or injury to any such property, with the causes thereof, and measures necessary for the care and preservation of the same, and recommendations as to methods which would tend to render the service more efficient and economical. Said report shall also embrace any other matter ordered by the executive council and shall contain an inventory of all state property under his control. All reports of the custodian shall be subscribed and sworn to by him. [33 G. A., ch. 6, § 2.] [21 G. A., ch. 148, § 7.]

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

any session of the general assembly. [27 G. A., ch. 7, § 1; 21 G. A., ch. 148, § 8; 20 G. A., ch. 140, § 2.]

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

CHAPTER 7.

OF THE EXECUTIVE COUNCIL.

SECTION 156. **Secretary—how chosen.** That section one hundred fifty-six of the code be and hereby is repealed and the following enacted in lieu thereof:

"The executive council shall choose a secretary who shall hold office during its pleasure." [32 G. A., ch. 5, § 1; C., '73, § 119; R., § 999.]

SEC. 157. **Secretary—duties.** That section one hundred fifty-seven of the code be and hereby is repealed and the following enacted in lieu thereof:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

6. *Report for publication in Iowa official register.* He shall, on or before the fifteenth day of January in each odd-numbered year, prepare a report of the doings of the executive council for the two preceding calendar years; which report shall include a statement of the assessments of railroads, sleeping and dining cars, express companies' property, equipment cars and telegraph property by companies or lines; the aggregate assessment of telephone properties by classes; the official canvass of the votes cast at the last general election; a statement of the cities and towns the class of which may have been changed; and a classified and condensed statement of the expenditures made or approved by the executive council and a condensed statement of all other acts of the said council that are of general interest. This report so made and approved by the executive council shall be published in the Iowa official register.

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

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

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

10. *Bond.* He shall give a bond to the state, in an amount to be determined and approved by the executive council, for the faithful discharge of his duties." [32 G. A., ch. 5, § 2; C., '73, § 120.]

SEC. 161. **Annual settlements—repealed.** [29 G. A., ch. 9, § 1.]

[See § 161-a.]

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

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

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

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

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

[See § 162. EDITOR.]

SEC. 162. **Itemized statements required.** That section one hundred sixty-two of the code is hereby repealed and the following enacted in lieu thereof:

"All officers of the state, members of boards or commissions, officers of state institutions and all persons drawing funds from the treasury of the state shall file with the auditor of state duplicate itemized vouchers, showing in detail the items of service, expense, things furnished or contracts upon which payment is sought, before a warrant is issued upon the state treasury. Duplicate vouchers shall not be required to be filed for disbursements made on account of institutions under the management of the board of control or the state board of education. All warrants shall be drawn in the name of the person, firm or contractor entitled to payment or compensation and in no case shall warrants be drawn in the name of the certifying office, department, board or institution or in the name of an employe of the same except for personal service rendered or expense incurred by said employe unless there be express statutory authority therefor, except that when goods or material are purchased in foreign countries, warrants may be drawn upon the state treasurer, payable to bearer for net amount of invoice and current exchange, and the state treasurer shall furnish such foreign draft payable to order of person, firm or corporation from whom purchase is made. When the law permits the drawing of funds in advance of their expenditure the person or persons drawing such funds shall file the itemized vouchers above required one hundred days after the issuance of any such warrant, each voucher to show by proper reference that it was paid out of the funds drawn on the date of the issuance of the warrant before mentioned. Duplicate copies of vouchers above required to be filed with the auditor of state shall be filed by him with the executive council at the end of each month and by the executive council made available for the use of the expert accountant, named under

the provisions of section one hundred sixty-one-a of the supplement to the code, 1907." [33 G. A., ch. 7, § 1.]

SEC. 163. **Council to publish itemized statement—repealed.** [28 G. A., ch. 6, § 3.]

[See § 163-c.]

SEC. 163-a. **Biennial reports of expenditures by state officers—publication by executive council.** That section one hundred sixty-three-a of the supplement to the code, 1907, be and the same is hereby repealed and the following enacted in lieu thereof:

"Biennially, on or before the first day of September of each year prior to the convening of the general assembly, the executive council shall cause to be compiled a complete report of the expenditures of the several state offices, boards, commissions and institutions, except those institutions under the management of the board of control, or the state board of education [,] in such manner as will show the amount and nature of all expenditures reported; the price paid for things or commodities purchased or furnished for said departments or institutions; the rates paid as salaries or per diem with the names of the officers, clerks or employes receiving compensation or payment for expenses; a statement of supplies and paper drawn from the supply department; a statement of printing and binding done for the several departments; a statement of fees collected and the disposition made thereof by each of said offices, boards, commissions and institutions. All bills against the state of Iowa of any kind or character including personal per diem and expense accounts, now or hereafter required by law to be examined and approved by the executive council before payment is made therefor, shall be made out in duplicate and filed in the office of the secretary of the executive council. A copy of all the reports required to be filed with the several state departments, boards or commissions, by the secretary of state, under the provisions of section one hundred twenty of the supplement to the code, 1907, shall be filed with the executive council. All other data required for this report shall be reported by the several state officers, departments or institutions to the executive council at such times and in such form as the executive council may direct. For the keeping of the necessary accounts, preparing the data thus to be reported and preparing the report required the executive council may employ a competent clerk at not to exceed three dollars per day for the time actually and necessarily employed, the expense thereof to be paid from the state treasury upon verified vouchers certified by the executive council." [33 G. A., ch. 7, § 2.] [28 G. A., ch. 6, § 1.]

SEC. 163-b. **How published—distribution.** Section one hundred sixty-three-b of the supplement to the code, 1907, is hereby repealed and the following enacted in lieu thereof:

"The report required by section two of this[1] act shall be published by the executive council in an edition of five thousand copies, five hundred of which shall be bound in cloth and the balance in paper covers, and shall be distributed as follows: One copy bound in cloth and fifteen copies in paper covers to each member of the general assembly; one copy bound in cloth to each state officer, member of board and commission; one copy bound in cloth to each public, free and college library in the state; ten copies bound in cloth to the state library; five copies bound in cloth to the state historical department; one copy bound in paper to each county auditor, treasurer, clerk of the district court, and each newspaper in the state; the remaining copies in excess of the reserve list to be distributed

on order of the executive council." [33 G. A., ch. 7, § 3.] [28 G. A., ch. 6, § 2.]

[1"the" in the enrolled bill. EDITOR.]

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

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

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

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

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

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

SEC. **170-b. Levy of tax for general state purposes.** The executive council shall in the year nineteen hundred and two fix the rate per centum to be levied upon the valuation of the taxable property of the state necessary to yield for general state purposes approximately the sum of two million three hundred thousand dollars and in the year nineteen hundred and three shall fix the rate necessary to yield approximately the sum of two million dollars. [29 G. A., ch. 176, § 1.]

[See § 1380-b. EDITOR.]

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

SEC. **170-d. Fees—when deposited.** That section one hundred seventy-d of the supplement to the code, 1907, be and the same is hereby repealed and the following enacted in lieu thereof:

"That all officers of state, elective or appointive, all boards, commissions and departments, except the department of agriculture, shall turn into the state treasury or bank or depositary to the credit of the state treasurer, as designated by the state treasurer, not later than the third day succeeding the collection thereof, ninety per cent. of all fees [,] commissions and moneys collected or received with an itemized statement of sources from which received and the fund to be credited; and shall also file with the

auditor of state a duplicate of such statement. The balance actually collected in cash remaining in the hands of any officer, board, or department, shall not exceed the sum of five thousand dollars and no money collected shall be held more than thirty days." [35 G. A., ch. 18, § 1.] [30 G. A., ch. 7, § 1.]

SEC. 170-d1. **Acts in conflict repealed.** All acts or parts of acts in conflict with this act are hereby repealed. [35 G. A., ch. 18, § 2.]

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

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

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

SEC. 170-h. **Proposal for compromise of state claims—adjustment by attorney-general.** Whenever, in the judgment of the attorney-general, the strict enforcement by the state of a demand for money or other property against any person, partnership, corporation or joint stock association is impracticable or inequitable, he may submit to the executive council a written proposal for a compromise thereof, made by the party against whom the demand is asserted, with his opinion and advice thereon. The executive council shall thereupon consider the equities of the case, the situation and financial ability of the debtors, and the interests of the state, and determine in writing upon what terms the demand in question should be settled as against all or any of the parties thereto. Its report shall be filed with the governor, and thereupon the attorney-general may adjust the claim in accordance with such determination and may execute on behalf of the state all papers necessary and proper to carry the compromise into effect, and to release from such claim any and all parties thereto who shall seasonably comply with the conditions of the settlement so authorized. [33 G. A., ch. 8, § 1.]

SEC. 170-i. **Payment of costs taxed against state.** The executive council of the state of Iowa is hereby authorized to allow and pay any costs taxed to the state of Iowa or other expenses incurred in any suit or proceeding brought by or against any of the state departments or in which the state is a party or interested, to be paid out of any moneys in the state treasury not otherwise appropriated. [35 G. A., ch. 11, § 1; 34 G. A., ch. 2, § 1.]

SEC. **170-j. Retroactive five years.** The provisions of this act shall also apply to all costs taxed or incurred as above provided within the five years last past. [34 G. A., ch. 2, § 2.]

SEC. **170-k. Consent to street improvements.** That whenever in the improvements of the streets and alleys abutting property owned by the state of Iowa in cities of the first class, including cities acting under the commission plan of government and including cities acting under special charter, it requires the joint action of the city and the state to make and complete such improvement, the executive council is empowered and authorized, when in its judgment it is advisable and proper and to the best interest of the state, to consent to the making of such improvements and to contract and pay for such portion thereof as in its judgment may be equitable and just. Such contracts shall be made and drawn as provided in chapter seven of title two of the supplement to the code, 1907, and warrants drawn for the payment of such improvements so authorized by the council shall be paid out of any funds in the treasury, not otherwise appropriated. [35 G. A., ch. 12, § 1.]

SEC. **170-l. Authorized to incur expense of investigations.** The executive council is authorized to incur such expense as it may find necessary to make investigations to determine the facts affecting or relating to any duty that is now or may hereafter be imposed upon said council by law. Its authority shall extend to and include the procuring of data for the determination of the value at which property may be accepted by corporations in payment for issues of capital stock; the investigation of property values for the purpose of assessment and taxation and for the purpose of adjusting the valuation of property of taxing districts and counties; matters relating to the census to be made under chapter eight, title two of the supplement to the code, 1907, or amendments thereto; matters relating to official expenses and expense accounts; matters relating to public revenues or to procure anything not otherwise provided, necessary to enable said executive council to properly or adequately perform any duty imposed by law. It may also incur the necessary expenditure to perform or to cause to be performed any duty imposed by law upon the executive council which the members or its regular employes are unable to perform, or for which the statute imposing the duty fails to make the necessary provision for the execution thereof. [35 G. A., ch. 13, § 1.]

SEC. **170-m. Maximum sum fixed in each case.** Before incurring any expenditure authorized in section one of this act, an order shall be made and recorded in the records of the executive council setting forth the necessity for incurring the same and fixing the maximum amount that may be so expended in each such case. [35 G. A., ch. 13, § 2.]

SEC. **170-n. Members or regular employes to act when possible—requisite vote on employment.** No expenditure for personal service, per diem or salaries shall be authorized for the employment of any person for a duty that may be performed by a member of the council or its regular employes without neglect of the usual duties of the members or said employes. Expenditures authorized for personal service, per diem or salaries shall be made only upon the unanimous, affirmative vote of all members of the executive council and before any person shall be employed the rate of compensation of salary shall be determined and the aggregate amount that may be expended in each case shall be determined and recorded in the records of the executive council. Any person so employed shall be selected on account of especial fitness for the labor to be performed and the record of employment shall contain a statement of the

peculiar fitness of such employe for the special duty to be performed. [35 G. A., ch. 13, § 3.]

SEC. 170-o. **No additional compensation to members or employes —expenses.** Members of the executive council and its regular employes shall be paid no additional salary or compensation for special service but shall receive their necessary traveling expense, including subsistence when absent from the seat of government. [35 G. A., ch. 13, § 4.]

SEC. 170-p. **Appropriation.** There is hereby appropriated out of any money in the state treasury not otherwise appropriated an amount sufficient to pay the expenditures authorized by this act. [35 G. A., ch. 13, § 5.]

CHAPTER 8.

OF THE CENSUS.

SECTION 171. **Executive council to provide blank forms—schedules.** That chapter eight of title two of the code be, and the same is hereby repealed, and there is hereby enacted in lieu thereof, the following:[1]

"The executive council shall cause to be prepared and printed, blank forms, suitable for the purpose of taking the census, to enable the assessors to make uniform returns of population and agriculture for the census. The schedules relating to the population shall comprehend, for each inhabitant, the name, age, color, sex, conjugal condition, place of birth, and place of birth of parents, whether alien or naturalized, number of years in the United States, occupation, months unemployed, literacy, school attendance, and ownership of farms and homes; and the executive council may use its discretion as to the construction and form and number of inquiries necessary to secure information under the topics aforesaid. The schedules relating to agriculture shall comprehend the following topics: Name of occupant of each farm, color of occupant, tenure, acreage, value of farm and improvements, acreage of different products, quantity and value of products and number and value of live stock. All questions as to quantity and value of crops shall relate to the year ending December thirty-first next preceding the enumeration. The specific form and division of inquiries necessary to secure information under the foregoing topics, shall be in the discretion of the executive council. Such blanks must be furnished to the respective county auditors, and by them to the township assessors, on or before the first Monday in January of the year in which the census is to be taken. In addition to the matters specified to be enumerated in this bill, there shall be blanks for the ex-soldiers of the United States living in Iowa, which shall contain the name, company and regiment to which the soldier belonged, and his present place of residence. [30 G. A., ch. 8, § 1; C., '73, §§ 112-115; R., §§ 991-994.]

[1§§ 171 to 177-b inclusive. EDITOR.]

SEC. 172. **Assessor to fill and return blanks.** The assessor shall at the time of assessing property in the year nineteen hundred and five, and every ten years thereafter, take such census in his township, municipality, or division thereof, and make entry upon such blanks of all matters therein required to be enumerated or returned, and return the same to the county auditor on or before the first day of June of the census year. [30 G. A., ch. 8, § 2; C., '73, § 114; R., § 992.]

The assessor acting in the taking of a census is a proper party in a proceeding to determine the correctness of the action of the county auditor although return has already been made to the auditor. *Semones v. Needles*, 137–177, 114 N. W. 904.

SEC. 173. **When assessor fails.** When any assessor fails to perform the duties required in this chapter such auditor shall appoint some suitable person to take the census, as provided herein, at as early a day as practicable, at the expense of the county. [30 G. A., ch. 8, § 3; C., '73, § 117; R., § 997.]

[For repeal of original code section see 1st par. § 171. EDITOR.]

SEC. 174. **Returns to be forwarded—provision for failure.** The county auditor shall forward such return to the secretary of state as soon as possible, and not later than the first day of July following. If such returns or any of them are not received by the fifteenth day of July, the executive council may cause such census to be made in said county, or any township, municipality, or division thereof, or the returns brought up, at the expense of the delinquent county. All of such returns shall be filed and preserved by the secretary of state. [30 G. A., ch. 8, § 4; C., '73, §§ 114, 116, 118; R., §§ 992, 996, 998.]

[For repeal of original code section see 1st par. § 171. EDITOR.]

SEC. 175. **Abstracts to be made and recorded.** The executive council shall cause abstracts or compilations of said census to be prepared, which shall be recorded by the secretary of state in a book to be kept by him for that purpose. The executive council may add to such compilation such other statistics in reference to banking, railroads, insurance, manufactures, education and other matters of public interest, as they may be able to procure from the heads of the various departments of the state, and other sources, and which they may consider of sufficient value to be included in the census. [30 G. A., ch. 8, § 5; C., '73, § 116; R., § 996; C., '51, § 619.]

[For repeal of original code section see 1st par. § 171. EDITOR.]

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

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

[For repeal of original code section see 1st par. § 171. EDITOR.]

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

[For repeal of original code section see 1st par. § 171. EDITOR.]

Whenever the number of inhabitants or the population of counties, cities or towns is to be determined, the last census, as shown by the official register, will control. *In re Sale of Intoxicating Liquors*, 108–368, 79 N. W. 260.

The fact that a state census offered in evidence was taken two years prior to the date of the consolidation of the school district held not to render it inadmissible as evidence of the population of the district at the time of such consolidation. *State v. Grefe*, 139–18, 117 N. W. 13.

SEC. 177-a. **Coöperation with United States census bureau.** So far as practicable, the executive council is authorized to coöperate with the census bureau of the United States in the gathering, compilation and publication of census statistics. [30 G. A., ch. 8, § 9.]

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

SEC. 177-c. **Report of national census for state—publication—evidence.** Whenever a general census is taken by the national government, it shall be the duty of the secretary of state to procure from the supervisor of such census, or other proper federal official, a copy of such part of said census as gives the population of the state of Iowa, by counties, and the population of the cities and towns of Iowa, and file same in his office. He shall then, at once, cause such census report, giving the population of the state by counties, and the population of the cities and towns of Iowa, to be published once in each of two daily newspapers of the state having general circulation, and from and after the date of such publication said census shall be in full force and effect throughout the state. On request and payment of a fee of two dollars he shall furnish a certified copy of the whole or any part of such census report; he shall also publish same, in full, in each copy of the official register until a census is taken under authority of the state, and he shall certify that such published census report is a true copy of the report furnished him by the federal official from whom he obtains it, and publish such certificate in connection with said census report, and such certified copy, and such published copy of the census, with published certificate, shall be evidence of all matters therein contained. Wherever in the code, or any supplement to the code or any copy of the session laws prior to this date, the population of any county, city or town is referred to, it shall be determined by the last certified, or certified and published, official census, whether the same be state or national. [34 G. A., ch. 3, § 1.]

SEC. 177-d. **Acts in conflict repealed.** All acts and parts of acts in so far as they conflict with this act are hereby repealed. [34 G. A., ch. 3, § 2.]

CHAPTER 9.

OF DUTIES ASSIGNED TO TWO OR MORE OFFICERS, AND GENERAL REGULATIONS.

SECTION 181. **Committee on retrenchment and reform.** The chairman of the committees on ways and means, judiciary, and appropriations, of the senate and house, respectively, and two members of the minority party from the senate and two members of the minority party from the house, at each regular session, shall constitute a standing committee, to be known as the joint committee on retrenchment and reform. The minority members hereinbefore provided for shall be appointed by the president of the senate and the speaker of the house, respectively, and if there be more than one minority party represented in either the house or senate, consisting of five or more members, one member shall be appointed from each of said minority parties and if there be more than two such minority parties,

the appointment shall be from the two minority parties having the greatest representation. The authority granted by law to the joint committee on retrenchment and reform shall continue after adjournment of the legislature and until the succeeding legislature shall reconvene and organize, with the same force and effect as is now granted by law to such committee during the period the legislature is in session. Said committee shall organize by the election of one of its members as chairman and another of its members as secretary and may meet at such times and places as may be ordered by resolution or upon call of the chairman and three other members of said committee, and the actual expenses of attendance at meetings other than those held during the time the legislature is in session shall be presented and audited by the executive council and paid from any funds in the state treasury not otherwise appropriated and said committee shall make a record of its meetings and transactions, which record shall be kept in the office of the secretary of state and shall be open to public inspection. [35 G. A., ch. 20, §§ 1, 2, 3.]

TITLE III.

OF THE JUDICIAL DEPARTMENT.

CHAPTER 1.

OF THE ORGANIZATION OF THE SUPREME COURT.

SECTION **192. Terms—business at each term.**

[See code § 192, supplement §§ 192-a and 203-c. EDITOR.]

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

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

SEC. **193. Judges—quorum.** Section one hundred ninety-three of the code is hereby repealed and the following enacted in lieu thereof:

"That hereafter the supreme court of Iowa shall consist of seven judges, four of whom shall constitute a quorum to hold court, but one alone thereof may adjourn from day to day or to a certain day or until the next term. [35 G. A., ch. 22, § 1.] [25 G. A., ch. 69, § 1; 16 G. A., ch. 7, § 1; C., '73, § 139; R., § 2627; C., '51, § 1551.]

[Acts inconsistent with § 1, ch. 22, 35 G. A., are repealed by § 194-a. EDITOR.]

SEC. **193-1a. Appointment additional judge—term.** "The additional judgeship[1] provided for in this act shall be filled by appointment by the governor after the taking effect of this act. The governor shall communicate such appointment to the senate. No nomination shall be considered by the senate until the same has been referred to a committee of five to be appointed by the president of the senate without the formality of a motion, which committee shall make its report to the senate in executive session at any time when called for by the senate. The consideration of the nomination by the senate shall not be had on the same legislative day the nomination is referred. The appointee shall be voted on and it shall require the concurrence of two thirds of all the members elected to the senate to confirm such appointment. The person so appointed and confirmed shall hold office until the first day of January following the general election in the year nineteen hundred fourteen and until his successor is elected and

qualified, which successor shall, at the general election in the year nineteen hundred fourteen and each six years thereafter, be elected for the full term of six years." [35 G. A., ch. 22, § 2.]

[1"judge" in enrolled bill. EDITOR.]
[Acts inconsistent with § 2, ch. 22, 35 G. A., are repealed by § 194-a. EDITOR.]

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

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

SEC. **194. Organization—division into sections.** Section one hundred ninety-four of the code is hereby repealed and the following enacted in lieu thereof:

"The court shall organize after the appointment and confirmation of the additional judge provided for by this act and may then be divided into two sections, the chief justice presiding in open court with each of said sections. The said sections so provided for in this act may hold open court separately and cases may be submitted to each section separately in accordance with the rules that shall be provided for by the supreme court. The said supreme court shall also adopt rules for the submission of any case or petition for rehearing whenever differences shall arise between members of either section or whenever the chief justice shall order or direct the submission of said question or petition for rehearing to the whole court. The supreme court shall make all rules and regulations necessary to provide for the submission of cases to the entire bench or to the separate sections herein provided for." [35 G. A., ch. 22, § 3.] [25 G. A., ch. 69, § 4.]

[Acts inconsistent with § 3, ch. 22, 35 G. A., are repealed by § 194-a. EDITOR.]

SEC. **194-a. Acts in conflict repealed.** All acts and parts of acts[1] inconsistent with this act are hereby repealed. [35 G. A., ch. 22, § 5.]

[1"act" in enrolled bill. EDITOR.]

SEC. 195. Divided court.

In case of equal division of the judges, the decision of the lower court is affirmed by operation of law. *Staber v. Collins*, 124–543, 100 N. W. 527; *Chicago, M. & St. P. R. Co. v. Davenport*, 127–677, 103 N. W. 996; *Chicago & N. W. R. Co. v. Cedar Rapids*, 127–618, 103 N. W. 997; *Clark v. Wabash R. Co.*, 132–11, 109 N. W. 309.

The announcement in an opinion filed with the clerk that the judges of the supreme court are equally divided in opinion, and that the judgment of the trial court stands affirmed by operation of law, constitutes a judgment of affirmance on which the execution of the sentence may be ordered. *Busse v. Barr*, 132–463, 109 N. W. 920.

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

Where as to a particular question the judges of the supreme court are equally divided in opinion, the decision as to that question will be affirmed. *Stewart v. Colfax Consol. Coal Co.*, 147–548, 126 N. W. 449.

SEC. 198. Opinions to be filed.

No written opinion is required where no question of law is involved rendering an opinion necessary. *Clay v. Maynard Sav. Bank*, 104–748, 73 N. W. 884.

SEC. 203. **Salaries of judges—repealed.**

[The above section has not been repealed by number specifically, but is manifestly repealed as shown at § 203-c. For substitute see § 203-a. EDITOR.]

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

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

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

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

CHAPTER 2.

OF THE CLERK OF THE SUPREME COURT.

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

Upon filing each appeal, three dollars;

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

Upon each continuance, one dollar;

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

Upon entering satisfaction of each judgment, fifty cents;

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

For copying an opinion to be transmitted to an inferior court upon reversal of a judgment or an order, to be paid by the party against whom the costs are adjudged, or for a copy of such opinion or any record made at the request of any person, for each hundred words, ten cents. [35 G. A., ch. 7, § 5.] [32 G. A., ch. 2, § 6; 21 G. A., ch. 118, § 6; 19 G. A., ch. 117, § 2; 17 G. A., ch. 74, § 1; C., '73, § 3771; R., §§ 2949, 4134-5; C., '51, §§ 2525-6.]

[For prohibition of additional compensation see § 86-a. EDITOR.]

SEC. 207-a. **Clerk and reporter appointed—terms—vacancies.** The present incumbents of the offices of clerk of the supreme court and reporter of the supreme court shall hold office until the expiration of the time for which they were respectively elected, and until their successors have been appointed and have qualified. Within ninety days prior to the expiration of the term of office of the present clerk of the supreme court and of the present reporter of the supreme court, and every four years thereafter, the members of the supreme court shall appoint a clerk of the supreme court and a reporter of the supreme court who shall hold office for a period of four years and until their successors have been appointed and

have qualified. Vacancies shall be filled in the same manner for the unexpired portion of the term. [35 G. A., ch. 106, § 2.] [C., '73, § 583.]

SEC. 207-b. **Soldiers' preference law—not applicable.** Chapter fourteen-B of title five of the supplement to the code, 1907, shall not apply to any appointment under this act. [35 G. A., ch. 106, § 3.]

CHAPTER 3.

OF THE ATTORNEY-GENERAL AND DEPARTMENT OF JUSTICE.

SECTION 208. **Department of justice—attorney-general at head of.** That sections two hundred and eight, two hundred and nine, and two hundred ten of the code be and the same are hereby repealed, and the following enacted in lieu thereof:[1]

"There shall be at the seat of government a department to be known as the department of justice, and the attorney-general shall be the head thereof. [33 G. A., ch. 9, §§ 1, 2.] [C., '73, § 150; R., § 124.]

[1]Substitute includes § 208-a and § 208-b hereof. EDITOR.]

SEC. 208-a. **Duties of attorney-general.** "It shall be the duty of the attorney-general:

1. To appear for the state, prosecute and defend all causes in the supreme court in which the state is a party or interested.
2. When requested to do so by the governor, executive council, or general assembly, or when in his judgment the interests of the state require it, he shall appear for the state before any other court or tribunal, prosecute or defend all actions and proceedings, civil or criminal, in which the state may be a party or interested.
3. When requested, he shall give his opinion in writing upon all questions of law submitted to him by the general assembly or either house thereof, the governor, lieutenant governor, speaker of the house, auditor, secretary of state, treasurer, superintendent of public instruction, executive council, board of control, chairman railroad commissioners, food and dairy commissioner, commissioner bureau labor statistics, adjutant general, president and secretary department of agriculture, president commission of pharmacy, state librarian, state mine inspector, secretary state board of health, state veterinary surgeon, president state board of dental examiners, state fish and game warden, and to the heads of any other state departments now existing, or hereafter created.
4. He shall, when required, prepare drafts for contracts, forms and other writings which may be required for the use of the state; and shall report to the governor, preceding each general assembly, the condition of his office, opinions rendered, and business transacted of public interest.
5. To exercise supervisory powers over county attorneys in all matters pertaining to the duties of their offices, and from time to time require of them reports as to the condition of public business intrusted to their charge.
6. To prosecute and defend all actions and proceedings brought by or against any state officer in his official capacity.
7. To promptly account for all moneys received by him belonging to the people of the state, or received in his official capacity, and pay the same into the state treasury.

8. To keep in proper books a record of all official opinions, and a register of all actions prosecuted and defended by him, and of all proceedings had in relation thereto, which books shall be delivered to his successor.

9. To perform all such other and further duties as are now or may hereafter be enjoined upon him by law. [33 G. A., ch. 9, § 3.] [C., '73, §§ 150, 151, 152, 153; R., §§ 124, 125, 126, 127, 130, 131.]

The attorney-general has nothing to do with an appeal in a criminal case until it reaches the supreme court. It is within the duty of the county attorney to take the appeal and give notice thereof. *State v. Grimmell*, 116-596, 88 N. W. 342.

Notwithstanding the provisions of code § 208, the attorney-general is given authority by 33 G. A., ch. 9, to appear before the grand jury in a trial court when, in his judgment, the interests of the state require him to do so. *Cosson v. Bradshaw*, 141 N. W. 1062.

The grand jury while in the discharge of its duty is, though a constituent part of the court, in many respects an independent tribunal exercising judicial functions; and under this statute the attorney-general is authorized to appear before a grand jury whenever, in his judgment, the interests of the state require him to do so. *Ibid.*

SEC. 208-b. **No compensation for other counsel unless specially authorized.** "No compensation shall hereafter be allowed to any person for services as an attorney or counselor to any department of the state government, or the heads thereof, or to any state boards or commissions, except in cases specially authorized by law, and then only on the certificate of the attorney-general that such services were actually rendered, and that the same could not be performed by the officers of the department of justice; provided, however, that in any case where the attorney-general is an interested party, the executive council may employ special counsel and audit and pay a reasonable compensation for legal services rendered by him." [33 G. A., ch. 9, § 4.]

SEC. 209. **Must give opinions—repealed.** [33 G. A., ch. 9, § 1.]

[See § 208. EDITOR.]

SEC. 210. **Account for moneys—repealed.** [33 G. A., ch. 9, § 1.]

[See § 208. EDITOR.]

SEC. 211. **Compensation.** He shall be provided with an office in the capitol building. His salary shall be five thousand dollars per annum, as full compensation; and whenever he is required by the duties of his office, or by direction of the governor or general assembly, to attend any of the courts of this state, or any of the federal courts, or transact other business for the state, he shall receive his actual expenses when so engaged elsewhere than at the seat of government. [35 G. A., ch. 7, § 4.] [21 G. A., ch. 172; C., '73, § 3770.]

[For prohibition of additional compensation see § 86-a. EDITOR.]

SEC. 212. **Assistant—salary.** That section two hundred twelve of the supplement to the code, nineteen hundred and seven, be and the same is hereby repealed, and the following enacted in lieu thereof:

"He may appoint one assistant who shall be required to devote his entire time to the duties of his office and who shall receive an annual salary of twenty-five hundred dollars." [35 G. A., ch. 23, § 1.] [30 G. A., ch. 10.]

CHAPTER 4.

OF THE SUPREME COURT REPORTER AND REPORTS.

[For provisions respecting appointment of supreme court reporter see §§ 207-a and 207-b. EDITOR.]

CHAPTER 5.

OF THE DISTRICT COURT.

SECTION 225. Jurisdiction—civil, criminal, probate.

Criminal: The criminal jurisdiction of the district court attaches at the time of the service of the warrant issued upon an indictment, and from that time it has control of the person of defendant, not only for the purpose of criminal investigation but for all matters incident to such control. Therefore authority cannot be given by statute to commissioners of insanity to determine the question of insanity of a prisoner under arrest. *Stone v. Conrad*, 105–21, 74 N. W. 910.

Probate: Jurisdiction to grant administration on the estate of a deceased person is in the district court of the county in which the deceased resided at the time of his death. The district court of another county acquires no jurisdiction in such case by the fact that there is property of the deceased in such county. *In re King's Estate*, 105–320, 75 N. W. 187.

While a probate court cannot foreclose a mortgage in favor of the estate against a person claiming a share in the estate, it may determine the indebtedness of such person to the estate and deduct the amount thereof from his share. *Prouty v. Matheson*, 107–259, 77 N. W. 1039.

A court taking jurisdiction in probate is presumed to have found facts such as to give it jurisdiction. *McFarland v. Stewart*, 109–561, 80 N. W. 657.

An order in a guardianship matter, under the provision of code § 3261 with reference to probate jurisdiction, may be made by consent of parties in another county in the same district, and will become a valid and binding adjudication when entered on the record in the proper county. *Steiner v. Lenz*, 110–49, 81 N. W. 190.

The fact that the case is brought before the court in an action in equity which should have been presented in probate does not go to the jurisdiction of the court. *Easton v. Somerville*, 111–164, 82 N. W. 475.

An action brought by a widow for an order upon her deceased husband's administrator to pay her distributive share of the assets of the estate is properly on the probate docket. *Duffy v. Duffy*, 114–581, 87 N. W. 500.

The objection that a proceeding relating to the construction of a will should have been in probate rather than in equity is not available on appeal, if not made in the trial court. *Filkins v. Severn*, 127–738, 104 N. W. 346.

While proceedings in probate are to be distinguished from proceedings at law or in equity, the court in which they are tried is the same. *Tucker v. Stewart*, 121–714, 97 N. W. 148.

An order admitting a will to probate after trial of issues raised on the ground that it is invalid is an adjudication and the question of validity cannot again be litigated by the same parties in an equitable action to set the will aside. *Niemand v. Seemann*, 136–713, 114 N. W. 48.

A probate court of this state has authority to appoint a guardian of the property on a nonresident on the ground of incompetency without judicial determination in a court having jurisdiction of the person of such nonresident. *Wallace v. Tinney*, 145–478, 122 N. W. 936.

No personal notice to the nonresident in such case is required to sustain the action of the court in making such appointment and the sufficiency of the showing cannot be questioned in a collateral attack on the probate proceedings. *Ibid.*

The probate court is a court of general jurisdiction and its proceedings are presumed to be regular until the contrary appears. *Erwin v. Fillenwarth*, 137 N. W. 502.

An order admitting a will to probate is effective throughout the state and may not be collaterally attacked. *Ibid.*

Absence of the judge from the court room during argument of counsel, held not to constitute error where it appeared that the judge was within the hearing of counsel and heard all that was said. *State v. Porter*, 105–677, 75 N. W. 519.

During the argument of a case the judge should remain within hearing that he may not even temporarily relinquish control of the proceedings or the conduct of the trial. At all times he must be in readiness to assert authority in keeping the argument within legitimate limits and to interpose whenever the conduct of officers of the court, jurors or spectators may require. *State v. Carnagy*, 106–483, 76 N. W. 805.

Absence of the judge from the court room during the arguments to the jury will not be a ground for a new trial where it appears that no prejudice resulted. *Allen v. Ames & College R. Co.*, 106–602, 76 N. W. 848.

The court may do many things which a judge cannot do. The petition for the incorporation of a municipal corporation being required to be presented to the court, an allowance thereof by the judge not sitting as a court will not be sufficient. *State ex rel. v. Council*, 106–731, 77 N. W. 474.

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

The county is liable for the expenses of the court, held as provided by law at the county seat, and by analogy the county is held liable for the reasonable compensation of an attorney appointed by the court to act in behalf of the public in prosecuting proceedings for the disbarment of an attorney. *Hyatt v. Hamilton County*, 121–292, 96 N. W. 855.

The statutory provisions of 22 G. A., ch. 37, with reference to the holding of court at Avoca, in Pottawattamie county, are not repealed, but on the contrary are recognized by this section. *State v. Higgins*, 121–19, 95 N. W. 244.

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

The first district shall consist of the county of Lee, and have two judges.

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

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

The fourth district shall consist of the counties of Woodbury and Monona, and have three judges.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The twenty-first district shall consist of the counties of Cherokee, O'Brien, Osceola, Lyon, Sioux and Plymouth, and shall have two judges.

The district judge shall be a resident of the district in which he is elected, and each judge shall hold office until the expiration of the term for which he has been heretofore elected. Each district judge hereafter elected, except to fill a vacancy, shall hold office four years and until his successor is elected and qualified. Each judge elected to fill a vacancy shall hold for the unexpired term and until his successor is elected and qualified. [35 G. A., ch. 28, § 1; 35 G. A., ch. 27, §§ 1, 2, 3; 35 G. A., ch. 24, § 1; 34 G. A., ch. 6, § 1; 34 G. A., ch. 5, § 1; 34 G. A., ch. 4, § 1.] [28 G. A., ch. 8, § 1; 27 G. A., ch. 11, § 1; 27 G. A., ch. 10, § 1; 26 G. A., chs. 121, 122; 25 G. A., chs. 66, 67, 68; 24 G. A., chs. 53, 54, 55; 21 G. A., ch. 134, §§ 3, 4.]

[Acts in conflict with § 1, ch. 10, 27 G. A., are repealed by § 227-b. EDITOR.]

SEC. **227-1a. First district—judges to alternate.** The judges in said first judicial district shall as nearly as practicable alternate in holding terms at the places for holding court in said judicial district, and terms may be held simultaneously at both places. [34 G. A., ch. 4, § 2.]

SEC. **227-2a. Additional judge—appointment—election.** The governor shall appoint a judge for said first judicial district of Iowa in conformity with this act, who shall hold his office until the next biennial election or until his successor is duly elected and qualified, and at the general election held in the year nineteen hundred twelve a judge of the district court of the first judicial district shall be elected whose first term of office shall expire at the same time as does the term of the present judge of said district and thereafter the term of office of the judges of said district shall be four years. [34 G. A., ch. 4, § 3.]

SEC. **227-3a. Fourth district—judges—unexpired terms.** That the judges now residing in the fourth judicial district, as hereby constituted, shall hold office until their terms expire. [35 G. A., ch. 27, § 5.]

SEC. **227-4a. Vacancy—appointment.** That the vacancy in the said office of district judge in the fourth judicial district, created by this act, shall be filled by appointment by the governor. [35 G. A., ch. 27, § 6.]

SEC. **227-5a. Appointee's term—election—unexpired term.** The person so appointed, as provided by section six hereof, shall hold office until the general election in nineteen hundred fourteen, or until his successor is elected and qualified. At the general election in nineteen hundred fourteen, there shall be chosen a district judge to fill the unexpired portion of the vacancy hereby created. [35 G. A., ch. 27, § 7.]

SEC. **227-6a. Election of three judges—term.** At the general election in nineteen hundred fourteen, three district judges shall be elected in the fourth judicial district, and whose terms of office shall begin on the first day of January after their election. [35 G. A., ch. 27, § 8.]

[See § 232-a. EDITOR.]

SEC. **227-7a. Seventh district—additional judge—appointment—election.** The vacancy in the said office of district judge in the seventh judicial district, created by this act, shall be filled by appointment by the governor; the person so appointed shall hold his office until the general election in nineteen hundred twelve, or until his successor is elected and qualified. At the general election in nineteen hundred twelve, there shall be chosen a district judge to fill the unexpired portion of the vacancy hereby created. [34 G. A., ch. 5, § 2.]

SEC. **227-8a. Election of five judges—terms.** At the general election in nineteen hundred fourteen, five district judges shall be elected in the seventh judicial district of Iowa, whose terms of office shall begin on the day now provided by law. [34 G. A., ch. 5, § 3.]

SEC. **227-9a. Ninth district—additional judge—appointment—election.** The vacancy in the said office of district judge in the ninth judicial district, created by this act, shall be filled by appointment by the governor; the person so appointed shall hold his office until the general election in nineteen hundred twelve, or until his successor is elected and qualified. At the general election in nineteen hundred twelve, there shall be chosen a district judge to fill the unexpired portion of the vacancy hereby created. [34 G. A., ch. 6, § 2.]

SEC. **227-10a. Election of five judges—terms.** At the general election in nineteen hundred fourteen, five district judges shall be elected in the the ninth judicial district of Iowa, whose terms of office shall begin on the first day of January after their election. [34 G. A., ch. 6, § 3.]

SEC. **227-11a. Tenth district—additional judge—appointment—election.** That upon this act becoming a law, it shall be the duty of the governor to appoint a judge to fill the vacancy which will then exist in the tenth judicial district, and the judge so appointed shall serve until January first, nineteen hundred fifteen, and until his successor is elected and qualified, which successor shall be elected at the general election in nineteen hundred fourteen and every four years thereafter. [35 G. A., ch. 24, § 2.]

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

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

SEC. **227-b1. Fifteenth district—additional judge—appointment—election.** The vacancy in the said office of district judge in the fifteenth judicial district created by this act shall be filled by appointment by the governor; and the person so appointed shall hold his office until the general election in the year nineteen hundred fourteen or until his successor is elected and qualified. The term of the additional judge elected at the general election in the year nineteen hundred fourteen shall commence on the first Monday in January, nineteen hundred fifteen. [35 G. A., ch. 28, § 2.]

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

SEC. **227-c1. Twenty-first district—judges—unexpired terms.** That the judges now residing in the twenty-first judicial district, as hereby constituted, shall hold office until their terms expire. [35 G. A., ch. 27, § 4.]

[See § 232-a. EDITOR.]

SEC. 228. **Terms where two county seats.**

The district court for Pottawattamie county is the same court and presided over by the same judge whether held at Avoca or at Council Bluffs, and when parties stipulate in a proceeding pending in the court at Avoca that a hearing thereof shall be had before a judge of the court at a term to be held at Council Bluffs, the hearing so held is a hearing before the court and not a hearing before the judge in vacation. *Ferguson v. Wheeler*, 126–111, 101 N. W. 638.

SEC. 232. **Judges to prepare schedule—printing—distribution.** That the law as it appears in section two hundred thirty-two of the supplement to the code, 1907, be repealed and the following enacted in lieu thereof:

"On or before the first day of October in each odd-numbered year the judges shall meet in their respective districts and determine the times and places of holding their courts during the two succeeding calendar years. The plan or schedule thus agreed upon, or ordered by the chief justice of the supreme court when they cannot agree, shall be forthwith forwarded by the district judges to the secretary of state and the clerk of the district court in each county in such district, and the clerk shall file the same and enter it of record in the journal of the court. The secretary of state shall, within ten days after receiving said orders, or before the first Monday in December after said orders are made, prepare a tabular statement of the times of holding the several courts, as fixed by the several orders in his office, and have printed five thousand copies thereof, which shall be distributed as follows: One copy to each state officer, each county auditor and sheriff, two copies to each judge of the district and superior courts, ten copies each to the state library, the library of the law department of the state university, and the state historical society, thirty-five hundred copies to the clerks of the district court, in proportion to the population of the county, for gratuitous distribution among the attorneys of the county, and the residue for free distribution under the supervision of the secretary of state. In preparing said plan or schedule, the judges shall so arrange, if practicable, that each judge shall hold at least one term of court during the year in each of the several counties of his district." [33 G. A., ch. 10, § 1.] [31 G. A., ch. 9, § 8; 21 G. A., ch. 134, § 6; 15 G. A., ch. 12, § 1; C., '73, § 165; R., §§ 2654-5; C., '51, §§ 1567-8.]

SEC. 232-a. **Terms in fourth and twenty-first districts.** That the judges of the district court of the fourth and twenty-first judicial districts are hereby directed to convene, separately, at some convenient point within their respective districts, on or before the fifteenth day of April, nineteen hundred thirteen, and determine the times and places of holding their courts and the judges who shall hold the same for the balance of the year nineteen hundred thirteen, and such determination shall have the effect of canceling any determination heretofore made. Such determination shall be forwarded to the secretary of state and the clerks of the district court and recorded, as provided by chapter ten of the acts of the thirty-third general assembly. [35 G. A., ch. 26, § 1.]

SEC. 233. **When special terms ordered—pleas of guilty in criminal cases.** A special term may be ordered in any county at any regular term of court in that county, or at any other time, by any judge of the district, for the trial of all causes pending at the last regular term of said court held prior to said special term, in which either party shall have served a trial notice as provided by law, or for receiving pleas of guilty in criminal cases and the entry of judgment thereon. When ordering a special term, the court or judge shall direct whether a grand or trial jury, or both, shall

be summoned. [34 G. A., ch. 7, § 1.] [17 G. A., ch. 89; C., '73, § 166; R., §§ 2656-8; C., '51, §§ 1569-71.]

SEC. 235. When special adjournment ordered.

Authority to postpone the term is conferred on the judge who is to preside thereat. *State v. McPherson*, 126–77, 101 N. W. 738.

SEC. 238. Regular adjournment—business continued.

Adjournments: This section is applicable to the hearing of an application for permit to sell intoxicating liquors, where a remonstrance has been filed. *Cox v. Burnham*, 120–43, 94 N. W. 265.

An adjournment of court is a final adjournment for the term unless there is some provision in the order itself or by statute that the court shall reconvene for the transaction of the business of that term. *Marengo Sav. Bank v. Byington*, 135–151, 112 N. W. 192.

SEC. 240-a. Districts composed of one county—assignment by chief justice—expenses of judges. That in any judicial district of the state of Iowa composed wholly of one county and having but one judge therein the chief justice of the supreme court shall assign one judge from some of the other judicial districts to hold not less than two terms of court each year at each place where the district court is held within such district, and the judge of such district shall be assigned by the chief justice of the supreme court to some other district to hold therein not less than two terms of court in each year, said assignments to be made at such times as the chief justice of the supreme court may deem best. But this act shall in nowise affect any statute now in force, except as herein modified. Any judge who is required by such assignment to hold court outside of his judicial district, or who has heretofore held court outside of his judicial district by virtue of such assignment since chapter eleven, acts of the thirty-third general assembly went into effect, shall be allowed his necessary and actual expenses by reason thereof. An itemized sworn statement shall be made showing the amount of such expenses incurred, and the same shall be filed with the auditor of state, who thereupon shall draw his warrant upon the treasurer of state for the amount of such expenses so incurred. [34 G. A., ch. 9, § 1; 33 G. A., ch. 11, § 1.]

SEC. 240-b. Petition for temporary additional judge—assignment—expenses. When, from any cause, the business of the district court of any judicial district of this state cannot be disposed of within a reasonable time by the judges elected within and for such district, then upon the filing of a petition signed by five or more resident attorneys of such district with the clerk of the supreme court, addressed to the chief justice thereof, setting forth the facts, the chief justice, being satisfied that the business of such judicial district demands an additional judge for a temporary period of time to dispose of such business or assist in the disposal of such business, shall name and transfer a judge from some other judicial district where the business of such district will warrant, to the place in the judicial district for which such petition is filed, who shall hold a term of court for such length of time as the chief justice of the supreme court may determine. The judge so transferred shall be allowed and paid all reasonable and actual expenses while in the performance of his duties in said temporary character, in addition to his salary. [35 G. A., ch. 29, § 1.]

SEC. 240-c. Jury drawn as for regular term. Upon the order being made for the transfer of such judge as contemplated by this act, such order shall be filed in the office of the clerk of the district court of the county where such judge shall hold a term or part thereof; thereupon the proper officers, as by statute provided, shall proceed and are hereby empowered as by statute provided to draw a grand jury and trial jury, if

necessary, which shall have the same force and effect as if drawn for a regular term and upon the order of a judge elected for such district in the usual and ordinary transaction of business of such district. [35 G. A., ch. 29, § 2.]

SEC. 241. Judges not to sit together.

One judge is not bound to follow the ruling of another judge in a prior stage of the proceedings in the same case. *Seery v. Murray*, 107–384, 77 N. W. 1058.

Where one judge succeeds another of the same district in conducting the proceedings of a court, there is no error in the succeeding judge doing that which the trial judge might have done, and at the suggestion of such trial judge. *Renner v. Thornburg*, 111–515, 82 N. W. 950; *State v. Jones*, 115–113, 88 N. W. 196.

SEC. 242. Record to be signed—execution not delayed.

Even where the record of a judgment does not follow the written directions of the judge, it must be treated, in the absence of any showing to the contrary, as truly evidencing the decision of the court, for a change in the views of the judge will be presumed rather than that the record is other than valid. *Christie v. Iowa L. Ins. Co.*, 111–177, 82 N. W. 499.

The provision as to the signing of the record is directory only, and a failure on the part of the presiding judge to sign the record does not prevent other proceedings being had which could have been predicated upon a signed record. *Donnelly v. Smith*, 128–257, 103 N. W. 776.

A judgment may be appealed from although the journal entry has not yet been signed by the judge. The statutory provisions as to the signing of the record by the judge are directory only. *In re Estate of Jones*, 130–177, 106 N. W. 610.

Judgments and decrees ordered and rendered during term time may be entered in vacation, the entry of a judgment and decree being a mere ministerial act. *Burke v. Burke*, 142–206, 119 N. W. 129.

As the record of a decree is sufficient without any signature of the judge, the fact that it is signed in the name of the judge without affixing any designation of his title is immaterial. The provisions of the statute as to the method of signing are directory only. *Dermedy v. Jackson*, 147–620, 125 N. W. 228.

SEC. 243. Court controls record.

A court may vacate and set aside its judgment when such judgment is unwarranted by the record. *Cooper v. Disbrow*, 106–550, 76 N. W. 1013.

Where the decree in an action allowing a minor to redeem from a tax sale fixed the time of redemption, held that the court might, at the next term before the record was signed, modify the decree so as to extend such time. *Hartley v. Bartruff*, 112–592, 84 N. W. 704.

There is no provision by which the signing of the record is to be postponed beyond the succeeding term, and the action of the court in modifying its judgment after the expiration of several terms cannot be sustained on a motion made at the succeeding term. *Perry v. Kaspar*, 113–268, 85 N. W. 22.

It is doubtful whether the district court has inherent power to suspend or supersede its judgments and orders pending an appeal; but at any rate a judge in vacation and acting in another county has no power to suspend the operation of a decree of the court duly entered. *Whitlock v. Wade*, 117–153, 90 N. W. 587.

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

A court may set aside a default or vacate a judgment upon cause shown, or, if satisfied that a mistake or wrong has been done, may make such order upon its own motion. *Streeter v. Gleason*, 120–703, 95 N. W. 242.

The court may modify its decision at any time before it is spread upon the record. *Hull v. Eby*, 123-257, 98 N. W. 774.

A court may make orders relating solely to the enforcement of a decree, although by appeal it has lost jurisdiction to retry the issues, and the case has not been remanded to it for that purpose. *Swan v. Harvey*, 123–192, 98 N. W. 641.

The judge sitting as a court in one county cannot act as the judge of the court in another county. *Williams v. Dean*, 134–216, 111 N. W. 931.

A modification of a record made by the court after notice without objection to the sufficiency of the application or the time within which it was made cannot subsequently be questioned. *In re Assignment of Wilson*, 138–225, 114 N. W. 551.

Notice is not required in a proceeding to secure the correction of a record in order to make it correspond to the actual decision of the court. *Meirkord v. Helming*, 139–437, 116 N. W. 785.

The power of the court to expunge a record entered without jurisdiction exists independently of the statute and without

reference to statutory time. *Hollister v. Vermont Bldg. Co.*, 141–160, 119 N. W. 626.

Where the court has made a correction as to the date of judgment entry it is not precluded from a subsequent correction where it appears that the first correction was erroneous. *Puckett v. Guenther*, 142–35, 120 N. W. 123.

After a final decree has been entered of record the trial court is without authority to change the same on application of the defendant and to the prejudice of the plaintiff without notice. *Kwentsky v. Sirovy*, 142–385, 121 N. W. 27.

Until the decree is entered on the proper record it is subject to the control of the court and the parties are bound to take notice of any motion for its correction. *Smith v. Willcockson*, 143–449, 121 N. W. 1054.

The court has ample authority to correct its own record on proper notice. *Kvamme v. Barthell*, 144–418, 118 N. W. 766.

While the trial is pending the power of the court to change or set aside a previous ruling or order therein is presumptively equal to its power to make such ruling or order in the first instance and its own change of view may be a sufficient reason for such action. *Holtz v. Smith-Morgan Ptg. Co.*, 150–91, 129 N. W. 328.

The court may at any time, without regard to the limitations of code § 4093, correct its record on proper application and showing, to conform to the facts. *First Nat. Bank v. Eichmeier*, 153–154, 133 N. W. 454.

While in one sense it may be said that a judgment is rendered when announced by the judge or entered by memorandum in his calendar, such announcement or entry amounts to nothing more than a decision or opinion as to what the judgment should be and does not constitute a judgment from which an appeal may be taken. *Sievertsen v. Paxton*, 133 N. W. 744, 142 N. W. 424.

SEC. 244. Corrections.

Mistake of the court in a matter of law cannot be corrected under this section. *Manning v. Nelson*, 107–34, 77 N. W. 503.

A court may during the term without notice modify a decree already entered. The record referred to in this and the preceding section is not the formal decree signed by the judge and kept in the record, but the record itself as found in the books which clerks are authorized to keep, and this record may be amended and corrected at any time before it is signed. Such correction may be made by a court on its own motion. If made at a subsequent term it must, as a general rule, be with notice to the parties interested. *McConnell v. Avey*, 117–282, 90 N. W. 604.

An amendment to a decree made at a subsequent term of court and without notice to the defendant is of no validity as to him. *Browne v. Kiel*, 117–316, 90 N. W. 624.

After the expiration of the term at which judgment is rendered a party is not required to take notice of other proceedings in the case. *McConkie v. Landt*, 126–317, 101 N. W. 1121.

The power of the court to correct its records as to a mistake of the clerk is not limited to the next succeeding term. *Greazel v. Price*, 135–364, 112 N. W. 827.

Even after the record is signed by the judge he may make a correction as to the date of the judgment entry and if it subsequently appears that such correction was itself erroneous he may make a further correction. *Puckett v. Guenther*, 142–35, 120 N. W. 123.

The right of the court to correct an evident mistake in the record is inherent. It is not affected by the statute nor the mere lapse of time. *Lambert v. Rice*, 143–70, 120 N. W. 96.

Though the minutes in the judge's calendar form no part of the records of the court, they are admissible in evidence in the absence of a record as tending to show the judgment actually rendered. *Mahaska County v. Bennett*, 150–216, 129 N. W. 838.

A decree having been entered, *nunc pro tunc* speaks from the date of the original entry and will support intermediate proceedings conformable therewith. *Ibid.*

Where the judge had, through misapprehension, dismissed a case for want of prosecution at a term at which it had not been entered for trial, held that he might at the next term set aside such dismissal. *National Loan & Inv. Co. v. Bleasdale*, 141 N. W. 456.

The fact that the pleadings have been lost after the trial of a case will not deprive the court of jurisdiction on a second trial and if the parties stipulate as to what the issues were on the first trial the court may proceed without a substitution of the lost records. *Blades v. Des Moines City R. Co.*, 146–580, 123 N. W. 1057.

SEC. 245-a. **Reporter's notes as evidence.** That the original shorthand notes of the evidence or any part thereof heretofore or hereafter taken upon the trial of any cause or proceeding, in any court of record of this state, by the shorthand reporter of such court, or any transcript thereof, duly certified by such reporter, when material and competent, shall

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

The provisions of 27 G. A., ch. 9, as to the introduction on a subsequent trial of the shorthand reporter's notes of testimony, has no application except on the retrial of the same case, or where the transcript of the evidence in another case is used for the purpose of impeachment. *Walker v. Walker*, 117–609, 91 N. W. 908.

Under these provisions the transcript of the testimony of a witness on a former trial is not admissible on a subsequent trial if the witness is present and competent to testify and if under such circumstances a deposition of the witness would not be admissible. *Lanza v. Le Grand Quarry Co.*, 124–659, 100 N. W. 488.

The translation of the shorthand reporter's notes of the testimony given on a former trial cannot be offered in evidence as the testimony of a witness subsequently deceased, unless the proceeding in which such transcript is offered is the same proceeding as that in which the testimony was first given. *In re Will of Wiltsey*, 122–423, 98 N. W. 294.

The transcript of shorthand notes of the testimony of a witness given on a former trial may be read in evidence as his testimony on retrial of the case if he is not present in the court room at the time it is offered. It is not necessary to show the grounds required for making a deposition admissible in evidence in a law case. *Fitch v. Mason City & C. L. Traction Co.*, 124–665, 100 N. W. 618.

In the absence of any special showing of prejudice, held not reversible error to allow a transcript of the evidence on a former trial to be introduced over the objection of the opposite party and afterwards withdrawing it from the jury and allowing the witnesses to be called. *Bell v. Clarion*, 120–332, 94 N. W. 907.

Where a transcript of evidence on a former trial was sought to be introduced by virtue of 27 G. A., ch. 9, for the purpose of impeaching a witness on a subsequent trial, held that such transcript was not admissible where the certificate did not show that the whole of the shorthand notes of the evidence of the witness was included in the transcript. *Connell v. Connell*, 119–602, 93 N. W. 582.

The transcript of a party's testimony on a former trial is admissible as against him for the purpose of establishing admissions against interest. *Lush v. Parkersburg*, 127–701, 104 N. W. 336.

The shorthand reporter called to testify as a witness may, without the introduction of his transcript of the evidence, testify to admissions made by a witness. The act has no application to such a case. *Frick v. Kabaker*, 116–494, 90 N. W. 498.

Where in a proceeding to contest a will contestant's widow and children were erroneously substituted on his death and evidence was taken in a trial under such substitution, held that the shorthand notes of such evidence might be used in

a retrial after the widow had been properly substituted as administratrix. *In re Wiltsey's Will*, 135–430, 109 N. W. 776.

The provision authorizing the use of the reporter's notes as evidence on a subsequent trial is intended to furnish a convenient means of proving the testimony of a witness on a former trial of the same case when the witness is not able to testify by reason of death, insanity or other intervening cause, and where a party becomes incompetent to testify as to conversations or transactions with one who is deceased at the time of the subsequent trial (under code § 4604), his testimony on a former trial cannot be used. *Greenlee v. Mosnat*, 136–639, 111 N. W. 996.

The method of proof of the testimony of a witness on a former trial provided for by this section does not exclude oral evidence as to what the testimony of the witness on a former trial was. *State v. Dean*, 148–566, 126 N. W. 692.

Notwithstanding the provisions of this statute for proving the evidence of a witness on a former trial, it is still competent as before to prove the fact by the testimony of witnesses who heard the evidence when given. *State v. Kimes*, 152–240, 132 N. W. 180.

The opportunity which defendant had for cross-examination, impeachment and contradiction when the testimony was given obviates any objection which can be made on the constitutional ground that defendant is entitled to be confronted with the witnesses against him. *Ibid.*

The testimony of a witness taken upon the first trial of a criminal case may be read upon the second trial where the witness has gone beyond the reach of a subpoena. Such use of testimony is not in violation of the constitutional provision that the defendant shall be confronted with the witnesses against him. *State v. Brown*, 152–427, 132 N. W. 862.

The transcript of the shorthand notes taken on a former trial is competent evidence of testimony given on such trial by a witness who is deceased or has gone beyond the reach of a subpoena; but the testimony of such a witness may be proven by oral evidence, even though it has not been taken down in writing. *State v. Conklin*, 153–216, 133 N. W. 119.

Where a portion of the testimony of a witness is read from the shorthand reporter's notes of his testimony on the first trial, the opposite party may have read the remainder of the examination of such witness as shown by the shorthand report. *State v. Thomas*, 157— ——, 138 N. W. 864.

The transcript of shorthand notes of evidence taken in a former trial may be used to show admissions or for impeachment purposes. *Rudd v. Dewey*, 139–528, 116 N. W. 1062.

Where the testimony preserved on a former trial is resorted to for the purpose of showing an admission by the party testifying, it is to be considered only as against such party and not as against coparties. *Coldren Land Co. v. Royal*, 140–381, 118 N. W. 426.

It is only on a retrial of the case that the shorthand notes taken on a former trial are admissible. *Spiers v. Hendershott*. 142–446, 120 N. W. 1058.

It is not improper to allow the minutes of the evidence of particular witnesses to be read to the jury on their request. *State v. Perkins*, 143–55, 120 N. W. 62.

To render the transcript of the evidence of a witness of a former trial admissible it is sufficient to show that the witness was not present at the subsequent trial. It is not necessary to show that his presence was not obtainable. *Van Norman v. Modern Brotherhood*, 143–536, 121 N. W. 1080.

There is no statutory authority for granting a new trial because of the death of the reporter before a transcript of his notes is made, preventing the procurement of such transcript for the purpose of appeal. *Dumbarton Realty Co. v. Erickson*. 143–677, 120 N. W. 1025.

This section has no reference to the use in evidence of admissions as to what a witness would swear to made on a former trial for the purpose of preventing a continuance. *Neidy v. Littlejohn*, 146–355, 125 N. W. 198.

SEC. 247. Decisions in vacation.

Attorneys cannot by agreement not reduced to writing nor entered on the records of the court agree to the submission of a case to be determined in vacation. *Whitlock v. Wade*, 117–153, 90 N. W. 587.

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

Where the trial judge filed with the clerk a finding of facts with his conclusions of law, ending with a direction that judgment be entered, but no judgment was entered in accordance therewith, held that there was not a decision of the case in vacation. *Christie v. Iowa L. Ins. Co.*, 111–177, 82 N. W. 499.

The power of a judge in vacation to make orders or exercise judicial functions is that only which is conferred by statute. *In re Guardianship of Kimble*, 127–665, 103 N. W. 1009.

A ruling or decree in vacation is invalid unless the case has been submitted for such determination. *Marengo Sav. Bank v. Byington*, 135–151, 112 N. W. 192.

A judge while holding court in one county has no power to make an order for the correction of the record in another county

even in the same district. *Williams v. Dean*, 134–216, 111 N. W. 931.

A judgment rendered and entered in vacation, without consent of the parties or any order of court entered during term time, is void. *Burke v. Burke*, 142–206, 119 N. W. 129.

SEC. 250. Probate powers conferred on clerk.

The clerk may act for the court in the matter of endorsing an order for publication of notice of administration on the letters of administration issued by him, and although the order as endorsed is in the name of the court, the signature of the clerk is sufficient. No record of such order is required to be kept. *Mosher v. Goodale*, 129–719, 106 N. W. 195.

Any person interested may appear in the probate proceeding and contest the appointment of an administrator; but the regularity of the appointment cannot be attacked in a collateral proceeding on the ground of insufficiency of the bond. *Beresford v. American Coal Co.*, 124–34, 98 N. W. 902.

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

SEC. 254. **Compensation of shorthand reporters—repealed.** [29 G. A., ch. 14, § 1.]

[See § 254-a1.]

SEC. 254-a1. **Repeal.** That section two hundred fifty-four of the code be and the same is hereby repealed and the following enacted in lieu thereof. [29 G. A., ch. 14, § 1.]

SEC. 254-a2. **Reporter—compensation.** "Shorthand reporters of the district courts shall be paid eight dollars per day for each day's attendance upon said court, under the direction of the judge, out of the county treasury where such court is held, upon the certificate of the judge holding the court; and in case the total per diem of each reporter and his substitute shall not amount to the sum of sixteen hundred dollars per year, the judge appointing him shall at the end of the year apportion the deficiency so remaining unpaid among the several counties of the district, if there be more than one county in such district, in proportion to the number of days of court actually held by said judge in such counties, which apportionment shall be by him certified to the several county auditors, who shall issue warrants therefor to said reporter, which warrants shall be paid by the county treasurers out of any funds in the treasury not otherwise appropriated. Shorthand reporters shall also receive eight cents per hundred words for transcribing their official notes, to be paid for in all cases by the party ordering the same. If a defendant in a criminal cause has perfected an appeal from a judgment against him and shall satisfy a judge of the district court from which the appeal is taken that he is unable to pay for a transcript of the evidence, such judge may order the same made at the expense of the county where said defendant was tried. [34 G. A., ch. 8, §§ 1, 2; 33 G. A., ch. 12, § 1.] [29 G. A., ch. 14, § 2; 18 G. A., ch. 195, § 2; C., '73, § 3777.]

The application for an order for a transcript at the expense of the county for the purpose of prosecuting an appeal should be made to the trial judge. The expense of the transcript, if the order is made, should be paid by the county in which the case is tried, although it is brought to that county on change of venue. *State v. Cater*, 109–69, 80 N. W. 222.

The reporter is entitled to compensation for each day of attendance under direction of the judge without regard to the services actually performed. *Ferguson v. Pottawattamie County*, 126–108, 101 N. W. 733.

While the judge may have some discretion as to ordering a transcript at the expense of the county, yet if he finds that the defendant is unable to pay for such transcript, he should order it without regard to his judgment as to whether defendant has had a fair trial. *State v. Robbins*, 106–688, 77 N. W. 463.

It is for the court to determine whether the defendant in a criminal case is unable

to pay for a transcript, and unless it appears on appeal that the finding of his inability to do so is unsupported by the evidence, an order allowing such transcript at the county's expense will not be interfered with on appeal. *State v. Steidley*, 133–31, 110 N. W. 147.

Under the language of this section, differing from that found in previous statutory provisions on the subject, it is not discretionary with the trial judge to refuse an order for transcript of the evidence in a criminal case at the expense of the county where the defendant makes a showing which is, *prima facie*, sufficient. *State v. Goodsell*, 136–445, 113 N. W. 826.

While the order for a transcript of the evidence at the expense of the county on an appeal by the defendant in a criminal case is discretionary, held that the showing in a particular case was such that it was error for the lower court to refuse an order for such transcript. *State v. Harris*, 151–234, 130 N. W. 1082.

It is not necessary in the application for such transcript to make a showing of merits. It will be presumed that the appeal is taken in good faith unless some showing be made to the contrary. *Ibid.*

If, by reason of a previous trial in the same prosecution in which the evidence was substantially the same, the defendant has a transcript of the evidence, he is not entitled to an order for a transcript of such evidence on the second trial at the expense of the county. *State v. Kehr*, 137–91, 114 N. W. 542.

While one who shows inability to pay the expense of a transcript of the evidence in a criminal case for the purpose of perfecting his appeal is entitled to a transcript at the expense of the county, yet if he has, by voluntary conveyance of his property after the institution of the criminal proceeding, deprived himself of the means necessary to meet the expense of his defense and of an appeal, he is not entitled to such allowance. If possessed of means for conducting his defense and prosecuting his appeal after the proceedings have been instituted, he is presumed to continue in that condition unless the contrary appears. *State v. Shaffer*, 137–93, 114 N. W. 540.

SEC. **254-a3. Taxed as part of costs.** "A charge of six dollars per day for reporting in all cases, except where the defendant in a criminal case is acquitted, shall be taxed as part of the costs in the case by the clerk of the court and paid into the county treasury when collected." [29 G. A., ch. 14, § 3.]

CHAPTER 5-A.

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

SECTION **254-a4. Trustee—appointment—trust funds.** Any owner or owners of any cemetery, or any party or parties interested therein, may by petition presented to the district court of the county where the cemetery is situate, have appointed a trustee with authority to receive any and all moneys that may be donated for and on account of said cemetery or any part thereof and to invest, manage and control same under the direction of the court; but he shall not be authorized to receive any gift, except with the understanding that the principal sum is to remain and be a permanent fund, and only the net proceeds therefrom to be used in carrying out the purpose of the trust created, and all such funds shall be exempt from taxation so far as consistent with the regulations governing the association owning or controlling the ground where the lot is located. [29 G. A., ch. 15, § 1.]

The effect of this statute is to permit perpetual trusts or endowments for privately owned cemeteries. It has no application by inference or in terms to public cemeteries, the maintenance of which is a charitable act and therefore within the recognized exceptions to the operation of the statute against perpetuities. *Chapman v. Newell*, 146–415, 125 N. W. 324.

SEC. **254-a5. Receipt attested by clerk—cemetery record.** Every such trustee shall execute and deliver to the donor a receipt showing the amount of money received, and the use to be made of the net proceeds from same. Such receipt shall be duly attested by the clerk of the court

granting letters of trusteeship and a copy thereof signed by the trustee and so attested shall be filed with and recorded by the clerk in a book to be known as the cemetery record, and in which shall be recorded all reports and other papers, including orders made by the court or judge relative to cemetery matters. [29 G. A., ch. 15, § 2.]

SEC. **254-a6. Loans—security.** It shall be the duty of such trustee to loan all moneys received by him, under the direction and with the approval of the court, but only as same may be secured by first mortgage upon Iowa real estate, and no loan shall be made or approved, unless it be made to appear upon oath of three disinterested citizens that such real estate is worth at least double the amount of the loan applied for, and that the title to same is good of record and in fact in the party making application therefor. [29 G. A., ch. 15, § 3.]

SEC. **254-a7. Bond—approval—oath.** Every such trustee before entering on the discharge of his duties or at any time thereafter when required by the court or judge must give bond in such penalty as may be required by the court, to be approved by the clerk, conditioned for the faithful discharge of the duties imposed on him by law and take and subscribe an oath the same in substance as the condition of the bond, which oath and bond must be filed with the clerk. [29 G. A., ch. 15, § 4.]

SEC. **254-a8. Clerk—duty of—additional bond.** It shall be the duty of the clerk at the time of filing each and every receipt mentioned in section two of this act, to at once advise the court or judge as to the amount of the principal fund in the hands of such trustee, the amount of bond filed, and whether or not it is good and sufficient for the amount given, to the end that the court or judge may, if to him it seems best, require a new or additional bond. [29 G. A., ch. 15, § 5.]

SEC. **254-a9. To serve without compensation—expenses.** Trustees appointed under this act shall not be entitled to receive any compensation for services rendered, but may out of the income received pay all proper items of expense incurred in the performance of their duties, including cost of bond, if any. [29 G. A., ch. 15, § 6.]

SEC. **254-a10. Annual report.** It shall be the duty of every such trustee to make full report of his doings in the matter of his trusteeship in the month of January following his appointment and in January of each successive year. In each of said reports he shall apportion the net proceeds received from the sum total of the permanent fund and make proper credit to each of the separate funds assigned to him in trust. [29 G. A., ch. 15, § 7.]

SEC. **254-a11. Removal—vacancy filled.** Any such trustee may be removed by the court or judge thereof at any time for cause and in the event of removal or death the court or judge must appoint a new trustee and require his predecessor or his personal representative to make full accounting with him for all the property belonging to such trusteeship. [29 G. A., ch. 15, § 8.]

SEC. **254-a12. County auditor to act as trustee—when—accounting.** In case no trustee is appointed by said court, or if so appointed does not qualify as provided in this chapter, then such funds as are therein mentioned or any funds donated by any person or estate to improvement of cemeteries, unless otherwise provided by law, shall be placed in the hands of the county auditor who shall receipt for, loan, and make annual reports of such funds in manner as provided by the law as it appears in sections two hundred fifty-four-e, two hundred fifty-four-f and two hundred fifty-four-j, of the supplement to the code. The said auditor shall annually turn

over the accrued interest in his hands to the cemetery association or other person having control of the cemetery entitled thereto, who shall use the same in carrying out the provisions of said trust, and who shall file a written report annually with the county auditor. [35 G. A., ch. 30, § 1.] [30 G. A., ch. 12.]

CHAPTER 5-B.

OF JUVENILE COURTS, DETENTION HOMES AND SCHOOLS.

[For concurrent jurisdiction of superior courts with the district court of all cases brought under §§ 254-a13 to 254-a30, inclusive, see § 260-a. EDITOR.]

SECTION **254-a13. Jurisdiction—district and superior courts—juvenile court record.** The district court and superior courts are hereby clothed with original and full jurisdiction to hear and determine all cases coming within the purview of this act, and the proceedings, orders, findings and decisions of said courts shall be entered in a book or books to be kept for the purpose and known as the juvenile court record. Said courts shall always be open for the transaction of business coming under the purview of this act, but the hearing of any matter requiring notice shall be had only in term time or at such time and place as the judge may appoint. [33 G. A., ch. 13, § 1.] [30 G. A., ch. 11, § 1.]

SEC. **254-a14. Terms defined—to whom applicable.** This act shall apply only to children under the age of sixteen years, not at the time inmates of a state institution or any industrial school for boys or for girls, or any institution incorporated under the laws of this state, and shall apply to all children of said age, except such as are charged with a commission of offenses punishable under the laws of the state with life imprisonment, or with the penalty of death. For the purpose of this act, the words "dependent children" or "neglected children" shall mean any child who for any reason is destitute or homeless or abandoned; or dependent upon the public for support; or who has not the proper parental care or guardianship; or who habitually begs or receives alms; or who is found living in any house of ill fame, or with any vicious or disreputable person; or whose home, by reason of neglect, cruelty or depravity on the part of its parents or guardian or other person in whose care it may be, is an unfit place for such child; and any child under the age of ten years, who is found begging, or giving any public entertainment upon the street for pecuniary gain for self or another; or who accompanies or is used in aid of any person so doing; or who, by reason of other vicious, base or corrupting surroundings, is, in the opinion of the court, within the spirit of this act. The words "delinquent child" shall include any child under the age of sixteen years, who violates any law of this state, or any city or village ordinance; or who is incorrigible; or who knowingly associates with thieves, vicious or immoral persons, or who is growing up in idleness or crime; or who knowingly frequents a house of ill fame; or who patronizes any policy shop or place where any gaming device is, or shall be operated; or who habitually wanders about any railroad yards or tracks, gets upon any moving train or enters any car or engine without lawful authority. The word "child" or "children" may mean one or more children, and the word "parent" or "parents" may be held to mean one or both parents when consistent with the intent of this act. The word "association" shall include any corporation which includes in its purposes the care or disposition of children coming within the meaning of this act. [30 G. A., ch. 11, § 2.]

SEC. **254-a15. Petition in writing.** Any reputable person being a resident of the county, having knowledge of a child in his county who appears to be either dependent, neglected or delinquent, may, without fee, file with the clerk of the court having jurisdiction of the matter a petition in writing, setting forth the facts, verified by affidavit; it shall be sufficient if the affidavit is upon information and belief. [30 G. A., ch. 11, § 3.]

SEC. **254-a16. Summons—trial—statutes applicable—costs—appeals.** Upon the filing of the petition the court may cause a summons to issue requiring the person having custody or control of the child or with whom the child may be, to appear with the child at a time and place stated in the summons. The parents of the child, if living, and their residence is known, or its legal guardian, if one there be, or if there is neither parent nor guardian or if his or her residence is not known, then some relative, if there be one and his residence is known, shall be notified of the proceedings, and in any case the judge may appoint some suitable person to act in behalf of the child. If the person summoned as herein provided shall fail to appear or bring the child, without reasonable cause, and abide the order of the court, he may be proceeded against as in case of contempt of court. In case the summons cannot be served or the party served fails to obey the same, and in any case when it shall be made to appear to the court that such summons will be ineffectual, a warrant may issue on the order of the court, either against the parent or guardian or the person having custody of the child or with whom the child may be, or against the child itself. On the return of the summons or other process, or as soon thereafter as may be, the court shall proceed to hear and dispose of the case in a summary manner; provided, however, that when the child is brought before the court, charged with the commission of a crime, not punishable with imprisonment for life, or the penalty of death, the court may, and if the child, its parent or guardian demands, shall place the child on trial for the commission of such offense. Where the penalty for the offense committed exceeds a fine of one hundred dollars, or imprisonment for thirty days, the court shall make an examination and in conducting same shall be governed by the provisions of section fifty-two hundred sixteen, fifty-two hundred eighteen, fifty-two hundred nineteen, fifty-two hundred twenty-one, fifty-two hundred twenty-two, fifty-two hundred twenty-three, fifty-two hundred twenty-four, fifty-two hundred twenty-five, fifty-two hundred twenty-six, fifty-two hundred twenty-seven, and fifty-two hundred thirty-nine of the code, and shall make certificate, order of discharge or commitment, issue warrant, require undertakings of witnesses and security and commit witnesses as provided by sections fifty-two hundred twenty-eight to fifty-two hundred thirty-five of the code inclusive. If the child is unable to furnish the required bail, the child may, pending the final disposition of the case, be detained in the possession of the person having charge of the same, or may be kept in a suitable place provided by the city or county authorities. If the crime is not triable on indictment or if it appears on the examination that a public offense has been committed which is not triable on indictment the court may order any peace officer to file an information against the child before him and shall proceed to try the case before a jury of twelve men, selected as in a justice's court. The proceedings, costs and taxation thereof, shall be as provided for trials in the district court and the defendant shall be entitled to his exceptions and right of appeal. [30 G. A., ch. 11, § 4.]

SEC. **254-a17. Discretionary powers of court.** When any such boy or girl shall be found guilty of the commission of a crime, not punishable

with imprisonment for life, or the penalty of death, the court in its discretion may, instead of entering judgment of conviction, make order concerning such child in manner as hereinafter provided. [30 G. A., ch. 11, § 5.]

SEC. **254-a18. Probation officers — appointment — compensation.** The court shall have authority to appoint or designate one or more discreet persons of good character to serve as probation officers during the pleasure of the court; said probation officers to receive no compensation from the public treasury; provided, however, that the district court, in any county of this state having a population of more than fifty thousand, may designate and appoint not to exceed four persons, of good character and special fitness, to serve as probation officers during the pleasure of the court, who are hereby vested with all of the powers and authority of sheriffs in and about the discharge of their duties as probation officers, and who shall each receive a compensation, to be fixed by the court, not to exceed seventy-five dollars per month. Any probation officer provided for by this section, when performing the duties of his office under the order of the juvenile court or a judge thereof, shall be allowed such necessary expenses as may be authorized by the judge of said juvenile court, and the same shall be paid out of the county treasury as other court costs. In case a probation officer shall be appointed by any court, it shall be the duty of the clerk of the court, if practicable, to notify the said probation officer in advance when any child is to be brought before the said court; it shall be the duty of said probation officer to make such investigation as may be required by the court; to be present in court in order to represent the interests of the child when the case is heard; to furnish to the court such information and assistance as the judge may require, and to take such charge of any child before and after trial as may be directed by the court. [34 G. A., ch. 10, § 1.] [32 G. A., ch. 7, § 2; 30 G. A., ch. 11, § 6.]

[See § 260-b which provides that probation officers appointed as above shall also act as the probation officers of the superior court where such superior court is located at the county seat. EDITOR.]

SEC. **254-a19. Exclusion from court room.** The judge of such court shall designate a certain time for the hearing of such cases and is hereby empowered, when tried in a summary manner as provided in section four hereof, to exclude from the court room at such hearing any and all persons that in his opinion are not necessary for the hearing of the case. The probation officer shall be present at every hearing in the interest of the child. [30 G. A., ch. 11, § 7.]

SEC. **254-a20. Commitment—financial aid for widowed mother.** When any child of the age stated in section two[1] hereof shall be found to be dependent or neglected, within the meaning of this act, the court may make an order committing the child to the care of some suitable state institution, or to the care of some reputable citizen of good moral character, or to the care of some industrial school, as provided by law, or to the care of some association willing to receive it, embracing in its objects the purpose of caring for and obtaining homes for dependent and neglected children, which association shall have been accredited as hereinafter provided. If the court finds that the mother of such dependent or neglected child is a widow, and if the court further finds that such mother is poor and unable to properly care for said child, but is otherwise a proper guardian, and that it is for the welfare of such child to remain at home, the court may enter an order finding such fact and fixing an amount of money necessary to enable such mother to properly care for such child; and thereupon it shall

be the duty of the county board of supervisors, through its overseer of the poor or otherwise, to pay to such mother, at such times as said order may designate, the amount so specified for the care of such dependent or neglected child until further order of the court; providing, however, that the amount to be paid for the care of any such child shall not exceed the sum of two dollars per week; and provided further that such payment shall cease upon any such child's attaining the age of fourteen years. The court may, when the health or condition of the child may require it, cause the child to be placed in a public hospital or institution for treatment or special care, or in a private hospital or institution which will receive it for like purposes without charge. [35 G. A., ch. 31, § 1.] [30 G. A., ch. 11, § 8.]

[1§ 254-a14 herein. EDITOR.]

SEC. **254-a20a. When considered widow.** Any mother whose husband is an inmate of any institution under the care of the board of control, shall, for the purposes of this act, be considered a widow, but only while such husband is so confined. [35 G. A., ch. 31, § 2.]

SEC. **254-a21. Guardianship—decree for adoption.** In any case where the court shall award a child to the care of any association or individual in accordance with the provisions of this act, the child shall, unless otherwise ordered, become a ward and subject to the guardianship of the association or individual to whose care it is committed. Such association or individual shall have authority to place such child in a family home, with or without indenture, and may be made party to any proceedings for the legal adoption of the child, and may by his or its attorney or agent appear in any court where such proceedings are pending and assent to such adoption. And such assent shall be sufficient to authorize the court to enter the proper order or decree for adoption. Such guardianship shall not include the guardianship of any estate of the child. [30 G. A., ch. 11, § 9.]

SEC. **254-a22. Surrender of child by agreement.** It shall be lawful for the parent, parents, guardian or other person having a right to dispose of [a] dependent or neglected child to enter into an agreement with any association or institution incorporated under any public law of this state for the purpose of aiding, caring for or placing in home such children, and being approved as herein provided, for the surrender of such child to such association or institution, to be taken and cared for by such association or institution or put in a family home. Such agreement may contain any and all proper stipulations to that end, and may authorize the association or institution, by its attorney or agent, to appear in any proceeding for the legal adoption of the child and consent to its adoption, and the order of the court made upon such consent shall be binding upon the child and its parents or guardian or other person the same as if such person were personally in court and consented thereto, whether made party to the proceeding or not. [30 G. A., ch. 11, § 10.]

SEC. **254-a23. Optional commitments—parole.** In the case of a delinquent child, the court may continue the hearing from time to time, and may commit the child to the care or custody of a probation officer, and may allow said child to remain in its own home subject to the visitation of the probation officer, such child to report to the probation officer as often as may be required, and subject to be returned to the court for further or other proceedings whenever such action may appear to be necessary; or the court may cause the child to be placed in a suitable family home, subject to the friendly supervision of the probation officer and the further order of

the court; or it may authorize the child to be boarded out in some suitable family home, in case provision is made by voluntary contribution or otherwise for the payment of the board of such child, until a suitable provision may be made in a home without such payment; or the court may commit such child, if a boy, to an industrial school for boys; or, if a girl, to an industrial school for girls; or the court may commit the child to any institution within the county, incorporated under the laws in this state, that may care for delinquent children, or be provided by a city or county, suitable for the care of such children, or to any state institution which may be established for the care of delinquent boys or girls over the age of ten years. In no case shall a child be committed beyond his or her minority. A child committed to such institution shall be subject to the control of the board of managers thereof, and said board shall have power to parole the child on such conditions as it may prescribe; and the court shall, on the recommendation of the board, have power to discharge such child from custody whenever, in the judgment of the court, his or her reformation is complete; or the court may commit the child to the care and custody of some association that will receive it, embracing in its objects the care of neglected or dependent children, and that has been duly accredited as hereinafter provided. [30 G. A., ch. 11, § 11.]

SEC. **254-a24. Custody of child—unlawful incarceration.** No court or magistrate shall commit a child not yet having reached his seventeenth birthday, to jail or police station, but if such child is unable to give bail it may be committed to the care of the sheriff, police officer, probation officer, or other person, who shall keep such child in some suitable place provided by the city or county, outside the enclosure of any jail or police station. When any child shall be sentenced to confinement in any institution to which adult convicts are sentenced, it shall be unlawful to confine such child in the same yard or enclosure with such adult convicts, or to bring such child into any yard or building in which adult convicts may be present. Any such child, taken before any justice of the peace or police court, in such counties, charged with misdemeanor, shall, together with the case, be at once transferred by said justice of the peace or police court, to said district court and proper order shall be made therefor. [30 G. A., ch. 11, § 12.]

The mayor of the city acting as a justice of the peace has no authority to fine or commit to jail persons under seventeen years of age charged with a misdemeanor, but he has power to hear complaints on preliminary informations, issue warrants, order arrests, etc., and he is not individually liable in damages for acting in excess of his jurisdiction in imposing a fine or imprisonment on such juvenile defendant. *McGrew v. Holmes*, 145–540, 124 N. W. 195.

SEC. **254-a25. Support of child.** In any case in which the court shall find a child dependent, neglected or delinquent, it may, in the same or subsequent proceedings, upon the parents of said child or either of them, being duly summoned or voluntarily appearing, proceed to inquire into the ability of such parent or parents to support the child or contribute thereto, and if the court shall find such parent or parents able to support the child or contribute to its support, the court may enter such order or decree as shall be according to equity in the premises, and may enforce the same by execution or in any way in which a court of equity may enforce its orders or decrees. [30 G. A., ch. 11, § 13.]

SEC. **254-a26. Supervision of institutions by board of control—annual reports.** The board of control shall designate and approve the institutions and associations to have charge of juveniles under this act

and shall have supervision, oversight and right of yisitation (by all or any of its members or by such persons as it shall appoint thereto) to all institutions and associations having charge of juveniles under this act, and said court, institutions and associations shall make annual reports in the first fifteen days in January of each year to said board of control. The report of the court shall include the number of juveniles of each sex brought before it, the number for whom homes have been obtained, the number sent to state institutions, and the number under charge of such association. [30 G. A., ch. 11, § 14.]

SEC. **254-a27. Religious belief.** The court in committing children shall place them as far as practicable in the care and custody of some individual holding the same religious belief as the parents of said child, or with some association which is controlled by persons of like religious faith with the parents of said child. [30 G. A., ch. 11, § 15.]

SEC. **254-a28. Statutes construed liberally.** This act shall be construed liberally to the end that its purpose may be carried out, to wit: that the care, custody and discipline of a child shall approximate as nearly as may be that which should be given by its parents, and in all cases where it can properly be done, the child to be placed in an approved family home and become a member of the family by legal adoption or otherwise. [30 G. A., ch. 11, § 16.]

SEC. **254-a29. Detention home and school in certain counties.** In any county of this state having a population of more than fifty thousand, it shall be the duty of the board of supervisors to provide and maintain, separate, apart and outside the enclosure of any jail or police station, a suitable detention home and school for dependent, neglected and delinquent children. [32 G. A., ch. 7, § 1.]

SEC. **254-a30. Tax for enforcement purposes.** For the purpose of providing for the enforcement of this act in all its parts the board of supervisors may levy a tax each year, in the counties of this state to which this act is applicable, not to exceed one mill on the dollar in any year, in addition to the taxes which they are now authorized to levy. [32 G. A., ch. 7, § 3.]

SEC. **254-a31. Contributory dependency—who guilty of.** When any child is found to be dependent or neglected, as defined by section two hundred fifty-four-a fourteen of the 1907 supplement of the code, the parent, parents, person or other person or persons having the care, custody, or control of such child, or any other person or persons who shall by any act or omission of duty encourage, counsel, or contribute to the neglect of such child, or who, by reason of wilful neglect of any duty owing by said parent or parents, person or persons to such child, is or are responsible for its neglect or dependency, shall be guilty of contributory dependency, and proceeded against as provided herein. [33 G. A., ch. 14, § 1.]

SEC. **254-a32. Jurisdiction—proceedings as in equity.** The district court shall have original and exclusive jurisdiction to hear and determine all cases coming within the purview of this act and the proceedings hereunder shall be as in equity and may be included with and be a part of the proceedings in behalf of the child and the court may enforce obedience to its orders in any way in which a court of equity may enforce its orders or decrees. [33 G. A., ch. 14, § 2.]

SEC. **254-a33. Judgment—proceedings—release on probation—bond.** Whenever the court upon hearing finds a person guilty of contributory dependency, the court may enter a judgment determining such facts and requiring such person to do or to omit to do any act or acts complained

of in the petition; and for the purpose of enforcing its judgment the court in its discretion may continue the proceedings from time to time and release such person on probation during the period of two years. The court may further, in its discretion, as part of its judgment, require such person to enter into a bond to the state of Iowa, with or without surety, in such sum as the court may direct, to comply with the orders of the court. [33 G. A., ch. 14, § 3.]

SEC. **254-a34. Failure to execute bond—commitment.** If the judgment of the court be that the person proceeded against shall execute bonds as provided herein, such bond shall be executed within such time as the court may fix; if[1] the person proceeded against should fail within the time fixed to execute such bond, the court shall commit such person to jail, there to remain until he shall give bond or perform the judgment of the court. [33 G. A., ch. 14, § 4.]

[1]"of" in enrolled bill. EDITOR.]

SEC. **254-a35. Proceedings on bond—sum recovered for benefit of child.** If the court be satisfied by information or evidence on oath that at any time during the two years the person proceeded against has violated the terms of the court's order or the terms of said bond, the court may direct the county attorney to institute proceedings on said bond in any court having jurisdiction of the sum fixed in said bond; the sum so recovered on such bond shall be turned over to the chief probation officer to be by him safely kept and expended for the care and maintenance of such child under the direction and discretion of the court. [33 G. A., ch. 14, § 5.]

SEC. **254-a36. Spendthrifts — drunkards — guardianship.** In case any person found guilty of contributory dependency shall be found to be a spendthrift who is squandering his property or an habitual drunkard, incapable of managing his affairs, the court shall of its own motion or on application appoint a guardian as provided by statute, who shall also have the duty to see that such person is employed as much as possible. [33 G. A., ch. 14, § 6.]

SEC. **254-a37. Failure to work—assistance—contempt—costs.** In case the contributory dependency shall in whole or in part consist in the failure of such person to work when he is physically and mentally able to do so and defendant claims that he cannot find work, then the court may appoint some person to find suitable employment for such person, and if he fails and refuses to work at such employment without reasonable excuse after it has been approved by the court he shall be guilty of contempt and be dealt with accordingly. It shall be the duty of the board of supervisors and of the cities of such counties, whether they be under special charter or not, to give preference and precedence to such persons upon the application of such appointee for such work as such counties or cities may have, in case such appointee, after reasonable effort to the satisfaction of the court, can find no other work elsewhere. In case defendant claims that he can find work and he does not go to work within a reasonable time to be fixed by the court he shall be guilty of contempt. This statute shall not be interpreted as allowing involuntary servitude but it shall be liberally construed as punishing the party affected as for contempt in case he does not do his parental duty and support his children as the law contemplates that he should do, after he has been ordered by the court to do so and efforts have been made to aid him in so doing. Any person who is able to properly support his children without labor shall not come within the contemplation of this statute. Section forty-seven hundred seventy-five-a of the supple-

ment to the code is not hereby repealed and the court in its discretion may order prosecution under that statute as provided in section ten[1] hereof. The costs of such probation including the compensation and expenses of such appointee shall be fixed, taxed, and paid as provided in the next succeeding section. [33 G. A., ch. 14, § 7.]

[1§ 254-a40 herein. EDITOR.]

SEC. **254-a38. Commitment to hospital for inebriates—probation—expenses—costs.** In every case where the contributory dependency consists in whole or in part of habitual drunkenness it shall be the duty of the court to commit such person guilty thereof to the state hospital for inebriates, at Knoxville, or to such other hospital for the cure of inebriates as the state may furnish, and, after his release therefrom, the court shall put him into the care of some person duly appointed as special probation officer who shall aid and assist him toward reform and shall see that he is properly employed. Such probation shall terminate at the end of two years from and after the time of commitment as herein provided, and the provisions in regard to abandonment as set forth in section twelve[1] hereof shall apply. The court shall render a judgment against defendant for the cost of treatment at such hospital for inebriates and the costs of suit and may, in a proper case, allow him to pay the same in such installments as the court may fix during the period of his probation, the county of his residence to pay the same in the first instance. Such special probation officer shall have such compensation as the court may allow which shall be taxed as costs of the case. [33 G. A., ch. 14, § 8.]

[1§ 254-a42 herein. EDITOR.]

SEC. **254-a39. Failure to pay—no exemptions—garnishment.** In case no guardian is appointed and the person found guilty of contributory dependency fails to apply a sufficient sum for the benefit of his family and it be deemed necessary by the court to levy upon any of his property, including wages, for the benefit of the family, he shall not have the benefit of any exemptions as provided by statute except such as are provided for an unmarried person. In such cases nothing further shall be necessary than the service of a copy of the order of the court which shall serve the purposes of an execution and it may also take the place of a notice of garnishment, and any property belonging to or debt owing such person shall be paid into court on or before a time to be fixed by the court, to be expended in such manner as the court may direct, and in case the person so garnished fails to turn over as herein provided or there is any dispute in regard to the matter, such person may be summoned to appear before the court out of which the order issued at a time for hearing to be fixed by the court and a hearing may be had and judgment entered as may be proper in the premises. The principal defendant shall be given such notice of the proceedings as the court may direct. [33 G. A., ch. 14, § 9.]

SEC. **254-a40. Criminal proceedings.** Nothing in this act shall be construed to be in conflict with, or to prevent proceedings under any statute of the state against any person for the commission of any act for which such person may be proceeded against as provided herein, and upon the hearing of any case herein the court in its discretion may order and direct the county attorney to take any and all needful steps to prosecute such person in accordance with the laws of the state concerning the commission of crimes. [33 G. A., ch. 14, § 10.]

SEC. **254-a41. Disposition of child during probation.** When children are allowed to remain in the custody of such person as is found guilty of contributory dependency the court may prescribe such conditions as seem most calculated to remove the cause of such dependency and neglect, and in case the court deems it for the best interests of the child to remove it from its home until the conditions of the probation have been complied with and the court is satisfied that such compliance will continue, then the court may place the same in the care and custody of the juvenile detention home, wherever such is authorized, or of such other suitable institution provided for by the juvenile court to act for such time during minority, as the court may deem fit, and the court at any time thereafter may set aside, change, or modify such order. [33 G. A., ch. 14, § 11.]

SEC. **254-a42. May be declared abandoned.** A person guilty of contributory dependency shall fully comply with all of the orders of the court within such time as the court may fix to be not more than one year and shall continue to comply with such order thereafter for such period as will make the full term of two years from and after the judgment establishing contributory dependency and, in case he fails to do so, the court may, in its discretion, declare the child or children whose parent he is, to be abandoned children, and, in case any person who has been adjudged guilty of contributory dependency and who has been ordered to pay for the support of such child departs from the jurisdiction of the court rendering such judgment and allows such support to remain unpaid for six months without excuse satisfactory to such court, such child or children whose support he has been ordered to pay may in the discretion of the court be[1] adjudged to be abandoned; the making of such payments shall not prevent the finding and judgment of abandonment after two years in case there are other orders of court which have not been complied with as hereinbefore provided. In case both parents are living and neither one has been relieved of its duty and both are guilty of contributory dependency, both shall be proceeded against at the same time. [33 G. A., ch. 14, § 12.]

[1]"by" in enrolled bill. EDITOR.]

SEC. **254-a43. Disposal of abandoned children—adoption.** In case at the end of two years a child is declared to be abandoned by both of its parents as provided by the preceding section the court may order the clerk of the district court to sign papers for its adoption, or it may be turned over to some home-finding association, approved by the board of control, or to the soldiers' orphans' home at Davenport, Iowa, with power to adopt such child out and to execute papers of adoption. [33 G. A., ch. 14, § 13.]

SEC. **254-a44. Inheritance from parents.** Any adoption as provided by [the] preceding section shall not prevent or cut off any inheritance he might be entitled to from his rightful or adoptive parents adjudged guilty of contributory dependency as hereinbefore provided, in accordance with the laws of descent of this state, such inheritance to be in addition to that to which he may be entitled by virtue of the adoption hereunder and no will to the contrary shall be valid. [33 G. A., ch. 14, § 14.]

SEC. **254-a45. Court to give aid—divorced parents.** In every cause in the juvenile court the court shall investigate whether every person responsible for the care, custody, maintenance, education, medical treatment and discipline of the child or children involved is doing his full duty by such child or children and, in case the court finds that the parents or other persons *in loco parentis* are not doing their duties, the court shall try all lawful and proper means under this act to make them do so, giving

them aid and assistance in case it be deemed necessary. The court may declare a child abandoned by one parent while it may not be by the other. In case the parents are divorced and the one having the custody is adjudged to have abandoned the child, then the ability and propriety of the other parent shall be considered. [33 G. A., ch. 14, § 15.]

SEC. **254-a46. Enticing away child—penalty.** If any person maliciously, forcibly, or fraudulently, take, decoy or entice away any child under the age of sixteen years with intent to detain, or conceal such child from its parents, guardian, or other person or institution having the lawful custody thereof, he shall be imprisoned in the penitentiary not more than ten years, or be imprisoned in the county jail not more than one year, or be fined not exceeding one thousand dollars. [34 G. A., ch. 11, § 1; 33 G. A., ch. 14, § 16.]

SEC. **254-a47. Liberal construction for protection of child.** This act shall be liberally construed in favor of the state for the purpose of the protection of the child from neglect, or omission of parental duty toward the child by its parents, or other persons standing *in loco parentis*, and further to protect the child from the effects of the improper conduct or acts of any person which may cause, encourage or contribute to the dependency and neglect of such child, although such person is in no way related to such child. [33 G. A., ch. 14, § 17.]

CHAPTER 6.

OF THE SUPERIOR COURTS.

SECTION **255. Establishment and effect of.** Any city in this state containing four thousand inhabitants, whether organized under a special charter or the general law for the incorporation of cities and towns, may establish a superior court as hereinafter provided, which, when established, shall take the place of the police court of such city. [32 G. A., ch. 8, § 1; 29 G. A., ch. 16, § 1; 21 G. A., ch. 2; 19 G. A., ch. 24, § 1; 16 G. A., ch. 143, § 1.]

SEC. **256. Submission to voters—election of judge—result certified—repealed.** [28 G. A., ch. 9, § 1.]

[See § 256-a.]

SEC. **256-a. Submission to voters—election of judges—term—commission.** The law, as it appears in section two hundred fifty-six-a of the supplement to the code, [1902] is hereby repealed and there is enacted in lieu thereof the following:

"Upon petition of a hundred citizens of any such city, the mayor, by and with the consent of the council, may, at least ten days before any general or city election, issue a proclamation submitting to the qualified voters of any city the question of establishing said court. Should a majority of all the votes cast at such election upon such proposition be in favor of said court, the same shall be established. The terms of the judges of all superior courts other than those whose terms expire after the first Monday in January, nineteen hundred and eight, shall terminate on the first Monday in January, nineteen hundred and seven, and there shall be elected at the general election in November, nineteen hundred and six, for a term of four years the successors of those judges whose terms of office under this act are made to expire on the first Monday in January, nineteen hundred and seven. Except as above provided, the judges of the superior

courts now or hereafter established shall be elected at the last general election preceding the expiration of the term of office of the incumbent. The names of candidates for judge shall be placed upon the same ballot as used in the city for state, county and township officers. The vote shall be returned and canvassed in the same manner as provided for county officers. Certificates of nomination of candidates for judge by conventions or primaries of political parties and nominations by petition shall be fixed with the auditor of the county in which said city is situated within the same time as provided by law for the filing of certificates of nomination and nominations by petition for offices to be filled by the electors of counties. Each judge shall qualify and hold his office for the term of four years from the first Monday in January next ensuing after said election and until his successor is elected and qualified. Immediately after the election of any judge, the board of supervisors of said county shall transmit a certificate of the election of said judge to the governor of the state, who shall thereupon issue to him a commission empowering him to act as judge, as herein provided. The terms of all judges who are now holding over by reason of the failure to elect their successors in the fall of nineteen hundred and five, are hereby extended until the first Monday in January, nineteen hundred and seven." [32 G. A., ch. 8, § 2; 31 G. A., ch. 10; 28 G. A., ch. 9, § 1; 19 G. A., ch. 24, § 2; 16 G. A., ch. 143, § 2.]

SEC. **258. Vacancy—inability—repealed.** [28 G. A., ch. 9, § 2.]

[See § 258-a.]

SEC. **258-a. Vacancy—inability to act.** That section two hundred fifty-eight of the code is hereby repealed and the following enacted in lieu thereof:

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

SEC. **260. Jurisdiction—attachments of real estate—city prisons used—inebriates.** Said court shall have jurisdiction concurrent with the district court in all civil matters, except in probate matters and actions for divorce, alimony and separate maintenance. It shall have exclusive original jurisdiction to try and determine all actions, civil and criminal, for the violation of city ordinances, and all jurisdiction conferred on police courts as now or as may hereafter be provided by law, and concurrent jurisdiction with justices of the peace. Writs of error and appeals may be taken thereto from justices' courts in the township in which the court is held, and, by consent of parties, from any other township in the county. For the trial of criminal actions on information and complaint, the court shall be open at such times and under such rules as it shall prescribe. In actions by attachment, where real property is levied on by writ of attachment, the officer levying the writ shall make entry thereof in the incumbrance book in the office of the clerk of the district court, in like manner and with like effect as of levies made in the district court. Parties may be committed to the city prison for confinement or punishment, instead of the county jail, at the option of the judge. In the absence of the judge, or in case of his inability to act, then, during such time, proceedings for the violation of city ordinances may be had before a justice of the peace residing in such city. Superior courts shall have original concurrent jurisdiction with the district courts of the state of Iowa in all matters pertaining to the deten-

tion and treatment of dipsomaniacs, inebriates and those addicted to the excessive use of narcotics, as provided in title twelve, chapter two-A of the supplement to the code, 1907, and the same proceeding shall be held so far as applicable. Wherever the words "district judge" "district court" or "judge of the district court" appear in title twelve, chapter two-A, the same shall be construed to apply to the superior courts or the judge thereof to the same extent that the same applies to the district court or the judge thereof. [33 G. A., ch. 15, § 1.] [22 G. A., ch. 40, § 1; 19 G. A., ch. 24, § 3; 16 G. A., ch. 143, § 6.]

The provisions of this chapter as to jurisdiction of superior courts are not unconstitutional. *Page v. Millerton*, 114–378, 86 N. W. 440.

SEC. 260-a. **Juvenile detention homes and schools—jurisdiction.** The superior court of any city shall have concurrent jurisdiction with the district court of the county in which said superior court is located, of all cases brought under the provisions of sections two hundred fifty-four-a thirteen, two hundred fifty-four-a fourteen, two hundred fifty-four-a fifteen, two hundred fifty-four-a sixteen, two hundred fifty-four-a seventeen, two hundred fifty-four-a eighteen, two hundred fifty-four-a nineteen, two hundred fifty-four-a twenty, two hundred fifty-four-a twenty-one, two hundred fifty-four-a twenty-two, two hundred fifty-four-a twenty-three, two hundred fifty-four-a twenty-four, two hundred fifty-four-a twenty-five, two hundred fifty-four-a twenty-six, two hundred fifty-four-a twenty-seven, two hundred fifty-four-a twenty-eight, two hundred fifty-four-a twenty-nine, two hundred fifty-four-a thirty of the supplement to the code, 1907; the superior courts shall have and possess all the powers conferred by said sections upon the district court and shall proceed in like manner, except that a jury trial in the superior court shall be had before a jury of six members. [33 G. A., ch. 13, § 2.]

[The title of ch. 13, 33 G. A., indicates that the above section is an amendment to the various sections named therein, but as this section gives additional jurisdiction to the superior court, it seemed advisable to have the section appear at this place. EDITOR.]

SEC. 260-b. **Probation officers—qualifications.** The probation officers appointed by the district court under section two hundred fifty-four-a eighteen of the supplement to the code, 1907, shall also act as the probation officers of the superior court, where such superior court is located at the county seat. Where the superior court is located in a city other than the county seat and in a county having a population of more than fifty thousand, the judge of such court may appoint a person of good moral character and special fitness to serve as probation officer during the pleasure of the court and such probation officer shall have the same powers as those conferred upon probation officers under the provisions of section two hundred fifty-four-a eighteen of the supplement to the code, 1907, and the compensation of such officer shall be fixed as provided by the terms of said section. [33 G. A., ch. 13, § 3.]

SEC. 261. **Changes of venue—for nonresidents—no jury in criminal cases.** Changes of venue may be taken from said court in all civil actions to the district court of the same or another county, in the same manner, for like causes and with the same effect as the venue is changed from the district court. But in all civil cases where any party defendant shall, before any pleading is filed by him, file in said cause a motion for a change of venue to the district court of the county, supported by affidavit showing that such party defendant was not a resident of the city where such court is held, at the time of the commencement of the action, the

cause, upon such motion, shall be transferred to the district court of the county. All criminal actions, including those for the violation of the city ordinances, shall be tried summarily and without a jury, saving to the defendant the right of appeal to the district court, which appeal shall be taken in the same time and manner as appeals are taken from justices' courts in criminal actions. [28 G. A., ch. 10, § 1; 22 G. A., ch. 40, § 2; 19 G. A., ch. 24, § 4; 16 G. A., ch. 143, § 7.]

Under this section as amended by 28 G. A., ch. 10, a defendant in an action brought in the superior court who is a nonresident of the city may have the venue changed to the district court upon showing such fact. *Woodring v. Rooney*, 121–595, 96 N. W. 1100.

Costs of change authorized by this section as amended follow the case and failure to pay the costs of the transfer does not render the order invalid. When such order is made the superior court loses jurisdiction of both parties and of the subject matter. *Iowa Loan Co. v. Wilson*, 145–381, 124 N. W. 201.

A railroad company operating its tracks through a city and having ticket offices there where it transacts business is not necessarily a resident of the city and may, in a proper case, have a change of venue to the district court when sued in the superior court. *Wiar v. Wabash R. Co.*, 151–121, 130 N. W. 794.

A railway corporation nonresident of the city is entitled to avail itself of the provisions of this section as to change of venue. The requirement of transfer on proper application is unconditional and mandatory, and the court cannot impose as a condition to the change the payment of costs to the time the change is applied for. *Chicago, B. & Q. R. Co. v. Castle*, 155–124, 135 N. W. 561.

A defendant who has made proper application for a change does not waive the error in refusing to grant such change by voluntarily going to trial after the change is refused. *Ibid.*

The refusal of the superior court to grant the change when properly applied for may be annulled by certiorari. *Ibid.*

The provision of this section is mandatory and leaves no discretion to the superior court. The filing of the motion necessarily terminates the right of the superior court to proceed further in the trial of the case. *Donisthorpe v. Lutz*, 155–379, 136 N. W. 233.

Where a partnership is sued in that capacity and the members are not made parties, the motion for a change of venue must show that the partnership is not a resident of a city. A showing that the partners are not such residents is not sufficient. *Argus v. Ware*, 155–583, 136 N. W. 774.

SEC. 263. Court of record—laws relating to district court to apply.

Statutes covering procedure in the district court as to setting aside default are also applicable in the superior court and a judgment by default may be set aside although a transcript of such judgment has been filed in the district court. *Klepfer v. Keokuk*, 126–592, 102 N. W. 515.

Provisions as to assignment of causes in the district court are applicable to the superior court except when inconsistent with specific provisions relating to the latter. *Smith v. Redmond*, 141–105, 119 N. W. 271.

SEC. 265. When recorder to act as clerk. As long as the business of the court can be done without a clerk, the judge shall be the clerk of said court and the city recorder or city clerk shall be deputy clerk of said court and may perform the duties of his principal as clerk of said court. Whenever, from the accumulation of causes and other demands upon the court, a clerk becomes necessary, the city recorder or clerk shall be the clerk thereof. He shall give bonds as required when the judge acts as clerk, and perform the same services as required by law of the clerk of the district court. [35 G. A., ch. 32, § 1.] [16 G. A., ch. 143, § 11.]

SEC. 266. Marshal as sheriff.

A constable is not authorized to act as officer of the superior court, and a writ of attachment issuing from such court should not be directed to such officer. *Freeman v. Lind*, 112–39, 83 N. W. 800.

SEC. 268. Right to jury, on demand.

Jury trial is not waived by failure to demand a jury at the time for which the cause has been assigned if the issues have not yet been joined. *Smith v. Redmond*, 141–105, 119 N. W. 271.

SEC. 273. Judgments made liens by transcript.

The effect of the filing of a transcript of the judgment of the superior court in the district court is to transfer to the district court the power to enforce the judgment of the superior court. No further proceedings can be had on the judgment in the superior court. *Oyster v. Bank*, 107–39, 77 N. W. 523.

A creditor who has recovered judgment in a superior court which has not been filed in a district court so as to become a lien on real property cannot proceed by equitable action to subject real property to payment of his claim. *Peterson v. Gittings*, 107–306, 77 N. W. 1056.

Judgments of superior courts are to be treated as judgments of the district court only when transcripts thereof are filed in the district court of the county in which the superior court has jurisdiction, and thereafter they are to be treated in all respects as judgments rendered in the district court. Before the transcript of a judgment is thus filed, the judgment can only be enforced through process issued out of the superior court which may be levied on personal property only. *Drahos v. Kopesky*, 132–497, 109 N. W. 1021.

Therefore held that in an action to set aside a fraudulent conveyance of real estate, the plaintiff did not by showing judgment of the superior court, no transcript of which had been filed in the district court, establish his right to levy on the property. *Ibid.*

An action to enjoin the enforcement of the judgment of a superior court cannot, after transcript thereof has been filed in the district court, be maintained in the district court of another county in the state. *Brunk v. Moulton Bank*, 121–14, 95 N. W. 238.

The power of the superior court to set aside a default is not lost by the filing of a transcript of the default judgment in the district court. *Klepfer v. Keokuk*, 126–592, 102 N. W. 515.

SEC. 275. Shorthand reporters—compensation.

The shorthand reporter appointed by the judge is entitled to compensation for the time of his attendance upon the court under the order of the judge without regard to the services actually performed. *Ferguson v. Pottawattamie County*, 126–108, 101 N. W. 733.

SEC. 276. **Question of abolishing court to be submitted.** Upon the petition of one third of the qualified electors of any city in which a superior court is now or hereafter established, the mayor, by and with the consent of the council of such city, shall, at least ten days before any general election or election for city officers, issue a proclamation submitting to the qualified voters of said city the proposition to abolish the superior court. The ballots shall be printed, and in the following form: "Shall the proposition to abolish the superior court of ———— be adopted?" and the election shall be conducted in all respects in accordance with the provisions of the election law. [28 G. A., ch. 9, § 3; 24 G. A., ch. 5, § 1.]

SEC. 280. **Compensation of marshal.** The marshal shall receive the same fees and compensation for serving the process of said court, and for other services required of the sheriff in the district court, as the sheriff receives for like services, but in all criminal cases in said court the marshal shall receive the same fees for his services as are paid to the constable in justice court. [34 G. A., ch. 12, § 1.] [16 G. A., ch. 143, § 12.]

SEC. 280-a. **Trial by jury without additional expense.** In all cities which are not county seats, and which have now or may hereafter have a population of twenty-five thousand or more, and in which superior courts are now or may hereafter be established, it shall be unnecessary in such superior court to make demand for trial by jury, and causes triable to a jury shall be tried to twelve jurors without the additional expense to any of the parties, required by section two hundred seventy of the code. [34 G. A., ch. 13, § 1.]

SEC. 280-b. **Jury—how drawn.** In providing jurors for superior courts in all such cities, the names of thirty persons shall be drawn by the officers at the times and in the manner provided by section two hundred sixty-nine of the code, and such persons whose names are drawn shall be

subject to jury duty, and shall constitute the regular panel of jurors in said superior courts, for the two calendar months commencing with the first day of the month succeeding the drawing. The judges of the superior courts may order such additional drawings to be made as may be necessary to provide jurors for such courts. [34 G. A., ch. 13, § 2.]

SEC. 280-c. **Salary of judge.** In all such cities the salary of the judge of the superior court shall be three thousand dollars per annum, and paid quarterly; the first two quarters from the city treasury, and the last two from the county treasury of the county wherein such court is located. [34 G. A., ch. 13, § 3.]

SEC. 280-d. **Compensation shorthand reporter.** In all such cities the compensation of the shorthand reporter in such superior court shall be eight dollars a day for the time actually employed. [34 G. A., ch. 13, § 4.]

SEC. 280-e. **Deputy clerk—compensation.** In all such cities there may be appointed by the city council, a deputy clerk of the court, who shall receive such compensation as the city council may allow. [34 G. A., ch. 13, § 5.]

SEC. 280-f. **Applicable to certain cities.** This act shall apply to cities acting under the commission form of government, which are not county seats, and which may have, or may hereafter have, a population of twenty-five thousand or more. [34 G. A., ch. 13, § 6.]

CHAPTER 7.

OF GENERAL PROVISIONS.

SECTION 281. **Judges not to practice.** No judge of any court of record shall practice as an attorney or counselor at law, or give advice in relation to any action pending or about to be brought in any of the courts of this state, but nothing contained in this section shall be construed to prohibit judges of police courts from the practice as attorneys and counselors at law in civil matters. [32 G. A., ch. 9; C. '73, § 187; R. § 2674; C. '51, § 1587.]

A judge has no right to give advice out of court to a receiver. Directions to the receiver should be reduced to writing and entered of record. *State Central Sav. Bank v. Fanning Ball-Bearing Chain Co.*, 118–698, 92 N. W. 712.

SEC. 283. Judicial proceedings public.

A proceeding to impanel a grand jury is not invalid although by reason of the lack of capacity in the room occupied for the purpose some persons are unable to gain access thereto. *State v. Richards*, 126–497, 102 N. W. 439.

SEC. 284. When judge disqualified.

A justice is not disqualified from certifying to a transcript of a judgment rendered by his predecessor by reason of the fact that he was a party to the action, his act of certification being one which is purely ministerial. *Hass v. Leverton*, 128–79, 102 N. W. 811.

The fact that the judge has previously been one of counsel for one of the parties in a previous litigation not involving the same issues does not disqualify him under the strict terms of the statute and he is not disqualified under the spirit of the statute if his connection with the previous proceedings has been nominal only. *In re Estate of Glass*, 127–646, 103 N. W. 1013.

Even as to a court of inferior jurisdiction, such as that of a justice of the peace or mayor, failure to object on account of relationship is a waiver of the disqualification. It is not necessary that the consent of the parties affirmatively appear in order to sustain the jurisdiction. *Dows v. De Long*, 149–251, 128 N. W. 341.

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

Judicial business may be transacted on the fourth of July and a witness may be punished for contempt in not appearing on that day in response to a subpoena. *Chambers v. Oehler*, 107–155, 77 N. W. 853.

A ministerial act, such as the service of a notice, not forbidden on Sunday, will not be illegal because performed on that day. *State v. Ryan*, 113–536, 85 N. W. 812.

Trial of causes on legal holidays other than Sunday is not prohibited, and the overruling of a motion for a continuance on the ground that the cause is set for trial on such holiday is not error. *Michel v. Boxholm Co-operative Creamery*, 128–706, 105 N. W. 323.

The ministerial act of spreading a judgment on the records of the court by the clerk is not invalid because performed on Sunday. *Puckett v. Guenther*, 142–35, 120 N. W. 123.

SEC. 286. Courts to be held at places provided, except.

It is not unlawful for a court to transact its business in a different room of the courthouse from that specially set aside for occupancy by the court. *State v. Richards*, 126–497, 102 N. W. 439.

CHAPTER 8.

OF THE CLERK OF THE DISTRICT COURT.

SECTION 287. Office—duties.

While it may be that the clerk of the court cannot be properly appointed receiver because as clerk he would be required to pass upon the sufficiency of the bond to be given by him as receiver, yet this objection cannot be raised by way of collateral attack in an action brought by him as receiver to collect indebtedness. His actions as receiver may be valid *de facto* although his appointment is erroneous. *Metropolitan Nat. Bank v. Commercial State Bank*, 104–682, 74 N. W. 26.

SEC. 288. Records—books to be kept.

What constitutes the record: An original decree, signed by the judge before it is entered in the proper record, is not a judgment. *McGlasson v. Scott*, 112–289, 83 N. W. 974.

The record book is the best evidence of a judgment, and it or a certain transcript thereof is alone admissible to show the judgment where there is no reason for introducing secondary evidence. *Baxter v. Pritchard*, 113–422, 85 N. W. 633.

Depositions, when filed, become a part of the records of the court, even though not used as evidence on the trial of the case in which they are taken, and if removed from the files without leave of court by the party filing them they may be required to be returned. *Howe v. Mutual Reserve Fund L. Assn.*, 115–285, 88 N. W. 338.

A record showing the dismissal of an action made without authority will not prevent the action being notice to purchasers of property affected thereby after the case is noticed for trial. *Furry v. Ferguson*, 105–231, 74 N. W. 903.

The record is the only proof of a judgment. It cannot be established by entries in the judge's calendar, or a form for the entry of judgment signed by the judge. *Callanan v. Votruba*, 104–672, 74 N. W. 13; *King v. Dickson*, 114–160, 86 N. W. 263.

Neither the mental conclusion of the judge presiding at the trial, nor the oral announcement of such conclusion, nor his written memorandum entered in his calendar, nor the abstract entered in the judgment docket, constitutes a judgment. A judgment cannot be said to be entered until it is spread by the clerk upon the record book. *Kennedy v. Citizens' Nat. Bank*, 119–123, 93 N. W. 71.

Where the judgment or conclusion of the court is reduced to writing and filed with the clerk, it becomes a judgment of the court, although not yet formally entered on the records. So held in a proceeding to punish for contempt in the violation of a temporary injunction which had been dissolved by a written decision of the court deposited with the clerk. *Coffey v. Gamble*, 117–545, 91 N. W. 813.

A judgment or decree is not rendered so that an appeal may be taken therefrom until it is entered of record as provided by statute. *Martin v. Martin*, 125–73, 99 N. W. 719.

Where the order for the hearing of an application for discharge of receiver was not entered of record until after the discharge was granted and publication of the notice of such application was not made until after the order was entered, held that the court was without jurisdiction and the

discharge was void. *Williams v. Des Moines Loan & Trust Co.*, 126–22, 101 N. W. 277.

The judgment may be valid, although the clerk's record entry thereof is not signed and approved by the court until the next term after the entry in the judge's calendar. *Percival v. Yousling*, 120–451, 94 N. W. 913.

The clerk should record the judgment in accordance with the memorandum of the judge, not only as to its substance, but also as to its date; but the record should show the actual date of final recording, and an appeal taken prior to such date is premature. *Hoffman-Bruner Granite Co. v. Stark*, 132–100, 108 N. W. 329.

Whether a transcript of evidence on a previous trial is admissible under a stipulation, is to be determined by the court, and it may take judicial notice of the record in the case and of the stipulation thereby shown. The record and stipulation need not be formally proved. *State v. Olds*, 106–110, 76 N. W. 644.

While the pleadings in a case are part of the record, a duly authenticated copy of the judgment is a specific item of evidence, admissible in itself without regard to the record in the case. *Alexander v. Grand Lodge A. O. U. W.*, 119–519, 93 N. W. 508.

Judgment rendered upon constructive or substituted service will not be binding upon a defendant not properly named in the record. *Thornily v. Prentice*, 121–89, 96 N. W. 728.

Thus where the service purported to be upon W. M. Thornily and judgment was entered against Wm. M. Thornily, held that the judgment was not valid as against Willis H. Thornily, the doctrine of *idem sonans* having no application. *Ibid.*

Where an amendment to the pleadings is treated by the parties as filed and the case is tried on the issues raised thereby, it cannot afterwards be objected that the filing of the amendment was not entered on the appearance docket. *Foley v. Cedar Rapids*, 133–64, 110 N. W. 158.

Entries nunc pro tunc: While a court may order a correction of its record of a prior date to conform to the facts as they existed at that date, it cannot by such order change its records so as to show that a fact existed on a prior date that did not then in truth exist. *First Nat. Bank v. Redhead*, 103–421, 72 N. W. 651.

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

Where a decree was prepared and signed by the judge and given to the clerk who filed but failed to record it, held that it might subsequently be made of record by a *nunc pro tunc* order as of the date when it should have been recorded. *Day v. Goodwin*, 104–374, 73 N. W. 864.

While courts possess the power to enter judgments *nunc pro tunc*, yet the exercise of such power presupposes the actual rendition of a judgment; the mere right to a judgment which never was rendered will not furnish the basis for such an entry. *Doughty v. Meek*, 105–16, 74 N. W. 744; *Graham Paper Co. v. Wohlwend*, 116–358, 89 N. W. 1068.

But a court may enter judgment *nunc pro tunc* on a confession of judgment where the clerk has failed to enter judgment thereon. *Doughty v. Meek*, 105–16, 74 N. W. 744.

Mere formal or clerical errors or omissions or mistakes in the entries of the clerk concerning matters of procedure, even in criminal cases, may be corrected by *nunc pro tunc* orders. *Smith v. District Court*, 132–603, 109 N. W. 1085.

Where upon the death of plaintiff in an action an order to substitute his administrator was made but judgment was entered in the name of the deceased plaintiff, held that the defect in the judgment and in proceedings thereunder might be cured by a *nunc pro tunc* entry correcting the judgment so as to show that it was in fact entered in favor of the substituted plaintiff. *Hunt v. Johnston*, 105–311, 75 N. W. 103.

An order *nunc pro tunc* will be made to avoid the effects of a delay by the court or of a delay or omission of its clerk, but rarely, if ever, to remedy a delay or omission due to a party or his attorney. *Newbury v. Getchell & Martin Lumber, Etc., Co.*, 106–140, 76 N. W. 514.

The time for taking an appeal is determined by the actual entry of the judgment and it cannot be made to relate back so as to cut off a right of appeal which until the entry of the judgment has not existed. *Stutsman v. Sharpless*, 125–335, 101 N. W. 105.

An order for a judgment entry *nunc pro tunc* cannot be made to relate back for the purposes of an appeal. *Hoffman-Bruner Granite Co. v. Stark*, 132–100, 108 N. W. 329.

Courts have inherent power to make *nunc pro tunc* orders, and are not limited by special statutory provisions as to the time when application for modification of the record is to be made. *Hofacre v. Monticello*, 128–239, 103 N. W. 488.

If no action of the court is in fact taken, there can be no entry *nunc pro tunc* as to such action, but if in fact taken and the particular evidence thereof is wanting, it may subsequently be supplied so as to relate back to the time when the act was in fact done. *Ibid.*

A motion authorized by code § 4127 for the correction of the record for the purpose of an appeal is not controlled as to

time of filing by code § 4093, providing that proceedings to correct mistakes or omissions of the clerk shall be by motion within one year. *Puckett v. Gunther*, 137–647, 114 N. W. 34; *Thompson v. Great Western Acc. Assn.*, 136–557, 114 N. W. 31.

As to correction of the record by the court, see notes to §§ 243 and 244.

Lost records: If the shorthand notes or transcript in an equity case are lost the court may order a substitution and will not be without jurisdiction to do so in a proceeding commenced within the time allowed for taking appeal although the final order for substitution is not entered until the time for the appeal in which it is desired to make use of the evidence has expired. *Ormsby v. Graham*, 123–202, 98 N. W. 724.

An order for the substitution of lost records in a case is not a matter of absolute right, but rests in the sound discretion of the court. *First National Bank v. Reid*, 122–280, 98 N. W. 107.

Judgment docket: The clerk of the court is required to keep a book in his office containing an abstract of judgments rendered, and costs in the case may properly be entered thereon in connection with the entry of the judgment. *Hayes v. Clinton County*, 118–569, 92 N. W. 860.

A judgment though improperly indexed may be valid between the parties, and as to everyone save a bona fide purchaser or incumbrancer without notice. *State Savings Bank v. Shinn*, 130–365, 106 N. W. 921.

Liability of clerk: The clerk may be liable in an action for damages brought by a party injured for failing to enter a transcript from a justice's court on the judgment index. *Lougee v. Reed*, 133–48, 110 N. W. 165.

SEC. 290. Entry of return of notice.

This section no doubt applies to notice in probate proceedings. *In re Will of Downs*, 141–268, 119 N. W. 703.

SEC. 291. Pleadings—when deemed filed—dates to be entered.

A pleading cannot be considered unless entered as filed in the appearance docket. *Johnson v. Berdo*, 131–524, 106 N. W. 609.

A paper may be filed without being marked or endorsed by the clerk or any other officer. The memorandum by endorsement of the filing is simply evidence of the fact. *In re Minor Children of East*, 143–370, 122 N. W. 153.

SEC. 293. To report criminal statistics to board of parole—what included. That section two hundred ninety-three of the code and chapter three of the acts of the thirty-third general assembly be and the same are hereby repealed and the following enacted in lieu thereof:

"The clerk of the district court is required to report to the board of parole on or before the fifteenth day of July of each year, the number of convictions for all crimes and misdemeanors in that court in his county for the year ending June thirtieth preceding, and such report shall show the character of the offense and the sentence imposed, the occupation of the convict, whether he can read or write; also the number of cases tried on which there were verdicts of acquittal, or cases in which [there] were dismissals by the court without trial, and what crimes the indictments in cases of acquittal or dismissal were for; also the expenses of the county for criminal prosecutions during the year, including jurors fees in all criminal cases; jurors meals while in the trial of criminal cases; all bailiff's fees for services while in attendance of the court or[1] jury during the trial of criminal cases; the expense incurred in taking convicted prisoners to prison or jail, attorney's fees allowed in the attendance of criminals; all the fees of grand jurors; all fees paid witnesses in the trial of criminal cases; all fees paid to the court reporter for reporting the trial of criminal cases and for transcripts made at the expense of the county in criminal cases; all fees paid to witnesses brought before the grand jury; all fees paid to the clerk of the grand jury and compensation of the bailiff in attendance upon the grand jury; all fees and expenses of the sheriff and other officers paid by the county for services in connection with the work of the grand jury; all expenses made in connection with the jail, including board of prisoners; all jurors fees, jurors meals, witness fees, constable's fees, and justice fees paid by the county in all criminal cases before a

justice of [the] peace, magistrate or police court; the compensation of the county attorney and his assistant and expenses in criminal cases." [35 G. A., ch. 33, § 1; 33 G. A., ch. 3, § 2.] [24 G. A., ch. 41; 22 G. A., ch. 82, § 40; 18 G. A., ch. 28, § 3; C. '73, § 203; R. § 349; C. '51, § 148.]

[1"on" in the enrolled bill. EDITOR.]

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

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

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

28. For issuing marriage licenses, one dollar each;

29. For all services performed in the settlement of the estate of any decedent, minor, insane person, or other persons laboring under any legal disability, except where actions are brought by the administrator, guardian, trustee or person acting in a representative capacity or against him, or as may be otherwise provided herein, where the value of the property of the estate does not exceed three thousand dollars, three dollars; where such value is between three and five thousand dollars, five dollars; where such value is between five and seven thousand dollars, eight dollars; where such value is between seven and ten thousand dollars, ten dollars; where such value is between ten and twenty-five thousand dollars, fifteen dollars; for each additional twenty-five thousand dollars or major fraction thereof, there shall be taxed the further sum of ten dollars;

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

All of which fees shall be paid into the county treasury. [34 G. A., ch. 14, § 1.] [29 G. A., ch. 17, § 1; C. '73, §§ 3781-2, 3787; R. §§ 430, 436, 1852, 4136, 4140-1; C. '51, §§ 2527, 2531-2.]

In estimating the value of the estate of a deceased for the purpose of determining the amount of the clerk's fee for services in the settlement of the estate, the value of real estate which is ordered to be sold for the payment of claims is not to be considered. *In re Estate of Pitt*, 153-269, 133 N. W. 660.

The statutory provision in this respect is predicated on the theory that payment is to be made on the basis of something actually done by the officer for the benefit of the litigant. *Ibid.*

SEC. 297. **Salary of clerk—additional compensation.** The clerks of the district courts shall receive as full annual compensation for all services the following: In counties having a population of less than ten thousand, the board of supervisors shall fix the salary at an amount not exceeding eleven hundred dollars. In counties having a population of ten thousand and not exceeding fifteen thousand, the salary shall be twelve hundred dollars. In counties having a population of fifteen thousand and not exceeding twenty thousand, the salary shall be thirteen hundred dollars. In counties having a population of twenty thousand and not exceeding twenty-five thousand, the salary shall be fourteen hundred dollars. In counties having a population of twenty-five thousand and not exceeding thirty thousand, the salary shall be fifteen hundred dollars. In counties having a population of thirty thousand and not exceeding thirty-five thousand, the salary shall be sixteen hundred dollars. In counties having a population of thirty-five thousand and not exceeding forty thousand, the salary shall be eighteen hundred dollars. In counties having a population of over forty thousand and less than fifty thousand, the salary shall be twenty-five hundred dollars; in counties having a population of fifty thousand and not over sixty thousand, the salary shall be twenty-seven hundred fifty dollars; in counties having a population of over sixty thousand and less than sixty-five thousand, the salary shall be three thousand dollars; and in counties having a population of over sixty-five thousand, the salary shall be thirty-three hundred dollars. The board of supervisors may in addition to the salary fixed for clerks in counties having a population of forty thousand or under allow them out of the probate fees as additional compensation an amount not exceeding three hundred dollars; provided that in counties where terms of the district court are held in two cities or towns there may

be added to the salary of the clerk the further sum of four hundred dollars. [34 G. A., ch. 15, § 1.] [25 G. A., ch. 77; 22 G. A., ch. 36, § 2; 21 G. A., ch. 134, § 16; 18 G. A., ch. 184, § 1; C. '73, § 3784.]

The fact that duties are required of the clerk for which no compensation is provided does not authorize the allowance of exaction of compensation in addition to that provided by statute. Therefore, held that one who becomes entitled to a fund in the hand of the clerk received in his official capacity is entitled also to the interest on such fund earned while it is on deposit with a bank in the clerk's name. *Rhea v. Brewster*, 130–729, 107 N. W. 940.

SEC. **298. Deputies—appointment—compensation—qualification.** The clerk, with the consent of the board of supervisors, may, when necessary, appoint a deputy, or employ a clerk or clerks, who shall not be a county officer. A certificate of such appointment and of the revocation thereof, when made, shall be filed with the county auditor. In counties of twenty thousand population or less, such deputy or clerk shall receive a salary not to exceed one half the sum allowed to the principal. In counties having a population above twenty thousand and not exceeding thirty-five thousand, one or more deputies or clerks may be employed, their total compensation not to exceed fifteen hundred dollars, except that, where court is held at two places in a county, it may be any sum not exceeding two thousand dollars. In counties having a population of thirty-five thousand and less than forty thousand, one or more deputies may be employed, their total compensation not to exceed the sum of two thousand dollars. In counties having a population exceeding forty thousand, one or more deputies or clerks may be employed, whose total compensation shall not exceed five thousand dollars; and in counties having a population exceeding sixty-five thousand, one or more deputy clerks may be employed, whose compensation shall not exceed ten thousand dollars, that each of the two chief deputy clerks shall be allowed a salary of not less than fourteen hundred dollars per annum. The compensation of such deputy or clerk shall be fixed by the board of supervisors at the time of the consent to the appointment. The deputy shall take the same oath as his principal, to be indorsed on the certificate of his appointment, and may perform the duties of his principal. Clerks' and deputies' salaries to be paid out of the county treasury in equal monthly installments. [35 G. A., ch. 35, § 1; 33 G. A., ch. 16, § 1.] [27 G. A., ch. 12, § 1; 22 G. A., ch. 36, §§ 1, 2; 18 G. A., ch. 184, § 1; C. '73, §§ 766-8, 770, 3784; R. §§ 642-3, 644-5, 647; C. '51, §§ 411-14, 416.]

CHAPTER 9.

OF COUNTY ATTORNEYS AND THEIR DUTIES.

SECTION **301. Duties.** That sections three hundred and one, three hundred and two, three hundred and six and three hundred and seven of the code be and the same are hereby repealed, and the following enacted in lieu thereof:

"It shall be the duty of the county attorney:

1. To diligently enforce, or cause to be enforced in his county, all of the laws of the state, actions for a violation of which may be commenced or prosecuted in the name of the state of Iowa, or by him as county attorney, except such laws, the enforcement of which is exclusively enjoined upon others by statute.

2. To appear for the state and county in all cases and proceedings in the courts of his county, to which the state or county is a party, and in the supreme court in all cases in which the county is a party.

3. To appear and prosecute all preliminary hearings before justices of the peace upon charges triable upon indictment.

4. To appear and prosecute misdemeanors before justices of the peace whenever he is not otherwise engaged in the performance of official duties.

5. To enforce all forfeited bonds and recognizances, and to prosecute all proceedings necessary for the recovery of debts, revenues, moneys, fines, penalties and forfeitures accruing to the state or his county, or to any school district or road district in his county; also to prosecute all suits in his county against public service corporations which are brought in the name of the state of Iowa.

6. To commence and prosecute all actions and proceedings brought by any county officer in his official capacity.

7. To give advice or his opinion in writing, without compensation, to the board of supervisors and other county officers when requested so to do by such board or officer, upon all matters in which the state or county is interested, or relating to the duty of the board or officer in which the state or county may have an interest; but he shall not appear before the board of supervisors upon any hearing in which the state or county is not interested, or in applications to establish, vacate or alter highways.

8. To attend the grand jury whenever necessary for the purpose of examining witnesses before it, or of giving it legal advice, or to procure subpœnas or other process for witnesses, to prepare all bills of indictment; but he must not be present when an indictment is considered or found.

9. To give a receipt to all persons from whom he shall receive money in his official capacity, and file a duplicate thereof with the county auditor.

10. To promptly notify the attorney-general of every criminal case appealed from his county to the supreme court, and when the appeal is taken by the state, at least forty days prior to the term at which the cause is to be heard, prepare and deliver to the attorney-general a typewritten manuscript of the abstract of the case; and when the appeal is taken by the defendant, he shall prepare and deliver to the attorney-general when necessary a typewritten manuscript of the amended abstract of the case in ample time to have the same printed and filed within the time prescribed by the rules of the supreme court; said manuscript of the abstract or amended abstract shall be in the form and manner prescribed by law, and the rules of the supreme court.

11. To make reports relating to the duties and the administration of his office to the governor or the attorney-general whenever called upon by the governor or the attorney-general so to do.

12. To perform such other and further duties as are now or may hereafter be enjoined upon him by law." [33 G. A., ch. 17, §§ 1, 2.] [21 G. A., ch. 73, §§ 2, 3, 7, 8.]

The county attorney cannot be called upon to perform any duty save such as may be enjoined upon him by law. He is not required to follow a case into another county on change of venue. *Bevington v. Woodbury County*, 107–424, 78 N. W. 222.

Therefore a contract for extra compensation for services to be rendered in a case in another county is valid. *Ibid.*

It is within the duties of the county attorney to take an appeal and give notice thereof in a criminal case. *State v. Grimmell*, 116–596, 88 N. W. 342.

A proceeding to punish for violation of a liquor injunction is not a criminal prosecution in which the county attorney is required to appear. Such a prosecution may be carried on by a citizen through an attorney employed by him. *Brennan v. Roberts*, 125–615, 101 N. W. 460.

In a proceeding under 33 G. A. ch. 78 to remove a county attorney from office, held that the showing as to failure of the

county attorney to prosecute criminal charges was not of such character as to require such removal. *State v. Hospers*, 147–712, 126 N. W. 818.

Communications made to a county attorney, with a view to his taking steps for the prosecution of a crime, are privileged. *Gabriel v. McMullin*, 127–426, 103 N. W. 355.

And see notes to § 4608 in this supplement.

The county attorney is required to prosecute all proceedings necessary for the recovery of fines. *Gunn v. Mahaska County*, 155–527, 136 N. W. 929.

SEC. 302. **To give opinions—repealed.** [33 G. A., ch. 17, § 1.]

[See § 301. EDITOR.]

The county attorney has no authority to appear for the county in proceedings to levy a special assessment for the construction of a ditch. *Yockey v. Woodbury County*, 130–412, 106 N. W. 950.

The board cannot contract to pay compensation to the county attorney for the performance of services which are beyond the scope of his authority and which it is a part of the duty of the board to perform; nor can it authorize payment to him of compensation in addition to his salary for services which he is required to perform as a part of his duty as county attorney, although he might have had a deputy who would have been entitled to such compensation. *Dubuque County v. Fitzpatrick*, 144–86, 121 N. W. 15.

SEC. 303. **Deputies—assistance—compensation—repealed.** [29 G. A., ch. 18, § 1.]

[See § 303-a.]

The provision of code § 5372, that the opening and closing arguments are to be made by the county attorney, does not prevent such arguments being made by an attorney hired by private prosecutors to assist the county attorney. *State v. Novak*, 109–717, 79 N. W. 465.

The assistant county attorney appointed with the approval of the court may represent the state in the investigation of the charge by the grand jury. *State v. Tyler*, 122–125, 97 N. W. 983.

The validity of the indictment is not affected by the fact that it is signed by the deputy county attorney. *State v. Mathews*, 133–398, 109 N. W. 616.

SEC. 303-a. **Assistants—compensation.** That section three hundred and three-a of the supplement to the code, 1907, be and the same is hereby repealed and the following enacted in lieu thereof:

"The county attorney may in writing, with the consent of the board of supervisors, appoint one or more practicing attorneys, who are residents of his county, as his assistants. The compensation of such assistants shall be fixed by the board of supervisors, and be paid out of the county treasury, and shall not exceed the following amounts: In counties having a population of thirty-six thousand and less than sixty thousand, one thousand dollars per annum; in counties having a population of sixty thousand and less than ninety-five thousand, fifteen hundred dollars per annum; in counties having a population of ninety-five thousand and over, two thousand dollars per annum. In counties of less that thirty-six thousand, he may appoint assistants who shall act without any compensation from the county, to assist him in the discharge of his duties. In any county, with the approval of the judge of the district court, he may procure such assistants in the trial of a person charged with felony as he shall deem necessary and such assistants upon presenting to the board of supervisors a certificate of the district judge before whom said cause was tried, certifying to the services rendered, shall be allowed a reasonable compensation therefor, to be fixed by the board of supervisors, but nothing in this act shall prevent the board of supervisors from employing an attorney to assist the county attorney in any cause or proceeding in which the state or county is interested." [34 G. A., ch. 16, § 1.] [29 G. A., ch. 18, § 1; 21 G. A., ch. 73, § 4.]

A county attorney is now authorized, subject to the approval of the court, to procure assistance in the trial of a person charged with a felony, and it is not necessary that such assistant be employed before the beginning of the trial. *State v. Cobley*, 128–114, 103 N. W. 99.

SEC. 304. Substitute in case of disability—compensation.

The authority of a substitute appointed by the court to act for the county attorney will be presumed until his want of authority is shown in an issue properly made. *Lake City Electric Light Co. v. McCrary*, 132–624, 110 N. W. 19.

The county attorney is entitled to be heard when the question arises as to whether he is under disability in a particular case and a substitute should be appointed whose compensation is to be taken from his salary. *State v. Miller*, 132–587, 109 N. W. 1087.

Where the county attorney, prior to his election to the office, had been consulted by a client with reference to his criminal liability in a transaction, held that on subsequently becoming the county attorney he was disqualified from conducting the prosecution against such client for the crime involved, and should have asked for the appointment of a substitute. *State v. Rocker*, 130–239, 106 N. W. 645.

SEC. 305. Prohibitions.

Where objection is not made during the trial to the appearance for the state of an attorney interested in a civil suit involving the same matter, such objection cannot be made for the first time in a motion for a new trial. By failing to object to the appearance of such attorney within a reasonable time after defendant is informed of his relations in the civil suit he waives all right of objection. *State v. Smith*, 108–440, 79 N. W. 115.

A county attorney in whose term a person is indicted for illegal sale of intoxicating liquors, is not prohibited from being an attorney for the wife in her action against such person for sales of liquor to her husband, such sales not being connected with the sales for which the indictment was procured. *Bellison v. Apland*, 115–599, 89 N. W. 22.

SEC. 306. To receipt for money—repealed. [33 G. A., ch. 17, § 1.]

[See § 301. EDITOR.]

SEC. 307. Attend grand jury—repealed. [33 G. A., ch. 17, § 1.]

[See § 301. EDITOR.]

When the county attorney is disqualified from acting in the prosecution of a crime, he should not appear before the grand jury with reference thereto, and if he does so the indictment should be set aside on motion. *State v. Rocker*, 130–239, 106 N. W. 645.

SEC. 308. Compensation. County attorneys shall be allowed an annual salary, in counties having a population less than fifteen thousand, nine hundred dollars; in counties of fifteen thousand and under twenty-five thousand, ten hundred dollars; in counties of twenty-five thousand and under thirty-five thousand, twelve hundred fifty dollars; in counties of thirty-five thousand and under forty-five thousand, fifteen hundred dollars; in counties of forty-five thousand and under fifty-five thousand, seventeen hundred fifty dollars; in counties of fifty-five thousand and under sixty-five thousand, two thousand dollars; and in all counties of sixty-five thousand and over, twenty-five hundred dollars; provided that in counties having a population exceeding thirty thousand and under thirty-five thousand the board of supervisors may pay not to exceed fifteen hundred dollars annually, and in counties having a population exceeding forty thousand and under forty-five thousand the board of supervisors may pay not to exceed seventeen hundred fifty dollars annually. Said salary shall be paid quarterly out of the general fund of the county, and shall be due at the end of each quarter, namely: March thirty-first, June thirtieth, September thirtieth and December thirty-first. In addition to the salary above provided, he shall receive the fees as now allowed to attorneys for suits

upon written instruments where judgment is obtained, for all fines collected where he appears for the state, but not otherwise, and school fund mortgages foreclosed, and his necessary and actual expenses incurred in attending upon his official duties at a place other than his residence and the county seat, which shall be audited and allowed by the board of supervisors of the county. In counties where the district court is held at two places in the county, the board of supervisors may allow to the county attorney, in addition to the salary above provided, a sum not to exceed two hundred fifty dollars. [33 G. A., ch. 18, § 1.] [32 G. A., ch. 10, § 1; 31 G. A., ch. 11; 29 G. A., ch. 18, § 2; 21 G. A., ch. 73, § 11.]

The board of supervisors may contract to pay extra compensation for following a case into another county on change of venue. *Bevington v. Woodbury County*, 107–424, 78 N. W. 222.

In addition to his regular salary, the county attorney is to receive fees for collection of fines only where he appears for the state. These fees, however, are not to be deducted from the fines and there is no provision authorizing any officer or board to deduct or allow a deduction from such fines for services in collecting them. *Gunn v. Mahaska County*, 155–527, 136 N. W. 929.

SEC. **308-a. In effect.** The provisions of this act shall become operative and be in force and effect on and after the fourth day of July, nineteen hundred and seven. [32 G. A., ch. 10, § 2.]

SEC. **308-b. Qualifications of county attorney.** County attorneys shall be qualified electors of their respective counties, duly admitted to practice as attorneys and counselors in the courts of this state as provided in chapter ten, title three of the code and amendments thereto; provided, however, that no person shall be qualified for such office whose license to practice has been revoked or suspended, while the same remains revoked or suspended. [35 G. A., ch. 36, § 1.]

CHAPTER 10.

OF ATTORNEYS AND COUNSELORS.

SECTION **310. Qualifications.** Every applicant for such admission must be at least twenty-one years of age, of good moral character, and an inhabitant of this state, and must have actually and in good faith pursued a regular course of study of the law for at least three full years, either in the office of a member of the bar in regular practice of this state or other state, or of a judge of a court of record thereof, or in some reputable law school in the United States, or partly in such office and partly in such law school; but, in reckoning such period of study, the school year of any such law school, consisting of not less than thirty-six weeks exclusive of vacations, shall be considered equivalent to a full year. Every such applicant for admission must also have actually and in good faith acquired a general education substantially equivalent to that involved in the completion of a high-school course of study of at least four years in extent. [32 G. A., ch. 11, § 1; 28 G. A., ch. 11, § 1; 20 G. A., ch. 168, § 2.]

[The amendment by the 32 G. A. changed the word "three" in the last line of the section to "four," the change to become effective after July 1, 1909. See § 310-a.]

The possession of a good general moral character is a requisite for admission to the bar. *State v. Mosher*, 128–82, 103 N. W 105.

SEC. **310-a. In effect.** This act shall take effect and be in force on and after July first, nineteen hundred and nine. [32 G. A., ch. 11, § 2.]

SEC. **311. Examinations.** Every such applicant shall also be examined by the court, or by a commission of not less than five members con-

stituted as hereinafter provided, as to his learning and skill in the law; and the court must be satisfied, before admitting to practice, that the applicant has actually and in good faith devoted the time hereinbefore required to the study of law, and possesses the requisite learning and skill therein, and has also the general education required by this act. The sufficiency of the general education of the applicant may be determined by examination before the commission, or in such other manner as the supreme court may by rule prescribe. [28 G. A., ch. 11, § 2; 20 G. A., ch. 168, § 3.]

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

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

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

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

[Acts in conflict with § 3, ch. 11, 28 G. A., are repealed by § 311-c. EDITOR.]

SEC. 313. **Practitioners from other states.** That the law as it appears in section three hundred thirteen of the code be and the same is hereby repealed and the following enacted in lieu thereof:

"Any person a resident of this state having been admitted to the bar of any other of the United States may, in the discretion of the court, be admitted to practice in this state without examination or proof of period of study, as hereinbefore provided, on proof of the other qualifications[1] required by this chapter, and on satisfactory proof that he has practiced law regularly for not less than one year in the state where admitted to practice, after having been admitted to the bar according to the laws of such state." [35 G. A., ch. 37, § 1.] [20 G. A., ch. 168, § 5.]

[1"qualification" in the enrolled bill. EDITOR.]

SEC. 315. **Mode of examination.** The supreme court may by general rules prescribe the mode in which examinations under this chapter shall be conducted, and in which the qualifications required as to age, residence, character, general education and term of study shall be proved, and may make any other and further rules, not inconsistent with this chapter, for the purpose of carrying out its object and intent. [28 G. A., ch. 11, § 4; 20 G. A., ch. 168, § 7.]

[Acts in conflict with § 4, ch. 11, 28 G. A., are repealed by § 311-c. EDITOR.]

SEC. 316. **Attorneys resident in other states—must appoint local attorney.** Any member of the bar of another state, actually engaged in any cause or matter pending in any court of this state, may be permitted by such court to appear in and conduct such cause or matter while retaining his residence in another state, without being subject to the foregoing provisions of this chapter. Provided that at the time he enters his appearance he files with the clerk of such court the written appointment of some attorney resident in the county where such suit is pending, upon whom service may be had in all matters connected with said action, with the same effect as if personally made on such foreign attorney within such county. In case of failure to make such appointment, such attorney shall not be permitted to practice as aforesaid, and all papers filed by him shall be stricken from the files. [28 G. A., ch. 12, § 1; 20 G. A., ch. 168, § 8.]

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

Duties and liabilities: Under code § 3851 an attorney is not competent as a surety on a bond for appeal from a justice of the peace. *Hudson v. Smith*, 111–411, 82 N. W. 943.

The relations between attorney and client require the utmost fairness and good faith on the part of the attorney, and the burden of proving the entire fairness of the transactions between them rests upon the attorney. A contract between attorney and client with reference to the property of the client is presumed to be fraudulent. *Shropshire v. Ryan*, 111–677, 82 N. W. 1035.

It is not negligence on the part of an attorney to decline to proceed further in a case, and such refusal will not render him liable in damages for a subsequent adverse result therein. *Cullison v. Lindsay*, 108–124, 78 N. W. 847.

In an action to recover on account of the negligence of an attorney in defending an action it is not sufficient to show the negligence of the attorney and the fact that judgment was recovered in the action. The plaintiff must go further in establishing that he has suffered damage by reason of such negligence. *Getchell & Martin Lumber Mfg. Co. v. Employers' Liability Assur. Cor.*, 117–180, 90 N. W. 616.

Where an attorney received money from his client to be applied to a specific purpose, held that he could not lawfully enter into an agreement for the appropriation of the money when received for the benefit of another to whom he owed no duty. *Farrar v. Farrar*, 104–621, 74 N. W. 5.

An attorney who has been employed by and received the confidence of his client is incompetent to accept a retainer from the other party in the same matter, even though he may have been discharged from the first employment and does not violate any confidence thus obtained. *Whitcomb v. Collier*, 133–303, 110 N. W. 836.

An attorney who has once been made the recipient of the confidence of a client concerning a certain subject matter is thereafter disqualified from acting for any other party adversely interested in such subject matter. Therefore, held that an attorney who had been consulted by a client with reference to a matter involving the criminal liability of the latter was disqualified on becoming county attorney from prosecuting the client for the crime involved. *State v. Rocker*, 130–239, 106 N. W. 645.

Compensation: The importance of the litigation, the success attained, and the benefit which it had secured may be considered in estimating the compensation to which the attorney who conducted it is entitled for the services he rendered. *Clark v. Ellsworth*, 104–442, 73 N. W. 1023.

Where the subject matter of the litigation is of great importance to the litigants, and of a character to lead them to use every legitimate effort to succeed, the wealth of the party and his consequent ability to make a severe contest may be considered in connection with his disposition to do so as tending to show the importance and value of services which the attorney for whose compensation he was responsible was required to render. *Ibid.*

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

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

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

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

In estimating the value of an attorney's services it is proper to take into account the time necessarily employed and the success of the litigation; also the amount or value involved and recovered, the ability, learning and experience of the attorney and his standing in the profession and if the action involved breach of trust on the part of the defendant and conduct inconsistent with business integrity, the standing of the defendant in the community may also be considered. *Graham v. Dubuque Specialty Mach. Works*, 138–456, 114 N. W. 619.

Where services have been rendered in pursuance of a written contract, no implied agreement for *quantum meruit* can arise. *Payne v. Davis County*, 150–597, 129 N. W. 823.

A contract by an attorney for contingent fee consisting of a certain proportion of the amount of recovery in the case, but not requiring of him the payment of any portion of the costs, is not unlawful. *Dunham v. Bentley*, 103–136, 72 N. W. 437.

A contract for a contingent fee, consisting of a specific share of the recovery, is not void as champertous. *Rickel v. Chicago, R. I. & P. R. Co.*, 112–148, 83 N. W. 957.

The fact that an attorney makes advancements in the way of paying the filing fee and for the attendance of witnesses and for other necessary expenses incident to the preparation and trial of the case, does not make the contract between the attorney and client as to fees illegal and immoral. *Wallace v. Chicago, M. & St. P. R. Co.*, 112–565, 84 N. W. 662.

An attorney who is required by the court to perform services for the public in a disbarment proceeding is entitled to reasonable compensation therefor from the county. *Hyatt v. Hamilton County*, 121–292, 96 N. W. 855.

An attorney who has faithfully discharged his duties under a contract for conducting a case to its conclusion until discharge, without ground by the client, may recover the entire compensation agreed upon. *Spurrier v. Bullard*, 131–123, 107 N. W. 1036.

A contract between client and attorney will be disregarded by the courts if made without a fair and full disclosure of the facts upon which it is predicated, and voluntary payment made by the client to the attorney while the relation still exists will not defeat the right of the client to have refunded to him the excess of the amount paid beyond a reasonable compensation where the settlement was procured by fraud or concealment. *Donaldson v. Eaton*, 136–650, 114 N. W. 19.

Contingent fee: A power of attorney by which the attorney for a consideration paid or promised obtains an interest in the subject matter, with an agreement to indemnify his principal against liability for costs and expenses in connection therewith, is irrevocable and operates as an assignment by the principal to the attorney. *Blondel v. Ohlman*, 132–257, 109 N. W. 806.

A contract between an attorney and his client that the attorney shall receive by way of compensation the balance of a lump sum agreed upon which shall remain after the attorney has satisfied a claim against his client is champertous and the voluntary payment by the client to the attorney of the sum thus agreed upon while the relation of attorney and client exists will not defeat the right of the client to have the balance returned to him, at least so far as it exceeds a reasonable compensation. *Donaldson v. Eaton*, 136-650, 114 N. W. 19.

A contract of employment of an attorney on a contingent fee is valid. *Graham v. Dubuque Specialty Mach. Works*, 138-456, 114 N. W. 619.

Where an attorney under contract for a contingent fee associates other attorneys with him and judgment is recovered for the client, the fact that one of such attorneys dies pending the appeal and that the appeal is defended by the others does not render improper the division of the contingent fee in accordance with the original agreement. *Senneff v. Healy*, 155-82, 135 N. W. 27.

Attorney—employment: An attorney who is employed by another attorney in the case as associate counsel and whose services are accepted by the client may recover from the client the value of his services. *Dorr v. Dudley*, 135-20, 112 N. W. 203.

As witness: While it is contrary to professional ethics for an attorney to become a witness without first entirely withdrawing from any further connection with the case, if he can safely do so without disregarding the interests of his client, nevertheless an attorney is a competent witness and it is error to throw discredit on the testimony of such witness further than to say that his interest as an attorney may be taken into account in determining the weight and credibility of his testimony. *Fletcher v. Ketcham*, 141 N. W. 916.

While the rules of professional ethics are for the guidance of attorneys in the practice of their profession and should, of course, as a rule, be scrupulously obeyed, it is not for the court to enforce them to the prejudice of the client or to state them to the jury in such a way that the client may suffer on account of the ethical impropriety of the attorney's conduct. *Ibid.*

SEC. 318. Deceit or collusion—punishment.

The facts in a particular case held sufficient to justify disbarment of an attorney for making a false affidavit, although under an agreement with the party to whom the affidavit was given that it should not be used in the state. It is not necessary under this section that a crime be committed. *State v. Howard*, 112-256, 83 N. W. 975.

SEC. 319. Authorities of attorneys and counselors.

An attorney does not have implied authority to confess or consent to judgment against his client. *First Nat. Bank v. Bourdelais*, 109-497, 80 N. W. 553.

An attorney under general employment has no authority to consent to judgment against his client or waive any cause of action or defense in his case. *Kilmer v. Gallaher*, 112-583, 84 N. W. 697.

An attorney recovering judgment for his client, which has proceeded to execution sale of the debtor's property, has no authority to assign or accept payment for the certificate of sale held by his client. *Howard v. Kelly*, 137-76, 114 N. W. 544.

An attorney for a party obtaining a judgment has no implied authority to make an assignment of such judgment for his client. *Ritz v. Rea*, 155-181, 135 N. W. 645.

An attorney has authority to sign a notice of appeal for his client. *In re Oldfield's Estate*, 157— ——, 138 N. W. 846.

Par. 2: An attorney has no power under his authority to bring and prosecute a suit to enter into a stipulation with reference to the liability of his client's homestead. *Lingenfelter v. Bowman*, 156-649, 137 N. W. 946.

Such stipulation made without special authority held not binding by ratification of the client, it appearing that the client had no knowledge of the terms and effect of the language used in the stipulation. *Ibid.*

Attorneys cannot by agreement not reduced to writing nor entered on the records of the court agree to the submission of a case for a decree to be entered in vacation. *Whitlock v. Wade*, 117-153, 90 N. W. 587.

It is within the scope of authority of an attorney to make an agreement as to the record in the case. *American Emigrant Co. v. Long*, 105-194, 74 N. W. 940.

An agreement between counsel not reduced to writing or made a matter of record cannot be enforced. *Baily v. Birkhofer*, 123-59, 98 N. W. 594.

An agreement between attorneys not in writing may be shown by the admissions of one of them as against his client. *Johnson v. Nash-Wright Co.*, 121-173, 96 N. W. 760.

A party who has been represented by an unauthorized attorney should disavow and disaffirm his action promptly upon receiving knowledge thereof, and if he is

made a party plaintiff with knowledge of the fact, he will be bound by the judgment if he does not disavow or disaffirm the action. *Oxtoby v. Henley*, 112–697, 84 N. W. 942.

Where an attorney has appeared in an action for defendant, authority for doing so will be presumed, and the burden is upon the defendant to show that no such authority in fact existed. *Uehlein v. Burk*, 119–742, 94 N. W. 243.

In the absence of bad faith on the part of the attorney, the presumption that he is authorized to appear for the client whom he represents is strong and can only be overcome by clear and satisfactory evidence. *Walsh v. Doran*, 145–110, 123 N. W. 999.

Clients cannot in reason expect that every act in connection with the business affairs entrusted by them to an attorney will be done by him personally. Therefore held that an attaching creditor, found to have unlawfully sued out an attachment, was liable for the negligent or wrongful acts of an assistant of the attorney employed by him, although such assistant was not a licensed attorney. *Lord, Owen & Co. v. Wood*, 120–303, 94 N. W. 842.

The attorney has no authority to employ an assistant at the claimant's expense without the client's consent and the mere fact that the client has knowledge of services being rendered in the prosecution of the case by such assistant will not bind him to make compensation, the presumption being that he was to be paid by the attorney regularly employed. *Gillilland v. Brantner*, 145–275, 121 N. W. 1047.

Under a contract for contingent fees in which it was provided that the attorneys should not in any event be chargeable for any part of the costs connected with the case, held that nevertheless they had implied authority to incur reasonable expense chargeable to the client in employing assistance to look up testimony. *Forbes v. Chicago, R. I. & P. R. Co.*, 150–177, 129 N. W. 810.

SEC. 320. Proof of authority may be required.

This section points out the exclusive method of testing the authority of the attorney to appear in behalf of the client, and the want of authority of the attorney cannot be raised by plea in abatement. *State v. Beardsley*, 108–396, 79 N. W. 138.

The authority of an attorney to prosecute an appeal to the supreme court may be called in question in a motion to dismiss the appeal, and if it affirmatively appears that such appeal was taken without authority, it will be dismissed. *Yockey v. Woodbury County*, 130–412, 106 N. W. 950.

SEC. 321. Attorney's lien—notice.

The statute as to the lien of an attorney is a substantial enactment of the common law with the requirement concerning notice added. *Foss v. Cobler*. 105-728, 75 N. W. 516.

An attorney has no common law lien on money due his client, and can only enforce a claim against such a fund under the statutory provisions. *Kerr v. Kennedy*, 119–239, 93 N. W. 353.

A new contract as to fees, made after the filing of an attorney's lien, does not defeat the lien. *Wallace v. Chicago, M. & St. P. R. Co.*, 112–565, 84 N. W. 662.

Where an attorney's lien has been filed, it makes no difference whether the money paid in settlement of the action is in fact paid before or after the dismissal of the action, if it appears that the payment was made in settlement of the claim and to prevent further litigation. *Ibid.*

At common law, the attorney had no lien upon money due his client in the hands of the adverse party, and to establish such lien, the facts must be such as to bring the case within the statutory provision. *Kauffman v. Phillips*, 154–542, 134 N. W. 575.

An attorney has a lien for services rendered and not for a share of his client's recovery stipulated for by contract. *Ibid.*

This section makes no provision for a lien on real estate, and the attorney for a wife who sues for divorce and alimony, and asks to have set aside an alleged fraudulent conveyance of land by her husband, cannot on the dismissal of the action by the wife intervene for the purpose of having a lien in his favor enforced on such land. *Keehn v. Keehn*, 115–467, 88 N. W. 957.

The statute gives a lien on money due and not on real estate although real estate may be the subject of the litigation. *McCormick v. Dumbarton Realty Co.*, 156–692, 137 N. W. 943.

Therefore held that in a proceeding by an occupying claimant to have determined his interest in the property, a finding of the amount of such interest did not entitle the attorney to a lien thereon. *Ibid.*

An attorney's lien is simply the right to hold or retain in the attorney's possession the money or property of client until his proper charges have been adjusted and paid. The lien may be enforced as a judgment, or by summary proceedings against a sheriff who has collected the money on execution, or in an action against the client or the adverse party, or, if it is a specific fund, by motion and order to get the necessary amount set aside for payment of the claim. The attorney's claim for services is properly

triable by a jury. *Sweeley v. Sieman*, 123–183, 98 N. W. 571.

The lien is on the money due to the client, and not on the judgment or amount recovered in the action in which the attorney is employed. The client cannot by dismissing the action and employing another attorney defeat the lien for actual services rendered while the employment of the attorney giving the notice continues. But notice given by one attorney does not give rise to a lien for services rendered by him and another attorney jointly. *Gibson v. Chicago, M. & St. P. R. Co.*, 122–565, 98 N. W. 474.

The lien of an attorney attaches only to money or property coming into the possession of the attorney claiming such lien. *Atlee v. Bullard*, 123–274, 98 N. W. 889.

A notice of an attorney's lien signed by the attorney as attorney for the party and not for himself will nevertheless be sufficient. *Gibson v. Chicago, M. & St. P. R. Co.*, 122–565, 98 N. W. 474.

The lien of the attorney attaches to the money paid by the judgment debtor to the clerk in satisfaction of the judgment. The creditor cannot complain of such payment. *Hubbard v. Ellithorpe*, 135–259, 112 N. W. 796.

Such lien attaches to the alimony awarded in a final decree of divorce. *Ibid.*

The right of an attorney under his lien is subject to any set-off which the debtor has against his client. The attorney as assignee of the judgment in favor of his client is in no better situation than the client as against an equitable right of set-off existing against the judgment debtor at the time of the assignment. *De Laval Separator Co. v. Sharpless*, 134–28, 111 N. W. 438.

In an action lawfully prosecuted by one person for the benefit of another, the former may for that purpose employ counsel whose reasonable compensation is a charge upon the proceeds of a recovery so obtained. *Lomack Home v. Iowa Mut. Tornado Ins. Ass'n*, 155–728, 133 N. W. 725.

A notice embodied in the original notice advising defendant of a lien "for legal services rendered and to be rendered" sufficiently indicates that it has reference to such services in the particular case. *Barthell v. Chicago, M. & St. P. R. Co.*, 138–688, 116 N. W. 813.

The purpose of the statute is to protect attorneys in the matter of compensation where, for some reason thought sufficient, their client settles with the opposite party unbeknown to them and such party must take the risk as to the attorney's claim and may not assume that no more has been promised than what subsequently shall be adjudged reasonable. *Cheshire v. Des Moines City R. Co.*, 153–88, 133 N. W. 324.

The notice of the claim for a lien need not state the details of the attorney's contract of employment. The lien is for the balance of compensation, whether owing by virtue of a written or oral agreement, or to be measured contingently, or on *quantum meruit*, or for a fixed amount. *Ibid.*

A notice of a lien is sufficient to protect the attorney as to any amount due from his client under a contract to pay him a share of the recovery as contingent fee whether such recovery is by settlement or otherwise, and the adverse party settling with the client without consent of the attorney does so at his peril. *Crosby v. Hatch*, 155–312, 135 N. W. 1079.

The provision as to an attorney's lien is a declaration of the common law with the addition of a method for giving notice of the lien. *Brown v. Morgan*, (C. C.) 163 Fed. 395.

An attorney who has recovered a judgment in favor of his client in a federal court in Iowa, and entered notice of a lien on such judgment in conformity to the state statute, may maintain a suit in equity in such court against the parties to the judgment to enforce his lien, such suit being ancillary to the original suit and within the jurisdiction of the court, without regard to the amount in controversy or the citizenship of the parties. *Ibid.*

SEC. 322. How lien released.

Where a suit is brought in equity to enforce an attorney's lien the client is not entitled to have the action transferred to the law docket on filing a bond, as authorized by this section. *Crissman v. McDuff*, 114–83, 86 N. W. 50.

After the release of the lien by filing a bond the client has full control of the judgment and of the funds in the hands of the clerk applicable to its satisfaction and the attorney's claim for services becomes an ordinary demand at law. *Jamison v. Ranck*, 140–635, 119 N. W. 76.

SEC. 323. License to practice may be revoked.

In a proceeding under this section, where the court fails to find the defendant guilty, it has no power, on dismissing the charges, to render judgment that the defendant be reprimanded and tax costs to the defendant. *State v. Tracy*, 115–71, 87 N. W. 727.

Notwithstanding the provision of code § 309, giving to the supreme court exclusive authority to license persons to practice law, any court of record has authority to revoke or suspend such license, and the district court therefore has jurisdiction to try and determine disbarment proceedings. *State v. Mosher*, 128–82, 103 N. W. 105.

SEC. 324. Grounds for revocation.

Judgment of disbarment should only be pronounced upon clear and convincing proof. *State v. Howard*, 112–256, 83 N. W. 975.

The evidence in a particular case considered and held sufficient to sustain a judgment of disbarment. *State v. Mosher*, 128–82, 103 N. W. 105.

The statute does not purport to include all the grounds for the revocation of licenses to practice as an attorney, and although ceasing to be of good moral character is not within the causes stated, a court has jurisdiction to disbar an attorney on that ground. The moral delinquencies must be such, however, as shall unfit the person accused for the proper discharge of the trust imposed in him. Among these are the absence of common honesty and veracity, especially in professional intercourse. *Ibid.*

Any unfaithful or fraudulent conduct toward the client, showing unfitness of the attorney to handle the affairs of others, is good ground for disbarment. *State v. Rohrig*, 139 N. W. 908.

Moral character is an essential qualification for the admission of an attorney to practice and he may be removed whenever he ceases to possess such character. *Ibid.*

Under the evidence in a particular case, held that an attorney was properly disbarred for extortion, compounding a felony and other improper conduct. *State v. Johnson*, 149–462, 128 N. W. 837.

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

The court may properly appoint more than one attorney to take charge of the proceedings and draw up the proper accusation. *State v. Howard*, 112–256, 83 N. W. 975.

The judge sitting as a court may direct disbarment proceedings to be begun in the name of the state and appoint attorneys to prosecute the case, although his attention to the misconduct of the attorney has been called by an affidavit presented to him in vacation. *State v. Tracy*, 115–71, 87 N. W. 727.

The order appointing attorneys to draw an accusation in a disbarment proceeding need not contain a recital of facts upon which the prosecution is to be based, but the attorneys appointed may include therein such matters as they deem proper. *State v. Mosher*, 128–82, 103 N. W. 105.

An attorney appointed by the court to act for the public in the prosecution of a disbarment proceeding is entitled to reasonable compensation to be paid by the county. *Hyatt v. Hamilton County*, 121–292, 96 N. W. 855.

The provision that the attorneys appointed by the court in a disbarment proceeding shall serve without compensation is not unconstitutional. *Brown v. Warren County*, 156–20, 135 N. W. 4, 137 N. W. 474.

SEC. 326. Notice.

The statute contemplates an examination of the accusation by the court and a finding as to its sufficiency before the accused is ordered to answer; but where the order to answer is previously made and defendant tests the sufficiency of the accusation by motion or otherwise, the irregularity is waived. *State v. Mosher*, 128–82, 103 N. W. 105.

SEC. 327. Pleading—trial—evidence preserved.

The defendant in a disbarment proceeding who has been acquitted is not entitled to have the evidence taken on a hearing extended into longhand at the expense of the county, and preserved in that form for future reference. The provision as to the preservation of the evidence is for the purpose of appeal only. *State v. Tomlinson*, 131–617, 109 N. W. 120.

A disbarment proceeding is not criminal in its nature, but a special civil proceeding, and defendant is not necessarily entitled to be confronted in court by the witnesses against him. The evidence of such witnesses may be offered in the form of depositions. *State v. Mosher*, 128–82, 103 N. W. 105.

Where the evidence is taken in shorthand, duly certified, and the transcript

thereof filed with the clerk within a reasonable time, there is compliance with the statutory requirement that all evidence be reduced to writing, filed and preserved. *Ibid.*

A sworn denial by the accused of the accusations does not prevent an investigation thereof on the issue raised by such denial. *Ibid.*

SEC. 329. Appeal.

The provision for appeal contemplates a hearing in the supreme court *de novo*. *State v. Mosher*, 128–82, 103 N. W. 105.

SEC. 329-a. **Clerk to certify order or judgment.** When a judgment has been entered in any court of record in the state of Iowa revoking or suspending the license of any attorney at law to practice in the said court, the clerk of the court in which the judgment is rendered shall immediately certify to the clerk of the supreme court the order or judgment of the court in said cause. [30 G. A., ch. 13.]

SEC. 330. Retention of money—misdemeanor.

This section has no application to a case where an attorney has extorted money from his client. *State v. Johnson*, 149–462, 128 N. W. 837.

SEC. 331. When not guilty.

The client is not required to give bond for the discharge of the attorney's lien before proceeding by motion to compel the attorney to pay over the money. *Union Bldg. & Sav. Assn. v. Soderquist*, 115–695, 87 N. W. 433.

Although an attorney gives bond for the return of money claimed in a summary proceeding, the payment of the money may be enforced in such proceeding, the attorney being protected by the bond given by plaintiff to release the attorney's lien. *Emanuel v. Cooper*, 153–572, 133 N. W. 1064.

Further as to compelling attorneys on motion to pay over money of the client, see notes to § 3826.

CHAPTER 11.

OF JURORS.

SECTION 332. Competency to act.

Inability to read and write the English language is a ground of challenge, but the mere fact that the juror is shown to have signed his name by a mark on several occasions, does not prove his inability to write. *State v. Greenland*, 125–141, 100 N. W. 341.

The fact that a juror has a slight defect in one eye which does not deprive him in any degree of his sight does not render him incompetent. *State v. Norman*, 135–483, 113 N. W. 340.

The discretion of the trial court in passing upon the competency of a person to act as a juror on challenge will not generally be interfered with on appeal. *Harris v. Moore*, 134–704, 112 N. W. 163.

And see notes to code § 3688 of this supplement.

SEC. 333. **Who exempt.** The following persons are exempt from liability to act as jurors: All persons holding office under the laws of the United States or this state; all practicing attorneys, physicians, registered pharmacists, dentists, and clergymen; all acting professors or teachers of any college, school or other institution of learning; and all persons disabled by bodily infirmity, or over sixty-five years of age; active members of any fire company; and any person who is conscientiously opposed to acting as a juror because of his religious faith. [33 G. A., ch. 19, § 1.] [26 G. A., ch. 61, § 2; C. '73, § 228; R. § 2721; C. '51, § 1631.]

If the jury list is made up from persons competent to serve as grand jurors and there is no showing of prejudice to defendant in the exclusion of any particular

class of persons, the failure to consider persons as competent who might have been selected will not be a ground of challenge to the grand jury. *State v. Pell*, 140-655, 119 N. W. 154.

SEC. 335. **Lists to be made biennially.** That section three hundred thirty-five of the code, as amended by chapter twenty of the acts of the thirty-third general assembly, be and the same is hereby repealed and the following enacted in lieu thereof:

"At the time of holding the general election in A. D. nineteen hundred twelve, and biennially thereafter, lists shall be made from which to select persons to serve as grand and petit jurors and talesmen for the biennial period commencing with the first day of January next thereafter, as follows: One hundred fifty persons in each county from which to select grand jurors; the number equal to one fourth of the whole number of qualified electors in said county, who voted in the last preceding general election as shown by the poll books of said election, from which to select petit jurors; and the number equal to thirty per cent. of the whole number of qualified electors, who voted at the last preceding general election, as shown by the poll books of said election, in the city or town in which the district court is held and the township or townships in which said city or town is located, from which to select talesmen; provided, however, that in no case shall such list for talesmen contain more than six hundred names. [34 G. A., ch. 17, §§ 1, 2; 33 G. A., ch. 20, § 1.] [26 G. A., ch. 61, § 4; C. '73, §§ 234, 244; R. § 2723.]

SEC. 335-a. **Talesmen—residence.** "The talesmen list shall be made from names of persons who reside in the city or town in which the district court is held and the township or townships in which said city or town is located. [34 G. A., ch. 17, § 3.]

SEC. 335-b. **Courts held in more than one place in county—jurors and talesmen.** "In counties where court is held in more than one place, the persons shall be selected from the qualified electors of the separate divisions of the county, giving to each division the number of grand jurors and petit jurors and talesmen to which it would be entitled, if it were a separate county. [34 G. A., ch. 17, § 4.]

SEC. 335-c. **Eligibility for jury service—length of service.** "No person on the list of grand jurors shall be eligible to serve as a grand juror except for one calendar year of the biennial period for which the list is made, and no person on the list of petit jurors shall be eligible to serve as a juror at more than one term of court during such biennial period. [34 G. A., ch. 17, § 5.]

SEC. 335-d. **Validity of nineteen hundred ten lists not affected.** "Nothing herein shall be construed to affect the validity of the jury list made at the time of holding the general election in A. D. nineteen hundred ten in accordance with the provisions of chapter twenty of the acts of the thirty-third general assembly for the biennial period commencing January first, nineteen hundred eleven." [34 G. A., ch. 17, § 6.]

SEC. 337. **Judges of election to return names—if they fail, supervisors supply names—who shall be omitted.** The auditor shall, at the time of furnishing the poll books to the judges of election, furnish them also a statement of the number of persons apportioned to their respective precincts to be returned for each of the said jury lists, together with the names of all persons who have served as grand or petit jurors since January first preceding, which latter names shall be furnished to him by the clerk of the district court. The judges shall thereupon make the requisite selection, and return lists of names so selected to the auditor with the re-

turns of elections; and in case the judges of election shall fail to make and return said lists as herein required, the board of supervisors shall, at the meeting held to canvass the votes polled in the county, make such lists for the delinquent precincts and the auditor shall file such lists in his office, and cause a copy thereof to be recorded in the election book. Should no general election be held in the year nineteen hundred and five, the board of supervisors shall meet on the first Monday in December of said year and prepare the grand and petit jury lists from the poll books returned from the various voting precincts of the county in the year nineteen hundred and four. Such lists shall be composed only of persons competent and qualified to serve as jurors; and the judges of election or boards of supervisors shall omit from said lists the name of any person who has served as a grand or petit juror in a court of record since January first preceding and shall also omit the name of any person who has served as judge or clerk of the general election in the year in which said jury list is prepared. And if the name of any such person is returned, the fact that he has requested to be so returned, or has served as such juror in a court of record during the jury year, as defined in this chapter, or has served as such judge or clerk of election as herein stated, shall be a ground for challenge for cause. The members of the election board, or the board of supervisors, when certifying to such lists, shall state that the lists do not contain the name of any person who requested, directly or indirectly, that his name appear thereon, and that it does not contain the name of any one who served as judge or clerk of the general election in the year in which the list is prepared. If the boundaries of any voting precinct shall be changed, it shall be the duty of the auditor, in making the apportionment of grand and petit jurors and talesmen, to assign to the new voting precincts the total number of grand and petit jurors and talesmen to which all the former precincts affected by the change were entitled, giving to each new precinct an equal number as nearly as possible. [33 G. A., ch. 21, § 1.] [29 G. A., ch. 20, § 1; 26 G. A., ch. 61, § 6; C. '73, §§ 237, 238; R. §§ 2726, 2727-8; C. '51, §§ 1636, 1637-8.]

Objections to a juror because he was the officer at the election required to return names of jurors, and requested a return of his own name, cannot be made after the examination of the jurors, although the fact is not known until after verdict. *In re Goldthorp's Estate*, 115–430, 88 N. W. 944.

The act relating to selection of grand jurors which took effect July 1, 1895, did not render illegal grand juries which had already been selected for the year under the old law. *State v. Wiltsey*, 103–54, 72 N. W. 415.

While the law requires grand jurors to be electors of the county, it does not require that a person must have voted or that his name be found upon the poll books, to make him eligible. Therefore a showing that the sheriff was unable to find a person of the name in the ward or city from which he was drawn, or that the county auditor could find no such name on the poll books does not show that the juror was not properly selected. *State v. Harris*, 122–78, 97 N. W. 1093.

An order of the district court setting aside the jury list for irregularities is not binding on persons not parties to the proceedings. *Polk County v. District Court*, 133–710, 110 N. W. 1054.

It is a ground for challenge that the juror has expressly requested that his name be placed on the list returned and the fact that the names of all the members of the election board in any precinct are placed on the list and returned as qualified jurors suggests that such names have been returned by mutual agreement or acquiescence which in law would amount to a request and such practice is to be condemned, but where it appeared that only two persons were returned who are members of election boards and these were from different townships and each testified that his name was placed on the list and returned against his express wish, held that there was no ground to complain that the statute had been violated. *State v. Anderson*, 140–445, 118 N. W. 772.

Under this section as amended, the fact that the name of a member of an election board appears upon a jury list does not invalidate an indictment returned by the grand jury selected from such list. The burden is upon one who objects to the

legality of the jury to show that such person sought or solicited appointment. *State v. Clark*, 141–297, 119 N. W. 719.

The district court has no doubt inherent power to set aside a list or panel of jurors on its own motion whenever it shall appear that a legal grand or trial jury cannot be drawn therefrom. *State v. Carter*, 144–371, 121 N. W. 801.

SEC. **337-a. District court to order lists prepared.** Wherever it has been or hereafter shall be found or determined by the district court in any county that, for any cause, the lawfully constituted grand jury or a like petit jury has not or cannot be obtained by drawing from the names returned by the election officers to the county auditor to serve as jurors, or that lawfully qualified talesmen cannot be selected by drawing from the list of names, or that the term for which such lists were drawn has expired, the said court may order the board of supervisors of said county to prepare lists of names of persons having the qualifications required by law for grand jurors, petit jurors and talesmen. The court ordering shall fix the time of meeting of said board of supervisors therefor and shall prescribe the time and manner of notice thereof to be given the several members of such board. Said notice may be served by any person and proof of service shall be the same as that of original notice. [32 G. A., ch. 12, § 1.]

While this statute was passed as an emergency measure to avoid difficulties which had arisen in the several counties of the state by reason of the action of the court in holding the grand and petit jury lists invalid because not returned as provided by law, yet its provisions are general in their nature and they are made applicable, not only to difficulties in existence, but also to those which might arise in the future from irregularities in the returning of such lists and all other contingencies. The statute is therefore not unconstitutional. *State v. Pell*, 140–655, 119 N. W. 154.

The validity of jury lists prepared under this section held not to depend upon the question whether the lists which had been set aside were invalid. *State v. Carter*, 144–371, 121 N. W. 801.

SEC. **337-b. Supervisors to prepare lists—meeting.** It is hereby made the duty of the members of said board of supervisors to obey the order of the district court made in accordance with the authority granted it in section one hereof, and they are hereby empowered and authorized to hold a meeting of said board for the said purpose and the preparation of jury lists by said board at said meeting shall have precedence over all other business. [32 G. A., ch. 12, § 2.]

SEC. **337-c. Apportionment.** The names to be drawn for grand jurors, petit jurors and talesmen shall be the number now required by law; they shall be apportioned among the several voting precincts by the county auditor as required by law, and such apportionment shall be certified by the auditor to the board of supervisors. [32 G. A., ch. 12, § 3.]

SEC. **337-d. Names selected—lists certified—filed with county auditor.** That section three hundred thirty-seven-d of the supplement to the code, 1907, be and the same is hereby repealed, and the following enacted in lieu thereof:

"In preparing such lists the board of supervisors shall select the names from the qualified electors from the several precincts as shown by the poll lists of the last preceding general election, selecting for grand jury, petit jury and talesmen lists, the number in each precinct shown by the auditor's apportionment provided for in this act. Such lists shall be separately certified by the board of supervisors, in substance and in form, as election officers are now required to certify lists returned by them and the lists shall be filed with the county auditor and recorded by him in the proper record, and shall stand as the regular jury list for the county for the year for which it is selected and shall be used therefor and juries

chosen therefrom, in all respects except as to time of selection of list and panel and summoning of the jurors, as is now provided by law; the time of selection of list and panel and summoning of the jurors to be under the order of the court." [33 G. A., ch. 22, § 1.] [32 G. A., ch. 12, § 4.]

Where there is no showing that the selection of names was not limited to "qualified electors from the several precincts, as shown by the poll lists," an objection on that ground is properly overruled. *State v. Pell*, 140–655, 119 N. W. 154.

One certification of all the lists returned to the auditor and recorded by him is a substantial compliance with the statute. *State v. Carter*, 144–371, 121 N. W. 801.

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

The objection that two members of the grand jury were residents of the same township will be waived if not urged before pleading to the indictment, unless it appears that defendant did not know of the irregularity before pleading. *State v. Kouhns*, 103–720, 73 N. W. 353.

Where a challenge to the panel is allowed and a new grand jury is to be impaneled for a particular case, the requirement that no more than one person shall be drawn as grand juror from any civil township, etc., is not applicable. *State v. VonKutzleben*, 136–89, 113 N. W. 484.

It is no ground of objection to the statute that it does not provide a representation on the jury list in proportion to the population of the respective townships from which the jury list is made up. *State v. Pell*, 140–655, 119 N. W. 154.

Slight deviation from the statutory methods of selection of a grand jury is not sufficient to warrant the setting aside of an indictment found by such grand jury. *State v. Clark*, 141–297, 119 N. W. 719.

There is no vested right in any particular jury list. Any irregularities in discharging grand jurors whose names are on the list cannot be relied on to reverse a conviction under an indictment returned by a grand jury properly selected. Technical defects in the summoning of a grand jury are not sufficient to warrant the reversal of a conviction under an indictment found by such a grand jury. Substantial compliance with the law is all that is required in such cases. *State v. Hassan*, 149–518, 128 N. W. 960.

SEC. 340. Clerk draws seven for each term—repealed. [27 G. A., ch. 114, § 3.]

[See § 340-a.]

SEC. 340-a. Repeal.

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

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

In a county having two county seats, the county recorder discharging the duties of his office at one county seat, and his deputy at the other, held that the deputy might act in the drawing of jurors at the latter county seat. *State v. Turner*, 114–426, 87 N. W. 287.

Where the court has set aside the precept under which a grand jury has been drawn and ordered the summoning of a new grand jury, the panel of the jury thus summoned cannot be challenged on the ground that it was not drawn in accordance with law. *State v. Pitkin*, 137–22, 114 N. W. 550.

SEC. 346. Number of jurors to be drawn.

The provisions of 22 G. A., ch. 37, relating to the drawing of jurors in Pottawattamie county, are still in force, although not expressly retained in the present code. Such provisions were in the nature of a special statute, and were not repealed by the code. *State v. Higgins*, 121–19, 95 N. W. 244.

SEC. 347. Others drawn when necessary.

It is not error for the court, before the beginning of trial, to order an additional panel to be drawn from the jury box and summoned for the trial of the case, the jurors so summoned becoming a part of the panel for the term or particular case as the order may direct, and not until the panel as thus increased has been exhausted should talesmen be called. *State v. John*, 124–230, 100 N. W. 193.

SEC. 348. Court controls number.

Where the jurors are excused for the time when their services are not needed, they are not entitled to compensation for such time. *Venett v. Jordan*, 111-409, 82 N. W. 953.

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

The statute requires the drawing to be in the presence of the court, and it will be presumed, unless otherwise shown by bill of exceptions (and not by affidavits), that the statutory direction was followed. *Moss v. Appanoose County*, 109-671, 81 N. W. 159.

While the statute authorizes the court to direct the clerk in calling talesmen to omit names of any whom he knows to be exempt from jury service, and does not authorize a direction to omit names of those known to be unable to serve, yet such misdirection will not constitute error in the trial of a case, where it appears that the complaining party did not exhaust his challenges, and that the jurors before whom the case was tried were legally qualified to sit, and that no exception to any member of the jury, nor to the jury as a whole, was taken. *State v. McIntosh*, 109-209, 80 N. W. 349.

It is not necessary to call talesmen in the order in which their names are drawn from the box. It is not objectionable to draw a sufficient number of talesmen all at once to meet the requirements of a particular case. *State v. Minor*, 106-642, 77 N. W. 330.

Where the names of the talesmen are drawn from the proper box they may be used as they appear without their names being again drawn. *State v. Wolf*, 112-458, 84 N. W. 536.

If the court orders an additional panel to be drawn from the jury box before the commencement of the trial, talesmen should not be called until the panel, as thus increased, has been exhausted. *State v. John*, 124-230, 100 N. W. 193.

SEC. 350. Disposition of ballots drawn.

Where the drawing was set aside and the persons whose names were so drawn did not serve, held not error to return their names to the jury box. *State v. Johnson*, 136-601, 111 N. W. 827.

SEC. **354. Fees of jurors.** That section three hundred fifty-four of the supplement to the code, 1907, be and the same is hereby repealed and the following enacted in lieu thereof:

"Jurors shall receive the following fees:

1. For each day's service or attendance in courts of record including jurors summoned on special venire, two dollars and fifty cents, and for each mile traveled from his residence to the place of trial, ten cents;

2. For each day's service before a justice of the peace, one dollar.

3. No mileage shall be allowed talesmen or jurors before justices. Immediately after the adjournment of each term of a court of record, the clerk thereof shall certify to the county auditor a list of the jurors, with the number of days' attendance to which each one is entitled." [33 G. A., ch. 23, § 1.] [30 G. A., ch. 14; C. '73, § 3811; R. § 4154; C. '51, § 2545.]

Where the jurors are excused for a time, as provided in code § 348, they are not entitled to compensation for such time. *Venett v. Jordan*, 111-409, 82 N. W. 953.

CHAPTER 12.

OF SECURITIES AND INVESTMENTS.

SECTION 355. Security to be by bond.

A surety company furnishing an official bond under a contract with the person for whom the bond is furnished that he will indemnify it against all losses, attorneys' fees and expenses sustained by reason of the execution of the bond, may in the absence of bad faith recover against such person its attorneys' fees expended in a suit on the bond, although the principal in the bond has also employed counsel and notified the company of that fact. *United States Fidelity & Guaranty Co. v. Hittle*, 121-352, 96 N. W. 782.

SEC. 356. To whom payable.

A bond in the alternative as to the party for whose benefit it is given is not void. If two or more persons are designated as obligees, their rights are coextensive with their interests. Bonds required in judicial proceedings inure to the benefit of parties who may sustain loss, whether named or not. *Lemon v. Drexel*, 152-144, 132 N. W. 184.

SEC. 357. Defects rectified.

The amendment of an affidavit will not be effectual to cure an error against a party who has already acquired rights. *McGillivary v. Case*, 107–17, 77 N. W. 483.

A bond which is essentially insufficient for the purpose for which it is given cannot be made sufficient by amendment after the time for giving such bond has expired. *Sutton v. Bower*, 124–58, 99 N. W. 104.

Even though a bond required should be without penalty, it is not void on account of a penalty being fixed therein. *Lemon v. Drexel*, 152–144, 132 N. W. 184.

After objection to the sufficiency of a bond is made on account of defect therein, such defect may be cured by amendment. *Emanuel v. Cooper*, 153–572, 133 N. W. 1064.

SEC. 358. Qualifications of sureties—attorneys not accepted. The surety in every bond provided for or authorized by law must be a resident of this state, and worth double the sum to be secured beyond the amount of his debts, and have property liable to execution in this state equal to the sum to be secured, except as otherwise provided by law. Where there are two or more sureties in the same bond, they must in the aggregate have the qualification prescribed in this section. Attorneys at law shall not be accepted as sureties upon any official bonds provided for in this section. Whenever the board of supervisors of any county shall have knowledge that any attorney at law is surety upon any official bond, above referred to, it shall require said officer to forthwith file a new bond. But nothing herein shall exempt such person from any liability upon the bond signed by him. [33 G. A., ch. 24, § 1.] [C. '73, § 249; R. § 4126.]

SEC. 359. Affidavit of sureties—effect of—guaranty companies as sureties.

Affidavit by the surety is not essential to the validity of the appeal bond in justices' court. *Porter v. Western Union Tel. Co.*, 133–747, 111 N. W. 322.

SEC. 360. When guaranty company may be accepted as surety—premium—not applicable to criminal cases. Whenever any person who now or hereafter may be required or permitted to give a bond applies for the approval thereof, any officer or body who is now or shall hereafter be required to approve the sufficiency of such bond shall accept and approve the same, whenever its conditions are guaranteed by a company or corporation duly organized or incorporated under the laws of this state, or authorized to do business therein, and to guarantee the fidelity of persons holding positions of public or private trust, or secure any bond above referred to, and which company shall have the certificate of the auditor of state authorizing it to do business therein, as provided in chapter four of title nine of this code, and the premium for any such guaranty or surety company bond as defined in this section, may, by the approval of the court, be paid out of the trust funds in the hands of the party of whom the bond is required. The certificate of the auditor of state, to the effect that such company has complied with the requirements of said chapter and title and is authorized to do business in this state, shall be sufficient evidence to authorize the officer or body having the approval of such bond to accept and approve the same, but no such security shall be accepted on any bond for an amount in excess of ten per cent. of the paid up cash capital of such company or corporation[1] authorized to do business in the state and in no

case to exceed ten per cent. of the capital of the reinsuring company and provided that a certificate of such reinsurance shall be furnished to the insured, but nothing herein contained shall apply to bonds in criminal cases. [34 G. A., ch. 18, § 1; 33 G. A., ch. 25, § 1.] [21 G. A., ch. 157, §§ 1, 5.]

[1]The records of the 34 G. A. indicate an intent to insert at this place "unless the excess shall be reinsured in some other good and reliable company," but said clause was left out of H. F. 506, ch. 18, 34 G. A., as finally passed and enrolled. The amendment, "authorized to do business in the state and in no case to exceed ten per cent. of the capital of the reinsuring company and provided that a certificate of such reinsurance shall be furnished to the insured," could not be inserted at the place directed by § 1, of ch. 18, 34 G. A. EDITOR.]

SEC. 364. **Investments—in what to be made.** That section three hundred sixty-four of the code be and the same is hereby repealed and the following enacted in lieu thereof:

"Where investments[1] of funds are to be made, including those to be made by executors, administrators, trustees and guardians, and no mode of investment is pointed out by statute, they may be made in the stocks or bonds of this state, or of those of the United States, or in bond or mortgage upon real property of the clear, unincumbered value of twice the investment or under order of court in bonds issued by or under the direction of cities, towns, counties, school or drainage districts of this state." [35 G. A., ch. 38, § 1.] [C. '73, § 251; R. § 4115; C. '51, § 2507.]

[1]"investment" in enrolled bill. EDITOR.]

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

SEC. 371. **Duty and liability of clerk as to deposits.** The clerk of the district court with whom any deposit of funds, moneys or securities shall be made, as provided by any law or an order of court, shall enter in a book, to be provided and kept for that purpose, the amount of such deposit, the character thereof, the date of its deposit, from whom received, from what source derived, to whom due or to become due, if known. He shall be liable upon his bond for all such funds, moneys or securities which may be

deposited with him, and shall make complete verified statements thereof to the board of supervisors at the January and June sessions each year. If the funds, moneys or securities so deposited with the clerk shall not be paid to the person or persons to whom the same is due, or to become due, within six months from the date of its deposit, the clerk shall then, unless otherwise ordered by the court or judge, deposit such funds, moneys or securities with the county treasurer for the use of the county wherein such appointment was made, taking the treasurer's receipt therefor, countersigned by the county auditor, who shall thereupon charge upon the books of his office and against the treasurer the amount named in such receipts. [28 G. A., ch. 14, § 1; 22 G. A., ch. 41, § 2.]

CHAPTER 13.

OF NOTARIES PUBLIC.

SECTION **373. Appointment—commissions expire—notice.** That section three hundred seventy-three of the code be repealed and the following enacted in lieu thereof:

"The governor may appoint and commission one or more notaries public in each county and may at any time revoke such appointment. The commission of all notaries public heretofore or hereafter issued prior to the fourth day of July, A. D. nineteen hundred and nine, shall expire on that day, and commissions subsequently issued shall be for no longer period than three years, and all such commissions shall expire on the fourth day of July in the same year. The governor shall, on or before the first day of May, A. D. nineteen hundred and nine, and every three years thereafter, notify each notary when his commission will expire, sending such notice by mail and accompanying the notice with a blank application for reappointment and a blank bond." [32 G. A., ch. 13, § 1; C. '73, § 258; R. § 195; C. '51, § 78.]

A notary public acting for a bank which holds a draft for collection, in presenting the draft is not the mere agent of the bank, but is a public officer for whose negligence the bank will not be liable. It makes no difference that the notary is also an employe of the bank. *First Nat. Bank v. German Bank*, 107-543, 78 N. W. 195.

The court takes judicial notice that a person whose name appears to the jurat was a notary public in and for the county named therein, and it presumes that he acted within the county of his jurisdiction. *Black v. Minneapolis & St. L. R. Co.*, 122-32, 96 N. W. 984.

SEC. **374. Conditions.** That section three hundred seventy-four of the code be repealed and the following enacted in lieu thereof:

"Before any such commission is delivered to the person appointed, he shall:

1. Procure a seal on which shall be engraved the words 'Notarial Seal' and 'Iowa,' with his surname at length and at least the initials of his christian name;

2. Execute a bond to the state of Iowa in the sum of five hundred dollars conditioned for the true and faithful execution of the duties of his office, which bond, when secured by personal surety, shall be approved by the clerk of the district court of the county of his residence; all other bonds shall be approved by the governor;

3. Write on said bond, or a paper attached thereto, his signature and place thereon a distinct impression of official seal;

4. File such bond with attached papers, if any, in the office of the governor;

5. Remit to the governor the fee required by law.

When the governor is satisfied that the foregoing requirements have been fully complied with, he shall execute and deliver a commission to the person appointed." [32 G. A., ch. 13, § 2; C. '73, § 259; R. §§ 197, 200, 207-9; C. '51, §§ 80, 83.]

One who is interested in the transaction or proceeding with reference to which an affidavit is taken cannot as notary take and certify such affidavit. *Empire R. E. & M. Co. v. Beechley*, 137–7, 114 N. W. 556.

SEC. 375. **Certificate of appointment filed with clerk.** That section three hundred seventy-five of the code be repealed and the following enacted in lieu thereof:

"When the governor delivers a commission to the person appointed, he or his secretary shall make a certificate of such appointment and forward the same to the clerk of the district court of the proper county, who shall file and preserve the same in his office, and it shall be deemed sufficient evidence to enable such clerk to certify that the person so commissioned is a notary public during the time such commission is in force." [32 G. A., ch. 13, § 3; 22 G. A., ch. 100; C. '73, § 260.]

SEC. 376. **Revocation—notice.** That section three hundred seventy-six of the code be repealed and the following enacted in lieu thereof:

"Should the commission of any person appointed notary public be revoked by the governor, he shall immediately notify such person and also the clerk of the district court of the proper county, through the mail." [32 G. A., ch. 13, § 4; C. '73, § 261.]

SEC. 377. **Powers.** Each notary is invested with the powers and shall perform the duties which pertain to that office by the custom and law of merchants within the county of his appointment or in any adjoining county in which he has filed in the office of the clerk of the district court a certified copy of his certificate of appointment. [34 G. A., ch. 19, § 1.] [C. '73, § 262; R. § 196; C. '51, § 79.]

[Acts of notary, how authenticated, see notes to code § 374.]

SEC. 378. **Record to be kept.**

The requirement as to keeping a record of notices sent is for the purpose of perpetuating proof of the notice, as well as of the demand and protest. *First Nat. Bank v. German Bank*, 107–543, 78 N. W. 195.

CHAPTER 15.

OF THE ADMINISTRATION OF OATHS.

SECTION 393. **Who may administer.**

The jurat to a statement for confession of judgment is sufficient if it show that such statement was subscribed and sworn to without reciting the name of the person subscribing and swearing to the jurat. It will be presumed that it was sworn to by the person whose name is affixed thereto. *Briggs v. Yetzer*, 103–342, 72 N. W. 647.

An affidavit is a written declaration under oath signed by the affiant and where the declaration is not signed, a jurat showing that it is sworn to is not sufficient. *Dyer v. Des Moines Ins. Co.*, 103–524, 72 N. W. 681.

A deputy clerk has power to administer oaths. *Wheelock v. Hull*, 124–752, 100 N. W. 863.

The court will take judicial notice of the fact that the clerk of the court has authority to administer oaths in proceedings before the court. *State v. Harter*, 131–199, 108 N. W. 232.

Although the jurat attached to a verified pleading does not disclose the county where the oath was administered it will be presumed it was in the proper county. *Turner v. Loomis*, 146–655, 125 N. W. 662.

TITLE IV.

OF COUNTY AND TOWNSHIP GOVERNMENT.

CHAPTER 1.

OF COUNTIES.

SECTION 394. Body corporate.

Aside from statutory provision, a county would be a quasi corporation, and not a municipal corporation. *Hanson v. Cresco*, 132–533, 109 N. W. 1109.

A county is a corporate person which can speak and act only through its appropriate officers and agents. *State v. McKinney*, 130–370, 106 N. W. 931.

A county has no such general financial interest in the expenses of the courts as to authorize it to interfere by certiorari to test the validity of the order of a judge declaring the jury lists illegal. *Polk County v. District Court*, 133–710, 110 N. W. 1054.

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

SEC. 396. Relocation of county seat.

The board of supervisors cannot change location of courthouse without submitting question to vote. *Way v. Fox*, 109–340, 80 N. W. 405.

SEC. 398. Remonstrance.

A remonstrance may properly be circulated and signed while the petition for relocation is being likewise circulated and before it is presented to the board of supervisors. *Willing v. Rye*, 123–471, 99 N. W. 158.

Parties who have signed a remonstrance cannot withdraw their names therefrom after it has been presented and before the board has acted. *Ibid.*

SEC. 399. Notice of hearing. Upon the filing of such petition, sixty days' notice thereof and of the date of hearing shall be given by the auditor by publishing, once each week, for three consecutive weeks in a newspaper, if there be one printed in the county; if not, then by posting the same in every township in the county, and on the door of the courthouse therein. [31 G. A., ch. 9, § 12; C. '73, § 284.]

SEC. 400. Hearing—notice of election—when established forty years. Upon the hearing of such petition and remonstrance, if no objections are filed to either, the board shall proceed to determine whether the petition has been signed by one half of all the legal voters in the county as shown by the last census, either state or federal, after deducting therefrom all names appearing on the remonstrance which also appear on the petition, and also to determine whether more legal voters have signed the

petition than have signed the remonstrance. If the requisite notice has been given, and the board shall find that one half of all the legal voters, after making said deduction, have signed said petition, and that said one half exceeds the number that have signed the remonstrance, the board shall order that, at the next general election, a vote shall be taken between said place and the existing county seat, and shall require a constable of each township in the county to post notices of such order in three public places in such township, at least fifty days before said election, and shall also publish a notice of such election in some newspaper, if there be one published in the county, once each week, for four consecutive weeks, the last publication to be at least twenty days before said election; but if objections are made, either as to petition or remonstrance, the board shall inquire into and hear additional evidence with reference to the fact as to whether the names appearing on either petition or remonstrance were the names of legal voters at the time they were placed on the petition or remonstrance, and whether the signatures are genuine; provided, however, where a county seat has been located continuously in one place for forty years or more, no order shall be made by the board that a vote shall be taken on the removal of such county seat unless one half of all legal voters of said county, according to the last state or federal census, have signed the petition, after deducting therefrom all the names that appear on both the petition and the remonstrance, and all other names not properly on the petition, and all names on said petition not placed thereon within sixty days next preceding the filing of the same shall be stricken therefrom; and provided further that the provisions hereof shall not be held to apply where the proposition is to relocate a county seat within the corporate limits of a city or town, where one is already located; and provided further, that the provisions hereof shall not apply when the distance between the limits of the proposed county seat and the limits of the then existing county seat does not exceed one mile. [34 G. A., ch. 20, § 1.] [31 G. A., ch. 9, § 13; 25 G. A., ch. 10, § 4; C. '73, § 285.]

SEC. 402. **Removal of records—requisite vote.** If a majority of all the votes cast be in favor of the proposition, the board of supervisors shall make a record thereof, and declare the town named therein to be the county seat of said county, and shall remove the records and documents thereto as early as practicable thereafter; provided, however, that where a county seat has been located continuously in one place for forty years or more two thirds of all the votes cast must be in favor of the proposition to remove said county seat before the board shall make a record thereof and declare the county seat removed; and in the absence of said two-thirds vote in favor of such proposition there shall be no removal; and provided further that the provisions hereof shall not be held to apply where the proposition is to relocate a county seat within the corporate limits of a city or town, where one is already located; and provided further, that the provisions hereof shall not apply when the distance between the limits of the proposed county seat and the limits of the then existing county seat does not exceed one mile. [34 G. A., ch. 20, § 2.] [C. '73, § 287.]

SEC. 403. **County bonds—form of.** Whenever the outstanding indebtedness of any county on the first day of January, April, June or September in any year exceeds the sum of five thousand dollars, the board of supervisors, by a two-thirds vote of all its members, may fund or refund the same, and issue the bonds of the county therefor in sums not less than one hundred dollars nor more than one thousand dollars each, payable at a time stated, not more than twenty years from their date. In counties con-

taining a city or cities of the first class, the indebtedness incurred in the making and repairing of the bridges may be refunded whenever such outstanding indebtedness equals or exceeds the sum of five thousand dollars, the tax to pay such bonds and interest to be levied under the provisions of section four hundred and six of the code, but only on the assessable property in the county outside of the limits of said city or cities of the first class. Said bonds shall bear interest not exceeding six per cent. per annum, payable semiannually, and be substantially in the following form, but subject to changes that will conform them to the the resolution of the said board, to wit:

No..... ....., Iowa, ...

The county of....., in the state of Iowa, for value received, promises to pay to bearer.....dollars, lawful money of the United States of America, on....., with interest on said sum from the date hereof until paid at the rate of.....per cent. per annum, payable..... annually on the first days of.....and.....in each year, on presentation and surrender of the interest coupons hereto attached. Both principal and interest payable at.....

This bond is issued by the board of supervisors of said county pursuant to the provisions of section four hundred and three, chapter one, title four of the code of Iowa, and in conformity to a resolution of said board duly passed.

And it is hereby certified and recited that all acts, conditions and things required by the laws and constitution of the state of Iowa to be done precedent to and in the issue of this bond have been properly done, happened and been performed in regular and due form, as required by law, and that the total indebtedness of said county, including this bond, does not exceed the constitutional or statutory limitations.

In testimony whereof, said county, by its board of supervisors, has caused this bond to be signed by the chairman of the board and attested by the auditor, with the county seal attached, this.....day of.....

.....
Chairman Board of Supervisors.

Attest:

.....
County Auditor, ...County, Iowa.

(Form of Coupon.)

The treasurer of.....county, Iowa, will pay to bearer..... dollars, on....., at....., for.....annual interest on its.....bond, dated.....

No..... .....
County Auditor.

[30 G. A., chs. 15, 16; 26 G. A., ch. 76; 25 G. A., chs. 54, 55, 56, 57; 24 G. A., ch. 17; 22 G. A., ch. 91; 21 G. A., chs. 14, 22; 20 G. A., chs. 80, 175; 19 G. A., ch. 147; 18 G. A., ch. 183; 17 G. A., chs. 58, 154; 16 G. A., ch. 125; 15 G. A., ch. 9; C. '73, § 289.]

Where funding bonds have been issued to cover indebtedness for bridges erected outside the limits of a city of the first class, they are to be paid by taxes levied on the property in the county outside of the limits of such city. *Slutts v. Dana*, 138-244, 115 N. W. 1115.

SEC. 404. **Negotiation of—duties of treasurer.** Whenever bonds issued under this chapter shall be executed, numbered consecutively, and sealed, they shall be delivered to the county treasurer and his receipt taken therefor, and he shall stand charged on his official bond with all bonds

delivered to him and the proceeds thereof, and he shall sell the same, or exchange them, on the best available terms, for any legal indebtedness of the county outstanding on the first day of January, April, June, or September next preceding the resolution of the board authorizing their issue, but in neither case for a less sum than the face value of the bonds and all interest accrued on them at the date of such sale or exchange. And if any portion of said bonds are sold for money, the proceeds thereof shall be applied exclusively for the payment of liabilities existing against the county at and before the date above named. When they are exchanged for warrants and other legal evidences of county indebtedness, the treasurer shall at once proceed to cancel such evidences of indebtedness by indorsing on the face thereof the amount for which they were received, the word "canceled" and the date of cancellation. He shall also keep a record of bonds sold or exchanged by him by number, date of sale, amount, date of maturity, and the name and post-office address of purchasers, and, if exchanged, what evidences of indebtedness were received therefor, which record shall be open at all times for inspection by the public. Whenever the holder of any bond shall sell or transfer it, the purchaser shall notify the treasurer of such purchase, giving at the same time the number of the bond transferred and his post-office address, and every such transfer shall be noted on the records. The treasurer shall also report under oath to the board, at each regular session, a statement of all bonds sold or exchanged by him since the preceding report, and the date of such sale or exchange; and, when exchanged, a list or description of the county indebtedness exchanged therefor, and the amount of accrued interest received by him on such sale or exchange, which latter sum shall be charged to him as money received on bond fund, and so entered by him on his books; but such bonds shall not be exchanged for any indebtedness of the county except by the approval of the board of supervisors of said county. [33 G. A., ch. 27, § 1.] [26 G. A., ch. 76; 25 G. A., chs. 54, 55, 56; 22 G. A., ch. 91; 21 G. A., ch. 22; 20 G. A., ch. 80; 19 G. A., ch. 147; 18 G. A., ch. 183; 17 G. A., ch. 154; 17 G. A., ch. 58, § 2; 16 G. A., ch. 125, § 1; 15 G. A., ch. 9; C. '73, § 290.]

SEC. **406. Levy to pay interest and principal.**

Where funding bonds have been issued to cover indebtedness for the erection of bridges outside of the limits of a city of the first class the levy for the payment of such bonds is to be made on the property in the county outside of such city limits. *Slutts v. Dana*, 138–244, 115 N. W. 1115.

SEC. **407. Redemption — notice — interest stopped — transfer of funds.** Whenever the amount in the hands of the treasurer belonging to the bond fund, after setting aside the sum required to pay interest maturing before the next levy, is sufficient to redeem one or more bonds, which by their terms are subject to redemption, he shall notify the owner of such bond or bonds, in the manner hereinbefore prescribed, that he is prepared to pay the same, with all the interest accrued thereon. If not presented for payment or redemption within thirty days after the date of such notice, the interest on such bond shall cease, and the amount due thereon shall be set aside for its payment whenever presented. All redemptions shall be made in the order of their numbers. If after the payment of all bonds and interests provided for in section four hundred and three of the supplement to the code, 1907, there remains any money in said bond fund, the board of supervisors may by resolution transfer said funds to the particular fund or funds on account of which the indebtedness arose for which said bonds were issued. [34 G. A., ch. 21, § 1.] [27 G. A., ch. 15, § 1; 17 G. A., ch. 58, § 4; C. '73, § 292.]

SEC. **409-a. Public hospital—proceedings for establishment of.** Any county may establish a public hospital in the following manner: Whenever the board of supervisors of any county shall be presented with a petition signed by two hundred resident freeholders of such county, one hundred fifty of whom shall not be residents of the city, town, or village where it is proposed to locate such public hospital, asking that an annual tax may be levied for the establishment and maintenance of a public hospital at a place in the county named therein, and shall specify in their petition the maximum amount of money proposed to be expended in purchasing or building said hospital, such board of supervisors shall submit the question to the qualified electors of the county at the next general election to be held in the county, or at a special election called for that purpose, first giving ninety days' notice thereof in one or more newspapers published in the county, if any be published therein, and by posting such notice, written or printed, in each township of the county, which notice shall include the text of the petition and state the amount of tax to be levied upon the assessed property of the said county, which tax shall not exceed two mills on the dollar, for a period of time not exceeding twenty years and be for the issue of county bonds to provide funds for the purchase of a site or sites and the erection thereon of a public hospital, and hospital buildings, and for the support of same; which said election shall be held at the usual places in such county for electing county officers, the vote to be canvassed in the same manner as that for county officers. [33 G. A., ch. 26, § 1.]

SEC. **409-b. Question submitted—hospital fund.** The board of supervisors of such county shall submit to the qualified electors thereof, at a regular or special election, the question whether there shall be levied upon the assessed property of such county a tax of —— mills on the dollar for the purchase of real estate for hospital purposes, for the construction of hospital buildings, and for maintaining same, or for either or all of such purposes. The ballots to be used at any election at which the hospital question is submitted, shall be printed with a statement substantially as follows:

☐ Yes For a —— mill tax for a bond issue for a public
☐ No hospital and for maintenance of same.

If a majority of the votes cast at such election on the proposition so submitted shall be in favor of a —— mill tax for a bond issue for a public hospital and for maintenance of same, the board of supervisors shall levy the tax so authorized, which shall be collected in the same manner as other taxes are collected and credited to the "hospital fund," and shall be paid out on the order of the hospital trustees for the purposes authorized by this act and for no other purposes whatever. [33 G. A., ch. 26, § 2.]

SEC. **409-c. Board of hospital trustees—term.** Should a majority of all the votes cast upon the question be in favor of establishing such county public hospital, the board of supervisors shall proceed at once to appoint seven trustees chosen from the citizens at large with reference to their fitness for such office, three of whom may be women, all residents of the county, not more than four of said trustees to be residents of the city, town, or village in which said hospital is to be located, who shall constitute a board of trustees for said public hospital. The said trustees shall hold their offices until the next following general election, when seven hospital trustees shall be elected and hold their offices, two for two years, two for four years, three for six years, and who shall by lot determine their respective terms. At each subsequent general election the offices of the trustees whose terms of office are about to expire shall be filled by the nomination

and election of hospital trustees in the same manner as other officers are elected, none of whom shall be practicing physicians. [33 G. A., ch. 26, § 3.]

SEC. 409-d. **Organization of board—treasurer—expenses of trustees—powers and duties.** The said trustees shall within ten days after their appointment or election qualify by taking the oath of civil officers and organize as a board of hospital trustees by the election of one of their number as chairman, one as secretary, and by the election of such other officer as they may deem necessary, but no bond shall be required of them. The county treasurer of the county in which such hospital is located shall be treasurer of the board of trustees. The treasurer shall receive and pay out all the moneys under the control of the said board, as ordered by it, but shall receive no compensation from such board. No trustee shall receive any compensation for his services performed, but he may receive reimbursement for any cash expenditures actually made for personal expenses incurred as such trustee, and an itemized statement of all such expenses and money paid out shall be made under oath by each of such trustees and filed with the secretary and allowed only by the affirmative vote of all the trustees present at a meeting of the board. The board of hospital trustees shall make and adopt such by-laws, rules and regulations for their own guidance and for the government of the hospital as may be deemed expedient for the economic and equitable conduct thereof, not inconsistent with this act and the ordinances of the city or town wherein such public hospital is located. They shall have the exclusive control of the expenditure of all moneys collected to the credit of the hospital fund, and of the purchase of site or sites, the purchase or construction of any hospital building or buildings, and of the supervision, care and custody of the grounds, rooms or buildings purchased, constructed, leased or set apart for that purpose; provided that all moneys received for such hospital shall be deposited in the treasury of the county to the credit of the hospital fund, and paid out only upon warrants drawn by the auditor of said county upon the properly authenticated vouchers of the hospital board. Said board of hospital trustees shall have power to appoint a suitable superintendent or matron, or both, and necessary assistants and fix their compensation, and shall also have power to remove such appointees; and shall in general carry out the spirit and intent of this act in establishing and maintaining a county public hospital with equal rights to all and special privileges to none. Such board of hospital trustees shall hold meetings at least once each month, shall keep a complete record of all its proceedings; and four members of said board shall constitute a quorum for the transaction of business. One of said trustees shall visit and examine said hospital at least twice each month and the board shall during the first week in January of each year file with the board of supervisors of said county a report of their proceedings with reference to such hospital and a statement of all receipts and expenditures during the year; and shall at such time certify the amount necessary to maintain and improve said hospital for the ensuing year. No trustee shall have a personal pecuniary interest either directly or indirectly in the purchase of any supplies for said hospital, unless the same are purchased by competitive bidding. [33 G. A., ch. 26, § 4.]

SEC. 409-e. **Vacancies—how filled.** Vacancies in the board of trustees occasioned by removals, resignations or otherwise shall be reported to the board of supervisors and be filled in like manner as original appointments, appointees to hold office until the next following general election, when such vacancy shall be filled by election in the usual manner. [33 G. A., ch. 26, § 5.]

SEC. **409-f. Hospital bonds.** Whenever any county in this state shall have provided for the appointment and election of hospital trustees and has voted a tax for a term not exceeding twenty years for hospital purposes, as authorized by law, the said county may issue bonds in anticipation of the collection of such tax in such sums and amounts as the board of hospital trustees shall certify to the board of supervisors of said county to be necessary for the purposes contemplated by such tax, but such bonds in the aggregate shall not exceed the amount which might be realized by said tax based on the amount which may be yielded on the property valuation of the year in which the tax is voted, and such bonds shall mature in twenty years from date and shall be in sums of not less than one hundred dollars nor more than one thousand dollars, drawing interest at a rate not exceeding five per cent. per annum, payable annually or semiannually; said bonds shall be payable at pleasure of county after five years, and each of said bonds shall provide that it is subject to this condition and shall not be sold for less than par, and shall be substantially in the form provided for county bonds, but subject to changes that will conform them to the provisions of this act, and be numbered consecutively and redeemable in the order of their issuance. For the negotiation of said bonds, their constitutionality, levy to pay interest and principal, and redemption, sections four hundred and three, four hundred and four to four hundred and nine, inclusive, of chapter one, title four of the code shall apply. Provided the total amount of bonds to be issued shall not exceed one hundred thousand dollars. [33 G. A., ch. 26, § 6.]

SEC. **409-g. Condemnation proceedings for hospital sites.** If the board of hospital trustees and the owners of any property desired by them for hospital purposes cannot agree as to the price to be paid therefor, they shall report the facts to the board of supervisors and condemnation proceedings shall be instituted by the board of supervisors and prosecuted in the name of the county wherein such public hospital is to be located, by the county attorney for such county, under the provisions of chapter four of title ten of the code. [33 G. A., ch. 26, § 7.]

SEC. **409-h. Plans and specifications—bids advertised for.** No hospital buildings shall be erected or constructed until the plans and specifications have been made therefor and adopted by the board of hospital trustees, and bids advertised for according to law for other county public buildings. [33 G. A., ch. 26, § 8.]

SEC. **409-i. Municipal jurisdiction.** The jurisdiction of the city, town, or village in or near which such public hospital is located shall extend over all lands used for hospital purposes outside the corporate limits if so located, and all ordinances of such cities and towns shall be in full force and effect in and over the territory occupied by such public hospital. [33 G. A., ch. 26, § 9.]

SEC. **409-j. Annual levy for improvement and maintenance.** That section ten of chapter twenty-six of the acts of the thirty-third general assembly, be and the same is hereby repealed, and the following is enacted in lieu thereof:

"In counties exercising the rights conferred by this[1] act, the board of trustees of said hospital shall, at its regular August meeting each year, determine and fix the amount necessary for the improvement and maintenance of any such public hospital so established, during the ensuing year, in addition to the tax for the hospital fund hereinbefore provided for, and the president and secretary of the board shall certify the same to the county auditor of such county before September first of each year; and the board

of supervisors of said county shall, at its September session following, levy a sufficient tax upon the assessed value of the taxable property in the county as will produce said sum for the ensuing year, but said levy shall not exceed one mill on such assessed valuation." [35 G. A., ch. 39, § 1; 33 G. A., ch. 26, § 10.]

[1"the" in enrolled bill. EDITOR.]

SEC. **409-j1. Acts in conflict repealed.** All acts and parts of acts in conflict with this act and provision are hereby repealed. [35 G. A., ch. 39, § 2.]

SEC. **409-k. Who entitled to hospital benefits—compensation—nonresidents.** Every hospital established under this act shall be for the benefit of the inhabitants of such county and of any person falling sick or being injured or maimed within its limits; but every such inhabitant or person who is not a pauper shall pay to such board of hospital trustees or such officer as it shall designate for such county public hospital, a reasonable compensation for occupancy, nursing, care, medicine, or attendance, according to the rules and regulations prescribed by said board, such hospital always being subject to such reasonable rules and regulations as said board may adopt in order to render the use of said hospital of the greatest benefit to the greatest number; and said board may exclude from the use of such hospital any and all inhabitants and persons who shall wilfully violate such rules and regulations. And said board may extend the privileges and use of such hospital to persons residing outside of such county, upon such terms and conditions as said board may from time to time by its rules and regulations prescribe. [33 G. A., ch. 26, § 11.]

SEC. **409-l. Exclusive control by trustees.** When such hospital is established the physicians, nurses, attendants, the persons sick therein and all persons approaching or coming within the limits of same, and all furniture and other articles used or brought there shall be subject to such rules and regulations as said board may prescribe. [33 G. A., ch. 26, § 12.]

SEC. **409-m. Donations to hospital—title vested in county.** Any person or persons, firm, organization, corporation or society desiring to make donations of money, personal property or real estate for the benefit of such hospital, shall have the right to vest title of the money or real estate so donated in said county, to be controlled, when accepted, by the board of hospital trustees according to the terms of the deed, gift, devise, or bequest, of such property. [33 G. A., ch. 26, § 13.]

SEC. **409-n. Medical practitioners—no discrimination—right of patient to employ.** In the management of such public hospital no discrimination shall be made against practitioners of any school of medicine recognized by the laws of Iowa, and all such legal practitioners shall have equal privileges in treating patients in said hospital. The patient shall have the absolute right to employ at his or her own expense his or her own physician and when acting for any patient in such hospital the physician employed by such patient shall have exclusive charge of the care and treatment of such patient, and nurses therein shall as to such patient be subject to the directions of such physician; subject always to such general rules and regulations as shall be established by the board of trustees under the provisions of this act. [33 G. A., ch. 26, § 14.]

SEC. **409-o. Training school for nurses.** The board of trustees of such county public hospital may establish and maintain in connection therewith and as a part of said public hospital a training school for nurses. [33 G. A., ch. 26, § 15.]

SEC. **409-p. Detention and examination of insane.** The said board of trustees shall at all times provide a suitable room for the detention and examination of all persons who are brought before the commissioners of insanity for such county, provided that such public hospital is located at the county seat. [33 G. A., ch. 26, § 16.]

SEC. **409-q. Department for tuberculous persons—head nurse.** The board of trustees of said hospital are hereby authorized to provide, as a department of said public hospital, but not necessarily attached thereto, suitable accommodations and means for the care and treatment of persons suffering from tuberculosis, and to formulate such rules and regulations for the government of said persons, and for the protection from infection of other patients and of nurses and attendants in such public hospital as they may deem necessary; and it shall be the duty of all persons in charge of or employed at such hospitals, or residents thereof, to faithfully obey and comply with any and all such rules and regulations. Said board of hospital trustees shall, if practicable, employ as head nurse to be placed in charge of said public tuberculosis sanatorium one who has had experience in the management and care of tuberculous persons. [33 G. A., ch. 26, § 17.]

SEC. **409-r. Compensation for treatment—subjects for charity.** The board of hospital trustees shall have power to determine whether or not patients presented at said public hospital for treatment are subjects for charity and shall fix such price for compensation for patients, other than those unable to assist themselves, as the said board deems proper, the receipts therefor to be paid to the treasurer of said county and credited by him to the hospital fund. [33 G. A., ch. 26, § 18.]

SEC. **409-s. Indigent tuberculous patients—contracts with other hospitals.** The board of supervisors of any county, where no suitable provision has been made for the care of its indigent tuberculous residents, may contract with the board of hospital trustees of any public hospital for the care of such persons in the sanatorium department of said hospital, upon such reasonable terms as may be agreed upon. [33 G. A., ch. 26, § 19.]

SEC. **409-t. Care of charity patients in advanced stages of tuberculosis—expenditure limited.** That the board of supervisors of each county in this state is hereby authorized to provide for the separation and maintenance of persons financially unable to provide for themselves, who have no relatives liable for their support and who are suffering from pulmonary tuberculosis farther advanced than the incipient stages. Such provision may be made by constructing or otherwise securing and equipping suitable buildings and operating them, or by placing the persons designated in institutions designed and prepared to give them suitable care and treatment, and the board of supervisors may allow for the care and support of each patient in such institution a sum not exceeding fifteen dollars per week. Provided that in counties of fifteen thousand, or over, population, a sum not to exceed five thousand dollars, and in counties of less than fifteen thousand population a sum not to exceed two thousand dollars, may be appropriated for constructing, acquiring and equipping buildings without a vote of the qualified electors. The board of supervisors may submit the question of expending a greater amount than above specified to a vote of the people at any general election, and may for such purposes expend the amount by said vote authorized. [35 G. A., ch. 40, § 1.]

CHAPTER 2.

OF THE BOARD OF SUPERVISORS.

SECTION 410. **How constituted—number—how determined.** The board of supervisors in each county shall consist of three persons, except where the number may heretofore have been or hereafter be increased in the manner provided by this chapter. They shall be qualified electors, and be elected by the qualified voters of their respective counties, and shall hold their office for three years. The board of supervisors of any county may, and, when petitioned to do so by one fourth of the electors of said county, shall submit to the qualified voters of the county, at any regular election, one of the following propositions, as such board may elect in the absence of a petition, or as may be requested in said petition: "Shall the proposition to increase the number of supervisors to five be adopted?" or, "Shall the proposition to increase the number of supervisors to seven be adopted?" as the board shall elect in submitting the question. If the majority of the votes cast shall be for the proposition so submitted, then at the next ensuing election for a supervisor, the requisite additional supervisors shall be elected, whose terms of office shall be determined by lot, in such a manner that one half of the additional members shall hold their office for three years, and one half for two years. In any county where the number of supervisors has been increased to five or seven, the board of supervisors, on the petition of one fourth of the legal voters of the county, shall submit to the qualified voters of the county, at any regular election, one of the following propositions, as the same may be requested in such petition: "Shall the proposition to reduce the number of supervisors to five be adopted?" or, "Shall the proposition to reduce the number of supervisors to three be adopted?" If a majority of the votes cast shall be for the decrease, then the board of supervisors shall be reduced to the number indicated by such vote, and thereafter there shall be biennially elected the number requisite to keep the board full. [31 G. A., ch. 12, § 1; C. '73, §§ 294, 299.]

SEC. 411. **Election—term of office.** That section four hundred eleven of the code be and the same is hereby repealed, and the following enacted in lieu thereof:

"At the general election in the year nineteen hundred and six there shall be elected for a term of two years, members of the county board of supervisors to succeed those whose terms were extended one year by the biennial election amendment. At the general election in the year nineteen hundred and six, and biennially thereafter, there shall be elected members of the board of supervisors for a term of three years to succeed those whose terms of office will expire on the first Monday in January following said election; there shall also be elected members for a term of three years to succeed those whose terms will expire on the first Monday in January one year later than the aforesaid date. It shall be specified on the ballot when each shall begin his term of office. No member shall be elected who is a resident of the same township with either of the members holding over (but a member-elect may be a resident of the same township as the member he is elected to succeed), except that, in counties having five or seven supervisors, and having therein a township embracing an entire city of thirty-five thousand inhabitants or over, he may be a resident of the same township; and in no case shall there be more than two supervisors from such township." [31 G. A., ch. 12, § 2; C. '73, § 295.]

Whether elected by a district or the entire county, a member of the board acts for the county, and only as a district is a part of the county can the member elected from

such district be said to be a representative of such district. *In re Assessment of Farmers' L. & T. Co.*, 155–536, 136 N. W. 543.

SEC. 412. **Repeal—meetings.** That section four hundred twelve of the code be and the same is hereby repealed and the following enacted in lieu thereof:

"The members of the board of supervisors shall meet at the county seat of their respective counties on the second secular day in January and on the first Monday in April and June and the second Monday in September and November in each year, and shall hold such special meetings as are provided by law."[1] [33 G. A., ch. 28, § 1.] [32 G. A., ch. 14; C. '73, § 296.]

[1]The words struck out by ch. 28, 33 G. A. are not identical with those in the supplement of 1907 which have been eliminated from the section as above compiled. It seems manifest, however, that the intent of the said amendatory act has been complied with. EDITOR.]

SEC. 416. **Supervisor districts.** The board of supervisors may, at its regular meeting in January in any even-numbered year, divide its county by townships into a number of supervisor districts corresponding to the number of supervisors in such county; or, at such regular meeting, it may abolish such supervisor districts, and provide for electing supervisors for the county at large. [34 G. A., ch. 22, § 1.] [17 G. A., ch. 68; 15 G. A., ch. 39, § 1.]

This statutory provision has never been repealed expressly or by implication. The provisions of the primary election law are not inconsistent with its application with reference to the election of members of the board of supervisors. *Lahart v. Thompson*, 140-298, 118 N. W. 398.

A board of supervisors has power to divide the county into supervisor districts after the holding of a primary election and the nomination of supervisors; and where this has been done and prior thereto the nomination of a member of the board from the county at large was made, rather than for the district thereafter created, such nomination will not be treated as one for the district but a vacancy occurs to be filled by the proper authorities by a nomination for such district. *State v. Parker*, 147–69, 125 N. W. 856.

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

The canvassing of a statement of consent under the mulct liquor law, which is required to be at a regular meeting (code § 2450), may be made at an adjourned meeting provided for at a regular meeting. *Butterfield v. Treichler*, 113–328, 85 N. W. 19.

SEC. 422. **Powers specified.** The board of supervisors at any regular meeting shall have the following powers, to wit:

1. To appoint one of its number chairman in the absence of the regular chairman, and a clerk, in the absence of the auditor or his deputy;
2. To adjourn from time to time, as occasion shall require;
3. To make such orders concerning the corporate property of the county as it may deem expedient;
4. To examine and settle all accounts of the receipts and expenditures of the county, and to examine, settle and allow all claims against the county, unless otherwise provided for by law;
5. To build and keep in repair the necessary buildings for the use of the county and of the courts;
6. To cause the county buildings to be insured in the name of the county, or otherwise, for its benefit, and in case there are no county buildings, to provide suitable rooms for county purposes;
7. To set off, organize and change the boundaries of townships in the respective counties, designate and give names thereto, and define the place of holding the first election;

8. To grant licenses for keeping ferries in the respective counties, as provided by law;

9. To purchase, for the use of the county, any real estate necessary for the erection of buildings for county purposes; to remove the site of, or designate a new site for, any county buildings required to be at the county seat, when such site shall not be beyond the limits of the town, village or city at which the county seat is, at the time of such proposed change, located, and to permit any person, persons, or corporation to use any portion of the lands owned by the county for ornamental or art purposes, or for the erection of any monument or fountain under such restrictions and regulations as the board of supervisors may from time to time enact, provided that such use does not interfere with the use for which such real estate was originally acquired by the county;

10. To require any county officer to make a report, under oath, to it on any subject connected with the duties of his office, and to require any such officer to give such bonds, or additional bonds, as shall be reasonable or necessary for the faithful performance of his duty; any such officer who shall neglect or refuse to make such report or give such bonds within twenty days after being so required, may be removed from office by the board by a vote of a majority of the members elected thereto;

11. To represent the respective counties, and to have the care and management of the property and business thereof, in all cases where no other provision shall be made;

12. To manage and control the school fund of the respective counties as shall be provided by law;

13. To appoint commissioners to act with similar commissioners duly appointed in any other county or counties, and to authorize them to lay out, alter or discontinue any highway extending through their own and one or more other counties, subject to the ratification of the board;

14. To fix the compensation of all services of county and township officers not otherwise provided for by law, and to provide for the payment of the same;

15. To authorize the taking of a vote of the people for the relocation of the county seat, as provided by law;

16. To alter, vacate or discontinue any state or territorial highway within their respective counties;

17. To lay out, establish, alter or discontinue any county highway heretofore laid out, or hereafter to be laid through or within the county, as may be provided by law;

18. To provide for the erection of all bridges which may be necessary, and which the public convenience may require, within their respective counties, and to keep the same in repair, except as is otherwise provided by law;

19. To determine what bounties, in addition to those already provided by law, if any, shall be offered and paid by the county on the scalps of such wild animals taken and killed within the county as it may deem it expedient to exterminate, but no such bounty shall exceed five dollars;

20. To purchase for the use of the county any real estate necessary for the erection of buildings for the support of the poor of the county, and for a farm to be used in connection therewith, and make appropriations not exceeding three hundred dollars in any one year for the growing of experimental crops thereon under the direction of the board;

21. To have and exercise all the powers in relation to the poor given by law to the county authorities;

22. To make such rules and regulations, not inconsistent with law, as it may deem necessary for its own government, the transaction of business, and the preservation of order;

23. To purchase real estate for county fairs, the title of such real estate to be in the name of the county;

24. To employ a competent person who shall perform all of the duties now belonging to the office of county surveyor, and who may be employed by them for the purpose of making general specifications for the grading, repairing and building of roads, bridges and culverts, and to perform such other duties as the board of supervisors may determine;

25. To contract with any free public library in the county for the free use of the books thereof by the residents of the county outside of the cities and towns therein, as provided in section one[1] of this act, which contract when made shall supersede all contracts made by townships or school corporations, and to levy annually on the taxable property of the county outside of cities and towns a tax of not more than one mill on the dollar to be used exclusively for that purpose. [35 G. A., ch. 70, § 4; 34 G. A., ch. 24, § 2; 34 G. A., ch. 23, § 1.] [32 G. A., ch. 17, § 1; 32 G. A., ch. 15; 31 G. A., ch. 14, § 2; 31 G. A., ch. 13; 18 G. A., ch. 46; 16 G. A., ch. 80; C. '73, § 303; R. § 312.]

[1§ 729-a herein. EDITOR.]

[By § 2, ch. 14, of the 31 G. A., subdivision 22, of above section was changed to 23, and a new subdivision was supplied to take the place of 22. By § 1, ch. 16, 32 G. A., § 2, ch. 14, 31 G. A., was stricken out. § 1, ch. 17, 32 G. A., added a new subdivision as 24, but as subdivision 22 of 31 G. A. was stricken out the old numbering has been retained and subdivision 24 by 32 G. A. is given as 23. § 2, ch. 24 of the 34 G. A., added a paragraph to be numbered 24, as did also § 4, ch. 70, of the 35 G. A. The situation made it necessary to place the amendment of the 35 G. A. as paragraph 25. EDITOR.]

In general: The act of the individual members of the board of supervisors, even though concurred in by majority, is not binding upon the county. *Modern Steel Structural Co. v. Van Buren County*, 126–606, 102 N. W. 536.

The members of the board cannot bind the county by a contract signed by them individually. *Gunn v. Mahaska County*, 155–527, 136 N. W. 929.

The county is not liable for trespass or other torts committed by or under the order of its supervisors or other officers. *Wenck v. Carroll County*, 140–558, 118 N. W. 900.

Par. 4. Claims: The duty of the board of supervisors to audit and allow claims against the county cannot be delegated to any other person or officer and the board cannot, therefore, resolve in advance of the contracting of claims that they shall be paid by the county without further allowance. *Heath v. Albrook*, 123–559, 98 N. W. 619.

The board of supervisors has the authority to adjust with an officer any claim which the county may have for moneys irregularly drawn from the treasury, and to allow him as against such claim reasonable compensation for necessary assistance in his office procured and paid for by him notwithstanding irregularity in the method adopted at the time for securing from the county reimbursements for the amounts thus paid. *McCarty v. Eggert*, 154–28, 134 N. W. 426.

Par. 9. Purchase of real estate: The power to purchase real estate needed for the erection of buildings for county purposes carries with it as a necessary incident the power to create an indebtedness therefor, and to evidence the same by some form of nonnegotiable instrument, but held that under the provisions of code §§ 447, 448, the board had no authority to issue negotiable bonds for such indebtedness without compliance with the provisions of those sections. *Witter v. Board of Supervisors*, 112–380, 83 N. W. 1041.

Par. 11. General powers: The powers granted to or implied in a municipal or quasi corporation are only such as are necessary to make those expressly granted applicable; therefore it has no authority to execute a deed with covenants of warranty unless such authority is expressly given, and it will not be liable for breach of such a warranty. *Harrison v. Palo Alto County*, 104–383, 73 N. W. 872.

Nor will it be liable for failure of title to land conveyed by it at least where the nature of its title was known to the grantee. *Ibid.*

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

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

The care and management of the property and the business of the county is intrusted to the board and while the courts may inquire into a gross abuse of the power thus granted, they cannot substitute themselves for the board in determining as to the proper disposition of the property of the county. *Nelson v. Harrison County*, 126–436, 102 N. W. 197.

In an action to restrain the issuance of bonds on the allegation that warrants for which they were to be issued were illegal, held that the holders of warrants were necessarily parties. *Ibid.*

Boards of supervisors have the care and management of property belonging to the county, and should provide sidewalks in front of premises, in a city, belonging to the county and used for courthouse purposes, and the county is liable to special assessments for improvements on the streets abutting such premises. *Edwards & Walsh Const. Co. v. Jasper County*, 117–365, 90 N. W. 1006.

A county may employ agents other than the county attorney to prosecute claims for the county. *Galusha v. Wendt*, 114–597, 87 N. W. 512; *Disbrow v. Board of Supervisors*, 119–538, 93 N. W. 585; *Shinn v. Cunningham*, 120–383, 94 N. W. 941.

Par. 12. School fund: The board of supervisors has no power to provide for the payment of a percentage of fines to be collected which are to go to the school fund. *Gunn v. Mahaska County*, 155-527, 136 N. W. 929.

Par. 16. Highways: The power of establishing and vacating roads other than streets and alleys in municipalities is lodged in the board of supervisors and the power to vacate streets and alleys in the city council. *Chrisman v. Brandes*, 137–433, 112 N. W. 833.

Par. 18. Liability as to bridges: Where the traveler had the option of crossing the stream under the bridge and incurring the risk of going up a steep bank in doing so or to go upon the bridge along the approach which was not guarded by a railing, held that he was not guilty of contributory negligence in using the approach to the bridge, it not appearing that he had reason to anticipate any danger on the approach by reason of want of proper guarding rails. *Morgan v. Dallas County*, 103–57, 72 N. W. 304.

The contingency of horses becoming frightened on a bridge or the approach thereto and backing the vehicle to the side is one which should be foreseen and the danger thereof provided against by suitable barriers, and the county may be held liable for failure to provide a reasonable barrier as a protection against such danger. *Faulk v. Iowa County*, 103–442, 72 N. W. 757.

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

An approach to a bridge essential to enable persons on the highway to reach the main structure, and without which the main structure would be incomplete, constitutes a part of the bridge. *Eginoire v. Union County*, 112–558, 84 N. W. 758.

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

When two causes combine to produce an injury to a traveler upon a bridge both of which are in their nature proximate, the one being a culpable defect in the bridge and the other some occurrence for which neither is responsible, the municipality is liable, provided the injury would not have been sustained but for such defect. *Walrod v. Webster County*, 110–349, 81 N. W. 598.

Where the owner of a steam threshing machine runs it over a highway bridge without complying with the statutory provision requiring him to place planks under his engine (code § 1571), he may nevertheless recover damages resulting from defects in the bridge for which the county is liable, if his violation of the statute has not directly contributed to the injury. *Tackett v. Taylor County*, 123–149, 98 N. W. 730.

Under the provisions of code § 757, the city is liable for negligence in failing to keep in repair the bridges not coming within the description of county bridges. *Freeman v. Independence*, 123–1, 97 N. W. 1083.

One who makes use of a bridge after repair and removal of barricades is not charged with contributory negligence by knowledge that prior to such repair and barricading the bridge was in defective condition. *Jones v. Shelby County*, 124–551, 100 N. W. 520.

To avoid the use of a bridge which has been known to be defective the traveler is not bound to commit trespass on private property, the bridge being apparently open to public travel. *Ibid.*

Failure to use reasonable care in making repairs of a bridge which is known to the county authorities to be unsafe, renders the county liable for injuries resulting from its unsafe condition after such repair has been attempted and the county

will not be relieved by the action of its agents in reporting it as safe after inspection. *Schlensig v. Monona County*, 126–625, 102 N. W. 514.

The use of the county bridges for the passing of traction engines being well known, it is negligence on the part of the county to open for public use a bridge which is unsafe for the passage of such engines. *Ibid.*

The power to build and repair bridges carries with it corresponding duties, so that the county may be held liable for damages resulting from negligence in building or failing to repair, but there is no such obligation with reference to highways. *Wilson v. Wapello County*, 129–77, 105 N. W. 363.

Whatever may be the liability of a county for failure of the board of supervisors to maintain a county bridge in safe condition, the board cannot be compelled by mandamus, at the suit of a property owner, to build or restore a bridge which has become impassable, that being a matter of discretion with the board, to be exercised in view of the public interest. *Leonard v. Wakeman*, 120–140, 94 N. W. 281.

If a bridge stands for such a length of time that the natural processes of decay have weakened it to the point of danger, and the exercise of reasonable care in oversight and inspection will reveal such condition to the proper officers, the county cannot rely upon the want of notice as excusing it from the charge of negligence in not maintaining the bridge in safe condition. *Perry v. Clarke County*, 120–96, 94 N. W. 454.

The streets within a city or town plat pass under the control of the board of supervisors of the county when the corporate existence of the city or town is terminated. *Chrisman v. Brandes*, 137–433, 112 N. W. 833.

Failure to comply with code § 1571 does not defeat the right to recover for a defective bridge where a steam engine is hauled across such bridge by animal power. *Young v. Madison County*, 137–515, 115 N. W. 23.

An exception to the jurisdiction of the board of supervisors with regard to bridges is found in the provision of code § 758 giving cities of the first class full control of the bridge fund levied and collected within the city limits. *Slutts v. Dana*, 138–244, 115 N. W. 1115.

Any construction necessary to enable persons using a bridge to pass from it to the roadway at either end may be considered an approach which the county must keep in a reasonably safe condition. *Hubbard v. Montgomery County*, 140–520, 118 N. W. 912.

A member of the board of supervisors cannot bind the county by a statement made with reference to the condition of a bridge when at the time of making such statement he is not in the performance of any duty connected therewith or referring thereto. *Escher v. Carroll County*, 146–738, 125 N. W. 810.

Injury alleged to have resulted to plaintiff from defect in a county bridge held to be sufficiently shown under the evidence to be the proximate result of the defective bridge. *Williams v. Clarke County*, 148–746, 127 N. W. 1030.

The duty of reasonable inspection to discover and guard against the structure becoming weak by reason of rust and decay is imposed on the proper officers of the county which has undertaken to build and maintain the bridge. The duty of the county is not limited to making and repairing all defects to which its attention has been expressly called. *Brooks v. Van Buren County*, 155–282, 135 N. W. 1110.

In an action against the county to recover damages for injuries resulting from a defective bridge, the county may not be allowed to show that it followed its usual custom in repairing such bridge. *Sewing v. Harrison County*, 156–229, 136 N. W. 200.

Whether an approach to a bridge is a part of the bridge is generally a question for the jury. *Ibid.*

It is not proper to instruct the jury that it is the duty of the county to keep its bridges safe. Its duty is performed if it keeps them reasonably safe or uses ordinary and reasonable care in keeping them safe. *Escher v. Carroll County*, 141 N. W. 38.

Par. 21. Poor: The county acting through its board of supervisors being charged with the duty of relieving the necessities of destitute persons, a devise to the dependent poor of a specified county who are maintained wholly or in part by the county, and constituting the board of supervisors of said county trustees to receive and carry the trust into effect, is a charitable gift within the exception of the collateral inheritance tax. *In re Estate of Spangler*, 148–333, 127 N. W. 625.

SEC. 423. Expenditures for improvements—when vote necessary. The board of supervisors shall not order the erection of a courthouse, jail, county home or other building, or bridge, except as provided in section four hundred twenty-four of the code, when the probable cost will exceed five thousand dollars, nor the purchase of real estate for county purposes exceeding two thousand dollars in value, until a proposition therefor shall have been first submitted to the legal voters of the county, and voted for

by a majority of all persons voting for and against such proposition at a general or special election, notice of the same being given for thirty days previously, in a newspaper, if one be published in the county, and, if none be published therein, then by written notice posted in a public place in each township in the county. [33 G. A., ch. 29, § 1.] [29 G. A., ch. 21, § 1; 18 G. A., ch. 46; 16 G. A., ch. 80; C. '73, § 303; R. § 312.]

The limitation of the expense of erecting a courthouse, without submission to vote, does not apply to expenditure of money donated by private citizens. *Way v. Fox*, 109–340, 80 N. W. 405.

While an alteration in the contract for the construction of a courthouse which involves an expenditure beyond the amount voted for that purpose may be invalid, warrants for the construction cannot be enjoined unless it appears that such warrants represent unlawful expenditure. *Zerwekh v. Thornburg*, 123–254, 98 N. W. 769.

The board may expend money for the furnishing of a courthouse without vote of the electors notwithstanding a provision in a proposition submitted for the erection of the courthouse that no additional appropriation or expenditure for furnishing will be made. There is no authority in the statute for submitting a proposition to limit the power of expenditure for proper purposes. *Ibid.*

SEC. 424. Appropriations for county bridges—limitations.

Where two adjoining counties having equal interests in maintaining a boundary line road and the bridges thereon have proceeded, each relying on the action of the other to order a construction or repair of the common way, and each has bound itself by making an appropriation of money therefor or by taking any action obligating itself to make such appropriation for the common benefit, neither is permitted without the consent of the other to withdraw from the enterprise and thereby prevent its accomplishment, or cast the entire burden of such accomplishment on the other. Therefore, the board of supervisors of one of the counties committed to such a common enterprise cannot release such county from its obligation to contribute by rescinding the resolution by which the concurrent action of the two counties was initiated. *Bremer County v. Walstead*, 130–164, 106 N. W. 352.

SEC. **424-a. Bridges across boundary streams—rights of county to construct.** Counties bordering upon streams of water which form the boundary lines of this state may construct and maintain foot and wagon bridges across any such stream the same as if such stream were wholly within the limits of the county constructing the same; any such county within which such bridge may be desired may unite in the construction and maintenance of such bridge with any adjoining state, or any county, city or other municipal subdivision within such state into which such bridge may extend; provided, that in such construction and maintenance the rights of adjoining states shall in no wise be infringed. [34 G. A., ch. 28, § 1.]

SEC. **424-b. Submission to electors on petition—notice—levy of tax—bonds.** Whenever ten per cent. of the legal voters of any county named in section one[1] of this bill, as shown by the returns of the last general election, shall petition the board of supervisors of such county to submit to the voters of the county at a general election the question whether such county shall be authorized to construct a bridge extending from such county across the state boundary river into the adjoining state, and shall also include the amount to be expended in the construction of such bridge, it shall be the duty of the board of supervisors to submit such question to the voters of such county at the first general election occurring not less than sixty days after the filing of such petition. Notice of the submission of such question shall be given by publishing the same for four consecutive weeks in at least three newspapers of general circulation published in such county, the last of which publications shall be at least three days and not more than ten days before the holding of such election. If a majority of those voting upon the said proposition shall vote affirmatively upon the

same the board of supervisors may levy from year to year a tax, not to exceed one mill, upon all the taxable property in the county to erect said bridge; and it may also issue the bonds of the county in the manner provided by the provisions of title four chapter one of the code, except that said issue of bonds may be spread as to maturities over a period of twenty years; such issue shall not, however, exceed the amount authorized to be expended in the construction of such bridge. The provisions of section four hundred and six of the code shall apply to such issue of bonds and the levies for the payment of such bonds and interest shall be made under its provisions. [34 G. A., ch. 28, § 2.]

[1§ 424-a herein. EDITOR.]

SEC. **424-c. Agreement as to construction and cost—shall advertise for bids.** In the event that the construction of such bridge shall be authorized as hereinbefore provided, the board of supervisors may unite with the adjoining state or any county, city, town or other municipal division thereof in an agreement for the construction of such bridge, and such agreement may fix the particular portion or part which each of the contracting parties shall erect or maintain; or it may provide the particular percentage of the construction or maintenance of such bridge which each shall pay. The contract for the construction of such bridge shall be let to the lowest responsible bidder after bids have been invited by publication for four consecutive weeks in two or more papers of general circulation, and the board of supervisors shall have the right to reject any or all bids and readvertise for bids. The county shall not, however, be liable in any event for any part of the cost of construction of such bridge beyond the part or proportion that it has contracted with the adjoining state or municipality to bear in the construction of the same. [34 G. A., ch. 28, § 3.]

SEC. **424-d. Liability for maintenance.** The county shall not be liable for negligence in the maintenance of such bridge except for that part which it shall undertake to exclusively maintain and where there is a contract for joint maintenance of the entire structure, it shall only be liable for that part or portion which is within the boundary lines of the state of Iowa. [34 G. A., ch. 28, § 4.]

SEC. **424-e. Leases for public utilities.** The board of supervisors may lease to any street railway the right to cross said bridge with its line of railway upon such terms and conditions as may be authorized by the board of supervisors and the governing body of the adjoining state or municipality interested in such bridge, but no discrimination shall be made as between street railways and all shall be permitted to use the tracks constructed upon such bridge, provided that any line desiring to use the tracks thereon shall bear its reasonable share of the cost of construction and maintenance of such tracks. Like privileges may be leased to telegraph, telephone and electric power companies for the construction of their lines of wire across such bridges, except that a joint use of said wires shall not be exacted, and provided that any rights granted under the provisions of this section to use this bridge shall not in any way impair or abridge the use thereof by the public. [34 G. A., ch. 28, § 5.]

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

This section does not require that the road be constructed on the immediate bank of the stream, but a road within a reasonable distance of the stream is within its provisions; and the statute contemplates the abandonment of the highway in place of which a new one is established under this section. *Stahr v. Carter*, 116–380, 90 N. W. 64.

SEC. 430. **Dependent soldiers' and sailors' tax—erection of monuments.** A tax of one mill upon the dollar, or such less sum as may be needed, may be levied by the board of supervisors upon all taxable property within the county, to be collected at the same time and in the same manner as other taxes, to create a fund for the relief of and to pay the funeral expenses of honorably discharged, indigent United States soldiers, sailors and marines, and their indigent wives, widows, and minor children not over fourteen years of age, if boys, nor over sixteen years, if girls, having a legal residence in the county, or for the erection of a monument in any cemetery in the county, a portion of which has been set apart for the burial of Union soldiers, sailors and marines, in which there have been not less than thirty interments, said fund to be expended for the purpose aforesaid by the joint action and control of the board of supervisors and the relief commission provided for by section four hundred thirty-one of the code. [35 G. A., ch. 41, § 1; 34 G. A., ch. 25, § 1; 33 G. A., ch. 30, § 1.] [30 G. A., ch. 17, § 1; 24 G. A., ch. 69, § 1; 22 G. A., ch. 105, § 1.]

[The amendments made by the 33, 34 and 35 assemblies are placed as manifestly intended. They do not make proper distinction between the code, supplement and session laws. EDITOR.]

The term "Union soldiers" as used in describing persons who may be appointed to the commission for distribution of soldiers' relief, means those who fought in the Civil War between the states in support of the Union in contradistinction to those who as soldiers fought for the establishment of the confederacy. *Keely v. Board of Supervisors*, 139 N. W. 473.

An action of certiorari is not the proper method to test the validity of an appointment to such board made by the supervisors. As the board has a discretion, a particular applicant for appointment has no such interest as to authorize him to maintain an action of certiorari. *Ibid.*

SEC. 431. **Commission to disburse—duties.**

The distribution of the fund provided for in this section is not controlled by the provisions of code § 2230 relating to the relief of the poor. *Hamilton County v. Hollis*, 141–477, 119 N. W. 978.

SEC. 432. **Meetings—report to supervisors—disbursements—how made.** The commission shall meet annually at the county auditor's office, on the second Monday in September, and at such other times as may be necessary, at which annual meeting it shall determine who are entitled to relief, and the probable amount required to be expended therefor, which sum it shall certify to said board, together with a list of those found to be entitled to relief, and the sum to be paid in each case, the aggregate not to exceed the amount to be raised by the tax levy authorized; and it, at its regular September meeting, shall levy a sufficient tax to raise this amount. Upon the filing of the list with the board of supervisors, the county auditor shall, within twenty days thereafter, transmit to the township clerks in the county the names of those, if any, to whom relief has been awarded, and the amount. On the first Monday of each month after the fund is ready for distribution, the auditor shall issue his warrant upon the county treasurer to the commission for the sums thus awarded, and it shall proceed to disburse the same to the parties named in the list, taking receipts therefor, or distribution may be made in any other manner the commission may direct. Should it appear to the commission that any person entitled to assistance will not properly expend the same, then the payment may be made to some suitable person, who shall, as directed by it, make the disbursements thereof, for the use and benefit of such person. The amount awarded to any party may be increased, decreased or discontinued by the commission at any regular meeting. New names may be added and certi-

fied thereat, and it shall, at the close of the year, make annual detailed reports of its work, which shall be accompanied with the proper vouchers for all moneys received by it. [32 G. A., ch. 18; 24 G. A., ch. 69, § 2; 22 G. A., ch. 105, § 3.]

SEC. **433. Burial of indigent soldiers and sailors—wives and widows of same.** That section four hundred thirty-three of the supplement to the code, 1907, be and the same is hereby repealed and the following substitute enacted in lieu thereof:

"The board of supervisors shall designate some suitable person in each township to cause to be decently interred the body of any honorably discharged soldier, sailor, or marine who served in the army or navy of the United States during any war, who may hereafter die without leaving sufficient means to defray the expenses of his funeral. Such burial shall not be made in any cemetery or burying ground or part thereof used exclusively for the burial of the pauper dead. The expenses of such burial shall in no case exceed the sum of fifty dollars, and in case surviving relatives of the deceased shall desire to conduct the funeral, and are unable or unwilling to pay the charges therefor, they shall be permitted to do so and the expenses shall be paid as herein provided. The provisions herein contained shall also apply to the deceased wife or widow of such indigent soldier, sailor or marine who may hereafter die without leaving sufficient means to defray the expenses of her funeral." [34 G. A., ch. 26, § 1; 33 G. A., ch. 31, § 1.] [30 G. A., ch. 17, § 2; 20 G. A., ch. 178, § 1.]

SEC. **441. Official newspapers—how selected—what published in —printed in foreign languages—compensation.** The board of supervisors of each county shall, at its January session in each year, select two newspapers published within the county, or one, if there be but one published therein, having the largest number of bona fide yearly subscribers within the county, which circulation shall be determined as follows: In case of contest, the applicants shall each deposit with the county auditor, on or before a day named by the board of supervisors, a certified statement, subscribed and sworn to before some competent officer, giving the names of the several post offices, and the number and the names of the bona fide yearly subscribers receiving their papers through each of said offices living within the county; such statements to be in sealed envelopes, and opened by the county auditor upon direction of the board of supervisors; and the two applicants thus showing the greatest number of bona fide yearly subscribers living within the county shall be the county official papers, in which all the proceedings of the county board of supervisors, the schedule of bills allowed, and the reports of the county treasurer, including a schedule of the receipts and expenditures, shall be published at the expense of the county during the ensuing year, and the costs of such publication shall be thirty-three and one-third cents for each ten lines of brevier type, or its equivalent; but in counties having a population of fifteen thousand or more, three papers, not more than two of which shall be published in the same town, shall be selected, in which such proceedings shall be published, with the same limitation as to compensation; and in counties where the district court is held in two places each district shall be regarded as a county for the purposes of such publication. The county auditor shall furnish all such papers selected a copy of such proceedings for that purpose. In case a contest is made by a publisher, the board shall receive other evidence of circulation, and he shall have the right of appeal to the district court, to be taken as in ordinary actions. Neither publisher to the contest shall receive pay for publishing such proceedings until the

case is finally disposed of. And in counties where a newspaper of general circulation is printed in a foreign language, the board may, in addition to those already provided for in this section, select one of such newspapers as one in which the proceedings of the board of supervisors may be published, in a foreign language, and said newspaper shall receive the same compensation therefor as is paid the official papers of said county for such publication, not exceeding thirty-three and one-third cents per square. Provided that said paper shall have at least six hundred actual bona fide yearly subscribers residing within said county, and shall file a list thereof as provided by law. [34 G. A., ch. 27, § 1.] [31 G. A., ch. 15; 30 G. A., ch. 18; 29 G. A., ch. 22, § 1; 21 G. A., ch. 86, § 2; 20 G. A., ch. 197, § 2; C. '73, § 307.]

Where the board has authority, on account of the population of the county, to select a third paper, such third paper is to be selected in the same manner as the other two are selected. It is not intended that any two or more papers may combine their bona fide subscription lists and be selected by virtue thereof. *Packard v. Snyder*, 110–628, 82 N. W. 327.

As to measurement for purpose of determining amount of compensation, see *Brown v. Lucas County*, 94–70, 62 N. W. 694.

The appeal is triable in the district court *de novo*, and the court should not approve the action of the board of supervisors unless the paper selected by the board makes such showing in the district court as entitles it to be selected. *Young v Rann*, 111–253, 82 N. W. 785.

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

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

The procedure to be adopted on appeal from the action of the board of supervisors in awarding the public printing is analogous to rather than identical with the methods employed to perfect an appeal from a justice of the peace. *Sturges v. Vail*, 127–705, 104 N. W. 366.

The bond may be approved by the county auditor with whom it is to be deposited. *Ibid.*

The filing and approval of the bond perfects the appeal and the transcript of the proceeding is necessary only for the purpose of presenting to the district court the facts on which the decision of the board of supervisors was based. *Ibid.*

The lists of subscribers which are to be considered by the board must be filed on or before the time named for hearing, and after the contestants have filed their respective lists the board has no authority to receive additional lists on a continuation of the hearing. One who has filed no such list at the time fixed for the hearing is not in a position to contest the selection subsequently made by the board. *Ibid.*

The person to whom the public printing is awarded takes such privilege in the exercise of a public function or employment and is not entitled to the fees authorized unless it appears that he holds the position by good title, even though he has performed the service as *de facto* officer. On the other hand one who has good claim to the office, but has not performed the service for which he claims the possession of the office, cannot recover from the county fees for the services which he had a right to perform. *Smith v. Van Buren County*, 125–454, 101 N. W. 186.

The provisions as to compensation for official publication in a newspaper fix a maximum limit to the cost of such publication, and leave it to the discretion of the board to fix the amount to be paid within such limits. *Wooster v. Mahaska County*, 122–300, 98 N. W. 103.

Where one publisher contests the bona fides of the showing of his competitor as to circulation, other evidence than the statement may be received, and if it appears that the paper whose list is contested has not the largest number of bona fide subscriptions within the county it is not entitled to selection as one of the county official papers. But if through error or mistake alone a slight variance as to the requirements of the statute appears such variance is not fatal to the paper which has in fact the largest number of bona fide subscriptions. *Stone v. Quigley*, 138–491, 116 N. W. 603.

The abstract of the election returns as canvassed and received from the various precincts under the provisions of code § 1149 is to be published as a part of the proceedings of the board. *Clarke v. Lake*, 146-109, 124 N. W. 866.

The action of the board in auditing and certifying the expenses of primary elections, one half of which is to be paid by the state, constitutes such proceedings of the board as should be published under the provisions of this section. *Index Printing Co. v. Board of Supervisors*, 150–411, 130 N. W. 401.

The proceedings of the county board of canvassers are the proceedings of the board

of supervisors and as such are required to be published as herein provided. *Ibid.*

The statements by the executive council as to the length of railroad track within the county and the assessed value thereof per mile, and as to the lines of telegraph and telephone companies within the county, and as to the length of the routes and the assessed value of each of the express companies within the county, are all matters which, being required to be made of record by the board, are proper to be published as a part of its proceedings. *Ibid.*

The itemized account of the township clerk showing receipts and expenditures of moneys for road purposes in his township, being required to be certified to the board, is to be published as a part of the proceedings of the board; also the synopsis of the itemized reports of the township trustees, showing the names of all persons to whom money has been paid out of the road fund and the amount paid to each. *Ibid.*

No particular time is specified within which the publications contemplated in this section shall be made. *Ibid.*

Service of notice of appeal on the publisher against whom a protest has been lodged is sufficient. A change in the name used to designate the appellant is immaterial where it does not lead to any confusion as to who are the contending parties on the appeal. *In re Cherokee County Printing*, 156–282, 136 N. W. 765.

The proceedings contemplated by this section are largely informal in character before a board not accustomed to judicial procedure. *Ibid.*

The county is in no just sense a party to the appeal and a service of notice on an official of the county is not required. *Ibid.*

The appeal is a special proceeding and while not triable to a jury, it is to be heard as an ordinary action. *Ibid.*

Notice of the intended canvass by the board of supervisors of a petition of consent required by code § 2450 to be published "in the official newspaper of the county," held to be sufficiently given by publication in all the newspapers of the county, the board having selected none as the "official paper" for the current year. *In re Consent to Sell Intoxicating Liquors, De Board v. Williams*, 155–149, 134 N. W. 620.

Publication of a notice required to be by insertion in the official newspapers of the county held sufficient when made in the newspapers which had been selected as the official newspapers for the preceding year and which were still recognized as such. *Jackman v. Board of Supervisors*, 156–620, 137 N. W. 906.

SEC. 442. Books to be kept by board.

As the appointment of a deputy sheriff is required by code § 510 to be filed in the auditor's office and approved by the board of supervisors, the fact that such appointment is not shown by the records of the board to have been approved is prima-facie evidence that it was never made. *Buck v. Hawley*, 129-406, 105 N. W. 688.

As to amendment of the records of the board of supervisors as kept by the auditor, see code § 470 and the notes.

SEC. 446. Manner of submitting questions to vote. The mode of submitting such questions to the people shall be the following: The whole question, including the sum desired to be raised, or the amount of tax desired to be levied, or the rate per annum, and the whole regulation, including the time of its taking effect or having operation, if it be of a nature to be set forth, and the penalty for its violation if there be one, shall be published once each week for at least four weeks in some newspaper printed in the county. If there be no such newspaper, the publication shall be by being posted up in at least one of the most public places in each township in the county, and, in addition, in at least five among the most public places in the county, one of them being at the door of the courthouse, for at least thirty days prior to the time of taking the vote. All such notices shall name the time when such question will be voted upon, and the form in which the question shall be taken, and a copy of the question submitted shall be posted up at each place of voting during the day of election. [31 G. A., ch. 9, § 14; C. '73, § 310; R. § 251; C. '51, § 115.]

SEC. 448. Rate of such tax. The rate of tax shall in no case be more than one per cent. on the county valuation in one year. When the object is to borrow money for the erection of public buildings, as above provided, the rate shall be such as to pay the debt in a period not exceeding ten

years; but in counties having a population of twenty-five thousand or over, and where it is proposed to expend one hundred thousand dollars or over, the rate of levy shall be such as to pay the debt in not exceeding twenty-five years. In issuing bonds for such indebtedness, when voted, the board of supervisors may cause portions of said bonds to become due at different definite periods. But none of such bonds so issued shall be due and payable in less than five or more than twenty-five years from date. When the object is to construct, or to aid in constructing, any highway or bridge, the annual rate shall not be less than one mill on the dollar of the assessed valuation; and any of the above taxes becoming delinquent shall draw the same interest as the ordinary taxes. [32 G. A., ch. 19; 23 G. A., ch. 32; C. '73, § 312; R. § 253; C. '51, § 117.]

Although the board of supervisors, under code § 422, par. 9, has power to create an indebtedness evidenced by nonnegotiable instruments for the purchase of real estate necessary for the erection of buildings for county purposes, it has not power to issue negotiable bonds therefor without compliance with the provisions of these sections. *Witter v. Board of Supervisors*, 112–380, 83 N. W. 1041.

SEC. 451. Rescission by subsequent vote.

Although the statute embodied in this section was enacted before that embodied in code § 423, authorizing the levying of a tax by popular vote for the erection of courthouses, both being now reënacted in the code, are to be construed together, and a tax levied for such purpose may be rescinded by vote of the electors. *Windsor v. Polk Co.*, 115–738, 87 N. W. 704.

SEC. 452. Board must submit questions on petition.

In a particular case held that the petition on which it was desired that the board should act had never been presented to the board, and no action thereon was required. *Windsor v. Polk Co.*, 115–738, 87 N. W. 704.

SEC. 458. **Supervisors to tax dogs.** Sections four hundred fifty-eight and four hundred fifty-nine of the code are hereby repealed and the following is enacted in lieu thereof:

"The board of supervisors of each county shall at its September session, each year, when levying other taxes, levy a tax of one dollar on each male and spayed female and three dollars on each female dog listed by the assessor, which shall constitute a special fund to be disposed of as provided for in this act." [32 G. A., ch. 20, § 1; 22 G. A., ch. 70, § 2.]

[See § 458-a to § 458-d, inclusive. EDITOR.]

SEC. 458-a. **County auditor to prepare assessor's book.** It shall be the duty of each county auditor to provide suitable columns properly headed in the assessor's book to carry out the provisions of this act. [32 G. A., ch. 20, § 2.]

SEC. 458-b. **Domestic animal fund.** The treasurer of each county may, if not otherwise used, upon the taking effect of this act, transfer all taxes collected on dogs during the year nineteen hundred and six and subsequent years to a separate fund to be known as the domestic animal fund, and hereafter on receiving the tax books for the collection of other taxes, shall collect the tax herein provided for as other taxes are collected and keep the same as a separate fund to be known as the domestic animal fund. [32 G. A., ch. 20, § 3.]

SEC. 458-c. **Injuries to domestic animals—claims for damages—how allowed and paid.** Any person damaged by the killing or injury of any domestic animal or fowl by dog, dogs or wolves may present to the board of supervisors of the county in which such killing or injury occurred, a detailed statement and account of such killing or injury, stating the

amount of damage claimed therefor and verified by affidavits by two or more disinterested persons not related to the claimant, such claim to be filed with the county auditor not later than ten days from the time such killing or injury occurred or was known to[1] the owner or his agent. Claims filed as herein provided shall be heard by the board of supervisors at the first regular session after the filing thereof or at such time as the board of supervisors may determine upon. No claim shall be allowed where it is shown that the injury and damage complained of was caused by a dog or dogs owned or controlled by the claimant. The board shall hear and determine said claims as soon as practicable after they are filed, and shall allow the same or such portion thereof as they may deem just, and shall find and enter of record the value of each animal killed or the amount of damage done thereto, and shall authorize the auditor to issue warrants for the amount of damages thus found, the same to be paid by the county treasurer out of the domestic animal fund, and if disallowed they shall so enter it upon their record. [35 G. A., ch. 42, § 1; 33 G. A., ch. 32, § 1.] [32 G. A., ch. 20, § 4.]

[1]The word "be" followed the word "to" in the 1907 supplement but does not appear in § 4, ch. 20, 32 G. A. It is therefore dropped in this work. EDITOR.]

Under this section as amended by 33 G. A. ch. 32, one whose animals have been killed by dogs has his election to resort to the domestic animal fund or to sue the wrongdoer for damages. After receiving an allowance made by the board of supervisors for such fund he cannot sue the wrongdoer for the balance of his claim. *Ellis v. Oliphant*, 141 N. W. 415.

SEC. **458-d. Warrants—how drawn and paid—balance.** The county auditor shall on the first day of July, nineteen hundred and seven, and on the first day of January and July of each year thereafter, furnish an itemized statement to the county treasurer of all warrants that have been issued for the six months preceding such date as provided herein, and the treasurer shall on or before the tenth day of each of said months pay said warrants issued by the auditor, as aforesaid, out of the domestic animal fund; provided, however, that if such fund is then insufficient to pay said warrants in full he shall pay on each pro rata; and provided further, that no claim shall be allowed under the provisions of this act for any damages sustained for animals killed or damaged prior to the taking effect of this act. When the balance in the domestic animal fund, after paying the warrants issued thereto, as hereinbefore provided, exceeds the sum of five hundred dollars the board of supervisors may transfer the excess to the general county fund. [30 G. A., ch. 20, § 5.]

SEC. **459. Treasurer to collect—repealed.** [32 G. A., ch. 20, § 1.]
[See § 458. EDITOR.]

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

Members of the board of supervisors are prohibited from becoming parties, directly or indirectly, to contracts for labor or material furnished to the county. *Nelson v. Harrison County*, 126–436, 102 N. W. 197.

The acts of a township trustee in furnishing men and teams to perform labor for the township under a contract with the road superintendent, to be paid for out of township funds, is a violation of this provision. *State v. York*, 131–635, 109 N. W. 122; *State v. York*, 135–529, 113 N. W. 324.

Labor contracts between a member of the board and the county are invalid. *Harrison County v. Ogden*, 133–677, 108 N. W. 451.

SEC. **469. Compensation of supervisors.** That section four hundred sixty-nine of the code be and the same is hereby repealed, and the following enacted in lieu thereof:

"The members of the board of supervisors shall receive four dollars per day each for each day actually in session, and four dollars per day exclusive of mileage when not in session but employed on committee service, and five cents for every mile traveled in going to and from the regular, special and adjourned sessions thereof and in going to and from the place of performing committee service. But in counties having a population of ten thousand or less they shall not receive compensation for session service of more than thirty days in the year; in counties having a population of more than ten and less than twenty-three thousand, for not more than forty-five days of such service in a year; in counties having a population of twenty-three and not over forty thousand, for not over fifty-five days of such service in a year; in counties having a population of forty and not over sixty thousand, for not more than sixty-five days of such service in a year; in counties having a population of sixty and not over eighty thousand, for not more than seventy-five days of such service in a year; in counties having a population of eighty and not over ninety thousand, for not more than ninety days of such service in a year; in counties having a population of over ninety thousand for not more than one hundred days of such service in a year. The time spent by the board of supervisors as a ditch or drainage board and in considering drainage matters, whether as a single board or jointly with one or more other boards, shall not be counted in computing the number of days which any board has been in session, but the members of the board shall be entitled to compensation at the same rate for the time spent in ditch and drainage matters, in addition to the compensation allowed as hereinbefore set forth, but in no case shall said board be allowed more than fifty days additional time in one year for time spent in drainage matters. If on the same day the board acts both as a county board and also for the purpose of considering drainage matters, the board shall be paid for one day only, and from the general fund or drainage fund as the board may order." [34 G. A., ch. 24, § 4.] [32 G. A., ch. 21; 21 G. A., ch. 15; 19 G. A., ch. 159; C. '73, § 3791.]

SEC. **469-a. Prospecting for coal—tax levy.** The board of supervisors of any county is hereby authorized to levy a tax, not to exceed one mill upon the dollar, on all taxable property within the county, to be collected at the same time and in the same manner as other taxes and to be used in payment of expense incurred in prospecting for coal as provided in this chapter. [34 G. A., ch. 29, § 1.]

SEC. **469-b. Question submitted—form of ballot.** There shall be submitted to the voters of said county at any general election, to be determined by the board of supervisors, the question whether or not the levy provided for in section one hereof shall be made, and such question shall be submitted to the voters upon a printed ballot in the following form:

"Shall the board of supervisors be authorized and directed to levy a tax of one mill upon the dollar for the purpose of prospecting for coal?"

Those in favor will mark in the square, "yes" and those opposed to said tax will mark "no" in such square. [34 G. A., ch. 29, § 2.]

SEC. **469-c. Vote canvassed—result certified.** That said vote shall be canvassed by the judges of election and the results certified to the board of supervisors, who shall canvass the vote at the same time and in the same manner as is required in other special propositions submitted to the voters. [34 G. A., ch. 29, § 3.]

SEC. **469-d. Coal fund tax to be kept separate.** That said tax shall be paid into the county treasury at the same time and in the same manner as other taxes and shall be known upon the books of the treasurer as a coal fund tax and shall be kept separately and distinctly from the other funds, and be paid out upon the warrants duly issued by the county auditor when the same has been allowed and ordered paid by the board of supervisors. [34 G. A., ch. 29, § 4.]

SEC. **469-e. Bids for prospecting—location of shaft.** The board of supervisors shall have the power to receive bids for ascertaining whether or not coal may exist in the county and shall award said bid to the lowest responsible bidder. The said board shall have the right to pass upon the location where said shaft is to be sunk, and ascertain whether or not said location is the most feasible point to prospect in said county. [34 G. A., ch. 29, § 5.]

CHAPTER 3.

OF THE COUNTY AUDITOR.

SECTION **470. Duties defined.**

The appeal bond in a proceeding for the selection of an official newspaper should be filed with and approved by the auditor, he being the ministerial officer of the board. *Sturges v. Vail*, 127–705, 104 N. W. 366.

While the right of officers to amend records kept by them is generally recognized, yet such amendment cannot be resorted to for the purpose of making a new record retrospectively in order to sustain the action of a board of supervisors in levying assessments for a public ditch. *Tod v. Crisman*, 123–693, 99 N. W. 686.

If the records of the auditor do not show the filing of the appointment of a deputy sheriff as required by code § 510, this is prima-facie evidence that no such appointment was ever made. *Buck v. Hawley*, 129–406, 105 N. W. 688.

SEC. **475. Statistics of crime to clerk of court for report to board of parole.** That section four hundred seventy-five of the code be and the same is hereby repealed and the following enacted in lieu thereof:

"The county auditor shall report to the clerk of the district court, on or before the fifth day of July of each year, the expenses of the county in criminal prosecutions during the year ending June thirtieth preceding, including but distinguishing the compensation of the county attorney; and such report shall be so made as to include all the items of criminal expenses which appear in the records of his office and are required to be reported by the clerk of the district court to the board of parole as set out in section two hundred ninety-three of the code, and the clerk of the district court shall furnish to the auditor the blanks to be used in making such report." [35 G. A., ch. 34, §§ 1, 2; 33 G. A., ch. 3, § 3.] [18 G. A., ch. 22, § 2.]

SEC. **479. Compensation.** That section four hundred seventy-nine, supplement to the code, 1907, be and the same is hereby repealed and the following enacted in lieu thereof:

"County auditors shall receive an annual compensation for all services as follows: in counties having a population of less than fifteen thousand, fourteen hundred dollars; in counties having a population of fifteen thousand and less than twenty thousand, fifteen hundred dollars; in counties having a population of twenty thousand and less than twenty-five thousand, sixteen hundred dollars; in counties having a population of twenty-five thousand and less than thirty thousand, seventeen hundred dollars; in counties having a population of thirty thousand and less than thirty-five thousand, eighteen hundred dollars; in counties having a population of

thirty-five thousand and less than forty thousand, two thousand dollars; in counties having a population of forty thousand and less than fifty thousand, twenty-two hundred dollars; in counties having a population of fifty thousand and less than sixty thousand, twenty-five hundred dollars; in counties having a population of sixty thousand and less than seventy thousand, twenty-seven hundred fifty dollars; in counties having a population of seventy thousand or over, three thousand dollars; in counties having a population of one hundred thousand or over, thirty-three hundred dollars; in counties having a population of more than twenty thousand, the board of supervisors may allow such additional compensation to the deputy or clerks as they may deem reasonable." [35 G. A., ch. 43, § 1.] [30 G. A., ch. 19; 18 G. A., ch. 184, § 3; C. '73, § 3798.]

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

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

SEC. **480-b. Printing and distribution—information to auditor of state.** Said financial report shall be ordered printed by the board of supervisors in pamphlet form in such numbers as the board may direct, for distribution among the taxpayers of the county. The county auditor of each county shall, on or before April first of each year, furnish to the auditor of state the information contained in such financial report and any other information relative to the financial affairs of the county which he may require, upon blank forms provided by the auditor of state for this purpose. [33 G. A., ch. 33, § 1.] [29 G. A., ch. 23, § 2.]

SEC. **481. Deputy — qualifications — compensation — other assistants.**

One who is orally designated as deputy, and to whom the oath is orally administered, and of whom no bond is exacted, but who in fact performs the duties of deputy, is an officer *de facto*. *Murphy v. Lentz*, 131–328, 108 N. W. 530.

The supervisors may make an allowance for temporary assistance required by the county auditor in a county where no deputy has been appointed, notwithstanding the provision of code supp. § 479, that in such county the auditor shall receive a stated compensation for all services. *McCarty v. Eggert*, 154–28, 134 N. W. 426.

The provision that the allowance for assistance shall be made on bills filed for such services at the next regular meeting of the board is directory only and it is not beyond the authority of the board to make a final settlement with the auditor on a showing that assistance in his office has been necessary and has been rendered and paid for in reasonable amounts, allowing in such settlement amounts paid out by the auditor not exceeding the amount previously authorized. *Ibid.*

When demand is made upon the board to bring action in the name of the county against the auditor to recover the amount received by him in excess of his salary, it is competent for the board to make a settlement in which they shall allow the auditor the amount which they might have properly allowed him from time to time for assistance had the bills for such services been properly presented. *Ibid.*

CHAPTER 4.

OF THE COUNTY TREASURER.

SECTION 482. Duties in general.

The deposit by a county treasurer of funds in a bank in his name as treasurer would not constitute a conversion thereof, or render him liable for embezzlement. (Overruling *Lowry v. Polk County*, 51–50.) So held *arguendo* in a case involving the legality of such deposit by a school treasurer. *Hunt v. Hopley*, 120–695, 95 N. W. 205.

It is not competent for the board of supervisors to contract to pay a tax collector for making delinquent tax lists, that being a matter pertaining to the office of treasurer. *Massie v. Harrison County*, 129–277, 105 N. W. 507.

It is the treasurer's duty to receive, safely keep, disburse and account for all moneys payable to the county, and the provision of § 1457 as amended relating to the designation of a depository bank for county funds does not authorize the board of supervisors to designate such county depository save on the nomination of the treasurer. *State v. Rhein*, 149–76, 127 N. W. 1079.

Where the county has received and has in its possession a drainage tax, it cannot hold the county treasurer liable therefor. *Calhoun County v. McCrary*, 141 N. W. 310.

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

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

The statute of limitations runs against a warrant without regard to whether it has been called by the treasurer for payment. *Bodman v. Johnson County*, 115–296, 88 N. W. 331.

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

1. Three fourths of one per cent. of all money collected by him as taxes due any city or town, to be paid out of the same;
2. Three per cent. of all taxes collected by him for all other tax funds, to be paid out of the county treasury;
3. For each certificate of purchase issued for lands sold for nonpayment of taxes, twenty cents;
4. For paying money into the state treasury, when required by law or the auditor of state, such compensation as the board of supervisors shall allow, not exceeding one fourth of one per cent. on the amount so paid, which allowance shall be paid by the county;
5. When the aggregate amount of compensation allowed exceeds fifteen hundred dollars in any year, the excess shall be paid into the county treasury; but in counties where the population does not exceed ten thousand, the salary shall not exceed thirteen hundred dollars, and in such counties there shall not be allowed for deputy or clerk hire more than the amount provided in the next section. But in counties having a population of twenty-five thousand or over the board of supervisors may allow such additional compensation as it may deem proper. [35 G. A., ch. 44, § 1.] [27 G. A., ch. 16, § 1; 18 G. A., ch. 184, § 2; 17 G. A., ch. 122, § 3; C. '73, § 3793; R. § 777.]

Although a commission is allowed to the county treasurer for taxes collected, he has not such an interest in the taxes as to be disqualified to act under code § 1374 in collecting taxes on omitted property. His interest in the result is remote

and incidental. *Beresheim v. Arnd*, 117–83, 90 N. W. 506.

That portion of the regular annual mulct tax which the county is required by law to pay to the city is not subject to the county treasurer's charge of three fourths of one per cent. for collection. *Waverly v. Bremer County*, 126–98, 101 N. W. 874.

The compensation to which the treasurer is entitled for collecting special assessments certified to him by the city cannot be included in the levy of the assessment upon property. *Higman v. Sioux City*, 129–291, 105 N. W. 524.

The county treasurer is not allowed a commission for the collection of taxes payable to the holder of city improvement certificates. *Barber Asphalt Pav. Co. v. Woodbury County*, 137–287, 114 N. W. 1044.

SEC. 491. **Deputies — qualification — compensation — other assistants—counties doing drainage business.** Each county treasurer may, in writing, with the consent of the board of supervisors, appoint any one not holding a county office his deputy, for whose acts he shall be responsible, and from whom he shall require bond, which bond shall be approved by the officer who has the approval of the principal's bond, and such appointment may be revoked in writing; which appointment and revocation shall be filed and kept in the auditor's office. The person thus appointed shall qualify by taking the same oath as his principal, indorsed upon the certificate of appointment. The deputy, in the absence or disability of his principal, may perform all the duties of the principal pertaining to his office, and shall receive a salary not exceeding nine hundred dollars a year, to be fixed by the board of supervisors. In case no deputy shall be appointed, but, on account of the pressure of business in his office, the treasurer is compelled temporarily to employ an assistant, he shall file the bill for such service at their next regular meeting, and the board of supervisors shall make a reasonable allowance therefor. In counties where the population does not exceed ten thousand, except in cases where such county is doing a drainage business in an amount requiring additional help, the board shall not allow to exceed three hundred dollars for deputy or clerk hire, and in counties having a population of more than twenty-five thousand, it may allow such sum in addition to the salary above fixed, or for clerk hire, as may be proper. [35 G. A., ch. 45, § 1; 35 G. A., ch. 44, § 2.] [18 G. A., ch. 184, § 2; 17 G. A., ch. 122, § 3; 16 G. A., ch. 4; C. '73, §§ 766–8, 770–1, 3793; R. §§ 421, 642, 643–5, 647–8; C. '51, §§ 411, 416, 417.]

CHAPTER 5.

OF THE COUNTY RECORDER.

SECTION 494. **Office—duties.** The recorder shall keep his office at the county seat, and shall record at length, and as speedily as possible, all instruments in writing which may be delivered to him for record, in the manner directed by law. If in the recording of any such instrument heretofore recorded or hereafter to be filed for record, the recording fee for which has once been paid, the recorder shall commit an error in making the record thereof, it shall be his duty to re-record such instrument upon the presentation of the original by the owner thereof, without further compensation; and he shall also enter upon the margin of the new record a reference to the original record, and upon the margin of the original record a reference to the new record, giving the book and page thereof. When an error has been made in indexing any instrument, it shall be the duty of the recorder to re-index the same without further compensation. [30 G. A., ch. 20; C. '73, § 335; R. § 358; C. '51, § 150.]

SEC. **495. Fees to be reported and paid to county—compensation.** That section four hundred ninety-five of the supplement to the code, 1907, be and the same is hereby repealed and the following enacted in lieu thereof:

"The recorder shall report quarterly, under oath, to the board of supervisors, on blanks furnished by the auditor, all fees collected by him, and certify under oath that he has collected all fees for recording instruments provided by law; shall make annual settlement with the board of supervisors on the first Monday in January of each year, and pay into the county treasury all fees received by him. And the recorder shall receive as full compensation for all services the sum of twelve hundred dollars per annum in counties having a population of less than fifteen thousand, and fourteen hundred dollars in counties having a population of more than fifteen thousand and less than twenty-five thousand, and fifteen hundred dollars in counties having a population of over twenty-five thousand and less than thirty-five thousand, and sixteen hundred dollars in counties having a population of over thirty-five thousand and less than fifty thousand, and eighteen hundred dollars in counties having a population of over fifty thousand and less than sixty thousand, and two thousand dollars in counties having a population of sixty thousand or over." [35 G. A., ch. 46, § 1.] [32 G. A., ch. 22; 30 G. A., ch. 21, § 1; 25 G. A., ch. 76, § 1.]

SEC. **496. Deputies—qualifications—compensation—other assistants.** Each county recorder may, in writing, with the consent of the board of supervisors, appoint any one not holding a county office his deputy, for whose acts he shall be responsible, and from whom he shall require bond, which bond shall be approved by the officer who has the approval of the principal's bond, and such appointment may be revoked in writing; which appointment and revocation shall be filed and kept in the auditor's office. The person thus appointed shall qualify by taking the same oath as his principal, indorsed upon the certificate of appointment. The deputy, in the absence or disability of his principal, may perform all the duties of the principal pertaining to his office, and shall receive a salary not exceeding nine hundred dollars a year, to be fixed by the board of supervisors. In counties where no deputy is appointed, or in counties having a population of thirty-five thousand or over, the recorder may, with the approval of the board of supervisors, temporarily employ one or more assistants, when the pressure of business in his office renders it necessary, and he shall file a bill for such service at the next regular meeting of the board of supervisors, who shall make a reasonable allowance therefor. [30 G. A., ch. 21, § 2; 29 G. A., ch. 25, § 1; 25 G. A., ch. 76, § 2; 18 G. A., ch. 184, § 2; 17 G. A., ch. 122, § 3; 16 G. A., ch. 4; C. '73, §§ 766–8, 770–1; R. §§ 421, 642–5, 467–8; C. '51, §§ 411, 412, 413, 416, 417.]

In a county where the district court is held at two places, and the county recorder is in the discharge of his office at one place and his deputy at another, held that the deputy might act in drawing a jury. *State v. Turner*, 114–426, 87 N. W. 287.

No allowance can be made for an assistant except for services for the quarter of a year preceding the time when the bill is filed. The provision of the statute in this respect is mandatory. *Allen v. Adams County*, 120–63, 94 N. W. 261.

Where a proper claim is filed by the recorder, it is not necessary, in order to be entitled to an allowance, that the claim be made by the person who rendered the services, or that the recorder show that the services have been paid for. It is proper for the recorder to present the claim in his own name for services of an assistant necessarily employed, and the board can allow only the reasonable value of the services necessarily procured. *Ibid.*

SEC. **498. Fees to be collected—fee book.** The recorder shall be entitled to charge and receive the following fees:

1. For recording each instrument containing four hundred words or less, fifty cents;

2. For every additional hundred words or fraction thereof, ten cents.

3. He shall keep a fee book which shall be ruled in appropriate columns in which he shall enter each and every instrument filed for record, each instrument shall be numbered in numerals from one consecutively through the year, and shall commence with number "1" on and immediately after the date of settlement with the board of supervisors each year. He shall enter on said fee book from left to right in appropriately ruled columns as follows: The number of the instrument, grantor, grantee and character of instrument, carrying out in separate columns the fee charged in dollars and cents in each case and said fee book shall be a part of the records of the office of the county recorder and shall be kept and maintained therein as the other books and records thereof. He shall also enter or cause to be entered at the top of the page where the permanent record of the instrument begins, these words "Recording fee————" and place on blank line the exact amount charged in dollars and cents for each instrument recorded. [31 G. A., ch. 16; C. '73, § 3792; R. § 4143; C. '51, § 2534.]

CHAPTER 6.

OF THE SHERIFF.

SECTION **499. Duties in general.** That sections four hundred ninety-nine and five hundred and two of the code be, and the same are hereby, repealed, and the following enacted in lieu thereof:[1]

"It shall be the duty of the sheriff, by himself or deputy, to preserve the peace in his county, to ferret out crime, to apprehend and arrest all criminals, and in so far as it is within his power, to secure evidence of all crimes committed in his county, and present the same to the county attorney and the grand jury; to file informations against all persons who he knows, or has reason to believe, have violated the laws of the state, and to perform all other duties pertaining to the office of sheriff, or enjoined upon him by law. [33 G. A., ch. 34, §§ 1, 2.] [C. '73, § 337; R. § 383; C. '51, § 170.]

[1]See § 499-a to § 499-d, inclusive. EDITOR.]

SEC. **499-a. Authority to summon aid.** "The sheriff, by himself or deputy, may call any person to his aid to keep the peace or prevent crime, or to arrest any person liable thereto, or to execute process of law; and when necessary, the sheriff may summon the power of the county. [33 G. A., ch. 34, § 3.]

SEC. **499-b. Execution and return of writs.** "The sheriff shall, by himself or deputy, execute and return all writs and other legal process issued by legal authority to him directed. [33 G. A., ch. 34, § 4.]

SEC. **499-c. Investigation on order of county attorney.** "The sheriff shall, whenever directed so to do in writing by the county attorney, make special investigation of any alleged infraction of the law within his county, and report with reference thereto within a reasonable time to such county attorney. When such investigation is made the sheriff shall file with the county auditor a detailed, sworn statement of his expenses, accompanied by the written order of the county attorney, and the board shall audit and allow only so much thereof as it shall find reasonable and necessary. [33 G. A., ch. 34, § 5.]

SEC. **499-d. Peace officers not relieved from duties.** "Nothing in this act shall be so construed as to relieve any peace officer from the full and faithful discharge of all the duties now or hereafter enjoined upon him by law." [33 G. A., ch. 34, § 6.]

SEC. **501. Duty as to jail and prisoners.**

Failure of a sheriff to properly confine in the county jail a prisoner sentenced to confinement therein by a proper federal court (see code § 5637) is punishable by such court for contempt. *Ex parte Shores*, (D. C.) 195 Fed. 627.

SEC. **502. Power to summon aid—repealed.** [33 G. A., ch. 34, § 1.]

[See § 499 to § 499-d, inclusive. EDITOR.]

SEC. **508. Fees to be reported and paid to county.** Quarterly itemized reports under oath, upon blanks to be furnished by the county auditor, shall be made to the board of supervisors by the sheriff, of all fees and mileage charged or taxed, and all that are collected by him and his deputies, including all sums for which the county is liable, except for dieting and lodging prisoners; and at the time of making such quarterly reports he shall make full settlement with said board, filing therewith the receipts of the county treasurer for all moneys paid over to him. [29 G. A., ch. 26, § 1; 25 G. A., ch. 75, § 1.]

SEC. **509. Compensation—repealed.** [29 G. A., ch. 27, § 1.]

[See § 510-a.]

SEC. **510. Deputies—qualification—compensation—repealed.** [29 G. A., ch. 27, § 1.]

[See §§ 510-a, 510-b.]

SEC. **510-a. Compensation.** That section five hundred and nine and section five hundred ten of the code be repealed and the following substituted therefor:

"In counties having a population of over forty-five thousand the sheriff shall receive in full compensation for his services, except the expenses hereinafter provided for, thirty-five hundred dollars per annum, to be paid out of the receipts of the office. In counties having a population of over twenty-eight thousand and less than forty-five thousand the sheriff shall receive in full compensation for his services, except the expenses hereinafter provided for, three thousand dollars per annum, the same to be paid out of the receipts of the office. In counties having a population of over eleven thousand and less than twenty-eight thousand the sheriff shall receive in full compensation for his services, including the salary provided by section five hundred eleven of the code, the sum of two thousand dollars per annum, the same to be paid out of the receipts of the office. And any excess over the sums provided in all counties shall be paid into the county treasury annually. In all counties the expenses necessarily incurred and actually paid while engaged in the performance of official duties in serving criminal process, or commitments to the penitentiaries, industrial schools or asylums, shall be allowed by the board of supervisors, and paid as other claims against the county, and he shall be allowed to retain all mileage collected by him in the service of civil process. Provided, that in counties having a population of less than eleven thousand in which the receipts of the office, together with the salary allowed under section five hundred eleven of the code, do not amount to the sum of fifteen hundred dollars in any year, the board of supervisors shall, at the January session thereof, allow the sheriff a sum which, added to the receipts of the office for the previous year,

will amount to the sum of fifteen hundred dollars; and that in counties having a less population than twenty-eight thousand, in which the receipts of the office and salary allowed under section five hundred eleven of the code do not amount to the sum of eighteen hundred dollars per annum, the board of supervisors shall, at the January session thereof following, make an allowance to the sheriff of a sum equal to the difference between the receipts of the office in the previous year, and eighteen hundred dollars. And in counties having a population of more than twenty-eight thousand and less than forty-five thousand, in which the receipts of the office and salary allowed by the board do not in any year amount to the sum of two thousand dollars, the board of supervisors shall, at the January session thereof following, make an allowance to the sheriff of a sum equal to the difference between the receipts of the office for the previous year, and two thousand dollars. And in counties having a population of more than forty-five thousand in which the receipts of the office do not in any one year amount to the sum of thirty-five hundred dollars, the board of supervisors shall at the January session following make an allowance to the sheriff of a sum sufficient to make his salary equal to the sum of thirty-five hundred dollars. And provided further, that all fees earned, except mileage, and uncollected at the end of each year shall belong to the county, and when paid shall by the clerk of the district court be reported to the board of supervisors and paid into the county treasury. [33 G. A., ch. 35, § 1.] [29 G. A., ch. 27, §§ 1, 2.]

Where the county is entitled to the fees for service of process in criminal cases, the sheriff is entitled to allowance by way of expenses of the amounts necessarily paid out by him for railroad fare, livery hire and hotel bills, while traveling for the purpose of serving criminal process. *Bybee v. Marion County*, 128–610, 105 N. W. 118.

In counties having a population of over eleven thousand and under twenty-eight thousand the sheriff cannot receive more than eighteen hundred dollars per annum where the receipts of the office and salary do not exceed that amount. *Dallas County v. Hanes*, 135–550, 113 N. W. 345.

So far as the sheriff collects mileage before the expiration of his term of office he is entitled to retain it as his own, but after the expiration of such term it belongs to the county. *Cremer v. Wapello County*, 139–580, 117 N. W. 954.

SEC. 510-a1. **Mileage heretofore earned—property of officer.** All mileage heretofore taxed under the provisions of section five hundred ten-a of the supplement to the code, 1907, which has not been prepaid by parties litigant shall be and remain the property of the officer who earned the same and he shall be entitled to receive the same, when paid, whether in or out of office. [33 G. A., ch. 35, § 2.]

SEC. 510-b. **Deputies—qualification—compensation.** In all counties the sheriff shall in writing appoint one or more persons, not holding a county office, as deputy or deputies, for whose acts he shall be responsible and from whom he shall require a bond, which appointment and bond shall be approved by the officer having the approval of the principal's bond; and such appointment may be revoked in writing, which appointment and revocation shall be filed and kept in the auditor's office. In all cases the board of supervisors shall fix the number of deputies and shall fix the salary of such deputies at not exceeding one thousand dollars per annum in counties having a population of over twenty-eight thousand, and at not exceeding six hundred dollars per annum each in counties having a population of less than twenty-eight thousand; and in all counties the chief deputy shall be paid by the sheriff out of the compensation allowed him under the provisions of the preceding section,[1] and all other deputies shall be paid by the county. [29 G. A., ch. 27, § 2; 25 G. A., ch. 75, § 3;

18 G. A., ch. 184, § 2; 17 G. A., ch. 122, § 3; 16 G. A., ch. 4; C. '73, §§ 766–771; R. §§ 421, 642–3, 646–8; C. '51, §§ 411–413, 415–417.]

[1§ 510-a herein. EDITOR.]

A bailiff employed at a monthly salary cannot properly draw compensation for fees earned by him when actually serving in that capacity. *State v. Welsh*, 109–19, 79 N. W. 369.

Under statutory provisions which were superseded by the adoption of the code, held that the sheriff in a county not containing twenty-eight thousand inhabitants, and who was not therefore a salaried officer, was nevertheless entitled to an allowance for a deputy. *Mentzer v. Marion County*, 114–478, 87 N. W. 440.

The fact that the records of the auditor and of the board of supervisors do not show the filing of the appointment of a deputy sheriff is prima-facie evidence that no such appointment was made. *Buck v. Hawley*, 129–406, 105 N. W. 688.

The deputy which the sheriff is required to appoint is the chief deputy who is to be paid by the sheriff out of the compensation allowed him. *Culver v. Fayette County*, 142–269, 120 N. W. 627.

The sheriff cannot by stipulation in advance with one whom he appoints as chief deputy and whose salary is therefore to be paid out of the compensation of the sheriff, limit such compensation to a less amount than that subsequently fixed by the board of supervisors. *Bodenhofer v. Hogan*, 142–321, 120 N. W. 659.

A contract on the part of a public officer to render services for less than the compensation provided is against public policy. *Ibid.*

The illegality of the arrangement between the deputy and the sheriff as to the amount of compensation to be paid will not defeat the right of the deputy to recover the amount to which he is entitled irrespective of the provisions of the illegal contract. *Ibid.*

Acceptance by the deputy of the amount agreed upon and release of the sheriff from the illegal contract will not defeat the right of the deputy to recover the amount to which he is entitled. *Ibid.*

The sheriff is responsible for the acts of his deputy. *Gutschenritter v. Whitmore*, 139 N. W. 567.

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

1. For attending the supreme court, to be paid out of the amount appropriated for contingent expenses of said court, two dollars per day;

2. For serving a notice and making return thereof, for the first person served, fifty cents, and for each additional person, twenty-five cents;

3. For each warrant served, two dollars, and the repayment of any amount actually paid by him as necessary expenses in executing such warrant, as sworn to by the sheriff; if service of the warrant cannot be made, the repayment of all necessary expenses actually paid by the sheriff, while attempting in good faith to serve such warrant within this state, and such reasonable compensation as the board of supervisors may deem just and equitable;

4. For serving and returning a subpoena, for each person served, twenty cents;

5. For summoning a grand or trial jury, for each person served, sixty cents, to be paid out of the county treasury; and such sum shall be in full compensation for such service;

6. For summoning a jury to assess the damages to the owners of lands taken for public improvements, and attending them, five dollars per day. This paragraph shall not be so construed as to allow a sheriff to make separate charges for different assessments, which can be made by the same jury and completed in one day of ten hours;

7. For serving an execution, attachment, or order for the delivery of personal property, injunction, or any order of court, and making return thereof, two dollars;

8. For collecting and paying over money, on the first five hundred dollars or fraction thereof, two per cent.; on all in excess of five hundred dollars and under five thousand dollars, one per cent.; on all over five thousand dollars, one-half per cent.;

9. For making and executing a certificate or deed for lands sold on execution, or a bill of sale for personal property sold, one dollar;

10. For the time necessarily employed in making an inventory of personal property attached or levied upon, twenty-five cents per hour;

11. For a copy of any paper required by law, made by him, for each one hundred words, ten cents;

12. Mileage in all cases required by law, going and returning, five cents per mile;

13. For taking each bond required by law, twenty-five cents;

14. For each commitment to jail, twenty-five cents; discharge from same, twenty-five cents;

15. For receiving a prisoner on surrender by bail, fifty cents;

16. For boarding prisoners, a compensation of twelve and one-half cents for each meal, and not to exceed three meals in twenty-four consecutive hours, and for each night's lodging the sum of twelve and one-half cents; provided that in counties having a population of fifty thousand or over, the board of supervisors may fix the compensation of the sheriff for boarding and lodging prisoners, at a rate not exceeding the above;

17. For waiting on and washing for prisoners, the sheriff shall have such reasonable compensation as shall be allowed by the board of supervisors;

18. For attending before any judge with a prisoner, one dollar per day;

19. For attending sale of property, for each day, one dollar;

20. For conveying one or more convicts to either of the penitentiaries of the state, or any prisoner to any county jail outside of the county in which said sheriff resides, or any insane person or persons to any insane asylum in the state, or person or persons to either of the industrial schools, he shall be allowed, as full compensation therefor, his necessary traveling expenses actually paid by him, including board and railroad fare for himself and such person or persons, or any other necessary expenses, and, in addition thereto, forty cents per hour for the time necessarily employed in going to and from said prisons, asylums, or schools, to be certified by the affidavit of such sheriff, accompanied by the proper vouchers, to the board of supervisors of the county from which the persons were committed. Should the sheriff need any assistance in taking prisoners to the penitentiary or insane persons to the asylum, the same shall be furnished at the expense of the county, the compensation to be fixed by the board of supervisors;

21. He shall be allowed for serving any warrant for the seizure of intoxicating liquors, one dollar; for the removal and custody of such liquor, actual and reasonable expenses; for the destruction of such liquor under the order of the court, his actual and reasonable expenses, and one dollar; for posting and leaving notices in such cases, one dollar;

22. The jailer may be furnished a dwelling in connection with the jail, or as convenient thereto as practicable, in the discretion of the board of supervisors;

23. The sheriff is also entitled, for attending the district court, and for other service for which no compensation is allowed by law, except in counties having a population of over twenty-eight thousand, an annual salary, which shall be fixed by the board of supervisors, but in no case less than two hundred dollars nor more than four hundred dollars. When sheriffs perform official duties in justices' courts, their fees shall be the same as allowed constables. [35 G. A., ch. 47, § 1; 33 G. A., ch. 36, § 1.] [27 G. A., ch. 17, §§ 1, 2; 25 G. A., ch. 83; 23 G. A., ch. 41; 19 G. A., ch. 94, §§ 2–23; C. '73, §§ 3788–89, 3807; R. § 1570.]

Where an order of court fixed the time when persons who had signed affidavits in support of an application for change of venue should appear for cross-examination, held that service of subpoenas on such persons should not be taxed as the service of an order of court. *Spangler v. Beaver*, 106–744, 75 N. W. 668.

The fees of the sheriff for performing the duties of constable (as authorized in code § 4591) are to be accounted for by him as fees of his office. *Jones County v. Arnold*, 134–580, 111 N. W. 973.

SEC. **511-a. Repeal.** Paragraph sixteen of section five hundred eleven of the supplement to the code, 1907, as amended by chapter thirty-six of the acts of the thirty-third general assembly is hereby repealed and the following enacted in lieu thereof:[1] [35 G. A., ch. 47, § 1.]

[1]The substitute appears as paragraph 16 of § 511 above. EDITOR.]

CHAPTER 7.

OF THE CORONER.

SECTION **515. Inquest—when held—warrant for jurors.**

It is the province of the coroner to determine whether a post-mortem examination shall be made. *Finarty v. Marion County*, 127–543, 103 N. W. 772.

SEC. **520. Witnesses—shorthand reporter—compensation.** The coroner shall issue subpoenas for such witnesses as have knowledge touching the manner of the death of the person whose inquest is being held, returnable at such time and place as he may direct. They shall be sworn as in other cases, and their evidence reduced to writing under the direction of the coroner, subscribed by them, and returned to the district court, with the verdict and all other papers in the case. For the purpose of preserving the testimony of such witnesses, and all the acts and doings of the coroner and jury, the coroner may appoint a shorthand reporter at a compensation of not to exceed fifty cents per hour for time actually employed in any inquest or investigation, and for extending the notes, and when such reports are extended into longhand by the said shorthand reporter and certified to by the coroner and said reporter to the effect that they contain a full, true and complete report of all proceedings, they shall be the official record of the said inquest or investigation. The said shorthand reporter shall before entering upon his duties as such reporter, take an oath to be administered by the coroner, that he will faithfully take down in shorthand the evidence as it is given by the witnesses at such inquest or investigation, and that he will correctly extend the same into longhand. The coroner may enforce the attendance of witnesses and jurors, and punish them for contempt in disobeying his process, in like manner as a justice of the peace may do in a criminal proceeding before him. [32 G. A., ch. 23; C. '73, §§ 356–8, 365; R. §§ 400–2, 409; C. '51, §§ 190–2, 199.]

SEC. **521. Finding of jurors—form.**

The presumption is of an accidental rather than a suicidal death, and the coroner's verdict finding death to be suicidal only raises a conflict in the evidence to be determined by the jury. *Tomlinson v. Sovereign Camp of Woodmen*, 141 N. W. 950.

SEC. **529. Physician employed—fees.**

The physician is entitled to recover his compensation from the county for making a post-mortem examination at the direction of the coroner without regard to the question as to whether the circumstances were such as to warrant the coroner in ordering such inquest. *Finarty v. Marion County*, 127–543, 103 N. W. 772.

CHAPTER 8.

OF THE COUNTY SURVEYOR.

SECTION 534. Duties—record to be kept.

The filing of notes and plans made by the county surveyor do not constitute a link in the chain of title nor give information as to possession, and the recording thereof has no bearing on ownership, possession or title save as they may tend to show the true location of the boundaries. *Keller v. Harrison*, 151–320, 128 N. W. 851, 131 N. W. 53.

SEC. 535. Former field notes to be used.

The statute recognizes the county auditor as the proper custodian of the government field notes. *Keller v. Harrison*, 139–383, 116 N. W. 327.

SEC. 538. Record to be furnished—presumptive evidence.

The survey, to be entitled to the presumption here contemplated, must have been made with the knowledge of the party sought to be bound, and recorded as here provided. *McAnich v. Hulse*, 113–58, 84 N. W. 914.

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

The object of the recording is to preserve evidence of the facts but such evidence has no bearing on the question of conflicting claims of title. *Keller v. Harrison*, 151–320, 128 N. W. 851, 131 N. W. 53.

Neither the record nor the report of the county surveyor is to be treated as *prima facie* correct in the absence of any showing authorizing it to be received in evidence. *Matson v. Poncin*, 152–569, 132 N. W. 970.

CHAPTER 9.

OF THE DUTIES OF COUNTY OFFICERS.

SECTION 549. Designation of newspapers. That section five hundred forty-nine of the code be and the same is hereby repealed and the following enacted in lieu thereof:

"The clerk of the district court, sheriff, auditor, treasurer and recorder shall each designate the newspapers printed in the English or foreign language in which the notices pertaining to his office shall be published, and the board of supervisors shall designate the papers in which all other county notices shall be published. Any person now empowered under the law to designate the newspaper in which he desires to publish legal notices may select the newspaper printed in the English or foreign language. Such notice, however, must be printed in the English language." [35 G. A., ch. 48, § 1.] [C. '73, § 306.]

SEC. 550-a. Auditor of state to prescribe system of accounts—advisory committee. The auditor of state is hereby authorized and directed to formulate and prescribe a system of books, blanks, records, vouchers, receipts, etc., for use of county auditors, county treasurers and clerks of the district court, which system shall be adopted and used by all county auditors, county treasurers and clerks of the district court of the state from and after January first, nineteen hundred and eight. To assist in the preparation of the forms above contemplated, the auditor of state is hereby authorized to appoint a committee of not less than five nor more than seven persons, each of whom shall have had at least one term's experience either as county auditor, county treasurer or clerk of the district court, or who shall be an[1] expert accountant. The committee thus appointed shall serve without compensation except that the necessary traveling, hotel and other

expenses of the members for a period of not more than thirty days shall be paid by the state, and the auditor of state is hereby authorized to draw warrants upon the treasurer of state for the payment of such expenses upon receipt of vouchers therefor properly filed with and approved by the executive coucil. [32 G. A., ch. 24, § 1.]

[1"an" does not appear in the session laws. EDITOR.]

SEC. **550-b. Forms furnished—expenses—how paid.** The auditor of state shall, as soon as practicable after the same have been prepared, furnish each county auditor, county treasurer and clerk of the district court with a complete set of all forms prescribed under the provisions of this act pertaining to the affairs of his office and the expense thereof shall be paid in the same manner as other like expenses of the office of the auditor of state. [32 G. A., ch. 24, § 2.]

SEC. **550-c. Fees to be paid quarterly—acts in conflict repealed.** That the clerk of the district court, county auditor and county recorder shall pay all fees collected by them and belonging to the county, into the county treasury quarterly. All acts and parts of acts in conflict with this act are hereby repealed. [34 G. A., ch. 30, § 1.]

CHAPTER 10.

OF TOWNSHIPS AND TOWNSHIP OFFICERS.

SECTION **551. Supervisors divide county into townships.**

A township is not a body corporate for any purpose. It is a mere subdivision of the county for governmental purposes, and it is not therefore a municipal corporation. *Hanson v. Cresco*, 132–533, 109 N. W. 1109.

A civil township is not a corporation and cannot be sued. *Austin Western Co. v. Weaver Twp.*, 136–709, 114 N. W. 189.

A township is not a body corporate and cannot sue or be sued, but its officers are required by law to perform certain duties which are conferred upon them by statute and for the nonperformance of which they may be liable in damages. *Davis v. Laughlin*, 147–478, 124 N. W. 876.

Township trustees are not individually liable for an injury caused by a defect in a highway. *Theulen v. Township of Viola*, 139–61, 117 N. W. 26.

SEC. **555. Notice.** Notice of the time when such petition shall be presented shall be given by publication, once each week, for two consecutive weeks in a newspaper published in the township, the last of which publications shall be at least ten days prior to the time fixed for the presentation of such petition; or if no paper is printed in such township, or the papers therein printed refuse to make such publication, the notice herein contemplated shall be given by posting in five public places in the township, two of which shall be without, and three within, such corporate limits. [31 G. A., ch. 9, § 2; C. '73, § 383.]

SEC. **560. Township and city coterminous—clerk and trustees abolished.** Where a town or a city, not acting under a special charter, constitutes one or more civil townships the boundary lines of which coincide throughout with the boundary lines of the town or city, the offices of township clerk and trustee are abolished. [30 G. A., ch. 22; 24 G. A., ch. 10, § 1.]

SEC. **564. Trustees may employ counsel—county attorney may act when interests are not adverse.** Whenever litigation shall arise, involving the right or duty of township trustees to certify or levy taxes which

have been authorized upon expressed conditions, then in such cases, if the trustees are made parties to said litigation, they shall have authority to employ attorneys in behalf of said township, and are further authorized to levy the necessary tax to pay for said legal services, and to defray the unavoidable expenses of said litigation. Provided, however, in counties having a population of less than twenty-five thousand where the trustees are made parties to litigation arising by reason of the performance of their duties, as provided in this chapter, the county attorney, as a part of his official duties, shall appear in behalf of the township trustees. Provided, however, that if the interests of the county and the trustees are adverse, then in such event, the county attorney shall not appear for said trustees but they may employ other counsel and pay the expense thereof out of the fund created by this act. [34 G. A., ch. 31, § 1.] [20 G. A., ch. 120.]

It is only in such a case as contemplated in this section that the township trustees are authorized to employ attorneys in behalf of the township. Where they are sued in their individual capacity for breach of duty in connection with the highways they have no such authority. *Davis v. Laughlin*, 147–478, 124 N. W. 876.

SEC. 565. **Assessor where city included.** That the law as it appears in section five hundred sixty-five of the code be and the same is hereby repealed and the following enacted as a substitute therefor:

"In each even-numbered year there shall be elected in each township, a part of which is included within the corporate limits of any city or town, by the voters of such township residing without the corporate limits of such city or town, one assessor who shall be a resident of said territory outside of said city or town." [33 G. A., ch. 37, § 1.] [19 G. A., ch. 110; 18 G. A., ch. 201, § 1; 16 G. A., ch. 6; C. '73, § 390.]

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

SEC. 579. **Constable—duties.**

A writ of attachment from a district or superior court cannot be directed to a constable. *Freeman v. Lind*, 112–39, 83 N. W. 800.

SEC. 583. **Cemeteries—plat—record of.**

Action of township trustees with reference to boundaries of cemetery lots will not be binding on parties who do not have notice. *Hassenclever v. Romkey*, 133–470, 110 N. W. 905.

SEC. 584. **Conveyance of lots—record of.**

A lot owner in a cemetery established by the township trustees does not acquire fee title to such lot by his deed. *Anderson v. Acheson*, 132–744, 110 N. W. 335.

SEC. 585. **Trustees condemn lands.** The township trustees are hereby empowered to condemn, or purchase and pay for out of the general fund, and enter upon and take, any lands within the territorial limits of such township for the use of cemeteries, in the same manner as is now provided for cities and towns. Civil townships are hereby authorized and

empowered to receive by gift, devise, or bequest, money or property for the purpose of establishing and maintaining libraries, township halls, cemeteries, or for any other public purpose. All such gifts, devises, or bequests shall be effectual only when accepted by resolution of the board of trustees of such township. [31 G. A., ch. 17; 16 G. A., ch. 130, § 3.]

SEC. **586. Tax to pay for—adjoining townships.** They shall, at the regular meeting in April, levy a tax sufficient to pay for any such lands so condemned or purchased, or for the necessary improvement and maintenance of cemeteries thus established, or for the maintenance and improvement of cemeteries so established in adjoining townships in case they deem such action advisable. They shall have power to control any such cemeteries, or appoint trustees for the same, or sell them to any private corporation for cemetery purposes. They shall also have power to levy a tax not to exceed one mill to improve and maintain any cemetery not owned by the township, provided the same is devoted to general public use. The levy herein authorized may be extended to property within the limits of any city or town so far as same is situated within the township, unless such city or town is already maintaining a cemetery, or has levied a tax in support thereof. And the said tax may be so expended for the support and maintenance of any such cemetery after the same has been abandoned and is no longer used for the purpose of interring the dead. [35 G. A., ch. 50, § 1; 33 G. A., ch. 38, § 1.] [30 G. A., ch. 23; 29 G. A., ch. 28, § 1; 16 G. A., ch. 130, § 4.]

SEC. **590. Compensation of trustees.** Township trustees shall receive:

1. For each day's service of eight hours necessarily engaged in official business, to be paid out of the county treasury, two dollars each, except in townships having a population of thirty thousand or over, and situated entirely within the limits of a city acting under special charter, such compensation shall be three dollars per day;

2. For each day engaged in assessing damages done by trespassing animals, one dollar each, to be paid as other costs are in such cases;

3. When acting as fence viewers, or viewing or locating any ditch or drain, or in any other case where provision is made for their payment otherwise, they shall not be paid out of such treasury, but in all such cases their fees shall be paid in the first instance by the party requiring their services, and they shall append to the report of their proceedings a statement thereof, and therein shall direct who shall pay said fees, and in what sums respectively; and the party having so advanced any such fees may have his action therefor against the party so directed to pay the same, unless, within ten days after demand by the party entitled thereto, he shall be reimbursed therefor. [33 G. A., ch. 39, § 1; 16 G. A., ch. 35; C. '73, § 3808; R. § 4156; C. '51, § 2548.]

SEC. **591. Compensation of clerk.** The township clerk shall receive:

1. For each day of eight hours necessarily engaged in official business, where no other compensation or mode of payment is provided, to be paid from the county treasury, two dollars, except in townships having a population of thirty thousand or over, and situated entirely within the limits of a city acting under special charter, such compensation shall be three dollars per day;

2. For all money coming into his hands by virtue of his office, except money received from his predecessor in office, unless otherwise provided by law, two per cent.;

3. For filing each application for a drain or ditch, fifty cents;

4. For making out and certifying the papers in any appeal taken from an assessment by the trustees of damages done by trespassing animals, such additional compensation as the board of supervisors may allow. [33 G. A., ch. 40, § 1.] [32 G. A., ch. 25; 16 G. A., ch. 61; C. '73, § 3809; R. §§ 909, 911.]

SEC. **592. Compensation of assessor.** Each township assessor shall receive in full for all services required of him by law, a sum to be paid out of the county treasury, and fixed annually by the board of supervisors at their January session; said compensation shall be for the succeeding year, and shall not exceed the sum of two and one-half dollars for each day of eight hours which said board determines may necessarily be required in the discharge of all official duties of such assessors, except in townships having a population of thirty thousand or over, and situated entirely within the limits of a city acting under special charter, such compensation shall be four dollars per day. [33 G. A., ch. 41, § 1.] [C. '73, § 3810; R. § 730.]

SEC. **592-a. Township trustees—power to contract for use of public libraries—tax—annual levy.** Section five hundred ninety-two-a of the supplement to the code, 1907, is hereby repealed and the following is enacted as a substitute therefor:

"The township trustees of any civil township shall have power to contract with any free public library for the free use of such library by the residents of said township, as provided in section one[1] of this act and to pay such library the amount agreed therefor, and to levy annually, at the April meeting, a tax not exceeding one mill on the dollar on the taxable property of the township, the fund derived from which shall constitute a special fund to be known as the library fund, and shall be used exclusively for the purposes contemplated in this section. When a majority of the resident taxpayers, as shown by the last preceding assessment list of such civil township, petition the trustees thereof in writing to enter into such contract, and such library gives its written consent thereto, it shall be the duty of such trustees to execute such contract. When any such contract is made, whether on petition of the resident taxpayers or without such petition, a tax in an amount sufficient to pay such library the consideration agreed upon, not exceeding one mill on the dollar, shall be annually levied by such trustees and their successors, until such contract is terminated by its own provisions or by a majority vote of the electors of such township." [35 G. A., ch. 70, § 2.] [32 G. A., ch. 16; 31 G. A., ch. 14, § 3.]

[1§ 729-a herein. EDITOR.]

SEC. **592-b. Township hall funds—transfer authorized—how made.** That whenever there is now, funds in the hands of any township clerk, when same was raised under the provisions of sections five hundred sixty-seven and five hundred sixty-eight of the code, when same is not desired for the purposes set forth in above-mentioned sections, then said fund may be transferred to road fund of any township wherein same was raised, when a petition is presented to the trustees, signed by a majority of the electors of said township that voted at the last regular election prior to the signing of said petition, as shown by the poll books of said township, said transfer of funds to be made by the township clerk, upon the filing of said petition with said clerk, upon order of the trustees. [31 G. A., ch. 18.]

CHAPTER 11.

OF GENERAL REGULATIONS AFFECTING COUNTIES AND TOWNSHIPS.

SECTION 596. Officers not to purchase warrants.

The statute prohibits the purchase at a discount by an officer of any claim against the county, whether it be evidenced in writing or not. *Harrison County v. Ogden*, 133–677, 108 N. W. 451.

TITLE V.

OF CITY AND TOWN GOVERNMENT.

CHAPTER 1.

OF INCORPORATION.

SECTION 599. How effected.

The petition is to be presented to the district court and not to the judge. *State ex rel. v. Council*, 106–731, 77 N. W. 474.

Organization of an incorporated town alone has no effect on the boundaries of a school district. These will remain as before the incorporation. *Independent School Dist. v. Jones*, 142–8, 120 N. W. 315.

SEC. 600. Commissioners—notice. Upon compliance with the provisions of the preceding section, the court shall at once appoint five commissioners, who shall at once give notice of an election for incorporation, for not less than three successive weeks preceding the same, by posting notices in three public places within the limits of the proposed town, and by publication, once each week, for three consecutive weeks in one or more newspapers published in the county where the court is held; which notice shall state the time and place of holding the election, and a description of the limits of the proposed town, and that a plat and description thereof is on file in the office of the clerk of the district court. The court is vested with power to change or limit the territory proposed to be incorporated, before appointing the commissioners as herein provided. [31 G. A., ch. 9, § 20; C. '73, § 422.]

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

the said assessor in the manner provided by subdivision nine of section six hundred sixty-eight of the code. [31 G. A., ch. 9, § 28; 28 G. A., ch. 16, § 1; C. '73, §§ 423, 425.]

SEC. 608. **Publication.** When the incorporation of any city or town shall have been discontinued, the clerk of the court shall cause a notice thereof to be published, once each week, for four consecutive weeks in a newspaper published in the county where the court is held, and shall also certify the fact to the secretary of state and to the recorder of the county. [31 G. A., ch. 9, § 21; C. '73, § 452.]

SEC. 611. **By proceedings in court.** When any city or town shall desire to annex abutting and contiguous territory which has been laid out in lots or parcels, not within the limits of a city or town, the council thereof may present to the district court of the county in which the city or town is situated a petition, describing the territory to be annexed, and stating that the same had been laid out as above mentioned, the facts constituting the desirability of annexation, the name of each owner of any portion thereof, if there is more than one such owner, and the particular portion of such territory owned by each, which petition shall have attached thereto a plat thereof. Notice of the filing of such petition shall be served, by publication in one newspaper published in the city or town, once each week, for four consecutive weeks, and by posting in five public places in the territory desired to be annexed for the same period; the corporation shall be plaintiff, the owners defendants, and issues joined and the case tried as an ordinary action, as far as applicable, except that no judgment for costs shall be rendered against any defendant who does not make defense. If the court finds the allegations of the petition true, and that justice requires the annexation of said territory or any part thereof, a decree shall be entered accordingly, and from that time the territory therein described shall be included in such corporation. The same record and certified copies shall be made and filed as provided in the preceding section. [31 G. A., ch. 9, § 22; C. '73, § 431.]

SEC. 614. **Indebtedness—how paid.**

The remedy of the holder of bonds issued by a city subsequently annexed to another, and which has ceased to have officers of its own, is by a suit in equity against the city to which the annexation is made, which is to be deemed in equity a trustee for the creditor, charged with the duty of collecting the amount adjudged to be due him. *Burlington Sav. Bank v. Clinton*, 106 Fed. 269. And see S. C. 111 Fed. 439.

SEC. 615. **Extension—how effected.** Any city or town may have its limits enlarged by resolution of the council, fixing the boundaries of the city or town, to the proposed extent, which shall, as far as practicable, be terminated by straight lines drawn parallel, respectively, to the corresponding lines of the government survey, and the question must then be submitted to the vote of the electors of the city or town as thus proposed to be enlarged, on a day fixed by resolution of the council, and notice thereof given by proclamation of the mayor of the time and place of holding the same, setting forth the exact question to be presented to the electors for determination, which shall be published in some newspaper published in said city or town, once each week, for four weeks, consecutively; provided, however, that where no newspaper is published in such city or town, such proclamation shall be posted for an equal length of time in five public places within the corporate limits of said city or town, one of which shall be on the door of the mayor's office. The council shall select three judges and two clerks for said election, whose duties shall be the same as prescribed

by law for judges and clerks of election. If at such election a majority of the votes cast are for such extension, the mayor shall issue a proclamation announcing that fact, and from thenceforth the limits of said city or town shall be enlarged as proposed. [35 G. A., ch. 51, § 1.] [31 G. A., ch. 9, § 23; 17 G. A., ch. 169, §§ 1–3; 16 G. A., ch. 47, §§ 1–3.]

A resolution providing for the submission of the question of extending the boundaries to the vote of the electors is simply a step to an election, and citizens in general have no right to be heard on the question of the adoption of such resolution. *Moore v. City Council*, 119–423, 93 N. W. 510.

The legality of the action of the council with reference to the extension of city limits may be tested by an action of *certiorari*. *Ibid.*

Irregularity in the form of the ballots prepared by the town officials will not vitiate the result of the election if the voters are not misled thereby. *Lehigh Sewer Pipe & Tile Co. v. Lehigh*, 156–386, 136 N. W. 934.

As to a proceeding for the extension of town limits, there is no provision for a recount of ballots cast on the question of such extension. *Ibid.*

SEC. 616. **Taxation of lands.** No lands included within said extended limits which shall not have been laid off into lots of ten acres or less, or which shall not subsequently be divided into parcels of ten acres or less by the extension of streets and alleys, and which shall also in good faith be occupied and used for agricultural or horticultural purposes, shall be taxable for any city or town purpose, except that they may be subjected to a road tax to the same extent as though they were outside of the city or town limits, which tax shall be paid into the city or town treasury. Said lands shall not be exempt from taxation for library purposes as provided by section seven hundred thirty-two of the supplement to the code, 1907, as amended by chapter forty-six of the acts of the thirty-third general assembly. [35 G. A., ch. 52, § 1.] [20 G. A., ch. 158; 17 G. A., ch. 169, §§ 4, 5; 16 G. A., ch. 47, § 4.]

The mere temporary occupancy and use for agricultural purposes of annexed land will not prevent its being subject to municipal assessments. *Allen v. Davenport*, 107–90, 77 N. W. 532.

The exemption of agricultural lands, owned in tracts of ten acres or more, from city taxes, does not apply to property which is used for city residence purposes. *Windsor v. Polk County*, 109–156, 80 N. W. 323.

SEC. 622. **Severance—application.** When the inhabitants of a part of any town or city, whether the same is or is not laid out in lots and blocks, desire to have the part thereof in which they reside severed therefrom, they may apply by petition in writing, signed by a majority of the resident property holders of that part of the territory of such city or town, to the district court of the county, which petition shall describe the territory proposed to be severed, and have attached thereto a plat thereof, and shall name the person or persons authorized to act in behalf of the petitioners in the prosecution of said petition. Where the property sought to be severed has not been subdivided into lots or blocks and there are no owners residing upon any portion of the same, the petition may be signed and the proceedings maintained in like manner by a majority of the owners of the property sought to be severed. [31 G. A., ch. 19; C. '73, § 440; R. § 1048.]

This section does not require that the reasons for desiring a severance shall be stated, and it evidently is not intended that the ordinary rules of pleading shall apply in such cases. *Luick v. Belmond*, 109–361, 80 N. W. 431.

It is for the court to determine whether control over the territory proposed to be severed is important to the proper exercise of police powers on the part of the city, and whether if desirable for residence purposes it is likely to be so occupied in the future; and the finding of the court or jury will not ordinarily be disturbed in the absence of a showing of abuse of discretion. If however the interest of the

city in retention of the territory is only for the purpose of deriving taxes therefrom, the severance should be granted. *Johnson v. Forest City*, 129–51, 105 N. W. 353.

Difference in the rate of assessments between property within the corporate limits and outside property will not be a ground for severing territory which by reason of its use is not subjected to city taxation. *Hanson v. Cresco*. 132–533, 109 N. W. 1109.

In such a proceeding, the question as to how the territory came to be annexed to the corporation is immaterial. *Ibid.*

The fact that a portion of the territory proposed to be severed is necessary for sewer outlets, garbage disposal, and the location of a pest house, will not make such severance improper in view of the fact sewers may be maintained through territory outside of the corporate limits, and outside property may be held by the municipality for garbage disposal and location of a pest house. *Ibid.*

The danger of increasing assessable valuations on account of inclusion of property within corporate limitations is not a ground for severance of territory. *Wilson v. Waterloo*, 138–628, 116 N. W. 734; *Peek v. Waterloo*, 138–650, 116 N. W. 735.

The fact that land used for agricultural purposes is included within the limits of a town does not entitle the owner thereof to have it severed. The sanitary regulations of the town and the probable necessity for future growth may be taken into account in determining whether such territory is properly included. *In re Town of LeRoy*, 135–562, 113 N. W. 347.

The petition should be signed by the majority of the holders of real property of the portion of the city or town which is asked to be severed. The reference to "resident property holders" does not relate to inhabitants owning personal property only. *Stason v. Albia*, 150–207, 129 N. W. 809.

SEC. 625. Trial—commissioners appointed.

On an application to have territory detached from a city on the ground that the land included therein was not platted and was used exclusively for agricultural purposes and not needed for any possible increase of city population, held that it did not sufficiently appear that the land was not needed for the city and that it would not be presumed that it would be taxed unreasonably, and the judgment of the court on a verdict of the jury that the territory should not be severed was sustained. *Christ v. Webster City*, 105–119, 74 N. W. 743.

SEC. **633. Proclamation—notice.** The mayor, or, in case there is no mayor, the president of the council, shall at once issue a proclamation giving notice of such election, of the question submitted to the electors, and of the time and place of holding the election, which proclamation shall be published, once each week, for four consecutive weeks in some newspaper published in such city or town, and, if there is none published therein, then such proclamation shall be published by posting a copy thereof in five public places within the corporate limits of such city or town, one of which shall be on the door of the mayor's office. [31 G. A., ch. 9, § 24; C. '73, § 436.]

CHAPTER 2.

OF ORGANIZATION AND OFFICERS.

SECTION **639. Change of class—loss of population.** Within six months after the publication of any state or federal census, the executive council shall cause a statement and list of each city or town affected thereby, in its class as a municipal corporation, to be published in some newspaper at the seat of government, and in each city or town the class of which is changed by an increase of population. Provided, however, that any city at the time of taking effect of the code having a population sufficient to be classed either as a city of the first or second class shall remain in such class, and shall not be affected in its classification by a subsequent loss of population unless in cities of the second class, as shown by the last state or federal census, the population shall have dropped below fifteen

hundred and in cities of the first class, below ten thousand. [35 G. A., ch. 53, § 1.] [15 G. A., ch. 52; C. '73, § 509; R. § 1079.]

SEC. 641. **Wards.** Cities may be, by the council thereof, divided into wards, new ones created, or the boundaries changed, but in all cases, whether it be the creation of wards or the changing of the boundaries thereof, the same shall be laid off, as nearly as may be, in a rectangular form, conforming the lines to the center of the streets or alleys, and giving to each ward, as far as practicable, an equal population; but in cities of the second class the number shall not be increased beyond five nor decreased to less than two. [32 G. A., ch. 26, § 1; 18 G. A., ch. 26; C. '73, § 520; R. § 1092.]

The city council has power to create new wards by ordinance but not by resolution. *Cascaden v. Waterloo*, 106–673, 77 N. W. 333.

SEC. 642. **Regular elections.**

The residence of an elector, if an unmarried man having no other home, is in the ward in which he rooms, and not in that of the boarding house at which he takes his meals. *State v. Savre*, 129–122, 105 N. W. 387.

Municipal elections are held according to the regulations enacted for the conduct of general elections. *Jackman v. Board of Supervisors*, 156–620, 137 N. W. 906.

SEC. 643. **Officers to be residents.**

Where a woman was elected clerk of a city but on a question raised as to her eligibility to the office she resigned and her husband was appointed, after which she kept the records of the meetings of the council which were signed by him as clerk, held that the validity of the proceedings thus recorded was not impaired. *Swan v. Indianola*, 142–731, 121 N. W. 547.

SEC. 645. **Council—how composed.** That section six hundred forty-five of the supplement to the code [1902] be repealed and the following enacted in lieu thereof:

"City and town councils shall be composed as follows: In cities, two councilmen at large and one councilman from each ward; in towns, five councilmen at large." [32 G. A., ch. 26, § 2; 29 G. A., ch. 29, § 2; 19 G. A., ch. 25; 18 G. A., ch. 120; 17 G. A., chs. 9, 14; C. '73, §§ 511, 521, 531; R. §§ 1081, 1093.]

SEC. 646. **Election of councilmen—terms of office.** That section six hundred forty-six of the code be repealed and the following enacted in lieu thereof:

"On the organization of a city or town or on its reorganization after the change of its class, or at the first regular municipal election hereafter, a council shall be elected as follows, except that in those cities of the second class that elect a mayor in odd-numbered years, the term of those councilmen and officers expiring in nineteen hundred and eight is extended one year; in those cities of the second class that elect a mayor in even-numbered years, the term of those councilmen and officers expiring in nineteen hundred and nine is extended one year; and at the municipal election at which a mayor is elected in nineteen hundred and nine or nineteen hundred ten, as the case may be, the council shall be elected in accordance with the provisions of this act: By the election of two councilmen at large, but if any city embraces within its limits the whole or part of two or more townships, two of which contain one thousand or more electors, only one of the councilmen at large shall be chosen from any one township. There shall also be elected at the same time one councilman from each ward, who shall be chosen by the electors residing within the limits thereof. Thereafter, the successors of such councilmen at large and ward councilmen and officers

shall be chosen at the regular biennial elections and shall hold office for two years. In towns in which a mayor is elected in the even-numbered years the officers and councilmen shall be elected under the provisions of this act in the year nineteen hundred ten, and the councilmen and officers to be elected in nineteen hundred and eight shall be elected for a term of two years, and the term of councilmen and officers whose terms expire in nineteen hundred and nine shall be extended one year. In towns in which a mayor is elected in odd-numbered years the officers and councilmen shall be elected under the provisions of this act in nineteen hundred eleven, and the councilmen and officers to be elected in nineteen hundred and eight shall be elected for a term of three years. The councilmen and officers to be elected in nineteen hundred and nine shall be elected for two years, and the term of councilmen and officers whose term expires in nineteen hundred ten shall be extended one year. All town officers[1] elected in nineteen hundred ten or nineteen hundred eleven, as the case may be, and thereafter under the provisions of this act, shall be elected for the term of two years." [32 G. A., ch. 26, § 3; 19 G. A., ch. 25; 17 G. A., chs. 9, 14; C. '73, §§ 511, 521; R. § 1093.]

[1"offices" in session laws, 32 G. A., and in 1907 supplement. EDITOR.]

Under the provisions of 32 G. A., ch. 26, held that in cities of the second class in which officers were to be elected in even-numbered years, such officers were to be elected in 1908 in accordance with the statute repealed and the councilmen were not to be chosen under the statute until 1910. *State v. Payton*, 139–125, 117 N. W. 43.

SEC. **647. Elective officers in cities of first class.** That section six hundred forty-seven of the code be repealed and the following enacted in lieu thereof:

"In all cities of the first class there shall be elected biennially a mayor, solicitor, treasurer, auditor, city engineer, assessor, and in cities where there is no superior court, a police judge." [32 G. A., ch. 26, § 4; 19 G. A., ch. 110; 18 G. A., ch. 201, § 1; 17 G. A., ch. 20; 16 G. A., chs. 6, 33; C. '73, §§ 390, 535; R. § 1106.]

SEC. **648. Elective officers in cities of second class.** That section six hundred forty-eight of the supplement to the code, 1907, and the law as it appears therein, is hereby repealed and the following enacted in lieu thereof:

"In cities of the second class there shall be elected biennially a mayor, treasurer and assessor." [35 G. A., ch. 54, § 1.] [32 G. A., ch. 26, § 5; 21 G. A., ch. 141; 19 G. A., ch. 110; 16 G. A., ch. 6; C. '73, §§ 390, 517, 532; R. §§ 1090, 1103.]

SEC. **649. Elective officers in towns.** That section six hundred forty-nine of the code is hereby repealed and the following enacted in lieu thereof:

"In towns there shall be elected, biennially, a mayor, treasurer and assessor." [32 G. A., ch. 26, § 6; 19 G. A., ch. 110; 17 G. A., ch. 9; 16 G. A., ch. 6; C. '73, §§ 390, 511, 514; R. §§ 1081, 1084.]

SEC. **651. Officers appointed by council.** That section six hundred fifty-one of the supplement to the code, 1907, and the law as it appears therein, is hereby repealed and the following enacted in lieu thereof:

"In all cities and towns the council, at its first meeting after the biennial election, shall appoint a clerk, and in cities of the second class shall appoint a city solicitor." [35 G. A., ch. 54, § 2.] [32 G. A., ch. 26, § 7; 25 G. A., ch. 13, §§ 1, 3; 17 G. A., ch. 20, § 1; 16 G. A., ch. 33, § 1; C. '73, §§ 515, 522, 532, 534; R. §§ 1086, 1093, 1103, 1105.]

Under this section as it originally stood, the term of office of street commissioner was in effect fixed at two years and the occupant of the office at the end of a two years' term who was a veteran had no better right to appointment than another candidate who was also a veteran. (See code supp. § 1056-a15.) *King v. Ottumwa*, 148-411, 126 N. W. 943.

SEC. **652. Officers appointed by the mayor.** That section six hundred fifty-two of the code is hereby repealed and the following enacted in lieu thereof:

"The officers to be appointed by the mayor shall be as follows:

1. The mayor of each city or town shall appoint a health physician, street commissioner and a marshal who shall be, *ex officio*, chief of police, and may also appoint one or more deputy marshals. In cities and towns he shall appoint as many policemen as the council, by general ordinance, shall direct, and such officers shall hold their positions during the pleasure of the mayor. He shall also appoint such officers as shall be provided by ordinance. He may also, in cases of emergency, appoint such number of special policemen as he may think proper, reporting such special appointment to the council at its next regular meeting; all such special appointments to continue in force until such meetings, unless sooner terminated by the mayor. In cities having a board of police and fire commission, policemen shall be appointed as provided in the act creating such board.

2. In cities of the first class, he shall appoint, when deemed necessary, a wharf master. If there is a board of public works, such board shall appoint the street commissioner." [32 G. A., ch. 26, § 8; 25 G. A., ch. 13; 20 G. A., ch. 7, § 1; 17 G. A., ch. 20, §§ 1, 2; 16 G. A., ch. 33, § 2; C. '73, §§ 515, 532, 534–5, 537; R. §§ 1086, 1103, 1105–6.]

The marshal in towns being an appointee of the mayor, a contract between the city council and a person to act as marshal at a stipulated salary is not valid. *Baxter v. Beacon*, 112-744, 84 N. W. 932.

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

[The above section is made applicable to special charter cities by § 654-a. EDITOR.]

A city may by ordinance provide for the appointment of a police matron, without regard to statutory authority, and may by contract fix her compensation at a different rate than that fixed by statute. *Daniels v. Des Moines*, 108-484, 79 N. W. 269.

SEC. **654-a. Applicable to special charter cities.** The provisions of the law as it appears in section six hundred fifty-four of the supplement to the code [1902] and section six hundred seventy-two of the code, are also made applicable to cities acting under special charters. [32 G. A., ch. 27.]

SEC. **655. Other officers—appointed by mayor.** Cities and towns may, by general ordinance, provide for the appointment, by the mayor, of such additional officers, including superintendent of markets, harbor masters and port wardens, usual and proper for the regulation and control of navigation, trade or commerce, or needful and proper for the good government of the city or town, or the due exercise of its corporate powers,

and fix their term of office, as they may deem necessary. [32 G. A., ch. 26, § 9; 16 G. A., ch. 33, §§ 1, 2; C. '73, 514, 524, 528; R. §§ 1084, 1095, 1098.]

SEC. **657. Removal of appointive officers.** That section six hundred fifty-seven of the code be repealed and the following enacted in lieu thereof:

"All persons appointed to office in any city or town may be removed by the officer or body making the appointment, but every such removal shall be by written order which shall give the reasons therefor and be filed with the city clerk." [32 G. A., ch. 26, § 10.]

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

1. *Executive officer—magistrate.* He shall be a conservator of the peace, and, within the limits of the same, shall have all the powers conferred upon sheriffs to suppress disorders. He shall be the chief executive officer thereof, and it shall be his duty to enforce all regulations and ordinances; he may, upon view, arrest any one guilty of a violation thereof, or of any crime under the laws of the state, and shall, upon information supported by affidavit, issue process for the arrest of any person charged with violating any ordinance of the city; shall supervise the conduct of all corporate officers, examine into the grounds of complaint made against them, and cause all neglect or violation of duty to be corrected, or report the same to the proper tribunal, that they may be dealt with as provided by law. [C. '73, §§ 506, 519, 537; R. §§ 1085, 1091, 1102, 1105.]

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

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

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

5. *Presiding officer—vote.* That paragraph five of section six hundred fifty-eight of the supplement to the code [1902] be repealed and the following enacted in lieu thereof:

"He shall be the presiding officer of the council with the right to vote only in case of a tie." [32 G. A., ch. 26, § 11; 29 G. A., ch. 29, § 1; 18 G. A., chs. 120, 146; 17 G. A., ch. 9; 16 G. A., ch. 58; C. '73, §§ 512, 518, 531; R. §§ 1082, 1091.]

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

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

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

of the rooms or cells in which male prisoners are imprisoned. [25 G. A., ch. 15, § 1.]

Par. 1. **Executive officer—magistrate:** Where the mayor of a town causes the arrest of a property owner for resisting eviction from a portion of the premises occupied by him, which is claimed by the town as a street, the official position of the mayor will not relieve him from liability if the arrest is wrongful and without jurisdiction. *Young v. Gormley*, 120–372, 94 N. W. 922.

Par. 2. **Office:** Where a city fails to furnish a proper office for its mayor he may furnish one and collect the actual and reasonable expense thereof from the city. *Hill v. Clarinda*, 103–409, 72 N. W. 542.

Par. 5. **Presiding officers—vote:** The mayor is the presiding officer of the city council when acting as a board of review for the equalizing of taxes. *Frost v. Board of Review*, 113–547, 85 N. W. 770.

The right of the mayor to a casting vote is limited to cases where there is in fact a tie. *State v. Alexander*, 107–177, 77 N. W. 841.

Under the code of '73, the mayor of a city of the second class being a member of the city council, though only voting in case of tie, held that he must be included with the council in determining whether a proposition was carried by a three-fourths vote. *Griffin v. Messenger*, 114–99, 86 N. W. 219.

SEC. **658-a. Legalizing certain proceedings.** That all acts, motions, proceedings, resolutions and ordinances heretofore passed or adopted by the council of any city, including cities acting under special charter, and incorporated towns in the state on the supposition that the mayor was not a member of such council, and which would conform to the law if the mayor had not been a member of said council, shall for all purposes from the date of such act, motion, proceeding, resolution or ordinance, be considered as valid and legal as they would have been had the mayor not been a member of such body. [29 G. A., ch. 224, § 1.]

SEC. **659. Clerk—duties.**

The clerk is to keep an accurate record of proceedings under the supervision of the council, and the council, on hearing the record read by the clerk, may correct it. The council has the control of the record of its proceedings, and until such record is approved it is open to such modifications as may be necessary to truthfully exemplify what has been done. *Mann v. LeMars*, 109–251, 80 N. W. 327.

Although the record of proceedings of the council is kept by one who is not the clerk, if such record is approved by the council and attested by the duly authorized clerk, the validity of the record is not involved. *Swan v. Indianola*, 142–731, 121 N. W. 547.

The town clerk is required to make an accurate record of all proceedings of the council and there cannot be a certification of a record of a resolution adopted by such council unless a record thereof has been made. *Sawyer v. Collins*, 148–712, 127 N. W. 1015.

SEC. **660. Treasurer—duties.**

The preference given to warrant holders by this section applies only as between warrants issued in any given year. Holders of warrants for the expenses of one year have no claim on the funds of a subsequent year, at least until the expenses of the latter year are paid. *Phillips v. Reed*, 107–331, 76 N. W. 850, 77 N. W. 1031. And see *Phillips v. Reed*, 109–188, 80 N. W. 347.

SEC. **660-a. Depositary—daily balances—interest—bond by bank.** That treasurers of cities of the first and second class, cities operating under special charter and cities under the commission form of government shall, with the approval of the city council as to place and amount of deposit, by resolution entered of record, deposit all city funds in any bank or banks in the city to which the said funds belong, at interest at the rate of not less than two per cent. per annum on ninety per cent. of the daily balances payable at the end of each month, all of which interest shall accrue to the benefit of the general city fund; but before such deposit is made in any bank it shall file a bond for double the amount deposited with sureties to be approved by the treasurer and the city council and conditioned to hold

the treasurer harmless from all loss by reason of such deposit or deposits; provided that in cases where an approved surety company's bond is furnished said bond may be accepted in an amount of ten per cent. more than the amount deposited. Said bonds shall be filed with the city clerk and action shall be brought thereon by the treasurer or the city as the council may elect. [35 G. A., ch. 55, § 1.]

SEC. 660-b. **Failure of local bank to accept funds.** If no bank or banks in the city will accept said deposits under the terms and conditions of this act then the said funds shall be deposited in any bank or banks in the state which[1] will accept said funds under the terms and conditions of this act. [35 G. A., ch. 55, § 2.]

[1"who" in enrolled bill. EDITOR.]

SEC. 660-c. **Private use of funds prohibited.** No treasurer shall loan or in any manner use for private purposes any funds coming into his hands as such treasurer. [35 G. A., ch. 55, § 3.]

SEC. 660-d. **Expense of bond.** That if the city treasurer shall request it the city shall pay the reasonable expense of procuring the bond for the city treasurer not exceeding one half of one per cent. per annum upon the amount thereof. [35 G. A., ch. 55, § 4.]

SEC. 661. **Assessor—duties—deputies—officer—supplies.** All assessors elected by cities and towns shall perform the same duties as township assessors. They may appoint such number of deputies as the council shall authorize. Except that in cities of the first class having a population of sixty thousand or over the board of supervisors of the county shall furnish the assessor with supplies and an office. And said assessor shall appoint such number of deputies as the board of supervisors may authorize, such appointments to be approved by the said board. If any city or town is situated in two or more counties, the assessor shall make returns of the assessment to the proper county. [32 G. A., ch. 26, § 12; 29 G. A., ch. 30, § 1; 19 G. A., ch. 110; 18 G. A., ch. 201, §§ 1, 2; 16 G. A., ch. 6; C. '73, § 390.]

SEC. 662. **Marshal—duties.**

The town council is given no power to appoint a marshal. *Baxter v. Beacon*, 112–744, 84 N. W. 932.

A marshal arresting a person without warrant will be liable in damages for false arrest if he does not take the prisoner before a magistrate and make complaint before him. *Stewart v. Feeley*, 118–524, 92 N. W. 670.

SEC. 663. **Deputy marshals—duties.**

A deputy marshal held not to be a peace officer under the provisions of § 4109 of code of '73, and therefore not entitled to fees for the arrest of vagrants under 23 G. A., ch. 43. *Twinam v. Lucas County*, 104–231, 73 N. W. 473.

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

A street commissioner has apparent authority to grade the streets, and if he does so in a case where the grading is unlawful and his acts are known to the city council and not objected to, his authority will be presumed and the city will be liable. *Brown v. Webster City*, 115–511, 88 N. W. 1070.

The act of the city engineer or chief of fire department in directing a water company as to the pressure to be maintained at certain hydrants or in certain districts does not amount to a waiver of the terms of a contract between the company and the city as to the water pressure to be maintained. *Cedar Rapids Water Co. v. Cedar Rapids*, 117–250, 90 N. W. 746.

It is the duty of the city attorney to represent the city in a litigation pending in court and his appearance for it in instituting a suit, or in its behalf when sued, in the absence of any showing to the contrary, is presumed to have been authorized. *Rankin v. Chariton*, 139 N. W. 560, 141 N. W. 424.

SEC. 668. **City and town councils—powers and duties.** All legislative and other powers granted to cities and towns shall be exercised by the councils, except those conferred upon some officer by law or ordinance. They shall perform the duties required in this code including the following:

1. *Organization.* The members of such council shall, on the first Monday after their election, assemble and organize the council. [C. '73, § 522; R. § 1093.]

2. *Quorum.* In all cities or towns, a majority of the whole number of members to which such corporation is entitled, including the mayor, shall be necessary to constitute a quorum. [17 G. A., ch. 9; C. '73, §§ 511, 522; R. §§ 1081, 1093.]

3. *Meetings.* They shall determine the time and place of holding their meetings, which shall at all times be open to the public, and, in the absence of the mayor or clerk, shall appoint a temporary chairman or clerk from their own number, which appointment shall be entered of record. [C. '73, § 524; R. § 1095.]

4. *Special meetings.* The mayor or any three members of the council shall call special meetings by notice to each of the members, personally served, or left at his usual place of residence, of which service a record shall be made by the clerk. [C. '73, § 524; R. § 1095.]

5. *Rules—journal.* They shall determine the rules of their own proceedings, and keep a journal thereof, which shall be open to the inspection and examination of any citizen. [C. '73, § 522; R. § 1093.]

6. *Attendance of members.* They may compel the attendance of absent members in such manner and under such penalties as they may prescribe. [C. '73, § 522; R. § 1093.]

7. *Seal.* Each council shall cause to be provided a seal, in the center of which shall be the name of the city or town, and around the margin the words, "city seal" or "town seal," as the case may be, which shall be affixed to all transcripts, orders or certificates which it may be necessary or proper to authenticate. [C. '73, §§ 454, 523; R. §§ 1047, 1094.]

8. *Election of officers.* All appointments or elections of officers, except for the purpose of filling vacancies, in offices not filled by election by the council, shall be made viva voce, and the concurrence of a majority of the whole number of members of the council shall be required. On the vote resulting in an election or appointment, the name of each member and for whom he voted shall be recorded. [18 G. A., ch. 146, § 3; C. '73, § 493; R. § 1134.]

9. *Filling vacancies.* In selecting persons to fill vacancies in offices not filled by election by the council, it shall vote by ballot, and the person receiving a majority of the votes of the whole number of members shall be declared elected to fill such vacancy. [19 G. A., ch. 124, § 2.]

10. *Terms of officers.* They shall fix by ordinance the terms of service, not exceeding one year, except in cities holding biennial elections, where such term shall not exceed two years, of all officers appointed or elected, whose terms are not prescribed by law. [C. '73, §§ 514, 524; R. §§ 1084, 1095.]

11. *Powers of officers.* They shall prescribe by ordinance the powers to be exercised and duties to be performed by the officers appointed or elected, so far as such powers and duties are not defined by law. [C. '73, §§ 514, 524–5, 528; R. §§ 1084, 1095, 1096, 1098.]

12. *Police force.* They shall have power to establish a police force, and to organize the same under the general supervision of the marshal, and to

provide one or more station houses. [C. '73, §§ 525, 542; R. §§ 1116, 1695.]

13. *Control of finances.* They shall have the management and control of the finances and all the property, real and personal, belonging to the city or town. [C. '73, § 524; R. § 1095.]

14. *Members not interested.* No member of any council shall, during the time for which he has been elected, be appointed to any municipal office which shall be created, or the emoluments of which shall be increased, during the term for which he shall have been elected; nor shall he be interested, directly or indirectly, in any contract or job for work, or the profits thereof, or services to be performed for the corporation. [C. '73, § 490; R. § 1122.]

15. *Provide for custody of women and children.* In cities having a population of twenty-five thousand inhabitants or more, the council shall appropriate annually such sums as may be necessary for the arrangements needed to secure separate care and confinement in the station houses of all women and children under arrest, and for the appointment, salary and maintenance of police matrons. [25 G. A., ch. 15, § 6.]

16. *Appropriations.* In cities of the first and second class, the council shall make the appropriation for all the different expenditures of the city government for each fiscal year at or before the beginning thereof, and it shall be unlawful for it or any officer, agent or employe of the city to issue any warrant, enter into any contract, or appropriate any money, in excess of the amount thus appropriated, for the different expenses of the city, during the year for which said appropriation shall be made. Any such city shall not appropriate, in the aggregate, an amount in excess of its annual legally authorized revenue; but nothing herein shall prevent such cities from anticipating their revenues for the year for which such appropriation is made, or from bonding or refunding their outstanding indebtedness. The council of such cities shall advertise in at least two newspapers published in said cities for three weeks, two insertions for each week, for bids for furnishing all supplies of every kind for the several departments of the city, not required to be advertised for by the board of public works; said advertisements to be published two weeks before the beginning of each fiscal year. [32 G. A., ch. 28; 22 G. A., ch. 4.]

Par. 1. **Organization:** In exercising their powers in respect to the control of utilities in which the city or town enjoys a proprietary interest, the governing bodies may, in the absence of statutory restrictions, delegate all functions purely ministerial or administrative to committees of their own members, by whose action the corporation will be bound as absolutely as though these bodies had acted directly. *Burge v. Rockwell City*, 120–495, 94 N. W. 1103.

Ordinarily all members of a committee should be notified of the time and place of its proposed meeting, even though a majority will control. The minority ought to have an opportunity of being heard. *Ibid.*

A committee having authority to make a contract, has also authority to change the terms thereof. *Ibid.*

The council may act as to a matter over which it has jurisdiction although it has no clerk and its proceeding may be proved by parol evidence in the absence of a record. *Swan v. Indianola*, 142–731, 121 N. W. 547.

Par. 4. **Special meetings:** A meeting of the council may be called by the mayor or any three members of the council, and at such called meeting all legitimate business may be considered. If all the members attend such meeting, failure to give notice thereof is immaterial. *Moore v. City Council*, 119–423, 93 N. W. 510.

Par. 8. **Election of officers:** A record showing the election of an officer is not conclusive where it shows proceedings inconsistent with such election. *State v. Alexander*, 107–177, 77 N. W. 841.

Under provisions of an ordinance (while the code of '73 was in force) somewhat analogous to those found in this paragraph, held that the mayor could cast the deciding vote in case of a tie in the election of an officer. *Ibid.*

The method of voting by the city council in the election of officers rests very largely within the discretion of the majority, and

the fact that the mayor, with the approval of the majority of the council, refuses to allow a member to change his vote will not invalidate the election of the person thus declared to be elected. *Mann v. LeMars*, 109–251, 80 N. W. 327.

As the appointment of a marshal in towns is with the mayor, and not with the council, held that a contract made with the council to act as marshal on a salary named was invalid. *Baxter v. Beacon*, 112–744, 84 N. W. 932.

Par. 14. Members not interested: Where the council of a city was by statute authorized to fix the salaries of city officers, but the members of the council were forbidden to vote upon any question in which they were directly or indirectly interested, held that the action of the members of the council in increasing their salaries was unlawful and that in receiving the increased salaries thus voted to themselves they were guilty of a misdemeanor in doing an act forbidden by law. *State v. Shea*, 106–735, 72 N. W. 300.

A contract for sale of lumber to a city for sidewalks, etc., by a member of the city council is void. *Bay v. Davidson*, 133–688, 111 N. W. 25.

Par. 16. Appropriations: The object of this subdivision requiring expenditures only as the result of appropriations, is to place municipal corporations on a cash basis, preventing the accumulation of a floating indebtedness. *Windsor v. Des Moines*, 110–175, 81 N. W. 476.

Notwithstanding the provisions of code § 660 that warrants which have been indorsed "not paid for want of funds" shall be paid in order of their presentation, warrants for the expenses of one year do not take priority over the warrants for the expenses of a subsequent year with reference to the funds available for payment of the expenses of the latter year. *Phillips v. Reed*, 107–331, 76 N. W. 850, 77 N. W. 1031.

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

SEC. 669. Compensation of councilmen—how paid—when acting as board of review. Councilmen in cities of the first class shall be paid an amount prescribed by ordinance, not in excess of two hundred fifty dollars per annum, which shall be in full compensation of all services of such councilmen of every character connected with their official duties, except when acting as members of the board of review, for which service they shall receive not more than two dollars a day for each day when acting as a board of review, to be paid out of the county treasury; and in all other cities and towns they shall receive not to exceed one dollar each for every regular or special meeting, and in the aggregate not exceeding fifty dollars in any one year; but in such cities and towns the members shall be paid in addition to the foregoing, for services as members of the board of review, an amount not exceeding one dollar for each session of not less than three hours, and the compensation for services as members of the board of review shall be paid out of the county treasury. [35 G. A., ch. 56, § 1.] [28 G. A., ch. 17, § 1; 22 G. A., ch. 24, § 1; C. '73, § 505; R. § 1095.]

The compensation to be paid to a councilman is fixed by statute, and it cannot be increased either by direct payment or indirectly through the medium of profit on the sale of goods. *Bay v. Davidson*, 133–688, 111 N. W. 25.

SEC. 672. Compensation of police matrons.

If a police matron is appointed under statutory provisions, her compensation cannot be affected by contract, but to avail herself of this rule it must appear that she was appointed in virtue of the statute. The city need not necessarily act under the statute in making such appointment, and if it does not, a contract regulating her compensation will be valid. *Daniels v. Des Moines*, 108–484, 79 N. W. 269.

SEC. 673. Fees of marshal and deputy.

The county is not liable for statutory fees of the city marshal in liquor seizure cases. *Des Moines v. Polk County*, 107–525, 78 N. W. 249.

SEC. 674. Compensation of assessors and deputies—special services. That section six hundred seventy-four of the supplement to the code, 1907, be and the same is hereby repealed and the following enacted in lieu thereof:

"City and town assessors and their deputies shall receive the same compensation as township assessors, which shall be determined in the same manner and payable from the county treasury. Except, that in cities including those under the commission form of government having a population of twenty thousand or over the compensation of the assessor shall not be more than eighteen hundred dollars per annum, to be fixed by the board of supervisors, and that of the deputies at not more than three dollars and fifty cents per calendar day, Sunday excepted, to be fixed by the board of supervisors. Provided, however, that in cities where extra or special services are to be performed by the assessor, the board of supervisors may by special contract with the assessor determine the compensation to be paid." [35 G. A., ch. 57, § 1.] [29 G. A., ch. 30, § 2.]

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

Where salaries are provided for police judge and marshal, the city becomes entitled to the fees thereof in criminal cases, and may recover the same in an action against the county. *Des Moines v. Polk County*, 107–525, 78 N. W. 249.

A statute granting certain cities the power to fix the compensation of mayors by ordinance, and limiting the salary to the amount so fixed, held not to take effect in any particular city until passage of an ordinance therein adopting that plan of compensation. *State v. Olinger*, 109–669, 80 N. W. 1060.

SEC. 676. **Compensation of other officers.**

Special policemen at elections, appointed under the provisions of code § 1125, are not entitled to compensation from either the city or the county as no provision for such compensation is made under the statute. *Mousseau v. Sioux City*, 113–246, 84 N. W. 1027.

CHAPTER 2-A.

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

SECTION 679-a. **Board created.** That there is hereby created and established a board of police and fire commissioners in cities of the first class and cities under special charter which, according to any state or national census heretofore or hereafter taken, are shown to have a population of more than twenty thousand. [32 G. A., ch. 29, § 1; 29 G. A., ch. 31, § 1.]

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

SEC. 679-c. **Commissioners must qualify.** Before entering upon the duties of their office each of said commissioners shall take and subscribe an oath, which shall be filed and kept in the office of the city clerk, to support the constitution of the United States and of the state of Iowa, to obey the laws, and in all of his official acts and judgments to aim only to secure and maintain an honest and efficient police and fire force, free from partisan

distinction or control, and to perform the duties of his office to the best of his ability, and shall execute a bond payable to the city in which he is appointed, in the penal sum of five thousand dollars, with sureties to be approved by the city council of said city. The expense for said bond shall be paid by said city. [29 G. A., ch. 31, § 3.]

SEC. **679-d. Mayor to appoint—terms—how selected—chairman—quorum—removal.** Immediately upon the taking effect of this act the mayor of such city shall appoint said board of police and fire commissioners, who shall be confirmed by the city council, and the said commissioners so appointed shall hold their office, one of them until the first Monday in April, nineteen hundred and four, one of them until the first Monday in April, nineteen hundred and six, and one of them until the first Monday in April, nineteen hundred and eight; and on the last Monday in March, nineteen hundred and four, and on the same day in each even-numbered year, thereafter, the mayor shall appoint one commissioner in such city to take the place of the commissioner whose term of office expires the first Monday in April following such appointment, and the members so appointed shall serve for the term of six years following the said first Monday in April. The chairman of the board for each biennial period shall be the member whose term first expires. The said commissioners shall be selected from the two leading political parties, so that, as far as practicable, two members of the board shall be members of the dominant political party and one member of the board shall be a member of the political party next in numerical strength, as shown by the votes cast at the last state or national election. And any commissioner who during his term of office becomes a candidate for or accepts any other place of public trust or emolument, or who during the same period knowingly consents to his nomination for any office elective by the people, or fails to publicly decline the same within twenty days succeeding such nomination, shall be deemed to have thereby vacated his office, and a successor shall be appointed as provided in this act. The majority of said board shall constitute a quorum for the transaction of business. Any of said commissioners may be removed for misconduct or malfeasance in office, by the mayor of said city, with the consent and approval of a majority of the city council. [29 G. A., ch. 31, § 4.]

Under this section some discretion is left to the appointing power, and in the absence of proof that the mayor making an appointment was guilty of fraud or collusion or was acting perversely and in open disregard of the law, his discretion cannot be reviewed on appeal. *State v. Sargent*, 145–298, 124 N. W. 339.

The office provided for being not one created by the constitution, but municipal in character, the provisions relating to members of political parties do not render the statute unconstitutional. *Ibid.*

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

of the next regular examination shall be filled from said list so certified; provided, however, that should said list for any cause become reduced to less than three, then the chief of police or the chief of the fire department, as the case may be, may temporarily fill a vacancy until the next examination of the board. In all examinations and appointments under the provisions of this act honorably discharged soldiers, sailors or marines of the regular or volunteer army or navy of the United States shall be given a preference, if otherwise qualified. [29 G. A., ch. 31, § 5.]

The board of police commissioners is not given the power to appoint, but only the power to furnish a list of names from which appointments shall be made, and the chief of police has the discretion as to who shall be selected for positions on the police force. The action of the chief in suspending or discharging any of his subordinates is final unless the board shall determine otherwise on appeal, in which event, the board has the power to order a suspended member to be reinstated. But when reinstatement is directed, the chief may exercise his discretion as to the position on the force which the reinstated member shall be given. *Markey v. Schunk*, 152–508, 132 N. W. 883.

SEC. **679-f. Police and fire departments—officers—salaries—clerk of board—record.** The officers of the police force in said city shall be a marshal who shall be, *ex officio*, chief of police, and shall be appointed by the mayor of said city, and such other officers as the city council may designate; and the officers of the fire department shall be chief of the fire department, who shall be appointed by the board of police and fire commissioners, and such other officers as the city council may designate. The city council of said city shall fix the salary of the marshal and of the chief of the fire department, and shall fix the number of policemen and firemen for the police and fire force, and shall fix the salaries to be paid to each. The city council shall also provide a suitable room in which the said board of police and fire commissioners may hold its meetings, and the board may appoint a clerk, whose salary shall be fixed by the city council. Said board shall keep a record of all its meetings and proceedings. [32 G. A., ch. 29, § 2; 29 G. A., ch. 31, § 6.]

The city council has power to designate what officers shall constitute the police force except the marshal or chief, and to fix the number of policemen. *Markey v. Schunk*, 152–508, 132 N. W. 883.

SEC. **679-g. Appointments—how and by whom made.** The law as it appears in section six hundred seventy-nine-g of the supplement to the code is hereby amended so that the same shall read as follows:

"The chief of police shall appoint the police force for said city and the chief of the fire department shall appoint the fire force for said city." [32 G. A., ch. 29, § 3; 29 G. A., ch. 31, § 7.]

SEC. **679-h. Removal—suspension—hearing—reduction of force.** That section six hundred seventy-nine-h of the supplement to the code, 1907, be and the same is hereby repealed and the following enacted in lieu thereof:

"All police officers and policemen, and all firemen, including the chief of the fire department, and all employes in the civil list covered by this act, shall be subject to removal by the board of police and fire commissioners for misconduct or failure to perform their duty under such rules and regulations as may be adopted by the said board, whenever said board shall consider or declare such removal necessary for the proper management and discipline of said department; but the chief of police or the chief of the fire department may temporarily suspend or discharge any member of his force for misconduct, or neglect of duty, or disobedience of orders; provided that any person so suspended or discharged within five days there-

after may appear before said board, and said board shall investigate the cause of said removal or discharge, and if the same is found insufficient he shall be reinstated. The board shall fix the date for the trial of such discharged or suspended officer or man of either the police or fire department within fifteen days after demand for a hearing by the accused and shall give ten days' written notice to the accused of the date set for trial, specifying the charges upon which the accused is to be tried and the name of the person making the charges. The meetings and procedure of the board when trying such cases shall be open to the public, and said accused shall have the right of counsel, and the examination of witnesses for and against the accused shall be in the presence of the accused, and he, or his counsel, shall have the right to cross-examine any witness testifying against him. The accused shall have the right to produce witnesses in his defense, and the board shall cause the witnesses of the accused to be properly subpoenaed. Meetings shall be called by the chairman upon the application of two members of the board, and written notices must be sent to all members of the board, stating the time and the place and the purpose for calling a meeting. The board shall have the power to enforce the attendance of witnesses, and the production of books and papers, and to administer oaths in the same manner, and with like effect and under the same penalties as in the case of magistrates, exercising civil or criminal jurisdiction under the statutes of Iowa."

Whenever the revenue of any city available for the use of paying the salaries of the police officers, policemen and firemen is insufficient to pay the current salaries to the number of policemen then engaged on the police force and the firemen, the city council of any city which has a board of police and fire commissioners, as provided in chapter two-A of title five of the supplement to the code, 1907, may provide by general ordinance for a reduction in the number of its firemen, and its police officers and policemen, except the chief of the fire department and the chief of police, in which event, the necessary number to make such reduction shall be honorably discharged from the said police force or the fire department. The persons discharged shall be designated in writing by the mayor; provided, however, that in making such discharge, the mayor shall take into consideration the length of service, competency and efficiency of the members of the police force and the members of the fire department. It shall be the duty of the mayor to designate for discharge the policemen and firemen whose length of service is of the shortest duration and who have shown the least efficiency and competency. [34 G. A., ch. 33, § 1; 34 G. A., ch. 32, § 1.] [32 G. A., ch. 29, § 4; 29 G. A., ch. 31, § 8.]

[Ch. 33, 34 G. A. repeals § 679-h of the supplement to the code, 1907, and enacts a substitute therefor which appears as the second paragraph of the above section, was approved April 1, 1911, carried no publication clause and became effective July 4, 1911. The third paragraph of the above section is an amendment to "Sec. 679-h, supplement to the code, 1907," enacted by ch. 32, 34 G. A., approved April 15, 1911, and effective by publication April 21, 1911. Neither of the above acts of the legislature refers to the other act. There may be some doubt as to whether the third paragraph above set forth remained in force longer than July 4, 1911. EDITOR.]

All police officers, except the chief, are removable absolutely by the police board for cause, and the chief is given the power to suspend or discharge subject only to a review by the board. *Markey v. Schunk*, 152–508, 132 N. W. 883.

The legislature intended no more than to require a continuance of employment on the force where a member has been discharged or suspended by the chief. The board has no power to place a discharged or suspended man in a particular position. *Ibid.*

SEC. 679-i. **Present officers continued in office.** The present chief of the fire department and the members of the police and fire department of each of the cities affected by this act, and the acts of which it is amendatory, other than the chief of police, shall be continued in their present positions without further appointment or examination, subject, however, to all rules and regulations adopted for the government of said departments under this act and the provisions of chapter thirty-one, acts of the twenty-ninth general assembly. [32 G. A., ch. 29, § 5.]

SEC. 679-j. **Qualifications of appointees—political contributions.** No person shall be appointed or employed on the police or fire force of said city who is not a citizen of the United States and who has not been a resident of said city for more than one year next preceding said appointment, and who is not able to read and write the English language, and who is not of good moral character, or who is addicted to the use of intoxicating liquor as a beverage. No member of said police or fire force shall directly or indirectly contribute any money to any person for nomination or election purposes, and no person shall be appointed to or removed from said police or fire forces on account of his political beliefs. [29 G. A., ch. 31, § 9.]

SEC. 679-k. **Penalty.** Any person violating the provisions of this act shall be guilty of a misdemeanor, and upon conviction shall pay a fine not to exceed one hundred dollars, or be imprisoned in the county jail not to exceed thirty days. [29 G. A., ch. 31, § 10.]

SEC. 679-l. **Board of public works—vacancies—removals—who eligible.** In any city having a population of thirty thousand or more the council may by ordinance establish a board of public works and in cities having a population of fifty thousand or more, there is hereby created a board of public works. Such board of public works shall consist of two members residents of the city, to be appointed by the mayor, and upon the establishment of said board one member shall be appointed for two years, and one for three years, and their successors shall be appointed for three years. The members shall hold office until their successors are appointed and qualified. The mayor shall have the power to remove any member of the board of public works for cause at any time. Vacancies shall be filled by the mayor. No member of the council or city official shall be a member of such board. The provisions of this section shall not affect the terms of those now constituting the board of public works in those cities in which a board of public works has heretofore been established by ordinance, but the successors to such members shall be appointed under the provisions of this act. [32 G. A., ch. 26, § 13.]

CHAPTER 2-B.

OF THE DEPARTMENT OF PUBLICITY, DEVELOPMENT AND GENERAL WELFARE.

SECTION 679-m. **Department authorized—superintendent—assistants—compensation.** Any city in this state shall have power to establish by ordinance, upon the terms and conditions hereinafter prescribed, a department under control of the city council, said department to be known as the department of publicity, development and general welfare, and the mayor, with the approval of the council, shall have power to appoint a superintendent of such department, and may employ such assistants as may be necessary to perform the work of said department, upon such compen-

sation as may be fixed by resolution of such city council. [34 G. A., ch. 57, § 1.]

SEC. 679-n. **Purposes—supervision of mayor—no investment in private enterprises.** Said department shall be for the purpose of collecting and distributing, by correspondence, advertising and other means, information relating to the industrial, commercial, manufacturing, residential, educational and other advantages and resources of such city; and for the purpose of encouraging and promoting the establishment and development of industries and manufacturing, commercial and other interests in such cities and the increase of population thereof; and for the purpose of investigating, promoting and doing such things as may be for the general welfare of such city and the inhabitants thereof; provided, however, nothing in this act shall be construed as authorizing cities to invest any funds raised by taxation in private enterprises or to pay from such funds any bonuses for same. The duties of the superintendent and other employes of said department shall be such as may be prescribed from time to time by the city council, and they shall be at all times under the supervision and control of the mayor in performing said duties. [34 G. A., ch. 57, § 2.]

SEC. 679-o. **Conditions of establishment—question submitted.** The said department can only be established upon the approval of sixty per cent. of the legal voters of said city who shall vote on said question, and which question may be submitted by the council of such city at any general, city or special election for such purpose, at which election the question submitted shall be: "Shall the city of (naming it) establish a department of publicity, development and general welfare?" If said question shall be answered in the affirmative by not less than sixty per cent. of the voters voting thereon, the said department may be established for a period of not to exceed five years from the date of such election. Within one year of the end of such period or at any time thereafter the question may be resubmitted and said department reëstablished for a like period, provided that not less than sixty per cent. of the voters thereon vote in favor thereof. [34 G. A., ch. 57, § 3.]

SEC. 679-p. **Expenses—what funds available.** The expenses of said department may be defrayed out of any and all funds received by such city from fines and penalties and out of any funds that may be in the treasury of said city, not derived from general taxation nor from special taxes levied for other purposes. [34 G. A., ch. 57, § 4.]

CHAPTER 3.

OF ORDINANCES, COURTS AND FINES.

SECTION 680. Power to pass ordinances—penalties.

In general: An ordinance is not generally necessary to determine the action of the council in carrying out, in a particular instance, the power expressly granted to it by the legislature. *Shelby v. Burlington*, 125–343, 101 N. W. 101.

Where the city is authorized to exercise a power by general ordinance, an ordinance is essential before the city can act; and an ordinance may be necessary though the statute conferring the power does not specifically direct that it shall be exercised by means of a general ordinance as the statute is not specific as to the methods to be adopted in carrying out the power. But if the method to be adopted, as in the case of special assessments for street improvements, is specifically pointed out by statute, no ordinance is necessary. All that can be essential in such a case is that the city take the steps provided by the statute. *Martin v. Oskaloosa*, 126–680, 102 N. W. 529.

When a city provides by ordinance

for the assessment of the costs of a permanent sidewalk upon abutting property, and specifies the notice to be given to owners of abutting property, the giving of such notice as required is an essential condition of the levying of the assessment upon the property. *Zalesky v. Cedar Rapids*, 118–714, 92 N. W. 657.

The grade of a street cannot be established or changed without an ordinance or resolution authorizing it. *Eckert v. Walnut*, 117–629, 91 N. W. 929; *Caldwell v. Nashua*, 122–179, 97 N. W. 1000.

The creating or changing of the boundary of wards must be by ordinance and cannot be by resolution. *Cascaden v. Waterloo*, 106–673, 77 N. W. 333.

The city having the power to construct sewers and to make ordinances with reference to the preservation of the health and convenience of the people has implied authority to borrow money for the purpose of constructing a plant for the disposition of sewage. *Glucose Sugar Ref. Co. v. Marshalltown*, 153 Fed. 620.

The invalidity of one provision of an ordinance does not necessarily render the remaining portions of the ordinance invalid. *Davenport Gas & Elec. Co. v. Davenport*, 124–22, 98 N. W. 892.

The establishment of a public way even over property belonging to a city calls for the exercise of legislative power which can be exercised only by ordinance or resolution. *Bradley v. Centerville*, 139–599, 117 N. W. 968.

The action of the council in passing an ordinance relating to a matter within its jurisdiction is legislative and should not be interfered with by the courts. The motive of members will not be inquired into. But if an ordinance, by law or resolution is contractual in character the motives of its members may be inquired into as affecting the validity of the contract. If an ordinance is passed under the general welfare clause or by reason of some implied grant it will be condemned if unreasonable, arbitrary or oppressive. *Swan v. Indianola*, 142–731, 121 N. W. 547.

An ordinance will not be held void because unreasonable unless it clearly appears that it imposes an unreasonable burden as a whole. *Council Bluffs v. Illinois Cent. R. Co.*, 157– ——, 138 N. W. 891.

When a question is raised as to the reasonableness of a city ordinance which has reference to a subject matter within the corporate jurisdiction, the ordinance will be presumed to be reasonable unless the contrary appears on the face of the ordinance itself or is established by proper evidence. But a general power given to a municipality must be exercised in a reasonable manner. *Iowa City v. Glassman*, 155–671, 136 N. W. 899.

While the provisions of this section are very general in terms they do not give the city power to do more than impose fines. It cannot license or provide any other remedy than that provided by the statute itself. Therefore held that the city council had no authority to require a person selling milk within the city limits to apply for a license therefor from the city and provide for the issuance of such license at the discretion of the city board of health. *Bear v. Cedar Rapids*, 147–341, 126 N. W. 324.

The enforcement of such an ordinance may be enjoined. *Ibid.*

A city being expressly empowered to construct sewers, has implied power to provide for the disposition of sewage by constructing a plant for that purpose. *Glucose Sugar Refining Co. v. Marshalltown*, (C. C.) 153 Fed. 620.

Punishing offenses: A city has power to enact an ordinance prohibiting the keeping open on Sunday of places resorted to for the drinking of intoxicating liquors. Such an ordinance is not inconsistent with the statutes of the state relating to the sale of intoxicating liquors. *Lovilia v. Cobb*, 126–557, 102 N. W. 496.

The general policy of the law being to give municipalities full power and adequate means to protect themselves against unlawful disturbances of the peace and good order within their corporate limits, an ordinance providing for the punishment of assault and battery, which does not impose a different penalty from that provided by statute, is valid. *Avoca v. Heller*, 129–227, 105 N. W. 444.

The power of punishing gambling being unqualifiedly conferred on the city, it has authority to provide for such punishment by ordinance not inconsistent with the statutes of the state relating to the same offense. *Blodgett v. McVey*, 131–552, 108 N. W. 239.

An act may be punishable under a city ordinance although its punishment is also provided for by statute, if the ordinance is not inconsistent with the statutory provision. *Neola v. Reichart*, 131–492, 109 N. W. 5.

The city council cannot in the exercise of its general powers pass an ordinance providing a penalty for keeping saloons open on election day, as such an ordinance would be in conflict with the state law on the same subject. (See code § 2448.) *Iowa City v. McInnerny*, 114–586, 87 N. W. 498.

It may be provided in an ordinance for regulating or prohibiting the running at large of dogs, that the owner of a dog shall be guilty of a misdemeanor in allowing it to run at large unmuzzled. *Sibley v. Lastrico*, 122–211, 97 N. W. 1074.

Under the authority to provide for the safety of its inhabitants a city has authority to pass an ordinance requiring bicycles on the streets after dark to carry lights. *Des Moines v. Keller*, 116–648, 88 N. W. 827.

The violation of a municipal ordinance enacted by the authority of the state is a crime and proceedings for its punishment are criminal. *Ewing v. Webster City*, 103–226, 72 N. W. 511.

The legislature may confer authority upon mayors or police courts to enforce obedience to ordinances by a civil action. *Ottumwa v. Scott*, 139 N. W. 901.

Violation of ordinance negligence per se: Where the owner of a horse or his employe in charge thereof leaves the horse unfastened in the street in violation of the provisions of an ordinance, such owner is liable to one who is injured in consequence of the horse running away. *Healy v. Johnson*, 127–221, 103 N. W. 92.

SEC. 681. Adoption of ordinances.

In general: Omissions and irregularities in the adoption of an ordinance may be cured by a legalizing act. *Marion Water Co. v. Marion*, 121–306, 96 N. W. 883.

Failure to comply with a directory statute with reference to the recording of ordinances does not affect their validity. *Allen v. Davenport*, 107–90, 77 N. W. 532.

An ordinance which it is within the power of the city to pass will not be declared void in a *quo warranto* proceeding. *State v. Nebraska Tel. Co.*, 127–194, 103 N. W. 120.

Title: The requirement that an ordinance shall not contain more than one subject which must be expressed in the title is a limitation on the power of the council to enact ordinances, and an ordinance passed in violation of it is inoperative for want of power. *Marion Water Co. v. Marion*, 121–306, 96 N. W. 883.

The title of an ordinance describing it as relating to obstructions of or injury to streets, alleys and sidewalks, sufficiently covers a prohibition as to the leaving of horses in the streets without being properly fastened. *Healy v. Johnson*, 127–221, 103 N. W. 92.

Where the granting of certain rights and privileges to a telephone company is the subject matter expressed in the title of an ordinance, the grant of the use of the streets is sufficiently covered by such title. *State v. Nebraska Tel. Co.*, 127–194, 103 N. W. 120.

An ordinance "concerning misdemeanors" may include provisions as to keeping open a place of business on Sunday. *Lovilia v. Cobb*, 126–557, 102 N. W. 496.

The title of "an ordinance to regulate bicycles" is sufficient to cover provisions requiring riders of bicycles to carry a sufficient light after dark. *Des Moines v. Keller*, 116–648, 88 N. W. 827.

An ordinance vacating a street and at the same time conveying it, where the diversion is the real purpose does not contain two subjects. *Tomlin v. Cedar Rapids & I. C. R. & L. Co.*, 141–599, 120 N. W. 93.

The purpose of the requirement that an ordinance shall contain but one question is to prevent the practice of presenting in a single act subjects diverse in their nature with a view to effect a combination and thus secure the passage of several measures, no one of which would succeed upon its own merits. *Trout v. Minneapolis & St. L. R. Co.*, 148–135, 126 N. W. 799.

Where the title of an amending ordinance in connection with the title of the ordinance amended leaves no doubt as to the correspondence between the subject matter and the title, it is sufficient. *Council Bluffs v. Illinois Cent. R. Co.*, 157– ——, 138 N. W. 891.

Amendment or repeal: Except as to rights acquired under an ordinance which a repeal cannot destroy or impair, the power of the city council to repeal ordinances is no less broad than its power to enact them. *Snouffer v. Cedar Rapids & M. C. R. Co.*, 118–287, 92 N. W. 79.

In amending, repealing or suspending an ordinance with reference to a matter which can be regulated by ordinance only, the council must act by ordinance and cannot proceed by resolution. *Cascaden v. Waterloo*, 106–673, 77 N. W. 333.

The amending ordinance must contain the entire ordinance or section revised or amended. *Ibid.*

The intention is that an amending ordinance or section shall be complete in itself and that the former ordinance or section shall be repealed. The purpose of this section is to avoid the confusion and frequent contradiction which results from amendments which purport to add to or take from an existing ordinance mere words or phrases. *Rocho v. Boone Electric Co.*, 140 N. W. 193.

SEC. 682. Reading.

The requirement of reading on three different days may be dispensed with by vote of three fourths of the council. *Collins v. Iowa Falls*, 146–305, 125 N. W. 226.

SEC. 683. Adoption—majority vote. No resolution or ordinance for any of the purposes hereinafter set forth shall be adopted without the concurrence of a majority of the whole number of members elected to the council, to wit:

1. To pass or adopt any by-law or ordinance;
2. To pass or adopt any resolution or order to enter into a contract;
3. To pass or adopt any ordinance for the appropriation or payment of money; but in towns, by-laws, ordinances, and the resolutions and orders set forth in this section shall require for their passage or adoption a concurrence of four councilmen, or of three councilmen and the mayor. On the passage or adoption of every by-law, ordinance, and every such resolution or order, the yeas and nays shall be called and recorded. No money shall be appropriated except by ordinance. In towns money may be appropriated by resolution. [27 G. A., ch. 19, § 1; 18 G. A., ch. 146, §§ 2, 3; C. '73, §§ 489, 493; R. §§ 1122, 1134.]

The concurrence of a majority of the whole number of the council is required for the adoption of a resolution. *Cascaden v. Waterloo*, 106–673, 77 N. W. 333.

In the absence of any statutory or charter restrictions a majority of a quorum of the council is sufficient for the adoption of a resolution. *Thurston v. Huston*, 123–157, 98 N. W. 637.

Except as otherwise specified by statute, the proceedings of the council are to be governed by the parliamentary rules generally recognized by the courts as applicable to the action of legislative bodies. *Ibid.*

The ayes and nays on the adoption of an ordinance must be entered at large on the minutes. *Cook v. Independence*, 133–582, 110 N. W. 1029.

The yeas and nays should be called and recorded on the passage of an ordinance authorizing the execution of a contract. *Marion Water Co. v. Marion*, 121–306, 96 N. W. 883.

Where the record shows the presence of a majority of the council and the vote on the passage of the ordinance is recorded as unanimous, it sufficiently appears that the ordinance is adopted by the concurrence of a majority of the council. *Ibid.*

If the record shows the names of the members present, and that the roll was called and the vote was unanimous, it sufficiently appears that the members recorded as present voted in the affirmative. *Ibid.*

Where the record of the adoption of the ordinance gives the names of the members of the council present and shows that there was a corresponding number of votes in favor of the passage of the ordinance and none against it, it is not essential that there be an express record also of the names of those voting in the affirmative. *State v. Nebraska Tel. Co.*, 127–194, 103 N. W. 120.

Where the minutes of the action of the council show the names of the members voting, it will be presumed that the vote was by yeas and nays. *German Ins. Co. v. Manning*, 95 Fed. 597.

A majority vote in favor of the motion to reconsider an affirmative vote on a resolution to adopt and approve a street improvement as made according to contract, held to render the resolution of approval ineffectual. *Wingert v. Tipton*, 134–97, 108 N. W. 1035, 111 N. W. 432.

Subject to certain exceptions, a resolution does not require a record of the yea and nay vote of the council and a less formal record of its passage may be sustained than would be required to show the adoption of an ordinance. *Sawyer v. Lorenzen*, 149–87, 127 N. W. 1091.

Where the record does not show that all members of the council were present, nor who voted for or against the passage of the ordinance, or whether the vote was unanimous, the statutory requirement that "the yeas and nays shall be called and recorded" is not complied with. The requirement is mandatory. *Sutton v. Mentzer*, 154–1, 134 N. W. 108.

Where an ordinance is relied on, its invalidity may be shown by a failure of the record to establish compliance with the statutory requirements as to its passage. *Ibid.*

Where the record shows the affirmative vote, by name, of the majority of the council, this is sufficient to indicate that the yeas and nays were called. *Ibid.*

No presumption can be entertained in support of an ordinance or resolution that it was duly enacted by vote of the council in a meeting duly assembled upon which vote the yeas and nays have been called and recorded. It is the recorded yea and nay vote which the statute requires and not the mere fact of such vote, and parol evidence is not admissible as a substitute for the official record. *Farmers' Telephone Co. v. Town of Washta*, 157– ——, 133 N. W. 361.

The city council can authorize the occupancy of its streets by a street railroad by resolution as well as by ordinance. But where the statute requires an ordinance, a resolution is not sufficient. *Des Moines City R. Co. v. Des Moines*, (C. C.) 151 Fed. 854.

SEC. 684. Two-thirds vote.

The mayor being a member of the council in cities of the second class, under code of '73, § 531, held that in determining whether there had been a three-fourths vote of the council to dispense with a rule as to reading an ordinance on three successive days, the mayor should be included, although not entitled to a vote except in cases of a tie. *Griffin v. Messenger*, 114–99, 86 N. W. 219.

SEC. 685. Signing by mayor—veto—passing over veto.

The requirement that the mayor sign resolutions or ordinances of the city council before they take effect is mandatory, and the successor of the mayor in office when the ordinance or resolution is passed has no power to make it valid by his signature. *Altman v. Dubuque*, 111–105, 82 N. W. 461.

There is a broad distinction between the requirement that the mayor shall sign ordinances simply as a means of authentication, and a requirement that he shall sign as evidence of his approval. The former may well be said to be ministerial and directory only, while the latter is undoubtedly mandatory. *Moore v. City Council*, 119–423, 93 N. W. 510.

The legislature has not authorized the signing of ordinances by the temporary chairman of the meeting of the council at which the ordinance is adopted. *Ibid.*

Action of a city council in allowing a claim against the city is a "resolve," and requires the signature of the mayor. Without such signature, or facts making the resolve valid notwithstanding the want of approval, the action of the council is invalid. *Stutsman v. McVicar*, 111–40, 82 N. W. 460.

Under prior statutory provisions, held that in cities of the second class having less than eight thousand inhabitants, the signature of the mayor to a resolution passed by the council was not necessary. *Bennett v. Marion*, 106–628, 76 N. W. 844.

The requirement that the mayor shall sign all ordinances or resolutions of the city council, or, in the event of his failure to do so, that he follow the requirements of this section, is mandatory; but as an ordinance may, in accordance with these provisions, become operative without the mayor's signature, it is not enough to defeat the validity of an ordinance to show that the mayor did not sign it. There is no necessity for formal presentation to him for signature. It is enough that he was present when the ordinance was passed and did not return the same with reasons for refusal to sign. *Town of Hancock v. McCarthy*, 145–51, 123 N. W. 766.

Signature of the ordinance by a temporary chairman of the council is not sufficient; but where under the charter of a special charter city there was provision for one, previously selected for the purpose, to act as president pro tempore in the absence of the mayor, held that the signature of such officer was the signature of the mayor for the time being. *Collins v. Keokuk*, 147–233, 124 N. W. 601.

The direction to the clerk to advertise for bids for a street improvement need not be by resolution and therefore does not require the mayor's approval. *Miller v. Oelwein*, 155–706, 136 N. W. 1045.

SEC. 686. Recording—publishing.

A resolution or ordinance making a special assessment may be proven by parol evidence. *Edwards & Walsh Const. Co. v. Jasper County*, 117–365, 90 N. W. 1006.

Publication as required by statute is essential to the validity of an ordinance, and held in a particular case that the publication in an extra edition of a daily paper, only a few copies of which were issued and sold, was not such publication as contemplated by law. *State v. Omaha & C. B. R. & B. Co.*, 113–30, 84 N. W. 983.

Until a resolution or ordinance becomes effective there is no authority for its publication. *Moore v. City Council*, 119–423, 93 N. W. 510.

The object of the recording of an ordinance or resolution is to furnish evidence thereof and the failure to immediately record an ordinance or resolution which has been held by the mayor for fourteen days without signing does not prevent its going into operation under the provisions of code § 685. *Hardwick v. Independence*, 136–481, 114 N. W. 14.

The authentication required by this section is mandatory but it may be made in such a manner and at such time as to show a compliance with the preceding section if that be the manifest intent. *Town of Hancock v. McCarthy*, 145–51, 123 N. W. 766.

An ordinance found in a record book produced by the city clerk and identified by him as the original ordinance book of the city and a part of the records of his office is admissible in evidence as such. *Lane-Moore Lumber Co. v. Storm Lake*, 151–130, 130 N. W. 924.

An ordinance which is void may be repealed and a valid substitute enacted therefor. *Ibid.*

It is competent to show by parol evidence that an ordinance was properly signed by the mayor and that it was published in accordance with the statute. *Powers v. Iowa Cent. R. Co.*, 157– —, 136 N. W. 1049.

SEC. 687. **Published ordinances.**

The provision for the publication of ordinances of a city does not contemplate the necessity of a readoption of the ordinances. *Gallaher v. Jefferson*, 125–324, 101 N. W. 124.

Ordinances published in accordance with the provisions of this section are presumed to have been regularly passed and it will be presumed in the absence of proof to the contrary that the ordinance book in which the ordinance was recorded was duly authenticated. *Town of Hancock v. McCarthy*, 145–51, 123 N. W. 766.

Publication of a printed revision of ordinances does not cure a defect in the passage of an ordinance thus published. *Sutton v. Mentzer*, 154–1, 134 N. W. 108.

This section does not contemplate a reënactment of the ordinance but only a compilation and a method of proof and the embodiment in a publication of the city ordinances of an ordinance which is invalid on account of defect of form does not cure the defect. *Rocho v. Boone Electric Co.*, 140 N. W. 193.

SEC. 687-a. **Proceedings published or posted.** Immediately following a regular or special meeting of the city or town council, the clerk shall, when so ordered by said council, prepare a condensed statement of the proceedings of said council, including the list of claims allowed, and from what funds appropriated and cause the same to be published in one or more newspapers of general circulation, published in said city or town, or by posting in one or more public places, as directed by said council. [33 G. A., ch. 42, § 1.]

SEC. 687-b. **Cost of publishing.** That the compensation allowed each newspaper for such publication shall not exceed one third of the legal fee provided by statute for the publication of legal notices. [33 G. A., ch. 42, § 2.]

SEC. 688. **Police court—jurisdiction.**

A police court may entertain a civil action to recover the poll tax provided for in code supp. § 892. *Ottumwa v. Scott*, 139 N. W. 901.

SEC. 691. **Jurisdiction of mayor—may transfer case on own motion—fees.** The mayor shall have exclusive jurisdiction of all actions or prosecutions for violations of the city or town ordinances. He shall also have, in criminal matters, the jurisdiction of a justice of the peace, coextensive with the county, and, in civil cases, the same jurisdiction within the city or town as a justice of the peace has within the township. None of the jurisdiction referred to in this section shall be exercised by the mayors in cities having a superior or police court. If the mayor or judge of the superior or police court is absent or unable to act, the nearest justice of the peace shall have jurisdiction and hold his court in criminal proceedings, and receive the statutory fees, to be paid by the city or county, as the case may be. When an information is filed before a mayor of any city or town for the violation of an ordinance of such city or town, the mayor having jurisdiction as provided in this section may, upon his own motion only, at any time after the information is filed and before the trial, transfer the case for further proceedings to any justice of the peace court within such city or town, and the justice of the peace, for the further proceedings in the case to whom the case is transferred, shall have jurisdiction thereof to the same extent and with the same power and like limitations as the mayor of such city or town. The fees taxable after the transfer of the case fixed by ordinance shall be paid by the city or town as the case may be to the justice before whom the case is tried. [35 G. A., ch. 58, § 1.] [24 G. A., ch. 6, § 2; 18 G. A., ch. 189, § 1; C. '73, §§ 506, 546; R. §§ 1085, 1102, 1105.]

The mayor has the jurisdiction of a justice of the peace in criminal matters and while under the provisions of the statute relating to juveniles (code § 254-a24) he cannot impose a fine or imprisonment on such offender, he is not liable in civil damages for imposing such wrongful imprisonment, as he has jurisdiction to hear

complaints or preliminary information, issue warrants, order arrests, etc., and the improper imposition of a fine or imprisonment is only in excess of jurisdiction and not without jurisdiction. *McGrew v. Holmes*, 145–540, 124 N. W. 195.

As the mayor of a city has coördinate jurisdiction to some extent with a justice of the peace of the township in which the city is situated, the acceptance by the mayor of a city of the office of justice of the peace creates a vacancy in the office of mayor on account of the incompatibility of the two offices. *State v. Anderson*, 155–271, 136 N. W. 128.

The jurisdiction of the mayor extends to both civil and criminal actions for violation of ordinances. *Ottumwa v. Scott*, 139 N. W. 901.

SEC. 691-a. **Applicable to this act.** The law as the same appears in section six hundred ninety-two of the code, shall apply to this act. [35 G. A., ch. 58, § 2.]

SEC. 692. **Procedure—appeal—judicial notice of ordinances.**

The town or city court has always taken judicial notice of the ordinances of the municipality in which it sits, as it stands in the same relation to these as does the state court to public statutes, and under the provision of this section the district court on appeal is required likewise to take judicial notice of such ordinances. *Scranton v. Danenbaum*, 109–95, 80 N. W. 221.

In a prosecution for violation of an ordinance the ordinance must be pleaded. Courts will not take judicial notice of an ordinance, except in case of appeals from inferior tribunals. *State v. Olinger*, 109–669, 80 N. W. 1060.

On an appeal from a conviction before the mayor for violation of an ordinance, the defendant may waive a jury trial. *Lovilia v. Cobb*, 126–557, 102 N. W. 496.

SEC. 694-a. **Appropriation authorized—purposes—repealed.** That section six hundred ninety-four-a, supplement to the code, 1907, be and the same is hereby repealed. [35 G. A., ch. 59, § 3.]

[The title to ch. 59, 35 G. A. makes no mention of a repeal. EDITOR.]

[See §§ 694-b, 694-c. EDITOR.]

SEC. 694-b. **Membership in Iowa league of municipalities—appropriation authorized.** Cities and towns, including cities under special charter and under the commission plan of government, may by resolution appropriate money out of the general fund and pay dues in the league of Iowa municipalities not to exceed annually the following amounts: Municipalities less than two thousand, ten dollars; from two thousand to five thousand, twenty dollars; from five thousand to ten thousand, thirty dollars; from ten thousand to thirty thousand, forty dollars; from thirty thousand to fifty thousand, fifty dollars; all over fifty thousand, sixty dollars; and in addition may pay the actual expenses of not more than two delegates to the meetings of such league. [35 G. A., ch. 59, § 1.]

SEC. 694-c. **System of accounting—reports.** At the annual meeting of the league in nineteen hundred thirteen, the chief clerk of the state municipal accounting department shall meet with the league and formulate a system of accounting and reports to be adopted by the league and thereafter the league shall keep and make such accounts and reports as shall be required by said department, and the same shall be annually checked by the municipal accounting department and published in the volume of municipal accounts. [35 G. A., ch. 59, § 2.]

CHAPTER 4.

OF GENERAL POWERS.

SECTION 695. **Bodies corporate—name—authority.**

Extent of powers: Municipal corporations have and can exercise such powers only as are expressly granted by their charters or legislative acts, or are neces-

sarily implied therefrom, or are necessarily incidental thereto. *Aldrich v. Paine*, 106–461, 76 N. W. 812.

The power to levy taxes may be delegated to a municipal corporation, but not to a board or tribunal not elected by the people of the municipality. *State ex rel. v. Mayor, etc., of Des Moines*, 103–76, 72 N. W. 639.

The city council, having the right to order a work of public improvement and having adopted an ordinance and resolution directing the work according to certain specifications, acquires jurisdiction over the property involved. *Allen v. Davenport*, 107–90, 77 N. W. 532.

A taxpayer may maintain an action to enjoin the carrying out of a resolution increasing the number of wards in a city, there being no authority to change the wards by resolution. *Cascaden v. Waterloo*, 106–673, 77 N. W. 333.

A municipality cannot exercise a power unless it be expressly conferred by the legislature or absolutely necessary to carry out some other power expressly conferred. In case of doubt the existence of the power will be denied. *Cherokee v. Perkins*, 118–405, 92 N. W. 68.

A municipal corporation has only such powers as are expressly granted or fairly or necessarily implied from those granted or such as are essential to the declared objects and purposes of the corporation. *Brooks v. Brooklyn*, 146–136, 124 N. W. 868.

If there is no authority to make a contract under these rules, any attempt to do so is void. *Ibid.*

If the project is merely colorable under the pretense of authority, but intended to promote some private purpose, the court will declare it illegal. *Ibid.*

A municipal corporation will not be allowed to repudiate a contract which has been carried out by the other party on the ground that such party stood in a fiduciary or official relation to the corporation with which the contract was made, without surrendering the benefits received. Nor will a taxpayer be allowed to maintain an action in the interest of the corporation to recover the compensation paid to a contractor under such contract. *Kagy v. Independent Dist.*, 117–694, 89 N. W. 972.

Any contract of a municipal corporation for which there is no express or implied statutory authority is invalid. *Cedar Rapids Water Co. v. Cedar Rapids*, 118–234, 91 N. W. 1081.

A person dealing with a municipal corporation is held to know the extent of the power of such corporation, and if, with such knowledge, he obtains a grant for which there is no legal authority or which is in violation of an express statute, he does so at his peril and obtains no right which is enforceable in the courts. *Ibid.*

Such a contract cannot be held to give color of right to the privilege thus attempted to be granted. *Ibid.*

A municipal corporation may be said to possess a dual character. In one capacity it is a property holder, a mere business agency, and is charged with the management of the financial and business interests of the municipality; in another capacity it is an arm of sovereignty and is charged with legislative and governmental powers. Contracts wrongfully made by it in the first capacity are as obligatory and inviolable as contracts made between private individuals, but, in the absence of statutory authority, any contract or agreement, whether in the form of an ordinance or otherwise which directly or indirectly surrenders or materially restricts the exercise of the governmental or legislative function or power, may at any time be terminated or annulled by the municipality, though such action may, under some circumstances, involve liability for compensation to persons who have acted upon and in good faith of the validity of such contract. *Snouffer v. Cedar Rapids & M. C. R. Co.*, 118–287, 92 N. W. 79.

A city has two classes of powers,—the one legislative or governmental, by which it controls its people as their sovereign; the other, proprietary or business, by means of which it acts and contracts for the private advantage of the inhabitants of the city and of the city itself. In the exercise of its business powers, the officers of the city may bind it beyond the terms of their offices, and in the exercise of these powers the city will be governed by the same rules as control a private individual or private corporation under like circumstances. *Tuttle v. Cedar Rapids*, (C. C. A.) 176 Fed. 86.

In the exercise of the proprietary or quasi private powers conferred upon it, the city is subject to the same rules as are applicable to private persons or corporations. Such a power is that of making special assessments for public improvements. *First Nat. Bank v. Emmetsburg*, 157– —, 138 N. W. 451.

Having exercised the power of letting a contract for the making of a permanent public improvement, a city cannot plead *ultra vires* as against the contractor on account of irregularities in the proceeding and may be estopped from objecting to payment for a completed and retained improvement although the irregularities in the proceedings have been such as to relieve property owners from special assessments on their property. *Ibid.*

A city in granting a franchise for the use of its streets for street railway purposes is acting in a sovereign capacity and has only such powers as are expressly given or arise by necessary implication from those granted. *State v. Des Moines City R. Co.*, 140 N. W. 437.

In letting contracts for public printing to the lowest responsible bidder the council has no power or jurisdiction to discriminate in favor of an employer of union labor against others. *Miller v. Des Moines*, 143–409, 122 N. W. 226.

An incorporated town has power to acquire and hold real and personal property for the purpose of erecting a building for public offices and fire department, to be paid for out of the general fund. *Brooks v. Brooklyn*, 146–136, 124 N. W. 868.

The provisions of code supp. §§741-j–741-m have reference to cases where the town has not in its general fund enough to pay for the grounds and is compelled to issue bonds to be paid at a later date. *Ibid.*

Within the limitation fixed by the constitution and statutes a city has express power to borrow money and as a necessary incident thereto may issue proper evidences of indebtedness for money so borrowed. But it has no authority to issue long time negotiable bonds for money thus borrowed, in the absence of express statutory authority. *Reed v. Cedar Rapids*, 136–191, 113 N. W. 773.

Liability for acts of officers: A municipal corporation is not as a general rule liable for the negligence or carelessness of its agents or servants in handling its fire apparatus. The service performed is one in which it has no particular interest and from which it derives no special benefit in its corporate capacity. Such employes are not agents and servants of the city, but act as officers charged with a public service, for whose negligence no action will lie against the city. Where the powers conferred are governmental in nature the city cannot be made liable for the execution thereof. *Saunders v. Ft. Madison*, 111–102, 82 N. W. 428.

The city is not liable for the acts of its officers in making an arrest without legal cause or excuse, and unlawfully, cruelly and inhumanly treating such person by imprisoning him in an unsuitable place. *Lahner v. Inc. Town of Williams*, 112–428, 84 N. W. 507.

Where a city contracting for macadamizing streets undertakes to furnish the use of a steam roller in charge of its own employes it is liable for damages by fire set out by sparks by reason of the defective condition of the engine. *McMahon v. Dubuque*, 107–62, 77 N. W. 517.

A city is thus liable where it is engaged in doing with its own instrumentality that which it was authorized to contract with another to do at the expense of the abutting lot owners, and the work was voluntarily assumed and carried on for compensation. *Ibid.*

The city having power to make excavations in the streets is liable for the wrongful acts of its officers or agents in making such excavations. *Millard v. Webster City*, 113–220, 84 N. W. 1044.

A municipal corporation is not estopped by the acts of its officers done without authority. *Cedar Rapids Water Co. v. Cedar Rapids*, 117–250, 90 N. W. 746.

The city having power to prevent injury or annoyance from any nuisance, has no authority to permit the stretching of a wire over the public street on which a performance is permitted, resulting in injury to persons in the street. *Wheeler v. Ft. Dodge*, 131–566, 108 N. W. 1057.

The statutory authority to provide places for the interment of the dead and to adopt regulations for their burial will not be construed to authorize the creation and maintenance of either a public or a private nuisance. *Payne v. Wayland*, 131–659, 109 N. W. 203.

SEC. 696. **Prevention of nuisances—prohibition by ordinance—regulation of slaughter houses.** They shall have power to prevent injury or annoyance from anything dangerous, offensive or unhealthy, to cause any nuisance to be abated, to provide for the destruction of weeds and other noxious growths upon any of the lots and parkings therein, and to provide for the assessment of the cost thereof to the property; to provide for the immediate seizure and destruction of tainted or unsound meat or other provisions; to establish all needful regulations as to the management of packing and slaughter houses, renderies, tallow chandleries and soap factories, bone factories, tanneries, and manufactories of fertilizers and chemicals, within the limits of such cities or towns; to regulate and restrain the deposit and removal of all offensive material and substances, and the engendering of offensive odors and sights therefrom, so as to protect the public against the same; to establish and regulate slaughter houses; and, in cities having five thousand or more inhabitants, to build and control the same. In addition to any right of abatement of any public or private nuisance, they shall have the right to prohibit the same by ordinance and to punish by fine or imprisonment for the violation thereof. [35 G. A., ch.

60, § 1.] [27 G. A., ch. 22, § 1; 22 G. A., ch. 16, § 1; 19 G. A., ch. 89, § 9; C. '73, §§ 456, 526; R. §§ 1057, 1096.]

[The above section is made applicable to special charter cities by § 952 as well as by § 696-a. EDITOR.]

A municipality being given power to prevent and abate nuisances cannot escape liability for damages resulting from its action on the plea of *ultra vires*. *Fitzgerald v. Sharon*, 143–730, 121 N. W. 523.

The powers here specified do not expressly or by implication cover the regulation of the sale of milk by dealers within the city limits nor authorize the exaction of a license from such dealers. *Bear v. Cedar Rapids*, 147–341, 126 N. W. 324.

After an ordinance has been properly adopted prohibiting the obstruction of a stream within the city limits, for the purpose of preventing injury to its inhabitants, the city may maintain proceedings in equity to enforce such regulation by having such obstruction abated as a nuisance. *Sioux City v. Simmons Hardware Co.*, 151–334, 129 N. W. 978, 131 N. W. 17.

The burden is not in such a case upon the city to show that the obstruction which is in violation of a condition of the ordinance is in its nature a nuisance, but rather upon the property owners who have violated the provisions of the ordinance to show that it is unreasonable. *Ibid.*

A city conveying a portion of a street for private use may attach as a condition to such conveyance that the use be so restricted as not to constitute a nuisance. *Ibid.*

SEC. **696-a. Applicable to special charter cities.** Section six hundred ninety-six of the code is hereby made applicable to cities acting under special charter. [35 G. A., ch. 60, § 2.]

SEC. **697. Burial of dead—cemeteries.**

The provisions as to providing and regulating places for the burial of the dead are inconsistent with the acquirement of a fee by the lot owner. *Anderson v. Acheson*, 132–744, 110 N. W. 335.

SEC. **698. Filling or draining lots.**

This section relates to water standing in depressions or pools and not to large areas of low, wet or swampy land. The authority of the council is limited to obviating the nuisance occasioned by the standing of stagnant water. *Aldrich v. Paine*, 106–461, 76 N. W. 812.

SEC. **699. Drainage preserved.**

The provisions of this section are intended to restore the natural course for surface or other water in case it has been obstructed by grading or filling. *Aldrich v. Paine*, 106–461, 76 N. W. 812.

The city cannot require the owner of property abutting on a street to construct drains to carry off the surface water accumulated by improvements of the street. The provisions of this section relate to natural water courses. *Hoffman v. Muscatine*, 113–332, 85 N. W. 17.

A municipality may become liable for improperly constructing and maintaining a drain and it cannot escape such liability on the plea of *ultra vires*. *Fitzgerald v. Sharon*, 143–730, 121 N. W. 523.

SEC. **700. Regulations—licenses—engineers—examinations.** They shall have power to regulate, license and tax hotels, restaurants and eating houses; to define by ordinance who shall be considered transient merchants; to regulate, license and tax their sales and those of auctioneers, bankrupt and dollar stores, and the like, but the exercise of such power shall not interfere with sales made by sheriffs, constables, coroners, marshals, executors, guardians, assignees of insolvent debtors or bankrupts, or any other person required by law to sell real or personal property; to regulate, license and tax peddlers, house movers, billposters, itinerant doctors, itinerant physicians and surgeons, junk dealers, scavengers, pawnbrokers, and persons receiving actual possession of personal property as security for loans, with or without a mortgage or bill of sale thereon, and to provide for the examination and licensing engineers of stationary engines; to license and regulate all keepers of intelligence or employment offices, bureaus and agencies, as well as all persons doing the business of seeking

employment for others, or procuring or furnishing employers for others, or giving information whereby employes or employers may be obtained. [35 G. A., ch. 61, § 2.] [32 G. A., ch. 31; 27 G. A., ch. 21, § 1; 27 G. A., ch. 22, § 2; 22 G. A., ch. 16, § 1; 19 G. A., ch. 89, § 1; 16 G. A., ch. 24; C. '73, §§ 462–3; R. § 1063.]

[The above section is made applicable to special charter cities by § 952. EDITOR.]

This provision does not cover the case of an itinerant dentist. *Cherokee v. Perkins*, 118–405, 92 N. W. 68.

The city may, by ordinance, impose a license upon one engaged in taking orders for goods on his own account to be secured by him from a wholesale house and shipped to him for delivery to the purchasers, he paying for the goods at wholesale and collecting the retail price. *Cedar Falls v. Gentzer*, 123–670, 99 N. W. 561.

The business of a traveling optician who merely prescribes and collects for eye glasses to be furnished to his patients is not that of a merchant who must procure a license as an itinerant merchant. *Waukon v. Fisk*, 124–464, 100 N. W. 475.

One engaged simply in soliciting orders or making delivery of goods on behalf of another is not a peddler, nor a transient merchant. *State v. Nelson*, 128–740, 105 N. W. 327.

While a city has power to define by ordinance who shall be considered transient merchants, it cannot by ordinance declare those persons to be merchants who by universal acceptance in the business world are not such. *Ibid.*

Under an ordinance imposing a license on peddlers with packs or with vehicles, a license cannot be exacted of one who simply solicits orders for goods as an employe and occasionally makes delivery of the same while so soliciting. *State v. Smithart*, 128–631, 105 N. W. 128.

The legislature may in the exercise of its police powers impose a license on all itinerant physicians practicing within the state and at the same time may authorize municipalities to impose a license for the practice thereof within its boundaries, and held that an ordinance of a city requiring the payment of a license by itinerant physicians might be enforced as against an itinerant physician who was duly authorized by the state board of medical examiners to practice in the state. *Fairfield v. Shallenberger*, 135–615, 113 N. W. 459.

Such an ordinance is not to be construed as applicable to nonresidents only and therefore is not unconstitutional on that ground. *Ibid.*

A license may be required from the same person for the same business by the state and by its municipalities. *Ibid.*

An ordinance imposing a license on transient merchants is applicable to residents as well as nonresidents if the business conducted is intended to be intermittent in character, and not permanent. *Town of Scranton v. Hensen*, 151–221, 130 N. W. 1079.

In a prosecution for the violation of such an ordinance, the plaintiff has the right to show that the stock of goods in question had been kept and offered for sale at other places in an itinerant manner. *Ibid.*

An ordinance relating to the licensing of peddlers must be reasonable in view of the purpose for which such license is provided. *Iowa City v. Glassman*, 155–671, 136 N. W. 899.

The power to tax peddlers cannot be so exercised as to practically and effectually prohibit their business so far as it is lawful. *Ibid.*

SEC. 700-a. **Public dance halls, etc.—regulation—license.** Cities and towns shall have power to regulate, define, tax, license or prohibit public dance halls, skating rinks, fortune tellers, palmists, and clairvoyants. [32 G. A., ch. 32, § 1.]

SEC. 700-b. **Billboards—regulation—license.** Cities and towns shall have the power to regulate the construction and location of billboards and the power to license and tax the owners thereof or persons maintaining the same. [32 G. A., ch. 32, § 2.]

SEC. 700-c. **Temporary merchants' license.** That hereafter it shall be unlawful for any temporary or transient merchant to engage in, do or transact any business as such within any city or incorporated town without first having obtained a license as hereinafter provided. [35 G. A., ch. 62, § 1.]

SEC. 700-d. **How secured—fee—limitations.** Any temporary or transient merchant desiring to engage in, do or transact business in any county in this state, shall file an application for license for that purpose with the auditor of the county in which he desires to do business, which application

shall state his name, his proposed place of business, the kind of business proposed to be conducted and the length of time for which he desires to conduct such business. Such temporary or transient merchant shall pay to the treasurer of such county a license fee of two hundred dollars and the treasurer of such county shall issue to such person duplicate receipts therefor; such temporary or transient merchant shall thereupon file the treasurer's receipt for such payment, together with the bond and appointment of agent for service of notice of suit as hereinafter provided, with the auditor of such county, who shall thereupon issue to such temporary or transient merchant a license to do business at the place described in the application and the kind of business to be done shall be described in such license. No license shall be good for more than one person, unless such person shall be the member of a copartnership, nor for more than one place of business, and shall be good for a period of one year from the date of its issuance. The auditor shall keep a record of such licenses in a book which shall at all times be open to public inspection. [35 G. A., ch. 62, § 2.]

SEC. 700-e. **Bond to auditor—agent for service of notice.** Before a license shall issue as herein provided, the applicant shall execute and deliver to the county auditor a good and sufficient bond in the amount of one thousand dollars with surety or sureties to be approved by the county auditor. Said bond shall run to the county auditor as obligee and shall be for the protection of all persons, firms[1] or corporations[2] who may have claims against the obligor arising out of said business and any such person, firm or corporation may sue thereon in his or in its own name. At the time of delivering such bond to the county auditor, the obligor shall also deliver to the county auditor a duly executed instrument making the county auditor the agent of the obligor for the purpose of being served with original notice of suit on said bond. [35 G. A., ch. 62, § 3.]

[1"firm" and 2"corporation" in enrolled bill. EDITOR.]

SEC. 700-f. **Advertising of bankrupt or other special stocks—affidavit showing facts—false statements—penalty.** It shall be unlawful for any temporary or transient merchant to advertise, represent or hold out any goods, wares or merchandise as being sold as an insurance, bankrupt, railway wreck, insolvent, assignee, trustee, executor, administrator, receiver, syndicate, wholesale, manufacturer or closing out sale, or as a sale of any goods, wares or merchandise damaged by smoke, fire, water or otherwise, unless such temporary merchant shall file with the county auditor an affidavit showing all the facts relating to the reasons for and character of such sale so to be advertised or represented, and showing that the goods, wares and merchandise of such sale are in fact in accordance with such advertisements and representations; such affidavit shall include a statement of the names of the persons from whom the goods, wares and merchandise so to be advertised or represented, were obtained, and the date of the delivery of said goods to the applicant and the place from which said goods, wares and merchandise were last taken, and all details necessary exactly to locate and fully to itemize all goods, wares and merchandise so to be advertised and represented. If such affidavit shall fail to show that such goods, wares and merchandise of such sale are in accordance with the proposed advertisements or representations as shown in such affidavit, or fails to disclose the facts as herein required, or if the county auditor learns that the said affidavit is untrue in any particular, then the county auditor shall refuse such applicant a license for such sale. Should a license be issued to such applicant it shall state that such person is authorized and

licensed to sell such goods, wares and merchandise, and advertise, represent and hold out the same as being sold as such insurance, bankrupt, railway wreck, insolvent, assignee, trustee, executor, administrator, receiver, syndicate, wholesale, manufacturer or closing out sale of any goods, wares and merchandise, or as being damaged by smoke, fire, water, or otherwise, or in any similar manner present any other fact, as shown by such affidavit. Such affidavit shall be sworn to by the applicant before a person authorized to administer oaths. If the applicant be a partnership it shall be sworn to by a member of such partnership, or if the applicant be a corporation it shall be sworn to by one of the officers of such corporation. Every person making a false statement of any fact in such affidavit shall be deemed guilty of perjury and shall be punished for such offense as provided by the laws of Iowa. [35 G. A., ch. 62, § 4.]

SEC. **700-g. Temporary or transient merchant defined.** The words "temporary or transient merchant" for the purposes of this act shall include all persons, firms or corporations, both as principal and agent, who engage in, do or transact any temporary or transient business, either in one locality or more, or by traveling from one or more places in this state, selling goods, wares or merchandise and who for the purpose of carrying on such business hire, lease or occupy a building, structure or car, for the exhibition and sale of such goods, wares or merchandise. [35 G. A., ch. 62, § 5.]

SEC. **700-h. Evidence.** Provided, further, that whenever it appears that any such stock of goods, wares and merchandise has been brought into any county in this state by a person, firm or corporation who has not previously conducted a merchandise business therein, and it is claimed that such stock is to be closed out at reduced prices, such facts shall be prima-facie evidence that the person, firm or corporation so offering such goods for sale is a transient merchant as defined in this act. [35 G. A., ch. 62, § 6.]

SEC. **700-i. Auditor may require bond on complaint—permanent merchant defined.** If complaint be made to the county auditor that any person, firm or corporation doing business in any city or incorporated town within the county is a transient merchant and such person, firm or corporation shall claim to be a permanent merchant, the county auditor shall require of such person, firm or corporation, and he or it shall furnish, a bond in the sum of one thousand dollars, with surety or sureties to be approved by the county auditor. Such bond shall run to the county auditor as obligee and it shall secure the payment of the license in the event that such person, firm or corporation does not continue in the business which he or it is conducting in such city or incorporated town for a period of one year from the time when such business was started; said bond shall also be for the protection of all persons, firms or corporations having claim or claims against the obligor arising out of said business as provided in section three hereof. At the time of delivering such bond to the county auditor the obligor shall also deliver to the county auditor a duly executed instrument making the county auditor the agent of the obligor for the purpose of being served with original notice of suit on said bond. Such merchant so complained against shall also furnish to the county auditor the affidavit required in section four[1] hereof before advertising or holding out any goods, wares or merchandise as being sold as an insurance, bankrupt, railway wreck, insolvent, assignee, trustee, executor, administrator, receiver, syndicate, wholesale, manufacturer or closing out sale, or as a sale of any goods, wares or merchandise damaged by smoke,

fire, water or otherwise. But after such merchant has been conducting the particular business in which he or it is engaged in such city or incorporated town for a period of one year, such merchant shall be held to be a permanent merchant and the provisions of this act shall no longer be applicable to such merchant. [35 G. A., ch. 62, § 7.]

[1§ 700-f herein. EDITOR.]

SEC. 700-j. **To whom not applicable.** The provisions of this act shall not apply to sales made to dealers by commercial travelers or selling agents in the usual course of business or to sheriffs, constables, bona fide assignees, receivers or trustees in bankruptcy, or other public officers selling goods, wares and merchandise according to law, nor to any person selling farm and garden products. [35 G. A., ch. 62, § 8.]

SEC. 700-k. **Additional to municipal regulation.** Nothing in this act contained shall be construed as prohibiting or in any way limiting or interfering with the right of any city or incorporated town to regulate or license the carrying on within such municipality the business of a transient merchant as in this act defined, in any case where authority has been or shall hereafter be conferred upon it so to do, but the requirements of this act shall be in addition thereto. [35 G. A., ch. 62, § 9.]

SEC. 700-l. **Fees—paid into general fund.** All license fees collected under this act shall be paid into the general revenue fund of the county. [35 G. A., ch. 62, § 10.]

SEC. 700-m. **Penalty.** Any person violating the provisions of this act or conducting any such business after the expiration of the license shall be guilty of a misdemeanor, whether he be the owner of goods, wares and merchandise sold or carried by him or not, and on conviction thereof shall forfeit and pay into the county treasury, in addition to the penalty imposed therefor, double the amount of the tax for one year, as fixed in section two[1] hereof. [35 G. A., ch. 62, § 11.]

[1§ 700-d herein. EDITOR.]

SEC. 702. Billiard saloons—gaming.

The city may by ordinance provide for the punishment of gambling, although the same act constitutes a criminal offense under the statutes of the state. *Blodgett v. McVey*, 131–552, 108 N. W. 239.

SEC. 703. Circuses—theaters—shows.

The city, having power to regulate, license or prohibit shows and exhibitions, may render itself liable by permitting a performance on a wire stretched over the street resulting in injury to persons in the street. *Wheeler v. Ft. Dodge*, 131–566, 108 N. W. 1057.

A court will not enjoin the enactment of a proposed ordinance in regard to the regulation or prohibition of theatrical exhibitions even though, if enacted, it would be invalid as in excess of the power here given. *Majestic Theater Co. v. Cedar Rapids*, 153–219, 133 N. W. 117.

SEC. 704. **Gambling houses—disorderly houses.** They shall have power to suppress, restrain and prohibit gambling houses, disorderly houses, houses of ill fame, opium or hop joints, or places resorted to for the use of opium or hasheesh, and punish the keepers thereof, and persons resorting thereto. [28 G. A., ch. 18, § 1; C. '73, § 456; R. § 1057.]

[The above section is made applicable to special charter cities by § 952. EDITOR.]

SEC. 707. Dogs.

The power to regulate or prohibit the running at large of dogs may be exercised by making it a misdemeanor on the part of the owner to allow a dog to run at large unmuzzled. *Sibley v. Lastrico*, 122–211, 97 N. W. 1074.

The fact that a dog is allowed to run at large without being muzzled as required by city ordinance does not render the owner liable for injury caused by such dog unless such injury is the proximate result of the lack of a muzzle. *Forsythe v. Kluckhohn*, 150–126, 129 N. W. 739.

Proof of specific acts or of the habit of the animal to bite or seize the clothing of persons on the street, held admissible as a circumstance tending to sustain plaintiff's charge that the animal so acted at the time of the injuries inflicted upon the plaintiff. *Forsythe v. Kluckhohn*, 142 N. W. 225.

SEC. **709-a. Building code—penalties.** Cities and towns, including cities under special charter and cities under the commission form of government, shall have the power to adopt by ordinance a building code, providing for the districting of such cities into one or more districts, establishing reasonable rules and regulations for the erection, reconstruction and inspection of buildings of all kinds within their limits and for a fee for such inspection and providing penalties for violation thereof. [35 G. A., ch. 63, § 1.]

SEC. **711. Fires—electric apparatus—regulations—fire limits.** That section seven hundred eleven of the code and the law as it appears therein be and the same is hereby repealed and the following enacted in lieu thereof:

"Cities, including cities acting under special charters and cities acting under commission form of government, and towns shall have power to make regulations for protection against fire and electrical apparatus, to establish fire limits, to prohibit within such limits the erection of all buildings and structures of every kind, additions thereto, substantial alterations thereof involving partial rebuilding, not constructed of fireproof materials, in whole or in part, as prescribed by ordinance, and to remove or take down any building or structure or part thereof erected contrary to such ordinances and to collect the cost thereof from the owner." [35 G. A., ch. 64, § 1.] [22 G. A., ch. 1, § 15; 22 G. A., ch. 21, § 1; C. '73, § 457; R. § 1058.]

[The above section is made applicable to special charter cities by § 952. EDITOR.]

A building erected in violation of an ordinance fixing fire limits may be torn down or removed without any judicial proceeding whatever. But one who is erecting a building with the intention of complying with the law has a reasonable time within which to put his building into the condition required by ordinance. *Lemmon v. Guthrie Center*, 113–36, 84 N. W. 986.

The term "fire proof" as used in this section is to be reasonably construed and refers to a roof which can be reasonably depended upon to resist the action of ordinary fires. *Lane-Moore Lumber Co. v. Storm Lake*, 151–130, 130 N. W. 924.

The statute leaves the builder to his choice of non-combustible material. *Ibid.*

The city has authority to provide that no further building or structure shall be erected on premises already improved or used except in conformity with the specified regulations and it may provide appropriate means to enforce such regulations. *Ibid.*

SEC. **713-a. Smoke nuisance in certain cities.** The emission of dense smoke within the corporate limits of the cities of the state, including cities acting under commission form of government, now or hereafter having a population of thirty thousand or over and in cities acting under special charter now or hereafter having a population of sixteen thousand or over, is hereby declared a nuisance. [35 G. A., ch. 49, § 1.]

SEC. **713-b. Abatement—inspection.** Every such city is hereby empowered to provide by ordinance for the abatement of such nuisance either by fine or imprisonment or by action in the district court of the county in which such city is located, or by both, such action to be prosecuted in the name of the city. They may also by ordinance provide all necessary rules and regulations for smoke inspection and the abatement and prevention of the smoke nuisance. [35 G. A., ch. 49, § 2.]

[The title to ch. 49, 35 G. A., so far as it refers to classes of cities, mentions only "certain cities, including cities acting under special charter." EDITOR.]

SEC. 713-c. **Repeal.** That chapter thirty-seven of the laws of the thirty-fourth general assembly be and the same is hereby repealed. [35 G. A., ch. 49, § 3.]

SEC. 716-a. **Levy for fire fund.** That any city of the second class may levy a tax in any one year of not more than three mills, and in cities with a population in excess of ten thousand, five mills on the dollar of the assessed valuation of the taxable property within the corporate limits for the purpose of maintaining a fire department; and the money so raised shall constitute a fire fund, and shall be applied to no other purpose. [33 G. A., ch. 43, § 1.] [27 G. A., ch. 20, § 1.]

SEC. 716-b. **Maintenance of fire departments—special tax for.** Cities organized under the commission form of government, and cities having a population of five thousand or more organized under chapter two of title five of the code, and cities organized under special charter shall have power to levy a special tax of not to exceed one and one-half mills each year, upon all taxable property in said city, for the purpose of acquiring property for the use of the fire department and equipping the same. No part of the general fund shall be used for equipping said fire department. Nothing in this act shall be held to extend the power of such cities to make annual levies for general and special taxes in excess of forty-eight mills. [35 G. A., ch. 65, § 1.]

SEC. 716-c. **Levy—percentage—maturity.** Such cities shall have the power after the purchase of the property and equipment, by ordinance or resolution, to levy at any one time the whole or any part of the cost of such property and equipment upon such taxable property and determine the percentage of tax, not exceeding one and one-half mills, to be paid each year, and the number of years not exceeding ten, given for the maturity of each installment thereof. Certificates of such levy shall be filed with the county auditor in which said city is located, setting forth the amount of percentage and maturity of said tax, or each installment thereof, certified as correct by the city clerk or auditor, and thereupon said tax shall be placed upon the tax lists of the proper county or counties, and collected as other taxes. [35 G. A., ch. 65, § 2.]

SEC. 716-d. **May anticipate collection—fire fund bonds.** Any such city may anticipate the collection of taxes authorized to be levied for a fire fund for the equipment, or purchase of property for the fire department, and for that purpose may issue fire fund certificates or bonds with interest coupons, and the provisions of chapter twelve, title five of the code shall be operative as to such certificates, bonds and coupons, in so far as they may be applicable. [35 G. A., ch. 65, § 3.]

SEC. 716-e. **Bonds secured by assessments.** Said certificates, bonds and interest thereon shall be secured by said assessments and levies and shall be payable only out of the funds derived from such levies and pledged to the payment of the same, and no certificate or bonds shall be issued in excess of taxes authorized and levied to secure the payment of the same. It shall be the duty of such city on receipt of such funds, to hold the same separate and apart in trust for the payment of said certificates, bonds and interest and to apply the proceeds of such funds to the payments of said certificates, bonds and interest. [35 G. A., ch. 65, § 4.]

SEC. 717. **Markets.**

A city may require that any person buying or selling by weight within the city limits shall have the commodity bought or sold weighed on the public scales and

the fact that a grain buyer has a place of business remote from the public scales so that he suffers a disadvantage by being compelled to have the grain which he buys weighed at such scales will not be a ground for enjoining the enforcement of such ordinance. *Ewing v. Webster City*, 103–226, 72 N. W. 511.

The power to enact an ordinance establishing and regulating a city market is specifically given and this power necessarily carries with it the power to prohibit the sale or weighing of commodities elsewhere than at the place established as such public market. *State v. Smith*, 123–654, 96 N. W. 899.

The establishment of a public market on one of the streets of a city does not constitute a nuisance *per se*, even though it results in temporary or partial obstruction of the street. *Ibid.*

The powers conferred upon the city under this section are legislative in character, and within the limits prescribed by statute are plenary. *Lacy v. Oskaloosa*. 143–704, 121 N. W. 542.

SEC. 718. Wharves, docks and piers.

The right of a city to impose wharfage fees within its jurisdiction does not arise wholly out of the expense which it incurs in the maintenance of a wharf. *Keckevoet v. Dubuque*, 157– —, 138 N. W. 540.

The exercise of the power to impose wharfage fees is not an interference with interstate commerce. *Ibid.*

In a particular case held that the wharfage fees exacted of a person who made use of the river frontage in his business were excessive. *Ibid.*

SEC. 720. **Heating plants—water or gas works—electric plants—purchase and sale of heat, gas, water and electric current.** They shall have power to purchase, establish, erect, maintain and operate, within or without the corporate limits of any city or town, heating plants, waterworks, gas works or electric light or electric power plants, with all the necessary reservoirs, mains, filters, streams, trenches, pipes, drains, poles, wires, burners, machinery, apparatus and other requisites of said works or plants, and lease or sell the same. They may also grant to individuals or private corporations the authority to erect and maintain such works or plants for a term of not more than twenty-five years, and may renew, amend or extend the term of such grant; but no exclusive franchise shall be thus granted, amended, extended or renewed. And they shall have power to enter into contracts with persons, corporations or municipalities for the purchase of heat, gas, water, and electric current for either light or power purposes, and shall have power to sell the same either to residents of such municipality, or to others, including corporations, and to erect and maintain the necessary transmission lines therefor either within or without the corporate limits, to the same extent, in the same manner, and under the same regulations, with the same power to establish rates and collect rents as is or hereafter may be provided by law for cities having municipally owned plants. No such works or plants shall be authorized, established, erected, purchased, leased or sold, or franchise extended or renewed or amended, or contract of purchase entered into, unless a majority of the legal electors voting thereon vote in favor of the same at a general, city or special election. [35 G. A., ch. 66, § 1; 34 G. A., ch. 34, § 1; 33 G. A., ch. 44, § 1.] [28 G. A., ch. 19, § 1; 26 G. A., ch. 13; 22 G. A., ch. 11, §§ 1, 2; 22 G. A., ch. 26; C. '73, §§ 471–3.]

Although the city attempts to give an exclusive monopoly to a water company, that fact will not nullify the portions of the contract giving the company the right to furnish water. *Kimball v. Cedar Rapids*, 100 Fed. 802.

Under § 471 of the code of 1873, the city council might by affirmative vote of four fifths of the members authorize the construction of waterworks. *Marion Water Co. v. Marion*. 121–306, 96 N. W. 883.

But the passage of an ordinance by the requisite vote approving a contract for the furnishing of water to the city does not constitute an authorization of the erection of waterworks as required by the statute. *Ibid.*

Notwithstanding the failure of a council to authorize the erection of waterworks as provided by statute, the company with whom a contract to furnish water to the city is made may recover under such contract for water actually furnished. *Ibid.*

The assignee of such a contract may recover against the city for water furnished under its provisions. *Ibid.*

Under a contract to furnish water to the city the water company is not limited in its recovery of compensation for water furnished to the proceeds of the five mill water tax authorized by statute. *Ibid.*

The city may have power to contract for a water supply for a long term of years, but does not necessarily have the right to fix the rate in advance to be paid under such contract for a long period. It may, however, make the contract exclusive. *Davenport Gas & Elec. Co. v. Davenport*, 124–22, 98 N. W. 892.

The grant of a franchise to build and operate waterworks is limited to twenty-five years, and no privilege under such grant can continue for a longer time. *Cedar Rapids Water Co. v. Cedar Rapids*, 118–234, 91 N. W. 1081.

The power to contract for water for municipal purposes and for the rate which shall be charged other consumers is to be exercised in the interests and for the benefit of the inhabitants of the city, including public corporations, and a provision in such contract that water be furnished free to public schools is not invalid. *Independent School Dist. v. LeMars City Water & Light Co.*, 131–14, 107 N. W. 944.

Every consumer of water is privy to such contract to such an extent as to be entitled to enforce the provisions for his benefit. *Ibid.*

A contract to furnish free water to public schools is not affected by the fact that a sewerage system is subsequently installed for school buildings, making necessary a larger supply of water. *Ibid.*

The water supplied to a city or town at public expense may properly be used in sprinkling the streets. *McAllen v. Hamblin*, 129–329, 105 N. W. 593.

Under statutory provision authorizing cities to contract with a company for the erection of waterworks and furnishing water for public use, and providing that the city might levy a tax to pay for water taken for public use, not in excess of five mills on the dollar for any one year, held that the power to levy the tax was not a limitation on the power to contract, and that the city might be liable for the contract price in excess of the proceeds of the tax. *Ft. Madison Water Co. v. Ft. Madison*, 110 Fed. 901; *Ft. Madison v. Ft. Madison Water Co.*, 114 Fed. 292.

The question to be voted upon under the statute being whether the municipality should construct waterworks, held that the adoption of a proposition submitted to the voters as to whether bonds should be issued for the construction of waterworks was not sufficient, the question of issuing bonds being incidental only to the real question of constructing the waterworks. *Brown v. Carl*, 111–608, 82 N. W. 1033.

Also held that it was error to include in the proposition as to issuing bonds the statement that the proceeds would be used for maintaining as well as constructing such works. *Ibid.*

An existing system of waterworks may be acquired by the city by agreement, or taken under the right of eminent domain. *Nash v. Council Bluffs*, (C. C.) 174 Fed. 182.

The rates fixed by a city council are presumptively correct, and the company challenging the same on the grounds that they are not remunerative must overcome such presumption by a fair preponderance of testimony. *Des Moines Water Co. v. Des Moines*, (C. C.) 192 Fed. 193.

The grant of a franchise to a waterworks company necessarily carries with it the power, by appropriate measures, to protect the works from destruction or injury and the water supply from impairment or pollution. The exercise of such power is not a denial of the substantial rights of individuals, as members of the general public, to use the waters of a stream and the sand forming its bed, as private rights are subordinate to a public use of paramount importance. *Mann v. Des Moines Water Co.*, (C. C. A.) 202 Fed. 862.

SEC. 721. Question submitted—notice—how given. The council may order any of the questions provided for in the preceding section submitted to vote at a general or city election, or at one specially called for that purpose; or the mayor shall submit said question to such vote upon the petition of twenty-five property owners of each ward in the city, or of fifty property owners of any incorporated town. Notice of such election shall be given in two newspapers published in said city or town, if there are two, if not, then in one, once each week for at least four consecutive weeks. But if no such newspaper is published within the limits of the corporation, then such notice may be given by posting copies thereof in three public places within the limits of said corporation, two of which places shall be the post office and the mayor's office of such city or town. The party asking for a renewal or extension of such franchise shall pay the cost incurred in holding such election. [33 G. A., ch. 44, § 2.] [29 G. A., ch. 32, § 1; 22 G. A., ch. 11, § 4.]

Where the question submitted was whether the town should issue bonds for the purpose of erecting, maintaining and operating a system of waterworks, held that this was not a submission of the question whether such waterworks should be constructed by the town, and the adoption of the proposition did not authorize such construction. The precise question to be passed upon should be placed in plain terms before the voters. *Brown v. Carl*, 111–608, 82 N. W. 1033.

Also held that the incorporation into such question of the proposition that the proceeds of the bonds should be used to some extent in the maintenance of the waterworks was improper, and being in the nature of an inducement to the voter to cast an affirmative ballot, vitiated the acceptance of the proposition. *Ibid.*

Under code § 955, providing for notice of application for waterworks franchises in cities under special charter, which section contains provisions similar to this section, held that the notice provided for is one not only advising the property owners that the franchise is desired, but also of the very terms of such franchise. *Hall v. Cedar Rapids*, 115–199, 88 N. W. 448.

SEC. 722. **Condemning land, plants and works—limitation.** They shall have power to condemn and appropriate so much private property as shall be necessary for the construction and operation of said works or plants, and for the purpose of constructing and maintaining dams across the nonnavigable waters and watercourses of the state in forming reservoirs and sources of water to supply such waterworks and plants, as provided for the condemnation of land for city purposes; to issue bonds for the payment of the cost of establishing the same, including the cost of land condemned on which to locate them, and to confer by ordinance the power to appropriate and condemn private property for such purpose upon any individual or corporation authorized to construct and operate such works or plants. That when any city or town shall have voted at an election as is provided in sections seven hundred twenty and seven hundred twenty-one of the supplement to the code, 1907, to purchase, establish, erect, maintain, and operate heating plants, waterworks, gasworks, or electric light or electric power plants, or when any such city or town shall have voted to contract indebtedness and issue bonds as is provided in sections thirteen hundred and six-b, thirteen hundred and six-c, thirteen hundred and six-d, and thirteen hundred and six-e of the supplement to the code, 1907, for any of the purposes therein enumerated, and in such city or town there shall then exist any such heating plant, waterworks, gasworks, electric light or electric power plants, or incomplete parts thereof or more than one, not publicly owned, and the contract or franchise of the owner of which utility has expired or been surrendered and such owner and city or town cannot agree upon terms of purchase, such city or town may, by resolution, proceed to acquire by condemnation, as hereinafter provided, any one or more of such heating plants, waterworks, gasworks, electric light or electric power plants or incomplete parts thereof and when so acquired may apply the proceeds of the bonds voted or issued in payment therefor and in making extensions and improvements to such works or plants so acquired; but not more than one of such utilities shall be so acquired when any such city or town shall be indebted in excess of the statutory limitation of indebtedness for such purposes for any such acquired property. [33 G. A., ch. 45, § 1.] [31 G. A., ch. 20; 23 G. A., ch. 13, § 1; 22 G. A., ch. 10, § 1; 22 G. A., ch. 11, §§ 2, 3; C. '73, § 474.]

[The above section is made applicable to special charter cities by § 952. EDITOR.]

The city is authorized to condemn lands to protect, maintain and continue its water supply. *Laplant v. Marshalltown*, 134–261, 111 N. W. 816.

SEC. 722-a. **Court of condemnation—appointment—vacancies—procedure.** That upon the passage of the resolution as provided under

section one hereof and presentation of a certified copy thereof to the supreme court while in session, or to the chief justice of the supreme court, the said court or chief justice shall, within five days thereafter, appoint three district court judges from three judicial districts, of which one shall be from the district wherein such city or town is located, if he be not a resident of such city or town, as a court of condemnation, and shall enter an order requiring said judges to attend as such court of condemnation at the county seat in the county in which said city or town is located, within ten days thereafter, which judges shall so attend as ordered; and such court of condemnation at the time it meets to organize, as is provided in said order, or at any time during the proceeding, which may be adjourned from time to time for any purpose, may fix a time for the appearance of any person or persons which any party desires to have joined in the proceedings and which the court deems necessary, which time for appearance shall be sufficiently remote to give notice upon such parties; but if such time of appearance shall occur after any proceedings are begun they shall be reviewed by the court as it may direct to give all parties full opportunity to be heard. All persons not appearing and having any right, title, or interest in or to the property which is the subject of condemnation or any part thereof and including all leaseholders and mortgagee trustees of bondholders which are to be made parties to the proceedings, shall be served with notice thereof, and the time and place of meeting of said court in the same manner and for the same length of time as the service of original notices, either by personal service or service by publication, the time so set being the time at which the parties so served are required to appear, and actual personal service of the notice within or without the state shall supersede the necessity of publication. These provisions shall also apply to condemnation proceedings which are pending, but nothing herein shall be held to invalidate any proceedings or notices served in any proceedings under chapter nine, title ten, or under the provisions of the act to which this is amendatory which have been had or taken at the time of the taking effect of this act. Such court of condemnation shall have the power to summon and swear witnesses, take evidence, order the taking of depositions, and require the production of any books and papers, as is provided in chapter one, title twenty-three of the code, and a reporter may be appointed, as is provided for the district court; and such court shall perform all the duties of commissioners in the condemnation of property and such duties and the method of condemnation and procedure, including provisions for appeal, shall, except as herein otherwise specially provided, be the same, as nearly as may be, as is provided in chapter four, title ten of the code, but the clerk of the district court of the county where such city or town is located shall perform all the duties required of the sheriff in said chapter and, in case of a vacancy in said court of condemnation, such vacancy shall be filled in the same manner in which the original appointment was made and the court may review any evidence of its record made necessary by reason of such vacancy. [34 G. A., ch. 35, § 1; 33 G. A., ch 45, § 2.]

So long as the supreme court of the state has not passed upon the constitutionality of this provision for appointment of appraisers by such court, but, on the other hand, has acted under it, the federal court will not pass upon the question of whether it is in violation of the constitution of the state. *Des Moines Water Company, v. Des Moines*, 194 Fed. 557.

SEC. 722-b. **Costs—expenses of members.** The costs of said proceedings shall be the same and paid in the same manner as in proceedings

in the district court, and the said district court judges of said court of condemnation shall receive, while engaged in such service, their actual expenses, which expenses shall be taxed as costs in the case. [33 G. A., ch. 45, § 3.]

SEC. 724. **Rates—taxes.** They shall have power, when operating such works or plants,[1] and shall have the power to sell the products of such municipal heating plants, waterworks, gasworks or electric light or electric power plants, to any municipality, individual or private corporations outside of the city or town limits as well as to individuals or corporations within its limits, and to erect in the public highway the necessary poles upon which to construct transmission lines, and to assess from time to time, in such manner as they shall deem equitable, upon each tenement or other place supplied with water, gas, heat, light or power, reasonable rents or rates fixed by ordinance, and to levy a tax, as hereafter provided, to pay or aid in paying the expenses of running, operating, renewing, extending and repairing such works or plants owned and operated by such city or town, and the interest on any bonds issued to pay all or any part of the cost of their construction. [35 G. A., ch. 67, § 1.] [29 G. A., ch. 33, § 1; 28 G. A., ch. 19, § 1; 22 G. A., ch. 11, § 2; C. '73, § 475.]

[1]The amendment made by ch. 67, 35 G. A., which is inserted here beginning with "and shall have the power" and ending with "to construct transmission lines, and," is placed in strict accordance with the directions of the act, though the section is thereby rendered rather incoherent. EDITOR.]

[The above section is made applicable to special charter cities by § 952. EDITOR.]

A city may provide by ordinance for cutting off the supply of water to a customer who fails to pay his bills when due. But such a regulation cannot be made the instrument whereby the company may become the judge of its own case and shut off water to enforce the payment of disputed bills. *Spaulding Mfg. Co. v. Grinnell*, 155–500, 136 N. W. 649.

SEC. 725. **Regulation of rates and service.** They shall have power to require every individual or private corporation operating such works or plant, subject to reasonable rules and regulations, to furnish any person applying therefor, along the line of its pipes, mains, wires, or other conduits, with gas, heat, water, light or power, and to supply said city or town with water for fire protection, and with gas, heat, water, light or power for other necessary public purposes, and to regulate and fix the rent or rate for water, gas, heat, light or power; to regulate and fix the rents or rates of water, gas, heat and electric light or power; to regulate and fix the charges for water meters, gas meters, electric light or power meters, or other device or means necessary for determining the consumption of water, gas, heat, electric light or power, and these powers shall not be abridged by ordinance, resolution or contract. [28 G. A., ch. 19, § 1; 22 G. A., ch. 11, § 2; 22 G. A., ch. 16, § 1; C. '73, §§ 473, 475.]

[The above section is made applicable to special charter cities by § 952. EDITOR.]

A contract by which the city is required to pay excessive rental for hydrants for a period of years held invalid. *Hall v. Cedar Rapids*, 115–199, 88 N. W. 448.

By acceptance from the city of a franchise to furnish gas to the inhabitants of the city the company assumes a public duty to supply gas at a reasonable rate to all inhabitants and to charge each the same price and to furnish on the same terms for like service under the same or similar circumstances. It cannot refuse to furnish gas to one who complies with the terms and conditions imposed on the ground that such applicant is indebted on a previous gas bill as to which there has been litigation, it not appearing that the applicant is irresponsible. *Phelan v. Boone Gas Co.*, 147–626, 125 N. W. 208.

The act of the municipality in fixing rates for a corporation having a franchise to supply the public is purely legislative and it is presumed to have been in the proper exercise of the power conferred.

Evidence considered and held not sufficient to show that the rate fixed in the particular case was not remunerative. *Cedar Rapids Gas Light Co. v. Cedar Rapids*, 144–426, 120 N. W. 966.

SEC. 727. **Public library—bequests—conditions of—how enforced.** Cities and towns shall have power to provide for the formation and maintenance of a free public library, open to the use of all the inhabitants, under proper regulations, and may purchase land and erect buildings, or hire buildings or rooms, suitable for that purpose, and provide for the compensation of the necessary employes; may receive, hold or dispose of any and all gifts, donations, devises and bequests that may be made to them for the purpose of establishing, increasing or improving any such library; and when the conditions of such gifts, donations, devises, and bequests have once been accepted by the council, the performance of such conditions may be enforced at the instance of the library board by mandamus and by other due process of law; and the council may apply the profits, proceeds, interest and rents accruing therefrom in such manner as will best promote the prosperity and utility of such library; but no money can be appropriated for such purpose until the electors of such city or town shall, at a general or special election, have voted for the establishment of such library. [29 G. A., ch. 34, § 1; C. '73, § 461.]

[The above section is made applicable to special charter cities by § 952 as well as by § 727-a. EDITOR.]

SEC. 727-a. **Applicable to special charter cities.** This act shall apply to cities acting under special charter. [29 G. A., ch. 34, § 2.]

SEC. 728. **Library trustees.** In any city or town in which a free library has been established, there shall be a board of library trustees, consisting of nine members, to be appointed by the mayor, by and with the approval of the council. Of said trustees first appointed, one third shall hold office for two, one third for four, and one third for six, years, from the first day of July following their appointment; and, at their first meeting, shall cast lots for the respective terms, reporting the result of such lot to the council. Biennially thereafter, before the first day of July, the mayor shall appoint, by and with the approval of the council, three trustees to succeed the trustees retiring on the following first day of July, each of whom shall hold office for six years from such first day of July, and until his successor is appointed and qualified. Vacancies occurring in the board shall be filled by appointment by the mayor, such appointees to fill out the unexpired term for which the appointment is made. Bona fide citizens and residents of the city or town, male or female, over the age of twenty-one years, are alone eligible to membership. The removal of any trustee permanently from the city, or his absence from six consecutive regular meetings of the board, except in case of sickness or temporary absence from the city, without due explanation of absence shall render his office as trustee vacant. Members of said board shall receive no compensation for their services. Provided that in cities and incorporated towns where a college or university is located, it shall be lawful for the city or town and such institution of learning to jointly establish and maintain a public library for their mutual benefit, upon such terms and conditions as regards maintenance, control, appointment of library trustees and other incidents of joint control as may in any lawful manner be mutually agreed upon between them; but no city or town may undertake to contribute toward the maintenance more than the amount produced by a rate of taxation therefor allowed by law, and no persons shall be appointed or confirmed as library

trustees other than such having the qualifications required by law. [34 G. A., ch. 36, § 1.] [30 G. A., ch. 24, § 1; 25 G. A., ch. 41, § 1.]

[The above section is made applicable to special charter cities by § 952. EDITOR.]

The power to levy taxes for library purposes cannot be vested by the legislature in the board of library trustees not elected by the people, but appointed by the mayor with the advice and consent of the council. *State ex rel. v. Mayor, etc., of Des Moines*, 103–76, 72 N. W. 639.

SEC. **729. Powers.** Said board of library trustees shall have and exercise the following powers: To meet and organize by the election of one of their number as president of the board, and by the election of a secretary and such other officers as the board may deem necessary; to have charge, control and supervision of the public library, its appurtenances and fixtures, and rooms containing the same, directing and controlling all the affairs of such library; to employ a librarian, such assistants and employes as may be necessary for the proper management of said library, and fix their compensation; but, prior to such employment, the compensation of such librarian, assistants and employes shall be fixed for the term of employment by a majority of the members of said board voting in favor thereof; to remove such librarian, assistants or employes by a vote of two thirds of such board for misdemeanor, incompetency or inattention to the duties of such employment; to select and make purchases of books, pamphlets, magazines, periodicals, papers, maps, journals, furniture, fixtures, stationery and supplies for such library; to authorize the use of such libraries by nonresidents of such cities and towns and to fix charges therefor; to make and adopt, amend, modify or repeal by-laws, rules and regulations, not inconsistent with law, for the care, use, government and management of such library and the business of said board, fixing and enforcing penalties for the violation thereof; and to have exclusive control of the expenditures of all taxes levied for library purposes as provided by law, and of the expenditure of all moneys available by gift or otherwise, for the erection of library buildings and of all other moneys belonging to the library fund. Said board shall keep a record of its proceedings. [31 G. A., ch. 14, § 1; 28 G. A., ch. 20, § 1; 26 G. A., ch. 50, § 1; 25 G. A., ch. 41, § 2.]

[The above section is made applicable to special charter cities by § 952. EDITOR.]

SEC. **729-a. Power to contract for use of books.** Section seven hundred twenty-nine-a of the supplement to the code, 1907, is hereby repealed and the following is enacted as a substitute therefor:

"The board of library trustees of any free public library shall have power to contract with any school corporation, the township trustees of any civil township, the board of supervisors of the county in which said library is situated, and the council of any city or town, whether such school corporation, civil township, or city or town be in the same county in which such library is situated or in an adjoining county, for the free use of said library by the residents of such school corporation, civil township, county, city or town, by one or more of the following methods in whole or in part:

First: By lending the books of such library to such residents on the same terms and conditions as to residents of the city or town in which said library is situated.

Second: By the establishment of depositaries of books of such library to be loaned to such residents at stated times and places.

Third: By the transportation of books of such library by wagon or other conveyance for lending the same to such residents at stated times and places.

Fourth: By the establishment of branch libraries for lending books to such residents.

Such contracts, unless otherwise provided therein, shall remain in force for five years, unless sooner terminated by a majority vote of the electors of such school corporation, civil township, county, city or town." [35 G. A., ch. 70, § 1.] [31 G. A., ch. 14, § 1.]

[See par. 25, § 422. EDITOR.]

SEC. **729-b. Library buildings—condemnation of ground for location of.** In any city or town in which a free library has been or may hereafter be established, the board of library trustees shall have the power to condemn real estate in the name of the city or town for the location and construction of library buildings and for branch libraries, and for the purpose of enlarging the grounds for such library buildings and branch libraries. [29 G. A., ch. 35, § 1.]

SEC. **729-c. Condemnation proceedings.** Proceedings for condemnation of land as contemplated in this act, shall be in accordance with the provisions of the code relating to taking private property for works of internal improvement, except that no attorney's fee shall be taxed or allowed for the owner of the real estate. [29 G. A., ch. 35, § 2.]

SEC. **729-d. Applicable to special charter cities.** This act shall apply to cities acting under special charter. [29 G. A., ch. 35, § 3.]

SEC. **729-e. Power to unite with historical associations.** Whenever a local county historical association shall be formed in any county having a free public library, the trustees of such library are hereby authorized to unite with such historical association and to set apart the necessary room and to care for such articles as may come into the possession of said association; said trustees are also authorized to purchase necessary receptacles and materials for the preservation and protection of such articles as are in their judgment of a historical and educational nature and pay for the same out of the library fund. [32 G. A., ch. 33, § 1.]

SEC. **730. Library fund—treasurer.** All moneys received and set apart for the maintenance of such library shall be deposited in the treasury of such city or town to the credit of the library fund, and shall be kept by the treasurer separate and apart from all other moneys, and paid out upon the orders of the board of trustees, signed by its president and secretary. Provided that in any city or incorporated town where is maintained jointly by the city or town and an institution of learning a free public library, for the support and maintenance of which both the city and the institution of learning contribute, the library trustees may elect a library treasurer therefor, and it shall be the duty of the city treasurer to pay over to said library treasurer any and all library taxes that may be collected by him monthly. [30 G. A., ch. 24, § 2; 25 G. A., ch. 41, § 3.]

[The above section is made applicable to special charter cities by § 952. EDITOR.]

SEC. **730-a. Contracts, elections and ordinances legalized.** Where cities or incorporated towns and institutions of learning have established or contracted to establish public libraries to be maintained and controlled jointly as contemplated by this act, all contracts, elections, ordinances and other proceedings made, held or passed in the manner provided by law are hereby declared as valid and obligatory upon the parties thereto as though the same had been made, held or passed after the taking effect of this act. [30 G. A., ch. 24, § 3.]

SEC. 732. **Library tax—additional support—transfer from building to maintenance fund.** That the law as it appears in section seven hundred thirty-two of the supplement to the code [1902] be and the same is hereby repealed and the following enacted in lieu thereof:

"The board of trustees shall, before the first day of August in each year, determine and fix the amount or rate, not exceeding five mills on the dollar in all cities and incorporated towns, of the taxable valuation of such city or town, to be levied, collected and appropriated for the ensuing year for the maintenance of such library; and in cities and towns also the amount or rate, not exceeding three mills on the dollar of the taxable valuation of such city, to be levied, collected and appropriated for the purchase of real estate and the erection of a building or buildings thereon for a public library, or for the payment of interest on any indebtedness incurred for that purpose, and for the creation of a sinking fund for the extinguishment of such indebtedness; and shall cause the same to be certified to the city council, which shall levy such tax for each of said purposes so determined and fixed, and certify the per centum thereof to the county auditor, with the other taxes for said year."

In any city or town under special charter where the mulct law is in force, the city or town council may, in addition to the tax hereinbefore provided for, appropriate not to exceed twenty per cent. of the total amount of the mulct tax received by said municipality, for the support and[1] maintenance of its free public library including the purchase of books and furniture.[2]

When any public library building shall be fully completed and paid for and a balance remains in the library building fund, the library trustees are authorized to transfer such excess to the maintenance fund; provided that this shall not be construed to authorize a levy of tax for building purposes after the library has been erected with intent to take advantage of this act to increase the library income for maintenance purposes. [35 G. A., ch. 68, § 1; 35 G. A., ch. 69, § 1; 33 G. A., ch. 46, § 1.] [31 G. A., ch. 21; 30 G. A., ch. 25; 29 G. A., ch. 36, § 1; 28 G. A., chs. 21, 22, § 1; 26 G. A., ch. 50, § 2; 25 G. A., ch. 41, § 4.]

[1"the" in session laws and supplement of 1907. EDITOR.]

[2The paragraph in the above section which refers to the mulct law was an amendment enacted by the 30 G. A., ch. 25, as additional to § 732 of the 1902 supplement, but the 31 G. A., by ch. 21, repealed said § 732 without referring to or specially repealing the said amendment. The editor of the 1907 supplement deemed it advisable to include the said amendment in the section and explained the same editorially. As the section has been thrice amended since the publication of the 1907 supplement without reference to said amendment, it has been thought best to again include it. Whether or not the said paragraph is a part of the law is a matter for judicial determination. EDITOR.]

[The above section is made applicable to special charter cities by § 952. EDITOR.]

SEC. 732-a. **Applicable to special charter cities.** This act shall apply to cities acting under special charter. [28 G. A., ch. 22, § 2.]

[Section 732-a is § 2 of ch. 22 of the acts of the 28 G. A. Section 1 of the same chapter amended § 732 by inserting the clause, "such tax or so much thereof as it may deem necessary to promote library interests." Section 732 was repealed by the 31 G. A., ch. 21, but nothing was done with the above section.]

SEC. 737. **Plumbing — regulations — inspector.** They shall have power by ordinance to prescribe rules and regulations for all plumbing connecting any building with sewers, water mains and gas pipes; and may prescribe the kind and size of materials to be used in such plumbing, and the manner in which the same shall be done; and to appoint an inspector

thereof, and define his duties and powers; and to provide for the assessment of the cost of such inspection and replacing of the pavement to the property; and to prescribe penalties for the violation of such ordinance. Nothing herein shall be construed as authorizing the annulment of any rules or regulations relating to such plumbing made by the local or state board of health, but such ordinance shall conform to and enforce the same. [27 G. A., ch. 22, § 3; 26 G. A., ch. 14.]

[The above section is made applicable to special charter cities by § 958. EDITOR.]

In an action to enforce a penalty under an ordinance requiring the testing of plumbing placed in a building for future as well as for immediate use, held that the penalty was not enforceable where there were no sewers or water mains upon the street available for connection and the plumbing was only put in the house in course of construction with a view to its use when such connections should be available. *Des Moines v. Cutler*, 144–535, 123 N. W. 218.

SEC. 737-a. **Plumbers' license—board of examiners—inspection—penalties.** Cities and towns, including cities acting under commission form of government and cities acting under special charter, shall have power to regulate and license plumbers; to create a board of examiners to determine the qualifications thereof; to prescribe rules and regulations for the installation of plumbing work and materials; to provide for the inspection of such work, materials and manner of installation; to compel the removal of plumbing installed in violation of the manner prescribed and to impose penalties within the limits of section six hundred eighty of the code for a violation of the ordinances enacted hereunder. [35 G. A., ch. 61, § 1.]

SEC. 738. **Repeal.** That sections seven hundred thirty-eight and seven hundred thirty-nine of the code be and the same are hereby repealed. [30 G. A., ch. 26.]

SEC. 739. **Regulations as to construction and use—repealed.** [30 G. A., ch. 26.]

[See § 738.]

SEC. 740. **Taking property by gift or bequest—how administered—tax for maintenance of institutions so established.** Counties, cities, towns, civil townships wholly outside of any city or incorporated town, and school corporations, are authorized to take and hold property, real and personal, derived by gifts and bequests; and to administer the same through their proper officers in pursuance of the terms of the gift or bequest; and when made for the establishing of institutions of learning or benevolence, and there is no provision made in the gift or bequest for the execution of the trust, the court having charge of the probate proceedings in the county shall appoint three trustees, residents of said county, who shall have charge and control of the same, and who shall continue to act until removed by the court. And they shall give bond as required in case of executors, to be approved in the same manner as in case of executors' bonds, and said trustees shall be subject to the orders of said court. When any county, city, or town shall receive by gift or devise, property, real or personal, for the purpose of establishing any institution of benevolence including hospitals, and no sufficient fund or endowment is provided for its maintenance, or when any such municipality shall receive by gift or devise property, real or personal, for either of said purposes, upon condition that the donee or devisee provide for aiding the maintenance of such institution by a tax levy upon the assessed property of such municipality, as may be done under the provisions of this act, it shall be the duty of the govern-

ing board of such municipality to submit by resolution to the qualified electors thereof at a regular or special election the question whether there shall be levied upon the assessed property of such municipality an annual tax not exceeding three mills on the dollar for the purpose of aiding the maintenance of such institution. The said proposition shall be submitted in the manner provided for similar propositions in the chapter on elections. If a majority of the votes cast at such election on the proposition so submitted shall be in favor of the proposition for taxation the governing board of such municipality shall determine the amount to be levied for such purpose, not exceeding three mills on the dollar, and the amount so fixed shall be levied upon the assessed property of such municipality and collected in the same manner as other taxes of such municipality are levied and collected; and when collected by the county treasurer shall be paid over to the treasurer of the institution authorized to receive the same and shall be paid out on the order of the trustees of such institution who are authorized to manage and control the same, for the purposes authorized by this act and for no other purpose whatever.

The governing board of such municipality may discontinue such levy of tax in the event that the institution to be aided thereby is destroyed by the elements and no fund is provided or available for its rebuilding; or after five years of continuance of such tax aid the governing board may, and upon the petition of twenty-five per cent. of the qualified electors of such municipality, shall, by resolution, resubmit to the qualified electors of such municipality, at a regular or special election, in the same manner hereinbefore specified, the question whether tax aid for such institution shall be discontinued, and if sixty-five per cent. of the votes cast at such election on the proposition so submitted be in favor of discontinuing tax aid, no further levy of tax shall be made for such purpose.

The provisions of this act shall not be construed as repealing any other provisions of title five of the code or code supplement of 1907 relating to like institutions.

That cities, including cities under commission form of government and cities under special charter, incorporated towns and civil townships wholly outside of any city or incorporated town shall for the purposes of this act be and they are hereby created trustees in perpetuity, and are authorized and required to accept, receive and expend all moneys and property donated or left to it by bequest, to be used in caring for the property of the donor in any cemetery, or in accordance with the terms of such donation or bequest, and the money or property thus received shall be used for no other purpose whatever. That the mayor and council of such cities and towns, and the township trustees of civil townships wholly outside of any city or incorporated town shall have authority to receive and invest all moneys and property, so donated or bequeathed, in bonds of the United States, or municipal bonds, or certificates, or other evidence of indebtedness issued by authority of and in accordance with the laws of this or any state, when same are at or above par, and shall use the income from such investment in caring for the property of the donor in any cemetery, or as shall be provided in the terms of such gift or donation. Provided, however, that before any part of the principal may be so invested or used, the said city, incorporated town or civil township shall, by resolution, in accordance with the law as now provided, accept said donation or bequest, and shall, by said resolution, duly provide for the payment of interest thereon at the rate of not less than two per centum per annum, payable annually, to the cemetery fund or to the cemetery association, or to the

person having charge of said cemetery, to be used in caring for or maintaining the individual property of the donor in said cemetery, all to be in accordance with the terms of the donation or bequest.

All acts or parts of acts in conflict herewith are hereby repealed. [35 G. A., ch. 30, §§ 2, 3; 33 G. A., ch. 47, §§ 1, 2, 3.] [28 G. A., ch. 23, § 1; 26 G. A., ch. 20.]

[The above section is made applicable to special charter cities by § 958. EDITOR.]

A bequest to the permanent school fund of a designated county held valid. *Chapman v. Newell*, 146–415, 125 N. W. 324.

Even if the board of supervisors has no authority to administer such a trust, it will not be allowed to lapse. *Ibid.*

SEC. **741-a. Accounts—how kept—receipts and vouchers.** That all cities and towns, including cities acting under special charter, shall establish and keep their accounts so the same shall exhibit a true and detailed statement of all public funds collected, received and expended on account of such municipality for any purpose whatever, by any and all public officers, employes or other persons. Such accounts shall show the receipt, use and disposition of all public property, and the income, if any, derived therefrom, and of all sources of public income and the amount due and received from each source. All receipts, vouchers and other documents kept, or that may be required to be kept, necessary to prove the validity of every transaction and the identity of every person having any beneficial relation thereto, shall be filed and preserved in the office of the clerk or recorder as the case may be. [29 G. A., ch. 37, § 1.]

SEC. **741-b. Separate accounts.** Separate accounts shall be kept for every appropriation, showing date and manner of each payment made out of the funds provided by such appropriation, the name and address of each person or corporation to whom paid, and for what purpose paid. Separate accounts shall be kept for each department, public improvement, or undertaking and for each public utility owned or operated by the said municipality. Said separate accounts for each public utility shall show the true and entire cost of the said utility and operation thereof, the amount collected annually by general or special taxation for the services rendered to the public, and the amount and character of the service rendered therefor, and the amount collected annually from private users, if any, for the services rendered to them, and the amount and character of the services rendered therefor. [29 G. A., ch. 37, § 2.]

SEC. **741-c. Annual report—publication.** Each municipality shall make an annual public report, which shall contain an accurate statement, in summarized form, of all collections made or receipts of such municipality from all sources, all accounts due the public, but not collected, and all expenditures for every purpose; and a statement in detail of the cost and operation and all income of each public utility operated or owned by the municipality. Said report shall further show in detail the entire public debt of such municipality, and the amount of debt which the municipality may under the law contract for the year for which the report is made. Said report shall be published annually at the close of the fiscal year in at least two newspapers of general circulation in said city or town as the case may be, but if only one paper is so published, then in one, and if none be published, then by posting a copy in three public places in said city or town. [29 G. A., ch. 37, § 3.]

SEC. **741-d. City hall.** Cities having a population of thirty-five hundred or over, and those acting under special charter, shall have the power to erect a city hall and to purchase the ground therefor. [35 G. A., ch. 72, § 1.] [32 G. A., ch. 34, § 1.]

The provision relating to issuance of bonds in anticipation of the tax is simply auxiliary to and in aid of the general purpose of the statute which is sufficiently covered by the title. *Beaner v. Lucas*, 138–215, 112 N. W. 772.

SEC. **741-e. Special tax.** For the purpose of paying for the construction of such building and the purchase price of such ground, such cities shall have the power to levy upon all the property within the corporate limits of such cities and towns subject to taxation for said purposes in addition to all other taxes now provided by law, a special tax not exceeding in any one year two mills on the dollar for a period of years not exceeding twenty. [32 G. A., ch. 34, § 2.]

SEC. **741-f. Bonds—limit of indebtedness.** Any city desiring to construct such a building or to purchase ground therefor may issue bonds in anticipation of the special tax authorized in the preceding section. Such bonds shall be known as city hall bonds and shall be issued and sold in accordance with the provisions of chapter twelve of title five of the code of Iowa, and acts amendatory thereto. In issuing such bonds, the city council may cause portions of said bonds to become due at different, definite periods, but none of such bonds so issued shall be due and payable in less than five or more than twenty years from date. And in issuing such bonds such city may become indebted in an amount which, added to all other indebtedness, shall not exceed two per centum of the actual value of the taxable property in such city as determined by the last state and county tax list, anything in section thirteen hundred and six-b of the supplement to the code, 1907, to the contrary notwithstanding, and such indebtedness may be incurred and such bonds issued in pursuance of an election which may have been heretofore held authorizing the erection of such city hall. [33 G. A., ch. 48, § 1.] [32 G. A., ch. 34, § 3.]

SEC. **741-g. Question submitted.** No building shall be erected under the provisions of this act unless a majority of the legal voters voting thereon vote in favor of the same at a city election or at a special election. [33 G. A., ch. 49, § 1.] [32 G. A., ch. 34, § 4.]

While the council is given plenary power in the selection and purchase of a suitable site and may levy taxes or issue bonds in payment therefor, the approval of the majority of the voters voting thereon is essential before any building may be erected, and without such approval the council has no authority to levy taxes or issue bonds to meet the cost of the erection of such city hall. *Coggeshall v. Des Moines*, 138–730, 117 N. W. 309.

SEC. **741-h. Notice—form.** The question provided in the preceding section to be submitted may be ordered by the city council submitted to a vote at a general city election or at one specially called for that purpose. Notice of such election shall be given by publication in two newspapers published in said city once each week for not less than four consecutive weeks, and the election shall be held not less than seven nor more than ten days after the completion of such publication. The question to be submitted shall be in the following form:

Shall the city of.....erect a city hall at a cost not exceeding $..... [32 G. A., ch. 34, § 5.]

SEC. **741-i. Acts in conflict repealed.** Chapter twenty-seven of the acts of the thirtieth general assembly and all other acts or parts of acts inconsistent herewith are hereby repealed. [32 G. A., ch. 34, § 6.]

SEC. **741-j. Tax for buildings and grounds in cities of the second class and towns.** Cities of the second class and towns shall have the power to levy a tax not exceeding three mills on the dollar upon all the property within the corporate limits of said cities and towns, excepting

lots greater than ten acres in area used for agricultural and horticultural purposes, for the purpose of creating a sinking fund to be used as provided in this chapter for the purchase or erection of a city building or fire station, or both, and necessary ground therefor. [30 G. A., ch. 28, § 1.]

Where the building authorized by the council was in fact an opera house and the offices provided for the town and the accommodations for the fire department were mere incidents to the building, held that contracts for the erection of such building were illegal. *Brooks v. Brooklyn*, 146–136, 124 N. W. 868.

SEC. **741-k. Subsequent levies.** Cities of the second class and towns are hereby authorized to purchase buildings and grounds or to erect buildings specified in section one[1] of this chapter and are authorized to continue the levying of the three mill tax herein provided for until the purchase price, principal and interest or the cost incurred in the erection of said buildings is fully paid and discharged. [30 G. A., ch. 28, § 2.]

[1§ 741-j herein. EDITOR.]

SEC. **741-l. Contracts—bonds or warrants.** Cities of the second class and towns levying such sinking fund tax are hereby authorized to let a contract or contracts for the purchase or erection of said buildings and purchase of grounds and upon the approval and adoption of said contract or contracts as hereinafter provided to apply such sinking fund on the cost thereof, and cities and towns so purchasing or constructing such buildings or grounds are authorized to pledge the proceeds of the continuing three mill levy provided for in this chapter and shall have the right to issue bonds or warrants to secure the payment of the purchase price of said buildings or grounds or the cost of constructing said buildings, provided that said bonds or warrants shall bear not more than five per cent. interest per annum, but no part of the general fund of such city or town shall be applied on such bonds or warrants or upon the purchase price of buildings or grounds or cost of erection of said buildings. In the payment thereof the city or town and holders of said contracts, bonds or warrants shall be restricted to the proceeds of said taxes. [30 G. A., ch. 28, § 3.]

SEC. **741-m. Question submitted.** Said contract or contracts shall not be binding on said city or town until the same shall have been approved by the city or town council at a regular meeting or a special meeting called for such purpose and shall have been adopted by a majority of the electors of said city or town voting at a city or special election which shall have been duly called after thirty days' notice by said city or town. Proposition to be submitted at said election and the form of ballot shall be: Shall the contract or contracts approved by the city or town council in relation to the purchase of buildings or grounds or erection of buildings be adopted? The proposition shall be printed and placed on the ballots and the voter shall designate his choice and the election shall be conducted in the manner provided in the chapter on elections. [33 G. A., ch. 49, § 2.] [30 G. A., ch. 28, § 4.]

A ballot in the form authorized by this section is sufficient. *Brooks v. Brooklyn*, 146–136, 124 N. W. 868.

SEC. **741-n. City or town councils—power to contract for use of public libraries—petition—tax levy.** Section seven hundred forty-one-n of the supplement to the code, 1907, is hereby repealed and the following is enacted as a substitute therefor:

"The council of any city or town in which there is no free public library shall have power to contract with any free public library for the free use

thereof by the residents of such city or town, as provided in section one[1] of this act, and to pay such library such an amount as may be agreed upon therefor, and to levy annually on the taxable property of such city or town a tax not exceeding one mill on the dollar to be used exclusively for such purpose. When a majority of the resident taxpayers, as shown by the last preceding assessment list of such city or town, petition the council thereof in writing to enter into such contract, and such library gives its written consent thereto, it shall be the duty of such council to execute such contract, and when any such contract is made, whether on petition of the resident taxpayers or without such petition, a tax in amount sufficient to pay such library the consideration agreed upon, not exceeding one mill on the dollar, shall be annually levied by such council until such contract is terminated." [35 G. A., ch. 70, § 3.] [31 G. A., ch. 14, § 4.]

[[1]§ 729-a herein. EDITOR.]

SEC. **741-o. Hospital trustees.** Cities having a population of over five thousand may by ordinance provide for the election at a general, city or special election of three hospital trustees, whose terms of office shall be six years, one to be elected each even-numbered year, but at the first election three shall be elected and hold their office, respectively, for two, four and six years, and who shall by lot determine their respective terms. [35 G. A., ch. 71, § 1.] [32 G. A., ch. 35, § 1; 31 G. A., ch. 22, § 1.]

[See note under § 741-r.]

SEC. **741-p. Hospital board—organization—officers—duties.** The said trustees shall within ten days after their election, qualify by taking the oath of office and organize as a hospital board, by the election of one of their number as chairman and one as secretary, but no bond shall be required of them. They shall also elect a treasurer not one of their number, who shall give bonds in the sum of twenty-five thousand dollars, the penalty of which may be increased by the board. The treasurer shall receive and pay out all the moneys under the control of the said board as ordered by it, but shall receive no compensation for his services. No commissioner shall receive any compensation for his services performed, but he may receive reimbursement for any cash expenses actually made for personal expenses incurred as such trustee, but an itemized statement of all such expenses and moneys paid out shall be made under oath by each of such trustees and filed with the secretary and allowed only by the affirmative vote of the full board. Said board of trustees shall be vested with authority to provide for the management, control and government of such city hospital and shall provide all needed rules and regulations for the economic conduct thereof. In the management of said hospital no discrimination shall be made against practitioners of any school of medicine recognized by the laws of the state of Iowa. [31 G. A., ch. 22, § 2.]

SEC. **741-q. Question submitted—tax—how levied and collected—hospital fund.** The council of such city may by resolution submit to the qualified electors of the same at a city or special election, the question whether there shall be levied upon the assessed property thereof a tax not exceeding three mills on the dollar in cities having a population of over twenty-two thousand, not exceeding two mills on the dollar in cities having a population of over five thousand and less than twenty-two thousand, for the purchasing of real estate for hospital purposes, and for the construction of such hospital and for maintaining the same, or for either or all of such purposes. The said proposition shall be submitted in the man-

ner provided for similar propositions in the chapter on elections. The council shall in the resolution ordering such election, specify the rate of taxation proposed and the number of years the same shall be levied not exceeding fifteen years. If a majority of the votes cast at such election on the proposition so submitted shall be in favor of the proposition for taxation the council shall levy the tax so authorized which shall be collected and paid over to the treasurer of such hospital board in the same manner as other taxes are collected. Such taxes shall be known as a hospital fund and shall be paid out on the order of the trustees for the purposes authorized by this act and for no other purpose, whatever. [33 G. A., ch. 49, § 3.] [32 G. A., ch. 35, § 1; 31 G. A., ch. 22, § 3.]

[See note under § 741-r.]

SEC. **741-r. Bonds.** Whenever any city having a population of over twelve thousand five hundred shall by ordinance provide for the election of hospital trustees, and has voted a tax for a term of years not exceeding fifteen years, for hospital purposes as authorized by law, the said city may issue bonds in the name of such city in anticipation of the collection of such tax in such sums and amounts as the city council thereof may deem necessary for the purposes contemplated by such tax, but such bonds in the aggregate shall not exceed the amount which might be realized by said tax based on the amount which may be yielded on the property valuation in the year in which the tax is voted, and such bonds shall mature in fifteen years from date, and shall be in sums of not less than one hundred, nor more than one thousand, dollars, bearing interest at a rate not exceeding five per cent. per annum, payable annually or semiannually; said bonds may be payable at pleasure of city after five years and shall not be sold for less than par. Said city, after the issuance of any such bonds, shall each year for ten years before the maturity thereof, set aside out of the tax levied by it a sum equal to one tenth of the principal thereof, which sum shall be applied after five years from date of issue in payment of the principal whenever the amount on hand shall be sufficient to pay one or more of said bonds and each of said bonds shall provide that it is subject to this condition. [31 G. A., ch. 22, § 4.]

[By ch. 35 the 32 G. A. changed the words "twelve thousand five hundred," in §§ 741-o and 741-q, respectively, to "five thousand," but made no change of the words "twelve thousand five hundred," in the above section.]

SEC. **741-s. Condemnation proceedings.** If the board of hospital trustees and the owners of any property desired by them for hospital purposes cannot agree as to the price to be paid therefor, the city council of said city shall cause the same to be condemned in the manner provided for taking land for public purposes by cities. [31 G. A., ch. 22, § 5.]

SEC. **741-t. Jurisdiction over hospital lands.** The jurisdiction of such cities and towns shall extend over all lands used for hospital purposes without the corporate limits if so located, and all ordinances of such cities and towns shall be in full force and effect in and over the territory occupied by such hospitals. [31 G. A., ch. 22, § 6.]

SEC. **741-u. Appropriation for improvements and maintenance.** In cities exercising the rights by this act, the council may appropriate each year not exceeding five per cent. of its general fund for the improvement and maintenance of any hospital so established. [31 G. A., ch. 22, § 7.]

SEC. **741-v. Indebtedness.** Cities of the second class shall be allowed to become indebted for the purposes provided in this act to an amount aggregating with all other indebtedness of the said city,[1] a sum not ex-

ceeding two and one-half per centum of the actual value of the property within said city, to be ascertained by the last state and county tax list previous to the incurring of such indebtedness, provided that before an indebtedness shall be contracted in excess of one and one-fourth per centum of the actual value of the taxable property ascertained as provided in section two of chapter forty-one as found in section thirteen hundred and six-b of the supplement to the code, [1902] a petition signed by a majority of the qualified electors of such city shall be filed with the council of such city, asking that an election shall be called, stating the purposes for which the money is to be used and that the said hospital cannot be purchased, built or maintained within the limit of one and one-fourth per centum of valuation of the taxable property of such city. If two thirds of all the electors voting at such election vote in favor of such indebtedness at such election, the council of such city shall issue the bonds as provided in this act to the limit as herein provided. [31 G. A., ch. 22, § 8.]

['The word "in" appearing in the text of the former supplement is dropped here. EDITOR.]

SEC. **741-w. Department of public docks — question submitted.** The city council or board of commissioners in any incorporated town or city, including cities under commission plan and those under special charter now or hereafter situated on any natural or artificial navigable waterway within or bordering upon the state of Iowa, may, when in their judgment [deemed] expedient, create a department known as the department of public docks, providing that before said commission may go into operation, the question shall be submitted to the qualified electors of said city or town at a regular or special election called for that purpose; and provided further, that a majority of those voting at said election shall vote in favor of the creation of such department of public docks. [35 G. A., ch. 74, § 1.]

SEC. **741-w1. Commissioners — appointment — qualifications — terms—organization—removal—vacancies.** The department of public docks shall be administered by a dock board consisting of three members to be known as commissioners of public docks. Within three months, or as soon as possible after the time when this act shall go into effect, the mayor of the municipality shall appoint, with the approval of the municipal council, as members of the dock board, three commissioners of public docks, who have been residents of the municipality in which they are appointed for a period of not less than five years, and who shall not at the time of their appointment or during their term of office be interested in or be employed by any common carrier, and said board shall act without compensation. Said commissioners when first appointed shall hold office for a term of one, two and three years respectively, and shall determine by lot among themselves which commissioners shall hold the said respective terms. Thereafter, one commissioner with the said qualifications shall be appointed annually by the mayor and the term of office of such commissioner shall be three years. The members of the board shall qualify by taking oath for the faithful performance of their duties. Within ten days after their appointment the commissioners shall meet and organize the dock board by the election from among their number of a president and a secretary of said board, and shall from time to time adopt rules and regulations for the government of their department and to govern their proceedings, which shall be adopted by resolution recorded in a book kept by the board and known as book of rules and regulations, and said rules and

regulations shall be in force after publication in some newspaper published and circulated in the municipality. The dock board shall maintain an office and keep a record of all of its proceedings and acts, and books of account showing all of its financial transactions, which records and books of accounts shall at all times be open to public inspection. If any commissioner shall at any time during his said incumbency cease to have the qualifications required by this act for his appointment, or shall wilfully violate any of his duties under the law, such commissioner shall be removed by the mayor after written charges have been preferred against him and a due hearing of such charges has been had by the mayor upon reasonable notice to such commissioner. Vacancies occurring in the board through resignation, or otherwise, shall be filled by the mayor, for the unexpired term. [35 G. A., ch. 74, § 2.]

SEC. **741-w2. Powers and duties.** The board shall have power and it shall be its duty for and in behalf of the city or town hereinafter called the municipality, for which it is organized:

(a) *General plan.* To prepare or cause to be prepared a comprehensive general plan for the improvement of its harbor and water front, making provision for the needs of commerce and shipping, and providing for the construction of such docks, basins, piers, quay walls, wharves, warehouses, tunnels, belt railway connecting with all railway lines within the municipality, and such cranes, dock apparatus and machinery equipment as it may deem necessary for the convenient and economical accommodation and handling of water craft of all kinds and of freight and passengers, and the free interchange of traffic between the waterway and the railways and the railways and the waterway; which plan shall be filed in the office of the board and be open to public inspection, and which may from time to time be changed, altered or amended by the board, as the requirements of shipping and commerce and the advance of knowledge and information on the subject may suggest.

(b) *Purchase and condemnation of property.* To purchase or acquire by condemnation or other lawful means, such personal property, lands or rights or interests therein, including easements, as may be necessary for use in the provision and in the construction of any public owned harbor, dock, basin, pier, slip, quay wall, wharf, warehouse, or other structures, and in the construction of a belt railway and railway switches, and appurtenances as provided for in such plan as may be adopted by the board. If the board shall deem it proper and expedient that the municipality shall acquire possession of such wharf property, lands or rights or interests therein, including easements, and no price can be agreed upon between the board and the owner or owners thereof, the board may direct the municipal corporation attorney to take legal proceedings to acquire same for the municipality in manner as is or may be provided by the general laws of the state of Iowa in the case of corporations having the right of eminent domain. The title of all lands, property and rights acquired by the board shall be taken in the name of the municipality it represents.

(c) *Control of property.* The board shall have exclusive charge and control of the wharf property belonging to the municipality including belt railway located in whole or in part thereof, all the wharves, piers, quay walls, bulkheads, and structures thereon and waters adjacent thereto, and all the slips, basins, docks, water fronts, the structures thereon and the appurtenances, easements, uses, reversions and rights belonging thereto, which are now owned or possessed by the municipality, or to which the municipality is or may become entitled, or which the municipality may

acquire under the provision hereof or otherwise. The board shall have the exclusive charge and control of the building, rebuilding, alteration, repairing, operation and leasing of said property and every part thereof, and of the cleaning, grading, paving, sewering, dredging and deepening necessary in and about the same.

(d) *Abutting property—jurisdiction and improvement.* The board is hereby vested with jurisdiction and authority over that part of the streets and alleys and public grounds of the municipality which abut upon or intersect its navigable waters, lying between the harbor line and the first intersecting street measuring backward from high-water mark, to the extent only that may be necessary or requisite in carrying out the powers vested in it by this act; and it is hereby declared that such jurisdiction and authority shall include the right to build retaining or quay walls, docks, levees, wharves, piers, warehouses, or other constructions, including belt railway and railway switches, across and upon such streets and alleys and public grounds, and to grade, fill and pave the same to conform to the general level of the wharf, or for suitable approaches thereto; provided that such improvements shall be paid for out of funds in the hands of the board and not by assessments against abutting property.

(e) *Control consistent with navigation laws—collect tolls.* The board is also vested with exclusive government and control of the harbor and water front consistent with the laws of the United States governing navigation, and of all wharf property, belt railway, wharves, piers, quay walls, bulkheads, docks, structures and equipment thereon, and all the slips, basins, waters adjacent thereto and submerged lands and appurtenances belonging to the municipality, and may make reasonable rules and regulations governing the traffic thereon and the use thereof, with the right to collect reasonable dockage, wharfage, sheddage, storage, cranage fees, and tolls thereon, as hereinafter provided.

(f) *Rules and regulations—specifications — ordinances — publication.* The board shall have power to make general rules and regulations for the carrying out of the plans prepared and adopted by it for the building, rebuilding, repairing, alteration, maintenance and operation of all structures, erections, or artificial constructions upon or adjacent to the water front of the municipality, whether the same shall be done by the board or by others; and except as provided by the general rules of the board, no new structures, or repairs upon or along said water front shall be undertaken, except upon application to the board and under permit by it and in accordance with the general plans of the board and in pursuance of specifications submitted to the board and approved by it upon such application. The general rules and regulations of the board, whenever adopted by it, shall be embodied in the form of ordinances and certified copies thereof shall, forthwith upon their passage, be transmitted to the clerk of the municipality who shall cause the same to be transcribed at length in a book kept for that purpose and the same shall be included in any compilation or publication of the ordinances of the municipality. Upon filing any such certified copy of any such ordinances, the said clerk shall forthwith cause the same to be published once in some newspaper of general circulation published in the municipality, or if none is there published, then in the next nearest newspaper published in this state, and the said ordinance shall be in force and effect from and after the date of said publication. Provided, however, that if the said ordinances are included in any book or pamphlet of ordinances published by said municipality, no other publication shall be required, and they shall be in force and effect from the

date said book or pamphlet is published. The said ordinances of the board shall not be considered or construed as ordinances of said municipality, except as they may be adopted as ordinances of said municipality, and the provisions of the code and statutes of the state now or hereafter enacted relative to ordinances of cities and towns shall not apply to ordinances passed by said board unless express reference be made thereto in said statutes.

(g) *Tolls and charges—regulations.* The board shall have the power to fix and regulate and from time to time to alter the tolls, fees, dockage, wharfage, cranage, sheddage, storage and other charges for all public-owned docks, levees, belt railway, piers, quay walls, slips, basins, wharves and their equipment, or the use of any portion of the water front of the municipality, which charges and rates shall be collectible by the board and shall be reasonable with a view only of defraying the necessary annual expenses of the board in constructing and operating the improvements and works herein authorized; a schedule of such charges and regulations shall be enacted by the board in the form of ordinances and a certified copy thereof shall be transmitted to the clerk of the municipality in like manner as other ordinances of the board before the same shall go into or be in effect, and a copy of same shall be kept posted in a conspicuous place in the office of the board.

(h) *Assistants—officers—ordinances.* The board shall have power to employ such assistants, employes, clerks, workmen and laborers as may be necessary in the efficient and economical performance of the work authorized by this act. All officers, places and employments in the permanent service of the board shall be provided for by ordinance duly passed by the board and the same shall be transmitted to the clerk of the municipality as provided for other ordinances of the board.

(i) *Construction work plans—approval—public inspection—bids—exceptions—emergencies.* In the construction of docks, levees, wharves and their appurtenances, or in contracting for the construction of any work or structures authorized by this act, the board shall proceed only after full and complete plans (approved by the board) and specifications for said work have been prepared and submitted and filed with the board by its engineer for public inspection, and after public notice asking for bids for the construction of such work, based upon such plans and specifications, has been published in some newspaper of general circulation published within the municipality, or if none so published, then in the nearest newspaper published in this state, which publication shall be made at least thirty days before the time fixed for the opening of said bids and contracting for such work, and such contract may then be made with the lowest responsible bidder therefor; unless the board deems the bids excessive or unsuitable, in which event it may proceed to readvertise for bids, or the board may do the work directly, purchasing such materials and contracting for such labor as may be necessary without further notice or proposals for bids; except that it shall make no purchase of materials in amounts exceeding five hundred dollars except by public letting upon ten days' notice, published as aforesaid, specifying the materials proposed to be purchased; provided, however, that said public letting shall not be required in case no satisfactory bids are received, or in case of an emergency where the delay of advertising and public letting might cause serious loss or injury to the work. The board shall, in all cases, have the right to reject any and all bids, and may either readvertise therefor, contract with others at a figure

not exceeding the lowest bidder without further advertising, or do the work directly as hereinbefore provided.

(j) *Tax levy—dock fund.* To defray the expense of exercising the powers conferred by this act, or any portion of such expense in excess of the income from the aforesaid rates and charges to be collected by the board, the council of the municipality shall levy a special tax upon the taxable property of the municipality, not exceeding two mills on the dollar, and which, if there is a bond issue as herein provided, may be levied and made payable for a period not exceeding ten years or the term for which the bonds may be issued, and any portion of which may be pledged to the payment of such bonds and which portion shall be set apart as a sinking fund for the payment thereof, and which bonds may be by said municipality made payable out of said funds only, or may be made payable as general indebtedness of said municipality. The provisions of section thirteen hundred and six-b of the supplement to the code of Iowa [1907] shall not apply to said indebtedness evidenced by such bonds. The board shall annually make to the council a report of the receipts and disbursements made by or on account of said board, and shall file with the council an estimate of the amounts necessary to be raised by taxation to defray the expenses of the board. The council shall at the time of levying annual taxes levy a sufficient tax not exceeding said two mills to meet the said estimate and which shall be collected as other taxes and paid over to the treasurer of the municipality and by him credited to the fund to be known as the dock fund.

(k) *Bonds—limitation.* Whenever said dock board shall deem it necessary or advisable to issue bonds for the purpose of constructing any of the works or improvements herein authorized or purchasing property for said purpose, the said board shall petition the council of the municipality to issue such bonds stating the purpose for which said bonds are requested and thereupon the council shall issue the said bonds if the municipality is not thereby indebted in excess of the limit imposed by section three of article two of the constitution of the state of Iowa; or if the council does not deem it advisable to issue said bonds, if the same would not be in excess of said limitation, the council shall submit the question of issuing said bonds to the voters of said municipality, and if a majority of said voters voting at a special election or general election vote in favor thereof, said bonds shall be issued. The proceeds of said bonds when issued shall be paid to the municipal treasurer and credited to the dock fund. If the municipality is already indebted beyond the said limitation the council may, if it deem it advisable, levy a special tax not exceeding two mills on the dollar per annum for the purpose of paying bonds and which may be levied for a period not exceeding ten years or the term of the bonds and in anticipation of the collection of the said tax, bonds may be issued for the said purpose designated in said petition, and which bonds shall be payable only out of the proceeds of said special tax already levied at the time of their issuance, and the municipality shall not be indebted on said bonds or any further obligated than to collect and apply the proceeds of said tax to the liquidation of said bonds.

(l) *Funds, how disbursed—books audited.* All funds collected by the dock board, or by the municipality for dock purposes from the proceeds of taxes, bonds or otherwise, shall be deposited with the treasurer of the municipality and disbursed by him only upon warrants or orders duly signed by the president and countersigned by the secretary of the dock board and which shall state distinctly the consideration for which same

are drawn, and a permanent record shall be kept by the board of all warrants or orders so drawn showing the date, amount, consideration and to whom payable. When paid the same shall be canceled and kept on file by the treasurer of the municipality. The books of the board shall from time to time be audited by the municipal auditor under the direction of the mayor, in such manner and at such times as he may direct or prescribe, and all of said books and records of the board shall at all times be open to public inspection. [35 G. A., ch. 74, § 3.]

SEC. **741-w3. Applicable to special charter cities.** This act shall be applicable also to cities acting under special charter, or exercising powers conferred by special charter. [35 G. A., ch. 74, § 4.]

SEC. **741-w4. Acts in conflict repealed—regulations applicable—control by state officers.** All laws in conflict with this act are hereby repealed. That all state regulations for the control and operation of railroads, common carriers and public utilities shall apply to and have full force and effect in regard to all powers, duties and actions of the department of public docks and the same shall be subject to and under the control of the state board of railroad commissioners or the public utility commission now or hereafter established by law. [35 G. A., ch. 74, § 5.]

CHAPTER 5.

OF THE PURCHASE AND CONSTRUCTION OF WATERWORKS.

SECTION **742. Tax—sinking fund.** Cities of the first class shall have power to levy, in addition to the regular water tax authorized by law, a tax of two mills upon the dollar upon all the property within the corporate limits of said cities, excepting lots greater than ten acres in area, used for horticultural or agricultural purposes, for the purpose of creating a sinking fund, to be used as provided in this chapter for the purchase or erection of waterworks in such cities, or for the payment of any indebtedness incurred by such cities for waterworks now owned by the same. The proceeds of such two-mill levy shall be deposited in one or more solvent banks or trust companies of the city making such levy, at a rate of interest not less than three per cent. per annum, compounded semiannually, and payable, principal and interest, on demand, after sixty days' notice in writing. The city treasurer depositing the proceeds of such tax shall exact from the bank or trust company wherein such money is deposited a satisfactory bond, payable to the city, to be approved by the treasurer and mayor of such city, and to be filed in the office of the city treasurer. [28 G. A., ch. 24, § 1; 27 G. A., ch. 23, § 1; 26 G. A., ch. 1, § 1.]

[The above section is made applicable to special charter cities by § 958 as well as by § 742-a. EDITOR.]

A city may provide for a tax to be levied before the contract for the purchase or construction of the works is entered into. The council may first determine the kind and cost of the works to be erected, the amount of tax to be levied and other incidental matters before submitting the matter to the voters. *Youngerman v. Murphy*, 107–686, 76 N. W. 648.

The fact that proceedings to erect and establish waterworks are irregular and the bonds issued for the erection of such works are void, does not authorize an injunction against the city to restrain it from using and operating such works. *Ramsay v. Marble Rock*, 123–7, 98 N. W. 134.

SEC. **742-a. Applicable to special charter cities.** This act shall apply to cities acting under special charter. [28 G. A., ch. 24, § 2.]

[§ 742-a is § 2 of ch. 24 of the acts of the 28 G. A. § 1 of said chapter amends § 742 of the code by changing the rate of interest from four to three per cent.]

SEC. **742-a1. Use of sinking fund.** In all cities of the first class, where a sinking fund has been accumulated as provided in chapter five, title five of the code, and in which waterworks have not been purchased under said chapter, such cities are hereby authorized to use and apply such sinking fund and all accumulations thereof upon the cost of waterworks purchased or erected under the provisions of sections seven hundred twenty, seven hundred twenty-one and seven hundred twenty-two of the supplement to the code, 1907, as amended by chapter forty-five, acts of the thirty-third general assembly, and chapter thirty-five, acts of the thirty-fourth general assembly. [35 G. A., ch. 73, § 1.]

SEC. **742-b. Authority to loan—service to military reservation—conditions.** That wherever any corporation engaged in maintaining and operating a waterworks plant within any city of this state where the United States has or may hereafter establish a military reservation within a distance of five miles from either of the boundaries of said city and such city has either under the provisions of chapter one of the acts of the twenty-sixth general assembly or of section seven hundred forty-two of the code levied taxes for the purpose of creating a sinking fund to be used for the purchase or erection of waterworks therein, such city shall be authorized to loan a portion not however to exceed fifty thousand dollars of the proceeds of the taxes so levied to such corporation so maintaining and operating such waterworks plant, with interest at a rate not less than two per cent. per annum, for a period of not more than ten years from the date of the passage of this act upon such terms as the city council of such city may approve. Provided, however, that such corporation shall apply the proceeds of every such loan to the laying of a main with the necessary attachments and usual branches to hydrants from its pumping station or other connection with its mains to the said military reservation and to make the changes in its plant which may be required to furnish the service demanded by the United States at such reservation. [29 G. A., ch. 38, § 1.]

SEC. **742-c. Reversion of funds loaned.** That when the funds that have been loaned as provided in section one of this act, and the interest thereon, are repaid to the city to which they belong, said funds together with all interest derived therefrom shall immediately revert to the fund for which the said taxes were levied and thereafter be used for no other purpose than as authorized by chapter one of the acts of the twenty-sixth general assembly or section seven hundred forty-two of the code. [29 G. A., ch. 38, § 3.]

SEC. **742-d. Water for military reservations—how furnished.** That all individuals or private corporations to which any city in this state has granted authority to erect and maintain waterworks with all the necessary reservoirs, mains, filters, pipes and other appurtenances in such city including the Des Moines waterworks company now owning and operating such a plant in the city of Des Moines, shall, whenever the United States has, or may hereafter establish a military reservation within a distance of five miles from either of the boundaries of such city, be authorized to use said waterworks plant in said city, and the mains now or hereafter laid in the highways of said city for the purpose of furnishing water to such military reservation, such authority to continue so long as under franchises now

held or hereafter granted such individuals or corporations shall be authorized to maintain and operate such waterworks plant in such cities. [29 G. A., ch. 207, § 1.]

SEC. **742-e. Mains in highways.** The board of supervisors of any county in which such military reservation is or may hereafter be located, shall have the power to authorize any such individual or corporation to lay its mains in any of the highways of the county for the purpose of extending the same to any such military reservation. [29 G. A., ch. 207, § 2.]

SEC. **744. Purchase or erection—indebtedness heretofore incurred.** Cities of the first class are hereby authorized to purchase or erect waterworks, under the provisions of this chapter, for the purpose of supplying said cities and the inhabitants thereof with water, and are authorized to continue the levy of the two-mill tax herein provided for until the purchase price, principal and interest, or the cost incurred in the erection of said works, or the indebtedness heretofore incurred for and on account of such works, is fully paid and discharged. [27 G. A., ch. 23, § 2; 26 G. A., ch. 1, § 3.]

[The above section is made applicable to special charter cities by § 958. EDITOR.]

SEC. **745. Contracts—bonds—cities procuring or owning waterworks.** Cities levying such sinking fund tax are hereby authorized to let a contract or contracts for the purchase or erection of waterworks, and, upon the approval and adoption of such contract or contracts as hereinafter provided, to apply such sinking fund upon the cost thereof, and cities so purchasing or constructing and those now owning such waterworks are authorized to pledge the proceeds of the continuing two-mill levy provided for in this chapter, and the regular water levy, and the net revenues derived from the operation of the waterworks, and shall have the right to mortgage or bond such works, to secure the payment of the purchase price or the cost of constructing such waterworks, or the cost of making necessary extensions and improvements of such waterworks, and such cities shall have the right to execute additional mortgage or mortgages or bonds upon such works for the purposes above set forth. Provided that said additional mortgage or mortgages or bonds shall bear not more than six per cent. interest per annum; but no part of the general fund of such city shall be applied upon such contracts, bonds or mortgage. In the payment thereof, the city and holders of said contracts, bonds or mortgages shall be restricted to the proceeds of the said taxes and the net revenues of the said waterworks, as hereinbefore provided; and such contract, contracts or bonds shall not bear a higher rate of interest than five per cent. per annum, payable semiannually. Cities of the first class which have adopted or may adopt an ordinance availing themselves of the privileges conferred herein, shall in addition thereto have and possess the following powers:

A—In addition to mortgage on the water plant to secure the bonds hereinbefore authorized, the said city may, in addition to the security of said mortgage and as a part thereof, grant a franchise to maintain and operate said plant on foreclosure sale under said mortgage, said franchise to become effective only on the passing of title under the said foreclosure sale and to continue for a period of not exceeding twenty-five years thereafter; providing that the granting of such franchise shall be approved by a majority of the electors of said city, voting at an election thereon, which election shall be held as provided in section seven hundred forty-six, supplement of the code [1902].

B—They shall have power to issue the general bonds of the city creating an indebtedness of said city to an amount which, with its other existing indebtedness, shall not exceed five per cent. of the actual value of the taxable property of said city, as shown by the last preceding assessment, the said bonds or proceeds of sale thereof to be used in the purchase or construction of a water plant, as herein provided; provided, however, that such bonds can be issued by order of the city council of said city only after a contract for the purchase or construction of a water plant and providing for the issuance of such bonds has been approved by the majority of the electors of said city voting at an election thereon to be held in accordance with the provisions of section seven hundred forty-six, supplement of the code [1902]. Neither the said bonds nor the proceeds thereof shall be diverted to another purpose than as herein provided. Said cities may purchase or contract a water plant and pay for the same partly out of the water bonds and partly out of the general bonds herein provided, or wholly out of either class of bonds or proceeds thereof, as such city may determine. The general bonds of the city herein provided shall bear interest at not exceeding five per cent. per annum, payable semiannually, and shall be payable not more than twenty years after date and in the general form of bonds provided by section four hundred and three of the code, with such changes as may be necessary to conform the same to this statute and the ordinances or contract of the city under which they are issued. [31 G. A., ch. 23, § 1; 29 G. A., ch. 39, § 1; 29 G. A., ch. 40, § 1; 27 G. A., ch. 23, § 3; 26 G. A., ch. 1, § 4.]

[The above section is made applicable to special charter cities by § 958, also by § 745-b. EDITOR.]

Bonds issued in pursuance of statutory provisions authorizing the levy of taxes in the future for the construction of waterworks, with a provision that when the bonds are paid by the proceeds of such tax, the waterworks shall become the property of the city, are invalid if in excess of the constitutional limitation of indebtedness. *Ottumwa v. City Water Supply Co.*, 119 Fed. 315; *City Water Supply Co. v. Ottumwa*, 120 Fed. 309.

The provisions of this section, as amended by 27 G. A., ch. 23, indicating the intention of the legislature to empower cities of the first class to purchase or erect waterworks and provide a plan by which the cost of such improvement may be met, held not to create an indebtedness, within the meaning of the constitution, art. 11, § 3, prohibiting municipal corporations from becoming indebted to an amount in the aggregate exceeding five per cent. on the value of the taxable property. *Swanson v. Ottumwa*, 118–161, 91 N. W. 1048.

Such provisions contemplate the levying of a tax, payable in installments in the future, to be appropriated, as they are collected, to the payment of the amount necessary to secure the waterworks which may be provided for by contract. But as the corporation is not under obligation to pay, except as money may be provided out of the collection of such taxes, there is no such obligation as to constitute an indebtedness. *Ibid.*

Under statutory provision authorizing cities to contract with a company for the erection of waterworks and furnishing water for public use, and providing that the city might levy a tax to pay for water taken for public use, not in excess of five mills on the dollar for any one year, held that the power to levy the tax was not a limitation on the power to contract, and that the city might be liable for the contract price in excess of the proceeds of the tax. *Ft. Madison Water Co. v. Ft. Madison*, 110 Fed. 901; *Ft. Madison v. Ft. Madison Water Co.*, 114 Fed. 292.

It seems that the contract to purchase waterworks or the contract to erect, as may be adopted by the council, must be ratified by the voters. *Nash v. Council Bluffs*, (C. C.) 174 Fed. 182.

SEC. **745-a. Acts in conflict repealed.** All acts and parts of acts, so far as the same are in conflict with the foregoing, are hereby repealed. [31 G. A., ch. 23, § 2.]

SEC. **745-b. Applicable to special charter cities.** This act shall apply to cities acting under special charter. [29 G. A., ch. 40, § 2.]

[The above section is § 2, ch. 40, of the acts of the 29 G. A., making said act applicable to cities under special charters.]

SEC. 746. **Question submitted—powers of council after affirmative vote—preliminary work.** Said contract or contracts shall not be binding upon said city until the same shall have been approved by the city council at a regular meeting, or a special meeting called for such purpose, and shall have been adopted by a majority of the electors of said city voting at a city or special election, which shall have been duly called after thirty days' notice by said city. The proposition to be submitted at said election, and the form of ballot, shall be: "Shall the contract or contracts approved by the city council in relation to the waterworks be adopted?" The proposition shall be printed and placed on the ballots, and the voter shall designate his choice, and the election shall be conducted, in the manner provided in the chapter on elections. When a majority of the electors of said city at any election shall have declared in favor of the purchase or erection of any waterworks, or shall have authorized the incurring of indebtedness or issuance of bonds for waterworks, the city council may provide by contract or otherwise without submission of same to the electors, for surveys, examinations, appraisements, estimates, plans, specifications, advertisements for bids and all other necessary work, preliminary to the making of such contract or contracts for purchase or erection of waterworks, and pay for the same and the expense of said election out of said sinking fund. [33 G. A., ch. 50, § 1; 33 G. A., ch. 49, § 4.] [29 G. A., ch. 39, § 1; 26 G. A., ch. 1, § 5.]

[The above section is made applicable to special charter cities by § 958. EDITOR.]

The electors do not determine the abstract question of waterworks or no waterworks. They simply approve or disapprove of the particular contracts submitted to them. The ultimate question of the establishment of such works rests with the city council. *Youngerman v. Murphy*, 107–686, 76 N. W. 648.

An ordinance passed after the adoption by the electors of a proposition to grant a waterworks franchise, which differs in detail, but not substantially from the one submitting the matter to a vote, will not be invalid on account of such slight variance. *Centerville v. Fidelity Trust & Guar. Co.*, 118 Fed. 332.

SEC. 747. **Trustees—repealed.** [29 G. A., ch. 41, § 1.]

[See § 747-a.]

[§ 747 was repealed by ch. 41, acts of the 29 G. A., which took effect by publication March 15, 1902, while ch. 39, acts of the 29 G. A., which took effect by publication March 28, 1902, amends, or attempts to amend, said § 747, which had been repealed by ch. 41, aforesaid.]

A resident and taxpayer has such interest in the matter as to be entitled to institute proceedings by *quo warranto* to test the validity of the appointment of trustees under this section. *State ex rel. v. Barker*, 116–96, 89 N. W. 204.

The provisions of this section, as amended by acts of 27 G. A., ch. 23, and 28 G. A., ch. 25, are unconstitutional because they take the control and management of the waterworks away from the city council and also because they provide for the exercise by the judges of the district court of authority not judicial in its nature nor connected with the exercise of the judicial power conferred on the courts by the constitution. *Ibid.*

SEC. 747-a. **Trustees—appointment—term—vacancies—compensation—bond—removal.** That section seven hundred forty-seven of the code as amended, be and the same is hereby repealed, and the following enacted in lieu thereof:

"The waterworks now owned or hereafter purchased or erected by such cities shall be managed and operated by a board of waterworks trustees, which shall be composed of three resident electors, appointed for the term of six years by the mayor of said city. Upon the taking effect of this act, in

cities now owning such waterworks, or upon the approval of the contract for the purchase or erection of waterworks by cities as herein provided, the mayor thereof shall, within ten days thereafter, appoint such board of waterworks trustees, the first appointees thereto to hold office for the following designated terms, namely, one for two years, one for four years, and one for six years. All vacancies occurring on said board, occasioned by expiration of term, by death, resignation or removal, shall be filled by appointment of the mayor of such city. The compensation of said trustees shall be three hundred dollars per year to each member of said board. Each of the said trustees shall execute and furnish to the city an official bond in the sum of five thousand dollars, to be approved by the mayor and filed with the city clerk. Such trustees may be removed from office for proper cause under the provisions of chapter eight of title six of the code." [29 G. A., ch. 39, § 1; 29 G. A., ch. 41, § 1; 28 G. A., ch. 25, § 1; 27 G. A., ch. 23, § 4; 26 G. A., ch. 1, §§ 6, 7, 12.]

[The above section is made applicable to special charter cities by §§ 747-b, 748-b, 958. EDITOR.]

The board of trustees has authority to bind the city for the expense of operating the waterworks and on refusal of the council to levy a tax under code § 1005 to cover the expense of running, operating and repairing, one who has furnished fuel for the operation of such works under contract with the trustees is entitled to maintain an action against the city for the indebtedness by way of damages. *Martin-Strelau Co. v. Dubuque*, 149–1, 127 N. W. 1013.

SEC. **747-b. Applicable to special charter and first class cities.** All the provisions of this act shall be held and construed as applying to cities of the first class and to cities acting under special charters. [29 G. A., ch. 41, § 2.]

SEC. **748. Powers — waterworks fund — how disbursed.** The said board of trustees shall have the power to carry into execution the contract or contracts for the purchase or erection of such waterworks, and to employ a superintendent and such other employes as may be necessary and proper for the operation of such works, for the collection of water rentals, and for the conduct of the business incident to the operation thereof. The said board of trustees shall require of the superintendent, and of the other employes as they may deem proper, good and sufficient bonds, the amount thereof to be fixed and approved by said board, for the faithful performance of their duty, such bonds to run in the name of the city and to be filed with the city treasurer and kept in his office. All money collected by the board of waterworks trustees shall be deposited at least weekly by them, with the city treasurer; and all money so deposited and all tax money received by the city treasurer from any source, levied and collected for and on account of the waterworks, shall be kept by the city treasurer as a separate and distinct fund. The city treasurer shall be liable on his official bond for such funds the same as for other funds received by him as such treasurer. Such moneys shall be paid out by the city treasurer only on the written order of the board of waterworks trustees, who shall have full and absolute control of the application and disbursement thereof for the purposes prescribed by law, including the payment of all indebtedness arising in the construction of such works, and the maintenance, operation, and extension thereof. [29 G. A., ch. 161, § 1; 29 G. A., ch. 39, § 1; 28 G. A., ch. 25, § 2; 26 G. A., ch. 1, §§ 8, 9.]

[The above section is made applicable to special charter cities by §§ 748-a, 748-b, 958. EDITOR.]

SEC. **748-a. Applicable to special charter cities.** That the provisions of said section, as amended, shall be applicable to cities under special charters. [29 G. A., ch. 161, § 2.]

SEC. **748-b. Applicable to special charter cities.** That chapter twenty-five, of the acts of the twenty-eighth general assembly, relating to waterworks, be and the same is hereby made applicable to cities under special charters. [29 G. A., ch. 162, § 1.]

[The latter portion of § 748, beginning with the words, "all money collected," is § 2 of ch. 25, acts of the 28 G. A. § 1 of the same chapter amended § 747 of the code, which is now repealed.]

SEC. **749. Fixing rates.**

The board of trustees of waterworks has the absolute power to fix water rates, with no limitation except that the rates shall be sufficient, together with the proceeds of a tax which the council is authorized to levy under the provisions of code § 1005, to meet the cost of operation, maintenance and repair. *Martin-Strelau Co. v. Dubuque*, 149–1, 127 N. W. 1013.

CHAPTER 6.

OF STREETS AND PUBLIC GROUNDS.

SECTION **751. Establishment — improvement — assessments on abutting property.** Cities and towns shall have power to establish, lay off, open, widen, straighten, narrow, vacate, extend, improve and repair streets, highways, avenues, alleys, public grounds, wharves, landings and market places within their limits; but no street, avenue, highway, or alley which shall hereafter be dedicated to public use by the proprietor of the ground in any municipal corporation shall be deemed a public street, avenue, highway, or alley, or be under the use or control of such municipality, unless the dedication shall be accepted and confirmed by an ordinance or resolution specially passed for such purpose. The expenses of such repairs and improvements may be paid from the general fund, or from the highway or poll taxes of such cities or towns, or partly from each of such funds. That in all cities having a population of more than thirty thousand, such cities shall have the power to extend, improve and repair streets, highways, avenues, alleys, public grounds, wharves, landings and market places within their limits. The expense of such extension, improvement and repairs may be paid from the general fund or from the highway or poll taxes of such cities or towns, or partly from each of such funds or by assessing all or any portion of the cost thereof on abutting property according to the benefits derived from such extension, repairs or improvement as provided in chapter seven of title five of the code, and amendments thereto. [35 G. A., ch. 75, § 1.] [20 G. A., ch. 20, § 1; 18 G. A., ch. 96, § 1; 15 G. A., ch. 6; 15 G. A., ch. 51, § 5; C. '73, §§ 464–5, 527; R. §§ 1064, 1095.]

[The above section is made applicable to special charter cities by § 958. EDITOR.]

Boundaries: The planting of trees and the construction of temporary sidewalks by an abutting owner does not constitute such assertion of title as against the city that the acquiescence therein by the city will give rise to estoppel as to the line claimed by such abutting owner to be his boundary line. *Vorhes v. Ackley*, 127–658, 103 N. W. 998.

The width of streets in a city is matter of proof, and the court cannot take judicial notice thereof. *Coe College v. Cedar Rapids*, 120–541, 95 N. W. 267.

By mutual acquiescence of the city and

the grantor or dedicator of land for public purposes, a street may become established on a different line from that first fixed by the dedication. *Menoher v. Gravity*, 148–695, 127 N. W. 1087.

Wharves: A provision of an ordinance prohibiting house boats from landing or remaining on any portion of the river or landing within any part of the ice harbor of the city of Dubuque, held to be unreasonable and in excess of the power of the council. *Keckevoet v. Dubuque*, 157–—, 138 N. W. 540.

Laying out and changing: In an incorporated town the county board of supervisors has no authority to lay out a public highway. *Philbrick v. University Place*, 106–352, 76 N. W. 742.

A city may by ordinance changing the course of a street give to an abutting proprietor the title to a portion thereof. *Ottumwa Brick & Const. Co. v. Ainley*, 109–386, 80 N. W. 510.

Dedication and acceptance: The provision of § 527 of the code of '73 that no street dedicated to public use in any city shall be deemed public unless accepted by ordinance is intended for the protection of a city from liability for not keeping such street in good condition. It has reference only to streets and alleys which are dedicated by the land owner and not to such as are acquired by the city by purchase or by prescription, and in the latter case no acceptance by ordinance is necessary. It seems that such provision is applicable to cities only and not to towns. *Burlington, C. R. & N. R. Co. v. Columbus Junction*, 104–110, 73 N. W. 501.

The dedication of a street in a plat may be subsequently accepted by a city so as to make the dedication effectual, even as against one who has in the meantime acquired title to the adjoining lot and taken possession of the dedicated street. *Backman v. Oskaloosa*, 130–600, 104 N. W. 347.

A city may accept and improve a portion only of a street dedicated on a plat. *Ibid.*

Acceptance of an alley under a common law dedication may be shown by other acts than the adoption of a formal notice. It may be inferred from public use, or other acts indicative of an intention on the part of the city to treat it as a public alley. *Keokuk v. Cosgrove*, 116–189, 89 N. W. 983.

The approval of the plat provided for in code § 915 does not involve the question of accepting the streets and alleys. *Giltner v. Albia*, 128–658, 105 N. W. 194.

Where a contract of conveyance provided that the grantor should procure the dedication of a portion of the property as a street, or that such portion be included in the sale with the understanding that the same be dedicated for street purposes, held that both parties construed the contract to mean a dedication of the streets accepted by the city. *McCormick v. Merritt*, 131–160, 105 N. W. 428.

Alleys in cities and towns are usually public and a reference to an alley in a description to premises conveyed implies the existence of a public alley. *Talbert v. Mason*, 136–373, 113 N. W. 918.

An administrator authorized to sell the land of a deceased owner has no authority to make a dedication thereof for public streets. *Davis v. Bonaparte*, 137–196, 114 N. W. 896.

No conditions can be annexed to the dedication of streets restrictive of their full public use. *Lacy v. Oskaloosa*, 143–704, 121 N. W. 542.

The discretion of the council in requiring the removal of obstructions from the street cannot be reviewed by the courts. *Ibid.*

For the dedication of property belonging to a city to public use for a street or alley the city must act by ordinance or resolution directed to that end. *Bradley v. Centerville*, 139–599, 117 N. W. 968.

Acceptance by either ordinance or resolution is sufficient; and held that acceptance by resolution was sufficient although an existing ordinance of the city required acceptance by ordinance. *Hunter v. Des Moines*, 144–541, 123 N. W. 215.

While mere use is not in itself sufficient to establish a public way by prescription, it is, when long continued with knowledge of the owner of the property, a fact of importance in determining the dedication to the public. *Foulke v. Agency City*, 145–471, 122 N. W. 823.

In contracting to accept the dedication of streets and alleys, to establish their grades and to grade them, a city is exercising, not its governmental or proprietary, but its business powers. *Tuttle v. Cedar Rapids*, (C. C. A.) 176 Fed. 86.

Under the evidence in a particular case, held that the plaintiff town had never accepted the dedication of a portion of the street of which they sought to recover possession in an action. *Exira v. Whitted*, 140–576, 118 N. W. 917.

The filing of a plat containing the designation of a tract as a public square, followed by its occupancy, improvement and use as a park, constitutes a dedication and the title of the city thereto is as complete as its title to the streets. *Lacy v. Oskaloosa*, 143–704, 121 N. W. 542.

Vacation: The validity of proceedings to vacate a street should be tested by certiorari and not by an equitable action to restrain. *McLachlan v. Gray*, 105–259, 74 N. W. 773.

The general assembly has plenary power over streets and may vacate or discontinue the public easement in them and may invest municipal corporations with this authority. *Ibid.*

While the power to vacate is not arbitrary, and must be exercised only for some

public purpose, yet in a proper case it is not unlawful for the city to vacate a street for the use of a railroad company for depot purposes. So held where a street was vacated for such purpose on conditions in behalf of the city imposed on the railroad company. *Spitzer v. Runyan*, 113–619, 85 N. W. 782.

When a city or town plat is filed the streets therein become county highways and on the termination of the corporate existence of the city or town pass completely under the control of the county board of supervisors. *Chrisman v. Brandes*, 137–433, 112 N. W. 833.

A board of supervisors has power to vacate the streets and alleys of a plat which is not within an incorporated town or city, although there may have been an incorporation of territory including the plat during a portion of the time intervening between the platting and vacation of the same, but which had been annulled by a decree of the court; and the jurisdiction of the supervisors in such circumstances is unaffected by the provisions of § 920 relating to a vacation of all or a part of a plat upon request of lot owners. *Ibid.*

The power to vacate a street is expressly conferred by statute, and when all property owners are affected alike by such vacation, though in different degrees, there is no ground on which to base a remedy. But in so far as the street is necessary to the free and convenient travel to and from the premises of a particular owner, his right to use the city property is an individual property right appurtenant to his premises which cannot be taken away without the payment of damages. *Borghart v. Cedar Rapids*, 126–313, 101 N. W. 1120.

On the vacation of a street the title to the portion of land which has constituted such street does not revest in abutting owner, but remains in the city and may be disposed of for other purposes. And if a railroad company is permitted to use the land thus vacated the abutting owner has no action against a railroad company for damages for obstruction of the street. *Harrington v. Iowa Cent. R. Co.*, 126–388, 102 N. W. 139.

Upon vacation of a street the title thereto does not revest in the original dedicator, nor in the grantee of abutting lots. *Lake City v. Fulkerson*, 122–569, 98 N. W. 376.

The city council may vacate a street or alley by the passage of an ordinance with reference to the same even without notice to the abutting owner. *Bradley v. Centerville*, 139–599, 117 N. W. 968.

The act of the city in permitting the continued public use of a street or alley after vacation and subsequent proceedings with reference to its improvement do not nullify the vacation effected by ordinance; nor will a mere repeal of the ordinance of vacation reëstablish the public character of the street or alley. *Ibid.*

A platted street may lose its character as a public street by abandonment and failure of use for a long period of time. *De Nefe v. Agency City*, 143–237, 121 N. W. 1049.

Where upon incorporation and afterward for many years the town has allowed a portion of a platted street to be occupied, improved and used for private purposes, it is estopped from afterwards asserting title to such portion. *Duetzmann v. Kuntze*, 147–158, 125 N. W. 1007.

The city council has authority to vacate a public street or alley and convey the same to a private individual. *Ridgway v. Osceola*, 139–590, 117 N. W. 974.

But an abutting property owner has a right appurtenant in a street or alley which is necessary to the free and convenient access to his premises and such right cannot be taken away without the payment of damages. If, however, the owner still has free access to his property and to the improvements thereon, notwithstanding the vacation, and his means of ingress and egress are not substantially interfered with, no damages can be recovered. *Ibid.*

The mere adoption of an ordinance for the vacation of a portion of a street where abutting owners are not compensated and such portion of the street is not separated in any way from the remaining portion does not affect such vacation as that an owner of property abutting upon the portion of the street to which the ordinance refers ceases to be an abutting owner subject to assessment for the improvement of the balance of the street. *Sutton v. Mentzer*, 154–1, 134 N. W. 108.

After vacation of a street, the title freed from the public use continues in the city and it may convey the ground vacated to another to be used for private purposes. *Walker v. Des Moines*, 142 N. W. 51.

But this power may not be exercised arbitrarily and in disregard of the trust for the public. *Ibid.*

The sole inquiry as to the vacation of the street should be, whether it is necessary for public use and convenience and sufficiently traveled as to justify its maintenance at the public expense, and the matter of subsequent disposal should be postponed until the feasibility of the vacation has been settled, or at least that question should be treated as of secondary consideration. *Ibid.*

Where access to the lots of an owner has not been interfered with, he is not entitled to compensation for vacation of the street. *Ibid.*

A city may vacate a street or alley and divert it to the use by a railroad company. *Tomlin v. Cedar Rapids & I. C. R. & L. Co.*, 141–599, 120 N. W. 93.

Under an easement thus granted the company has the right to construct and

operate its road without the franchises necessary in case of the use of a street. *Ibid.*

The fact that a public street in which a railway track has been laid and been maintained in continuous use has ceased to be generally used otherwise, is not sufficient to show an abandonment. *Baker v. Chicago, R. I. & P. R. Co.*, 154–228, 134 N. W. 587.

A grant by a municipality of a right to use its streets for railroad purposes will be strictly construed against the grantee and where it is a grant of the right to lay a single track and damages against abutting property are settled on this basis the company cannot lay additional tracks without additional grant and compensation. *Henry v. Mason City & Ft. D. R. Co.*, 140–201, 118 N. W. 310.

A contract between a city and a railroad company, pursuant to which the city vacates and conveys to the company certain street crossings in consideration of improvement to be made by the company, does not preclude the city from subsequently reopening such street crossings, by condemnation proceedings, on payment of damages assessed in favor of the company. *Osceola v. Chicago, B. & Q. R. Co.*, (C. C. A.) 196 Fed. 777.

As to vacation of a street by act of the owner in vacating a plat, see notes to § 919.

Improvements: A city whose finances will admit of doing so may pay for street improvements out of the general fund, or it may guarantee such payment. *Ottumwa Brick & Const. Co. v. Ainley*, 109–386, 80 N. W. 510.

The right to construct sewers to carry off the surface water and filth is usually regarded as incident to the power of maintaining the streets, but there is no provision for the construction of sewers through private property within incorporated towns, though the power to condemn for this purpose is conferred upon cities. *Aldrich v. Paine*, 106–461, 76 N. W. 812.

The insertion in a contract for street paving of a stipulation that it shall be kept in repair for a specified period is not invalid as in violation of the provision that repairs shall be paid out of the general fund. *Allen v. Davenport*, 107–90, 77 N. W. 532.

Any power attempted to be exercised with reference to street improvements under the provisions of this section must be exercised by means of a general ordinance for no provision is made by statute as to the method of exercising that power. But so far as the power is conferred in ch. 7 of the code, the method is specifically prescribed and no ordinance is necessary. *Martin v. Oskaloosa*, 126–680, 102 N. W. 529.

The legislature has imposed on the city council the power of determining how the cost of street improvements shall be met and for this purpose a resolution is sufficient. *Shelby v. Burlington*, 125–343, 101 N. W. 101.

In the exercise of its power to improve the streets a city may excavate the street to its full width without being liable in damages to an abutting property owner for depriving his property of its lateral support. *Talcott v. Des Moines*, 134–113, 109 N. W. 311.

While the council may order the removal of trees in the street if they are found to be an obstruction to its improvement, it has no authority to arbitrarily destroy them or order their destruction and an officer of the corporation may be liable in damages for removing trees in the street without authority. *Waterbury v. Morphew*, 146–313, 125 N. W. 205.

SEC. 753. Supervision—repair.

Supervision: The statute of limitations will not run to defeat the city in the exercise of its governmental authority with reference to streets. *Chicago, R. I. & P. R. Co. v. Council Bluffs*, 109–425, 80 N. W. 564.

The power given to cities and towns to control their streets, contract for their improvement and regulate their use, is a legislative power, and the burden is not cast upon the city to show that its exercise of such power is reasonable. The presumption is in favor of its reasonableness. *Snouffer v. Cedar Rapids & M. C. R. Co.*, 118–287, 92 N. W. 79.

As a city has authority to care for its streets, keep them free from rubbish and prohibit stone or other material being thrown thereon, it may provide by ordinance for the punishment of persons who negligently allow stones to fall and remain upon the street, and one who, in violation of such ordinance, allows stones to fall from wagons used in transporting them, and to remain on the street an unnecessary length of time, may be liable in damages to one who is injured by reason of running into such obstruction. *Overhouser v. American Cereal Co.*, 118–417, 92 N. W. 74.

A municipality has the power to provide for the sprinkling of its streets and for payment of the costs thereof out of the general fund; and no ordinance or resolution to authorize such service is necessary. *McAllen v. Hamblin*, 129–329, 105 N. W. 593.

The use of water procured at the public expense for such purpose is authorized. *Ibid.*

Such service is in the nature of a public and not a private benefit. *Ibid.*

The city council has authority to require the removal from the street of hitching posts which in its judgment constitute

a nuisance. *Lacy v. Oskaloosa*, 143–704, 121 N. W. 542.

Where streets have been opened and improved the council must take care that they are not obstructed by the unauthorized act of any person or persons. A street is a public way from side to side and from end to end, and any private use thereof which in any degree detracts from, hinders or prevents its free use as a public way is within the meaning of the law an obstruction or incumbrance. *Ibid.*

The city has no power or authority to grant any individual the right to permanently occupy any part of the street with any structure for any private use. *Ibid.*

The municipality being charged with the care, supervision and control of all public ways within its limits may exclude from the streets the telegraph or telephone lines of a corporation not securing the right to use the streets for the purpose as provided in code §§ 775–776. *Farmers' Telephone Co. v. Washta*, 157– —, 133 N. W. 361.

Use of streets other than for travel: There is no statutory authority for granting to individuals the right to the use of city streets for private purposes, and the city is not estopped from the use or improvement of the streets for public purposes by reason of a privilege given to an abutting owner to construct and maintain a private drain in such streets. *Bennett v. Mt. Vernon*, 124–537, 100 N. W. 349.

Cities and towns are required to keep all streets and public places within their limits, and which are open for public use, free from dangerous obstructions and pitfalls and in a condition of reasonable repair; and this requirement is broad enough to cover not only the purposes of public travel, but any use to which the street may be subject not in itself violative of any established rule of law and hence improper and illegal. *Nocks v. Whiting*, 126–405, 102 N. W. 109.

Therefore, held that the owner of a horse which has escaped from his control may recover for injuries to the animal caused by a defect in the street. *Ibid.*

While streets and alleys may be devoted to other purposes than public travel, yet such use is the paramount object in maintaining and establishing them and all other uses must be subordinated thereto. *Young v. Rothrock*, 121–588, 96 N. W. 1105.

The abutting owner is not necessarily guilty of obstructing the street so as to constitute a nuisance rendering him liable in damages by placing a wire around the parking along the sidewalk. *Snyder v. Ward*, 125–146, 100 N. W. 348.

The public right to the use of the street goes to the full width and extends indefinitely upward and downward, so far as to prohibit encroachment upon said limits by any persons by any means by which the enjoyment of the public right is or may be in any manner hindered or obstructed, or made inconvenient or dangerous. *Wheeler v. Ft. Dodge*, 131–566, 108 N. W. 1057.

Therefore, held that the act of the city in permitting a wire to be stretched above the street on which a dangerous performance was to be carried on was unlawful, and rendered the city liable for an injury to a person in the street resulting from such attempted performance. *Ibid.*

A court of equity has jurisdiction to enquire into the reasonableness of the exercise of power on the part of a city in regulating the obstruction of streets by railway trains. The control of the streets by the city is in the exercise of a trust for the general public and it may not by ordinance or otherwise destroy or unnecessarily or unreasonably abridge the right of the public to the free and unobstructed use of the streets. *Gilcrest Co. v. Des Moines*, 128–49, 102 N. W. 831.

The statutory provisions authorizing the construction of street railways over the streets of a city leaves in the general public the right of unrestricted use of the entire street from curb to curb, subject to the right of the company to the proper use of its track. *Snouffer v. Cedar Rapids & M. C. R. Co.*, 118–287, 92 N. W. 79.

The right of a street railway company in the streets is subordinate to the power of the city to control and improve such streets, and this power of the city cannot be abrogated by ordinance or relinquished by contract. *Ibid.*

One desiring to change the location of a house or other structure may move it along a public street providing the conditions of the street are such that this may be done without injury to others having a prior right thereto and providing further that this does not by interfering with travel become a nuisance. But where the use of the street has been lawfully appropriated in so far as essential for the operation thereon of an electric street railway, one desiring to move his house along such street may be enjoined from doing so if such unusual and extraordinary use of the street would destroy the trolley line and interrupt for a considerable time the operation of cars thereon. *Ft. Madison St. R. Co. v. Hughes*, 137–122, 114 N. W. 10.

A lot owner may lawfully erect a building to the full size of his lot and, subject only to municipal control, he may discharge the water flowing from his roof into a public street or alley. *Reynolds v. Union Sv. Bk.*, 155–519, 136 N. W. 529.

The city may permit areaways and entrances to basements and cellars from a public street or alley where the same are properly protected and do not unreasonably interfere with the convenient use of the public way. *Ibid.*

The city may authorize areas and cellarways in the street leading into base-

ments of abutting buildings and the property owner may be held liable for negligence in the use of such privilege notwithstanding the permission of the city. *Edwards v. Hasel*, 157– —, 138 N. W. 501.

While the city is required to keep its streets open and free from nuisances, yet they may be lawfully used for other purposes which are conducive to the public convenience and tend to make them of greater utility to those who legally have a right to use them. Therefore held that the city might authorize hitching racks and posts to be maintained in the street and that an adjoining property owner could not maintain an injunction for the the abatement thereof unless he was otherwise injured than as one of the public entitled to the use of such street. *Smith v. Jefferson*, 142 N. W. 220.

Trees in street: The lot owner has a property interest in the shade trees standing in the street in front of his lot, and if they are so located as not to be an obstruction to the proper use of the roadway or sidewalk, the city may not arbitrarily destroy or remove them. If, however, the city duly adopts a plan for the improvement of the street by grading or otherwise which necessarily requires the destruction of the trees, their removal and the prosecution of such work affords no cause of action to the lot owner. *Kemp v. Des Moines*, 125–640, 101 N. W. 474.

The city does not lose control of its streets by consent to or acquiescence in the planting of trees by an abutting owner within the limits of the street, and if such trees become an obstruction to public travel or interfere with proper street improvements, they may be removed, but even where the right to remove exists, it must be exercised reasonably and not to the injury of trees further than may be necessary. *Gallaher v. Jefferson*, 125–324, 101 N. W. 124.

Trees in a street are not necessarily a nuisance where they do not obstruct travel, and it is in accordance with public policy to preserve them, if practicable. A city or town should not require the removal of trees, nor the grading of a sidewalk so as to cause their destruction, unless necessary in the reasonable improvement of the street. *Burget v. Greenfield*, 120–432, 94 N. W. 933.

The interest of the property owner in the grading of a street in front of his premises and in the preservation of the trees growing there, so far as they do not constitute a nuisance, can be interfered with or affected only in the mode pointed out by statute and ordinances adopted in pursuance thereof. *Ibid.*

A property owner has such interest in the grade of his sidewalks in front of his premises and the preservation of the trees growing there, that he is entitled to an injunction to restrain an unauthorized action of the city council respecting change of grade. *Ibid.*

Trees along the side of the street of a city or town do not constitute a nuisance *per se;* nor do the shadows of such trees interfering with the lights or lighting of streets constitute such nuisance. *Blain v. Montezuma*, 150–141, 129 N. W. 808.

Change of grade: The general control of the streets, which is vested in a municipal corporation, does not authorize it to change the grade otherwise than by ordinance. *Caldwell v. Nashua*, 122–179, 97 N. W. 1000.

In grading streets the city may assume that the abutting owner will improve his property in conformity therewith and if no injury would have resulted had the abutting property been so improved there can be no recovery of damages on account of surface water flowing over the premises. But the fact that abutting property is brought to the level with the street at the lot line only does not prevent the owner from recovering damages for surface water thrown upon his land by an improper obstruction in the street. *Monarch Mfg. Co. v. Omaha, C. B. & S. R. Co.*, 127–511, 103 N. W. 493.

As the corporation is given the right to grade its streets, the rule as to liability for throwing surface water upon the premises of an adjoining owner to his damage is not applicable as between the city and the owner of the premises abutting upon the street. *Keck v. Venghause*, 127–529, 103 N. W. 773.

See also notes to code § 782 in this supplement.

Estoppel: Mere lapse of time without assertion of public right to land designated on a plat as intended for public purposes will not of itself estop a city from asserting the existence of the public right, but it may be taken into account in determining whether the right has been established by clear and unequivocal testimony. *Mt. Vernon v. Young*, 124–517, 100 N. W. 694.

The public right to the use and occupancy of streets and other lands dedicated to the public use may be lost by estoppel where the person claiming adversely to the public has made valuable improvements without objection on the part of the city. *Sioux City v. Chicago & N. W. R. Co.*, 129–694, 106 N. W. 183.

Where a strip of land has been dedicated and accepted for a street and occupied by the public as such, the act of the city in levying taxes thereon will not estop it from asserting its rights thereto as a street. *Hanger v. Des Moines*, 109–480, 80 N. W. 549.

While lapse of time or failure to assert a public right will not of itself estop a city from claiming the existence of a street or street line, it does afford good ground for insisting that before dispos-

sessing a citizen of property over which he has long been exercising ownership the public right shall be established by evidence of a clear and unequivocal character. *Eldora v. Edgington*, 130–151, 106 N. W. 503.

Moreover, a city may abandon a portion of a street or by nonuser forfeit its right thereto, and it may be foreclosed by agreement or acquiescence as to the true line. *Ibid.*

Further as to estoppel, see notes to § 917.

Liability for defects and obstructions: A city is not an insurer against all accidents on its streets and is responsible only when it fails to use reasonable care to keep its streets in reasonably safe condition for public travel. But if it fails in this, and injury results, not due to want of ordinary care on the part of the person injured, the city is responsible. So held where an injury resulted by reason of a horse becoming unmanageable through fright and throwing the vehicle over the edge of an embankment, which was not as wide as required by law. *Harvey v. Clarinda*, 111–528, 82 N. W. 994.

In such case it is for the jury to say whether the accident would have happened but for the defective condition of the street. *Ibid.*

A municipal corporation is liable for defects and obstructions in a street, left in its natural condition, which has been opened to public use. If used for the ordinary purposes of a street, it is the duty of the corporation to keep it in reasonably safe condition for that purpose. *Lamb v. Cedar Rapids*, 108–629, 79 N. W. 366.

Where the excavating of a street is done by a person with the knowledge of the city, it is liable for injuries resulting from a defective condition of the street due to such excavating. *Keyes v. Cedar Falls*, 107–509, 78 N. W. 227.

The city is liable for the unlawful grading of streets in front of the premises of a complaining owner, and where such grading was done by the street commissioner, with the knowledge of the council, held that authority of the officer to act would be presumed and his wrongful acts would be charged to the city. *Brown v. Webster City*, 115–511, 88 N. W. 1070.

One who, without negligence on his part, is injured by stepping into a hole in the portion of the street used for a driveway, is entitled to recover if the city is negligent in that respect. *Finnegan v. Sioux City*, 112–232, 83 N. W. 907.

It is not contributory negligence to walk in the driveway. *Ibid.*

The street includes the bridges located therein. *Sachs v. Sioux City*, 109–224, 80 N. W. 336.

The mere fact of tearing up or obstructing a street even to the full width thereof, if done under the authority of the city, does not in itself constitute negligence. *Stevens v. Citizens' Gas & Elec. Co.*, 132–597, 109 N. W. 1090.

Cities being given the care of public highways, streets and alleys, and being required to keep the same in repair and free from nuisance, a city is liable for injuries resulting from its negligence in failing to keep in repair a bridge which does not come within the description of a county bridge. *Freeman v. Independence*, 123–1, 97 N. W. 1083.

It is negligence in the city to leave a ridge of dirt in the center of a traveled street such as to make it unsafe to drive thereon. *Streeter v. Marshalltown*, 123–449, 99 N. W. 114.

Although a street or part thereof may be abandoned by a city or town, nevertheless such city or town has no right to erect and maintain obstructions in such street, to the damage of a property owner, and will be liable in damages as a private individual would be. *Pettit v. Grand Junction*, 119–352, 93 N. W. 381.

If the city allows structures to remain in the street with the knowledge that they had been unlawfully placed there, and were dangerous, it renders itself liable to anyone receiving injuries by reason thereof. *Farrell v. Dubuque*, 129–447, 105 N. W. 696.

Ordinances of the city prohibiting such obstructions in the street are admissible in evidence to show that the action of those erecting such structures was unlawful and therefore negligent. *Ibid.*

A town is not liable for injury to one passing along the street resulting from negligence of a contractor in not barricading an opening made for purpose of building, unless the town authorities are charged with notice that the contractor has been negligent in failing to barricade such openings. *Bender v. Minden*, 124–685, 100 N. W. 352.

The duty of the city is to place warning lights near an excavation. If this is done the city is not liable if these lights are removed without its knowledge, until it knows or should know of their removal. The city is not required to keep a man on guard to see that the lights are not removed. *Garnetz v. Carroll*, 136–569, 114 N. W. 57.

The city cannot relieve itself of liability for a dangerous condition of sidewalks by delegating the work of construction or repair to independent contractors. *Pace v. Webster City*, 138–107, 115 N. W. 888.

The duty of the city to maintain its streets in a safe condition cannot be delegated to an independent contractor so as to relieve the city from liability with respect thereto. *Prowell v. Waterloo*, 144–689, 123 N. W. 346.

Therefore held that the city was liable for injuries resulting from a failure to place warning lights on a barrier erected

on a sidewalk although such failure was that of an independent contractor. *Ibid.*

The authority to keep the streets free from nuisances carries with it the affirmative duty or obligation to keep and maintain the public ways in reasonably safe condition, or free from nuisances, and for violation of this duty an individual suffering injury therefrom may recover damages. *Wheeler v. Ft. Dodge*, 131–566, 108 N. W. 1057.

Whether or not a given structure or performance in the street endangers the public safety is under ordinary circumstances a question for the jury. *Ibid.*

To render a city liable for injuries received on a sidewalk by reason of its negligence in maintaining the same, it is not necessary to show that the city has acquired perfect title to the street by dedication or otherwise. It is sufficient if that which is assumed to be a street is open and used as such and so recognized by the city and the control over the same has been assumed and exercised by it. *Kircher v. Larchwood*, 120–578, 95 N. W. 184.

It is the duty of the city to exercise reasonable care in keeping safe the sidewalks along thoroughfares regardless of whether there has been a formal dedication to the city of such thoroughfare as a street. *Dunn v. Oelwein*, 140–423, 118 N. W. 764.

Although the city may be required to keep its streets in a reasonably safe condition only for travelers with horses, teams and carriages, and may be under no obligation to maintain them in safe condition for use by bicycle riders, nevertheless, if it permits obstructions in the street which cause injury to the rider of a bicycle, without negligence on his part, it will be liable therefor. *Overhouser v. American Cereal Co.*, 118–417, 92 N. W. 74.

Where an obstruction is improperly placed in the street by a police officer under the direction of the mayor, the city is liable for injuries resulting from such improper obstruction. *Shinnick v. Marshalltown*, 137–72, 114 N. W. 542.

If a vehicle of any kind becomes disabled on the street the owner may leave it in the street for such reasonable time as may be necessary for its removal. But after this time has elapsed it constitutes an obstruction and a nuisance, and the city, with express or implied knowledge of its continuance in the street, will be liable for any injury resulting to persons driving in the street by reason of their horses becoming frightened thereat or otherwise. *Cutter v. Des Moines*. 137–643, 113 N. W. 1081.

The duty of the city to keep its streets in a safe condition and free from obstructions that may seriously interfere with travel 'relates not only to defects in the highway and objects thereon against which vehicles may come in collision, but also extends to injuries resulting from the fright of horses of ordinary gentleness at objects upon the streets naturally calculated to, and which may reasonably be expected to, produce such fright. *Frazee v. Cedar Rapids*, 151–251, 131 N. W. 33.

In an action for such injuries where the obstruction is not in the traveled path and becomes obnoxious simply because of its being likely to frighten horses of ordinary gentleness, it must appear that the horses which the plaintiff was driving were of that kind. *Ibid.*

A person using the street has the right to assume that it is in safe condition and that the city has taken the proper precautions to keep it so. *Ibid.*

Unless the place in which the injury is received is a public street the city is not liable. *Davis v. Bonaparte*, 137–196, 114 N. W. 896.

Nuisances: A municipality is not liable in damages for the exercise of its purely governmental functions, but in the exercise of its purely municipal or ministerial functions it stands on the same footing with a corporation or an individual. *Fitzgerald v. Sharon*, 143–730, 121 N. W. 523.

The liability of a city or town for injuries to property owners resulting from making authorized street improvements must be predicated upon negligent or unskillful performance. So held where plaintiff sought to recover damages resulting from the flooding of his land in consequence of such improvement. *Walters v. Marshalltown*, 145–457, 120 N. W. 1046.

In its relation to land owners outside its limits the town has no greater authority than a private individual and if in grading or guttering its streets it causes damages to the land owner outside its limits it may be liable therefor. *Baker v. Akron*, 145–485, 122 N. W. 926.

While a city has no right to improve its streets in such a negligent manner as to cause injury to an abutting property owner by throwing an unnecessary burden upon him as to surface waters, it is the right of the city to make its streets passable and in doing so to provide for the passage of surface waters in drains and culverts through and over them and if a method adopted is reasonably suitable an abutting property owner cannot complain. *Cech v. Cedar Rapids*, 147–247, 126 N. W. 166.

A city may be liable for maintaining a nuisance on a strip of land used as a part of the street and appurtenant thereto which results in injury to a particular individual. *Worrell v. Bloomfield*, 148–691, 127 N. W. 1082.

The statutory duty of the city to keep its streets in repair and free from obstruction and from the inroads of flood waters is sufficient grounds to justify its insistance upon the opening of a channel for the natural flow of a stream, and it is im-

material that a nuisance consisting of surface water did not develop into a source of injury to anyone until the subsequent growth and expansion of the city brought people into a position to be injuriously affected by it. As between the property owner and the public, the inquiry goes to the conditions existing at the time when the complaint was made. *Waterloo v. Waterloo, C. F. & N. R. Co.*, 149–129, 125 N. W. 819.

The city has the right not merely as a private property owner but in behalf of the public to cause the abatement of obstructions in a stream, the consequence of which is to damage or reasonably threaten injury to neighboring property. Such obstruction is a nuisance. *Sioux City v. Simmons Hardware Co.*, 151–334, 129 N. W. 978, 131 N. W. 17.

Use of sidewalks: An ordinance prohibiting the use on sidewalks of "all varieties of vehicles known by the general term 'bicycle'" does not apply to tricycles. *Wheeler v. Boone*, 108–235, 78 N. W. 909.

Persons who have a right to ride on sidewalks in vehicles which may properly be used thereon may rely, as footmen may, on the sidewalks being in suitable condition for people to walk over, and have the same rights in case of injuries resulting from neglect. *Ibid.*

The city council may permit reasonable use of sidewalks by an abutting owner in obtaining access to all parts of his property by the construction of areas, cellar stairways and otherwise, but it has no authority to permit the use, by one property owner, of the street so as to interfere with its reasonable use by another property owner, or to permit an obstruction of the reasonable use of the street or sidewalk by the public. *Perry v. Castner*, 124–386, 100 N. W. 84; S. C., 130–703, 107 N. W. 940.

Defective and obstructed sidewalks: The duty to keep sidewalks in repair being mandatory and not discretionary, the city is liable for injuries received by reason of the defective condition of a sidewalk due to the negligence of the city. *Parmenter v. Marion*, 113–297, 85 N. W. 90.

A platform projecting over the sidewalk from the second story of a building is not necessarily a nuisance, and held that the city was not liable for the wrongful act of the owner of such building in throwing a bale of hay from the platform to the street without proper care as to safety of persons who might be below. *Ibid.*

It cannot be said as a matter of law that a town is, because of the smallness of its population, not liable for defects in sidewalks. *Graham v. Oxford*, 105–705, 75 N. W. 473.

Where a sidewalk is constructed by a city not in accordance with a general plan or grade, but as a temporary expedient, it is liable for damages resulting from such plan of construction as renders it unsafe, and it is competent to show that it was so sloping as to be dangerous and also to show that it lacked appurtenances which were required to make it safe. *Ford v. Des Moines*, 106–94, 75 N. W. 630.

While it may be that the city will not be liable for defects in the sidewalk resulting from the adoption of a plan prepared by a competent engineer, and in accordance with which the work is done, yet it cannot make this defense where the plan of the sidewalk is left entirely to the direction or discretion of the city engineer. If the design is left to the whim or fancy of a single individual it cannot be said that the sidewalk is constructed in accordance with a plan, within the meaning of such rule. *Hodges v. Waterloo*, 109–444, 80 N. W. 523.

Where a sidewalk is built under the direction of the town officials and they assume jurisdiction thereof and it is used by the public, the town may be assumed to be liable for negligence in keeping it in repair, although it is not upon ground which has been lawfully dedicated to public use. *Harrison v. Ayrshire*, 123–528, 99 N. W. 132.

When the municipal corporation has allowed a sidewalk to be built for the use of the public, its duty is to see that it is kept in safe condition. *Brown v. Chillicothe*, 122–640, 98 N. W. 502.

A city is bound only to use reasonable diligence in making discovery of existing defects in sidewalks. *Belken v. Iowa Falls*, 122–430, 98 N. W. 296.

A city is not bound to do more than to keep its sidewalks in a reasonably safe condition for travel, and it is error to instruct the jury on the assumption that the walk was not in a reasonably safe condition where there is a conflict in evidence as to the city's negligence. *Bauer v. Dubuque*, 122–500, 98 N. W. 355.

When the municipality has exercised reasonable care to make and keep its sidewalks safe, it has discharged the duty of keeping them in a reasonably safe condition. *Crandall v. Dubuque*, 136–663, 112 N. W. 555.

A city or town is required only to maintain its sidewalks in a reasonably safe condition for public travel. *Scurlock v. Boone*, 142–580, 120 N. W. 313.

Where the petition in an action for injuries from a defective sidewalk sufficiently points out the location and nature of the defect, it is not necessary to specifically describe in detail the defect complained of. *Brown v. Chillicothe*, 122–640, 98 N. W. 502.

Negligence in allowing a ring and staple to remain near the edge of a sidewalk some considerable distance above the level of the street may constitute negligence, the injury being the result of the distance which a person tripped on such obstruc-

tion would fall rather than in the fact that a fall was likely to be occasioned by such obstruction. *Schnee v. Dubuque*, 122–459, 98 N. W. 298.

The liability of a city for an injury resulting from a trap door maintained in the sidewalk by an abutting property owner for access to the basement of his building is dependent upon knowledge on the part of the city, express or implied, that the trap was frequently left open without proper guards. *Earl v. Cedar Rapids*, 126–361, 102 N. W. 140.

It is immaterial in such case whether the person who falls into the trap does so while passing from the street to the adjoining building or from the building to the street or whether the trap is only partly in the street and partly on the adjoining premises. *Ibid.*

An obstruction in the portion of the street set apart for a sidewalk and used for passing, if negligently allowed to remain, will render the city liable for resulting injury. *Rea v. Sioux City*, 127–615, 103 N. W. 949.

It cannot be said, as a matter of law, that an obstruction in a sidewalk or street crossing two inches high cannot be such a defect that the city or town may be liable for injuries which it causes. The liability in such case does not necessarily depend upon the size of the defect, but upon the effects which may reasonably be apprehended from it upon persons who use the walk or crossing in a proper manner. *Baxter v. Cedar Rapids*, 103–599, 72 N. W. 790.

In an action to recover for injuries received by slipping on an approach from the street to the sidewalk, held that there was no evidence of negligence in the construction of the approach such as to warrant a recovery. *Lush v. Parkersburg*, 127–701, 104 N. W. 336.

Snow and ice: That walks are made slippery by melting snow is a fact of common knowledge and should be taken into account by the city in constructing walks, especially those which have sloping surfaces and in consequence are liable to be dangerous when slippery. *Ford v. Des Moines*, 106–94, 75 N. W. 630.

A city is not relieved from liability for a defect in a sidewalk which causes an injury because of the icy condition of the walk which contributes to the accident. If the walk, by reason of its defective construction, or by reason of previous snow or ice thereon, which should not have been allowed to remain, is dangerous to pedestrians under the prevailing climatic conditions, then the city is liable. *Hodges v. Waterloo*, 109–444, 80 N. W. 523.

Even though the fall of a person on a sidewalk is caused in some part by snow thereon, if it is caused also in part by a dangerous slant in the walk the corporation may be liable. *Sylvester v. Casey*, 110–256, 81 N. W. 455.

Whether, under all the circumstances, it was negligence in the city not to anticipate the dangerous condition of a walk due to water running thereon and freezing, and in not providing against such danger, is a question for the jury. *Shumway v. Burlington*, 108–424, 79 N. W. 123.

Municipal corporations are chargeable with negligence in permitting the accumulation of snow and ice in uneven and irregular masses upon the streets. *Sankey v. Chicago, R. I. & P. R. Co.*, 118–39, 91 N. W. 820.

The mere fact that a sidewalk is dangerous because of the presence of snow and ice is not sufficient to establish negligence on the part of the city even though the snow and ice are not removed within a reasonable time. But if by reason of travel or the action of the elements the snow becomes ice and is allowed to remain in a dangerous condition, the city cannot escape liability by showing that the condition was caused by natural causes as by rain and sleet or sudden changes of weather. *Templin v. Boone*, 127–91, 102 N. W. 789.

If ice on a sidewalk is produced by artificial causes, such as the discharge of water from an eaves trough, and the city has notice thereof or should have had notice in the exercise of reasonable care, and there has been a reasonable time within which to remove it before the accident occurred, failure to do so constitutes negligence, rendering the city liable for resulting injuries. *Hofacre v. Monticello*, 128–239, 103 N. W. 488.

The city is negligent with reference to snow or ice on the sidewalk only when it has become rough and uneven by travel and allowed to remain and freeze in that condition, so that one in the exercise of ordinary care cannot safely pass over it. The burden is on the plaintiff to prove that the injury was caused by such condition of the walk, due to defendant's neglect. *Tobin v. Waterloo*, 131–75, 107 N. W. 1031.

The city is liable for injuries resulting from the slippery and uneven surface due to failure of the city to remove snow from the sidewalks within a reasonable time. *Crandall v. Dubuque*, 136–663, 112 N. W. 555.

The mere fact that snow and ice on a walk renders it dangerous does not, in itself, make the city liable for an injury resulting therefrom. It is only when the ice and snow is suffered to remain upon the sidewalk until, by tramping of pedestrians, freezing and thawing or other cause, the surface has become rough, rigid, rounded or slanting so that a person, in the exercise of ordinary care, cannot pass over it without danger of falling,

that the defect is such as to render the city liable. *Dempsey v. Dubuque*, 150–260, 132 N. W. 758.

Proximate cause: A fall on a sidewalk which is in a dangerous condition, but which results from dizziness to which the person is subject by reason of a previous fall chargeable to the negligence of the city in maintaining safe walks, is not to be considered as the proximate result of the previous injury. *Watters v. Waterloo*, 126–199, 101 N. W. 871.

Evidence of negligence: Evidence of the defective condition of the sidewalk some distance from the place of the accident is admissible where it appears that the entire walk was out of repair and in a dangerous condition. *Bailey v. Centerville*, 108–20, 78 N. W. 831.

Where the question is whether or not a walk was defective, an ordinance of the city regulating the laying of walks and passed prior to the construction of the walk in question may be introduced in evidence as bearing on the question whether the walk as constructed was sufficient. *Shumway v. Burlington*, 108–424, 79 N. W. 123.

Evidence that a walk, as it existed at the time of the accident, has subsequently been taken out, may be introduced as showing how witnesses knew the condition of the walk, where it is not attempted thereby to prove an admission that the walk was defective. *Frohs v. Dubuque*, 109–219, 80 N. W. 341.

Evidence as to the original construcion of a walk may be admissible to show, not that it was originally defective, but as bearing upon the question of notice to the city as to its condition. *Ibid.*

Evidence that another person tripped upon the same loose board a few days before the accident is admissible, where such evidence is not relied upon as substantive proof of the actionable defect; but to show the existence of this particular loose board prior to the injury, and the manner in which it was discovered by the witness. *Ibid.*

Where the city offers evidence tending to show that the sidewalk was in good repair before, at and after the time of the injury complained of, the plaintiff may prove that repairs have been made at and near the place in question after the accident. *Parker v. Ottumwa*, 113–649, 85 N. W. 805.

Evidence of subsequent repair of the defective walk by the city is competent as bearing upon the actual condition at the time of the accident and that it must have been in such condition for such length of time as to charge the city with notice. *Patton v. Sanborn*, 133–650, 110 N. W. 1032.

An ordinance passed after the construction of a sidewalk is not to be considered in determining whether the sidewalk was constructed in a proper method. *McCartney v. Washington*, 124–382, 100 N. W. 80.

While evidence of subsequent changes or repairs is not admissible to show defective condition at the time of an injury, yet if such evidence is competent for any purpose it is not to be excluded on the ground that it is incompetent to show the negligence of the city. *Achey v. Marion*, 126–47, 101 N. W. 435.

Evidence as to the condition of the walk after the accident is admissible where by other evidence it is made to appear that the condition was practically the same when examined by the witnesses as when the accident occurred. *Harrison v. Ayrshire*, 123–528, 99 N. W. 132.

In an action for injury resulting from defective condition of a sidewalk, plaintiff should not be allowed to show the condition of the walk at a time substantially subsequent to the time of the accident. *Edwards v. Cedar Rapids*, 138–421, 116 N. W. 323.

If on examination within a short time after the accident the materials of which the walk was constructed were found to be rotten and decayed, it was proper to show that fact as bearing on the condition at the time of the accident as well as showing that such defective condition had existed for such time that the city in the exercise of reasonable care ought to have discovered and remedied the defect. *Jackson v. Grinnell*, 144–232, 122 N. W. 911.

Where plaintiff contends that the entire walk was out of repair, testimony as to prior accidents happening on the same walk is admissible, although they appear not to have occurred at the same place on the walk. *Yeager v. Spirit Lake*, 115–593, 88 N. W. 1095.

Evidence as to the condition of the walk and repairs thereto prior to the time of the accident is admissible for the purpose of showing knowledge of its condition on the part of the city. *Ibid.*

In an action for personal injuries resulting from defect in the street, evidence of similar accidents at the same place is not admissible. *Streeter v. Marshalltown*, 123–449, 99 N. W. 114.

It is the duty of a city to exercise ordinary care to discover latent as well as apparent defects in a sidewalk. *Anders v. West Union*, 131–192, 108 N. W. 226.

But proof that upon tearing up a walk the stringers were found in a decayed condition, held not of itself sufficient to show negligence on the part of the city. *Ibid.*

Evidence considered as tending to show negligence of the city in the construction and maintenance of the walk causing injury to the plaintiff. *Goucher v. Sioux City*, 115–639, 89 N. W. 24.

For witnesses to state that a walk was defective is to announce a conclusion, and therefore such testimony is not admissible, but the witness may say that the walk

was sound and in good condition, as it would be impossible to describe absence of defects which did not exist. *Brooks v. Sioux City*, 114–641, 87 N. W. 682.

Witnesses may testify as to the life and durability of timber and nails, such as were used in the walk. *Patton v. Sanborn*, 133–650, 110 N. W. 1032.

Notice: Whether, in view of the fact that a sidewalk is continuously in a bad condition, the city is chargeable with notice of defects therein, is for the jury. *Bailey v. Centerville*, 108–20, 78 N. W. 831.

Evidence in a particular case held sufficient to charge the town with notice of the defective condition of the sidewalk in question. *Hoover v. Mapleton*, 110–571, 81 N. W. 776.

Evidence in a particular case held sufficient to show knowledge by the city of the defective condition of the sidewalk. *Beaver v. Eagle Grove*, 116–485, 89 N. W. 1100.

For the purpose of showing notice to the city, witnesses may testify as to their having tripped and fallen over the same defect in the sidewalk prior to the injury for which plaintiff seeks to recover. *Wilberding v. Dubuque*, 111–484, 82 N. W. 957.

Where a defect in original construction of the sidewalk is shown the city is conclusively presumed to have notice thereof. *Evans v. Iowa City*, 125–202, 100 N. W. 1112.

Notice of the defective condition of a sidewalk generally is notice of an included particular defect. *Ibid.*

If the sidewalk, as originally constructed, is defective and unsafe, the city is liable for resulting injuries although it had no knowledge of such defective condition. *Roney v. Des Moines*, 150–447, 130 N. W. 396.

Constructive notice to the city of defective condition of a walk is not to be founded upon the condition of the particular plank causing the injury. The general condition at such point may be considered. *Hoover v. Mapleton*, 110–571, 81 N. W. 776.

Evidence of the condition of the sidewalk near the place of the defect which causes the accident is admissible for the purpose of showing whether the officers of the city should have discovered the defect in question in time to repair it before the accident. *Spicer v. Webster City*, 118–561, 92 N. W. 884.

Evidence as to the condition of the walk near the place where the injury was received is competent upon the question of knowledge on the part of the city as to the condition of the walk at the point of the accident, but it is competent for no other purpose, and if the defendant requests an instruction limiting the effect of such evidence it should be given. *Kircher v. Larchwood*, 120–578, 95 N. W. 184.

Evidence of the condition of the sidewalk prior to the time of plaintiff's injury is admissible as showing notice of the defective condition. *Hofacre v. Monticello*, 128–239, 103 N. W. 488.

In an action for injury caused by an accumulation of snow and ice upon a sidewalk, it is proper to show the icy condition of the walk at the place of the accident at other times as tending to charge the city with notice of the dangerous condition. *Hanousek v. Marshalltown*, 130–550, 107 N. W. 603.

Where the plaintiff in an action against the city for injuries received by reason of a defective sidewalk alleged knowledge on the part of the city of such defect, and there is a general denial of plaintiff's allegations, it is competent for the plaintiff to prove the condition of the sidewalk at or near the place of the injury, provided the dangerous and defective condition thus shown was reasonably observable by the officers of the city in the exercise of ordinary care, and had been in existence for such length of time as to charge the city with notice. *Clark v. Cedar Rapids*, 129–358, 105 N. W. 651.

In such action it is competent to prove the condition of the sidewalk at the place of the accident as it was found soon after the accident occurred, there being no indication of any substantial change in the condition. *Ibid.*

A general allegation of knowledge on the part of the city of the unsafe and dangerous condition of a sidewalk at the time of the injury is sufficient to permit proof of actual or constructive notice of the condition of the walk. *Pace v. Webster City*, 138–107, 115 N. W. 888.

In an action to recover damages for injuries received by the falling of a structure permitted to be erected on the street, held that evidence of the dangerous construction of other structures of the same character was competent as tending to show notice to the city. *Farrell v. Dubuque*, 129–447, 105 N. W. 696.

Declarations of the sidewalk inspector with reference to the dangerous condition of the sidewalk by reason of such structure held admissible as against the city. *Ibid.*

Evidence as to the general condition of the walk is properly admissible as tending to show knowledge on the part of the town of a defective condition. *Harrison v. Ayrshire*, 123–528, 99 N. W. 132.

The general bad condition may be shown as tending to prove notice to the city of the defect resulting in injury. *Witt v. Latimer*, 139–273, 117 N. W. 680.

Where the negligence charged consists of improper construction and maintenance and not in want of repair, the question whether the improper condition has existed for such length of time that the officers of the city in the exercise of reasonable diligence should have known thereof,

is not involved. *Achey v. Marion*, 126–47, 101 N. W. 435.

A municipal corporation charged with the duty of maintaining its streets in reasonably safe condition for public use, is held to have notice of dangerous defects therein, and especially defects arising from natural wear and decay, whenever such condition has existed so long that, in the exercise of reasonable oversight and care by the officers of the municipality it should have been discovered and repaired. *Smith v. Sioux City*, 119–50, 93 N. W. 81.

Notice of defect in a sidewalk may be inferred from lapse of time and the character and location of the walk. The negligence of the city may consist in its not acquiring notice of defects in its walks. *Padelford v. Eagle Grove*, 117–616, 91 N. W. 899.

When a defect has existed for such a length of time that the officers of the city should have discovered the defect if they had exercised ordinary care and diligence, then the law presumes notice to them, whether the defect has been reported to them or not, and whether they actually knew it or not. *Wilberding v. Dubuque*, 111–484, 82 N. W. 957.

Evidence that a defect apparent to observation has existed in a sidewalk for six months will warrant the jury in finding knowledge thereof by municipal authority. *Brown v. Chillicothe*, 122–640, 98 N. W. 502.

Service of notice on the owner of property to construct a permanent sidewalk may be shown in an action against the city to recover damages for injuries received from a defective sidewalk in front of the premises of such owner, as tending to show knowledge of the defective condition of the walk on the part of the city. *Wilson v. Cedar Rapids*, 123–10, 98 N. W. 119.

Where a city through its proper officers directed the construction of repairs in the sidewalk necessarily involving the erection of barriers, it is the duty of the city to see that danger to passers should be prevented by proper lights and it is not necessary to show that the city had notice that the sidewalk was in a dangerous condition. *Prowell v. Waterloo*, 144–689, 123 N. W. 346.

Contributory negligence: One who has full knowledge of a defect in a sidewalk and afterwards without necessity passes over the place where such defect exists without any precaution or excuse for want of precaution, is guilty of such contributory negligence with reference to a resulting injury as to defeat recovery. *Barce v. Shenandoah*, 106–426, 76 N. W. 747; *Marshall v. Belle Plaine*, 106–508, 76 N. W. 797.

One who appreciates the danger of using a defective street cannot recover for injuries resulting from such use. *Reynolds v. Centerville*, 151–19, 129 N. W. 949.

It does not necessarily constitute contributory negligence to use a defective street, although the person using it has knowledge of the defect and there is another reasonably convenient way by which such person might reach his destination. *Harvey v. Clarinda*, 111–528, 82 N. W. 994.

It is not true that one who knows of a defect in a walk is necessarily guilty of negligence in attempting to pass over it. Much depends upon the character of the defect, the occasion for passing over it and the care used in doing so. If a person knows of a defect in a walk, but believes that it can be passed in safety with the exercise of ordinary care and is justified as a reasonably prudent man in holding that belief he is not negligent in attempting to pass over it in an ordinarily careful manner. *Graham v. Oxford*, 105–705, 75 N. W. 473.

One who knows a walk to be unsafe, and that it is imprudent to attempt to pass over it, is guilty of contributory negligence in attempting to do so, but knowledge of unsafe condition is not enough as matter of law to establish contributory negligence. *Yeager v. Spirit Lake*, 115–593, 88 N. W. 1095.

It is error to charge that if plaintiff knew the walk to be unsafe he was required to use more than ordinary care in passing over it. *Hoover v. Mapleton*, 110–571, 81 N. W. 776.

In such case the court may leave it to the jury to say whether there was contributory negligence in passing over the walk known to be dangerous, where it is shown that there was another and a convenient way by which the plaintiff might have proceeded to his destination. *Ibid.*

While in some cases the nature of the defect in the sidewalk may suggest that a person going upon the walk with knowledge of the defect will be deemed as matter of law guilty of contributory negligence, in general it must appear that the person using the walk regarded it as dangerous or considered it to be imprudent to go upon it at the time he did. *Slyvester v. Casey*, 110–256, 81 N. W. 455.

Intoxication does not in itself constitute contributory negligence on the part of a person injured on a sidewalk, unless the evidence shows that his intoxication in some way aided in bringing about the injury, or it appears that it was negligent for him to be on the walk in an intoxicated condition. *Ibid.*

It is not negligent for a person to pass over streets or sidewalks of a city at night. A person has the right to rely upon the assumption that the city has done its duty in keeping the streets in order. *Keyes v. Cedar Falls*, 107–509, 78 N. W. 227.

It is not negligence, as matter of law, for one to pass over a defective sidewalk. Whether or not it is imprudent for plaintiff to pass over a sidewalk in a defective condition is for the jury. *Cox v. Des Moines*, 111–646, 82 N. W. 993.

One who passes over a defective walk with reasonable care under the circumstances is not guilty of contributory negligence, although charged with knowledge that the walk is defective. *Bailey v. Centerville*, 115–271, 88 N. W. 379.

One who is injured in passing over a defective sidewalk is not guilty of contributory negligence if he exercised the care an ordinarily prudent person would exercise in passing over the walk. *Rusch v. Dubuque*, 116–402, 90 N. W. 80.

The fact that the person injured knew of the defect which caused the injury does not render his action in using the walk negligent if in view of the condition he used reasonable care. *Van Camp v. Keokuk*, 130–716, 107 N. W. 933.

The action of another in pushing by the person using the walk under such circumstances may constitute such diverting cause as to excuse failure to avoid the known defect. *Ibid.*

A pedestrian is not required to be on the lookout for hidden dangers in the street. He is only required to walk with his eyes open, observing his natural course in the usual way. *Earl v. Cedar Rapids*, 126–361, 102 N. W. 140.

A pedestrian is not as a matter of law required to inspect a walk before passing over it, but may assume that it is in repair, and the question whether he might have discovered the defect with ordinary attention to his own safety so as to have avoided the injury is for the jury. *Machacek v. Hall*, 131–412, 105 N. W. 690.

Mere knowledge of the condition of a walk on the part of a person injured will not, as matter of law, constitute contributory negligence in the use of such sidewalk. *Sachra v. Manilla*, 120–562, 95 N. W. 198.

Testimony on the part of plaintiff in an action to recover for injuries due to a defective sidewalk, that he knew the condition of the walk and that it was dangerous, will not justify the taking of the case from the jury. The question of contributory negligence in such a case is one of fact. *Carter v. Lineville*, 117–532, 91 N. W. 777.

The mere knowledge of a pedestrian that a walk over which he assumes to pass is not safe is not sufficient alone to establish negligence on his part as a matter of law. *Arnold v. Waterloo*, 128–410, 104 N. W. 442.

One may go upon a dangerous and unsafe walk without being necessarily negligent in doing so unless he knew or should have known in the exercise of ordinary care for his own safety that it was imprudent for him to attempt to pass over the same. *Templin v. Boone*, 127–91, 102 N. W. 789.

It is not knowledge of a defect which renders a foot passenger negligent in attempting to use a defective sidewalk, but failure to use ordinary care in avoiding the defect either by taking another way or by passing around the defect or otherwise endeavoring to escape the danger incident thereto. *Rea v. Sioux City*, 127–615, 103 N. W. 949.

One is not guilty of contributory negligence as a matter of law in passing over a defective sidewalk rather than taking another way where the defect is not known to him. *Considine v. Dubuque*, 126–283, 102 N. W. 102.

The question of contributory negligence of a person injured by a defect in a street is usually one for the jury and if it appears by the uncontradicted testimony of the plaintiff that he did not know of an excavation in the street until he fell into it, he is not to be held guilty of contributory negligence in attempting to use the street, although there was another safe and convenient way. *Bussell v. Ft. Dodge*, 126–308, 101 N. W. 1126.

To constitute contributory negligence in using a sidewalk known to be defective there must be not only knowledge of the defect, but also an appreciation of the danger reasonably to be apprehended therefrom, and if the person using the defective walk is justified in believing and does believe that by the exercise of ordinary care he can pass over it in safety and he does in fact exercise such care he cannot be charged with negligence. *Evans v. Iowa City*, 125–202, 100 N. W. 1112.

If a defect in the walk known to the person using it does not render it so dangerous that he is necessarily guilty of contributory negligence in attempting to pass it in the exercise of due care, it is for the jury to say whether there is under the circumstances such contributory negligence as to defeat recovery for an injury resulting from such defect. *Brown v. Chillicothe*, 122–640, 98 N. W. 502.

The mere fact that a walk is in an unsafe condition will not preclude its use where there is no other convenient way for the passer to reach his destination. *Houseman v. Belle Plaine*, 124–510, 100 N. W. 343.

Knowledge of defects in a street is not alone sufficient to bar recovery for injuries received by reason thereof. It must also be shown that plaintiff knew it was imprudent to try to pass over the same and that there was another way comparatively safe which he might have taken to reach his destination. *Hollingworth v. Ft. Dodge*, 125–627, 101 N. W. 455.

One who steps into an opening in the street of which he has knowledge is guilty of contributory negligence, although for the moment he may have forgotten the existence of such opening. *Bender v. Minden*, 124–685, 100 N. W. 352.

If the walk is not so openly and visibly dangerous that no prudent person would attempt to make use of it, the mere fact of using it does not constitute negligence

per se. Crandall v. Dubuque, 136–663, 112 N. W. 555.

Though a sidewalk is defective a traveler has the right to pass over it and if he does so it is usually for the jury to say whether in doing so he used due care. *Cook v. Hedrick*, 135–23, 112 N. W. 157.

The person injured is competent to testify as to want of knowledge of the defective condition of the walk. *Patton v. Sanborn*, 133–650, 110 N. W. 1032.

It is not negligence for one driving along a traveled street to cross from the right to the left side to avoid a rapidly approaching hosecart. *Streeter v. Marshalltown*, 123–449, 99 N. W. 114.

It is not contributory negligence on the part of one crossing the street to attempt to reach the sidewalk at a place other than a street crossing. *Rea v. Sioux City*, 127–615, 103 N. W. 949.

It is not negligence to cross a street in a diagonal direction and step upon a sidewalk at a place which is not a street crossing. *Bell v. Clarion*, 113–126, 84 N. W. 962; *Bell v. Clarion*, 115–357, 88 N. W. 824.

It is not contributory negligence to walk in the driveway. *Finnegan v. Sioux City*, 112–232, 83 N. W. 907.

A blind person making use of the streets or sidewalks of a city is not required to use a higher degree of care and caution than a person having full possession of his sense of sight, but the fact of his blindness is to be taken into account in determining whether he did or did not act with the care which a reasonably prudent man would ordinarily exercise when burdened by such infirmity. *Hill v. Glenwood*, 124–479, 100 N. W. 522.

Failure to anticipate an unusual danger in passing along a sidewalk does not constitute contributory negligence. *Kaiser v. Hahn*, 126–561, 102 N. W. 504.

One who relies upon defective sight as an excuse for failing to observe an obstruction from which an injury has resulted must show corresponding caution on account of such defective sight. *Ibid.*

The fact that an approach to the street, causing the injury to the plaintiff complained of, was similar to the approaches used generally in the city at the time of and long prior to the accident is admissible on the question whether the person injured had knowledge or should have had knowledge of the improper construction so as to be charged with contributory negligence in using such approach. *Keim v. Ft. Dodge*, 126–27, 101 N. W. 443.

So also it is competent to show that the corner at which the injury was received was not well lighted for the purpose of indicating a duty on the part of the plaintiff to exercise greater care. *Ibid.*

One passing along a sidewalk who steps over a foundation wall in process of construction adjoining the walk and falls into the excavation for the proposed building while trying to keep upon the walk, being misled by the darkness and the presence of obstructions, is not a trespasser in such sense that he cannot recover for injuries received on account of the obstructions in the walk which he is attempting to follow. *Dodge v. Lamont*, 130–721, 107 N. W. 948.

An instruction that a person in passing along a public street is required to use more caution and be more watchful when it is dark than in the daytime may be proper, but will not be necessary under all circumstances. *Baxter v. Cedar Rapids*, 103–599, 72 N. W. 790.

Under the facts of a particular case, held that the person injured by defect in a sidewalk had not been guilty of contributory negligence in failing to discover the defect. *Ibid.*

While the burden is on the plaintiff to negative want of due care, it is for the defendant to establish plaintiff's subsequent negligence respecting the consequences of the injury. *Wissler v. Atlantic*, 123–11, 98 N. W. 131.

Streets and sidewalks are for the use of the public and the law requires cities and towns to keep them in a reasonable condition of repair. It is not therefore the duty of the public or individual members thereof to critically inspect such streets and sidewalks before using the same. *Robertson v. City of Waukon*, 138–25, 115 N. W. 482.

Mere knowledge of the unsafe condition of an unbarricaded defective street or walk is not in itself sufficient to establish contributory negligence on the part of one who has the right to use such walk. *Scurlock v. Boone*, 142–684, 121 N. W. 369.

A person using a defective walk is not guilty of contributory negligence if he believes, and as an ordinarily prudent man he would believe, that he could use it with safety. *Jackson v. Grinnell*, 144–232, 122 N. W. 911.

The municipality is under some measure of active duty in the matter of inspection and of taking care to know that the streets do not become sources of danger to the traveling public and the traveler has the right to assume that the municipality has done its duty in this respect. *Platts v. Ottumwa*, 148–636, 127 N. W. 990.

It is not necessary that one using a sidewalk which is not in good condition shall go entirely out of his way in order to avoid the imputation of contributory negligence as a matter of law. *Fuller v. Williamsburg*, 152–424, 132 N. W. 819.

A traveler who knows, or as an ordinarily cautious person ought to know, that it is imprudent to pass over a defective sidewalk, and does so, although he might have

taken another course equally convenient, is guilty of such negligence as will defeat recovery for damages in the event of injury. *Gibson v. Denison*, 153–320, 133 N. W. 712.

SEC. 754. Regulation of conveyances and transportation.

The provision authorizing cities to regulate, license and tax vehicles kept for hire is not limited to those let out or rented, but includes conveyances used by the owner for conveying persons or property for hire. *Des Moines v. Bolton*, 128–108, 102 N. W. 1045.

The city may graduate the scale of fees and exempt from license all vehicles, the ordinary use of which will not materially wear its streets or destroy the free use thereof. *Ibid.*

SEC. 756. Lighting.

The power being given to provide lights for streets necessarily implies power to purchase the light of others and enter into a contract for such service. *Davenport Gas & Elec. Co. v. Davenport*, 124–22, 98 N. W. 892.

The city may contract for a period of years for the lighting of its streets, but it does not necessarily have power to fix the rate of compensation for a long period in advance. *Ibid.*

Such a contract may be exclusive. *Ibid.*

The exercise of the power given to a city or town to light its streets rests in the discretion of the corporation and does not give rise to an absolute obligation either as to extent or the method of lighting to be adopted. *Blain v. Montezuma*, 150–141, 129 N. W. 808.

SEC. 757. Care, construction and repair of bridges.

A bridge is a part of the street in which it is situated. *Sachs v. Sioux City*, 109–224, 80 N. W. 336.

A city is liable for negligence in failing to keep in repair bridges and culverts within the city limits which are not of such size as to constitute county bridges. *Freeman v. Independence*, 123–1, 97 N. W. 1083.

SEC. 758. Bridge fund.

Cities of the first class are removed from the general provision of code § 422 giving the board of supervisors power to provide for the erection of bridges in the county. *Slutts v. Dana*, 138–244, 115 N. W. 1115.

Property within the limits of a special charter city is not subject to a bridge tax levied by the board of supervisors of the county. *Keokuk v. Kennedy*, 156–680, 137 N. W. 914.

SEC. 758-a. Bridge tax—levy authorized. When the whole or any part of the cost of building or reconstruction of any bridge by a city of the first class shall be ordered paid from the city bridge fund, to be levied upon all the property within any such city, it shall have the power, after the completion of the work, by ordinance or resolution, to levy at any one time the whole or any part of the cost of such improvement upon all of the taxable property within such city and determine the whole percentage of tax necessary to pay the same, and the percentage to be paid each year, not exceeding two thirds of the maximum annual limit of the tax such city may levy for a bridge fund, and the number of years, not exceeding twenty-five, given for the maturity of each installment thereof, but no part of such costs shall be levied against property owned by the city, county, state or the United States. Certificates of such levy shall be filed with the auditor of the county or counties in which said city is located, setting forth the amount or percentage and maturity of said tax, or each installment thereof, upon the assessed valuation of all the property in said city, certified as correct by the city clerk or auditor, and thereupon said tax shall be placed upon the tax lists of the proper county or counties. [32 G. A., ch. 36, § 1.]

Where the city council levied the tax and issued certificates therefor prior to the completion of the bridge, held that after such completion a taxpayer could

not enjoin the collection of the tax. *Empire State Surety Co. v. Des Moines*, 152–531, 131 N. W. 870, 132 N. W. 837.

Even though such certificates might be invalid when issued, the holders of such certificates would be entitled to the payment contemplated thereby when the bridge should be so completed as to authorize the issuance of new certificates of the same character. *Ibid.*

In such case, a surety company will be in no situation to complain of the issuance of the certificates. *Ibid.*

SEC. **758-b. Bridge certificates or bonds.** Any such city may anticipate the collection of taxes authorized to be levied for a city bridge fund and for that purpose may issue bridge certificates or bonds with interest coupons, and the provisions of chapter twelve, title five, of the code shall be operative as to such certificates, bonds and coupons in so far as they may be applicable. [32 G. A., ch. 36, § 2.]

SEC. **758-c. How paid.** Said certificates, bonds and interest thereon shall be secured by said assessments and levies and shall be payable only out of the funds derived from such levies and pledged to the payment of the same, and no certificates or bonds shall be issued in excess of taxes authorized and levied to secure the payment of the same. It shall be the duty of such city to collect such funds, with interest thereon, and to hold the same separate and apart in trust for the payment of said certificates, bonds and interest and to apply the proceeds of said funds pledged for that purpose to the payment of said certificates, bonds and interest. [32 G. A., ch. 36, § 3.]

SEC. **758-d. Bonds for construction of bridges.** That cities of the first class are hereby authorized to contract indebtedness and to issue bonds for the purpose of constructing bridges. Such bonds shall be payable in not exceeding twenty annual installments and bear interest at not exceeding five per centum per annum, and shall be made payable at such place and be of such form as the city council shall by ordinance designate. But no city shall become indebted in excess of five per centum of the actual value of the taxable property of said city as shown by the last preceding assessment roll. [34 G. A., ch. 39, § 1.]

SEC. **758-e. Additional to other powers.** This act shall be construed as granting additional power without limiting the power already existing in cities of the first class. [34 G. A., ch. 39, § 2.]

SEC. **759. Aiding county bridge.**

Under these provisions aid may be given to a toll bridge. *Pritchard v. Magoun*, 109–364, 80 N. W. 512.

SEC. **760. Question submitted.**

Prior to the adoption of the present code it was not required that the ballots at a special election, such as here contemplated, should be in accordance with the Australian ballot law. *Pritchard v. Magoun*, 109–364, 80 N. W. 512.

Also held that notices of such election posted in hotels were posted in public places, as required by the statute. *Ibid.*

SEC. **766-a. Additional tax.** That any city in this state which has voted aid to any company for the construction of a highway or combination bridge across any navigable boundary river of this state, a condition of which vote, or the granting or acceptance of such aid, was that the city should have the right to purchase such bridge from the company so aided, its successors or assigns, may, at any time after such taxes voted in aid are collected, vote an additional tax of not exceeding five per centum of the assessed value of the taxable property of such city for the purpose of securing the funds necessary to enable it to make such purchase. Such taxes shall be payable in such annual installments not less than ten as the electors may determine. [29 G. A., ch. 42, § 1.]

SEC. 766-b. **Question submitted.** The question of whether or not such additional taxes shall be voted shall be submitted to the electors of such city before the city elects to make such purchase and the submission thereof shall be governed in all respects by sections seven hundred sixty, seven hundred sixty-one, seven hundred sixty-two, seven hundred sixty-three and seven hundred sixty-four of the code so far as the same are applicable. [29 G. A., ch. 42, § 2.]

SEC. 766-c. **Bonds or warrants—tolls.** After such taxes are voted the city may issue its bonds, warrants or other certificates drawing such interest not exceeding six per cent. per annum as the city council may determine, payable from such taxes as they are collected, and from no other source, and pledging them for their payment. Such taxes shall be used for no other purpose and such bonds, warrants or certificates shall not be sold for less than their par or face value with accrued interest. The city council shall fix the rate of tolls or charges for passing over the bridge, and such tolls shall be large enough to pay the interest upon the bonds, warrants or certificates issued for its purchase together with the expense of maintaining and operating it. [29 G. A., ch. 42, § 3.]

SEC. 766-d. **Vote of tax in cities after annexation.** In any case where aid has been extended and bridges erected in two separate cities, and subsequent thereto, one of such cities has been annexed to the other, the electors residing in the territory which comprises either of the separate cities before annexation, may vote taxes upon the property in such territory for the purchase of such bridge, and the proceedings in such case shall be the same as in the preceding sections of this act provided, except that the petition to the city council shall be signed by a majority of the resident freehold taxpayers of the territory in which the vote is to be had, and the taxes, when voted and properly certified, shall be levied only upon the property in such territory. [29 G. A., ch. 42, § 4.]

SEC. 767. **Railway tracks—street railways.**

An ordinary use of the street by a railway operated by trolley wires carried upon poles set at the side of the street is not a new or additional burden upon the public easement in a street entitling the abutting property owner to additional damages even though he is the owner of the fee. *Snyder v. Ft. Madison Street R. Co.*, 105–284, 75 N. W. 179.

A railroad company may acquire a right of way over private property and across streets of a city with its tracks in the occupation of such right of way without securing the consent of property owners, if in crossing the street it does not construct its line in front of abutting property. *Morgan v. Des Moines Union R. Co.*, 113–561, 85 N. W. 902.

The owner of abutting property upon a street may recover damages against a railroad company for obstructing the street by an embankment, although the track is not laid on the street in front of such abutting property owner's premises. *Dairy v. Iowa Cent. R. Co.*, 113–716, 84 N. W. 688.

The railroad track in the street for which damage must be paid to abutting property owners includes cuts, fills and other structures constituting the roadbed. *Middleton v. Mason City & Ft. Dodge R. Co.*, 127–433, 103 N. W. 364.

A city may condemn land for a public landing and grant a railway company a right of way over the same. *Diamond Jo Line Steamers v. Davenport*, 114–432, 87 N. W. 399.

Where land is dedicated to a city for public highway and other public purposes, the city may permit its use by a railway for the purpose of facilitating the business of such railway. *Burlington Gas Light Co. v. Burlington, C. R. & N. R. Co.*, 165 U. S. 370.

The franchise to lay its tracks on the streets of a city having been granted to a street railway company, permission to lay such tracks on a street not already occupied may be granted by the city council by resolution. *Thurston v. Huston*, 123–157, 98 N. W. 637.

The right of a street railway under its franchise to occupy such streets as the council in the reasonable exercise of its discretion may designate is not inconsistent with the existence of another street railway system in the same city operating under another franchise. *Ibid.*

It is the duty of a street railway company to so construct and operate its rail-

way as not to interfere unnecessarily with the right of abutting property owners to use and enjoy their property and it may be enjoined from maintaining a trolley pole in front of a dwelling house of plaintiff without necessity therefor in a manner to annoy him and injure and depreciate the value of his property. *Snyder v. Ft. Madison Street R. Co.*, 105–284, 75 N. W. 179.

While a city has authority to grant the use of the streets for railway purposes, and the power so granted carries with it the implied power to permit temporary and not unreasonable use thereof for standing trains, yet under this power the city may not entirely obstruct the public use of a street, nor permit such use as shall constitute a private nuisance, and a court of equity has jurisdiction to restrain the continuance of a public or private nuisance thus created. *Gilcrest Co. v. Des Moines*, 128–49, 102 N. W. 831.

The statutory provisions authorizing the construction of street railways over the streets of a city leaves in the general public the right of unrestricted use of the entire street from curb to curb, subject to the right of the company to the proper use of its track. *Snouffer v. Cedar Rapids & M. C. R. Co.*, 118–287, 92 N. W. 79.

If, in reliance upon a valid ordinance, a street railway company, in good faith and without notice that the authority to lay its tracks in the streets of a city is to be modified or withdrawn, proceeds to act in reliance upon such authority, the city cannot afterwards require the tracks to be removed, except upon the principle of fair indemnity. But the right of the railway company in the streets is subject to the general control of the city as to their reasonable use and improvement and this power of the city cannot be abrogated by ordinance or relinquished by control. *Ibid.*

A franchise granted to a street car company which was subsequently made exclusive for the term of thirty years, held in the absence of statutory or other limitation to be a perpetual franchise having been recognized by the city after the expiration of the thirty years' term, and therefore a contract which the city could not impair by ordering the company to remove its tracks from the streets. *Des Moines City R. Co. v. Des Moines*, 151 Fed. 854.

Where an electric street railway company has, under a franchise, constructed its track and erected the necessary trolley line of poles and wires, it acquires a right to maintain and use such track and line as against a citizen who desires to make an unusual and extraordinary use of the street in the moving of houses or other structures over it so as to destroy the trolley line and interrupt for a considerable time the operation of cars by means thereof. *Ft. Madison St. R. Co. v. Hughes*, 137–122, 114 N. W. 10.

Although a railroad track has been established in a street prior to the adoption of this section of the code and without compensation to the abutting property owners, such owners may object to the construction of a side track in the street without compensation being made. *Baker v. Chicago, R. I. & P. R. Co.*, 154–228, 134 N. W. 587.

The construction of street railways,—that is, of railways laid upon and along the streets and highways of a city for purposes of local traffic and travel—is subject to the authority and control of the municipality in which they operate. *Lewis v. Omaha & C. B. S. R. Co.*, 157– —, 138 N. W. 1092.

If a corporation organized primarily to own and operate a street railway assumes in its articles the further power to own and operate other railways and reserves to itself the right to designate the power by which it shall be operated, it is a railway corporation in the broad sense of the term and may exercise the discretion which such corporations generally possess in choosing the motive power to be used in operating its cars. *Ibid.*

Under the provisions of § 464 of the code of '73, the city had no power to grant a perpetual franchise for the maintenance of a street railway over its streets and it could not estop itself by its conduct from insisting that such a franchise was invalid. *State v. Des Moines City R. Co.*, 140 N. W. 437.

A corporation may, no doubt, operate a street railway upon the streets of a city under an ordinance or resolution permitting it so to do without express legislative authority. But such operation and occupancy would be nothing more than a mere license terminable at pleasure. *Ibid.*

SEC. **768. Street car vestibules.** On and after November first, nineteen hundred and seven, every person, partnership, company or corporation owning or operating a street railway in this state shall, from November first of each year to April first following, provide all cars, except trailers, used for the transportation of passengers, with vestibules inclosing the front platform on[1] all sides, for the protection of employes operating such cars. Any violation of this section shall be punished by a fine of not less than fifty dollars nor more than one hundred dollars for each day said cars are operated in violation hereof. [32 G. A., ch. 37.]

['The words "at least" appear in brackets between the words "on" and "all" in the 1907 supplement, the brackets calling attention to manifest surplusage. Being meaningless the words are dropped in this supplement. EDITOR.]

[The above section is made applicable to special charter cities by § 958. EDITOR.]

SEC. **768-a. Transparent shields.** That on and after the first day of October, nineteen hundred and nine, every person, partnership or corporation owning or operating street railways in this state shall provide and maintain upon all motor cars, except trailers, used for the transportation of passengers, not now by law required to carry an enclosed vestibule, a transparent shield extending the full width of each car and constructed in such manner as will afford protection to the motorman and passengers on the platform of such motor car from inclement weather. [33 G. A., ch. 51, § 1.]

SEC. **768-b. Penalty.** Failure to comply with the terms of this act shall be deemed a misdemeanor, and shall be punished by a fine of not less than twenty-five dollars, and each day during which any car shall be operated in violation of this act shall constitute a separate offense. [33 G. A., ch. 51, § 2.]

SEC. **768-c. Power brakes—sanding equipment.** Every person, partnership, company or corporation, owning or operating a street railway in this state shall equip every double truck passenger car of thirty-seven feet and more in length over all, or weighing thirty-five thousand pounds or more, purchased, built or rebuilt hereafter, with power brakes other than hand, capable of bringing such car to a stop within a reasonable distance, together with equipment for sanding the rails of any street railway, which brake and sand equipment shall be controlled and operated by the motorman on said car. [33 G. A., ch. 52, § 1.]

[See also § 768-e. EDITOR.]

SEC. **768-d. Penalty.** Any violation of this section shall be punished by a fine of not less than fifty dollars nor more than one hundred dollars for each day every such car is operated in violation hereof. [33 G. A., ch. 52, § 2.]

SEC. **768-e. Power brakes—sanding equipment—when effective.** Every person, partnership, company or corporation owning or operating a street railway in this state shall equip all of its double truck passenger cars with power brakes other than hand, capable of bringing such cars to a stop within a reasonable distance, together with equipment for sanding the rails, which brake and sand equipment shall be so constructed as to be operated by the motorman on the car operated by him; provided, however, that no street railway shall be required to equip more than one half of such cars now in operation and not so equipped before January first, nineteen hundred twelve, and all of such cars shall be equipped before January first, nineteen hundred thirteen. [34 G. A., ch. 38, § 1.]

[See also § 768-c. EDITOR.]

SEC. **768-f. Single truck cars.** All single truck passenger cars over thirty-two feet in length hereafter installed in service upon street railways shall be equipped and operated with the appliances provided for double truck cars in section one of this act. [34 G. A., ch. 38, § 2.]

SEC. **768-g. Penalty.** Any person failing to comply with the terms of this act shall be deemed guilty of a misdemeanor and upon conviction thereof, shall be punished by a fine of not more than twenty-five dollars and each day's operation of any car in violation of the terms of this act shall constitute a separate offense. [34 G. A., ch. 38, § 3.]

SEC. 769. **Railway crossings—speed of trains.**

This section expressly authorizes cities of the class specified to compel railroad companies to erect and maintain gates upon public streets at railway crossings. *Council Bluffs v. Illinois Cent. R. Co.*, 157– —, 138 N. W. 891.

SEC. 771. **Assessment of damages.** That section seven hundred seventy-one of the code supplement [1902] is hereby repealed and the following enacted in lieu thereof:

"When a viaduct shall be by ordinance declared necessary for the safety and protection of the public, the council shall provide for appraising, assessing and determining the damages which may be caused to any property by reason of the construction of the same and its approaches. The proceedings for such purpose shall be the same as are provided in case of taking private property for works of internal improvement, and the damages assessed shall be paid by the city out of the general bridge fund, or in cities having a population of twelve thousand or over from any other fund or funds legally available therefor." [32 G. A., ch. 38, § 1; 29 G. A., ch. 43, § 1; 22 G. A., ch. 32, § 2.]

[The above section is made applicable to special charter cities by § 958. EDITOR.]

The costs of the assessment and those occasioned by the appeal include reasonable attorney's fees as provided in code § 2007. *Globe Machinery & Supply Co. v. Des Moines*, 156–267, 136 N. W. 518.

And these costs are to be paid out of the fund designated in code supp. § 771-a. *Ibid.*

In a condemnation proceeding for the assessment of damages to property on account of the construction of a viaduct in the street, the supposed benefits to the abutting property may be considered as offsetting damages, but not to such extent as to entirely deprive the property owner or lessee of all damages. *Western Newspaper Union v. Des Moines*, 140 N. W. 367.

In such case, the shutting off of light or air may be considered as an element of damage to a leasehold interest. *Ibid.*

SEC. 771-a. **Viaduct fund.** That section one of chapter twenty-nine of the acts of the thirtieth general assembly is hereby repealed and the following enacted in lieu thereof:

"In cities having a population of twelve thousand or over, where a viaduct is required to be constructed, and the plans therefor have been approved, and there are no available funds in the general bridge fund, or any fund or funds of said city which may be legally used for the payment of such damages, such city may levy an annual tax not exceeding two mills on the dollar for the purpose of creating a fund to be known as a viaduct fund, for the payment of damages caused to property by reason of the construction of such viaduct and approaches thereto." [32 G. A., ch. 38, § 2.]

SEC. 773. **Apportionment of cost—use of—compensation for—repairs.** When two or more railroad companies own or operate separate lines of track to be crossed by a viaduct, the proportion thereof, and the approaches thereto to be constructed by each, or the cost to be borne by each, shall be determined by the council. The council shall fix a time and place where it will consider such matters and any objections that may be made to the construction of such viaduct and the approaches thereto. Not less than twenty days' written notice of such hearing shall be given to the company or companies owning or operating the track or tracks over or under which it is proposed to construct such viaduct. Said notice may be served in the same manner and upon the same persons or officers as in the case of an original notice. Such cities shall have power to regulate the use of such viaducts and to authorize or forbid the use thereof by street railway companies and to require the payment of compensation for such use. After the completion thereof, any revenue derived therefrom by the crossing thereon of street railway lines shall constitute a special fund, and shall

be applied in making repairs to such viaduct. One half of all ordinary repairs to such viaduct or its approaches shall be paid out of such fund, or be borne by the city, and the remaining half by the railroad company; and if the track of more than one company is crossed, the costs of such repairs shall be borne by such companies in the same proportion as was the original cost of construction. [29 G. A., ch. 43, § 2; 22 G. A., ch. 32, § 4.]

[The above section is made applicable to special charter cities by § 958. EDITOR.]

SEC. 774. **Refusal to comply.** If any railroad company neglects or refuses, for more than thirty days after such notice as may be prescribed by ordinance, to comply with the requirements of any ordinance passed under the provisions of this chapter, the city may enforce the construction, maintenance or repair of such viaduct and approaches by proceedings in mandamus and the court shall require the issues to be made up at the first term to which such action is brought and shall give the same precedence over other civil business. Refusals to comply with, or violations of, the orders of the court in such proceedings may be punished as contempts, by fine and imprisonment as provided in section twenty-one hundred nineteen of the code; or the city may construct or repair the viaduct or approaches, or any portion thereof, which such railroad company was required to construct or maintain, and recover the cost thereof from such company. [29 G. A., ch. 43, § 3; 22 G. A., ch. 32, § 6.]

[The above section is made applicable to special charter cities by § 958. EDITOR.]

SEC. 776. **Granting franchise—question submitted.** No franchise shall be granted, renewed or extended by any city or town for the use of its streets, highways, avenues, alleys or public places, for any of the purposes named in the preceding section, unless a majority of the legal electors voting thereon vote in favor of the same at a general, city or special election. The council may order the question of granting, renewal or extension of any such franchise submitted to a vote at a general or city election, or at one specially called for that purpose; or the mayor shall submit said question to such vote upon the petition of twenty-five property owners of each ward in a city, or fifty property owners in any incorporated town. Notice of such election shall be given in two newspapers published in said city or town, if there are two, if not, then in one, once each week for at least four consecutive weeks. But if no such newspaper is published within the limits of the corporation, then such notice may be given by posting thereof in three public places within the limits of said corporation, two of which places shall be the post office and the mayor's office of such city or town, and by publication for four consecutive weeks in a newspaper of general circulation in the county. The clerk shall prepare the ballots, and the proposition shall be submitted as provided for in the chapter on elections. The party applying for the franchise, or for a renewal or extension thereof, shall pay all expenses incurred in holding the election. [33 G. A., ch. 44, § 3.] [32 G. A., ch. 39.]

[The above section is made applicable to interurban railways by § 2033-d. EDITOR.]

The franchise to lay its tracks on the streets of a city having been granted to a street railway company, permission to lay such tracks on a street not already occupied may be granted by the city council by resolution. *Thurston v. Huston*, 123–157, 98 N. W. 637.

The provisions of this and the preceding section constitute limitations upon the right of a corporation to construct a telegraph or telephone line along the public highways of the state as provided in code § 2158. *Farmers' Telephone Co. v. Washta*, 157– —, 133 N. W. 361.

Whether the granting of such a franchise may be by resolution or must be by formal ordinance, it can be validly enacted only by a vote in a meeting of the

council upon which vote the yeas and nays must be called and recorded as required by code § 683. *Ibid.*

These provisions constitute an express limitation on the power of the city council as to granting the franchises contemplated. *State v. Des Moines City R. Co.*, 140 N. W. 437.

SEC. 777. **Temporary sidewalks.** They shall have power to provide for the laying, relaying and repairing of temporary sidewalks upon any street, avenue, public ground, wharf, landing or market place within the limits of such city or town, at a cost not exceeding forty cents a linear foot, to prescribe a uniform width thereof, and to regulate the grade of the same, and to provide for the assessment of the cost thereof on the propertv in front of which the same shall be laid, in proportion to the special benefits conferred upon the property thereby and not in excess thereof, and the city or town clerk shall certify the amount of such assessment to the county auditor, and it shall be collected the same as other taxes. [28 G. A., ch. 26, § 1; C. '73, § 468.]

[The above section is made applicable to special charter cities by § 958 as well as by § 777-a. EDITOR.]

Where an ordinance provides for ordering the construction of temporary sidewalks at the expense of the abutting property owners upon resolutions of the council, a notice of such order and service of notice of the resolution is necessary before the assessment can be enforced. *Hawley v. Fort Dodge*, 103–573, 72 N. W. 756.

Where no permanent grade is established the council cannot require the construction of a temporary plank sidewalk above the natural surface so as to bring it on a line with improvements on the street. *Hartrick v. Farmington*, 108–31, 78 N. W. 794.

This section confers upon the city some discretionary power other than the establishment of a fixed and uniform grade. *Converse v. Deep River*, 139–732, 117 N. W. 1078.

SEC. 777-a. **Applicable to special charter cities.** The provisions of this act are also made applicable to cities acting under special charters. [28 G. A., ch. 26, § 2.]

[§ 777-a is § 2 of ch. 26 of the acts of the 28 G. A. § 1 of the same chapter amended § 777 of the code, by striking out the word "plank" in the second line of said section, and inserting the clause "in proportion to the special benefits conferred upon the property thereby and not in excess thereof" near the end of said section.]

SEC. 779. **Permanent sidewalks—city clerk to certify assessment —special tax.** They shall have power to provide for the construction, reconstruction and repair of permanent sidewalks upon any street, highway, avenue, public ground, wharf, landing or market place within the limits of such city or town; but the construction of permanent sidewalks shall not be made until the bed of the same shall have been graded so that, when completed, such sidewalks will be at the established grade; and to assess the cost thereof on the lots or parcels of land in front of which the same shall be constructed; and the city clerk shall certify the amount of such assessment to the county auditor, and it shall be collected the same as other taxes. But, in cities having a city collector or treasurer who collects city taxes, the city clerk shall certify the amount of such assessment to such collector or treasurer, and the same shall be collected as other city taxes. Towns shall have the power to make the street improvements provided for in chapter seven of this title, and pay for the same, or any part thereof, out of the general fund, or to assess, levy and collect special taxes for the cost, or any part thereof, against the abutting property, in the manner provided in the said chapter. But unless the owners of a majority of the linear feet of the property fronting on the improvements referred to in this section petition the council therefor, the same shall not be made unless three fourths of

all the members of the council shall by vote order the making thereof. [28 G. A., ch. 27, § 1; 20 G. A., ch. 20, § 1; C. '73, § 466.]

[The above section is made applicable to special charter cities by § 958. EDITOR.]

[See §§ 791-a to 791-i inclusive for further provisions respecting permanent sidewalks. EDITOR.]

In exercising the taxing power the city must pursue the manner pointed out in the statute, and if assessment is made for the reconstruction of a sidewalk and not merely for repair, then it must be based upon petition of the owners of the majority of the frontage. *Farraher v. Keokuk*, 111–310, 82 N. W. 773.

An ordinance is essential to the right of the city to build permanent sidewalks or to require the same to be built. *Gallaher v. Jefferson*, 125–324, 101 N. W. 124.

An ordinance establishing the street grade is also an essential prerequisite to the work of excavating for a sidewalk. *Ibid.*

Where a city has undertaken to avail itself of the provisions of statute as to construction of permanent sidewalks, and has fixed in its general ordinance the mode of procedure, it is limited to the mode prescribed in the ordinance. And if a particular form of notice is specified before the construction of a permanent sidewalk can be required, such notice must be given. *Burget v. Greenfield*, 120–432, 94 N. W. 933.

It is not contemplated that a permanent sidewalk at grade shall be required until the city or town is prepared to bring the street itself to grade and has graded the bed of the sidewalk. *Ibid.*

The council has no authority to establish a wholly artificial grade line and then proceed to compel the construction of permanent sidewalks, not in accordance with this grade, but in accordance with some grade to be fixed upon by the council or its sidewalk committee, with the penalty that if the property owner does not comply with such direction he shall be compelled to construct his walk at the artificial grade, without regard to his own convenience or the public welfare. *Ibid.*

A city council may not only provide for the construction of permanent sidewalks, but, as a necessary incident thereto, for the time, place and manner of such construction, and when the work shall be done by the city, whether the cost thereof shall be paid from general funds or assessed upon abutting lots or parcels of land. But if the ordinance with reference thereto specifies the character of notice to be given to the property owner in case the costs are to be thus assessed, the giving of such notice is an essential prerequisite to the enforcement of the tax against the abutting property. *Zalesky v. Cedar Rapids*, 118–714, 92 N. W. 657.

Under an ordinance requiring that sidewalks shall be built and constructed within thirty days after notice to the owner, an officer of the corporation has no authority to cut down trees for the purpose of preparing for the construction of sidewalks where no notice has been given. *Waterbury v. Morphew*, 146–313, 125 N. W. 205.

While the bringing of the street to grade is not a condition precedent to the adoption of a resolution ordering a permanent sidewalk, it is a condition precedent to the construction of the walk, and if the city fails to bring the street to grade within the time that the property owner might have put in the walk for himself he is not in default for failing to make the improvement. *Bowman v. Waverly*, 155–745, 128 N. W. 950.

This section does not confer upon the city the power to assess the cost of the construction of crosswalks against the lots which are being assessed for a permanent sidewalk. *Kaynor v. Cedar Falls*, 156–161, 135 N. W. 564.

When the surface has been brought to the established grade, the removal of any other earth essential to the proper construction of the sidewalk is merely incidental to the laying of the walk and may be regarded as so connected therewith that it is a part of such construction. *Ibid.*

SEC. 780. Repair of sidewalks.

Repairs without notice can be assessed to abutting property, but not the expense of reconstruction unless the provisions of the preceding section are complied with. *Farraher v. Keokuk*, 111–310, 82 N. W. 773.

SEC. 782. Grades and grading.

Although the specific provision of § 465 of the code of '73 with reference to the power of a city to provide for the grading of a street only by resolution is omitted from this section, nevertheless the rights of holders of property abutting on streets are too important to permit cities and towns to establish and alter the grades of such streets without the certainty and publicity given by the passage of some ordinance or resolution with reference thereto. *Eckert v. Walnut*, 117–629, 91 N. W. 929.

The failure to adopt a resolution before proceeding with the work of grading a street amounts at best to nothing

more than a failure to observe and comply with a matter of form incident to the proceedings to carry into effect a legal right of which the city was already in full enjoyment. No special damages arising out of the failure to adopt a resolution ordering the work done being alleged or proved, an abutting property owner cannot recover damages as against a city for proceeding with the work without such resolution. *Wilber v. Ft. Dodge*, 120–555, 95 N. W. 186.

No remedy exists at common law to recover damages for injury to abutting property caused by bringing streets into conformity with the established grade. Nor is there any such remedy under statute, unless improvements were made with reference to a previously established grade. *Reilly v. Ft. Dodge*, 118–633, 92 N. W. 887.

The fact that no resolution is passed before the grading is done will not entitle an abutting property owner to recover damages against the city. *Ibid.*

An ordinance establishing a street grade is an essential prerequisite to the work of excavating for the construction of a permanent sidewalk. *Gallaher v. Jefferson*, 125–324, 101 N. W. 124.

The establishment of a grade for the center of a street operates also as the establishment of the grade for that portion of the street designed to be occupied by sidewalks and parking. *Ibid.*

The establishment of a grade for a permanent sidewalk is included and implied in the establishment of a street grade. *Ibid.*

The city is liable to an abutting property owner for damage to his property from cutting down a street on which no grade has been established. *Millard v. Webster City*, 113–220, 84 N. W. 1044.

As a general rule a city is not liable for damages occasioned by the mere grading of a street if this is done in a prudent manner, but the city will not be permitted to divert a large quantity of surface water from its natural course in another direction so as to flow on a lot owner's land in destructive quantities through a drain or channel. *Hoffman v. Muscatine*, 113–332, 85 N. W. 17.

Excavation in the street made in grading which allows the collection and standing of water may constitute such wrong on the part of the city as to sustain a judgment for damages. *Howard v. Lamoni*, 124–348, 100 N. W. 62.

The street grade having been properly established, the grade of the curb line is to be fixed with reference to the street grade according to approved methods of construction. *Shelby v. Burlington*, 125–343, 101 N. W. 101.

Where an abutting property owner is damaged by the unlawful grading of a street the city is liable if the grading is done by its authority, and where done by the street commissioner, with knowledge of the city council, and without objection by the council, authority will be presumed. *Brown v. Webster City*, 115–511, 88 N. W. 1070.

A city is liable for damages occasioned to an abutting property owner by cutting down the street in front of his premises except for the purpose of bringing the street to an established grade fixed by valid ordinance. *Markham v. Anamosa*, 122–689, 98 N. W. 493.

But the abutting owner does not acquire title by adverse possession to the land lying between his lot line and the edge of the sidewalk merely by occupancy and assertion of title and cannot therefore recover damages for the mere removal of the dirt between the lot line and the sidewalk. *Ibid.*

The fact that a city excavates the street to an established grade so that abutting property is deprived of its lateral support does not entitle the owner to compensation by way of damages. *Talcott v. Des Moines*, 134–113, 109 N. W. 311.

No formal action of the council is necessary to authorize the bringing of the street to the established grade. *Collins v. Iowa Falls*, 146–305, 125 N. W. 226.

As the city has power to grade and gutter its streets it is not liable to lot owners for damage from surface waters resulting from adoption of defective plans; but it may be liable if it negligently carries out such plans or if without any plans it proceeds in a negligent manner to make embankments or fills without providing for the escape of surface water, resulting in damage to property. *Hume v. Des Moines*, 146–624, 125 N. W. 846.

The property owner is entitled to a perpetual injunction to restrain the city from illegally cutting down a street without the authority of an ordinance fixing a grade; but the decree should not be so broad as to prohibit the city from thereafter exercising its legislative power to fix a grade and improve the street. *Hunter v. Ottumwa*, 150–281, 129 N. W. 961.

SEC. 784. Embankments and fills.

A city may acquire land by purchase or condemnation on which to construct a retaining wall. *Patterson v. Burlington*, 141–291, 119 N. W. 593.

SEC. 785. Change of grade—damages.

The grade of street cannot properly be changed except by an ordinance. *Caldwell v. Nashua*, 122–179, 97 N. W. 1000.

The grade of a street can neither be established nor changed save by ordinance. The city can acquire no rights as against

a property owner by virtue of a change of grade claimed to arise by implication only. *Morton v. Burlington*, 106–50, 75 N. W. 662.

That plaintiff's property was made more difficult of access and that a retaining wall was rendered necessary and that certain shade trees in the street, not obstructing travel, were injured or destroyed, held elements of damage for which recovery could be had under this section. *Richardson v. Webster City*, 111–427, 82 N. W. 920.

Where the work was done by the street commissioner, extending over a period of about six weeks, and the city disposed of some of the dirt taken from the excavation, held that there was sufficient evidence *prima facie* to show that the change was by the authority of the city. *Ibid.*

A witness should not be asked to state how much less in value the premises were worth after the change than before.

Mere adoption of an ordinance changing the grade gives no right of action to a property owner, and if the city proceeds to change the grade to some extent, without making the complete change necessary to conform the street to the established grade, the property owner can only recover damages resulting from such actual change. *Buser v. Cedar Rapids*, 115–683, 87 N. W. 404.

An abutting property owner is not entitled to recover damages until the change of grade is made effectual by change in the physical surface of the street; but his right of damages accrues when such actual change of grade is effected, although he has, between the time the change of grade is ordered and the time it is carried into execution, voluntarily conformed his improvements to the paper grade. *York v. Cedar Rapids*, 130–453, 103 N. W. 790.

Where the physical change of grade is made in pursuance of one general plan of improvement, the damages to be paid to the abutting property owner are indivisible, and the cause of action therefor does not arise until the improvement has been completed. *Foley v. Cedar Rapids*, 133–64, 110 N. W. 158.

One who improves his property with reference to the natural grade of the street, which does not conform to the grade established by ordinance, cannot recover damages occasioned by the act of the city in bringing the street to the established grade. *Farmer v. Cedar Rapids*, 116–322, 89 N. W. 1105.

If the land of the abutting owner is in fact benefited by the change of grade which improves the means of access to his property, that fact may be considered in fixing the amount of damages to be recovered for such change of grade. *Morton v. Burlington*, 106–50, 75 N. W. 662.

If a property owner makes improvements before the grade for a street is established, he cannot recover damages occasioned by the work of bringing the street to the grade as thereafter legally established. *Wilber v. Ft. Dodge*, 120–555, 95 N. W. 186.

The fact that the work of bringing a street to the grade established by city ordinance is begun without the adoption of a resolution ordering the work, does not create a right of action not otherwise existing in favor of a property owner for damages resulting from the bringing of such street to grade. *Ibid.*

But the city may be liable for damages caused by the grading of a street, even though done in accordance with the provisions of ordinance, if thereby the natural drainage is destroyed and no adequate means are provided for the escape of surface water. *Ibid.*

So the city may be liable for injury to abutting property by grading work done in a street, for which no legal grade has been established by ordinance, as required by law. *Ibid.*

To entitle a lot owner to damages for change of grade, the improvements must have been erected in accordance with the previous grade of the street; but it is not essential that such improvements shall have been made at the grade if they have been made with respect to a convenient use of the street, and damages thereto resulting from a change of grade may be recovered, although when made they were in fact below the established grade. *Stevens v. Cedar Rapids*, 128–227, 103 N. W. 363.

The property owner cannot complain of the improvement of the street in accordance with an established street grade, and the council may determine the grade of the curb line with reference to such street grade according to approved methods of street construction. The property owner alone and not a general taxpayer may complain of an improper method of construction. *Shelby v. Burlington*, 125–343, 101 N. W. 101.

The city and the property owner may agree as to the damages to be awarded for change of grade, and a taxpayer has no occasion for complaint in the absence of fraud. *Ibid.*

The measure of damages recoverable in change of grade is the difference in value of the property before the change and as it was just after, so far as such difference is due to the change. In ascertaining such difference the opinions of expert witnesses may be considered and the jury may take into account the cost of putting the property in the same relative condition with respect to the new grade as it was in respect to the old. *Richardson v. Sioux City*, 136–436, 113 N. W. 928.

Damage for injury to trees in the parking between the sidewalk and the traveled portion of the street is not to be allowed

where it appears that the trees were not set out in conformity with the grade which has subsequently been changed. *Ibid.*

The city is liable in damages if it injuriously grades the street in the absence of an ordinance and it is liable in damages if it injuriously makes a change in grade and the damage to the abutting owner cannot be any different in extent or character in the one case from what it is in the other. *Ibid.*

Benefits resulting from a change of grade are to be considered by the jury in connection with the disadvantages thereof. *Meardon v. Iowa City*, 148–12, 126 N. W. 939.

Property is improved according to an established grade whenever it is so improved that it can be comfortably and conveniently used for the purpose to which it is devoted while the street upon which it abuts is maintained at the grade so established. *Ibid.*

By a change or alteration of a street is meant actual physical change in the surface of the street. If the city does work in altering the grade and then ceases for such length of time to make it appear that the work is completed, an abutting property owner is only entitled to recover from the injury because of what is done, but for nothing more. *Ibid.*

The right to recover damages occasioned by the act of the public authorities in altering the grade of a street exists only by reason of some statute providing therefor. *Chiesa v. Des Moines*, 138 N. W. 922.

The term "owner" as used in this section includes the tenant as well as the holder of title. *Ibid.*

Where damages are awarded for change of grade, the measure generally is the difference in the value of the use of the property immediately before and immediately after the change of grade and the resulting benefits may be considered. *Western Newspaper Union v. Des Moines*, 140 N. W. 367.

SEC. 786. Appraisers.

The provisions of this section are not applicable to the assessment of damages for the construction of a viaduct in the street which is covered by code supp. § 771. *Globe Machinery & Supply Co. v. Des Moines*, 156–267, 136 N. W. 518.

SEC. 788. Assessment.

[Attention is called to § 792-a, infra, and note following said section.]

SEC. 791. Sewers.

As an incident to the power expressly given to construct sewers, the city has implied power to borrow money for the purpose of constructing a plant for the disposition of the sewage. *Glucose Sugar Refining Co. v. Marshalltown*, (C. C.) 153 Fed. 620.

In constructing sewers and keeping them in repair, a municipal corporation acts ministerially and is liable to a property owner for a nuisance created by the discharge of the sewer near his premises. *Hines v. Nevada*, 150–620, 130 N. W. 181.

The duty of preventing such a sewer from becoming a source of injury is a continuing one, not to be avoided by shifting the responsibility to landowners who make use of such sewer. *Ibid.*

The right to construct a sewer across the lands of others carries with it the right to enter upon the premises to make repairs and do such work as is necessary to its maintenance in proper condition so as not to constitute a nuisance. *Ibid.*

The city may provide for the construction of a sewer system out of the general funds of the city. *First Nat. Bank v. Emmetsburg*, 157– —, 138 N. W. 451.

SEC. **791-a. Permanent sidewalks—objections.** All objections to the cost of construction of permanent sidewalks, as provided by the code, against the lots or parcels of land in front of which the same are constructed, and all objections to the prior proceedings, on account of errors, irregularities or inequalities, must be made in writing and filed with the city clerk prior to the date fixed for said assessment; and all objections not so made shall be deemed waived, except where fraud is shown. [30 G. A., ch. 30, § 1.]

Objections to the construction of the walk are not to be deemed waived where fraud is shown. *Kaynor v. Cedar Falls*, 156–161, 135 N. W. 564.

SEC. **791-b. Tax—how paid.** If the owner of any lot or parcel of land against which an assessment for permanent sidewalks is made shall, at the time of making said special assessment, promise and agree in writing, indorsed on a certificate, or in a separate agreement, that in consideration

of having the right to pay his assessment in installments, he will not make any objection of illegality or irregularity as to the assessment or levy of such tax upon and against his property, and will pay said assessment, with interest thereon at such rate, not exceeding six per cent. per annum, as shall by ordinance or resolution of the council be prescribed, such tax, so levied against the lot or parcel of land of such owner, shall be payable in seven equal installments, the first of which shall mature and be payable on the date of said assessment and the others, with interest on the whole amount unpaid, annually thereafter, at the same time and in the same manner as the March semiannual payment of ordinary taxes; but where no such promise and agreement in writing shall be made by the owner of any lot or parcel of land, then the whole of said assessment so levied upon and against the property of such owner, shall be assessed and collected as provided for in section seven hundred seventy-nine of the code and amendments thereto. All such taxes, with interest, shall become delinquent on the first day of March next after their maturity and shall bear same rate of interest, with same penalties as ordinary taxes. [30 G. A., ch. 30, § 2.]

SEC. **791-c. Certificates of levy—lien upon property.** A certificate of levy of such special assessment, fixing the number of installments and the time when payable, certified as correct by the city clerk, shall be filed with the auditor of the county, or each of the counties in which the city is situated and thereupon said special assessment, as shown therein, shall be placed on the tax list of the proper county and said taxes and special assessment, with all interest and penalties thereon, shall become and remain a lien upon such lot or parcel of land until the same is paid; and said lien shall have precedence over all other liens, except ordinary taxes. [30 G. A., ch. 30, § 3.]

SEC. **791-d. Interest—rate.** Each installment of any such special assessment shall bear interest from the date of the assessment, not to exceed six per cent. per annum, which shall become due and payable at the March semiannual payment of ordinary taxes. Upon the payment of any installment there shall be computed and collected the installment and interest on the whole assessment remaining unpaid up to the first day of April following. [30 G. A., ch. 30, § 4.]

SEC. **791-e. Payment of assessment, interest, costs and penalties.** The owner of any property against which said special assessment is made and levied shall have the right to pay the same, or the unpaid installments thereof, with all interest up to the time of said payment, with any penalties, and the cost of any proceedings for the sale of the property for such special assessments or installments. [30 G. A., ch. 30, § 5.]

SEC. **791-f. Tax sale.** Property against which a special assessment has been levied for permanent sidewalks may be sold for any sum of principal or interest due and delinquent at any regular or adjourned tax sale, in the same manner, with the same forfeitures, penalties and rights of redemption and certificates and deeds on such sales shall be made in the same manner and with like effect, as in case of sales for the nonpayment of ordinary taxes. [30 G. A., ch. 30, § 6.]

SEC. **791-g. Sidewalk certificates.** The council may provide, by ordinance or resolution, for the issuance of permanent sidewalk certificates in the same manner and to the same effect as street improvement and sewer certificates provided for in chapter eight, title five of the code. [30 G. A., ch. 30, § 7.]

SEC. **791-h. Applicable to special charter cities.** The provisions of this act shall apply to cities under special charter. [30 G. A., ch. 30, § 8.]

SEC. 791-i. **Railroad right of way subject to special assessments.** That the right of way of any railroad company fronting or abutting upon a street, highway, avenue, alley, public ground, wharf, landing or market place within the limits of any city or town shall be subject to special assessments for sidewalks and street improvements authorized to be made under the provisions of chapters six and seven, title five of the code and amendatory acts thereto the same as any land or lot therein, and any special assessment made against any railroad right of way under any of the provisions of said chapters six and seven, title five of the code shall be a debt due personally from the railroad company owning or leasing such right of way, and unless the same is paid by such railroad company as a special assessment it may be collected in the name of the city or town levying such assessment in any court having jurisdiction. [32 G. A., ch. 40, § 1.]

CHAPTER 7.

OF STREET IMPROVEMENTS, SEWERS AND SPECIAL ASSESSMENTS.

SECTION 792. **Assessing cost of improvements—repavement—disposal of waste material.** Cities shall have power to improve any street, highway, avenue or alley by grading, parking, curbing, paving, graveling, macadamizing and guttering the same or any part thereof, and to provide for the making and reconstruction of such street improvements, and to assess the costs on abutting property as provided in this chapter; but the construction of permanent parking, curbing, paving, graveling, macadamizing or guttering shall not be done until after the bed therefor shall have been graded, so that such improvement, when fully completed, will bring the street, highway, avenue or alley up to the established grade: provided that only so much of the cost of the removal of the earth and other material as lies between the subgrade and the established grade shall be assessed to abutting property. And upon the repaving of streets, avenues or alleys they shall have power to dispose of the waste material and salvage from the old pavement under such rules and regulations as the council by resolution may direct, the proceeds derived from the sale of such waste material and salvage to be equitably applied upon the cost of the new improvement. Provided, however, no salvage may be sold hereunder until the owner, or his agent, of abutting property shall have been given ten days' notice in writing requiring him to elect whether he himself desires such salvage, which notice shall be personally served on the owner or his agent, or, if neither be found, by posting in a conspicuous place on the abutting property. The election, if made, shall be in writing and filed with the city clerk. Any owner electing to take his salvage shall not be entitled to a pro rata distribution derived from the proceeds of sale of any salvage hereunder. [35 G. A., ch. 77, § 1.] [25 G. A., ch. 7, § 20; 23 G. A., ch. 9, § 1; 22 G. A., ch. 13, § 1; 22 G. A., ch. 16, § 1; 21 G. A., ch. 168, § 1; 20 G. A., ch. 20, § 1; C. '73, §§ 466, 527; R. § 1095.]

The term "paved" as applied to streets, avenues and highways refers to the laying of some hard substance upon the earth so as to make a finished surface for travel, and does not apply to the reflooring of a bridge. *Cedar Rapids v. Cedar Rapids & Marion City R. Co.*, 108–406, 79 N. W. 125.

While permanent paving is not to be done until after the bed of the street shall have been brought so near to the grade as established by ordinance as that paving when fully completed shall bring the street fully up to the established grade, and the cost of grading is not to be assessed as

part of the improvement, yet if the grade is established at such time as that the improvement may be made with reference thereto it is sufficient. *Allen v. Davenport*, 107–90, 77 N. W. 532.

The city has the power to make permanent improvements only where they are constructed upon the established grade. Otherwise no assessment for such improvements can be made on abutting property. *Hubbell v. Bennett*, 130–66, 106 N. W. 375.

The right of the municipality to levy special assessments depends on statutory enactment and has no existence unless there be a valid statute conferring it. General authority to levy taxes for municipal purposes is not sufficient to confer the power, and the statute which does confer it is to be strictly construed in favor of the person against whom the assessment is levied. When express power is given, however, substantial compliance with the statute is all that is required. *Chicago, R. I. & P. R. Co. v. Ottumwa*, 112–300, 83 N. W. 1074.

The whole theory of special assessments is based on the doctrine that the property against which they are levied derives some special benefit from the improvement. *Ibid.*

A mere easement is not a lot, nor a parcel of land, within the terms of this section, and therefore held that a railroad was not subject to special assessment for improvement of a street abutting its right of way. It would be otherwise as to property of the company used for warehouses, depots, or other like purposes. *Ibid.*

Where the validity of the assessment is conceded to depend upon a valid ordinance or resolution, the invalidity of the ordinance or resolution on account of irregularity in the method of adoption in an assential particular will defeat the assessment. *Cook v. Independence*, 133–582, 110 N. W. 1029.

The statutory provisions as to the procedure in making special assessments are sufficiently definite without the aid of an ordinance. *Stutsman v. Burlington*, 127–563, 103 N. W. 800.

The method of making the special assessments authorized in this section being specifically pointed out in subsequent sections, no ordinance is necessary to enable the city to act in the exercise of that power. All that is essential is that the city take the steps provided by the statute. *Martin v. Oskaloosa*, 126–680, 102 N. W. 529.

Under prior statutes it has been held that a special assessment cannot be enforced against lots which do not abut upon the improvement. *Smith v. Des Moines*, 106–590, 76 N. W. 836.

A provision requiring the city council to ascertain the entire cost of the improvement and what portion may be assessable on adjacent property, and to assess such portion as provided by law or ordinance, does not violate the fourteenth amendment to the federal constitution. *Burlington Sav. Bank v. Clinton*, 106 Fed. 269.

A conveyance which is but an artifice, and not effectual to transfer title, will not relieve the property owner from liability for special assessments. *Ransom v. Burlington*, 111–77, 82 N. W. 427.

An assessment certificate becomes affected in the hands of a holder with the terms of the law and ordinances under which it is issued, and also with any agreement of the property owner made in pursuance of such ordinances, fixing the time of payment of the assessments. *Talcott v. Noel*, 107–470, 78 N. W. 39.

A city may by contract render itself liable on implied guaranty for the costs of an improvement in front of property not subject to the assessment, or which is of such value that the lien of the tax thereon cannot be successfully enforced. *Ottumwa Brick & Const. Co. v. Ainley*, 109–386, 80 N. W. 510.

And where the city by reason of its own fault issues certificates for such costs which are invalid, it is liable to the contractor for the amount thereof. *Ft. Dodge Electric L. & P. Co. v. Ft. Dodge*, 115–568, 89 N. W. 7.

The expense of paving in front of a courthouse square may be assessed against the county. *Edwards & Walsh Const. Co. v. Jasper County*, 117–365, 90 N. W. 1006.

Under prior statutes authorizing collection of the assessment by equitable proceedings, held that the city might proceed in equity although the taxes had been certified to the county treasurer and the necessary steps had been taken for the sale of the property for the tax. *Smith v. Des Moines*, 106–590, 76 N. W. 836.

Where paving and the curbing are provided for in separate proceedings, it is not objectionable to levy the curbing tax before the paving is completed. *Higman v. Sioux City*, 129–291, 105 N. W. 524.

In a proposal for bids for macadamizing a street the expense of grading should not be included except in so far as grading is necessary merely to prepare the street for the improvement, and an assessment for the expense of macadamizing, which under the contract included the bringing of the street to grade, is void. *Gallaher v. Garland*, 126–206, 101 N. W. 867.

Where the vendor in a contract to convey had subsequently been assessed for street improvements which it was presumed had materially increased the value of his property, held that the contract to convey could not be specifically enforced as against him, and that in the action for specific enforcement the validity of the assessment which he had not contested but to which he had waived objection, could not be inquired into. *King v. Raab*, 123–632, 99 N. W. 306.

Where a reassessment is proper the city council may no doubt be compelled to make it by proceeding by mandamus, but no such remedy is available to enforce an assessment of benefits where the contractor has not complied with his contract, and no assessment as provided by statute can therefore be made. *Crawford v. Mason*, 123–301, 98 N. W. 795.

The fact that street improvements have been paid for out of the general fund to which an abutting property owner has contributed, does not preclude the adoption of the plan of special assessments as to further improvements. *Shelby v. Burlington*, 125–343, 101 N. W. 101.

A city may provide for parking the center of a public street and may require an abutting property owner to pay for the expense of a curb along such park. *Downing v. Des Moines*, 124–289, 99 N. W. 1066.

Where power is given a city to provide for improvement of the streets it is ordinarily within the discretion of the council to determine when and where the work shall be done and to provide the plan thereof. *Ibid.*

It is not for the court to say whether the determination of a city to grade any particular street is reasonable or unreasonable, but it does have the power to say that the city must take reasonable care to do the work in a manner to avoid unnecessary injury to shade trees growing in front of a residence lot which do not obstruct the use of street or sidewalk. *Kemp v. Des Moines*, 125–640, 101 N. W. 474.

The authority of the city to grade its streets extends to the removal or destruction of trees which have been planted therein by an adjoining owner with the express or implied consent of the city, but the right should be exercised so as not to cause greater damage to the trees than necessary in the proper improvement of the street. *Gallaher v. Jefferson*, 125–324, 101 N. W. 124.

Where the council is wholly without power to order the paving of a street or alley at the expense of abutting property, its proceedings are without jurisdiction and void *ab initio* and the property owner may question the legality of the proceedings although he has not objected to or protested against the improvement. *Bradley v. Centerville*, 139–599, 117 N. W. 968.

The authority to pave at the expense of abutting property is expressly limited to streets, highways, avenues and alleys and special assessment for the paving of an alley which had been previously vacated was held to be without jurisdiction and void. *Ibid.*

The provisions of this section and § 793 refer to improvements for which special assessments may be made on abutting property, and have no relation to the matter of bringing the street to the grade established in accordance with the provisions of code § 782. *Collins v. Iowa Falls*, 146–305, 125 N. W. 226.

The discretion of the council in determining whether the public interest required the making of the improvement is not open to judicial review in the absence of some allegation and proof of fraud and oppression. *Collins v. Keokuk*, 147–233, 124 N. W. 601.

The provision that a street shall not be permanently improved until after it has been brought to grade does not make the establishment of the grade nor the preparation of the bed of the street for improvement a condition precedent to the adoption of a resolution of necessity or the ordering of the improvement. *Shaver v. Turner Imp. Co.*, 155–492, 136 N. W. 711.

When assessments are made and certificates issued they draw interest from date until paid, and if the city, through negligence or otherwise, fails to make and deliver valid assessments and assessment certificates to the contractor, where under the terms of the contract he is to receive his pay in such assessments or assessment certificates, the city is liable to the contractor for the amount of interest of which he is thus deprived. *Turner Imp. Co. v. Des Moines*, 155–592, 136 N. W. 656.

It is the property abutting the street and not necessarily the lot or parcel of land according to some plat which is made subject to assessment. *Kneebs v. Sioux City*, 156–607, 137 N. W. 944.

The city is not authorized to assess the cost of mere repairs against abutting property. It must appear that the work proposed constitutes a reconstruction, but if the pavement is destroyed as an entity and is to be reconstructed upon the same foundation upon which the original pavement rested, the cost is assessable to abutting property under this section. *Fuche v. Cedar Rapids*, 139 N. W. 903.

Where a pavement was not laid in accordance with the contract and the contractor, after being defeated in an action for the contract price, offered to remedy any defects in the pavement but no defects are pointed out and the contractor was further defeated in an action on *quantum meruit*, held that he might remove the pavement if it could be done without injury to the street. *Snouffer v. Tipton*, 142 N. W. 97.

SEC. **792-a. Special assessment—rate.** When any city or town council or board of public works levies any special assessment for any public improvement against any lot or tract of land, such special assessment shall be in proportion to the special benefits conferred upon the property thereby

and not in excess of such benefits. Such assessment shall not exceed twenty-five per centum of the actual value of the lot or tract at the time of levy, and the last preceding assessment roll shall be taken as prima-facie evidence of such value. [28 G. A., ch. 29, § 1.]

[By the title of the act (ch. 29, 28 G. A.), the act seems to have been intended as amendatory of chs. 7 and 8 of the code, only, while the wording of the above section would seem to include any special assessment for any public improvement.]

Prior to the enactment of this section it was held that the front foot rule of assessment without regard to benefits was not unconstitutional. *Allen v. Davenport*, 107–90, 77 N. W. 532.

The value of the lots as shown by the assessment roll is prima-facie evidence of the value for the purpose of determining whether the assessment exceeds twenty-five per cent. of the actual value. *Baily v. Sioux City*, 133–276, 110 N. W. 839.

The valuation of the lot for the purpose of determining the proportion of benefit should be confined to that portion subject to the assessment. *Rawson v. Des Moines*, 133–514, 110 N. W. 918.

In determining the benefits the council may consider the size, shape and location of the lot. *Reed v. Cedar Rapids*, 137–107, 111 N. W. 1013.

The size of parcels of ground adjoining the street improved may be taken into account in determining the assessment to be made thereon for the improvement. *Minneapolis & St. L. R. Co. v. Lindquist*, 119–144, 93 N. W. 103.

In making permanent improvements account may be taken, not only of present conditions, but also as to future benefits. *Ibid.*

The city council may act upon its own judgment regarding the value of property and the amount of benefit conferred, and in the absence of fraud its judgment is conclusive unless an appeal is taken therefrom. *Owens v. Marion*, 127–469, 103 N. W. 381.

The front-foot rule of assessment for street improvements cannot equitably be applied where the property of the owner against whom it is sought to enforce such assessment is a strip of land practically useless and without market value. *Iowa Pipe & Tile Co. v. Callanan*, 125–358, 101 N. W. 141.

The abutting owner seeking relief in equity from assessment for street improvement is not bound to tender any specific sum as representing the benefits received, less than that for which he is assessed. *Ibid.*

This act was evidently passed to provide for assessments according to benefits as distinct from the front-foot rule, but it did not operate to repeal the sections of the chapter relating to special charter cities on that subject. *Diver v. Keokuk Sav. Bank*, 126–691, 102 N. W. 542.

The manner of assessing the expenses of the improvement is prescribed by statute, but what shall be taken into consideration in determining to what extent the property has been enhanced in value by the improvement must depend on the circumstances of each particular case. Everything else being equal the front-foot rule is just in apportioning the cost among the several lot owners. *Stutsman v. Burlington*, 127–563, 103 N. W. 800.

Where it appears from the recital of the resolution by the council that the assessment is in proportion to the special benefits from the improvement as found by it, such recital is sufficient to show that the assessment is in accordance with the benefits. *Higman v. Sioux City*, 129–291, 105 N. W. 524.

While the assessment cannot be in excess of the benefits to the abutting property, within that limitation it should be distributed ratably and proportionately upon all such property in the taxing or assessment district. *Early v. Ft. Dodge*, 136–187, 113 N. W. 766.

Under code § 818 assessments are to be made in accordance with the front-foot rule unless the benefits are not proportional to the frontage, and it is only in this event that the assessment by benefits is applicable. *Des Moines U. R. Co. v. Des Moines*, 140–218, 118 N. W. 293.

A drainage district is not a city or town and the provisions of this section have no reference to the assessment of property for the construction of a ditch. *In re Farley Drain. Dist.* 140–339, 118 N. W. 432.

Where the assessment purports to be made in proportion to the benefits the recital in that respect is not contradicted by proof that the result would have been the same under the front-foot rule. *Hedge v. Des Moines*, 141–4, 119 N. W. 276.

The fact that property owners petition for the kind of improvement subsequently made tends to contradict their subsequent testimony that their property is not benefited by such improvement. *Ibid.*

A tax properly assessed in accordance with benefits is not liable to counterclaim or set-off on the ground that a portion of the material used in the improvement had been used in an improvement paid for by assessment on the same property. *Ibid.*

Assessments according to area of abutting parcels of property is not necessarily erroneous. *Andre v. Burlington*, 141–65, 117 N. W. 1082.

The assessment should not be disturbed on the ground that some parcels of abut-

ting property are omitted from assessment. *Ibid.*

Where the assessment is in excess of one fourth of the value of the property it will be reduced on appeal. *Ibid.*

In applying this section to assessments of an unplatted tract of land, the valuation per acre of the entire tract will be presumptively applicable to each portion of the tract in the absence of any evidence on the subject. *Gray v. Des Moines*, 150–299, 130 N. W. 582.

If the council erroneously assesses property for a street improvement for an amount exceeding twenty-five per cent. of its value, the remedy is by objection and appeal and not by action for injunction to restrain collection of the assessment. *Durst v. Des Moines*, 150–370, 130 N. W. 168.

The benefits referred to in this section are those accruing to the specific lots or tracts subject to assessment. Presumably, the improvement will be of benefit to all abutting property; but circumstances may be such that although the improvement enhances the value of most abutting property, it confers no benefit on a particular parcel. *Camp v. Davenport*, 151–33, 130 N. W. 137.

In determining whether a particular parcel of property is benefited, the test is not necessarily whether the market value has been increased. It is sufficient if the improvement has enhanced the actual value or worth of the property. *Ibid.*

An intersection is as important as any other part of the street and the improvement of a street is not complete unless it covers such intersection. If the improvement as a whole is of special benefit to abutting property, the improvement of the intersection confers some benefit, at least, on abutting property which is not adjacent to the intersection. *Perry v. Albia*, 155–550, 136 N. W. 681.

When the city undertakes to pave a street not already supplied with suitable curbs and gutters, the cost of such curbs and gutters is a part of the cost of the paving which cannot exceed twenty-five per cent. in value of the property. *Bailey v. Des Moines*, 157– —, 138 N. W. 853.

The fact that the curbing and guttering are provided for in a separate proceeding does not prevent their being regarded as parts of one improvement. *Ibid.*

Although an ordinance may provide for assessment according to the front-foot rule, the other provisions of the ordinance as to the matter of making assessments are not necessarily superseded by this section. *Dunker v. Des Moines*, 142 N. W. 207.

SEC. **792-b. Deficiencies—how paid.** If the special assessment which may be levied against any lot or tract of land shall be insufficient to pay the cost of the improvement, the deficiency shall be paid out of the general fund, or for sewers out of the sewer fund provided for in section eight hundred thirty-one, or subdivision three of section eight hundred ninety-four, or section nine hundred seventy-eight, or subdivision three of section ten hundred and five, or for other improvements out of the improvement fund provided for in section eight hundred thirty, or subdivision two of section eight hundred ninety-four, or section nine hundred seventy-seven, or subdivision two of section ten hundred and five of the code, and acts amendatory thereof as the case may be. If there be property against which no special assessment can be levied the proportion of the cost of the improvement which might otherwise be assessed against such property shall be paid in like manner. [28 G. A., ch. 29, § 2.]

The incorporation into the contract of a stipulation that for such portion of the costs of the improvement as cannot be taxed against the abutting property the contractor shall look to the improvement fund does not render the contract illegal. *Hedge v. Des Moines*, 141–4, 119 N. W. 276.

SEC. **792-c. What statutes govern.** So far as applicable, sections eight hundred twenty-one, eight hundred twenty-two, eight hundred twenty-three, eight hundred twenty-four, eight hundred twenty-nine, and eight hundred thirty-nine of the code shall govern all special assessments made in cities and towns unless otherwise specially provided. Upon appeal the court shall determine all questions, including that of benefits to the property assessed. [28 G. A., ch. 29, § 3.]

In the appeal here provided for, an objection to a variance between the improvement as made and that contemplated in the preliminary proceedings may be urged and such objection cannot be made the ground for a collateral attack upon the assessment. *Cheney v. Ft. Dodge*, 157– —, 138 N. W. 549.

SEC. 792-d. **Enforcement of certain statutes not affected.** Nothing in this act shall be construed to interfere with the enforcement of the provisions of sections eight hundred thirty-four and eight hundred thirty-five, of the code. [28 G. A., ch. 29, § 4.]

SEC. 792-e. **Applicable to special charter cities.** This act shall apply to cities acting under special charter. [28 G. A., ch. 29, § 5.]

SEC. 792-f. **This chapter and power to levy tax for improvement fund applicable to incorporated towns.** That the law as it appears in chapter fifty-three of the acts of the thirty-third general assembly be and the same is hereby repealed, and the following enacted in lieu thereof:

"That incorporated towns shall have and exercise the powers conferred by chapter seven, title five of the code, for the construction of street improvements authorized in section seven hundred ninety-two of the code, whenever four fifths of all of the members of the council by vote assent thereto, or when the same be petitioned for by the owners of the majority of the linear front feet of the property abutting thereon. That all of the provisions of subdivision two of section eight hundred ninety-four of the code shall be applicable and apply to incorporated towns." [35 G. A., ch. 84, § 1; 34 G. A., ch. 43, § 1; 33 G. A., ch. 53, § 1.]

SEC. 792-g. **Assessment against property not abutting—limitations.** Whenever, after January first, nineteen hundred fourteen, any city or town council, including the councils of cities acting under special charter, levies any special assessment for street improvement as provided by section seven hundred ninety-two of the code and amendments thereto and supplementary thereof, the same shall be made in accordance with the provisions of section seven hundred ninety-two-a of the supplement to the code, 1907, and shall be limited to the amount to be assessed against private property, against all lots and parcels of land according to area so as to include one half of the privately owned property between the street improved and the next street whether such privately owned property abut upon said street or not but in no case shall privately owned property situated more than three hundred feet from the street so improved be so assessed. In case of improvement upon an alley, such assessment shall be confined according to area to privately owned property within the block or blocks improved and if not platted into blocks for not more than one hundred fifty feet from such improved alley. [35 G. A., ch. 76, § 1.]

SEC. 792-h. **Acts in conflict repealed.** All acts and parts of acts in conflict herewith are hereby repealed. [35 G. A., ch. 76, § 2.]

SEC. 793. **How ordered.** That section seven hundred ninety-three of the code be and the same is hereby repealed, and the following enacted in lieu thereof:

"The construction or reconstruction of such improvement shall not be ordered made until three fourths of all the members of the council shall by vote assent thereto, provided that in cities under the commission plan of government with but three members in the council, a two-thirds vote shall be sufficient, unless the same be petitioned for by the owners of the majority of the linear front feet of the property abutting thereon; but a majority of the council may provide for repairing said improvements." [35 G. A., ch. 78, § 1.] [25 G. A., ch. 7, § 19; 20 G. A., ch. 20, § 1; C. '73, §§ 466, 494; R. § 1135.]

As the statute prescribes the steps to be taken for the construction of street improvements and sewers for which assessments may be made on abutting property, no ordinance with reference to the method of procedure is necessary. *Hardwick v. Independence*, 136–481, 114 N. W. 14.

Where the petition of property owners

purports to be signed by such owners or their duly authorized agents, the city council in acting upon the petition is presumed to have satisfied itself as to the genuineness of the signatures and the authority under which they were made and such a signing makes a prima-facie case of sufficiency. *Hedge v. Des Moines*, 141–4, 119 N. W. 276.

The provisions of § 792 and this section refer to improvements for which special assessments may be made on abutting property, and have no relation to the matter of bringing the street to the grade established in accordance with the provisions of code § 782. *Collins v. Iowa Falls*, 146–305, 125 N. W. 226.

The statutory provision as to a three-fourths vote has reference only to the order for improvement. *Nixon v. Burlington*, 141–316, 115 N. W. 239.

Although a petition may be presented for a public improvement, it may be ordered upon a vote of three fourths of the council without reference to such petition. *Bailey v. Des Moines*, 157– —, 138 N. W. 853.

SEC. 794. Sewers.

A sewer is usually closed but not necessarily so, and the term is usually applied to drains in a city, whether for water or filth or both; but there is no provision for the construction of sewers through private property within incorporated towns, though the power to condemn for this purpose is conferred on cities. *Aldrich v. Paine*, 106–461, 76 N. W. 812.

The authority of a board of supervisors under code § 1939 to provide for the construction of ditches or drains within the county extends to cities and towns, and a county ditch may properly be constructed and the cost thereof assessed to abutting property through the limits of an incorporated town. *Ibid.*

A temporary gutter for surface drainage may be constructed in the street without the passage of a special ordinance authorizing it, and without compliance with the provisions as to sewers. Even if a resolution for such improvement should be necessary, the acceptance of the work by the city would be a ratification of the act of the street commissioner in constructing it without such resolution. If such drain or gutter is negligently constructed, one injured thereby may recover damages in an action, but is not entitled to have it abated as a nuisance. *Cooper v. Cedar Rapids*, 112–367, 83 N. W. 1050.

The entire city may be made one sewer district, and the cost of constructing a sewer which is beneficial to the entire city may be provided for by a sewer tax on the entire real property within the limits of the city. *Grunewald v. Cedar Rapids*, 118–222, 91 N. W. 1059.

Where an abutting property owner connected his cellar with a sewer, with knowledge that the sewer was not sufficient to carry off the surface water and sewage, due to extraordinary rains, held that he was not entitled to recover damages by reason of the insufficiency of the sewer for the purpose. *Sheriff v. Oskaloosa*, 120–442, 94 N. W. 904.

The city council, in attempting to contract for the city with reference to the construction of sewers beyond the limit of its powers, does not bind the city to the payment of the certificates issued in pursuance of such contract and there can be no recovery either on the certificates or upon *quantum meruit*. *Citizens' Bank v. Spencer*, 126–101, 101 N. W. 643.

The city having authority to provide for the construction of sewers has implied authority to borrow money for the purpose of constructing a plant for the disposition of sewage. *Glucose Sugar Ref. Co. v. Marshalltown*, 153 Fed. 620.

A sewer, though in itself properly constructed, may be so planted as to create a nuisance which may be abated. *Rand Lumber Co. v. Burlington*, 122–203, 97 N. W. 1096.

The existence of another sewer constructed by the city does not preclude an assessment for a new sewer. *Bell v. Burlington*, 154–607, 134 N. W. 1082.

The fact that no adequate outlet for the new sewer has yet been provided and that without such outlet it may create a nuisance, is not a sufficient reason for setting aside an assessment for the construction of such sewer. *Ibid.*

The fact that the property assessed is not benefited because drainage is afforded by an old sewer constructed by the city which the city has the power to discontinue, is not sufficient reason for setting aside an assessment for a new sewer. *Ibid.*

A sewer system is intended not only for the private convenience of lot owners but for the comfort and safety of the public as a whole. *Ibid.*

Future prospects and reasonable anticipations of the city's growth, expansion and consequent needs may also be considered in determining the propriety of the establishment of a new sewer. *Ibid.*

Contracts for the construction of sewers relate to the business powers of the city as distinguished from its governmental powers. *First Nat. Bank v. Emmetsburg*, 157– —, 138 N. W. 451.

A city has implied power to construct a plant for the disposition of sewage. *Glucose Sugar Refining Co. v. Marshalltown*, (C. C.) 153 Fed. 620.

SEC. 797. **Changing watercourses.**

Where a city in the exercise of statutory authority has fixed the channel of a water course through which surface water flows, a property owner has no right by filling his lot and obstructing such channel to throw such surface water out of the course thus fixed. *Waverly v. Page*, 105–225, 74 N. W. 938.

The power to change a water course is not conferred on incorporated towns. *Aldrich v. Paine*, 106–461, 76 N. W. 812.

SEC. 799. **Question submitted—special election.** If the council on receiving the plans, specifications, and estimate of the expenses to be incurred, referred to in the last preceding section, shall still be of the opinion that the work should be done as proposed, it shall call a special election of the entire city or of any sewer district thereof in which the proposed work is to be done to finally determine the same question, and also the question of levying a special tax upon the property of the city or such sewer district, in addition to all other taxes now provided for by law, for that purpose. If the council shall determine that the estimated cost is greater than should be levied and collected in a single year, it may fix the yearly proportion, and determine in what years the same shall be levied and collected, and provide by ordinance or resolution the time of submitting the question to a vote. [28 G. A., ch. 28, § 1; 23 G. A., ch. 6, § 3.]

SEC. 801. **Damages assessed.** After the plat and notes of the survey are made and filed, the council shall appoint five commissioners, resident freeholders of the city, not interested in any property abutting on said stream, who shall be sworn faithfully and impartially to perform the duties that may be required of them, either by this chapter or any ordinance passed in pursuance hereof, who shall determine what lot, lots or lands abutting on said stream will be benefited or damaged by doing the work, the amount of benefit or damages which will accrue to or be sustained by each and every lot, lots or lands, and the owners thereof, and make report in writing of their findings. In determining any question as to whether benefits accrue to or damages are sustained by such lot, lots or lands, or the owners thereof, the said commissioners shall consider the amount of land reclaimed or lost, the expense that will be incurred by the owners thereof in doing said work, and the advantages accruing from the removal of the easement of said watercourse, and any other matter that they may think proper to be considered for such purpose, but no damages shall be awarded for the cost of filling said channel. The commissioners shall give notice of the time and place of their meetings to determine what lot, lots and lands are benefited or damaged, by publication thereof at least five days successively prior thereto, in some newspaper of general circulation in said city; and, for the purpose of enabling them to determine the fact of benefit or damage, may take any competent evidence which the owner of any property affected may see fit to offer. The findings of the commissioners shall be returned to the council, and it may approve, reject or modify the same. Notice of the hearing before the council, upon the report so made, shall be given by publication in a newspaper of general circulation in the city for five successive days, which last publication shall be ten days before such hearing, and if, after this hearing, it shall conclude to reject the report, it shall resubmit the matter to other commissioners, who shall proceed as in the first instance. If the council shall approve or modify this second finding, it shall proceed to assess the amount of benefits so found against said abutting lot, lots or lands, and the channel to be filled or reclaimed. Any person aggrieved by the action of the council in making said assessment may appeal therefrom to the district court of the county in which it is made,

within twenty days from the date of the assessment, and also have the right to review the action of the council in said court in the manner now provided by law. In the event that there is no daily newspaper published in the city or town then the notices provided for by section eight hundred and one of the code may be given by one publication thereof in a weekly newspaper of general circulation published in such city or town, such publication to be made at least five, and not exceeding ten, days prior to the hearing or meeting referred to in said section. [31 G. A., ch. 25; 23 G. A., ch. 6, § 5.]

It is immaterial that the assessment names the property upon which it is assessed as belonging to an owner deceased. *Smith v. Des Moines*, 106–590, 76 N. W. 836.

SEC. **807. Assessment to abutting property.**

[The above section is made applicable to special charter cities by § 963-a. EDITOR.]

SEC. **810. Street improvements and sewers—preliminary notice.** When the council of any such city shall deem it advisable or necessary to make or reconstruct any street improvement or sewer authorized in this chapter, it shall, in a proposed resolution, declare such necessity or advisability, stating the one or more kinds of material proposed to be used and method of construction, whether abutting property will be assessed, and, in case of sewers, the one or more kinds and size, and what adjacent property is proposed to be assessed therefor, and in both cases designate the location and terminal points thereof, and cause twenty days' notice of the time when said resolution will be considered by it for passage to be given by four publications in some newspaper of general circulation published in the city, the last of which shall be not less than two nor more than four weeks prior to the time fixed for its consideration, at which time the owners of the property subject to assessment for the same may appear and make objection to the contemplated improvement or sewer and the passage of said proposed resolution, at which hearing the same may be amended and passed, or passed as proposed. But if no such newspaper is published within the limits of the corporation, then such notice may be given by posting copies thereof in three public places within the limits of the corporation, two of which places shall be the post office and the mayor's office of such city or town. [34 G. A., ch. 40, § 1; 34 G. A., ch. 41, § 1.] [25 G. A., ch. 7, § 20; 22 G. A., ch. 6, §§ 2, 3; 21 G. A., ch. 168, § 21.]

Establishment of the grade prior to the resolution providing for the improvement is not jurisdictional, and if the grade is established at such time that the improvement may be made with reference thereto it is sufficient. *Allen v. Davenport*, 107–90, 77 N. W. 532.

While cost of grading cannot be assessed as part of the street improvement, yet a reasonable amount of excavating in order to prepare the surface of the street for the finished improvement may be charged as part of the cost of paving. *Ibid.*

Resolution: The statutory provisions relating to special assessments for sewers authorize only a levy on abutting or adjacent property. A lot derives special benefit from a sewer, whether main or lateral, when it is so situated that connection can be made therewith. *Bennett v. Emmetsburg*, 138–67, 115 N. W. 582.

If it is proposed to specially assess abutting property for a sewer, the resolution of necessity must so declare, and if adjacent property is to be included the resolution must describe or point it out. *Ibid.*

A resolution of necessity which does not set forth a statement of the material to be used, method of construction, etc., is void. *Ibid.*

It is not necessary to mention in the resolution of necessity, or describe, the adjacent property to be assessed. *Andre v. Burlington*, 141–65, 117 N. W. 1082.

All that the council is authorized to do at the meeting when the resolution of necessity is presented is to receive such resolution and fix the date at which after due notice it shall be put upon its passage. *Nixon v. Burlington*, 141–316, 115 N. W. 239.

It is not required that all details of the materials to be used and the method and manner of their use shall be set forth in the preliminary resolution. The fact that the resolution of necessity does not specify a concrete foundation for a street pavement does not prevent the letting of a contract requiring such foundation. *Ibid.*

While fraud of the contractor in procuring a contract for a street improvement will vitiate the contract, yet if such fraud does not affect the preliminary action of the council and the award is to the lowest bidder there is no ground of complaint. *Swan v. Indianola*, 142–731, 121 N. W. 547.

The conditions of the contract are necessarily determined by the resolution of necessity, the ordinance or resolution directing the improvement, the plans and specifications adopted therefor and the published proposals and bid submitted. *Fullerton v. Des Moines*, 147–254, 126 N. W. 159.

It is not necessary in the resolution of necessity to specify how the cost of intersections shall be paid. *Durst v. Des Moines*, 150–370, 130 N. W. 168.

Where the statutes provide in detail the method of procedure in regard to street improvements an ordinance is not necessary and the city may proceed in accordance with the statutory provisions regardless of the provisions of its ordinance. *Miller v. Oelwein*, 155–706, 136 N. W. 1045.

The statute does not require that the proposed resolution and notice thereof state all the details of the contemplated improvement. The object is to apprise the public and persons interested of its general character and give them opportunity for investigation and protest. *Ibid.*

The statute requires the resolution of necessity to state what adjacent property is proposed to be assessed for a sewer. The purpose of the resolution is to advise the owners of property of the proposed improvement so that those whose property will be liable to assessment therefor may appear before the council and make objections thereto if they so desire. *Dunker v. Des Moines*, 156–292, 136 N. W. 536.

If by ordinance of the city it is provided what adjacent property may be assessed for a sewer, it is sufficient in the preliminary resolution to declare that the assessment for such sewer is to be made upon adjacent property. *Dunker v. Des Moines*, 142 N. W. 207.

Failure to make such publication as is required by the statute will deprive the court of jurisdiction to levy an assessment in pursuance of such proceedings unless the property owners affected are estopped by their conduct from relying upon the jurisdictional question. Those owners who become parties to the proceeding by uniting in it or coming voluntarily into it pending the execution of the work and seek to compel the due performance of the contract according to its terms are thus estopped. *Gilcrest v. Des Moines*, 157– —, 137 N. W. 1072.

Notice: Failure of the notice to correspond with the ordinances and resolutions is such a defect as to vitiate the assessment. *Gallaher v. Garland*, 126–206, 101 N. W. 867.

The published notice in a particular case held sufficient. *Arnold v. Ft. Dodge*, 111–152, 82 N. W. 495.

The statutory provisions as to special assessments must be strictly complied with. Unless the preliminary notice is given as required the council acquires no jurisdiction to act. *Reed v. Cedar Rapids*, 137–107, 111 N. W. 1013.

The fact that the last of the four publications is on Sunday does not render the proceedings invalid. *Nixon v. Burlington*, 141–316, 115 N. W. 239.

It is not required that the last publication of notice be twenty days before the time fixed for the consideration of the resolution. It is sufficient that the first publication is more than twenty days before the time fixed, provided the publication is completed as required. *Durst v. Des Moines*, 150–370, 130 N. W. 168.

Objections: Even the acceptance of the improvement by the board of public works leaves the question open to review by the city council upon the property owners' objections to the validity or correctness of the assessment. But where it appeared that by reason of failure to give opportunity for objection the assessment was invalid, nevertheless the city might proceed to give such notice and entertain objections and determine whether an assessment should be made. *Gilcrest v. Des Moines*, 157– —, 137 N. W. 1072.

The council may select for street improvement a patented article or process without rendering the assessment void. *Saunders v. Iowa City*, 134–132, 111 N. W. 529.

Compliance with these provisions constitutes a condition precedent to the exercise of the power to direct the pavement of the street or the laying of sewers and is jurisdictional. *Shaver v. Turner Imp. Co.*, 155–492, 136 N. W. 711.

But exact conformity of the improvement with the street grade as established is not essential to the validity of an assessment for such improvement. *Ibid.*

SEC. 811. Resolution.

No particular form of expression is necessary in the resolution ordering the street improvement. If it indicates that the improvement is to be made in accordance with the resolution of necessity, that is sufficient. *Stutsman v. Burlington*, 127–563, 103 N. W. 800.

It is not necessary that there should

be embodied in the resolution for the construction of a sewer a reference to the petition which gives the council jurisdiction to proceed in the matter where such petition otherwise appears of record. *Hardwick v. Independence*, 136–481, 114 N. W. 14.

Where it appeared that the council consisted of the mayor and eight aldermen and that all were present, held that compliance with this section was not shown by a record reciting that a sewer system was ordered to be established in accordance with a previous resolution of necessity by "eight votes for." *Bennett v. Emmetsburg*, 138–67, 115 N. W. 582.

It seems to be sufficient to record the vote upon sheets of roll-call paper specially prepared for the purpose without setting out a detailed account in the general record book. *Nixon v. Burlington*, 141–316, 115 N. W. 239.

When the record is made to show that the resolution for the improvement is not based on the petition of the property owners, the city cannot afterwards rely upon any waiver or estoppel from a petition which may have been filed for such improvement. *Bailey v. Des Moines*, 157– —, 138 N. W. 853.

SEC. 812. Contract.

A valid contract in compliance with the provisions of the statute is a jurisdictional prerequisite to the exercise by the city of the power to make a special assessment on abutting property for the cost of paving. *Allen v. Davenport*, 132 Fed. 209.

The acceptance of curbing under a contract is vitiated by proof of fraud of the contractor in not using the amount of cement required by the contract, whereby the work done is inferior to that contracted for, and such fraud will not be waived by the action of the city authorities in accepting the curbing. *Mason v. Des Moines*, 108–658, 79 N. W. 389.

The fact that the contract for the work requires that all the laborers employed shall be citizens of the city does not constitute such invalidity as to defeat recovery by the contractor after the work has been performed and accepted. *Edwards & Walsh Const. Co. v. Jasper County*, 117–365, 90 N. W. 1006.

In an action to recover the reasonable value of the improvements made under a contract which is void, recovery may be had for the cost of the material and labor. *Davenport v. Allen*, 120 Fed. 172.

The city's right of action against the property owner for money paid to the contractor commences to run at the time such payment is made. *Ibid.*

Under the terms of a particular contract for laying brick paving, held that nothing but a final acceptance of the completed work would constitute a waiver of the conditions of the contract as to the material used, and therefore a failure to object during the progress of the work would not be presumed to be an approval thereof. *Atkinson v. Davenport*, 117–687, 84 N. W. 689.

A stipulation in the contract providing for the maintenance of the improvement in good condition for the term of five years, held not to invalidate the contract, as it was in the nature of a guaranty and not an independent contract for repairing. *Osburn v. Lyons*, 104–160, 73 N. W. 650.

The fact that property owners knew that the improvements in question were being made and did not object thereto, held not to constitute an estoppel against them to question the validity of the contract, it not appearing that they had knowledge of the defects therein. *Ibid.*

The contract may properly provide for such grading and filling as is necessary to form the subgrade for the pavement. *McCain v. Des Moines*, 128–331, 103 N. W. 979.

In a particular case, held that there was such failure to comply with the specifications of the contract that the special assessment was invalid. *Ibid.*

A contract for a street improvement is not necessarily invalid because it requires the contractor to keep the improvement in repair for a specified period. *Diver v. Keokuk Sav. Bank*, 126–691, 102 N. W. 542.

Provisions of the contract not authorized by statute cannot be complained of after the work has been completed, by a property owner who has made no objection under the method pointed out by statute. *Ibid.*

Where the city assumes liability to the contractor for the cost of street improvements such liability becomes an indebtedness within the constitutional limitation; and the contract will be invalid if the indebtedness thus incurred is in excess of the constitutional limit. *Allen v. Davenport*, 107–90, 77 N. W. 532.

In the performance of the work called for by a contract for street improvements, strict compliance with every term and condition of the plans and specifications with mathematical exactness may not be attainable and if the engineer or overseer to whom both parties have committed the oversight of the work, acting in good faith without fraud or collusion, approves the work in all its various stages of progress, recovery should not be denied under the contract. *Ford v. Manchester*, 136–213, 113 N. W. 846.

The filing of the contract with the clerk before the commencement of the work is not a jurisdictional matter. *Collins v. Keokuk*, 147–233, 124 N. W. 601.

The question whether there has been a substantial performance of the contract on the part of the contractor is a mixed question of law and fact and a property owner cannot on appeal raise the objection that the contract has been modified unless such objection has been made before the city council. *In re Mayden*, 156–157, 135 N. W. 571.

While it is the duty of the board of public works to let the contract for a street improvement and superintend the work and pass upon the question of its completion according to the contract, yet proceedings preliminary to and including the passage of the resolution or ordinance are to be taken by the council. *Gilcrest v. Des Moines*, 157– —, 137 N. W. 1072.

SEC. **813. Bids—notice.** All contracts for the making or reconstruction of street improvements and sewers shall be let in the name of the city, to the lowest bidder, by sealed proposals, upon giving notice for at least ten days by two publications in a newspaper published in said city, which notice shall state as nearly as practicable the extent of the work and the one or more kinds of materials for which bids will be received, when the work shall be done, the terms of payment fixed, and the time the proposals shall be acted upon; but all bids may be rejected and new bids ordered; provided, however, that if no newspaper is published within the limits of such city or town, then such notice may be given by posting the same in three public places within the limits of such city or town, two of which such places shall be the post office and the mayor's office of such city or town. All bids must be accompanied, in a separate envelope, with a certified check payable to the order of the treasurer, in a sum to be named in the notice for bids, as security that the bidder will enter into a contract for the doing of the work, and will give the bond required in the following section. All such checks, where the bid has not been accepted, shall be returned to the respective bidders. [34 G. A., ch. 42, § 1; 34 G. A., ch. 40, § 2.] [25 G. A., ch. 7, § 3; 22 G. A., ch. 5, § 2; 22 G. A., ch. 6, § 1; 21 G. A., ch. 168, § 3; 20 G. A., ch. 20, § 2; 17 G. A., ch. 162, § 2; 15 G. A., ch. 51, § 2.]

Under statutory provisions requiring improvements to be made by bids advertised for by the board of public works upon plans and specifications furnished by the city engineer, the plans and specifications may be sufficient, although they are not as full and complete as they might possibly be made. *Jenney v. Des Moines*, 103–347, 72 N. W. 550.

Where the publication of the notice for bids did not state at what time the bids would be acted on and when the work should be done and the contract as let fixed a different date for the completion of the work from that referred to in the ordinance under which the improvement was to be made, held that the contract was invalid. The statutory provisions as to the method of letting such contracts are mandatory. *Osburn v. Lyons*, 104–160, 73 N. W. 650.

Where a notice for bids for street improvements did not specify when the work should be done nor at what time the proposals would be acted upon, held that it was insufficient and the assessments made for such improvements were invalid. *Polk v. McCartney*, 104–567, 73 N. W. 1067.

Where the notice is defective in not corresponding with the ordinance and resolutions, the acceptance of bids in pursuance of such notice does not furnish a sufficient basis for an assessment. *Gallaher v. Garland*, 126–206, 101 N. W. 867.

The requirement that notice of the letting be given "for at least ten days by two publications" means two publications, the last of which is at least ten days before the date specified. *Comstock v. Eagle Grove*, 133–589, 111 N. W. 51.

The contract is not invalid because it requires specifically the doing of acts of construction, implied but not expressed in the notice, or work for which no charge is made. *Ibid.*

The fact that the council selects for the paving a patented article or process does not render the contract invalid. *Saunders v. Iowa City*, 134–132, 111 N. W. 529.

The purpose of requiring notice to bidders is to avoid favoritism, and noncompliance with the statutory requirements defeats the jurisdiction to proceed in the levy of special assessments. *Bennett v. Emmetsburg*, 138–67, 115 N. W. 582.

The terms of the contract must correspond substantially with the terms of the conditions made the basis for the competitive bidding. *Hedge v. Des Moines*, 141–4, 119 N. W. 276.

It is impracticable to set out all of the details in advertisements for bids. It is enough if the bidder is referred therein to the plans and specifications on file. *Fullerton v. Des Moines*, 147–254, 126 N. W. 159.

Where the notice refers to specifications which are sufficiently definite, the contract is not open to objection on the ground that the specifications cover separate propositions for grading. *Dubbert v. Cedar Falls*, 149–489, 128 N. W. 947.

It is not necessary that the plans and specifications be on file until there is an advertisement for bids. The object of such plans and specifications has reference to entering into a contract and not to advising the property owners of the nature of the proposed improvement. *Miller v. Oelwein*, 155–706, 136 N. W. 1045.

It is not necessary that the direction to the clerk to advertise for bids be by resolution. *Ibid.*

To justify an injunction restraining the performance of a contract for street improvements on account of fraud of the contractor, the fraud must be something affecting the letting of the contract and such fraud will not be presumed. It cannot consist in mere intention. *Swan v. Indianola*, 142–731, 121 N. W. 547.

Fraud in accepting bids and the letting of the contract, material and prejudicial to the city, would be a ground for defeating the assessment and the contractor could not recover in an action for *quantum meruit*. *Ibid.*

Where the lowest bid is rejected for an insufficient reason and the contract is let to a higher bidder, such action of the council constitutes constructive fraud which will sustain an injunction against the city and its officers from entering into a contract with the higher bidder. *Miller v. Oelwein*, 155–706, 136 N. W. 1045.

As the contract is dictated and formulated by the officers of the city, the city should not be allowed to take an unconscionable advantage of a mistake or oversight therein. *Fullerton v. Des Moines*, 147–254, 126 N. W. 159.

After relying on the performance of the terms of the contract as made, the contractor is estopped from offering to remedy defects and asking a relevy or from recovering in *quantum meruit*. *Snouffer v. Tipton*, 150–73, 129 N. W. 345.

In view of provisions found in the contract, held that a pavement laid under an improvement contract did not become the property of the city or of the abutting property owners until paid for, but that any portion of it found faulty was to be removed by the contractor. *Snouffer v. Tipton*, 142 N. W. 97.

Under this section as amended by 34 G. A., ch. 40, the resolution and bid may relate to one or more kinds of material proposed to be used so that the city council may, in accepting a bid and entering into a contract, select the material to be used with reference to the cost of the work constructed of such material as compared with the cost of other kinds of material contemplated in the resolution and proposed by the bidder. *Miller v. Oelwein*, 155–706, 136 N. W. 1045.

SEC. 814. **Contractor's bond to repair.** All contracts for the making or reconstruction of street improvements or sewers may contain a provision obligating the contractor and his bondsmen to keep such improvement or sewer in good repair for not less than one year after the acceptance of the same by the city, and the bond shall be so conditioned as to conform to such contract. [27 G. A., ch. 24, § 1.]

The incorporation into the contract of the provisions of this section amended with reference to keeping the improvement in repair for one year does not render the contract illegal. *Hedge v. Des Moines*, 141–4, 119 N. W. 276.

SEC. 816. **Lien of tax—filing of notice.** After a contract has been made by any city for the making or reconstruction of any street improvement or sewer, the clerk shall file with the auditor of the county, or each of the counties, in which said city is situated, a written or printed copy of the notice of the resolution provided for, with a true copy of the proof of publication thereof, together with a certificate of the clerk that an ordinance or resolution has been adopted directing the making or reconstruction of said street improvement or sewer. Thereupon all special taxes for the cost thereof, or any part of said cost, which are to be assessed and levied against real property, or any railway or street railway, together with all interest and penalties on all of said assessments, shall become and remain a lien on such property from the date of the filing of said papers with the county auditor until paid, and shall have precedence over all other liens except ordinary taxes, which shall not be divested by any judicial

sale; but such lien for street improvements in case of abutting property shall not cover to exceed one hundred fifty feet in depth from the abutting line. Any such assessment against a railway or street railway shall be a first and paramount lien upon the track thereof within the limits of the city, provided that in all counties where taxes are collected in two or more places, no lien shall attach on any property for special taxes until on and after the notices and certificates provided for in this section have been filed in the office of the auditor in the place where said special taxes are collected. The auditor shall keep a book properly ruled for that purpose and enter thereon under its tract number all of such notices immediately following the filing of the same. [35 G. A., ch. 80, § 1.] [25 G. A., ch. 7, § 12; 21 G. A., ch. 168, § 3; 20 G. A., ch. 20, § 3; 20 G. A., ch. 25, § 9; 15 G. A., ch. 51, § 3.]

Under 25 G. A., ch. 7, § 12, which provided that the assessment should be a lien upon the property abutting upon the street on which the improvement was made, it was held that the cost of street improvements could not be assessed upon a lot not abutting upon the street, no matter how nearly adjoining it might be. *Smith v. Des Moines*, 106–590, 76 N. W. 836.

The liens of special assessments take priority in order of time. *Des Moines Brick Mfg. Co. v. Smith*, 108–307, 79 N. W. 77.

A conveyance which is but an artifice and not effectual to transfer title will not relieve the property owner from liability for special assessments. *Ransom v. Burlington*, 111–77, 82 N. W. 427.

A special assessment for the construction of a sidewalk becomes a lien on abutting property only upon the filing with the county auditor of a copy of the record of the city council directing a construction of the walk. *Cemansky v. Fitch*, 121–186, 96 N. W. 754.

The lien provided for is the lien of a tax and if there be no tax levied or leviable there is and can be no lien. Therefore a contractor who has not complied with his contract in constructing a street improvement cannot recover in *quantum meruit* against the abutting property owners for the benefit conferred by the insufficient construction of the improvement. *Snouffer v. Grove*, 139–466, 116 N. W. 1056.

The lien of the assessment attaches to the parcel of land abutting on the street and not necessarily to the platted lot of which such parcel forms a part. *Kneebs v. Sioux City*, 156–607, 137 N. W. 944.

SEC. 817. Cost at intersections.

There is nothing to require specific reference to intersections in the proposed resolution of necessity or the notice thereof. *Durst v. Des Moines*, 150–370, 130 N. W. 168.

The word "improvement" as here used includes the entire work under construction on a particular street and its meaning cannot be limited to the work done directly in front of a particular parcel of ground. *Perry v. Albia*, 155–550, 136 N. W. 681.

Property abutting a portion of the street improved, though not at the corner of a street intersection, may be assessed for its portion of the cost of the intersection. *Ibid.*

The property abutting or fronting upon the street which becomes subject to the assessment is not necessarily to be determined by platted lots. *Kneebs v. Sioux City*, 156–607, 137 N. W. 944.

SEC. 818. Cost of improvements—how paid.

The provisions of this section, authorizing apportionment of the cost on abutting lots according to their frontage, is not unconstitutional. *Hackworth v. Ottumwa*, 114–467, 87 N. W. 424.

An assessment for a street improvement should be made in accordance with the front-foot rule unless the benefits are not proportional to the frontage, in which case the provisions of code § 792-a are to be applied. *Des Moines U. R. Co. v. Des Moines*, 140–218, 118 N. W. 293.

SEC. 819. Cost of sewers.

The cost of the sewer at street intersections and also the cost of manholes and catch basins may be taken into account in making the assessment on abutting property. *Andre v. Burlington*, 141–65, 117 N. W. 1082.

The fact that no outlet is provided for a sewer which is to be constructed and to be paid for by assessment on abutting and adjacent property is not a ground for enjoining the improvement. *Dunker v. Des Moines*, 156–292, 136 N. W. 536.

Cities have the power to construct sewers and to assess the cost thereof on the property benefited or pay such costs from the sewer district fund or from the general fund, as the city may elect. *First Nat. Bank v. Emmetsburg*, 157 – —, 138 N. W. 451.

SEC. 820. Assessment of cost. When the making or reconstruction of any street improvement or sewer shall have been completed, or such part thereof shall have been completed as, under the contract, is to be paid for when done, the council, or board of public works where such board exists, shall, within twenty days following the completion of the making or reconstruction of said street improvement or sewer, ascertain the cost thereof, including the cost of the estimates, notices, inspection, and preparing the assessment and plat, and shall also ascertain what portion of such cost shall be, by law and the ordinance or resolution of the council under which such street improvement was made or sewer constructed, assessable upon abutting property; and, in case of sewers, also upon adjacent property, and what portion shall be assessed upon such abutting property, and in case of sewers, upon such abutting and adjacent property, for intersections and spaces opposite property owned by the city or the United States; and the council shall then assess such portions upon and against such property as provided by law. [35 G. A., ch. 81, § 1.] [25 G. A., ch. 7, §§ 10, 21; 22 G. A., ch. 5, § 5; 22 G. A., ch. 6, § 4; 21 G. A., ch. 168, § 10; 20 G. A., ch. 20, § 3.]

Permanent street improvements for which assessment can be made upon abutting property can be provided for only at the established grade. Improvements otherwise than at the established grade are temporary only, and assessments therefor cannot be made on property owners. *Hubbell v. Bennett*, 130–66, 106 N. W. 375.

Property owners cannot be heard to complain of a part of the assessment without tendering payment of the portion of the assessment which is valid. *Allen v. Davenport*, 107–90, 77 N. W. 532.

It is not until the completion of the work that the council is required to determine the cost and authorized to assess such cost upon abutting property. It is not contemplated that the assessment be made for the estimated cost. *Sanborn v. Mason City*, 114–189, 86 N. W. 286.

Statutes authorizing special assessments for improvements must be strictly construed, and when any of their substantial requirements are departed from, the proceeding is void. *Gill v. Patton*, 118–88, 91 N. W. 904.

If the city acts in excess of its authority in assessing abutting property for street improvements, such void assessments may be enjoined. *Hubbell v. Bennett*, 130–66, 106 N. W. 375.

The cost of collection should not be made a part of the assessment. *Higman v. Sioux City*, 129–291, 105 N. W. 524.

To render special assessments when certified to the county auditor a lien upon the property, they must have been assessed in strict conformity to the statute. *Fitzgerald v. Sioux City*, 125–396, 101 N. W. 268.

The owner of property abutting on a street opposite and at the end of an intersecting street is not relieved from liability to an assessment by the fact that the council does not include in the provisions for assessment the expense of improving the street intersection. *Millan v. Chariton*, 145–648, 124 N. W. 766.

By the term "abutting property" is meant that between which and the improvement there is no intervening land. *Ibid.*

The expense to the city involved in the making of the improvement may be properly paid out of the general revenue of the city. *Collins v. Keokuk*, 147–233, 124 N. W. 601.

In determining what is abutting property when an improvement passes through an unplatted tract of land belonging to a single owner, some reasonable limit should be set as to the depth of the property which should be subject to assessment. As to what such reasonable limit should be, the question must necessarily be determined by the particular facts of each case, and held proper for the court to treat the tract for this purpose as though platted with streets and alleys conforming to those already established over adjoining property. *Gray v. Des Moines*, 150–299, 130 N. W. 582.

This ruling is applicable to assessments for sewers where the city has only attempted to make an assessment against abutting property as distinct from adjacent property. *Ibid.*

This section and the preceding do no more than direct how the cost of a sewer may be paid and the tax that may be placed on abutting and adjacent property. They

are supplemental to the requirement of code § 810 for the purpose of advising interested parties of the streets and alleys affected by the improvement and of the exact amount assessed against each lot or parcel of ground in the sewer district. *Dunker v. Des Moines*, 156–292, 136 N. W. 536.

An action of *quantum meruit* will not lie against a city for the value of an improvement where the contractor has failed to substantially comply with the terms of his contract. *Snouffer v. Tipton*, 150–73, 129 N. W. 345.

Where the contractor insisting on his right to an assessment on account of the performance of his contract litigates that question to the conclusion of an appeal in the supreme court, he is estopped from afterwards insisting on the right to remedy defects and have a reassessment. *Ibid.*

Where the contractor has failed to recover the contract price on account of alleged defects in the pavement and has been defeated in an action for *quantum meruit*, he may still remove the pavement if he can do so without injury to the street or serious inconvenience or injury to property owners. *Snouffer v. Tipton*, 142 N. W. 97.

SEC. 821. Plat and schedule.

The provisions of this section require that the city council shall cause to be made and file for public inspection a plat of the land on which it is proposed to levy a special assessment, showing the street lots or parcels of ground subject to assessment for the improvement. It is therefore improper to assess platted lots collectively or in pairs. *Gill v. Patton*, 118–88, 91 N. W. 904.

The lots or parcels of land to be charged with the special assessment are to be assessed separately and not several together. *Stutsman v. Burlington*, 127–563, 103 N. W. 800.

Only that portion of a lot which is subject to assessment should be considered in determining the valuation as limiting the amount for which it may be assessed. *Rawson v. Des Moines*, 133–514, 110 N. W. 918.

The lot or parcel of ground abutting the improved street which is to be subjected to assessment is not necessarily determined by the boundaries of platted lots. *Kneebs v. Sioux City*, 156–607, 137 N. W. 944.

Property is abutting when there is no intervening land between it and the street. *Ibid.*

SEC. 823. Notice of assessment—publication. After filing the plat and schedule, the council shall give notice by two publications in each of two newspapers published in the city, if there be that number, otherwise in one, and by handbills posted in conspicuous places along the line of such street improvement or sewer; but if no such newspaper is published within the limits of such city or town then such notice may be given by posting copies thereof in three public places within the limits of such city or town, two of which such places shall be the post office and the mayor's office of such city or town; that said plat and schedule are on file in the office of the clerk, and that within twenty days after the first publication all objections thereto, or to the prior proceedings, on account of errors, irregularities or inequalities, must be made in writing and filed with the clerk; and the council, having heard such objections and made the necessary corrections, shall then make the special assessments as shown in said plat and schedule, as corrected and approved. [34 G. A., ch. 42, § 2.] [29 G. A., ch. 44, § 1; 25 G. A., ch. 7, §§ 11, 18; 22 G. A., ch. 5, § 6; 22 G. A., ch 6, § 5; 21 G. A., ch. 168, §§ 11, 19.]

If the property owner has notice and an opportunity to be heard before the assessment attaches and becomes a lien upon his property, this is all the law requires. *Arnold v. Ft. Dodge*, 111–152, 82 N. W. 495.

A property owner who has had notice during the progress of the work of the grade adopted, and in accordance with whose request the grade has been modified, cannot afterwards complain that the improvement is not in accordance with the established grade. *Ibid.*

Proof of the posting of notice may be made by parol evidence. *Owens v. Marion*, 127–469, 103 N. W. 381.

A record of the special assessment resolution reciting the posting of notices as required by law is sufficient to establish such fact. *Ibid.*

Objections to the form of notice must be made under the provisions of code § 824. A defect as to the form will not render the proceedings void. *Ibid.*

Although by 28 G. A., ch. 29, the provisions of this section as to notice of special assessments are made applicable to

cities under special charters, nevertheless, code § 971 on the same subject in the chapter relating to special chartered cities is not thereby repealed. *Diver v. Keokuk*, 126-691, 102 N. W. 542.

Under prior statutory provisions, held that a mere mistake in name of the owner to whom notice was directed would not invalidate the assessment. *Chicago, R. I. & P. R. Co. v. Ottumwa*, 112-300, 83 N. W. 1074.

Objections not made to the city council before the hearing cannot by subsequent amendment be brought before the district court. *Hedge v. Des Moines*, 141-4, 119 N. W. 276.

Even though the notice is defective, if it accomplishes its purpose and the property owner is not prejudiced by reason of any defect therein, the jurisdiction of the council cannot be questioned on account of such defect. *Andre v. Burlington*, 141-65, 117 N. W. 1082.

It is only when the duty of the board of public works has been performed by approving the work and making a schedule of the proposed assessments and filing the same with the city council that it becomes the duty of the latter body to give notice and opportunity for objections by persons conceiving themselves aggrieved. *Gilcrest v. Des Moines*, 157- —, 137 N. W. 1072.

SEC. 824. Objections.

One who, having proper notice of a special assessment, fails to resort to the statutory remedy for the purpose of correcting error in such assessment, cannot have relief in equity. *Minneapolis & St. L. R. Co. v. Lindquist*, 119-144, 93 N. W. 103.

The legislature having provided a tribunal for the determination of all controversies growing out of special assessments, a party complaining of such assessment must resort to that tribunal for the correction of all errors, irregularities or inequalities in the assessment itself or in any of the prior proceedings or notices, in the absence of fraud or of such a showing as deprives the tribunal of the right to act. Without resorting to such tribunal the property owner cannot complain of a defective notice. *Owens v. Marion*, 127-469, 103 N. W. 381.

Failure to appear before the city council and object to the making of a contract for improvements does not waive the right to enjoin a special assessment if defects in the proceedings are such as to render the assessment void. *Gallaher v. Garland*, 126-206, 101 N. W. 867.

The property owner is not bound to make any tender for benefits received in resisting the enforcement of a special assessment which is void. *Ibid.*

Complaints as to irregularities in the assessment of benefits as against a street railway company must be made before the city council, and must be specific as to the objection insisted upon. *Marshalltown Light, P. & R. Co. v. Marshalltown*, 127-637, 103 N. W. 1005.

Defects in the contract rendering it voidable and not void must be taken advantage of by a property owner by filing objections. No objection having been interposed until the work is performed, the property owner cannot complain. *Diver v. Keokuk Sav. Bank*, 126-691, 102 N. W. 542.

The errors and irregularities which are cured by failure to make objection as specified in the statute are such as the council might cure if attention were called thereto. Jurisdictional defects in the proceedings are not thus cured. *Comstock v. Eagle Grove*, 133-589, 111 N. W. 51.

Where the improvement is unauthorized and the tax void, the property owner complaining thereof is not bound to appear before the council to make objections but may proceed in equity to have the enforcement enjoined. *Carter v. Cemansky*, 126-506, 102 N. W. 438.

One who resists the enforcement of a special assessment against his property is not estopped from doing so by the fact that an installment of such assessment has been paid by one under whom he claims title. *Ibid.*

Failure of a property owner to object before the council to the character of the work does not estop him from insisting, in resistance to the payment of the special assessment, that the contractor has not complied with his contract. *Wingert v. Tipton*, 134-97, 108 N. W. 1035; 111 N. W. 432.

Objections not properly raised cannot be considered. *Camp v. Davenport*, 151-33, 130 N. W. 137.

The objection that the assessment exceeds twenty-five per cent. of the value of the property is one which should be presented to the council. *Durst v. Des Moines*, 150-370, 130 N. W. 168.

Jurisdictional defects are not waived by failure to appear and object to an assessment or failure to appeal from an order of the council adopting an assessment resolution. *Bennett v. Emmetsburg*, 138-67, 115 N. W. 582.

Where the property owner appears before the city council pursuant to notice and files objection to proceedings of the council he is limited both upon his appeal to the district court and to the supreme court to such objections as he filed with the council, save where fraud is shown or where it appears that the council acted without jurisdiction. *Andre v. Burlington*, 141-65, 117 N. W. 1082.

Objection on account of mere error or irregularity in the assessment must be raised by objection to the city council. *Ibid.*

Property owners who appear before the council and make objections and do not appeal from the adverse decision of the council are estopped from afterwards questioning the assessment or maintaining an action to enforce its collection unless it appears that the council was wholly without jurisdiction. *Nixon v. Burlington*, 141–316, 115 N. W. 239.

Action of the council in increasing the width of a pavement after letting the contract, if erroneous or irregular, must be questioned by objection and appeal and not in a proceeding to enjoin the collection of the assessment. *Ibid.*

Where the city has jurisdiction to order an improvement the property owner may estop himself by his own conduct or concessions from denying the sufficiency or validity of the proceedings which he has himself invoked and upon the assumed regularity of which he has himself acted and induced others to act. *Clifton Land Co. v. Des Moines*, 144–625, 123 N. W. 340.

Save where the order or proceedings sought to be enjoined is absolutely void, a special remedy created by statute is exclusive as to all controversies coming within its scope and if a party to whom such remedy is given fails to take advantage of it he cannot resort to equity. *Ibid.*

Objections which might have been interposed before the council and considered on appeal are waived if not thus presented and do not furnish a ground for enjoining the enforcement of the assessment. Only those objections which go to the jurisdiction of the council to proceed can be presented in an action to enjoin the levy of an assessment for the improvement as made. *Collins v. Keokuk*, 147–233, 124 N. W. 601.

Where the preliminary proceedings are such as to authorize the council to proceed to the letting of a contract, a taxpayer who has made no objection to the proceedings cannot enjoin the levy of an improvement tax to meet the cost of the excess beyond the assessments which may be levied on abutting property. *Dubbert v. Cedar Falls*, 149–489, 128 N. W. 947.

The objection that the improvement does not exactly conform with the established grade of the street is one which should be interposed by the property owner and cannot be made a ground for enjoining an assessment. *Shaver v. Turner Imp. Co.*, 155–492, 136 N. W. 711.

The question whether the variance between the improvement as constructed and that provided for in the preliminary proceedings is sufficient to invalidate the assessment is a proper matter of inquiry for the city council and the mere fact of such variance without regard to its materiality and extent does not deprive the council of jurisdiction to make the assessment, the remedy of the property owners being by petition before the council and appeal from its action. *Cheney v. Ft. Dodge*, 157– —, 138 N. W. 549.

Where it appears that the improvement has been made in a manner which might have been authorized, the availability of such improvement as constructed for future use in connection with the property may be taken into account in determining whether the amount of assessment exceeds the benefits to the property relative to such future use, but a mere departure in plan not affecting the substantial character of the improvement and not rendering the contract under which it was made invalid, will not justify an annulment of the assessment *in toto*. *Ibid.*

SEC. 825. **Levy of assessment—installments.** The special assessments made in said plat and schedule, as corrected and approved, shall be levied at one time, by ordinance or resolution, against the property abutting on such street improvement or sewer, and, in case of sewers, upon adjacent property, and, when levied and certified, shall be payable at the office of the county treasurer. If the owner of any lot or parcel of land or railway or street railway, the assessment against which is embraced in any bond or certificate provided for in chapter eight of this title, shall, within thirty days from the date of such assessment, promise and agree in writing, indorsed on such bond or certificate, or in a separate agreement, that, in consideration of having the right to pay his assessment in installments, he will not make any objection of illegality or irregularity as to the assessment or levy of such tax upon and against his property, and will pay said assessment with interest thereon at such rate, not exceeding six per cent. per annum, as shall by ordinance or resolution of the council be prescribed, such tax so levied against the lot or parcel of land or railway or street railway of such owner shall be payable in seven equal installments, the first of which, with interest on the whole assessment from date of ac-

ceptance of the work by the city council, shall mature and be payable on the date of such assessment, and the others, with interest on the whole amount unpaid, annually thereafter, at the same time and in the same manner as the March semiannual payment of ordinary taxes; but where no such promise and agreement in writing shall be made by the owner of any lot or parcel of land or railway or street railway within said time, then the whole of said special assessment so levied upon and against the property of such owner shall mature at one time, and be due and payable, with interest from the date of acceptance of the work by the city council, on the date of such assessment, and shall be collected at the next succeeding March semiannual payment of ordinary taxes. All such taxes with interest shall become delinquent on the first day of March next after their maturity, and shall bear the same interest, with the same penalties, as ordinary taxes. [35 G. A., ch. 82, § 1.] [25 G. A., ch. 7, §§ 11–20; 22 G. A., ch. 5, § 7; 21 G. A., ch. 168, § 12; 20 G. A., ch. 20, §§ 3, 6; 20 G. A., ch. 25, § 9; 17 G. A., ch. 162, § 3.]

Under the provision by which the owner of the property may by waiving objections to assessments have the right to pay in installments, a lessee is not such owner as to be entitled to file a waiver and thus make the assessment payable in installments. So held where a tenant under obligation to pay all taxes and assessments imposed on the property during the term of the lease attempted by signing a waiver to make the assessment payable in installments and thus escape liability for installments which would under such arrangements not become payable during his term. *Vorse v. Des Moines Marble & Mantel Co.*, 104–541, 73 N. W. 1064.

The certifying of the assessment to the auditor is not a duty enjoined, but a right conferred, and its exercise is discretionary. *Talcott v. Noel*, 107–470, 78 N. W. 39.

A resolution or ordinance making a special assessment may be proven by parol evidence. *Edwards & Walsh Const. Co. v. Jasper County*, 117–365, 90 N. W. 1006.

The council has no authority to include the expense of collecting the special assessment in the assessment itself which is levied on the property. *Higman v. Sioux City*, 129–291, 105 N. W. 524.

Where the vendor in a contract to convey had been subjected to special assessments which it was presumed had materially increased the value of his property, and on that ground resisted specific performance of his contract, held that the validity of the assessments could not be inquired into, such owner having waived any question as to their validity. *King v. Raab*, 123–632, 99 N. W. 306.

When it is sought to charge a property owner for the cost of works of public improvement, the power must be exercised strictly in the manner prescribed by law, and if by ordinance and resolution notice is specified as a condition for the levying of such special tax, the council has no jurisdiction to impose a tax unless the notice is given as required. *Zalesky v. Cedar Rapids*, 118–714, 92 N. W. 657.

Although the resolution levying the special tax does not specify the names of owners and description of their lots, yet if it makes reference to a plat and schedule previously filed which is approved, and which contains sufficient specifications, it is not objectionable. *Higman v. Sioux City*, 129–291, 105 N. W. 524.

A motion to reconsider the resolution adopting a pavement having been sustained by a majority vote of the council, held that there was no valid approval. *Wingert v. Tipton*, 134–97, 108 N. W. 1035, 111 N. W. 432.

Where a strip along one side of a street was vacated by ordinance, but abutting owners were not compensated and such portion of the street was not actually separated from the other portion, held that the vacation was not effectual so that the owners of property abutting on the vacated portion of the street ceased to be abutting owners for purposes of assessment for street improvement. *Sutton v. Mentzer*, 154–1, 134 N. W. 108.

Assessments are to be levied against property abutting on the street at the time the assessment is made. Ordinarily this is platted into lots but in the necessities of use, this may be subdivided or blocks or unplatted tracts may be found to be abutting. The term "parcel" may be applied to a part or subdivision of a lot as well as to some portion of a block or tract of other description. *Kneebs v. Sioux City*, 156–607, 137 N. W. 944.

Any interest and penalties collected by the county treasurer on paving certificates should be paid over to the holder of the certificates. *Barber Asphalt Pav. Co. v. Webster County*, 143–255, 121 N. W. 1072.

The city is liable to a contractor for interest on assessments or assessment certificates during the time he is delayed in receiving such assessments or assessment certificates through the negligence of the city. *Turner Imp. Co. v. Des Moines*, 155–592, 136 N. W. 656.

SEC. 829. Sale for assessment.

Where a special assessment is enforced by action by a private person only six per cent. interest can be collected. *Des Moines Brick Mfg. Co. v. Smith*, 108–307, 79 N. W. 77.

Where special assessments are certified for collection, the property owner is not required to pay interest or penalty, except as provided in the special assessment statutes. *Edwards & Walsh Const. Co. v. Jasper County*, 117–365, 90 N. W. 1006.

One who has paid taxes which he claims to have been unlawfully assessed by the city cannot recover back the money paid, unless it appears that there was no authority to assess the tax, that the money sued for has been actually received by the city, and that the payment was upon compulsion. *Hawkeye L. & B. Co. v. Marion*, 110–468, 81 N. W. 718.

A roadbed or right of way, or other property so connected with the operation of a railway as that its loss by conveyance or sale would necessarily dismember and break up the entirety and utility of the road as a line of travel and commercial intercourse, should not be sold for a special assessment thereon. *Minneapolis & St. L. R. Co. v. Lindquist*, 119–144, 93 N. W. 103.

Whether the roadbed of a railway company, constructed through property to which the company has a fee simple title, may be sold for special assessments on such property for the improvement of abutting streets, *quaere*. But the portion of such premises not used for railroad purposes may be sold for such assessments, like any other property. *Ibid.*

Where a special tax has not become a lien on property in such sense that the property could be sold therefor at the time of sale for general taxes, the lien of the special tax is not effectual as against the purchaser at the sale. *Harrington v. Valley Sav. Bank*, 119–312, 93 N. W. 347.

Under a void assessment the certificate holder is not entitled to recover on *quantum meruit* for benefits conferred on the owner of the property by the improvement. *Carter v. Cemansky*, 126–506, 102 N. W. 438.

Special assessments not certified or brought forward so as that they constitute a lien on the property at the time of the tax sale and not included in such sale are cut off so far as the tax purchaser is concerned. *Fitzgerald v. Sioux City*, 125–396, 101 N. W. 268.

The payment of a tax collected on a special assessment into the hands of the treasurer operates to that extent to discharge the obligation of the city to the contractor and the property owners who have paid such special assessment cannot enjoin the county treasurer from paying over to the certificate holder the taxes which have thus been paid. *First Nat. Bank v. Kelly*, 139 N. W. 564.

SEC. 830. Levy for city improvement fund.

The city improvement fund out of which deficiencies in the special assessment for street improvements may be paid is the fund provided for in code § 894 to cover costs at street intersections and similar places. *Corey v. Ft. Dodge*, 133–666, 111 N. W. 6.

The incorporation into the contract of the provision that the cost of any portion of the improvement which cannot be assessed against abutting property shall be paid out of the city improvement fund, without further liability on the part of the city held not to render the contract illegal. *Hedge v. Des Moines*, 141–4, 119 N. W. 276.

When the notice and contract have fixed terms, such as the statute itself authorizes, the contract is sufficiently specific although it reserves an option to the city to pay the costs above the assessment on abutting property in cash or out of the city improvement fund. *Dubbert v. Cedar Falls*, 149–489, 128 N. W. 947.

SEC. 831. Levy for sewer fund.

A district sewer tax is enforceable only against the real property within the sewer district. Therefore it cannot be enforced as against a railroad company which is taxed under code § 1336 on its real and personal property collectively. *Chicago, M. & St. P. R. Co. v. Phillips*, 111–377, 82 N. W. 787.

SEC. 832. Cost of repairs.

The expense of repairing may be paid out of the general fund or the improvement fund. *Shelby v. Burlington*, 125–343, 101 N. W. 101.

SEC. 833. Assessments not to be diverted.

A court of equity has jurisdiction to compel a city to perform its duty as trustee to collect and properly apply such assessments. *Vickrey v. Sioux City*, 104 Fed. 164.

A city which has issued bonds to be paid for by the collection of special assessments is a trustee, charged with the duty of collecting and applying such assessments, and equity has jurisdiction over a suit by the

holder of such bonds to require an accounting in respect to such trust and for the enforcement of the same. *Farson v. Sioux City*, 106 Fed. 278.

SEC. 834. Assessments on railways and street railways.

This section has reference to assessment of railways and street railways for the improvement of streets occupied by their tracks, and not to assessment of special taxes upon right of way abutting upon the street improvement. *Chicago, R. I. & P. R. Co. v. Ottumwa*, 112–300, 83 N. W. 1074.

This section is applicable to street improvements undertaken in pursuance of authority conferred by the code. *Ft. Dodge Elec. L. & P. Co. v. Ft. Dodge*, 115–568, 89 N. W. 7.

When the contractor has agreed to take certificates in payment for his work in paving a street, and the city, having authority to assess the entire amount upon abutting property, improperly issues certificates against the street railway company for a share of the expense, which certificates are invalid, it becomes liable to the contractor for the amount of the invalid certificates. *Ibid.*

A provision in a franchise exempting a street railway company from any requirement to pave except as provided therein does not constitute a contract on which the company may rely as against subsequent provisions with regard to assessing the expense of a street improvement in part upon the property of the company thus occupying such street. *Marshalltown Light, P. & R. Co. v. Marshalltown*, 127–637, 103 N. W. 1005.

The company may be required to pave not less but a greater width than required by statute and the city is not bound by any ordinance on the subject existing at the time of the enactment of this section but may enact a new ordinance fixing the portion of the street which the railway company may be required to pave. *Des Moines City R. Co. v. Des Moines*, 152–18, 131 N. W. 43.

SEC. **835. Cost of paving already laid.** Before any street railway company shall lay its track upon any street that has been paved, and which at the time is not being repaved, it shall pay into the city treasury the value of all paving between its tracks, and one foot outside thereof, which value shall be determined by the city council, but in no case shall exceed the original cost of the paving, and the money thus paid shall be refunded to the abutting property owners on said street in proportion to the amounts originally assessed against the property abutting thereon. The company or any person affected by or interested in such determination of the value of such pavement may appeal therefrom to the district court within thirty days thereafter and in the manner provided in section eight hundred thirty-nine of the code. [30 G. A., ch. 32.]

[The above section is made applicable to special charter cities by § 979. EDITOR.]

There is no provision for recovery by the city of any sum which is not to be apportioned among the property holders. The city is not entitled to recover in its own right unless it is an abutting property holder. *Oskaloosa v. Oskaloosa T. & L. Co.*, 141–236, 119 N. W. 736.

A street car company whose right in the streets has been fully and completely forfeited is in no sense an abutting owner so as to be entitled to compensation for pavement laid between its rails. *Ibid.*

The provisions in the amendment to this section for appeal from the assessment so far as applicable to an assessment made prior to the taking effect of the amendment relate only to the value of the pavement and not to the fixing of the liability of the street car company to the persons entitled to recover under the statute. *Ibid.*

SEC. **836. Relevy—schedule.** When by reason of nonconformity to any law or ordinance, or by reason of any omission, informality or irregularity, any special tax or assessment hereafter levied is invalid, or is adjudged illegal, or in case of deficiencies, the council shall have the power to correct the same by resolution or ordinance, and may reassess and relevy the same, as also an amount to make up such deficiencies, with the same force and effect as if done at the proper time, in the proper amount, and in the manner provided by law or by the resolution or ordinance relating thereto. Whenever any such special tax or assessment, upon property not by law exempt therefrom, shall have been heretofore or shall be hereafter adjudged to be void for any jurisdictional defect, and the city

adjudged liable to pay the same, the city council shall as to such property have power, by resolution or ordinance, to cause to be prepared a schedule and proposed reassessment in proportion to and not in excess of benefits, and to cause notice thereof to be given, and to hear objections thereto and make necessary corrections, as provided by section eight hundred twenty-three of the code, as amended by chapter forty-two of the laws of the thirty-fourth general assembly; and thereupon the council shall reassess and relevy such special tax or special assessment as so corrected, with the same force and effect as if jurisdiction had been acquired in the first instance, and all subsequent proceedings had been regularly and legally had. [35 G. A., ch. 83, § 1.] [22 G. A., ch. 6, § 7; 22 G. A., ch. 44, § 1; 20 G. A., ch. 20, § 3.]

An irregularity in an assessment does not affect the jurisdiction of the city in the proceeding, and may be cured. *Ottumwa Brick & Const. Co. v. Ainley*, 109–386, 80 N. W. 510.

Where a special assessment has been adjudged illegal because of some defect in the proceedings not going to the jurisdiction or power of the city to act in the premises, the legislature may, by general or special statute, provide for reassessment, but where the validity of an assessment has been finally determined by proceedings in court, the legislature cannot by subsequent action give validity to such assessment. *McManus v. Hornaday*, 124–267, 100 N. W. 33.

The statutory provision for reassessment is applicable where a valid assessment might have been made in the first place, but it does not authorize an assessment for the benefits conferred by the improvement where the contractor is not entitled to compensation under the contract. *Crawford v. Mason*, 123–301, 98 N. W. 795.

Where a legal assessment might have been made a reassessment is authorized. *Martin v. Oskaloosa*, 126–680, 102 N. W. 529.

There may be a relevy of a special assessment, even after the original levy of such assessment has been declared invalid by action in court. *Gill v. Patton*, 118–88, 91 N. W. 904.

These provisions have no application where an essential requisite of jurisdiction to impose an assessment has been omitted, such as the giving of notice, as required by ordinance and resolution. *Zalesky v. Cedar Rapids*, 118–714, 92 N. W. 657.

Where a portion of the improvement for which an assessment is made in bulk is without authority the collection of such assessment may be enjoined and the only method for the assessment on abutting property of the portion of the expense which is for a valid improvement is by relevy. *Bradley v. Centerville*, 139–599, 117 N. W. 968.

Where the original assessment was erroneous because abutting property was assessed according to area for a depth of more than one hundred fifty feet, instead of setting aside the assessment on appeal and allowing the council to relevy the proper tax, the court modified the assessment and reached the same practical result. *Hedge v. Des Moines*, 141–4, 119 N. W. 276.

Where the contractor for a street improvement has insisted that his contract has been fully performed and that he is entitled to an assessment and has litigated that question in an appeal to the supreme court, he cannot afterwards, by offering to remedy the defects in the work, become entitled to an assessment or to recover *quantum meruit* unless there is some provision to that effect in his contract. By reliance on performance and putting the city and the property owners to the expense of litigating that question he is estopped from afterwards offering to carry out the terms of the contract. *Snouffer v. Tipton*, 150–73, 129 N. W. 345.

SEC. 839. Appeal.

On the appeal the court has no power to make an entirely new assessment. *Berry v. Des Moines*, 115–44, 87 N. W. 747.

The provisions of this section are limited to assessment proceedings under the provisions of the code. *Ft. Dodge Elec. L. & P. Co. v. Ft. Dodge*, 115–568, 89 N. W. 7.

Where the assessment is made without any authority, then the property owner can enjoin the enforcement of the assessment without resorting to the remedy by appeal. *Ibid.*

One who might by appeal have an error in a special assessment corrected, cannot ask relief in equity. *Minneapolis & St. L. R. Co. v. Lindquist*, 119–144, 93 N. W. 103.

If the assessment is void for want of jurisdiction of the city council to act, the objection need not be raised before the council nor by appeal; but if defective only on account of irregularities or erroneous judgment on the part of the council, objection and appeal are the only remedies. *Owens v. Marion*, 127–469, 103 N. W. 381.

The court is authorized to determine on appeal whether the assessment made is just and equitable and bears some reasonable proportion to the benefits which the property derives from the improvement. If the assessment is clearly inequitable the court should exercise the authority given it to make such an assessment as should have been made or remand the matter to the council with directions as to its duty in the premises. *Early v. Ft. Dodge*, 136–187, 113 N. W. 766.

A property owner who makes objection before the council and does not appeal from its action is estopped afterwards from questioning the validity of the assessment save on the ground that the council was wholly without jurisdiction. *Nixon v. Burlington*, 141–316, 115 N. W. 239.

Where jurisdiction over the proceedings has once attached, a defect or omission subsequently occurring and for which the statutory appeal furnishes ample remedy cannot be made an equitable ground for injunction. The exclusive remedy is by objection to the council and appeal. *Clifton Land Co. v. Des Moines*, 144–625, 123 N. W. 340.

The regularity and sufficiency of the initial steps in the ordering of the work and making the assessment must be questioned in the method pointed out, and cannot be made the basis of an action to enjoin the assessment of the costs after the work has been completed. Any objections not thus made are waived. *Collins v. Keokuk*, 147–233, 124 N. W. 601.

The objection that the assessment exceeds twenty-five per cent. of the value of the property is one which should be made to the city council and prosecuted on an appeal from its action and cannot be made the basis of an original proceeding by injunction to defeat the assessment. *Durst v. Des Moines*, 150–370, 130 N. W. 168.

The propriety or necessity of making the improvement, no fraud being charged, cannot be reviewed in the courts. *Camp v. Davenport*, 151–33, 130 N. W. 137.

Objection to a modification of the contract for the improvement must be made before the city council. *In re Mayden*, 156–157, 135 N. W. 571.

Objection to a variance between the improvement as constructed and that provided for in the preliminary proceedings should be presented to the city council and by appeal from its action, and will not be a ground for setting aside the assessment as without jurisdiction in a collateral attack. *Cheney v. Ft. Dodge*, 157– —, 138 N. W. 549.

SEC. **840-a. Sewers—certain statutes applicable to towns.** That chapter thirty-one of the laws of the thirtieth general assembly be and the same is hereby repealed and the following enacted in lieu thereof:

"That all of the provisions of sections seven hundred ninety-two to section eight hundred forty-nine inclusive, of chapters seven and eight of title five of the code and that subdivision three of section eight hundred ninety-four of the code granting to cities of the first and second classes the power to construct sanitary sewers and assess the cost of the same to the real property abutting on, adjacent to or benefited by such sewers, and providing for a tax on the assessed valuation of all property therein when the entire city comprises one sewer district, shall be applicable and apply to incorporated towns." [31 G. A., ch. 24; 30 G. A., ch. 31.]

SEC. **840-b. Main sewer fund.** Any city of the first class shall have power to levy annually a tax not exceeding five mills on the dollar on the assessed valuation of all property therein, for a main sewer fund, to be used to pay the whole or any part of the cost of the making, reconstruction or repair of any main sewer within the limits of the city. [31 G. A., ch. 26, § 1.]

SEC. **840-c. Terms defined.** A "main sewer" as referred to in this act shall be held to mean any sewer that is commonly referred to by any one of the following terms: "intercepting sewer, out-fall sewer, or trunk sewer." [31 G. A., ch. 26, § 2.]

SEC. **840-d. Statutes applicable—main sewer assessments may cover entire drainage area.** The provisions of chapter seven, of title five of the code shall be applicable to providing for the making, reconstruction or repair of main sewers, the whole or any part of the cost of the making, reconstruction or repair of which shall be ordered paid from the main sewer fund herein provided for, to the same extent and in the same manner as the provisions of said chapter seven, of title five, of the code are now

applicable to providing for the making, reconstruction or repair of sewers, the whole or any part of the cost of the making, reconstruction or repair of which may be ordered paid from the city sewer fund. In addition to the foregoing powers, cities, including cities under special charters, shall have the power to assess the whole or any part of the cost of the construction of any main sewer or system of main sewers to the respective lots, tracts or parcels of ground as adjacent property which are included within a district to be fixed by the council, which may include all territory within the drainage area of such main sewer or main sewer system. And all such lots, tracts or parcels of ground which are subject to be furnished with sewer connection or drained by such main sewers or main sewer system shall be considered as adjacent property; provided this act shall not apply to cities having a population of more than forty-seven thousand. [35 G. A., ch. 85, § 1.] [31 G. A., ch. 26, § 3.]

SEC. **840-e. Main sewer certificates or bonds—statutes applicable.** The provisions of chapter twelve, of title five, of the code shall be applicable to taxes authorized to be levied for the main sewer fund. Certificates or bonds issued in anticipation of the collection of taxes authorized to be levied for the main sewer fund shall be denominated main sewer certificates or main sewer bonds. [31 G. A., ch. 26, § 4.]

SEC. **840-f. Aggregate tax for all sewer funds.** The aggregate tax levied by any city of the first class in any one year for a city sewer fund, a district sewer fund, and a main sewer fund, shall not exceed eight mills on the dollar on the assessed valuation of all the property therein. [31 G. A., ch. 26, § 5.]

SEC. **840-g. Sewer outlets and purifying plants—tax levy authorized.** That the law as it appears in chapter forty-one of the laws of the thirty-second general assembly be and the same is hereby repealed and the following is enacted as a substitute therefor, to wit:

"Cities of the second class and towns shall have the power to levy annually a tax of not to exceed three mills on the dollar to be used solely for the purpose of constructing outlets and purifying plants for sewers. The levy made under this act shall not be considered a part of the levy made for a sewer fund under provisions of the law as it appears in paragraph three of section eight hundred ninety-four of the supplement to the code, 1907. The tax herein authorized may be anticipated by issuing certificates or bonds, as provided by section nine hundred twelve of the code." [33 G. A., ch. 54, § 1.] [32 G. A., ch. 41, § 1.]

CHAPTER 8.

OF STREET IMPROVEMENT AND SEWER BONDS AND CERTIFICATES.

SECTION 841. Certificates issued.

Where a contractor agrees to take certificates in full payment for the work done, and the city, having authority to assess the entire cost on abutting property and issue certificates therefor to the contractor, attempts to issue illegal certificates for a portion of the amount against a street railway company not liable for the payment of any portion of the assessment, the city is bound to pay to the contractor the amount of the illegal certificates. *Ft. Dodge Elec. L. & P. Co. v. Ft. Dodge*, 115–568, 89 N. W. 7.

The contractor by accepting the illegal certificates does not preclude himself from remedy against the city, inasmuch as he is not bound to know that the necessary steps to render the certificates valid and binding have been taken. *Ibid.*

The city is liable to the contractor for assessment certificates which have been improperly issued by it against property

subject to assessment for the improvement. *Iowa Pipe & Tile Co. v. Callanan*, 125–358, 101 N. W. 141.

The city is not liable to a contractor on certificates which are invalid because proper steps have not been taken in ordering the improvement for which the certificates are issued. The contract with the contractor being invalid, no liability under the certificates arises. *Citizens' Bank v. Spencer*, 126–101, 101 N. W. 643.

Action against the city on implied contract is barred after five years from the time of the making of the improvement. *Ibid.*

The county treasurer being required to pay special assessments collected on account of city improvements to the holders of improvement certificates and not to the city, cannot retain the collection fee authorized in case of taxes collected for a city. *Barber Asphalt Pav. Co. v. Woodbury County*, 137–287, 114 N. W. 1044.

SEC. 842. Bonds.

Where the city by contract has rendered itself liable for the cost of street improvements, bonds to cover such cost will be invalid if in excess of the constitutional limit. *Allen v. Davenport*, 107–90, 77 N. W. 532.

Where the statutes of the state and the ordinances of the city under which the bonds were issued, and the recitals of the bonds themselves do not limit the right of recovery of the bond holder to a specific fund, the bonds are to be deemed an indebtedness of the city. *Vickrey v. Sioux City*, 115 Fed. 437.

SEC. 847. Bonds paid.

In equity the bond holder has the right to call upon the city to employ for his protection every power and right a city can exercise to levy and collect from the property benefited by the improvement the cost thereof which is in fact and in truth represented by the bonds issued. *Burlington Sav. Bank v. Clinton*, 111 Fed. 439.

CHAPTER 8-A.

OF PROTECTION OF CITY PROPERTY FROM FLOODS.

SECTION **849-a. Protection authorized.** That in addition to the powers they now have all cities and towns in this state shall have power in accordance with the provisions of this act to protect lots, lands and property within their limits from danger and damage from floods and high water by deepening, widening, straightening, altering or changing and otherwise improving watercourses within their limits, and by constructing levees, embankments and other works, and to provide for the levy of special assessments and other taxes and the issuance of bonds and certificates to defray the expense of such improvements. [33 G. A., ch. 55, § 1.] [30 G. A., ch. 33, § 1.]

SEC. **849-b. Petition—plans and specifications.** Whenever a petition requesting the exercise of the powers named in section one of this act, and signed by one hundred resident taxpayers of said city or twenty-five resident taxpayers of said town shall be presented to the council of said city or town, the council shall direct the city engineer, if there is one, and if not, one employed by it, to make the proper plans and specifications for doing the work, with an estimate of the cost thereof, including damages to property if any, and a map or plat showing the boundaries of the territory or district which will be benefited by such improvement, and showing as near as may be the name of the owner and the value of each lot or parcel of land, and other property therein as shown by the last assessment roll. [33 G. A., ch. 55, [§ 2].] [30 G. A., ch. 33, § 2.]

SEC. **849-c. Resolution—notice—hearing—question submitted.** If the council upon receiving such plans, specifications, estimate and map shall approve or modify and approve the same and be of opinion that the

work should be done as proposed, it shall in a proposed resolution declare the necessity or advisability of such improvement, describing the same in general terms and stating the estimated cost thereof, and the boundaries or other description of the territory or district which will be benefited, and shall cause twenty days' notice of the time when said resolution will be considered by it for passage to be given by two publications in each daily newspaper of general circulation published in the city or town, the last of which publications shall be not less than two or more than four weeks prior to the time fixed for consideration of said resolution; or in case there be no daily newspaper published in said city or town, then by publication in one or more weekly newspapers published within said city or town once each week for two consecutive weeks, or in towns where there are no newspapers published by posting in five public places for four weeks, at which time the owners of property benefited or affected by such improvement may appear and make objections in writing to the contemplated improvement and the passage of said proposed resolution, at which hearing the resolution may be amended and passed or passed as proposed. The council shall after adopting said resolution submit to the electors of said city or town for final determination the question of whether said improvement shall be made as proposed, and of levying for that purpose a special tax of not more than four mills in case of cities and ten mills in case of towns in any one year, in addition to all other taxes now provided by law. If the council shall determine that the estimated cost is greater than should be levied and collected in a single year, it may fix the yearly proportion and determine in what years the same shall be levied and collected. The percentage or rate of tax levied on property within the territory or district benefited by such improvement shall be double the percentage or rates levied upon property outside such territory or district. The council shall provide by resolution or ordinance the time of submitting the question to a vote. Said question shall be submitted either at the general city election, or at a special election, or at the general November election in the manner provided by law. When said question is to be voted upon at the general November election the county auditor shall cause the same to be printed on the official ballot to be voted at the several precincts within said city and the returns shall be certified by the auditor to the city council. [33 G. A., ch. 55, [§ 3].] [30 G. A., ch. 33, § 3.]

SEC. **849-d. Contracts.** If the majority of the votes cast on such proposition shall be in favor of the same the council may by ordinance or resolution order the making or construction of such improvement and thereupon the council, or board of public works where such board exists, shall contract for furnishing labor and material and for the making or construction either of the entire improvement in one contract or in separate and specified sections. Such contract or contracts shall be made as nearly as may be in the manner provided for contracting for street improvements in sections eight hundred twelve, eight hundred thirteen, eight hundred fourteen and eight hundred fifteen of the code and acts amendatory thereof. [30 G. A., ch. 33, § 4.]

SEC. **849-e. Levy of tax—placed on tax list.** As soon as may be after such improvement or specified section thereof has been contracted for, the council, or board of public works, where such board exists, shall ascertain as near as may be the cost thereof, including cost of property purchased or appropriated for the purpose of carrying into effect the provisions of this act and including the costs of plans, specifications, estimates, notices, inspection and preparing plats, schedules and assessments, and

thereupon the council shall by resolution levy the whole of said cost at one time as a special tax, of not more than four mills in case of cities or ten mills in case of towns in any one year, upon all taxable property within said city or town and upon all taxable property within the territory or district benefited by such improvement, and shall determine the whole percentage of tax necessary to pay the same and the percentage to be paid each year, and the number of years, not exceeding ten, given for maturity of each installment thereof. But such percentage of tax and such number of years shall not exceed the percentage of tax and the number of years authorized under the provisions of section three of this act, but no part of said cost shall be levied upon property owned by the city or town, the state or the United States, and the percentage or rate levied upon property within the territory or district benefited by such improvement shall be double the percentage or rate levied upon property outside such territory or district. Certificates of such levies shall be filed with the auditor of the county in which the city is located, setting forth the boundaries of the territory or district benefited by such improvement and the amount or percentage and maturity of said tax, or each installment thereof, upon the assessed valuation of all property in said city and upon the assessed valuation of all property within said territory or district benefited, certified as correct by the city clerk and thereupon said tax shall be placed upon the tax list of the proper county. The proceeds of such tax shall be kept as a separate fund and shall be used for the purpose of paying for the cost of said improvement or in paying bonds and certificates issued thereupon and for no other purpose whatsoever. [33 G. A., ch. 55, [§ 4].] [30 G. A., ch. 33, § 5.]

SEC. **849-f. Diversion of stream.** Whenever in making such improvement a stream shall be diverted from its old channel or any part thereof, the city or town shall have and may exercise in respect thereto all the powers named in sections eight hundred and two and eight hundred and three of the code. [33 G. A., ch. 55, [§ 5].] [30 G. A., ch. 33, § 6.]

SEC. **849-g. Purchase or condemnation of private property.** Said cities or towns may also purchase or condemn and appropriate so much private property as may be necessary to carry into effect the provisions of this act, and the cost thereof shall be included in and paid as a part of the cost of said improvement. [33 G. A., ch. 55, [§ 6].] [30 G. A., ch. 33, § 7.]

SEC. **849-h. Bonds and assessment certificates.** Any city or town constructing any improvement authorized by this act may issue bonds and assessment certificates in anticipation of any special tax or special assessment; said bonds and certificates shall be issued and sold in accordance with and be governed by the provisions of sections eight hundred forty-one, eight hundred forty-two, eight hundred forty-three, eight hundred forty-four, eight hundred forty-five, eight hundred forty-six and eight hundred forty-seven of the code and acts amendatory thereof. [33 G. A., ch. 55, [§ 7].] [30 G. A., ch. 33, § 8.]

SEC. **849-i. Costs—how paid.** The entire cost of constructing any improvement authorized by this act and any bonds or certificates issued in anticipation thereof shall be paid out of the special taxes and special assessments authorized by this act and no part of said cost or of any such bond or certificate shall ever be a charge upon or paid out of any other fund or the proceeds of any other assessment, tax or levy. [30 G. A., ch. 33, § 9.]

SEC. **849-j. Bonds—limitation of indebtedness.** That cities of the first class, including cities acting under the commission plan of government, having more than twenty-four thousand population are hereby au-

thorized to contract indebtedness and to issue bonds for the purpose of protecting the lots, lands and property within their limits from danger and damage from floods and high water by deepening, widening, straightening, altering or changing and otherwise improving watercourses within their limits and by constructing levees, embankments and other works. Such bonds shall be payable in not exceeding twenty annual installments and bear interest at not exceeding five per centum per annum, and shall be made payable at such place and be of such form as the city council shall, by ordinance, designate; but no city shall become indebted in excess of five per centum of the actual value of the taxable property of said city as shown by the last preceding assessment roll. [35 G. A., ch. 86, § 1.]

SEC. **849-k. Additional power to certain cities.** This act shall be construed as granting additional power without limiting the power already existing in cities of the first class including cities acting under the commission plan of government. [35 G. A., ch. 86, § 2.]

CHAPTER 9.

OF PARK COMMISSIONERS AND BOARD OF PUBLIC WORKS.

SECTION **850. Repeal.** That sections eight hundred fifty to eight hundred sixty-two of the code inclusive and sections eight hundred fifty to eight hundred sixty-two of the supplement to the code [1902] inclusive and amendments thereto be repealed and the following enacted in lieu thereof:[1] [32 G. A., ch. 42, § 1.]

[1]The substituted sections are §§ 850-a to 850-n inclusive. EDITOR.]

SEC. **850-a. Park commissioners—election—appointment.** There shall be elected at the regular municipal election in each city containing a population of forty thousand or over, and all other cities and towns may, by ordinance, provide for the election of three park commissioners whose terms of office shall be six years, one to be elected at each regular municipal election, but at the first election three shall be elected and hold their offices respectively for two, four and six years, their respective terms to be decided by lot and their successors shall be elected for the full term of six years; provided however that in all cities and towns not now having park commissioners the ordinance establishing such park commissioners shall not be in force until it has been submitted to the voters at a special or regular municipal election and approved by a majority of the votes cast at such election. In the event that such ordinance is approved by a majority of the votes cast at such election, the city council shall have the power to appoint three park commissioners to hold such office until the next regular city election. [35 G. A., ch. 99, § 1.] [32 G. A., ch. 42, § 2; 29 G. A., ch. 45, §§ 1, 2; 28 G. A., ch. 30, § 1; 27 G. A., ch. 25, § 1; 24 G. A., ch. 1, § 1; 24 G. A., ch. 2, § 1; 20 G. A., ch. 151, § 1.]

By the statute relating to the commission form of government in certain cities the provision as to park commissioners was rendered inapplicable to such cities. *Eckerson v. Des Moines*, 137–452, 115 N. W. 177.

SEC. **850-b. Qualification—organization—treasurer—compensation.** The commissioners shall, within ten days after their election, qualify by taking the oath of office and organize as a board by the election of one of their number as chairman and one as secretary, but each commissioner,

before he enters upon the duties of his office, shall give a bond with sureties to be approved by the council, in the penal sum of one thousand dollars, conditioned for the faithful discharge of his office. The city treasurer shall be the treasurer of said board and pay out all moneys under the control of the board as ordered on orders signed by the chairman and secretary, but shall receive no compensation for his services as such treasurer. Each of the commissioners shall receive such salary as shall be fixed by the city council, not to exceed in the aggregate annually ten dollars for each one thousand population or fraction thereof according to the last state or federal census, said compensation to be paid out of the park fund. [32 G. A., ch. 42, § 3; 28 G. A., ch. 30, § 2; 25 G. A., ch. 1, § 1; 24 G. A., ch. 1, § 2.]

[The above section is made applicable to special charter cities by § 991-a. EDITOR.]

SEC. **850-c. Tax—certified—purchase of real estate—grading—driveways.** That section eight hundred fifty-c of the supplement to the code, 1907, as amended by chapter fifty-seven of the acts of the thirty-third general assembly and chapter forty-four, acts of the thirty-fourth general assembly, be and the same is hereby repealed and the following enacted in lieu thereof:

"The board shall, on or before the first day of August of each year, determine and fix the amount or rate not exceeding two and one-half mills on the dollar in all cities and towns on the valuation of such city or town to be levied, collected and appropriated for the ensuing year, for park purposes, and shall cause the same to be certified to the city or town council, which shall levy such tax or so much thereof as it may deem necessary to promote park interests, and certify the per cent. thereof to the county auditor, and the other taxes for said year. In cities having a population of over twenty-five thousand said board is further authorized in its discretion to certify to the county auditor and to cause to be collected an additional tax for park purposes of one mill on the dollar on all taxable property of the city to be used for the sole and only purpose of purchasing and paying for real estate. The board may anticipate the collection of said additional tax authorized to be levied for the purchase of real estate for park purposes and for that purpose may issue park certificates or bonds with interest coupons and the provisions of chapter twelve, title five of the code shall be operative as to such certificates, bonds and coupons in so far as they may be applicable. The proceeds of such tax shall be kept as a separate fund and shall be used for the purpose of paying certificates or bonds and coupons issued thereupon and for no other purpose whatsoever."

(In all cities where said board shall have, prior to January first, nineteen hundred fourteen, made purchase of property for park purposes by means of the additional tax of one mill authorized by the provisions of chapter fifty-seven of the acts of the thirty-third general assembly and chapter forty-four of the acts of the thirty-fourth general assembly, the said board is authorized in its discretion to certify to the county auditor for the years nineteen hundred fourteen, nineteen hundred fifteen, nineteen hundred sixteen, nineteen hundred seventeen and nineteen hundred eighteen and cause to be collected an additional tax of one mill each year to be used for the sole and only purpose of grading, beautifying and otherwise improving any lands acquired for park purposes by means of the tax so authorized or for acquiring and improving any driveway or boulevard connecting one park with another.) [35 G. A., ch. 89, § 1; 35 G. A., ch. 88, § 1; 34 G. A., ch. 44, § 1; 33 G. A., ch. 57, § 1; 33 G. A., ch. 56, § 1.] [32 G. A., ch. 42, § 4; 32 G. A., ch. 43, § 1; 30 G. A., ch. 34, § 1; 29 G. A., ch.

163, § 1; 28 G. A., ch. 31, § 1; 28 G. A., ch. 30, § 3; 25 G. A., ch. 2, § 1; 25 G. A., ch. 1, § 2; 24 G. A., ch. 1, §§ 3, 4; 20 G. A., ch. 151, §§ 3–5.]

[The above section is made applicable to special charter cities by § 991-a. EDITOR.]

[The paragraph above set forth in parenthesis is the amendment contained in ch. 89, 35 G. A., approved Feb. 18, 1913, carrying no publication clause, and therefore taking effect July 4, 1913, as did also the first portion of the above section, which is ch. 88, 35 G. A., approved April 18, 1913. Whether or not the paragraph in parenthesis is a part of the law is not a matter for determination by the compiler of this work. It has not been deemed advisable to omit it. EDITOR.]

SEC. **850-d. Park fund—how expended.** No money of this fund shall be appropriated or expended for any purpose except as provided in this chapter. Such fund may be used in purchasing or acquiring real estate for park purposes including streets or highways to connect one park with another or to connect a park with streets or highways or for other purposes necessary and incident to the establishment and maintenance of parks and paving streets adjacent thereto and for the purpose of improving and maintaining the same and defraying the necessary expenses connected therewith, including the compensation of the board, its officers and employes, and when any annual tax or part thereof has been pledged for the payment of any bonds or the interest thereon, such tax or part thereof shall be devoted to no other purpose. For the payment of one or more park policemen to be recommended by the board and appointed by the mayor. For the purpose of paying for the necessary lights as fixed by the park board and paying for such water supply as may be necessary in such parks. [32 G. A., ch. 42, § 5; 32 G. A., ch. 43, § 1; 30 G. A., ch. 34, § 1; 29 G. A., ch. 163, § 1; 28 G. A., ch. 31, § 1; 28 G. A., ch. 30, § 3; 25 G. A., ch. 2, § 1; 25 G. A., ch. 1, § 2; 24 G. A., ch. 1, §§ 3, 4; 20 G. A., ch. 151, §§ 3–5.]

[The above section is made applicable to special charter cities by § 991-a. EDITOR.]

SEC. **850-e. Acquisition of real estate—powers of board.** Said park board may acquire real estate within or without the city for park purposes, by donation, purchase or condemnation and take the title to the same in the name of the board in trust for the public and hold the same exempt from taxation. It may sell, subject to the approval of the city council, exchange or lease any real estate acquired by it which shall be found unfit or not desirable for park purposes; shall keep a report of all transactions; shall have exclusive control of all parks and pleasure grounds acquired by it or of any other ground owned by the city and set apart for like purposes, and may make contracts, sue and be sued, but shall incur no indebtedness in excess of the amount of taxes already levied and available for the payment thereof except bonds hereby authorized. It shall make an annual detailed report of the amounts of money expended and the purposes for which used, to the council at the regular April meeting, and such annual statement shall be published as part of the annual municipal report. For the purpose of paying for real estate it may issue bonds for such sums and amounts as found necessary but the aggregate annual interest of all bonds issued by it and at any time outstanding shall not exceed one half of the amount of the annual tax authorized by this chapter. [33 G. A., ch. 56, § 2.] [32 G. A., ch. 42, § 6; 30 G. A., ch. 34, § 2; 25 G. A., ch. 2, § 2; 24 G. A., ch. 1, §§ 4, 7; 20 G. A., ch. 151, § 2.]

[The above section is made applicable to special charter cities by § 991-a. EDITOR.]

SEC. **850-f. Bonds—lien on property—mortgage.** Bonds issued under the provisions of this chapter shall be a lien upon all of the real estate

acquired by the commissioners therewith or with the proceeds thereof and such bonds or proceeds shall be used for the purchase of real estate only. The board shall have the power to mortgage any real estate purchased or controlled by it for park purposes to a trustee for the purpose of securing the payment of said bonds and after the issuance there shall be pledged for the payment of the interest thereon such amount of the annual tax levied by virtue of this chapter as shall be necessary to make such payment, and the residue of said tax may be used by the board for the payment of such bonds, for the purchase of real estate or improvement of the park and pleasure grounds of the city. [33 G. A., ch. 56, § 3.] [32 G. A., ch. 42, § 7; 31 G. A., ch. 27, § 1; 25 G. A., ch. 1, § 4; 24 G. A., ch. 1, § 6.]

[The above section is made applicable to special charter cities by § 991-a. EDITOR.]

SEC. **850-g. Jurisdiction—defacement of trees—penalty.** The jurisdiction of such board shall extend over all lands used for parks within or without the corporate limits and all ordinances of such cities and towns shall be in full force and effect in and over the territory occupied by such parks. Any person who shall, except by the authority of such commissioners, cut, break or deface any tree or shrub growing in such park or parks, or any avenue thereto, shall be deemed guilty of a misdemeanor and upon conviction thereof shall be punished by a fine not exceeding one hundred dollars or imprisonment in the county jail not exceeding thirty days. [32 G. A., ch. 42, § 8.]

[The above section is made applicable to special charter cities by § 991-a. EDITOR.]

SEC. **850-h. Rules and regulations.** The board may in writing prescribe rules and regulations for the government of the parks or public grounds under their control and persons resorting thereto, which rules and regulations shall be in force when entered in the record of the proceedings of the board, and a copy thereof signed by the commissioners has been posted at each gate or principal entrance to any such park or public grounds, and a wilful violation thereof shall be a misdemeanor, punishable by a fine not exceeding one hundred dollars or imprisonment in the county jail not exceeding thirty days. [32 G. A., ch. 42, § 9; 25 G. A., ch. 1, § 5.]

[The above section is made applicable to special charter cities by § 991-a. EDITOR.]

SEC. **850-i. City engineer—poles and wires on park grounds.** The board shall be entitled to the services of the city engineer, when requested, without expense to it. It shall have the power to regulate or forbid the erection of poles or the stretching of wire for electric light, street railway, or other corporations or persons in such parks or in or along streets, highways or over public places laid out or controlled by it. [32 G. A., ch. 42, § 10; 25 G. A., ch. 1, §§ 6, 7.]

[The above section is made applicable to special charter cities by § 991-a. EDITOR.]

SEC. **850-j. Park districts—condemnation of property.** Where any such city shall contain more than one organized township, at least one commissioner shall be a resident of each of said townships. If said board and the owners of any property desired by it for park purposes cannot agree as to the price to be paid therefor, it may cause the same to be condemned in the manner provided for taking land for municipal purposes. [33 G. A., ch. 58, § 1.] [32 G. A., ch. 42, § 11; 24 G. A., ch. 1, §§ 8, 9.]

[The above section is made applicable to special charter cities by § 991-a. EDITOR.]

SEC. **850-k. Appropriation for park purposes.** In cities and towns not having a park board the council may appropriate each year not exceeding five per cent. of the general fund for the improvement and maintenance of public parks. [32 G. A., ch. 42, § 12.]

[The above section is made applicable to special charter cities by § 991-a. EDITOR.]

SEC. **850-l. How expended.** Said fund so appropriated shall be expended under the direction of a committee of three persons, consisting of the mayor, one member of the council appointed by the council, and one resident property owner of such city or town appointed by the council, which committee shall receive no compensation for their services. [32 G. A., ch. 42, § 13.]

[The above section is made applicable to special charter cities by § 991-a. EDITOR.]

SEC. **850-m. Existing contracts and bonds.** Nothing in this act shall be construed to affect any contracts heretofore entered into by any park board or any bonds issued by such boards but all such contracts shall be carried out and all such bonds[1] shall be paid under the terms thereof. [32 G. A., ch. 42, § 14.]

[1"boards" in session law. EDITOR.]

[The above section is made applicable to special charter cities by § 991-a. EDITOR.]

SEC. **850-n. Acts in conflict repealed—tenure of office.** All acts or parts of acts inconsistent with the provisions of this act are hereby repealed, but nothing in this act shall be construed as affecting the tenure of office of park commissioners heretofore elected in cities or towns heretofore having a park commission. [32 G. A., ch. 42, § 15.]

[The above section is made applicable to special charter cities by § 991-a. EDITOR.]

SEC. **851. Qualification—organization—treasurer—compensation—repealed.** [32 G. A., ch. 42, § 1.]

[See § 850.]

SEC. **852. Taxes certified—purposes—repeal.** Section eight hundred fifty-two of the code, as amended by chapter forty-three of the acts of the thirty-second general assembly is hereby repealed. [33 G. A., ch. 57, § 2.] [32 G. A., ch. 42, § 1.]

[See § 850. EDITOR.]

SEC. **853. Acquisition of real estate—powers of board—repealed.** [32 G. A., ch. 42, § 1.]

[See § 850.]

Under 28 G. A., ch. 179, giving the board of park commissioners of Des Moines jurisdiction of the portions of the banks and bed of the Des Moines river below high-water mark within the limits of the city, held that while the board might not deny the right to take ice from the river within such limits, yet such right was subject to reasonable regulation by the board; and held that such statute was not unconstitutional. *Board of Park Commissioners v. Diamond Ice Co.*, 130–603, 105 N. W. 203.

Under such provisions the jurisdiction and control of the board extends to high-water mark on each side of the river. *Board of Park Commissioners v. Taylor*, 133–453, 108 N. W. 927.

The park board is a corporation or quasi corporation having power to contract, to sue and be sued and to condemn property for public purposes. It is not liable for an injury due to wanton and malicious acts or irregularity in the proceedings for condemnation of property but it is liable for the abandonment of the proceedings as provided in code § 2011 as amended. *Ford v. Board of Park Commissioners*, 148–1, 126 N. W. 1030.

SEC. 854. **Bonds—repealed.** [32 G. A., ch. 42, § 1.]

[See § 850.]

SEC. 855. **Lien on property—mortgage—repealed.** [32 G. A., ch. 42, § 1.]

[See § 850.]

SEC. 856. **Regulations—repealed.** [32 G. A., ch. 42, § 1.]

[See § 850.]

SEC. 857. **Police protection—repealed.** [32 G. A., ch. 42, § 1.]

[See § 850.]

SEC. 858. **Park districts—condemnation of property—repealed.** [32 G. A., ch. 42, § 1.]

[See § 850.]

SEC. 859. **Park commissioners in other cities and towns—repealed.** [32 G. A., ch. 42, § 1.]

[See § 850.]

[Other references to session laws which amended § 859 are 29 G. A., ch. 45, § 3; 28 G. A., ch. 30, § 4; 27 G. A., ch. 26, §§ 1, 2; 27 G. A., ch. 25, § 2. EDITOR.]

SEC. 860. **Voting tax for park fund—repealed.** [32 G. A., ch. 42, § 1.]

[See § 850.]

[Other references to session laws which amended § 860 are 30 G. A., ch. 35, § 1; 29 G. A., ch. 46, § 1. EDITOR.]

SEC. 861. **Powers and compensation of commissioners—repealed.** [32 G. A., ch. 42, § 1.]

[See § 850.]

[Other references to session laws amending § 861 are 30 G. A., ch. 36, § 1; 29 G. A., ch. 46, § 2. EDITOR.]

SEC. 862. **Protection of parks—repealed.** [32 G. A., ch. 42, § 1.]

[See § 850.]

[Another reference to a session law amending § 862 is 29 G. A., ch. 46, § 3. EDITOR.]

SEC. 862-a. **City council may appropriate—in certain towns and cities.** In towns and cities of five thousand population or less, the council may apropriate each year not exceeding five per cent. of the general fund for the improvement and maintenance of public parks. [29 G. A., ch. 47, § 1.]

SEC. 862-b. **How expended.** Said fund so appropriated shall be expended under the direction of a committee of three persons, consisting of the mayor, one member of the council appointed by the council, and one resident property owner of such city or town appointed by the council, which committee shall receive no compensation for their services. [29 G. A., ch. 47, § 2.]

SEC. 865. **Consultation with city engineer.** Section eight hundred sixty-five of the code is hereby repealed and the following enacted in lieu thereof:

"The board shall consult the city engineer regarding the plans and specifications and the advisability of doing or making contemplated improvements or work, and he shall from time to time furnish it with estimates of

the cost of material and plans and specifications for any work to be ordered or advertised to be done, and report to the board whether such improvement or work is made and completed according to contract. Whenever the members of the board of public works are unable to agree upon any matter which is before it for decision, including the appointing of agents and employes, the city engineer shall decide such matter or appointment, and his decision shall be the decision of the board of public works. Such decision shall be rendered in writing and shall be filed in the office of the board of public works and when so filed shall have the force and effect of a finding or determination by the board of public works." [32 G. A., ch. 26, § 14; 22 G. A., ch. 1, § 3.]

A tie or disagreement calling for the casting of the vote of the engineer can only exist where there has been a meeting of the board and the inability of the members to agree has been developed by a vote or other sufficient declaration. *Gilcrest v. Des Moines*, 157– —, 137 N. W. 1072.

SEC. 866. Contracts.

As the contract is prepared by the officers of the city it should be so construed as not to permit the city to avail itself of an unconscionable advantage by reason of a mistake. *Fullerton v. Des Moines*, 147–254, 126 N. W. 159.

SEC. **867. Bids.** It shall advertise for bids and make all contracts on behalf of the city for all work, and for material and work for public improvements in excess of two hundred dollars, whenever the same shall be ordered by the council or voted for at any election. Proposals for bids shall be published once each week for two weeks in two of the daily newspapers therein, which shall be completed at least two weeks before the making of any contract, which proposals shall state the amount and kinds of material to be furnished, the kind of improvement, and the time and conditions upon which bids will be received, all of which may be rejected. All contracts shall be made with the lowest responsible bidder, but it shall not be necessary before proposals are published or bids received to determine specifically the kind of material to be used. [32 G. A., ch. 26, § 15; 22 G. A., ch. 1, §§ 5, 6.]

Cities operating under the commission plan are not required or permitted to have a board of public works and the statutory provisions as to advertisement for bids applicable to the board of public works will not be applicable to the council of such city. *Sims v. Des Moines*, 146–410, 125 N. W. 329.

SEC. 869. Superintend lighting.

In entering into a contract, such as is contemplated in this section, the city is exercising its business powers as distinguished from those which are governmental, and is subject to the law of estoppel. It cannot, therefore, complain of the irregular manner in which a contract has been entered into after such contract has been fully executed by the other party and the city has received the full benefit of it. *Des Moines v. Welsbach Street Lighting Co.*, (C. C. A.) 188 Fed. 906.

A contract entered into under this section does not constitute the granting of a franchise which must be submitted to a vote of the electors. *Ibid.*

SEC. 870. Public works.

Bridges will not be regarded for all purposes as parts of the street under this section. So held with reference to provisions for paving. *Cedar Rapids v. Cedar Rapids & M. C. R. Co.*, 108–406, 79 N. W. 125.

Without actual fraud there may be such inattention, neglect of duty or other misconduct on the part of the person or body authorized to accept the improvement as to amount to legal fraud which will defeat the right of the municipality to collect a special assessment. *McCain v. Des Moines*, 128–331, 103 N. W. 979.

The certificate of the engineer that work has been done or material furnished is to be made to the board of public works and orders for payment drawn and signed by it. *Gilcrest v. Des Moines*, 157– —, 137 N. W. 1072.

Upon the abolition of the board of public works in Des Moines by the adoption of the commission form of government, held that the powers and duties of the board were conferred upon the city council, and as the board's authority to accept the work on a particular improvement had never been exercised by the board as distinct from its individual members, it had become the duty of the city council to determine whether the work should be accepted. *Ibid.*

SEC. **871. Expenditures.** It shall control and direct all expenditures to be made by its department, and sign and draw orders for the same, and all orders given and bills and accounts created by it shall first be indorsed by each of the members thereof, or their reasons stated in writing for not doing so, and approved by the council, before the same shall be ordered paid. No claim for any work done or material furnished in the construction of any public improvement shall be allowed by the council unless the same has first been approved by the board of public works. [32 G. A., ch. 26, § 16; 22 G. A., ch. 1, § 11.]

SEC. **873. Appointive powers.** It shall have power to appoint agents and employes necessary for the doing of its work. [32 G. A., ch. 26, § 17; 22 G. A., ch. 1, § 13.]

CHAPTER 9-A.

OF IMPROVEMENT OF THE CHANNELS OF MEANDERED STREAMS WITHIN THE CORPORATE LIMITS OF CERTAIN CITIES.

AN ACT to authorize the improvement of the channels of meandered streams dividing the territory within the corporate limits of certain cities, and to authorize the reclaiming of lands between the meandered lines of said streams within said corporate limits, and to create a commission therefor, and defining its powers and prescribing its duties.

WHEREAS the title to the beds of the meandered streams in Iowa, including all the land between the meandered lines of such streams, is vested in the state of Iowa and under control of the legislature, and

WHEREAS much of said lands between the meandered lines of such streams is land not needed by the waters of such streams for channels or watercourses, and

WHEREAS such lands as lie within the corporate limits of said cities would be of great value to the public if reclaimed by walls or embankments to secure an adequate channel for such streams, and

WHEREAS the courses of such streams through such cities could be beautified and made regular and sanitary and the expense of bridging greatly reduced, where they are now unsightly, irregular, unsanitary and of such great width that the expense of bridging and maintaining bridges is very great, and

WHEREAS the state can make no use of said lands and has an interest in the improvement of the channels of streams, therefore

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

SECTION **879-a. Petition—river front improvement commission.** That whenever five hundred electors of any city whose corporate limits are divided by a meandered stream shall, in writing, petition the governor of this state for the appointment of a commission, as provided for by this act, he shall, within one month thereafter, appoint three electors, residents of the city of the said electors so petitioning, who shall constitute a body corporate, to be known as the river front improvement commission of————,

inserting in said blank the name of the city of the said electors so applying. [29 G. A., ch. 210, § 1.]

SEC. **879-b. Election.** That one commissioner shall be elected at each biennial city election after the passage of this act to succeed one of the commissioners so appointed, whose term shall expire when his successor is elected and qualified. [29 G. A., ch. 210, § 2.]

SEC. **879-c. Organization—secretary—treasurer—bond.** The commissioners shall, within ten days after their appointment, qualify by taking the oath of office, determine, by lot, the order of the expiration of their terms, and organize by the election of one of their number as chairman; they shall also elect a secretary, not one of their number; and shall also elect a treasurer, not one of their number, who shall give bonds in the sum of twenty-five thousand dollars, the penalty of which may be increased by the commission. The treasurer shall receive and pay out all moneys under the control of said commission as ordered by it, but shall receive no compensation for his services. Each of the commissioners shall be reimbursed for the actual expenses incurred or money paid out by him in connection with the discharge of his official duties, but shall receive no compensation for his services. An itemized statement of all expenses and moneys received and paid out shall be made under oath and filed with the secretary and allowed by the commission. [29 G. A., ch. 210, § 3.]

SEC. **879-d. Title to river bed—lost boundary lines.** That when said commissioners have been so appointed and qualified, the fee simple title to the bed of the meandered stream, separating the corporate limits of the city, for which they are appointed, shall immediately vest in the commission in trust for the public and the same while held by the commission shall be exempt from taxation; provided that the fee title to the channel or bed of the stream to be located and preserved as hereinafter provided shall remain in the state; and provided also, that the vested rights of riparian owners and owners of water powers, shall not be injuriously affected by this act. Where the original boundary lines separating the land under the control of said commission from the land of the state or of any adjoining landowner, or the monuments marking the same are now or shall hereafter become lost, destroyed or in dispute, said commissioners may proceed to have said boundary lines established in the manner provided in chapter five, title twenty-one, of the code, and any proceeding heretofore instituted or action heretofore brought as provided in said chapter five, title twenty-one, of the code, is hereby legalized and validated as to the form of procedure used therein. [35 G. A., ch. 90, § 1.] [29 G. A., ch. 210, § 4.]

SEC. **879-e. Powers.** Said commission may redeem lands between the meandered lines of such stream, construct, regulate and maintain dams across such streams, provide for and protect, by secure walls or banks, a channel adequate to carry flood waters of a volume equal to all reasonable expectations, based on past experience, and the area drained by such stream, according to expert authority; beautify such walls or banks; and park so much thereof as public interest may require; and where circumstances permit, make any part of the area redeemed and acquired suitable for sites for public buildings. [29 G. A., ch. 210, § 5.]

SEC. **879-f. Profiles and specifications—approval.** That said commission may adopt plans, profiles and specifications for the improvement of the said river channel and banks, and the reclaiming of lands between the meandered lines of said stream within such city, and the construction of dams; but before the beginning of the execution of the same, such plans,

profiles and specifications shall be approved by the executive council of Iowa. [29 G. A., ch. 210, § 6.]

SEC. 879-g. **Additional powers—annual report—tax—river front improvement fund.** Said commission may acquire real estate and riparian and other rights within such city in the vicinity of such stream by donation, or purchase, or by condemnation for the public uses herein authorized in the manner provided by law for the taking of private property for public use, and shall take the title to property in the name of the commission and its successors, in trust for the public, and hold the same exempt from taxation. It may sell and convey or lease, or exchange any property acquired by it, by virtue of this act and otherwise. It shall have exclusive control of all the lands acquired by it, and of the banks and waters of such stream for carrying out the purposes of this act, may make contracts and sue and be sued. It shall keep a record of all its transactions, which shall during ordinary business hours be open to inspection by the public, and shall make an annual report of all moneys received and expended by it and for what general purposes, and of all moneys owing to it and by it and for what general purposes, to the city council at the regular November meeting, and publish such report in some newspaper in the city. The commission shall, subject to the approval of the city council, in each year determine and fix the amount or rate, not exceeding two mills on the dollar, on the taxable value of the taxable property of such city, to be levied, collected and appropriated for the ensuing year for the purpose of paying for real estate, riparian and other rights, for improvements, and for accomplishing the purposes of the creation of said commission and to provide for the payment of interest upon bonds and to retire such bonds, if any, and to meet the necessary expenses incident to the business of said commission. Said commission shall, on or before the first Monday in September of each year, certify to the county auditor the amount or rate of taxes so fixed, to be known as river front improvement fund, and when collected, the same [is] to be paid over to the treasurer of the commission, and by him paid out on its orders, and the board of supervisors of the county in which said city is situated shall levy said tax as fixed by said commission. [35 G. A., ch. 90, § 2.] [29 G. A., ch. 210, § 7.]

SEC. 879-h. **Bonds—mortgages.** For the purpose of paying for real estate and improvements and accomplishing the purposes of its creation, said commission may issue bonds in such amounts as it may deem necessary, and may execute trust deeds or mortgages upon its property acquired by virtue of this act and otherwise or any part thereof to secure the payment of said bonds and interest thereon. [29 G. A., ch. 210, § 8.]

SEC. 879-i. **Cities may aid in making improvements—indebtedness.** That such city shall not be liable for any indebtedness incurred by said commission or for any bond issued by said commission. That such cities are hereby authorized to aid in making the improvements specified in this act by appropriating money from its general fund or from the surplus remaining at the end of the fiscal year in any special fund, except in cases where such diversion of moneys is especially prohibited by statute, and may appropriate in aid of the improvements herein provided for, the reasonable saving effected in the building of bridges and otherwise by reason of said improvements. [29 G. A., ch. 210, § 9.]

SEC. 879-j. **Rules and regulations—penalty.** Said commission may, in writing, prescribe rules and regulations for the government of the public grounds under their control and persons resorting thereto, which rules and regulations shall be enforced when entered in the record of the

proceeding of the commission, and a copy thereof signed by the commissioners has been posted at each gate or principal entrance to any such public grounds and a wilful violation thereof shall be a misdemeanor, punishable by fine not exceeding twenty-five dollars. Anyone who shall cut, break or deface any tree or shrub growing in such public grounds, without authority, shall be guilty of a misdemeanor and be punished by fine not exceeding one hundred dollars or by imprisonment not exceeding thirty days in jail. Any magistrate in the city shall have jurisdiction to try such offenses. [29 G. A., ch. 210, § 10.]

SEC. **879-k. Police protection—water supply—poles and wires.** The mayor, on written request of the commission, shall furnish adequate police protection for such public grounds and the city shall furnish such water supply as may be necessary therefor, and properly light the same at its expense. The commission shall be entitled to the services of the city engineer, when requested, without expense to it. It shall have the power to permit or forbid the erection of poles or the stretching of wires for electric light, street railway or other purposes by persons or corporations, in such public grounds or in or along streets, highways or over public places laid out or controlled by it. [29 G. A., ch. 210, § 11.]

SEC. **879-l. Wharves—landing places—bath and boathouses.** That said commission shall have power, in and over the bed and banks of such river as specified, to construct and regulate the use of wharves, landing places, bathhouses, boathouses and other suitable structures and shall have exclusive jurisdiction over the water of such stream, within the corporate limits of such city and may maintain said stream in a suitable condition for boating, skating and other public amusements and purposes. [29 G. A., ch. 210, § 12.]

SEC. **879-m. What prohibited.** No member of the commission shall, during the time for which he has been appointed or elected, or for one year thereafter, be appointed to any office in the gift of the commission which shall be created, or the emolument of which shall be increased, during the term for which he was elected, nor shall he be interested directly or indirectly in any contract for work or service to be performed for the commission or in the purchase or sale of any property sold to or by the commission. [29 G. A., ch. 210, § 13.]

SEC. **879-n. Vacancies.** In case vacancy arises in the commission, the governor of the state shall fill such vacancy by appointment for the unexpired portion of the term, or until the next election, as the case may be. [29 G. A., ch. 210, § 14.]

SEC. **879-o. Cities affected.** That the law as it appears in section eight hundred seventy-nine-o, supplement to the code, 1907, be and the same is hereby repealed and the following enacted in lieu thereof:

"The provisions of chapter nine-A, title five of the supplement to the code, 1907, shall apply only to cities acting under special charter and cities of the first class acting under the general incorporation laws and cities acting under the commission form of government having a population of less than twenty-five thousand; provided, however, that the increase in population of any city subsequent to the establishment or appointment of a river front improvement commission therein shall in no manner invalidate or affect the title, standing or authority of such commission." [35 G. A., ch. 90, § 3.] [29 G. A., ch. 210, § 15.]

CHAPTER 9-B.

OF OFFICERS OF CITIES AND TOWNS.

SECTION **879-p. Executive powers and duties.** All executive functions, powers and duties in cities and towns shall be exercised and performed by the mayor and other elective and appointive officers and boards as provided by law, and neither the council nor the members thereof shall exercise any executive function unless expressly conferred by law. [32 G. A., ch. 26, § 18.]

SEC. **879-q. Officers not to be interested in contracts—free passes or franks.** No officer, including members of the city council, shall be interested, directly or indirectly in any contract or job of work or material or the profits thereof or services to be furnished or performed for the city or town. No such officer shall accept or receive, directly or indirectly, from any person, firm or corporation operating within the said city or town, any railway, interurban railway, street railway, gasworks, waterworks, electric light or power plants, telegraph line or telephone exchange or other business using a public franchise, any frank, free pass or ticket or other service upon terms more favorable than is granted to the public generally, except where, by franchise granted by the municipality to any such person or corporation, any officers of said municipality are granted such privileges as part of such franchise, and except that members of the police and fire departments of any city or town shall be carried without charge. Any violation of the provisions of this section shall be a misdemeanor. [32 G. A., ch. 26, § 19.]

CHAPTER 10.

OF CONDEMNATION AND PURCHASE OF LAND.

SECTION **880. For what purpose.**

The power to condemn may be delegated to municipalities and when this is done they have the same power as the state acting through any regularly constituted authority. *Bennett v. Marion*, 106–628, 76 N. W. 844.

The city may be allowed to determine for itself whether a particular improvement shall be made, but the land owner may raise a question as to the amount of land necessary for the purpose contemplated. *Ibid.*

If the land sought to be taken will to some extent conduce to the public use to which it is to be devoted, a decision of the municipality that it is necessary therefor should not be interfered with; otherwise it should be set aside. *Ibid.*

The jury should be directed to include, as damages, incidental injuries to the balance of the land owner's property by reason of the proper use of the condemned portion for the purpose contemplated. *Ibid.*

This section does not give the city any right to establish a pest house on property acquired by the city outside of its limits. *Warner v. Stebbins*, 111–86, 82 N. W. 457.

A city has authority to acquire land by condemnation for a public landing, and when so condemned it may give the right of way thereover to a railway company. *Diamond Jo Line Steamers v. Davenport*, 114–432, 87 N. W. 399.

The fact that the property is already owned by a private corporation as a steamboat landing does not prevent its condemnation for a public landing. *Ibid.*

The proceedings for condemnation may be abandoned by the city, but the city cannot abandon an award after it is made, and institute another proceeding for the purpose of condemning the same property. *Robertson v. Hartenbower*, 120–410, 94 N. W. 857.

Appropriation of property for a street or alley can be accomplished only by ordinance. *Bradley v. Centerville*, 139–599, 117 N. W. 968.

An incorporated town may purchase lands for the various public purposes contemplated by statute, to be paid for out of the general fund. *Brooks v. Brooklyn*, 146–136, 124 N. W. 868.

A city may condemn a right of way for a street crossing the depot grounds of

a railway company where the use of the proposed street is not inconsistent with the continuing use by the railway company of such grounds for proper purposes, even though it may be necessary for the company to make slight changes in its tracks or other appurtenances. *Chicago G. W. R. Co., v. Mason City*, 155–99, 135 N. W. 9.

The discretion of the city authorities in establishing a public way by which land adjoining the platted portion of the city may become available for residence and business purposes cannot be interfered with unless it may be in a case of clear abuse. *Ibid.*

SEC. 881. **Sewer outlets—disposal plants.** That section eight hundred eighty-one of the code be and the same is hereby repealed and the following enacted in lieu thereof:

"Cities and towns shall have the power to acquire real estate within or without their territorial limits necessary for sewer outlets, garbage disposal plants, sewage disposal plants and dump grounds, by purchase or condemnation as in this chapter provided, and the expense of such acquisition of real estate for sewer outlets, garbage disposal plants, sewage disposal plants and dump grounds, shall, in the case of garbage disposal plants and dump grounds, be paid out of the general fund, and in the case of sewer outlets and sewage disposal plants, out of the general fund or out of the sewer fund of the sewer district for which the sewer outlet or sewage disposal plant is established." [30 G. A., ch. 37; 26 G. A., ch. 8.]

The question whether the amount of land sought to be condemned is necessary for a sewer outlet may be raised by the land owner. *Bennett v. Marion*, 106–628, 76 N. W. 844.

In estimating damages, an improper use for sewer purposes such as would give rise to a nuisance is not to be considered, but the jury should be allowed to consider in what way the taking of land for these purposes would inconvenience the land owner in the use of the remainder of his land or lessen its value, and if sewers properly constructed would have this effect, then the jury should be directed to take this into consideration in making up their verdict. *Ibid.*

In such cases the city may be allowed to determine for itself whether the particular improvement shall be made, but the necessity for taking for that purpose the amount of land sought to be taken may be questioned by the land owner. *Ibid.*

The municipality may acquire real estate outside of its territorial limits for sewer outlets and for garbage disposal plants and dump grounds. *Hanson v. Cresco*, 132–533, 109 N. W. 1109.

Detriment to the portion of property not taken, resulting from the construction of a sewer, may be taken into account in estimating the damages in proceedings to condemn land for sewer purposes. *Richardson v. Centerville*, 137–253, 114 N. W. 1071.

The condemnation of land by virtue of power of eminent domain is a special proceeding and the legislature has almost unlimited power to fix the conditions upon which such condemnation may be made; therefore held that the allowance of an attorney's fee by the court, to be taxed as costs in case of condemnation of lands for sewer, was proper. *Ibid.*

A city has implied power to construct a plant for the disposal of sewage. *Glucose Sugar Ref. Co. v. Marshalltown*, 153 Fed. 620.

SEC. 883. Disposal of lands acquired.

The city may grant the land covered by a street which is duly vacated to a railroad company for depot purposes. *Spitzer v. Runyan*, 113–619, 85 N. W. 782.

An abutting owner may have damages against the city for vacating a street furnishing special access to such owner's property, but cannot recover damages against a railroad company for obstruction of such street after its vacation. *Harrington v. Iowa Cent. R. Co.*, 126–388, 102 N. W. 139.

So long as the right of the public to use a street continues it cannot be diverted to other uses, but when its vacation has been effected, the title, freed from the trust, continues in the city and it may convey the ground vacated to another to be used for private purposes. *Walker v. Des Moines*, 142 N. W. 51.

Further as to vacation of streets, see notes to code § 751 in this supplement.

SEC. 884. Proceedings for condemnation.

Costs made by the commissioners are to be paid by the corporation in any event. Only those involved in the appeal to the district court and attorneys' fees occa-

sioned thereby depend in any way on the result of the trial. These are to be taxed against the corporation, except in the contingency of a trial at which the amount of damages is not increased. If that contingency does not arise the costs are to be paid by the corporation. *Mellichar v. Iowa City*, 116–390, 90 N. W. 86.

On the abandonment of the proceedings it is but just and equitable that the party attempting to wrest the property from its owner should pay the expenses of litigation already incurred. *Ibid.*

The charge of the attorney in preparing an answer may properly be included in estimating the attorneys' fees, even though a formal answer is not required by the statute. *Ibid.*

Compensation for services rendered in other appeals, or in suits for the protection of the plaintiff's property, cannot be allowed. *Ibid.*

In the absence of a showing that delay in the proceeding is unreasonable, no action lies for the abandonment of the condemnation proceeding unless authorized by statute. *Ford v. Board of Park Commissioners*, 148–1, 126 N. W. 1030.

But by virtue of the reference to code § 2011 there is the same liability on the part of the board as on the part of a railroad corporation which having instituted proceedings for condemnation of property declines to take the property and pay the damage awarded. *Ibid.*

SEC. 885. Donation of sites for depots.

The city has no authority to issue negotiable bonds in payment for land condemned or otherwise taken in procuring a site for a railroad depot. The only indebtedness which the city can incur for that purpose is such indebtedness as may be satisfied out of its current revenues. *Swanson v. Ottumwa*, 131–540, 106 N. W. 9.

SEC. 886. Submission of question.

The provisions of this and the preceding section have no application to a case where the city vacates a street for use of a railroad company as depot grounds. *Spitzer v. Runyan*, 113–619, 85 N. W. 782.

CHAPTER 11.

OF TAXATION.

SECTION 888. City bridge fund.

This section provides the cities with means for exercising the power conferred in code § 758 with reference to the construction of bridges within the city limits. *Slutts v. Dana*, 138–244, 115 N. W. 1115.

Property within the city limits is not subject to a general bridge tax levied by the board of supervisors. *Keokuk v. Kennedy*, 156–680, 137 N. W. 914.

SEC. 891. Labor on highways. Any city or town shall have power to provide that all able-bodied male residents of the corporation between the ages of twenty-one and forty-five years, between the first day of January and the first day of November of each year, either by themselves or satisfactory substitute, shall perform two days' labor of eight hours each upon the streets, avenues, alleys, highways or public grounds within such corporation, at such times and places as the proper officer may direct, upon three days' notice in writing given, or pay in lieu thereof in money a sum to be fixed by such council, not exceeding one and a half dollars for each of such day's labor. For each day's failure to attend and perform the labor, or pay said sum of money, as required, at the time and place specified, unless excused by the supervisor of highways or street commissioner, the delinquent shall forfeit and pay the sum of two dollars, not exceeding four dollars in all. Any person excused shall be again notified to perform such labor or pay said sum of money in lieu thereof, at any time prior to November first of said year. All persons claiming to be exempt from labor under this section shall, within three days after receiving notice to perform such labor, furnish the mayor or other proper officer with an affidavit showing the extent and nature of the disabilities entitling him to such exemption.

If he fails to do so he shall be liable to perform such labor or pay the penalty provided herein. [27 G. A., ch. 27, § 1; 19 G. A., ch. 32; C. '73, § 487.]

[The above section is made applicable to special charter cities by § 1004. EDITOR.]

SEC. **892. Enforcement of road tax.** In case of failure to pay said sum of money in lieu of said labor, together with such forfeit, to the supervisor of highways, street commissioner, or other officer of said corporation authorized to receive the same within ten days from the expiration of the time fixed for the performance of such labor, said corporation may recover the same by action brought in the name of such city or town before the mayor of said corporation, or before any justice of the peace in the proper township. No property or wages belonging to said person shall be exempt to the defendant on an execution issued for said judgment and costs. The tax and forfeit money so collected shall be expended upon the streets, avenues, highways, alleys or public grounds of said corporation. All of such tax and forfeit money remaining unpaid on the first day of November in each year may be certified to the county auditor at any time before the following first day of December, and shall be entered by him upon the tax list of said county, and treated and collected as ordinary county taxes, and shall be a lien on all the real property of the delinquent. [27 G. A., ch. 27, § 2; 19 G. A., ch. 32; C. '73, § 487.]

[The above section is made applicable to special charter cities by § 1004. EDITOR.]

A police court has jurisdiction of a civil action to recover a poll tax provided for in this section. *Ottumwa v. Scott*, 139 N. W. 901.

SEC. **894. Other taxes.** Any city shall have power to levy annually the following special taxes:

1. *Grading fund.* A tax not exceeding, in any one year, three mills on the dollar, for a grading fund, to be used for the purpose of opening, widening, extending and grading any street, highway, avenue, alley, public ground or market place; [23 G. A., ch. 5, § 1; 21 G. A., ch. 160, §§ 2, 3; 20 G. A., ch. 20, § 5.]

2. *Improvement fund.* A tax not exceeding, in any one year, five mills on the dollar, for a city improvement fund, to be used for the purpose of paying the cost of the making, reconstruction or repair of any street improvements at the intersections of streets, highways, avenues or alleys, and at spaces opposite streets, highways, avenues and alleys intersecting but not crossing, and at spaces opposite property owned by the city or the United States, and for the purpose of paying the purchase price and subsequent taxes assessed against property purchased by the city at tax sale; [25 G. A., ch. 8, § 1; 22 G. A., ch. 12, § 1; 21 G. A., ch. 160, §§ 2, 3; 19 G. A., ch. 38, §§ 1, 2.]

[Made applicable to incorporated towns by § 792-f hereof. EDITOR.]

3. *Sewer fund.* A tax not exceeding, in any one year, two mills on the dollar on the assessed valuation of all property therein, for a city sewer fund, when the entire city comprises one sewer district, to be used to pay the cost of the making, reconstruction or repair of any sewer at the intersection of streets, highways, avenues, alleys, and at spaces opposite streets, highways, avenues and alleys intersecting but not crossing, and at spaces opposite property owned by the city or the United States, and to pay the whole or any part of the cost of the making, reconstruction or repair of any sewer within the limits of said city; when a city has been divided into sewer districts, a tax not exceeding two mills on the dollar on the assessed

valuation of all property in the sewer district, for a district sewer fund, to be used to pay, in whole or in part, the cost of the making, reconstruction or repair of any sewer located and laid in that particular district; [25 G. A., ch. 7, § 11; 22 G. A., ch. 7, § 1; 21 G. A., ch. 34; 17 G. A., ch. 162, § 1; 16 G. A., ch. 107, § 1.]

[See § 840-g. EDITOR.]

4. *Library tax.* That chapter thirty-eight of the laws of the thirtieth general assembly be and the same is hereby repealed and the following enacted in lieu thereof:

"In cities and towns which have established, or may hereafter establish, a free public library when the trustees of such library have made the certificate provided for in section one hereof, a tax in the amount so certified, but not exceeding in any one year five mills on the dollar in all cities and incorporated towns to be used for the maintenance of such library; and in such cities and towns an additional tax not exceeding in any one year three mills on the dollar, for the purchase of real estate and the erection of a building or buildings thereon for a public library, or for the payment of interest on any indebtedness incurred for that purpose, and for the creation of a sinking fund for the extinguishment of such indebtedness;" [35 G. A., ch. 68, § 2.] [31 G. A., ch. 21, § 2; 30 G. A., ch. 38; 26 G. A., ch. 5; 25 G. A., ch. 99, § 2; 25 G. A., ch. 43, § 1; 22 G. A., ch. 18, § 1.]

5. *Waterworks tax.* A tax not exceeding, in any one year, five mills on the dollar, which, with the water rates or rents authorized, shall be sufficient to pay the expenses of running, operating and repairing waterworks owned and operated by any city or town, and the interest on any bonds issued to pay all or any part of the cost of construction, renewal, repair or extension of such works; but such tax shall not be levied upon property which lies wholly without the limits of the benefit and protection of such works, which limits shall be fixed by the council each year before making the levy; [29 G. A., ch. 48, § 1; C. '73, § 475.]

6. *Tax for gasworks or electric plant.* A tax not exceeding, in any one year, five mills on the dollar, which, with the rates or rentals authorized, shall be sufficient to pay the expenses of running, operating and repairing gasworks and electric light or power plants owned by any city or town, and the interest on any bonds issued to pay all or any part of the cost of the construction of such works or plants; but such tax shall not be levied upon property which lies wholly without the limits of the benefit of the same, which limits shall be fixed by the council each year before making the levy; [22 G. A., ch. 11, § 2; C. '73, § 475.]

7. *Water tax.* A tax not exceeding, in any one year, five mills on the dollar, for the purpose of paying the amount due or to become due to any individual or company operating waterworks for water supplied under any contract, the levy to be limited to the property as in subdivision five hereof; and if in cities of the first class the maximum tax is insufficient to pay such amount under contracts now in force, the deficiency shall be paid out of the general fund; [C. '73, § 475.]

8. *Tax for gas or electric light or power.* A tax not exceeding, in any one year, five mills on the dollar, for the purpose of paying the amount due or to become due to any municipality, individual or company operating gasworks or electric light or power plants for all gas, electric light or power supplied under any contract, the levy to be limited to the property as in subdivision six hereof; providing that in[1] cities of five thousand or less, there may be in any one year a tax not exceeding seven mills on the dollar;

[35 G. A., ch. 91, § 1; 35 G. A., ch. 67, § 2.] [22 G. A., ch. 11, § 2; C. '73, § 475.]

["the" in enrolled bill. EDITOR.]

9. *Bond fund tax.* A tax for the purpose of creating a bond fund sufficient to pay the interest to accrue before the next annual levy on funding or refunding bonds outstanding, and such proportion of the principal that at the end of five years the sum raised shall equal at least twenty per cent. of the amount of the bonds issued; at the end of ten years at least forty per cent. of said amount; at the end of fifteen years at least sixty-five per cent. of said amount; and at or before the date of the maturity of said bonds a sum equal to the whole amount of the unpaid principal and interest, which tax shall be used to pay such principal and interest, and for no other purpose; [24 G. A., ch. 14, § 5; 23 G. A., ch. 4, §§ 6, 7; 22 G. A., ch. 17, § 5; 21 G. A., ch. 78, § 5.]

10. *Tax for water or gasworks or electric plant bonds.* A tax as authorized in the preceding subdivision, to be levied in the proportions therein set forth, and to be used exclusively in payment of the principal of bonds issued for the construction of water and gasworks and electric light and power plants, which tax shall not be levied upon property lying wholly without the limits of the benefit of such works or plants, which limits shall be fixed by the council each year before making the levy; [23 G. A., ch. 13, § 1; 22 G. A., ch. 10, § 1.]

11. *Cemetery tax.* A tax, not exceeding one half of one mill on the dollar of the assessed valuation of the property within the corporate limits, for the care, preservation and adornment of any cemetery owned or controlled by the city, or any private or incorporated cemetery association utilized by the citizens of said city or town; and the said tax may be so expended for the support and maintenance of any such cemetery after the same has been abandoned and is no longer used for the purpose of interring the dead; [35 G. A., ch. 50, § 2; 33 G. A., ch. 38, § 2.]

12. *Subdivisions five, six, seven, eight, nine and ten, extended to incorporated towns, and proceedings legalized.* The provisions of subdivisions five, six, seven, eight, nine, ten and eleven of said section eight hundred ninety-four are extended to incorporated towns, and all proceedings of incorporated towns had under the assumption that the said provisions were applicable to said incorporated towns are hereby legalized and confirmed, and said proceedings shall be in law held to be valid to the same extent as if the said subdivisions of said section eight hundred ninety-four of the code included incorporated towns by the specific terms thereof. The tax authorized by paragraph eleven hereof may as to towns exceed one half of one mill, but shall in no case exceed three mills on the dollar. [33 G. A., ch. 38, § 3.] [28 G. A., ch. 32, § 1.]

Par. 2. Improvement fund: The improvement fund may be resorted to for payment of deficiencies in special assessments for street improvements. *Corey v. Ft. Dodge*, 133–666, 111 N. W. 6.

Par. 5. Waterworks tax: The proceeds of the five-mill special water tax authorized by statute do not constitute the sole liability of the city under a contract to furnish water for public purposes. There may be a recovery of judgment under such contract payable out of the general funds. *Marion Water Co. v. Marion*, 121–306, 96 N. W. 883.

The limits of benefit and protection may be fixed by the council as coincident with the limits of the city. *Dubuque & S. C. R. Co. v. Mitchell*, 152–187, 131 N. W. 25.

In the case of railroad property, a valuable portion of which is within the limits of benefit and protection, the tax may be levied on the basis of the entire property within the city, although a portion of the track extends beyond such limits. *Ibid.*

The tax here provided for is not a special assessment but is levied in the exercise of the general taxing power. *Ibid.*

SEC. **894-a. Transfer of unclaimed electric light fund.** In any county of this state where a special tax has been levied to pay for the construction of an electric light plant for any city or town, and such tax is held invalid, and the same or any part thereof has remained uncalled for in the treasury of the county for a period of five or more years preceding the passage of this act, the board of supervisors of such county shall cause such unclaimed fund to be transferred and paid to the treasurer of the city or town in which such tax was levied, the same to be by the treasurer of such city or town credited to the general fund. [35 G. A., ch. 92, § 1.]

SEC. **894-b. Refund to tax payer.** The money so transferred and paid to the treasurer of such city or town, and so credited to the general fund or any part thereof, shall be paid at any time within five years from the receipt thereof to any person who is shown to be entitled thereto by evidence satisfactory to the city council or to the district court of the county in which such tax was levied and paid. Payment shall be made from the general fund of the city in the manner provided for the payment of other claims from that fund. [35 G. A., ch. 92, § 2.]

SEC. **898. Loans in anticipation of revenue.**

The object of this provision is to place municipal corporations on a cash basis and prevent the accumulation of a floating indebtedness. *Phillips v. Reed*, 107–331, 76 N. W. 850, 77 N. W. 1031; and see *Phillips v. Reed*, 109–188, 80 N. W. 347.

A city is not authorized, when borrowing money in anticipation of its revenues, to issue negotiable bonds therefor. *German Ins. Co. v. Manning*, 95 Fed. 597.

SEC. **902. Assessments and taxes certified—collection.** All assessments and taxes of every kind and nature levied by the council, except as otherwise provided by law, shall be certified by the clerk on or before the first Monday in September, to the county auditor, and by him placed upon the tax list for the current year, and the county treasurer shall collect all assessments and taxes so levied in the same manner as other taxes, and when delinquent they shall draw the same interest and penalties. Sales for such assessments and taxes when delinquent shall be made at the same time and in the same manner as such sales are made for other taxes, and should there be other delinquent taxes or assessments due from the same person, and collectible by the county treasurer, the sale shall be for all such delinquent assessments and taxes, and all the provisions of law relating to the sale of property for delinquent taxes shall be applicable as far as may be to such sales. Before the third Monday of each month, the county treasurer shall give written notice to the mayor of each municipality in the county of the amount collected for each fund up to the first day of that month, and the mayor of each municipality shall draw an order therefor in favor of the city treasurer, countersigned by the clerk or auditor of the municipality, upon the county treasurer who shall pay such taxes to the treasurers of the several municipalities only on such order. [31 G. A., ch. 29; 25 G. A., ch. 1, § 2; 24 G. A., ch. 1, § 3; 21 G. A., ch. 13, § 2; 19 G. A., ch. 63, § 2; C. '73, §§ 495, 498; R. §§ 1123, 1126.]

Where the proper notice of expiration of the period of redemption has not been served, so that the deed can properly be issued, the limitation of this section is not applicable. *Hintrager v. McElhinny*, 112–325, 82 N. W. 1008, 83 N. W. 1063.

CHAPTER 12.

OF BONDS.

SECTION 905. Funding.

The statutory authority given to refund does not validate an unauthorized indebtedness. *Swanson v. Ottumwa*, 131–540, 106 N. W. 9.

SEC. 906. Form.

An erroneous recital as to the statute under which bonds are issued will not render them invalid. *Fernald v. Gilman*, 123 Fed. 797.

SEC. **912-a. Applicable to towns.** All provisions of section nine hundred twelve of the code, granting to cities the power to issue certificates or bonds in anticipation of special taxes, shall be applicable, and is hereby made to apply to towns. [32 G. A., ch. 44.]

CHAPTER 13.

OF PLATS.

SECTION 914. For subdivisions or additions.

The owner of a lot platted as abutting on a navigable stream is not limited to the dimensions as determined by the platted meander line, but owns to high-water mark. *Board of Park Commissioners v. Taylor*, 133–453, 108 N. W. 927.

SEC. **915. Acknowledgment and recording — abstract of title.** Every such plat shall have a complete abstract of title attached thereto, and shall be accompanied by a statement to the effect that the subdivision of (here insert a correct description of the land or parcel subdivided), as appears on this plat, is with the free consent and in accordance with the desire of the proprietor, which shall be signed and acknowledged by him before some officer authorized to take the acknowledgment of deeds. Such proprietor shall also procure from the treasurer of the county in which the land lies, and file with the recorder, a certified statement that the land laid out into lots, streets and alleys is free from taxes, and a certified statement of the clerk of the district court that said land is free from all judgment, attachment, mechanics', or other liens, as appears by the records of his office, and a certified statement from the recorder that the title in fee is in such proprietor, and that it is free from incumbrance; but if the parcel of land so laid out shall be incumbered with a debt certain in amount, and which the creditor will not accept with accrued interest to the day of proffered payment if it draws interest, or with a rebate of interest at the rate of six per cent. per annum if it draws no interest, or if the creditor cannot be found, then such proprietor, and, if a corporation, its proper officer or agent, may file with the recorder of such county an affidavit, stating either that such proprietor has offered to pay such creditor the full amount of his debt, with interest, or with a rebate of interest, as the case may be, and that he would not accept the same, or that he cannot be found, whereupon such proprietor may execute and file with the recorder a bond in double the amount of such incumbrance, with three sureties who shall be freeholders of the county, to be approved by the recorder and clerk of the district court, which bond shall run to the county, and shall be for the benefit of the purchasers of any lots, and shall be conditioned for the payment of such incumbrance and the cancellation thereof of record as soon

as practicable after the same becomes due, and for the holding of all purchasers and those claiming under them forever harmless from such incumbrance. When such affidavit and bond shall have been filed with the recorder, together with the certificate of approval of the council of the city or town in which such land is situated or which is proposed to be made an addition thereto and a certificate of the recorder that said land is free from all incumbrance except as secured by said bond, and that the title in fee is in such proprietor, and that of the treasurer that the land is free from taxes, said plat shall be admitted to record, and be as valid as if such proprietor had filed with the recorder the certificate of such officer that said land was free from all incumbrance. [29 G. A., ch. 49, § 1; 18 G. A., ch. 53, § 1; C. '73, § 560.]

When a recorded plat is referred to in a deed as related to the matter of description, unless controlled by other facts or circumstances, such plat is to be considered as furnishing a true description of the property to be conveyed. *Quade v. Pillard*, 135–359, 112 N. W. 646.

The proprietor is entitled to have his plat approved if it complies with the provisions of the statute; that is the only question for determination by the city council. The matter of the acceptance of the streets and alleys by the city is not involved. *Giltner v. Albia*, 128–658, 105 N. W. 194.

SEC. 916. **Approval by council.** That section nine hundred sixteen of chapter thirteen, title five, of the code be and the same is hereby repealed and the following is enacted as a substitute therefor:

"All plats of additions to any city or town, or subdivision of any part or parcels of lands lying within or adjacent to any city or town, shall be divided by streets into blocks and such blocks and streets shall conform as nearly as practicable to the size of blocks and the width of streets in such city or town. And such streets shall be extensions of the existing system of streets thereof. All plats of such additions or subdivisions, except subdivisions of less than one block, before being recorded shall be filed with the clerk of such city or town, and when so filed, the council within a reasonable time shall consider the same, and if it is found that such plat conforms to the provisions hereof, the council shall direct the mayor and clerk to certify its resolution of approval, which shall be affixed to said plat before it shall be received for record by the county recorder. The council shall have power to require alleys to be platted separating abutting lots, and if so platted, said alleys shall conform as nearly as practicable to the width of alleys in said city or town and shall be extensions of the existing system of alleys." [34 G. A., ch. 45, § 1.]

If the blocks are divided into lots the dedication of alleys may be insisted upon, but the division into parcels smaller than blocks is not required. *Giltner v. Albia*, 128–658, 105 N. W. 194.

Where, at the time a plat of a town addition was filed, the place was an incorporated town, and not a city, an acceptance of the dedication by ordinance was not essential to the validity of the dedication, under code '73, § 527, declaring that the plat of an addition to a "city" should be ineffective until confirmed by an ordinance of the city, such provision being inapplicable to towns. *Burroughs v. Cherokee*, 134–429, 109 N. W. 876.

The ways designated on a plat as alleys become public ways on the acceptance of the dedication. *Talbert v. Mason*, 136–373, 113 N. W. 918.

For the purpose of assessment for street improvements on abutting property which has not been platted, it will be presumed that such property will be platted in conformity with the streets and alleys already established on adjacent property. *Gray v. Des Moines*, 150–299, 130 N. W. 582.

SEC. 917. **Dedication to public.**

Dedication: A deed which is inconsistent with the dedication of the streets and alleys of a plat to the public may amount to a revocation of the attempted dedication, unless it be shown that the public accepted the dedication before the

deed was made. *Minneapolis & St. L. R. Co. v. Britt*, 105–198, 74 N. W. 933.

While a substantial compliance with statutory provisions is all that is required to effect a dedication of portions of a plat laid out for streets and alleys, yet where the plat did not show the width of such streets and the size of the lots and blocks except as determinable by scale from the plat itself, held that it was too indefinite to be effectual. *Ibid.*

The plat of the city of Keokuk did not operate to vest the fee of the land in the streets in the city. *Chicago, B. & Q. R. Co. v. Kelley*, 105–106, 74 N. W. 935.

Payment of taxes on property is admissible as evidence against a claim of a dedication thereof to the public. *Brown v. Cedar Rapids*, 117–302, 90 N. W. 711.

To warrant the presumption of dedication, the use must be of a kind to convey to the owner knowledge of its extent and adverse nature. *Ibid.*

In a contest between grantor and grantee, where the plat differs from the survey, the latter will control. It may be that as to a purchaser buying in reliance on the plat as showing the dimensions of the lot, or as to a public officer charged with opening the streets, as shown by the plat, the rule would be otherwise. *Thrush v. Graybill*, 110–585, 81 N. W. 798.

Where the question was as to dedication in a plat made by county commissioners, held that the vital inquiry was as to the intent with which the commissioners acted in determining whether a square, which had been used for a courthouse, had been dedicated to the city, or retained by the county, and that, in order to determine this, the acknowledgment should be considered in connection with the plat, the certificate of survey and such circumstances as might throw light on the transaction. *Youngerman v. Board of Supervisors*, 110–731, 81 N. W. 166.

And under the language of the instruments and the circumstances surrounding their execution, held in a particular case that the title to such square did not pass to the city, but had been excepted from the dedication and retained by the county. *Ibid.*

The court is not authorized to add a line to the plat for the purpose of limiting the extent of the land dedicated to public use which does not appear on the plat as originally made, unless, perhaps, when there is a conflict in the boundaries, or in some cases when the plat is shown to be not in accordance with the original survey. *Boehler v. Des Moines*, 111–417, 82 N. W. 914.

Facts in a particular case held sufficient to show dedication of a street to the city and its acceptance. *Hull v. Cedar Rapids*, 111–466, 83 N. W. 28.

Evidence in a particular case held sufficient to show that an alley had been dedicated to public use. *Dodge v. Hart*, 113–685, 83 N. W. 1063.

An alley marked on the plat may become public by a common law dedication and acceptance. *Keokuk v. Cosgrove*, 116–189, 89 N. W. 983.

The owner's intention as to dedication of a portion of the platted territory to public purposes is to be gathered from the plat itself. *Mt. Vernon v. Young*, 124–517, 100 N. W. 694.

The recording of the plat is a tender of the conveyance of the portion set apart as streets and alleys for such use to a municipality, which continues until shown to have been withdrawn. But where there has been nonuser for not less than the statutory period, accompanied by actual and notorious possession of the land by an individual as private property under claim of right, an abandonment of the rights of the public in the street will be presumed. *Burroughs v. Cherokee*, 134–429, 109 N. W. 876.

Dedication of land for a street may be shown by the verbal declarations of the owner, by his act in filing a plat, by his silence in the face of known adverse possession by the public, or by any other act or omission from which the intention to dedicate may fairly be inferred. Acceptance may be inferred from general use by the public, or by the improvement and repair of the way by the authorities having care and control of the highways. The owners of abutting property may also divest themselves of all title in favor of the public by laying out a street and selling lots or parcels of land with reference thereto, and this rule is not subject to any acceptance by the public generally or by the authorities. *Snouffer v. Cedar Rapids & M. C. R. Co.*, 118–287, 92 N. W. 79.

Public use with the knowledge of the owner for the statutory period of limitation is admissible as tending to show a dedication. *Cedar Rapids v. Young*, 119–552, 93 N. W. 567.

In order that a dedication of land platted as a street shall be effectual, it is not essential that the statutory provisions as to platting be strictly complied with, but they must be substantially followed, that is, the portion of the platted land claimed as a street must have been pointed out with such precision and the boundaries so fixed that these may be certainly and definitely located from the data furnished. *Coe College v. Cedar Rapids*, 120–541, 95 N. W. 267.

Land may be dedicated to the public use in a plat without naming such use. But the intention to dedicate must appear, and this may sometimes be inferred from the shape of the land claimed to have been dedicated, its situation, dimensions and the like. *Ibid.*

The lines in a plat may aid in ascertaining a common law dedication, but they

will not be sufficient alone to establish such dedication. *Ibid.*

By the designation of a tract in a plat as a public square the title to such tract vests in the public and on the incorporation of a city including such tract the title inures to the municipality in trust for the public use. *Lacy v. Oskaloosa*, 143–704, 121 N. W. 542.

Where there is no express dedication of a street to the city, none will be inferred from mere use alone. *Johnson v. Robertson*, 156–64, 135 N. W. 585.

Acceptance: An acceptance of the dedication is essential to the validity of a conveyance to the city of ground designated for streets and alleys. *Blennerhasset v. Forest City*, 117–680, 91 N. W. 1044.

The title to streets and alleys as laid out in the plat does not pass to the city until the dedication is accepted. *Brown v. Taber*, 103–1, 72 N. W. 416.

A reasonable time is allowed for acceptance by the public of a highway dedicated by a plat, and what is such reasonable time necessarily depends upon the situation and circumstances. *Sarvis v. Caster*, 116–707, 89 N. W. 84.

The plat constitutes a dedication of space left between the lots for public travel, but the title thereto does not vest in the city or town prior to its acceptance, and until then such spaces are not highways. After acceptance by the municipality and improvement so that the plat has become effective in passing the fee, the proprietor of the plats cannot divest the municipality of the title without the knowledge or consent of its officers. *Chrisman v. Omaha & C. B. R. & B. Co.*, 125–133, 100 N. W. 63.

In the absence of proof of acceptance of a portion only of the platted street and of the recognition of the lot line contended for by the abutting owner, the city will not be estopped from asserting title in the street as platted to the true line. *Vorhes v. Ackley*, 127–658, 103 N. W. 998.

The opening by the city of a portion of the streets in the plat indicates an intention to accept the others, to be opened when needed. *Parriott v. Hampton*, 134–157, 111 N. W. 440.

Although the streets remain enclosed the acceptance by notice to the owner may be effectual. *Ibid.*

After the lapse of many years, slight evidence of acceptance of dedication of a street is sufficient. *Baker v. Chicago, R. I. & P. R. Co.*, 154–228, 134 N. W. 587.

After a railway track has been laid in a public street, the continuous use of the track is sufficient to preserve the public right in the street although it is no longer generally used for other purposes. *Ibid.*

The improvement of the streets of a plat by grading and paving and by using them for water and sewer pipes constitutes an acceptance of the dedication. And the fact that a part of the street has not been improved or used is of no consequence if it appears that it has not been needed. Where a city has used or improved a part of the street it will be presumed that it has accepted the entire street. *Gable v. Cedar Rapids*, 150–108, 129 N. W. 737.

Estoppel: The public right to the use and occupancy of a street may be lost by estoppel. *Corey v. Ft. Dodge*, 118–742, 92 N. W. 704.

A town may estop itself from asserting title to ground indicated on a plat as a public alley. *Blennerhasset v. Forest City*, 117–680, 91 N. W. 1044.

The proceedings by the city, even though irregular, to abandon an alley shown on the plat, held in connection with other circumstances, to constitute an estoppel of the city from subsequently asserting a right to such alley as against one who had occupied adversely. *Ibid.*

With reference to portions of the premises covered by a plat which are set apart for streets, the city may so deal with another claiming title thereto, by subjecting it to the payment of public charges, as to estop itself from asserting title as against him. *Davenport v. Boyd*, 109–248, 80 N. W. 314.

Assessments of lots as the property of a taxpayer does not estop the city from claiming that a portion of such lots constitute a street. *Cedar Rapids v. Young*, 119–552, 93 N. W. 567.

The fact that the city exacts taxes on the dedicated property does not estop it from claiming that the same has become a public street. *Hull v. Cedar Rapids*, 111–466, 83 N. W. 28.

The levy and collection by the city of taxes on a strip of land which has been dedicated and accepted as a street will not estop the city, as the representative of the public, from asserting its rights in such street. *Hanger v. Des Moines*, 109–480, 80 N. W. 549.

The doctrine of estoppel is applied to municipal corporations to prevent the assertion of public right to a street where the exercise of such right would be inequitable, as, for instance, where the street has been for the statutory period of limitations enclosed by a private owner, and he has for that period asserted ownership thereof under a claim of right. *Weber v. Iowa City*, 119–633, 93 N. W. 637.

Where the public right to streets has once attached by a sufficient acceptance of the dedication of a town plat, it is not subject to be divested by a strict application of the rules pertaining to adverse possession or to laches which obtain in controversies of individual owners. *McClenehan v. Jesup*, 144–352, 120 N. W. 74.

To estop the town in such a case from asserting title to the streets something more must be shown than a demand for opening before expansion of the town has

made the opening of the streets reasonably necessary. *Ibid.*

A city may be estopped by its conduct from insisting upon street lines different from those in accordance with which abutting property has been improved. *Johnson v. Shenandoah*, 153–493, 133 N. W. 761.

While the statute of limitations may not run against the city or town as to its right to its streets, it may by the conduct of its citizens or officers estop itself from claiming beyond a given line although another line may be, in fact, the true line according to the plat. *Bridges v. Grand View*, 139 N. W. 917.

The uninterrupted and undisputed possession of a strip of ground abutting upon a street for a long period of years, followed by the making of improvements thereon with reference to a claimed line, casts the burden upon the city or town of showing that the line thus claimed is not the true one. *Ibid.*

The building of houses, sidewalks and fences with reference to a claimed line for the street constitutes such improvement as that if acquiesced in for a long time by the city or town, it is estopped from contesting the correctness of the line thus claimed. *Ibid.*

Further as to estoppel, see notes to § 753.

Rights of abutting property owner: By accepting a street by dedication, a city or town enters into an implied obligation to keep it open and afford the dedicator or his grantee, near or remote, access to abutting lots, and though under the plenary powers of the legislature over all streets or highways such street may be vacated, the damages occasioned thereby cannot be said to be those shared by the public generally, and therefore compensation for such damages may be necessary. *Long v. Wilson*, 119–267, 93 N. W. 282.

The owner of property abutting on a street has a right to and an interest in the street distinct and different from that of the general public, and an adjudication between the city or town and another property owner as to the nonexistence of such street is not binding on a property owner not made party to such proceeding. *Ibid.*

While the legislature may authorize a city or town to vacate streets, it does not follow that it may do so without compensation to abutting property owners for damages to them as individuals, distinct from the general public, resulting from such vacation. *Ibid.*

Where land has been divided into lots, and a plat thereof is made, showing such lots and the streets on which they abut, and the owner sells the lots so designated on the plat, the purchaser has an easement in such streets as is necessary for the full enjoyment and use of his property, of which the grantor cannot deprive him. Nor can the fact that the plat was not made or authorized by the grantor, or that it was not a legal or recorded plat, make any difference with the rule. It is founded upon the doctrine of estoppel, and whether the plat be legal or illegal, authorized or unauthorized, if it be recognized and adopted by the grantor in making the sale, and is relied upon by the purchaser, the estoppel is as effectual as it would be were the conditions different. *Cleaver v. Mahanke*, 120–77, 94 N. W. 279.

The platting of ground as an alley, and designation thereof for that purpose, is equivalent to a deed in fee simple to the public, and the purchaser of lots abutting takes only to the lot line. *Blennerhasset v. Forest City*, 117–680, 91 N. W. 1044.

Although in a city under special charter the title in the streets may be in the abutting property owner so that the city has no right to use such streets for any purpose whatever other than that for which they were originally designed, yet the erection of trolley poles in the street in front of the property of an abutting owner is not such an additional use of the street as may be enjoined by a property owner in the absence of additional compensation. *Snyder v. Ft. Madison St. R. Co.*, 105–284, 75 N. W. 179.

The owner of property, chargeable with such knowledge of the use and improvement of an abutting street as a reasonably prudent and observing person having care for his property would ordinarily acquire, is chargeable with notice of the dedication of an abutting street by the owner, and acceptance thereof by the public. *Hanger v. Des Moines*, 109–480, 80 N. W. 549.

One who takes possession of a dedicated street in connection with an adjoining lot under a conveyance of the lot cannot enjoin the city from subsequently opening and improving the street. *Backman v. Oskaloosa*, 130–600, 104 N. W. 347.

Vacation of street: Where an unrestricted dedication by designation in the plat has been made, it vests an absolute title in the municipality, and on vacation of a street thus designated, the title does not revert to the original owner. *Lake City v. Fulkerson*, 122–569, 98 N. W. 376.

Further as to vacation of streets, see notes to code § 751 in this supplement.

Nonuser: While mere nonuser for the statutory period will not constitute an abandonment by a city of a street duly laid out, yet, where there has been such nonuser, accompanied by actual and notorious possession of the land by an individual as private property, under a claim of right, an abandonment will be presumed and the public right in the street will be held to be extinguished. *Weber v. Iowa City*, 119–633, 93 N. W. 637.

A city may abandon a portion of a street, or by nonuser forfeit its right thereto, and it may be foreclosed by agreement or acquiescence as to the true line. *Eldora v. Edgington*, 130–151, 106 N. W. 503.

SEC. 917-a. **Authority to change name of street.** Cities and towns and cities acting under special charter shall have authority to change by ordinance the name of a platted street. The mayor and city or town clerk shall certify and file the ordinance, after its passage, with the county recorder and county auditor in the county where the said city or town is located, which shall be entered of record in the recorder's office and a reference made on the margin of the original plat referring to the record of such change of names. [34 G. A., ch. 56, § 1.]

SEC. 918. **Vacation by proprietor.**

Where none of the lots abutting on such streets or alleys have been conveyed, the owner may vacate the plat and will thereafter be the unquestionable owner of the vacated streets and alleys. Subsequent grantees of lots described in such plat will not be entitled to proportional shares of the streets and alleys so vacated. *Brown v. Taber*, 103–1, 72 N. W. 416.

A platted street may be vacated by filing a written declaration thereof under the provisions of these sections. *De Nefe v. Agency City*, 143–237, 121 N. W. 1049.

SEC. 919. **Part of plat vacated.**

The plat cannot be vacated so as to extinguish the title of the municipality to streets which have been accepted and improved. Such streets have become highways. *Chrisman v. Omaha & Council Bluffs R. & B. Co.*, 125–133, 100 N. W. 63.

The provisions for vacation of a plat by the owner have no application to the vacation of streets in such plat by the city council or the board of supervisors. *Chrisman v. Brandes*, 137–433, 112 N. W. 833.

While provisions are here made for vacation of part of a plat, yet if the rights and privileges of other proprietors in the plat are affected and they do not consent to the vaction, it is not effectual. So held as to streets in a plat which the owner attempted to vacate. *Uptagraff v. Smith*, 106–385, 76 N. W. 733.

It is not only a highway which may not be vacated, but a public way against the closing of which there is a valid objection. *Hunter v. Des Moines*, 144–541, 123 N. W. 215.

Although the plat indicates a dedication of a portion thereof for railroad depot purposes, until such dedication is accepted, or so far as it is not accepted, such dedication may be withdrawn by a vacation of a portion of the plat. *Iowa Cent. R. Co. v. Homan*, 151–404, 131 N. W. 878.

SEC. 920. **Vacation by lot owner.**

A highway ought not to be vacated under the provisions of this section unless the immediate abutting owners so request. *Sarvis v. Caster*, 116–707, 89 N. W. 84.

A highway will not be vacated if it appears that in all reasonable probability it will soon be needed for public use, although it has not already been used by the public. *Ibid.*

After the incorporation of a town is discontinued the control of its streets and alleys passes to the board of supervisors. *Chrisman v. Brandes*, 137–433, 112 N. W. 833.

The statute requires only the owners of the part of the plat sought to be vacated to join in the petition. *Gable v. Cedar Rapids*, 150–108, 129 N. W. 737.

Streets should not be vacated for the benefit of private persons when such vacation will in all probability seriously inconvenience the general public. *Ibid.*

It is doubtful whether a court in a proceeding for the vacation of a street can order that it be vacated only as to some uses while retained as a public street for other uses. *Ibid.*

SEC. 922. **Plat by auditor—special charter cities excepted.** Whenever the original proprietor of any subdivision of land has sold or conveyed any part thereof, or invested the public with any rights therein, and has failed and neglected to execute and file for record a plat as provided in this chapter, the county auditor shall by mail or otherwise notify some or all of such owners, and demand its execution. If such owners, whether so notified or not, fail and neglect for thirty days after the issuance of such notice to execute and file said plat for record, the auditor shall cause one to be made, making any survey necessary therefor. Said plat shall be signed and acknowledged by the auditor, who shall certify that he executed it by reason of the failure of the owners named to do so, and file it for

record in his office and in the office of the county recorder, and when so filed it shall have the same effect as if executed, acknowledged and recorded by the owners. A correct statement of the costs and expenses of such plat, survey and record, verified by oath, shall be by the auditor laid before the first session of the board of supervisors, which shall allow the same and order them paid out of the county treasury, and he shall at the same time assess the amount pro rata upon the several subdivisions of said tract, lot or parcel so subdivided, and it shall be collected in the same manner as general taxes, and shall go to the general county fund; or said board may direct suit to be brought in the name of the county to recover from the original proprietor such cost and expense. Real estate situated in cities acting under special charter shall not be platted by the auditor under this section. [35 G. A., ch. 93, § 1.] [31 G. A., ch. 30, § 1; C. '73, § 568.]

SEC. **923. Platting for assessment and taxation.** Section nine hundred twenty-three of the code is hereby repealed and the following substitute is enacted in lieu thereof:

"Whenever a congressional subdivision of land of one hundred sixty acres or less, or any lot or subdivision, is owned by two or more persons in severalty, and the description of one or more of the different parts or parcels thereof cannot, in the judgment of the county auditor, be made sufficiently certain and accurate for the purposes of assessment and taxation without noting the metes and bounds of the same, he shall cause to be made and recorded in his office and the office of the county recorder a plat of such tract or lot with its several subdivisions, including and replatting in such plat such other plats or parts thereof included within the same lot or congressional subdivision of land as may seem to him to be required in accordance with the provisions of this chapter, proceeding as directed in the preceding section, and all of its provisions shall govern." [31 G. A., ch. 30, § 2; C. '73, § 569.]

The plat referred to in this section is not a municipal plat. It does not fix the character of the land, but only its description and extension of the corporate limits of the city so as to include such plat, held not to make it a city or town plat, within the provisions of § 1996, code of '73, as to the extent of the homestead within town plats. *Parrott v. Thiel*, 117–392, 90 N. W. 745.

While the auditor has authority to plat a tract into subdivisions for convenience in taxation, although the same territory has previously been platted, he should not do so unless the new plat contains such reference to former plats as will make it possible to determine just what portions of any particular lots in the original plats are included in each subdivision of the new plat. *Cranston v. McQuiston*, 127–104, 102 N. W. 785.

The plat contemplated is to be recorded in the auditor's office and not in the recorder's office and is not intended to furnish the basis of description for purposes of conveyance. *Ibid.*

Where the auditor's plat is improperly recorded in the recorder's office, it may be set aside in an action in equity for the purpose of removing a cloud from the title of one whose rights are determined by the original plat. *Ibid.*

The platting of territory within city limits by the auditor for purposes of taxation does not make it a part of the city or town plat. *Foster v. Rice*, 126–190, 101 N. W. 771.

SEC. **924. Insufficiency of description in deed.** Every conveyance of land in this state shall be deemed to be a warranty that the description therein contained is sufficiently definite and accurate to enable the auditor to enter the same on the plat book required to be kept; and when there is presented for entry on the transfer book any conveyance in which the description is not sufficiently definite and accurate, the auditor shall note such fact on the deed, with that of the entry for transfer, and shall notify the person presenting it that the land therein is not sufficiently described, and must be platted within thirty days thereafter. Any person aggrieved by the opinion of the auditor may within said thirty days appeal therefrom

to the board of supervisors, by giving notice thereof in writing, and thereupon no further proceeding shall be taken by the auditor. At its next session the board of supervisors shall determine said matter and direct whether the plat shall be executed and filed, and within what time. If the grantor in such conveyance shall neglect for thirty days thereafter to file for record a plat thereof, and of the appropriate congressional subdivision in which the same is found, duly executed and acknowledged as required by the auditor, or, in case of appeal, as directed by the board of supervisors, then the auditor shall proceed as is provided in this chapter, and cause such plat to be made and recorded in his office and the office of the county recorder, and thereupon the same result shall follow as provided in the preceding section. Such plat shall describe said tract and any other subdivisions of the smallest congressional subdivision of which the same is part, numbering them by progressive numbers, setting forth the courses and distances, the number of acres, and such other memoranda as is necessary; and descriptions of such lots or subdivisions according to the number and designation thereon said plat shall be deemed sufficient for all purposes. [31 G. A., ch. 30, § 3; C. '73, § 570.]

SEC. 924-a. **Acts of county auditors and recorders under certain statutes legalized.** The acts of the county auditors of Iowa, in making and recording plats as authorized under sections nine hundred twenty-two, nine hundred twenty-three and nine hundred twenty-four of the code without first having properly signed or acknowledged the same, and the acts of the county recorders of Iowa in recording such plats, are hereby legalized and the same declared valid and binding the same as though they had in such respects been made and recorded in strict compliance with law. [32 G. A., ch. 247, § 1.]

SEC. 924-b. **Descriptions of land legalized.** The description of land in all instruments, conveyances and incumbrances describing lots in or referring to plats made by the county auditors of Iowa, or by the county surveyor for the owner, and placed of record by the county recorders of Iowa, are hereby legalized and the same declared valid and binding the same as though the said plats had been signed and acknowledged and filed and recorded in strict compliance with law. [32 G. A., ch. 247, § 2.]

SEC. 924-c. **Pending litigation or decrees of court already rendered.** This act shall not affect any rights now in litigation or which have been settled or adjudicated by the judgment or decree of any court. [32 G. A., ch. 247, § 3.]

SEC. 926. **How made.** The county surveyor of any county in which is situated any city, town, village or addition thereto, as contemplated in this chapter, may, and upon payment of his legal fees by any person desiring the same, must, make a resurvey of such city, town, village or addition, or any portion, and plat thereof, which plat shall conform as near as may be with the original lines of the parcel or tract so resurveyed, and be made in all respects in accordance with the provisions of this chapter. In making a resurvey and plat, the surveyor may summon witnesses, administer oaths, and take and hear evidence touching the original plat lines and subdivisions, whether the original proprietor is dead, and any other matter which may assist in arriving at and establishing the true lines and boundaries; but no resurvey shall be made except upon notice to be given by the surveyor by a publication of the contemplated resurvey, once each week, for four consecutive weeks in some newspaper printed in the county. [31 G. A., ch. 9, § 25; 15 G. A., ch. 54, § 2.]

CHAPTER 13-A.

OF PENSIONS FOR DISABLED AND RETIRED FIREMEN.

SECTION **932-a. Firemen's pension fund—levy of tax for.** In all cities and towns, including cities organized under special charter, now or hereafter having an organized fire department, there may be and in all such cities having a paid fire department there shall be annually levied at the time of the levy of other taxes for city purposes a tax not exceeding one half of a mill on the dollar upon all taxable property within the limits of such cities and towns for the purpose of creating a firemen's pension fund. All moneys derived from taxes so levied and all moneys received as membership fees and dues as hereinafter provided and all moneys received from grants, donations, and devises for the benefit of such fund shall constitute a fund to be known and designated as a firemen's pension fund, which said fund shall be under the control of a board of trustees and shall be exclusively devoted to and for the purposes hereinafter enumerated. [33 G. A., ch. 61, § 1.]

SEC. **932-b. Board of trustees—to serve without compensation.** The chief officer of the fire department, the city treasurer, and the city solicitor, or attorney, of such cities and towns shall be ex-officio members of and shall constitute the board of trustees of the firemen's pension fund. The chief officer of the fire department shall be president and the city treasurer, treasurer of such board of trustees and the faithful performance of the duties of the treasurer shall be secured by his official bond as city treasurer. Such trustees shall not receive any compensation for their services as members of said board. [33 G. A., ch. 61, § 2.]

SEC. **932-c. Investment of surplus.** The firemen's pension fund shall be kept and preserved as a separate fund. The board of trustees shall have power to invest any surplus left in such fund at the end of the fiscal year, but no part of the fund realized from any tax levy shall be used for any purpose other than the payment of pensions. Investments shall be limited to interest-bearing bonds of the United States, of the state of Iowa, of the county, township or municipal corporation of the state of Iowa. All such securities shall be deposited with the treasurer of the board of trustees for safe-keeping. [33 G. A., ch. 61, § 3.]

SEC. **932-d. Gifts, devises or bequests—membership fees—assessments.** The board of trustees may take by gift, grant, devise, or bequest, any money or property, real or personal, or other thing of value for the benefit of the firemen's pension fund. All rewards in money, fees, gifts, or emoluments of every kind or nature that may be paid or given to any fire department or to any member thereof, except when allowed to be retained or given to endow a medal or other permanent or competitive reward on account of extraordinary services rendered by said fire department or any member thereof, and all fines and penalties imposed upon members shall be paid into the said pension fund and become a part thereof. Every member of the paid fire department of any city or incorporated town within the provisions of this act shall be required to pay to the treasurer of said fund a membership fee to be fixed by the board of trustees, not exceeding five dollars, and shall also be assessed and required to pay annually an amount equal to one per cent. per annum upon the amount of the annual salary paid to him, which said assessment shall be deducted and retained in equal monthly installments out of such salary. [33 G. A., ch. 61, § 4.]

SEC. **932-e. Who entitled to pensions—conditions of retirement—amount paid—disability—exemption.** That section five of chapter

sixty-one of the acts of the thirty-third general assembly, as amended by chapter fifty of the acts of the thirty-fourth general assembly be repealed and the following is enacted in lieu thereof:

"Any member of an organized paid fire department within the provisions of this act who shall have served twenty-two years or more in such department and shall have reached the age of fifty years, or who shall, while a member of such department, become mentally or physically permanently disabled from performing the duties of a fireman, shall be entitled to be retired, and upon retirement he shall be paid out of the firemen's pension fund of the city in which such department is located, a monthly pension equal to one half the amount of salary received by him monthly at the date he became entitled to retirement. Provided, however, that no member who has not served five years or more in such department shall be entitled to be retired and paid a pension under the provisions of this act on account of being mentally or physically permanently disabled, unless such disability was contracted while engaged in the performance of his duties or by reason of following the occupation of such fireman. Provided, further, that the chief officer of any fire department shall have the power to assign any member of the department, retired or drawing pensions under this act, to the performance of light duties in such fire department. The question of disability shall be determined by the trustees upon the advice of a physician appointed by the board of trustees for that purpose. Upon the death of any member of such fire department while in the service, or of any member who shall have been retired, leaving a widow or minor children or dependent father or mother surviving him, there shall be paid out of said fund as follows: To the surviving widow, so long as she remains unmarried and of good moral character, a pension of twenty dollars per month. If there be no surviving widow, or upon the death or remarriage of such widow, then to his dependent father and mother, if both survive, or to either dependent parent, if one survive, twenty dollars per month. To the guardian of each surviving minor child under sixteen years of age, six dollars per month. Provided, however, that the aggregate of all such payments shall not exceed one half of the amount of the salary of such member at the time of his death or retirement. If any such member shall have served twenty-two years in such department but shall not have reached the age of fifty years, he shall be entitled to retirement as above; provided, however, that no pension shall be paid while he lives until he reaches the age of fifty years. The provisions of this bill shall apply to volunteer or call members of a paid fire department, excepting that, as to such volunteer or call members, the amount of pension to be paid shall be such as the board of trustees shall fix or determine. After any member shall become entitled to be retired, such right shall not be lost or forfeited by discharge or for any other reason except conviction for felony. All pensions paid under the provisions of this act shall be exempt from liability for debts of the person to or on account of whom the same is[1] paid and shall not be subject to seizure upon execution or other process." [35 G. A., ch. 9, § 1; 34 G. A., ch. 50, § 1; 33 G. A., ch. 61, § 5.]

[1"as" in enrolled bill. EDITOR.]

SEC. **932-f. When effective.** No pension shall be paid under the provisions of this act prior to the first day of January, nineteen hundred ten, and no portion of the pension fund accumulated under the provisions of this act shall be expended for any purpose whatsoever prior to that time. If, on that date, there are living any person or persons who would

have been entitled to draw pensions under the provisions of this act, but for this limitation, pensions shall be paid to said persons from and after the first day of January, nineteen hundred ten, as though the right to said pensions had accrued on that date. [33 G. A., ch. 61, § 6.]

SEC. **932-g. Reëxamination of retired members.** If any member of any fire department shall have been retired by reason of physical or mental disability, the board of trustees shall have the right and power, at any time, to cause such retired member to be brought before it and again examined by competent physicians for the purpose of discovering whether such disability yet continues and whether such retired member should be continued on the pension roll, and shall also have the power to examine witnesses for the same purpose. Such retired member shall be entitled to reasonable notice that such examination will be made and to be present at the time of the taking of any testimony, shall be permitted to examine the witnesses brought before the board, and shall also have the right to introduce evidence in his own behalf. All witnesses produced shall be examined under oath and any member of such board of trustees is hereby authorized and empowered to administer such oath to such witnesses. The decision of such board upon such matters shall be final and conclusive, in the absence of fraud, and no appeal shall be allowed therefrom. Such disabled member shall remain upon the pension roll unless and until reinstated in such fire department by reason of such examination. [33 G. A., ch. 61, § 7.]

SEC. **932-h. Provisions subject to alteration.** The provisions of this act shall be, at all times subject to alteration or change and all persons claiming benefits under the provisions hereof shall be entitled to receive only such benefits as provided by law at the time such benefits shall be paid. [33 G. A., ch. 61, § 8.]

SEC. **932-i. Moneys drawn—how paid—report.** All pensions paid and all moneys drawn from the pension fund, under the provisions of this act, shall be upon warrants signed by the board of trustees, which said warrants shall designate the name of the person and the purpose for which payment is made. The treasurer of the board of trustees shall prepare annually, immediately after the first day of January, a report of the receipts and expenditures for the year ending December thirty-first of the previous year, showing the money on hand, how invested, all moneys received and paid out, which said report shall be filed with the city clerk. [33 G. A., ch. 61, § 9.]

CHAPTER 13-B.

OF PENSIONS FOR DISABLED AND RETIRED POLICEMEN.

SECTION **932-j. Policemen's pension fund—levy of tax for.** In all cities and towns, including cities organized under special charter, now or hereafter having an organized police department, there shall be annually levied at the time of the levy of other taxes for city purposes a tax not exceeding one half of a mill on the dollar upon all taxable property within the limits of such cities and towns for the purpose of creating a policemen's pension fund. All moneys derived from taxes so levied and all moneys received as membership fees and dues as hereinafter provided and all moneys received from grants, donations, and devises, for the benefit of such fund shall constitute a fund to be known and designated as a policemen's pension fund, which said fund shall be under the control of a board

of trustees and shall be exclusively devoted to and for the purposes hereinafter enumerated. [34 G. A., ch. 51, § 1; 33 G. A., ch. 62, § 1.]

SEC. **932-k. Board of trustees—to serve without compensation.** The chief officer of the police department, the city treasurer, and the city solicitor, or attorney, of such cities and towns shall be ex-officio members of and shall constitute the board of trustees of the policemen's pension fund. The chief officer of the police department shall be president and the city treasurer, treasurer of such board of trustees and the faithful performance of the duties of the treasurer shall be secured by his official bond as city treasurer. Such trustees shall not receive any compensation for their services as members of said board. [33 G. A., ch. 62, § 2.]

SEC. **932-l. Investment of surplus.** The policemen's pension fund shall be kept and preserved as a separate fund. The board of trustees shall have power to invest any surplus left in such fund at the end of the fiscal year, but no part of the fund realized from any tax levy shall be used for any purpose other than the payment of pensions. Investments shall be limited to interest-bearing bonds of the United States, of the state of Iowa, of any county, township, or municipal corporation of the state of Iowa. All such securities shall be deposited with the treasurer of the board of trustees for safe-keeping. [33 G. A., ch. 62, § 3.]

SEC. **932-m. Gifts, devises or bequests—membership fee—assessments.** The board of trustees may take by gift, grant, devise, or bequest, any money or property, real or personal, or other thing of value for the benefit of the policemen's pension fund. All rewards in money, fees, gifts or emoluments of every kind or nature that may be paid or given to any police department or to any member thereof, except when allowed to be retained or given to endow a medal or other permanent or competitive reward on account of extraordinary services rendered by said police department or any member thereof, and all fines and penalties imposed upon members shall be paid into the said pension fund and become a part thereof. Every member of the paid police department of any city or incorporated town within the provisions of this act shall be required to pay to the treasurer of said fund a membership fee to be fixed by the board of trustees, not exceeding five dollars, and shall also be assessed and required to pay annually an amount equal to one per cent. per annum upon the amount of the annual salary paid to him, which said assessment shall be deducted and retained in equal semiannual installments out of such salary. [33 G. A., ch. 62, § 4.]

SEC. **932-n. Who entitled to pensions—conditions of retirement—amount paid—disability—exemption.** Any member of a police department within the provisions of this act who shall, while a member of such department and while engaged in the performance of his duties as such policeman, be injured or disabled and, upon an examination by a physician appointed by the board of trustees, be found to be physically or mentally permanently disabled so as to render him unfit for the performance of duties of a policeman, shall be entitled to be retired and the board of trustees shall thereupon order his retirement and, upon being retired, [he] shall be paid out of the policemen's pension fund of such city, monthly, a sum equal to one half of the amount of the monthly compensation allowed such member as salary at the date of his injury or disability, if such person be a member of an organized police department in which salaries are paid to its members. If a member of such police department, retired, as above provided, because of permanent disability, shall die as a result of such injury, or if a member of such police department, while in the performance

of his duties, shall be killed or die as a result of injuries received, or if a member die because of any disease contracted by reason of his occupation as a policeman, and shall leave a widow or minor children or dependent father or mother surviving him, there shall be paid to the surviving widow, so long as she remains unmarried and of good moral character, a pension of twenty dollars per month out of the policemen's pension fund, and there shall also be paid to the guardian of the minor children of such member, out of said fund, a pension of six dollars per month for each of said children until it or they reach the age of sixteen years; provided, however, that there shall not be paid to the surviving widow and minor children an aggregate sum in excess of a sum equal to one half of the amount of the salary of such member at the time of his death or disability; and if such deceased policeman leave no widow or minor children, then there shall be paid to his dependent father and mother or to either, if one alone survives, a pension of twenty dollars per month. Any member of a police department who may be entitled to benefits under the provisions of this act and who has served twenty-two years or more in such police department, of which the last five years' service shall have been continuous, may make application to the board of trustees to be retired from such police department, and thereupon it shall be the duty of the board of trustees to order the retirement of such member, if it be found that he is unable to perform the duties to which he is or may be assigned, or has reached the age of fifty-five years; and upon retirement, he shall be paid a monthly pension equal to one half the amount of salary received by him as monthly compensation at the date of his retirement. Any member of a police department entitled to be retired, under the provisions of this act, but who shall continue in service and who shall be thereafter discharged for cause other than the violation of any law of the United States or the state of Iowa, amounting to a felony, shall, upon being discharged, be entitled to, and there shall be paid to him, a monthly pension equal to one half of the amount of salary received by him at the date of his discharge; provided, however, that the chief officer of any police department shall have the power to assign any members of the police department retired or drawing pensions under this act to the performance of light duties in such police department in cases of extraordinary emergencies; and provided further that, after the decease of a retired or a discharged member receiving a pension under the provisions of this act, his widow and minor child or children under sixteen years of age, or in case he leaves no widow and minor children, his dependent parent or parents, if any, shall be entitled to a pension in the amount and under the conditions heretofore provided to be paid to the surviving widow and minor children and dependent parents of a member killed or disabled in the performance of his duties. And provided further, if, at any time, there shall be insufficient funds in the policemen's pension fund to meet and pay all pensions due and owing from said fund, the board of trustees shall apportion the amount on hand in said fund among the persons entitled to such pensions in proportion to the amount to which each is entitled and the payment of such proportionate amount shall be considered a full payment of the amount then due, and no liability shall thereafter exist for the unpaid portions of such pensions. All pensions paid under the provisions of this act shall be exempt from liability for debts of the person receiving the same and shall not be subject to seizure upon execution or other process. [33 G. A., ch. 62, § 5.]

SEC. **932-o. When effective.** No pension shall be paid under the provisions of this act prior to the first day of January, nineteen hundred ten,

and no portion of the pension fund accumulated under the provisions of this act shall be expended for any purpose whatsoever prior to that time. If on that date there are living any person or persons who would have been entitled to draw pensions under the provisions of this act, but for this limitation, pensions shall be paid to said persons from and after the first day of January, nineteen hundred ten, as though the right to said pensions had accrued on that date. [33 G. A., ch. 62, § 6.]

SEC. **932-p. Reëxamination of retired members.** If any member of any police department shall have been retired by reason of physical or mental disability, the board of trustees shall have the right and power, at any time, to cause such retired member to be brought before it and again examined by competent physicians for the purpose of discovering whether such disability yet continues and whether such retired member should be continued on the pension roll, and shall also have the power to examine witnesses for the same purpose. Such retired member shall be entitled to reasonable notice that such examination will be made and to be present at the time of the taking of any testimony, shall be permitted to examine the witnesses brought before the board, and shall also have the right to introduce evidence in his own behalf. All witnesses produced shall be examined under oath, and any member of such board of trustees is hereby authorized and empowered to administer such oath to such witnesses. The decision of such board upon such matters shall be final and conclusive, in the absence of fraud, and no appeal shall be allowed therefrom. Such disabled member shall remain upon the pension roll unless and until reinstated in such police department by reason of such examination. [33 G. A., ch. 62, § 7.]

SEC. **932-q. Provisions subject to alteration.** The provisions of this act shall be, at all times, subject to alteration or change and all persons claiming benefits under the provisions hereof shall be entitled to receive only such benefits as provided by law at the time such benefits shall accrue. [33 G. A., ch. 62, § 8.]

SEC. **932-r. Moneys drawn—how paid—report.** All pensions paid and all moneys drawn from the pension fund, under the provisions of this act, shall be upon warrants signed by the board of trustees, which said warrants shall designate the name of the person and the purpose for which payment is made. The treasurer of the board of trustees shall prepare annually, immediately after the first day of January, a report of the receipts and expenditures for the year ending December thirty-first of the previous year, showing the money on hand, how invested, all moneys received and paid out, which said report shall be filed with the city clerk. [33 G. A., ch. 62, § 9.]

CHAPTER 14.

OF CITIES UNDER SPECIAL CHARTERS.

SECTION 933. General provisions not applicable.

The sections in this chapter are applicable only to cities under special charter. *Harvey v. Clarinda*, 111–528, 82 N. W. 994.

A statute applicable only to cities under special charter is not unconstitutional for want of uniformity of operation. The adoption in the constitution of 1857 of the provision prohibiting the granting of special charters to cities did not annul or render invalid the charters already granted. *Ulbrecht v. Keokuk*, 124–1, 97 N. W. 1082.

A statute relating to cities and towns containing no reference to special charter cities does not apply to such cities. *Reed v. Cedar Rapids*, 136–191, 113 N. W. 773.

SEC. 936. **Elections.**

This provision places elections and election contests in special charter cities fully under the provisions of title VI of the code so far as those provisions might be applied to elections in other cities. *Sterne v. Off*, 149–96, 127 N. W. 1038.

SEC. 937. **Council—vacancies.** In any such city having a population of twenty thousand or more, as shown by the last state or national census, the council shall consist of a mayor, two aldermen at large, and one alderman from each ward. At the first annual city election after the taking effect of this code, there shall be elected two aldermen at large, and one alderman from each ward. Thereafter the successors of such aldermen shall be elected biennially. The aldermen in office at the time of taking effect of this code shall continue in office only until the election and qualification of the aldermen herein provided for. Vacancies in the office of alderman shall be filled by the remaining members of the council of said city. The vacancy shall be filled within thirty days after the same has occurred, at a regular or special meeting, and a majority vote of the remaining members of the city council shall be necessary to fill the same. [35 G. A., ch. 94, § 1.]

SEC. 943. **Compensation of aldermen—not to be interested.**

The provision that no member of the city council shall be directly or indirectly interested in any contract for work or services does not affect the validity of the contract in such sense that a property owner can complain after the work is done of a violation of such provision. *Diver v. Keokuk*, 126–691, 102 N. W. 542.

The provision that a member of a city council shall not become interested directly or indirectly in any contract for work or service to be performed for the corporation, has no application to the employment of a member of the city council as physician by the local board of health appointed by the mayor. *Dewitt v. Mills County*, 126–169, 101 N. W. 766.

SEC. 947. **Ordinances—fines.**

A city may not impose a fine in excess of $100 for breach of an ordinance, and if the ordinance provides cumulative penalties for a continuing offense, so that the aggregate fines for such offense may amount to more than $100, the ordinance is in that respect void. *State v. Babcock*, 112–250, 83 N. W. 908.

SEC. 952. **Ordinances signed and published—general powers.** Sections six hundred eighty-five, six hundred eighty-six, six hundred eighty-seven and six hundred ninety-three of chapter three of this title, and sections six hundred ninety-five to seven hundred nineteen, seven hundred twenty-two to seven hundred thirty-two inclusive, of chapter four of this title, are hereby made applicable to cities acting under special charter. [27 G. A., ch. 28, § 1.]

The signature of an ordinance by one who under the authority of the charter is the presiding officer of the council *pro tempore* in the absence of the mayor is sufficient. *Collins v. Keokuk*, 147–233, 124 N. W. 601.

SEC. 953. **Library tax—repealed.** [29 G. A., ch. 50, § 1.]

[See § 953-a.]

SEC. 953-a. **Repeal.** That section nine hundred fifty-three of the code and section two of chapter twenty-eight of the acts of the twenty-seventh general assembly be and the same is hereby repealed. [29 G. A., ch. 50, § 1.]

SEC. 955. **Water and gasworks—electric light and power plants—street railway and telephone franchises.** Such cities shall have power to establish, erect, purchase, lease, maintain or operate, within or without the corporate limits, heating plants, waterworks, gasworks, electric light

or electric power plants, with all the necessary reservoirs, mains, filters, streams, trenches, pipes, drains, poles, wires, burners, machinery, apparatus, and other requisites of said works or plants; but no such works or plants shall be thus established, erected, purchased or leased unless a majority of the electors voting on such proposition shall vote in favor of the same, at a general or special election. They may also grant individuals or private corporations the authority to erect, maintain or purchase such works or plants or railways, street railways or telephone systems, for the term of not more than twenty-five years, and may renew or extend the term of such grants for a period not exceeding twenty-five years; but no exclusive franchise shall be thus granted, extended or renewed, and no franchise shall be granted or authorized, until after notice of the application therefor has been published once each week for four consecutive weeks in some newspaper published in such city. [23 G. A., ch. 11, § 1; 22 G. A., ch. 11, §§ 1, 2; 22 G. A., ch. 26; 14 G. A., ch. 78, §§ 2–5; C. '73, § 471.]

[The above section is made applicable to cities under commission form of government by § 1056-a19. EDITOR.]

The notice contemplated by this section is intended to advise the property owners of the city not only that the franchise is desired but also of the very terms of such franchise. *Hall v. Cedar Rapids*, 115–199, 88 N. W. 448.

The granting of permission to a street railway having a franchise for the laying of its tracks in the streets, to lay such tracks on a street not already occupied by it, is not the granting of a new franchise requiring statutory notice. *Thurston v. Huston*, 123–157, 98 N. W. 637.

SEC. **955-a. Repeal.** The law as it appears in section nine hundred fifty-five-a of the suplement to the code [1902] is hereby repealed. [32 G. A., ch. 46.]

[§ 955-a of the 1902 supplement was 29 G. A., ch. 51, § 1. EDITOR.]

SEC. **958. Other general powers.** Sections seven hundred thirty-four to seven hundred forty-one, inclusive, of chapter four; chapter five; and sections seven hundred fifty-one to seven hundred seventy-four, and seven hundred seventy-seven to seven hundred ninety-one, inclusive, chapter six, of this title are made applicable to cities acting under special charter. And wherever the words "board of supervisors," "county auditor or recorder of deeds," and "county treasurer," are used in any section made applicable by chapter fourteen of title five of this code, to cities acting under special charters, the words "city council," "city clerk or recorder," and "city collector or treasurer," shall be respectively substituted. [27 G. A., ch. 28, § 4.]

Property in a special charter city which has adopted the commission form of government is not subject to bridge taxes levied by the board of supervisors. *Keokuk v. Kennedy*, 156–680, 137 N. W. 914.

SEC. **963-a. Applicable to special charter cities.** That section eight hundred and seven of the code be and the same is hereby made applicable to cities acting under special charter. [35 G. A., ch. 79, § 1.]

SEC. **965. Street improvements and sewers.** Before the council orders any street improved or sewer constructed, it shall direct the engineer to prepare a plat, showing the location and general nature of the improvement, the extent thereof, the one or more kinds of material, or, in case of sewers, the size and one or more kinds of material to be used, and an estimate of the cost thereof, and the amount assessable upon any railway or street railway and upon each lot or parcel of land adjacent to or abutting on such improvement per front foot or square foot in area, and file such

plat and estimate in the office of the clerk or recorder. Notice of its intention to make such improvement shall be published by the city clerk or recorder in three consecutive issues of a newspaper of such city, stating that such plat is on file, and, generally, the nature of the improvement, its location, one or more kinds of material to be used, and the estimate of its cost, and fixing the time before which objections thereto can be filed, which time shall be not less than five days after the last publication of such notice. The council, after considering such objections, shall determine what changes, if any, shall be made in the plan shown by such plat, and may, by resolution, order such improvement, prescribing generally the extent of the work, the one or more kinds of material and, in case of sewers, the size and one or more kinds of material to be used, when the work shall be completed, the terms of payment, and provide for the publication of notice asking proposals for doing such work, and the time the same will be acted upon. [34 G. A., ch. 40, § 3.] [25 G. A., ch. 7, §§ 19, 20; 22 G. A., ch. 6, §§ 2, 3; 21 G. A., ch. 168, § 21.]

The notice required by this section is jurisdictional. *Reed v. Cedar Rapids*, 137–107, 111 N. W. 1013.

If the plat and schedule are filed as required in this section it is unnecessary to file a duplicate after the completion of the work. *Ibid.*

SEC. 971. **Notice and levy of special assessments.** After filing the plat and schedule referred to in section eight hundred twenty-one, chapter seven, of this title, the council shall direct the clerk or recorder to give ten days' notice, by publishing same three times in a newspaper published in said city, that such plat and schedule are on file in the office of the clerk, fixing a time within which all objections thereto or to the prior proceedings must be made in writing; and the council, having heard the objections and made necessary corections, shall levy the special assessment as shown in such plat and schedule. [27 G. A., ch. 28, § 3; 25 G. A., ch. 7, §§ 11, 18; 22 G. A., ch. 5, § 6; 22 G. A., ch. 6, § 5; 21 G. A., ch. 168, §§ 11, 19.]

The provision of this section is not repealed by 28 G. A., ch. 29, making the general provisions of code § 823 applicable to cities under special charters. *Diver v. Keokuk*, 126–691, 102 N. W. 542.

This section is not unconstitutional for not requiring the notice to fix a time certain for hearing objections. *Reed v. Cedar Rapids*, 137–107, 111 N. W. 1013.

SEC. 975. **When delinquent—lien.** Such assessment, and each installment with the interest thereon, shall be paid with accrued costs, at the office of the collector or treasurer, by the owner of the property upon which it is levied, at or before the time said property is sold for taxes or interest or both, and each installment and all interest due and unpaid shall become delinquent at the time fixed by ordinance or resolution, and shall bear such interest from the time of becoming delinquent, as ordinary taxes. All special assessments shall be a lien upon the property against which the same are assessed, from the date of the resolution of the council levying the same and shall be prior and superior to all other liens except ordinary taxes, and shall not be divested by any judicial sale of the property. [31 G. A., ch. 31; 25 G. A., ch. 7, § 11; 22 G. A., ch. 5, § 7; 21 G. A., ch. 168, § 12; 20 G. A., ch. 20, §§ 5, 6; 20 G. A., ch. 25; 17 G. A., ch. 162, § 3; 14 G. A., ch. 45, § 6; 13 G. A., ch. 14; 12 G. A., ch. 111; C. '73, §§ 478, 481; R. § 1068.]

SEC. 979. **Other provisions as to special assessments.** Sections eight hundred twenty-eight, eight hundred thirty-two, eight hundred thirty-three, eight hundred thirty-four, eight hundred thirty-five, and eight

hundred forty, chapter seven, of this title, are made applicable to cities under special charter. [27 G. A., ch. 28, § 5.]

SEC. 984. Personal debt—action to enforce.

The provision of § 479 of the code of '73 for recovery of ten per cent. interest and expenses of collection, where the assessment is collected by suit against the owner, held applicable only to a suit by the city. *Des Moines Brick Mfg. Co. v. Smith*, 108–307, 79 N. W. 77.

The statutory provisions relating to special charter cities that recovery against an abutting owner for an improvement may be assessed on the basis of *quantum meruit*, notwithstanding infirmities or irregularities in the proceedings for the assessment, held not applicable where for want of a valid contract as required by law the city had no jurisdiction to make any assessment for such improvement. *Allen v. Davenport*, 132 Fed. 209.

SEC. 986. Judgment.

The irregularities and defects referred to in this section are those of the officers of the city relative to the proceedings which do not affect the substantial rights of the parties. Neither the city nor the property owners can be forced to pay for pavement which fails to comply substantially with the contract made for its construction. *Snouffer v. Tipton*, 150–73, 129 N. W. 345.

SEC. 989. Limitation of action questioning.

[The above section is made applicable to cities under commission form of government by § 1056-a19. EDITOR.]

This section is not to be given a retrospective operation. *Waples v. Dubuque*, 116–167, 89 N. W. 194.

The provision is not applicable to certificates and bonds already issued at the time the provision was adopted. *Citizens' State Bank v. Jess*, 127–450, 103 N. W. 471.

Such limitation has no application to a reassessment to pay such certificates or bonds. *Ibid.*

SEC. 991. Park commissioners—election—ordinance submitted—terms. That sections nine hundred ninety-one to nine hundred ninety-six inclusive of the code, and amendments thereto be and the same are hereby repealed, and the following enacted in lieu thereof:

"There shall be elected at the regular municipal election in each city acting under special charter, and containing a population of forty thousand or over, and all other special charter cities may by ordinance provide for the election of three park commissioners whose terms of office shall be six years, one to be elected at each regular municipal election. At the first regular municipal election after the passage hereof, three commissioners shall be elected, and shall hold their office respectively for two, four and six years, their respective terms to be decided by lot, and their successor shall be elected for the full term of six years; provided, however, that in all such cities under special charter, and containing a population of less than forty thousand, not now having park commissioners, the ordinance establishing such park commissioners shall not be in force until it has been submitted to the voters at a special or regular municipal election, and approved by a majority of the votes cast at such election; and provided further, that in all such cities under special charter containing a population of forty thousand or over, in which there already exists a board of three park commissioners whose term of office is six years, and one of the members of which board is elected every two years at each regular municipal election, the three commissioners at present holding the office of park commissioners in such cities are hereby made the commissioners in such city in accordance with the provisions of this act, and they and their successors shall have and exercise all the powers and duties of park commissioners within the provisions of this act. [34 G. A., ch. 46, §§ 1, 2.] [20 G. A., ch. 151, §§ 1, 2.]

SEC. 991-a. **Applicable to special charter cities.** "Sections eight hundred fifty-b, eight hundred fifty-d, eight hundred fifty-g, eight hundred fifty-h, eight hundred fifty-i, eight hundred fifty-k, eight hundred fifty-l, eight hundred fifty-m, eight hundred fifty-n of the supplement to the code, 1907; section eight hundred fifty-c of the supplement to the code, 1907, as amended by chapter fifty-six and chapter fifty-seven of the laws of the thirty-third general assembly; and section eight hundred fifty-e of the supplement to the code, 1907, as amended by chapter fifty-six of the laws of the thirty-third general assembly; section eight hundred fifty-f of the supplement to the code, 1907, as amended by chapter fifty-six of the laws of the thirty-third general assembly; section eight hundred fifty-j of the supplement to the code, 1907, as amended by chapter fifty-eight of the laws of the thirty-third general assembly; and section eight hundred fifty-two[1] of the supplement to the code, 1907, as amended by chapter fifty-seven of the laws of the thirty-third general assembly, are hereby made applicable to cities acting under special charter." [34 G. A., ch. 46, § 3.]

[1§ 852 was repealed by 33 G. A., ch. 57, § 2. EDITOR.]

SEC. 992. **Park tax—repealed.** [34 G. A., ch. 46, § 1.]

[See § 991.]

SEC. 993. **Parks used for library building—repealed.** [34 G. A., ch. 46, § 1.]

[See § 991.]

SEC. 994. **Park fund—repealed.** [34 G. A., ch. 46, § 1.]

[See § 991.]

SEC. 995. **Powers and duties of commissioners—repealed.** [34 G. A., ch. 46, § 1.]

[See § 991.]

[The above section was amended by 33 G. A., ch. 59, § 1, before the repeal above shown. EDITOR.]

SEC. 996. **Bond—repealed.** [34 G. A., ch. 46, § 1.]

[See § 991.]

SEC. 999. **Condemnation of land.**

Under this section a city acting under special charter has power to acquire land by condemnation for a public landing.

Diamond Jo Line Steamers v. Davenport, 114–432, 87 N. W. 399.

SEC. 1003. **Taxes—levy of.** That section ten hundred and three of the code be and the same is hereby repealed and the following is enacted as a substitute therefor:

"The council shall levy a tax for the year then ensuing for the purpose of defraying its general or incidental expenses, which shall not exceed eight mills on the dollar of the assessed valuation of all taxable property in the city, but the aggregate of such levy, together with all levies for special purposes as hereinafter authorized, shall not exceed in any city in any one year, sixteen mills, excluding city and district sewer tax, road district tax, and any tax levied to pay the principal or interest on any bonds issued by such city, or tax levied to pay judgments, or taxes authorized for library, park or bridge purposes." [34 G. A., ch. 47, § 1.]

SEC. 1004. **Other provisions as to levying taxes.** Sections eight hundred eighty-eight, eight hundred eighty-nine, eight hundred ninety,

eight hundred ninety-one, eight hundred ninety-two and eight hundred ninety-three, of chapter eleven, of this title, section thirteen hundred seventy, section thirteen hundred seventy-one as amended by chapter thirty-three of the acts of the twenty-seventh general assembly, section thirteen hundred seventy-two as amended by chapter thirty of the acts of the twenty-seventh general assembly, and section thirteen hundred seventy-three, of chapter one of title seven, are made applicable to cities under special charter, except that the words "city treasurer" or "collector" and "city" shall be substituted for "county auditor" or "county" wherever the same appear in said sections. [29 G. A., ch. 52, § 1.]

A special charter city which has adopted the commission form of government has exclusive authority to levy bridge taxes on property within its limits. *Keokuk v. Kennedy*, 156-680, 137 N. W. 914.

SEC. 1005. **Special taxes.** They shall have power to levy annually the following taxes for special purposes:

1. *Grading fund.* A tax not exceeding three mills on the dollar for a grading fund, to be used for the purpose of opening, widening, extending or grading any street, public ground or market place; [23 G. A., ch. 5, § 1; 21 G. A., ch. 160, §§ 2, 3; 20 G. A., ch. 20, § 5.]

2. *Improvement fund.* A tax not exceeding three mills on the dollar for the city improvement fund, to be used for the purpose of paying the cost of the making, reconstruction and repair of any street improvement at the intersection of streets, and spaces opposite streets intersecting but not crossing, and the spaces opposite property owned by the city or state; [25 G. A., ch. 8, § 1; 22 G. A., ch. 12, § 1; 21 G. A., ch. 160, §§ 2, 3; 19 G. A., ch. 38, §§ 1, 2.]

3. *Sewer fund.* A tax not exceeding three mills on the dollar on the assessed valuation of all property therein, for the city sewer fund, to be used to pay the cost of making, reconstructing or repairing any sewer at the intersection of streets, and all spaces opposite streets intersecting but not crossing, and at spaces opposite property owned by the city or state, or to pay the whole or any part of the cost of making, reconstructing or repairing any sewer within the limits of such city. When the city has been divided into sewer districts, a tax not exceeding five mills on the taxable real property in the sewer district, for the district sewer fund, to be used to pay, in whole or in part, the cost of the making, reconstruction or repair of any sewer located or laid in that particular district; provided that, on petition of the owners of two thirds in value of all the taxable real estate within such sewer district for the construction of a sewer in such district, then the maximum percentage of taxes that can be levied in any one year shall not be limited to five mills, but shall be such percentage of the valuation of such property as will produce at least one tenth of the whole cost of such sewer assessable upon the real property in such district; [25 G. A., ch. 7, § 11; 22 G. A., ch. 7, § 1; 21 G. A., ch. 34, § 1; 17 G. A., ch. 162, § 1; 16 G. A., ch. 107, § 1.]

4. *Fire fund.* A tax not exceeding three mills on the dollar for the purpose of creating a city fire fund, to be used for paying the expenses of organizing, keeping and maintaining a fire department, including the expenses of constructing, purchasing, leasing and maintaining the proper and necessary buildings, grounds and apparatus therefor; provided, that where a paid fire department is maintained, all money derived from the sale of any buildings, grounds or apparatus of such fire department which

was originally paid for out of the fire fund, shall belong to said fire fund; [34 G. A., ch. 48, § 1.] [26 G. A., ch. 27; 23 G. A., ch. 8, §§ 1, 2.]

5. *Road fund.* When any city is divided into road districts, a tax not exceeding two mills on the dollar on all taxable property in such road district, to be known as the district road fund, and to be used only to pay the cost of cleaning, sprinkling and repairing the streets and public places in such district;

6. *Library tax.* In cities which have established, or may establish, a free public library, a tax as provided in section seven hundred thirty-two and amendments thereto; [29 G. A., ch. 50, § 2; 25 G. A., ch. 43, § 1; 25 G. A., ch. 99, § 2; 22 G. A., ch. 18, § 1; 14 G. A., ch. 17; 13 G. A., ch. 45; C. '73, § 461.]

7. *Tax for water and gasworks and electric plants.* A tax not exceeding five mills on the dollar, which, with the rates, rents or revenues derived therefrom, shall be sufficient to pay the expenses of running, operating and repairing, water and gasworks, electric light and power plants, owned and operated by such city, and the interest on or principal of any bonds issued to pay the cost of the construction of such works; but such taxes shall not be levied upon the property which lies wholly without the limits of the benefits or protection of such works or plants, which limit shall be fixed by the council each year before making the levy; [22 G. A., ch. 11, § 2; C. '73, § 475.]

8. *Tax for water, gas and electric light or power.* A tax, not exceeding five mills on the dollar for the purpose of paying the amount due, or to become due, to any individual or company operating water or gasworks or electric light power plants, for water, light, gas or power supplied to the city, the levy to be limited to the property benefited thereby; [22 G. A., ch. 11, § 2; C. '73, § 475.]

9. *Bond fund.* A tax for the purpose of creating a bond fund sufficient to pay the interest, to accrue before the next annual levy, on funding or refunding bonds outstanding, and to pay the principal of such funding or refunding bonds. In case of such bonds, the levy shall be so made that, dividing the principal into as many parts as the bonds have years to run, not less than one such part shall be levied each year, and shall be made so that the fund derived therefrom shall be available and sufficient to pay the bonds at their maturity; [24 G. A., ch. 14, § 5; 23 G. A., ch. 4, §§ 6, 7; 22 G. A., ch. 17, § 5; 21 G. A., ch. 78.]

10. *Water and gas or electric light and power bonds.* A tax to be used exclusively in payment of the principal and interest of bonds issued for the construction of water and gasworks, electric light and power plants, and which shall be levied in the manner provided in the preceding subdivision; [23 G. A., ch. 13, § 1; 22 G. A., ch. 10, § 1.]

11. *Park tax.* A tax not exceeding two mills on the dollar, as authorized by the vote of the electors, to purchase, improve and maintain public parks in such city; [24 G. A., ch. 1, § 7.]

12. *Special bridge tax.* A special tax to aid in the construction of bridges, when such tax has been voted by the electors of the city under the provisions of section seven hundred sixty, of chapter six, of this title. [27 G. A., ch. 29, § 1; 25 G. A., ch. 19, § 2; 21 G. A., ch. 13, § 2; 19 G. A., ch. 63, § 3.]

PAR. 5. A statutory provision not retained in the code provided that property paying special assessments for street improvements might be exempted from road tax. Held that the repeal of such provision by the adoption of the code left the

property subject to taxation under the provisions of this section. *Miller v. Hageman*, 114–195, 86 N. W. 281.

Par. 7. When the council refuses to levy a tax for the expense of running, operating and repairing waterworks owned by the city, one who has furnished fuel on the order of the trustees under the provisions of code supp. § 747-a may maintain an action against the city for damages for refusal to make such levy where the waterworks fund is not sufficient to meet the operating expense. *Martin-Strelau Co. v. Dubuque*, 149–1, 127 N. W. 1013.

Such obligation of the city is not affected by the amount of its general indebtedness. *Ibid.*

SEC. 1010. Levy and collection of taxes.

Where a city had provided by ordinance for notice to the tax payer before the city board of equalization could add to his taxes, held that in the absence of such notice the increase of his assessment by such board was invalid. *Cedar Rapids & M. C. R. Co. v. Redmond*, 120–601, 94 N. W. 1096.

SEC. 1011. Assessment.

The provisions of code § 1320 as to listing of property by an agent of a nonresident owner are applicable to special charter cities. *German Trust Co. v. Board of Equalization*, 121–325, 96 N. W. 878.

SEC. 1020. Questioning deed—refund. Sections fourteen hundred and six, fourteen hundred and seven, fourteen hundred and eight, fourteen hundred twenty-three, fourteen hundred thirty-four, fourteen hundred forty-six, fourteen hundred forty-seven and fourteen hundred forty-eight, chapter two, title seven, of this code are hereby made applicable to cities acting under special charters except that, where the word "treasurer" is used, there shall be used the words "city collector or treasurer or deputy treasurer or deputy or officer authorized to collect city taxes." And where the word auditor is used, there shall be substituted the words, "city clerk or recorder." [27 G. A., ch. 28, § 6.]

SEC. 1026. Officers appointed—quorum.

There is nothing in the statutes prohibiting a member of the city council from being employed by the local board of health at an agreed compensation to treat cases of contagious diseases. *Dewitt v. Mills County*, 126–169, 101 N. W. 766.

SEC. 1050. Notice of unliquidated claim—limitation of action.

The limitations provided for by this section held not to be retroactive in effect. *Thoeni v. Dubuque*, 115–482, 88 N. W. 967.

A suit for injuries resulting from a defective sidewalk cannot be commenced within thirty days from the date of the service of the notice of the claim for such injuries, under the provisions of this section. *Kenyon v. Cedar Rapids*, 124–195, 99 N. W. 692.

Under the statutory provision relating to notice of claims against a special charter city before bringing suit the action must be commenced within three months after the cause thereof has accrued, and the filing of the claim must be at least thirty days before the suit is brought. *Foley v. Cedar Rapids*, 133–64, 110 N. W. 158.

SEC. 1051. Notice of claim for personal injury—limitation.

Reasonable certainty as to the place is all that is required in the notice. *Rusch v. Dubuque*, 116–402, 90 N. W. 80.

This section applies only to cities under special charters. *Harvey v. Clarinda*, 111–528, 82 N. W. 994.

For similar provisions as to other cities, see notes to § 3447, par. 1.

Recovery for the claim properly described in the notice is not defeated by the fact that the plaintiff asks in his petition to recover a larger sum than that named in the notice, and held that a verdict for the amount thus named would not be disturbed. *Van Camp v. Keokuk*, 130–716, 107 N. W. 933.

The notice required herein should advise the municipality of the nature and cause of the injury, the time and place when and where it occurred, and the particular defects or negligence which it is claimed caused or contributed to it. The claimant is not bound however to rely upon a single defect nor to confine his statement of the defendant's negligence to such defect. *Bauer v. Dubuque*, 122–500, 98 N. W. 355.

Notice of the nature and cause of an injury alleged to be due to the negligence of

the city and for which recovery is sought is sufficient if it states in a general way the nature and cause of the injury and the defect or negligence complained of. It is not necessary that the facts constituting negligence be set out in detail. *Schnee v. Dubuque*, 122–459, 98 N. W. 298.

There cannot be recovery under an amendment to the petition filed more than three months after the injury for items of damage not included within the statement of the claim. *Ulbrecht v. Keokuk*, 124–1, 97 N. W. 1082.

Under an amendment to a petition filed more than three months after the injury of which no notice was given, there can be no recovery for items of damages not included in the statement of claim. *Frazee v. Cedar Rapids*, 151–251, 131 N. W. 33.

As to sufficiency of notice of claim, see notes to code § 3447, par. 1, in this supplement.

SEC. **1056-a1. Board of waterworks trustees.** That the waterworks now owned by such special charter cities having a population of thirty-five thousand or more shall be managed and operated by a board of waterworks trustees, which shall be composed of three resident electors, appointed by the mayor of any such city. Upon the taking effect of this act, one of such trustees shall be appointed for a term of one year, another for a term of two years, and the remaining trustee for a term of three years, and thereafter each such trustee shall be appointed for a term of three years. Said trustees shall receive no compensation whatever for their duties as such. All vacancies occurring on said board occasioned by death, resignation, removal or otherwise, shall be filled by appointment to be made by the mayor of said city for the unexpired term. Each trustee upon qualifying shall execute and furnish the city an official bond, in the sum of five thousand dollars, for the faithful performance of his duties, which bond. if sufficient, shall be approved by the city council and filed with the city recorder and by him kept in his office and recorded in a book kept for that purpose, and the expense of such bonds shall be paid by the city treasurer, upon the order of the trustees, out of the waterworks funds. Any of such trustees may be removed from office for cause under the provisions of chapter eight of title six of the code, and in addition thereto, the mayor may, for like cause after hearing, remove any of such trustees. [32 G. A., ch. 47, § 1.]

SEC. **1056-a2. Superintendent—employes—duties of board.** The said board of trustees shall employ an efficient superintendent, and such other employes as may be necessary and proper, for the operation and betterment of such works, for the collection of water rentals, and for the conduct of the business incident to the operation thereof. The said board of trustees shall require of the superintendent, and of the other employes as they may deem proper, good and sufficient bonds, the amount thereof to be fixed and approved by said board, for the faithful performance of their duties, which bonds shall run in the name of the city and be filed with the city recorder and by him kept in his office and recorded in a book kept for that purpose. All money collected by the board of waterworks trustees shall be deposited at least daily by them with the city treasurer; and all money so deposited and all tax money received by the city treasurer from any source, levied and collected for and on account of the waterworks, shall be kept by the city treasurer as a separate and distinct fund, for which funds the city treasurer shall be liable upon his official bond the same as for other funds received by him as such treasurer. Such moneys shall be paid out by the city treasurer only on the written order of the board of waterworks trustees, who shall have full and absolute control of the application and disbursement thereof for the purposes prescribed by law, including the payment of all indebtedness arising in the maintenance, operation, betterment, and extension of said waterworks; and said board of waterworks trustees shall make no payment of any kind whatsoever, except by written

order on the city treasurer. For the operation, betterment, and improvement of such works, said board of trustees may incur obligations, and to pay therefor may anticipate the revenues of such works for a period not to exceed one year, unless the city council shall by tax levy make provision for the payment thereof. The board of trustees shall fix uniform water rates and make and enforce proper rules and regulations for the collection of water rentals and the suplying of good water service, and shall furnish the city council a schedule of such water rates and duplicate of such rules and regulations for publication as part of the proceedings of the city council. Such board of trustees shall each three months furnish the city council an itemized statement of all receipts and expenditures during such period, including all current liabilities and outstanding accounts, and also complete annual statements, in the form of a balance sheet, which shall include all assets and liabilities; and, at least annually, and oftener if they see fit, report the general condition and needs of the waterworks plant; and such quarterly and annual statements and such reports shall, when so furnished, be at once published as a part of the proceedings of the city council. Said board of trustees shall keep a book wherein a record shall be entered and kept of their proceedings, and which proceedings, duly attested, shall be at once published in two of the official newspapers of any such city. All books, vouchers, and records of said trustees in any wise relating to the waterworks shall be open to the inspection and examination of any resident of said city. [32 G. A., ch. 47, § 2.]

SEC. **1056-a3. Cities affected—terms of office of acting trustees.** All the provisions of this act shall be held and construed as applying to cities acting under special charters having a population of thirty-five thousand or more as shown by the last state census; and all acts or parts of acts in conflict with this act shall not be applicable to any such cities in so far as they relate to the future management of waterworks; and upon the taking effect of this act and the appointment of trustees hereunder, the terms of office of any and all waterworks trustees now acting in any such city shall at once cease. [32 G. A., ch. 47, § 3.]

SEC. **1056-a4. Penalty or interest on unpaid taxes.** That in cities acting under special charter no penalty or interest shall be collected upon taxes or assessments remaining unpaid four years or more, from the first day of January of the year in which the tax books containing the same were first placed in the hands of the city collector or treasurer. [31 G. A., ch. 32.]

SEC. **1056-a5. Valuation—how provided.** That the assessed or taxable value of all property, and the value at which it shall be listed, and upon which the levy shall be made, in special charter cities shall be provided by the city council of such city. [31 G. A., ch. 33, § 1.]

SEC. **1056-a6. Levy upon property valued and returned by executive council.** That where all property, except such as is listed and valued by the executive council is assessed upon its full or a certain percentage of its full valuation, the levy upon all such property valued and returned by the executive council shall be on a like percentage of the valuation so returned. [31 G. A., ch. 33, § 2.]

SEC. **1056-a6a. Water front improvement—levee improvement fund.** That any city, acting under special charter, which is bounded in part or divided by a river, may improve said water front by constructing retaining walls, filling, grading, paving, macadamizing or riprapping the same; and to pay for such improvements the councils of said cities are empowered to levy a tax of not exceeding one mill on the dollar per annum

on the taxable property thereof, the same when collected to be known as the levee improvement fund. The proceeds of such fund shall be used exclusively for said purposes. [33 G. A., ch. 60, § 1.]

[The above section is made applicable to cities under commission form of government by § 1056-a19. EDITOR.]

SEC. **1056-a6b. Bonds.** In the event that the proceeds of such tax in any one year shall be insufficient to pay for the improvements of that year, or if the city council shall deem best to extend the payment over a number of years, then upon a majority vote of said council approving the same, said cities may borrow the money to make such improvements and issue the negotiable interest-bearing bonds of said city to evidence said debt; provided that the total bond that may be issued under this act by any one city shall not exceed one per centum of the assessed value of said city. [33 G. A., ch. 60, § 2.]

[The above section is made applicable to cities under commission form of government by § 1056-a19. EDITOR.]

SEC. **1056-a6c. Form of bonds.** Said bonds shall be in amounts provided in, and conform in substance to the requirements of, section nine hundred and six of the code. [33 G. A., ch. 60, § 3.]

[The above section is made applicable to cities under commission form of government by § 1056-a19. EDITOR.]

SEC. **1056-a6d. Levee improvement commission — term — bond.** That section one of chapter forty-nine of the acts of the thirty-fourth general assembly be and the same is hereby repealed and the following enacted in lieu thereof:

"Any city acting under special charter may establish a levee improvement commission to consist of the mayor, who shall be its chairman, and not more than four other persons to be appointed by the mayor with the approval of the city council. The appointive members shall be residents and qualified electors of the city, and shall hold no other official position in the city, and no member shall receive any salary for his services as a member of such commission. Their term of office shall be fixed by ordinance and shall not exceed six years. Before entering upon their office the appointive members shall each execute a bond in favor of the city in the penal sum of two thousand dollars, with approved fidelity company, surety for the faithful performance of their duties. The expense of this bond shall be paid out of the levee improvement fund." [35 G. A., ch. 95, § 1; 34 G. A., ch. 49, § 1.]

SEC. **1056-a6e. Powers and duties—treasurer.** The levee improvement commission shall have full charge and supervision of all improvements of the water front along any river within the corporate limits of the city. It shall have exclusive charge and control of the levee improvement fund and of all moneys derived from the sale of bonds issued by the city council for the purpose of carrying on the work of making water front improvements. It shall pay out of these funds only for the purposes named. The city treasurer shall be the treasurer of the levee improvement commission. He shall keep the levee improvement funds and the moneys derived from the sale of bonds for water front improvements in a separate and distinct fund from which he shall pay no money except upon the order of the levee improvement commission signed by its chairman and secretary, and countersigned by at least one other member of said levee improvement commission. [35 G. A., ch. 95, § 2; 34 G. A., ch. 49, § 2.]

CHAPTER 14-A.

OF UNIFORM SYSTEM OF MUNICIPAL ACCOUNTS.

SECTION **1056-a7. Annual financial report.** It shall be the duty of the chief accounting and warrant issuing officer of each city and town, namely auditor or clerk as the case may be, to prepare and to publish the annual report of the financial condition and transactions of the city or town now or hereafter required by law, and all accounting officers of all boards or commission departments and offices whatsoever within the corporate area receiving or disbursing public funds shall file with the auditor or clerk, within thirty days from the expiration of their fiscal year, a report in writing of official transactions in the form and manner required by law. In case of refusal or gross neglect to comply with the law and provisions herein governing the method of accounting for and reporting municipal transactions herein referred to, the official so delinquent shall be deemed guilty of a misdemeanor. The auditor or clerk aforesaid is hereby authorized to institute legal proceedings to enforce the provisions herein requiring report to him. [31 G. A., ch. 34, § 1.]

SEC. **1056-a8. How published.** In cities having a population of five thousand or over, the annual report aforesaid shall be printed in pamphlet form. At least five hundred copies of said report shall be printed and the expense thereof shall be provided for annually by the city council. In cities and towns having less than five thousand population, the annual report may be published in pamphlet form if authorized by the city council. [31 G. A., ch. 34, § 2.]

SEC. **1056-a9. Certified to auditor of state—auditor to publish returns—may send examiner in case of delinquency.** That section ten hundred fifty-six-a nine of the supplement to the code, 1907, be and the same is hereby repealed and the following enacted in lieu thereof:

"On or before the first day of May of each year the auditor or clerk of each city or town shall forward to the auditor of state a certified copy of the annual report in a form prescribed as hereinafter provided, and said auditor of state shall publish in a separate volume such returns, showing under appropriate schedules the total receipts and expenditures, assets and indebtedness and related data of all cities and towns in the state together with his comment and recommendations respecting desirable changes in the laws governing financial administration in municipalities. If the auditor or clerk of any city or town shall fail to file his report with the auditor of state within the time hereby prescribed the auditor shall have authority to send an examiner or examiners to said city or town to make the report, and the expense of said examiner or examiners, including per diem for the time so employed, shall be charged against such delinquent city or town. It shall be the duty of the auditor or clerk who served in such capacity during the time covered by the report, to prepare and file the same, and if the said auditor or clerk has retired from the office the city or town council shall allow him such compensation for preparing the report as its members may deem proper, the same not to exceed five dollars per day for the time actually employed in such service. Thirty-five hundred copies of said report by the auditor of state shall be annually printed on or before December first for general distribution in accordance with law." [35 G. A., ch. 97, § 1; 33 G. A., ch. 63, § 1.] [31 G. A., ch. 34, § 3.]

SEC. **1056-a10. Uniform system of accounts—auditor to prescribe —advisory committee.** That uniformity in the methods of accounting for and reporting the financial transactions of municipalities may be se-

cured, the auditor of state is authorized and he is hereby directed to formulate and prescribe a system of municipal accounts and method of presenting departmental and general reports which shall be adopted and complied with in the administration of all cities or towns on and after April first, nineteen hundred and seven. To insure careful consideration of the merits and defects of existing methods in local accounting, the auditor of state shall appoint an advisory committee of not less than five nor more than seven persons familiar with municipal accounts, a majority of whom shall be city accounting officers; said committee shall serve without compensation except that their necessary traveling and hotel expenses for a period not to exceed thirty days shall be allowed them, and for such expense the auditor of state is authorized to issue warrants upon the treasurer of state. In the system to be devised as herein contemplated, the officer and persons charged therewith shall adopt so far as practicable the latest and most approved methods in municipal accounting, especially the classifications and definitions of municipal finance in use in the national census office. [31 G. A., ch. 34, § 4.]

SEC. **1056-a11. Examiners of municipal accounts—compensation.** The auditor of state shall appoint one or more examiners of municipal accounts whose duty it shall be at least once in two years to examine into, audit and report upon the financial condition and transactions of all cities having a population of five thousand or more. Said examiners shall have power to compel the attendance of witnesses and to administer oaths and shall have access to all books, papers or records essential in a thoroughgoing examination. The examiner in charge of an investigation shall, on the conclusion thereof, file a written report of his findings with the mayor and council and with the auditor of state, including his criticisms of any faults found and his recommendations respecting improvements desirable. Any and all reports thus made and filed shall be open to public inspection. The compensation of said examiners shall be five dollars for each day actually employed, together with their necessary traveling expenses; the sum so due in any case shall be paid by the auditor of state upon the presentation of proper bills therefor, by warrants on the treasury of state; thereupon the auditor of state shall file a claim for the full amount so allowed with the auditor or clerk of the city or town examined, and the council thereof shall provide for its payment. [31 G. A., ch. 34, § 5.]

SEC. **1056-a12. Application for examination.** Any city or town with a population of less than five thousand may secure an examination of its financial transactions and the condition of its funds and a report thereon by a state examiner upon application by either the mayor or the council to the auditor of state. Further, upon petition of fifty or more taxpayers of any city or town setting forth facts that in the opinion of the state auditor justify action, the auditor of state shall send an examiner to inspect and report upon the financial administration and condition of the municipality in question. [31 G. A., ch. 34, § 6.]

SEC. **1056-a13. Applicable to special charter cities.** The foregoing provisions shall apply to cities under special charters. [31 G. A., ch. 34, § 7.]

SEC. **1056-a14. Acts in conflict repealed.** All acts or parts of acts inconsistent with this act are hereby repealed. [31 G. A., ch. 34, § 8.]

CHAPTER 14-B.

OF APPOINTMENTS AND REMOVALS.

SECTION **1056-a15. Preference in appointments and promotions.** That in every public department and upon all public works in the state of Iowa, and of the counties, cities and towns thereof, honorably discharged soldiers, sailors, and marines from the army and navy of the United States in the late civil war, who are citizens and residents of this state, shall be entitled to preference in appointment, employment and promotion, over other persons of equal qualifications and the persons thus preferred shall not be disqualified from holding any position hereinbefore mentioned on account of his age or by reason of any physical disability, provided such age or disability does not render him incompetent to perform properly the duties of the position applied for, and when such soldier, sailor or marine shall apply for appointment or employment under this act, the officer, board or person whose duty it is or may be to appoint or employ some person to fill such position or place shall, before appointing or employing any one to fill such position or place, make an investigation as to the qualifications of said soldier, sailor or marine for such place or position, and if he is a man of good moral character and can perform the duties of said position so applied for by him, as hereinbefore provided, said officer, board or person shall appoint said soldier, sailor or marine to such position, place or employment. A refusal to allow the preference provided for in this and the next succeeding section to any honorably discharged soldier, sailor or marine, or a reduction of his compensation intended to bring about his resignation or discharge entitles such honorably discharged soldier, sailor or marine to a right of action therefor in any court of competent jurisdiction for damages, and also a remedy for mandamus for righting the wrong. [30 G. A., ch. 9, § 1.]

If the qualifications of a soldier of the civil war as applicant are not equal to those of the other persons under consideration for appointment he is not entitled to such appointment and the appointing board is authorized to determine that question. *McBride v. City Council*, 134–501, 110 N. W. 157.

The statute providing for preference of honorably discharged soldiers and sailors of the civil war who are residents of the state to appointment, employment and promotion in the public service over others of equal qualification, violates no constitutional provision. The right of appointment to a minor municipal office is not a privilege within the constitutional guaranties. *Shaw v. Marshalltown*, 131–128, 104 N. W. 1121.

It is not sufficient that the applicant for an appointment who is a veteran be found to be of good moral character and competent to discharge the duties of the office. It must appear that his qualifications are equal to those of another who is an applicant for the same position, and in the absence of a finding of such fact by the appointing power, the appointment of the latter will not be set aside. *Ross v. City Council of Sioux City*, 136–125, 113 N. W. 474.

There is no special obligation to make an investigation as between two applicants both of whom are honorably discharged soldiers and as between two such applicants an appointing officer or board may select at discretion without formal investigation as to their respective qualifications. *Kitterman v. Board of Supervisors*, 137–275, 115 N. W. 13.

The term of office being fixed, the incumbent who is a veteran has no better right to reappointment to the office than another applicant who is also a veteran. *King v. Ottumwa*, 148–411, 126 N. W. 943.

The court will not by mandamus control the exercise of discretion on the part of the board in making an appointment, although the person seeking such appointment is an old soldier, unless there has been bad faith. The person seeking appointment in such case must show equal qualifications with the person appointed. *Arnold v. Wapello County*, 154–111, 134 N. W. 546.

SEC. **1056-a16. Removals.** Any person whose rights may be in any way prejudiced contrary to any of the provisions of this section shall be

entitled to a writ of mandamus to remedy the wrong. No person holding a position by appointment or employment in the state of Iowa, or in the several counties, cities, or towns, thereof, who is an honorably discharged soldier, sailor or marine having served as such in the union army or navy during the late civil war shall be removed from such position or employment except for incompetency or misconduct shown after a hearing, upon due notice, upon stated charges, and with the right of such employe or appointee to a review by a writ of certiorari. The burden of proving incompetency or misconduct shall rest upon the party alleging the same. Nothing in this act shall be construed to apply to the position of private secretary or deputy of any official or department, or to any person holding a strictly confidential relation to the appointing officer. [30 G. A., ch. 9, § 2.]

[The above chapter 14-B is not applicable to the offices of clerk and reporter of the supreme court. See § 207-b. EDITOR.]

Where the original appointment is for an indefinite time the action of the board in fixing a definite term after which appointment will be made for another definite term is in effect a removal and invalid if there is no right of removal under the act. *Kitterman v. Board of Supervisors*, 137–275, 115 N. W. 13.

The provision as to removal only on charges and investigation is constitutional. *Ibid.*

The appointment of a veteran to a public service or employment of a continuous character for which no term is fixed by statute must be treated as continuous and the provisions of the statute cannot be defeated by the action of the board in appointing him for a specified term. *Kitterman v. Board of Supervisors*, 145–22, 123 N. W. 740.

CHAPTER 14-C.

OF GOVERNMENT OF CERTAIN CITIES.

SECTION **1056-a17. Cities affected.** That section ten hundred fifty-six-a seventeen of chapter fourteen-C of the supplement to the code, 1907, be and the same is hereby repealed and the following enacted in lieu thereof:

"Cities having by the last preceding state or national census a population of two thousand or over, including any such city acting under special charter, may become organized as a city under the provisions of this act by proceeding as hereinafter provided." [35 G. A., ch. 102, § 1; 33 G. A., ch. 64, § 1.] [32 G. A., ch. 48, § 1.]

The statute providing for commission form of government in cities of a certain description is not objectionable as local or special legislation. *Eckerson v. Des Moines*, 137–452, 115 N. W. 177.

The statute is not unconstitutional as involving a delegation of legislative power. The only question to be submitted to the electors is whether the city shall be brought within the class of cities to which the statute is to be applicable. *Ibid.*

The statute does not violate the provision of the federal constitution guaranteeing to every state a republican form of government. *Ibid.*

Nor is it in conflict with the provision of the state constitution that the powers of government shall be divided into three departments. *Ibid.*

SEC. **1056-a17a. Reduction in population of no effect.** Whenever any city shall have been heretofore or may be hereafter organized on the commission plan under the provisions of title five, chapter fourteen-C of the supplement to the code, 1907, as amended by chapter sixty-four of the laws of the thirty-third general assembly, no reduction of the population of such city shown by a subsequent census shall have any effect upon the

organization, rights, powers, duties or obligations of such city or any of its officers, but the same shall continue and remain as though no such reduction or apparent reduction of population was made to appear. [34 G. A., ch. 55, § 1.]

SEC. 1056-a18. **Petition — question submitted — result certified — election of officers.** That section ten hundred fifty-six-a eighteen of chapter fourteen-C of the supplement to the code, 1907, be and the same is hereby repealed and the following enacted in lieu thereof:

"Upon petition of electors equal in number to twenty-five per centum of the votes cast for all candidates for mayor at the last preceding city election of any such city, the mayor shall, not less than thirty days prior to the election to be held as herein provided, by proclamation submit the question of organizing as a city under this act at a special election to be held at a time specified therein, and within two months after said petition is filed; provided, however, that in case not less than ten per cent. of the qualified electors of any city reside in each of two or more townships, said petition shall be signed by not less than ten per centum of the qualified electors of said city residing in each of said townships. If said plan is not adopted at the special election called, the question of adopting said plan shall not be resubmitted to the voters of said city for adoption within two years thereafter, and then the question to adopt shall be resubmitted upon the presentation of a petition signed by electors as hereinbefore provided, equal in number to twenty-five per centum of the votes cast for all candidates for mayor at the last preceding general city election. At such election, the proposition to be submitted shall be, 'Shall the proposition to organize the city of (name the city), under chapter fourteen-C of the supplement to the code, 1907, and amendments thereto be adopted?' and the election thereupon shall be conducted, the vote canvassed, and the result declared in the same manner as provided by law in respect to other city elections. If the majority of the votes cast shall be in favor thereof, cities having a population of twenty-five thousand and over shall thereupon proceed to the election of a mayor and four councilmen, and cities having a population of two thousand and less than twenty-five thousand shall proceed to the election of a mayor and two councilmen, as hereinafter provided. Immediately after such proposition is adopted, the mayor shall transmit to the governor, to the secretary of state, and to the county auditor, each a certificate stating that such proposition was adopted. At the next regular city election after the adoption of such proposition there shall be elected a mayor and councilmen. In the event, however, that the next regular city election does not occur within one year after such special election the mayor shall, within ten days after such special election, by proclamation call a special election for the election of a mayor and councilmen, sixty days' notice thereof being given in such call, such election in either case to be conducted as hereinafter provided." [35 G. A., ch. 102, §§ 1, 2; 34 G. A., ch. 52, § 1; 33 G. A., ch. 64, § 2.] [32 G. A., ch. 48, § 2.]

It is not improper to submit to the voters at one election the question whether the commission form of government shall be adopted and the further question as to who shall be the officers under the proposed organization. *Eckerson v. Des Moines*, 137–452, 115 N. W. 177.

SEC. 1056-a19. **Statutes applicable—existing ordinances, resolutions.** All laws governing cities of the first and second class and not inconsistent with the provisions of this act, and sections nine hundred fifty-five, nine hundred fifty-six, nine hundred fifty-nine, nine hundred sixty-four, nine hundred eighty-nine, ten hundred, ten hundred twenty-three,

and ten hundred fifty-three of the code, chapter sixty of the laws of the thirty-third general assembly and acts amendatory thereof now applicable to special charter cities and not inconsistent with the provisions of this act, shall apply to and govern cities organized under this act. All by-laws, ordinances and resolutions lawfully passed and in force in any such city under its former organization shall remain in force until altered or repealed by the council elected under the provisions of this act. The territorial limits of such city shall remain the same as under its former organization and all rights and property of every description which were vested in any such city under its former organization, shall vest in the same under the organization herein contemplated, and no right or liability either in favor of or against it, existing at the time, and no suit or prosecution of any kind shall be affected by such change, unless otherwise provided for in this act. [34 G. A., ch. 53, § 1; 33 G. A., ch. 64, § 3.] [32 G. A., ch. 48, § 3.]

The laws governing boards of public works do not apply to the action of the city councils in cities organized under the commission form of government. *Sims v. Des Moines*, 146–410, 125 N. W. 329.

The change to a commission form of government does not affect the sufficiency of notice of a claim for personal injuries against the city which has already arisen. *Frazee v. Cedar Rapids*, 151–251, 131 N. W. 33.

SEC. **1056-a20. Elective officers — vacancies — terms of office.** In every city having a population of twenty-five thousand and over there shall be elected at the regular biennial municipal election a mayor and four councilmen, and in every city having a population of two thousand and less than twenty-five thousand, there shall be elected at such election a mayor and two councilmen. If any vacancy occurs in any such office the remaining members of said council shall appoint a person to fill such vacancy during the balance of the unexpired term. Said officers shall be nominated and elected at large. Said officers shall qualify and their terms of office shall begin on the first Monday after their election. The terms of office of the mayor and councilmen or aldermen in such city in office at the beginning of the terms of office of the mayor and councilmen first elected under the provisions of this act shall then cease and determine, and the terms of office of all other appointive officers in force in such city, except as hereinafter provided, shall cease and determine as soon as the council shall by resolution declare. [35 G. A., ch. 102, § 1; 33 G. A., ch. 64, § 4.] [32 G. A., ch. 48, § 4.]

SEC. **1056-a21. Candidates—how nominated—primary election—ballot—canvass of vote—result published—municipal election.** That section ten hundred fifty-six-a twenty-one of the supplement to the code, 1907, be repealed and the following enacted in lieu thereof:

"Candidates to be voted for at all general municipal elections at which a mayor and councilmen are to be elected under the provisions of this act shall be nominated by a primary election, and no other names shall be placed upon the general ballot except those selected in the manner hereinafter prescribed. The primary election for such nomination shall be held on the second Monday preceding the general municipal election. The judges of election appointed for the general municipal election shall be the judges of the primary election, and it shall be held at the same place, so far as possible, and the polls shall be opened and closed at the same hours, with the same clerks as are required for said general municipal election. Any person desiring to become a candidate for mayor or councilman shall, at least ten days prior to said primary election, file with the said clerk a statement of such candidacy, in substantially the following form:

STATE OF IOWA, } ss:
.....County, }

I (.....) being first duly sworn, say that I reside at .....street, city of.....county of..... state of Iowa; that I am a qualified voter therein; that I am a candidate for nomination to the office of (mayor or councilman) to be voted upon at the primary election to be held on the.....Monday of.....19.... and I hereby request that my name be printed upon the official primary ballot for nomination by such primary election for such office.

(Signed).....

Subscribed and sworn to (or affirmed) before me by.....on this.....day of.....19....

(Signed).....

and shall at the same time file therewith the petition of at least twenty-five qualified voters requesting such candidacy. Each petition shall be verified by one or more persons as to the qualifications and residence, with street number, of each of the persons so signing the said petition, and the said petition shall be in substantially the following form:

PETITION ACCOMPANYING NOMINATING STATEMENT.

The undersigned, duly qualified electors of the city of..... and residing at the places set opposite our respective names hereto, do hereby request that the name of (name of candidate) be placed on the ballot as a candidate for nomination for (name of office) at the primary election to be held in such city on the.....Monday of..... 19.... We further state that we know him to be a qualified elector of said city and a man of good moral character and qualified in our judgment for the duties of such office.

Name of qualified electors.	Number.	Street.
.....	.....	.....

Immediately upon the expiration of the time of filing the statements and petitions for candidacies, the said city clerk shall cause to be published for three successive days in all the daily newspapers published in the city, in proper form, the names of the persons as they are to appear upon the primary ballot, and if there be no daily newspaper, then in two issues of any other newspapers that may be published in said city; and the said clerk shall thereupon cause the primary ballots to be printed, authenticated with a facsimile of his signature. Upon the said ballot the names of the candidates for mayor, arranged alphabetically, shall first be placed, with a square at the left of each name, and immediately below the words, 'Vote for one.' Following these names, likewise arranged in alphabetical order, shall appear the names of the candidates for councilmen, with a square at the left of each name, and below the names of such candidates shall appear the words 'Vote for four,' or 'Vote for two' as the case may be. The ballots shall be printed upon plain, substantial white paper, and shall be headed:

CANDIDATES FOR NOMINATION FOR MAYOR AND COUNCILMEN OF .....CITY AT THE PRIMARY ELECTION.

but shall have no party designation or mark whatever. The ballots shall be in substantially the following form:

(Place a cross in the square preceding the names of the parties you favor as candidates for the respective positions.)

OFFICIAL PRIMARY BALLOT.

CANDIDATES FOR NOMINATION FOR MAYOR AND COUNCILMEN OF .....CITY AT THE PRIMARY ELECTION.

For Mayor
☐(Name of candidate)
(Vote for one)
For Councilman
☐(Name of candidate)
(Vote for four) or (Vote for two)
as the case may be.

Official ballot attest
(Signature)
.....
City Clerk.

Having caused said ballots to be printed, the said city clerk shall cause to be delivered at each polling place a number of said ballots equal to twice the number of votes cast in such polling precinct at the last general municipal election for mayor. The persons who are qualified to vote at the general municipal election shall be qualified to vote at such primary election, and challenges can be made by not more than two persons, to be appointed at the time of opening the polls by the judges of election; and the law applicable to challenges at a general municipal election shall be applicable to challenges made at such primary election. Judges of election shall, immediately upon the closing of the polls, count the ballots and ascertain the number of votes cast in such precinct for each of the candidates, and make return thereof to the city clerk, upon proper blanks to be furnished by the said clerk, within six hours of the closing of the polls. On the day following the said primary election, the said city clerk shall canvass said returns so received from all the polling precincts, and shall make and publish in all the newspapers of said city, at least once, the result thereof. Said canvass by the city clerk shall be publicly made. The two candidates receiving the highest number of votes for mayor shall be the candidates, and the only candidates, whose names shall be placed upon the ballot for mayor at the next succeeding general municipal election; and in cities having a population of twenty-five thousand and over, the eight candidates receiving the highest number of votes for councilman, or all such candidates if less than eight, and in cities having a population of two thousand and less than twenty-five thousand, the four candidates receiving the highest number of votes for councilman, or all such candidates if less than four, shall be the candidates, and the only candidates, whose names shall be placed upon the ballot for councilman at such municipal election. All electors of cities under this act who by the laws governing cities of the first and second class and cities acting under special charter would be entitled to vote for the election of officers at any general municipal election in such cities, shall be qualified to vote at all elections under this act; and the ballot at such general municipal election shall be in the same general form as for such primary election, so far as applicable; and in all elections in such city, the election precinct, voting places, method of conducting election, canvassing the vote and announcing the results shall be the same as by law provided for election of officers in such cities, so far as the same are applicable and not inconsistent with the provisions of this act." [35 G. A., ch. 102, § 1; 33 G. A., ch. 64, § 5.] [32 G. A., ch. 48, § 5.]

The statute providing for primary election in cities adopting the commission form of government is not unconstitutional as forbidding the electors to vote for other candidates than those whose names are placed on the primary ballot. *Eckerson v. Des Moines*, 137–452, 115 N. W. 177.

SEC. **1056-a22. Services for hire—penalty.** Any person who shall agree to perform any services in the interest of any candidate for any office provided in this act, in consideration of any money or other valuable thing for such services performed in the interest of any candidate, shall be punished by a fine not exceeding three hundred dollars, or be imprisoned in the county jail not exceeding thirty days. [32 G. A., ch. 48, § 5-a.]

SEC. **1056-a23. Bribery and illegal voting—penalty.** Any person offering to give a bribe, either in money or other consideration, to any elector for the purpose of influencing his vote at any election provided in this act, or any elector entitled to vote at any such election receiving and accepting such bribe or other consideration; any person making false answer to any of the provisions of this act relative to his qualifications to vote at said election; any person wilfully voting or offering to vote at such election who has not been a resident of this state for six months next preceding said election, or who is not twenty-one years of age, or is not a citizen of the United States, or knowing himself not to be a qualified elector of such precinct where he offers to vote; any person knowingly procuring, aiding or abetting any violation hereof shall be deemed guilty of a misdemeanor and upon conviction shall be fined a sum not less than one hundred dollars, nor more than five hundred dollars, and be imprisoned in the county jail not less than ten nor more than ninety days. [32 G. A., ch. 48, § 5-b.]

SEC. **1056-a24. Council—quorum—mayor to preside.** Every city having a population of twenty-five thousand and over shall be governed by a council consisting of the mayor and four councilmen, and every city having a population of two thousand and less than twenty-five thousand shall be governed by a council consisting of the mayor and two councilmen, chosen as provided in this act, each of whom shall have the right to vote on all questions coming before the council. In cities having four councilmen three members of the council shall constitute a quorum, and in cities having two councilmen, two members of the council shall constitute a quorum, and in cities having four councilmen the affirmative vote of three members, and in cities having two councilmen the affirmative vote of two members shall be necessary to adopt any motion, resolution or ordinance, or pass any measure unless a greater number is provided for in this act. Upon every vote the yeas and nays shall be called and recorded, and every motion, resolution or ordinance shall be reduced to writing and read before the vote is taken thereon. The mayor shall preside at all meetings of the council; he shall have no power to veto any measure, but every resolution or ordinance passed by the council must be signed by the mayor, or by two councilmen, and be recorded, before the same shall be in force. [35 G. A., ch. 102, § 1; 33 G. A., ch. 64, § 6.] [32 G. A., ch. 48, § 6.]

SEC. **1056-a25. Council—powers and duties—departments.** The council shall have and possess, and the council and its members shall exercise all executive, legislative and judicial powers and duties now had, possessed and exercised by the mayor, city council, solicitor, assessor, treasurer, auditor, city engineer and other executive and administrative officers in cities of the first and second class, and in cities under special charter, and shall also possess and exercise all executive, legislative and judicial powers and duties now had and exercised by the board of public works,

park commissioners, the board of police and fire commissioners, and[1] board of waterworks trustees, in all cities wherein a board of public works, park commissioners, board of police and fire commissioners, and[1] board of waterworks trustees, now exist or may be hereafter created.

The executive and administrative powers, authority and duties in such cities shall be distributed into and among five departments, as follows:

1. Department of public affairs.
2. Department of accounts and finances.
3. Department of public safety.
4. Department of streets and public improvements.
5. Department of parks and public property.

The council shall determine the powers and duties to be performed by, and assign them to the appropriate department; shall prescribe the powers and duties of officers and employes; may assign particular officers and employes to one or more of the departments; may require an officer or employe to perform duties in two or more departments; and may make such other rules and regulations as may be necessary or proper for the efficient and economical conduct of the business of the city. [35 G. A., ch. 100, § 1; 33 G. A., ch. 64, § 7.] [32 G. A., ch. 48, § 7.]

[1]The words "and" have been inserted to make proper construction of the sentence. EDITOR.]

The fact that the executive, legislative and judicial powers are conferred upon one body is not a violation of the provisions of the state constitution that the powers of the government shall be divided into three separate departments. *Eckerson v. Des Moines*, 137–452, 115 N. W. 177.

Notwithstanding the subsequent amendment of code § 850 relating to park commissioners, without special reference to the statute as to commission form of government, the statutory provisions relating to park commissioners are superseded as to such cities by this section. *Ibid.*

Cities operating under the commission plan do not have a board of public works and the statutory provision as to advertising for bids applicable to boards of public works has no application to the action of the city council. *Sims v. Des Moines*, 146–410, 125 N. W. 329.

A city acting under special charter which adopts the commission form of government may exercise the powers conferred by its charter. *Keokuk v. Kennedy*, 156–680, 137 N. W. 914.

SEC. **1056-a26. Department superintendents—officers and assistants.** That section ten hundred fifty-six-a twenty-six of chapter fourteen-C of the supplement to the code, 1907, be and the same is hereby repealed, and the following enacted in lieu thereof:

"The mayor shall be superintendent of the department of public affairs, and the council shall at the first regular meeting after election of its members designate by majority vote one councilman to be superintendent of the department of accounts and finances; one to be superintendent of the department of public safety; one to be superintendent of the department of streets and public improvements; and one to be superintendent of the department of parks and public property; provided, however, that in cities having a population of less than twenty-five thousand there shall be designated to each councilman two of said departments. Such designation shall be changed whenever it appears that the public service would be benefited thereby. The council shall, at said first meeting, or as soon as practicable thereafter, elect by majority vote the following officers: city clerk, solicitor, assessor, treasurer, auditor, civil engineer, city physician, marshal, market master, street commissioner, and such other officers and assistants as shall be provided for by ordinance and necessary to the proper and efficient conduct of the affairs of the city; provided, however, that in cities having a population of less than twenty-five thousand such only of the

above named officers shall be appointed as may, in the judgment of the mayor and councilmen, be necessary for the proper and efficient transaction of the affairs of the city. In those cities of the first class not having a superior court, the council shall appoint a police judge. In cities of the second class not having a superior court the mayor shall hold police court, as now provided by law. Any officer or assistant elected or appointed by the council may be removed from office at any time by vote of a majority of the members of the council, except as otherwise provided for in this act." [35 G. A., ch. 100, § 2; 34 G. A., ch. 54, § 1; 33 G. A., ch. 64, § 8.] [32 G. A., ch. 48, § 8.]

SEC. **1056-a26a. Library trustees—powers and duties.** That the board of library trustees in all cities now or hereafter organized under the commission form of government shall consist of five members (except in cities which have heretofore maintained a library under lease or contract fixing a different number of trustees) and said board shall have and exercise all the powers possessed by library boards in cities not organized and acting under said chapter fourteen-C. [35 G. A., ch. 100, § 3.]

SEC. **1056-a26b. How selected—terms.** The said board of five trustees shall be selected as follows: At the first meeting of the council, or as soon as practicable thereafter, the mayor shall appoint, by and with the approval of the council, five library trustees, one to serve for the period of five years, one for four years, one for three years, one for two years and one for one year, and until their successors are elected and qualify. Upon the election of said five trustees the term of the existing board of nine trustees heretofore acting under the general law shall cease. Annually thereafter there shall be elected in like manner one trustee to serve for five years and to take the place of the trustee whose term first expires. Provided, however, that in cities already operating under said chapter fourteen-C of the supplement to the code, 1907, the library board shall continue as now constituted until the meeting of the first council elected after this date and until their successors as such trustees are elected and qualify. [35 G. A., ch. 100, § 4.]

SEC. **1056-a27. Power to create and discontinue offices.** The council shall have power from time to time to create, fill and discontinue offices and employments other than herein prescribed, according to their judgment of the needs of the city; and may by majority vote of all the members remove any such officer or employe, except as otherwise provided for in this act; and may by resolution or otherwise prescribe, limit or change the compensation of such officers or employes. [32 G. A., ch. 48, § 9.]

SEC. **1056-a28. Office in city hall—salaries.** The mayor and councilmen shall have an office in the city hall, and their total compensation shall be as follows:

1. In cities having by the last preceding state or national census a population of less than twenty-five thousand, the mayor and councilmen shall receive as their annual salaries the amount to be fixed by ordinance, as follows: For the mayor, not to exceed the sum of one hundred fifty dollars per annum for each one thousand of population, or major portion thereof, in such city, and for each councilman in such city, not to exceed the sum of one hundred twenty dollars per annum for each one thousand population, or major portion thereof; provided, however, that in such city no mayor shall receive a salary greater than the sum of twenty-five hundred dollars per annum, nor in such city shall a councilman receive as his annual salary an amount greater than two thousand dollars per annum;

and provided, further, that from and after the passage of this act, and during the first term of his office under the provisions of this act, the mayor and councilmen shall by ordinance fix their compensation as herein provided for their term of office; but thereafter the salary of any such officer shall not be increased or decreased during the term for which he shall have been elected or appointed.

2. In cities having by such census a population of twenty-five thousand and less than forty thousand, the mayor's annual salary shall be twenty-five hundred dollars, and [that of] each councilman, eighteen hundred dollars.

3. In cities having by such census a population of forty thousand and less than sixty thousand, the mayor's annual salary shall be three thousand dollars, and [that of] each councilman twenty-five hundred dollars.

4. In cities having by such census a population of sixty thousand or more, the mayor's annual salary shall be thirty-five hundred dollars, and that of each councilman, three thousand dollars. Such salaries shall be payable in equal monthly installments. Any increase in salary occasioned under the provisions of this scale by increase in population in any city shall commence with the month next after the official publication of the census showing such increase therein. Every other officer or assistant shall receive such salary or compensation as the council shall by ordinance provide, payable in equal monthly installments. The salary or compensation of all other employes of such city shall be fixed by the council and shall be payable monthly or at such shorter periods as the council shall determine. [35 G. A., ch. 102, §§ 1, 3; 33 G. A., ch. 64, § 9.] [32 G. A., ch. 48, § 10.]

SEC. **1056-a29. Meetings—president of council—vice president.** Regular meetings of the council shall be held on the first Monday after the election of councilmen, and thereafter at least once each month. The council shall provide by ordinance for the time of holding regular meetings, and special meetings may be called from time to time by the mayor or two councilmen. All meetings of the council, whether regular or special, at which any person not a city officer is admitted, shall be open to the public. The mayor shall be president of the council and preside at its meetings, and shall supervise all departments and report to the council for its action all matters requiring attention in either [any]. The superintendent of the department of accounts and finances shall be vice president of the council, and in case of vacancy in the office of mayor, or the absence or inability of the mayor, shall perform the duties of mayor. [32 G. A., ch. 48, § 11.]

SEC. **1056-a30. Ordinances and resolutions—franchises.** Every ordinance or resolution appropriating money or ordering any street improvement or sewer, or making or authorizing the making of any contract, or granting any franchise or right to occupy or use the streets, highways, bridges or public places in the city for any purpose, shall be complete in the form in which it is finally passed, and remain on file with the city clerk for public inspection at least one week before the final passage or adoption thereof. No franchise or right to occupy or use the streets, highways, bridges or public places in any such city shall be granted, renewed or extended, except by ordinance, and every franchise or grant for interurban or street railways, gas or waterworks, electric light or power plants, heating plants, telegraph or telephone systems, or other public service utilities within said city, must be authorized or approved by a majority of the electors voting thereon at a general or special election as provided in section seven hundred seventy-six of the code. [32 G. A., ch. 48, § 12.]

SEC. **1056-a31. Officers and employes—what prohibited.** No officer or employe elected or appointed in any such city shall be interested, directly or indirectly, in any contract or job for work or materials, or the profits thereof, or services to be furnished or performed for the city; and no such officer or employe shall be interested, directly or indirectly, in any contract or job for work or materials, or the profits thereof, or services to be furnished or performed for any person, firm or corporation operating interurban railway, street railway, gasworks, waterworks, electric light or power plant, heating plant, telegraph line, telephone exchange, or other public utility within the territorial limits of said city. No such officer or employe shall accept or receive, directly or indirectly, from any person, firm or corporation operating within the territorial limits of said city, any interurban railway, street railway, gasworks, waterworks, electric light or power plant, heating plant, telegraph line or telephone exchange, or other business using or operating under a public franchise, any frank, free pass, free ticket or free service, or accept or receive, directly or indirectly, from any such person, firm or corporation, any other service upon terms more favorable than is granted to the public generally. Any violation of the provisions of this section shall be a misdemeanor, and every such contract or agreement shall be void. Such prohibition of free transportation shall not apply to policemen or firemen in uniform; nor shall any free service to city officials heretofore provided by any franchise or ordinance be affected by this section. Any officer or employe of such city who, by solicitation or otherwise, shall exert his influence directly or indirectly to influence other officers or employes of such city to adopt his political views or to favor any particular person or candidate for office, or who shall in any manner contribute money, labor, or other valuable thing to any person for election purposes, shall be guilty of a misdemeanor and upon conviction shall be punished by a fine not exceeding three hundred dollars or by imprisonment in the county jail not exceeding thirty days. [32 G. A., ch. 48, § 13.]

SEC. **1056-a32. Civil service commissioners—duties—powers of council.** In cities having a population of twenty-five thousand and over the council shall, and in cities having a population of two thousand and less than twenty-five thousand, the council may, immediately after organizing, by ordinance appoint three civil service commissioners who shall hold office, one until the first Monday in April of the second year after his appointment, one until the first Monday in April of the fourth year after his appointment, and one until the first Monday in April of the sixth year after his appointment; provided, however, that in all cases in which no civil service commissioners are appointed by the council, the council shall have the same powers and shall exercise and perform all the duties devolving upon such commissioners, as provided for in this act. In cities wherein civil service commissioners have been appointed under the provisions of this act each succeeding council shall, as soon as practicable after organizing, appoint one commissioner for six years, who shall take the place of the commissioner whose term of office expires. The chairman of the commission for each biennial period shall be the member whose term first expires. No person while on the said commission shall hold or be a candidate for any office of public trust. Two of said members shall constitute a quorum to transact business. The commissioners must be citizens of Iowa, and residents of the city for more than three years next preceding their appointment. The council may remove any of said commissioners during their term of office for cause, four councilmen voting in favor of

such removal, and shall fill any vacancy that may occur in said commission for the unexpired term. The city council shall provide suitable rooms in which the said civil service commission may hold its meetings. They shall have a clerk, who shall keep a record of all its meetings, such city to supply the said commission with all necessary equipment to properly attend to such business.

(a) *Oath of office.* Before entering upon the duties of their office, each of said commissioners shall take and subscribe an oath, which shall be filed and kept in the office of the city clerk, to support the constitution of the United States and of the state of Iowa, and to obey the laws, and to aim to secure and maintain an honest and efficient force, free from partisan distinction or control, and to perform the duties of his office to the best of his ability.

(b) *Examinations—results certified—soldiers' preference.* Subdivisions b, c, and d of section ten hundred fifty-six-a thirty-two of the supplement to the code, 1907, be and hereby are repealed and the following enacted as a substitute therefor:

[The substitute includes subdivisions b, c, d and d1 hereof. EDITOR.]

Such commission shall, on the first Monday of April and October of each year, or oftener if they shall deem it necessary, under such rules and regulations as it may prescribe, hold examinations for the purpose of determining the qualifications of applicants for positions, including applicants for position of chief of the fire department, and for positions in the fire and police department, which examinations shall be practical in their character and shall relate to such matters as will fairly test the fitness of the person examined to discharge the duties of the position to which he seeks to be appointed. Such commission shall, as soon as possible after every such examination, certify to the city council the names of ten persons for each department who, according to its records, have the highest standing for the positions they seek to fill, as a result of such examination, and all vacancies in positions under civil service which shall occur before the holding of the next examination shall be filled from said list so certified; provided, however, if the list for any cause shall be reduced to less than three for any division or department, then the superintendent of the proper department may temporarily fill a vacancy until the next examination of the commission. In all examinations and appointments under the provisions of this act, honorably discharged soldiers, sailors or marines of the regular or volunteer army or navy of the United States shall be given a preference if otherwise qualified. [34 G. A., ch. 54, § 2.]

(c) *Removals and discharges—appeal—witnesses—annual report—rules and regulations.* All persons subject to such civil service examination shall be subject to removal from office or employment by majority vote of such civil service commission for misconduct or failure to properly perform their duties under such rules and regulations as may be adopted by the council. The chief of police, the chief of the fire department, or any superintendent or foreman in charge of municipal work, may peremptorily suspend or discharge any subordinate then under his direction for neglect of duty, disobedience of orders or misconduct, but shall, within twenty-four hours thereafter, report such suspension or discharge, with the reason therefor, to the superintendent of his department, who shall thereupon affirm or revoke such suspension or discharge according to the merits under the facts in the case. Every officer or employe so suspended or discharged and whose suspension or discharge has been affirmed, or the officer or per-

son so suspending or discharging a subordinate when such suspension or discharge has been revoked, as the case may be, may, within five days from the affirmance or revocation of any such suspension or discharge, appeal therefrom to the civil service commission, if the person taking the appeal was subject to such civil service, otherwise to the city council, and such commission or council, as the case may be, shall fully hear and determine the appeal upon the merits of the case, and if it be determined that any suspension or discharge was unwarranted the appellant shall be reinstated, otherwise it shall be affirmed. Any such appeal may be taken by serving upon the proper department superintendent or his secretary or clerk a notice in writing, within said time, specifying the ruling appealed from, which notice shall be signed by the person taking the appeal. A true copy of such notice of appeal shall be filed with the chairman of the civil service commission or mayor, as the case may be. Within five days from the service of such notice of appeal, the proper department superintendent shall file with the civil service commission, or city council, as the case may be, a written specification of the charges or grounds upon which the affirmance or revocation of the suspension or discharge appealed from was based. Within five days after such specifications are filed as aforesaid the commission or council, as the case may be, shall fix the time and place for hearing the appeal and notify the appellant in writing of the time and place so fixed, which notice shall contain a copy of the specifications so filed. The time for hearing any such appeal shall not be fixed earlier than five days nor later than twenty days from the filing of such specifications. The council and commission shall have the power to enforce the attendance of witnesses, the production of books and papers, and to administer oaths in the same manner and with like effect, and under same penalties, as in the case of magistrates exercising criminal or civil jurisdiction under the statutes of Iowa. The hearings on such appeals shall be public and appellant may be represented by counsel. The council or commission, as the case may be, shall issue subpoenas for such witnesses as appellant may designate, which shall be signed by the mayor or chairman of the commission, as the case may be. Such commission shall make annual report to the council and it may require a special report from such commission at any time. Such commission may prescribe such rules and regulations for the proper conduct of its business as shall be found expedient and advisable. [34 G. A., ch. 54, § 3.]

(d) *Chief of fire department—appointment—removal—members of fire and police departments—qualifications.* Such commission shall appoint a chief of the fire department, but the tenure of any person holding such position at this time shall not be affected by this section; provided, however, that such officer may be removed for cause in accordance with the provisions of the next preceding section. No person shall be employed in any capacity in the fire or police department unless he is a citizen of the United States and has been a resident of such city more than one year and is of good moral character and can read and write the English language and is not addicted to the use of intoxicating liquors as a beverage. Nothing in this act shall be construed as limiting the powers conferred upon the city council and its members in section ten hundred fifty-six-a twenty-five of the supplement to the code, 1907. [34 G. A., ch. 54, § 4.]

(d1) *Campaign contributions prohibited—penalty.* No member of the fire or police department in any such city shall directly or indirectly contribute any money or anything of value to any candidate for nomination or election to any office or to any campaign or political committee. Any

person violating any of the provisions of this section shall be deemed guilty of a misdemeanor and upon conviction shall pay a fine of not less than twenty-five dollars nor more than one hundred dollars, or be imprisoned in the county jail not to exceed thirty days. [34 G. A., ch. 54, § 5.]

(e) *Penalties.* The council of such city shall have power to pass ordinances imposing suitable penalties for the punishment of persons violating any of the provisions of this act relating to the civil service commission.

(f) *Officers and employes affected.* The provisions of this section shall apply to all appointive officers and employes of such city, except those especially named in section eight of this act, commissioners of any kind (laborers whose occupation requires no special skill or fitness), election officials, and mayor's secretary and assistant solicitor, where such officers are appointed; provided, however, that existing employes heretofore appointed, or employed after competitive examination, or for long service under the provisions of chapter thirty-one, acts of the twenty-ninth general assembly, and subsequent amendments thereto, shall retain their positions without further examination unless removed for cause. All officers and employes in any such city shall be elected or appointed with reference to their qualifications and fitness, and for the good of the public service, and without reference to their political faith or party affiliations. It shall be unlawful for any candidate for office, or any officer in any such city, directly or indirectly, to give or promise any person or persons any office, position, employment, benefit, or anything of value, for the purpose of influencing or obtaining the political support, aid or vote of any person or persons. Every elective officer in any such city shall, within thirty days after qualifying, file with the city clerk, and publish at least once in a daily newspaper of general circulation, his sworn statement of all his election and campaign expenses, and by whom such funds were contributed. Any violation of the provisions of this section shall be a misdemeanor and be a ground for removal from office. [35 G. A., ch. 102, § 1; 33 G. A., ch. 64, § 10.] [32 G. A., ch. 48, § 14.]

SEC. **1056-a33. Monthly itemized statement—annual examination.** The council shall each month print in pamphlet form a detailed itemized statement of all receipts and expenses of the city and a summary of its proceedings during the preceding month, and furnish printed copies thereof to the state library, the city library, the daily newspapers of the city, and to persons who shall apply therefor at the office of the city clerk. At the end of each year the council shall cause a full and complete examination of all the books and accounts of the city to be made by competent accountants, and shall publish the result of such examination in the manner above provided for publication of statements of monthly expenditures. [32 G. A., ch. 48, § 15.]

SEC. **1056-a34. Appropriations.** If, at the beginning of the term of office of the first council elected in such city under the provisions of this act, the apropriations for the expenditures of the city government for the current fiscal year have been made, said council shall have power, by ordinance, to revise, repeal or change said apropriations and to make additional apropriations. [32 G. A., ch. 48, § 16.]

SEC. **1056-a35. Terms defined.** In the construction of this act the following rules shall be observed, unless such construction would be inconsistent with the manifest intent, or repugnant to the context of the statute.

1. The words "councilman" or "alderman" shall be construed to mean "councilman" when applied to cities under this act.

2. When an office or officer is named in any law referred to in this act, it shall, when applied to cities under this act, be construed to mean the office or officer having the same functions or duties under the provisions of this act, or under ordinances passed under authority thereof.

3. The word "franchise" shall include every special privilege in the streets, highways and public places of the city, whether granted by the state or the city, which does not belong to citizens generally by common right.

4. The word "electors" shall be construed to mean persons qualified to vote for elective offices at regular municipal elections. [32 G. A., ch. 48, § 17.]

SEC. **1056-a36. Removal of elective officers—procedure—statement of candidacy—election of successors.** The holder of any elective office may be removed at any time by the electors qualified to vote for a successor of such incumbent. The procedure to effect the removal of an incumbent of an elective office shall be as follows: A petition signed by electors entitled to vote for a successor to the incumbent sought to be removed, equal in number to at least twenty-five per centum of the entire vote for all candidates for the office of mayor cast at the last preceding general municipal election, demanding an election of a successor of the person sought to be removed, shall be filed with the city clerk, which petition shall contain a general statement of the grounds for which the removal is sought. The signatures to the petition need not all be appended to one paper, but each signer shall add to his signature his place of residence, giving the street and number. One of the signers of each such paper shall make oath before an officer competent to administer oaths that the statements therein made are true as he believes, and that each signature to the paper appended is the genuine signature of the person whose name it purports to be. Within ten days from the date of filing such petition the city clerk shall examine and from the voters' register ascertain whether or not said petition is signed by the requisite number of qualified electors, and, if necessary, the council shall allow him extra help for that purpose; and he shall attach to said petition his certificate, showing the result of said examination. If by the clerk's certificate the petition is shown to be insufficient, it may be amended within ten days from the date of said certificate. The clerk shall, within ten days after such amendment, make like examination of the amended petition, and if his certificate shall show the same to be insufficient, it shall be returned to the person filing the same; without prejudice, however, to the filing of a new petition to the same effect. If the petition shall be deemed to be sufficient, the clerk shall submit the same to the council without delay. If the petition shall be found to be sufficient, the council shall order and fix a date for holding the said election, not less than thirty days or more than forty days from the date of the clerk's certificate to the council that a sufficient petition is filed. The council shall make or cause to be made publication of notice and all arrangements for holding such election, and the same shall be conducted, returned and the result thereof declared, in all respects as are other city elections. So far as applicable, except as otherwise herein provided, nominations hereunder shall be made without the intervention of a primary election by filing with the clerk at least ten days prior to said special election, a statement of candidacy accompanied by a petition signed by electors entitled to vote at said special election equal in number to at least ten per centum of the entire vote for all candidates for the office of mayor at the last preceding general municipal election, which said statement of candidacy and petition

shall be substantially in the form set out in section ten hundred fifty-six-a twenty-one, of the supplement to the code, 1907, so far as the same is applicable, substituting the word "special" for the word "primary" in such statement and petition, and stating therein that such person is a candidate for election instead of nomination. The ballot for such special election shall be in substantially the following form:

OFFICIAL BALLOT.

Special election for the balance of the unexpired term
of ..... as .....
FOR.....

(Vote for one only)
(Names of Candidates)

☐ .....
☐ .....
Name of present incumbent.

Official ballot attest:
(Signature) .....
City Clerk.

The successor of any officer so removed shall hold office during the unexpired term of his predecessor. Any person sought to be removed may be a candidate to succeed himself, and unless he requests otherwise in writing, the clerk shall place his name on the official ballot without nomination. In any such removal election, the candidate receiving the highest number of votes shall be declared elected. At such election if some other person than the incumbent receives the highest number of votes, the incumbent shall thereupon be deemed removed from the office upon qualification of his successor. In case the party who receives the highest number of votes should fail to qualify within ten days after receiving notification of election, the office shall be deemed vacant. If the incumbent receives the highest number of votes, he shall continue in office. The said method of removal shall be cumulative and additional to the methods heretofore provided by law. [33 G. A., ch. 65, § 1.] [32 G. A., ch. 48, § 18.]

The initiative, referendum and recall features of the commission form of government do not render the statute unconstitutional. *Eckerson v. Des Moines*, 137–452, 115 N. W. 177.

SEC. **1056-a37. Petitions for ordinances—adoption or submission —how repealed or amended.** Any proposed ordinance may be submitted to the council by petition signed by electors of the city equal in number to the percentage hereinafter required. The signatures, verification, authentication, inspection, certification, amendment and submission of such petition shall be the same as provided for petitions under section eighteen hereof. If the petition accompanying the proposed ordinance be signed by electors equal in number to twenty-five per centum of the votes cast for all candidates for mayor at the last preceding general election, and contains a request that the said ordinance be submitted to a vote of the people if not passed by the council, such council shall either (a) pass said ordinance without alteration within twenty days after attachment of the clerk's certificate to the accompanying petition, or (b) forthwith after the clerk shall attach to the petition accompanying such ordinance his certificate of sufficiency, the council shall call a special election, unless a general municipal election is fixed within ninety days thereafter, and at such special or gen-

eral municipal election, if one is so fixed, such ordinance shall be submitted without alteration to the vote of the electors of said city. But if the petition is signed by not less than ten nor more than twenty-five per centum of the electors, as above defined, then the council shall, within twenty days, pass said ordinance without change, or submit the same at the next general city election occurring not more than thirty days after the clerk's certificate of sufficiency is attached to said petition. The ballots used when voting upon said ordinance shall contain these words: "For the ordinance" (stating the nature of the proposed ordinance), and "Against the ordinance" (stating the nature of the proposed ordinance). If a majority of the qualified electors voting on the proposed ordinance shall vote in favor thereof, such ordinance shall thereupon become a valid and binding ordinance of the city; and any ordinance proposed by petition, or which shall be adopted by a vote of the people, cannot be repealed or amended except by a vote of the people. Any number of proposed ordinances may be voted upon at the same election, in accordance with the provisions of this section; but there shall not be more than one special election in any period of six months for such purpose. The council may submit a proposition for the repeal of any such ordinance, or for amendments thereto, to be voted upon at any succeeding general city election; and should such proposition so submitted receive a majority of the votes cast thereon at such election, such ordinance shall thereby be repealed or amended accordingly. Whenever any ordinance or proposition is required by this act to be submitted to the voters of the city at any election, the city clerk shall cause such ordinance or proposition to be published once in each of the daily newspapers published in said city, such publication to be not more than twenty or less than five days before the submission of such proposition or ordinance to be voted on. [32 G. A., ch. 48, § 19.]

The incorporation of provisions as to the initiative and referendum does not render these statutes unconstitutional. *Eckerson v. Des Moines*, 137–452, 115 N. W. 177.

SEC. **1056-a38. Ordinances—when effective—petitions of protest.** No ordinance passed by the council, except when otherwise required by the general laws of the state or by the provisions of this act, except an ordinance for the immediate preservation of the public peace, health or safety, which contains a statement of its urgency and is passed by a two-thirds vote of the council, shall go into effect before ten days from the time of its final passage; and if during said ten days a petition signed by electors of the city equal in number to at least twenty-five per centum of the entire vote cast for all candidates for mayor at the last preceding general municipal election at which a mayor was elected, protesting against the passage of such ordinance, be presented to the council, the same shall thereupon be suspended from going into operation, and it shall be the duty of the council to reconsider such ordinance; and if the same is not entirely repealed, the council shall submit the ordinance, as is provided by subsection b of section nineteen of this act, to the vote of the electors of the city, either at the general election or at a special municipal election to be called for that purpose; and such ordinance shall not go into effect or become operative unless a majority of the qualified electors voting on the same shall vote in favor thereof. Said petition shall be in all respects in accordance with the provisions of said section nineteen except as to the percentage of signers, and be examined and certified to by the clerk in all respects as is therein provided. [32 G. A., ch. 48, § 20.]

By special provision, an ordinance may be made to take effect at once as being "for the immediate preservation of the public peace, health and safety." *Empire State Surety Co. v. Des Moines*, 152–531, 131 N. W. 870, 132 N. W. 837.

SEC. **1056-a39. Abandonment of commission plan of government —procedure—form of ballot.** Any city which shall have operated for more than six years under the provisions of this act may abandon such organization hereunder, and accept the provisions of the general law of the state then applicable to cities of its population, or if now organized under special charter may resume said special charter by proceeding as follows: Upon the petition of not less than twenty-five per centum of the electors of such city a special election shall be called, at which the following proposition only shall be submitted:

"Shall the city of (name of city) abandon its organization under chapter fourteen-C of the supplement to the code, 1907, as amended by the acts of the thirty-third general assembly, and become a city under the general law governing cities, or if now organized under special charter shall resume said special charter?"

If the majority of the votes cast at such special election be in favor of such proposition, the officers elected at the next succeeding biennial election shall be those then prescribed by the general law of the state for cities of like population, and upon the qualification of such officers such city shall become a city under such general law of the state; but such change shall not in any manner or degree affect the property, rights or liabilities of any nature of such city, but shall merely extend to such change in its form of government. The sufficiency of such petition shall be determined, the election ordered and conducted, and the results declared, generally as provided by section eighteen[1] of this act, in so far as the provisions thereof are applicable. [33 G. A., ch. 64, § 11.] [32 G. A., ch. 48, § 21.]

[1See § 1056-a36 herein. EDITOR.]

SEC. **1056-a40. Petitions.** Petitions provided for in this act shall be signed by none but legal voters of the city. Each petition shall contain, in addition to the names of the petitioners, the street and house number in which the petitioner resides, his age and length of residence in the city. It shall also be accompanied by the affidavit of one or more legal voters of the city stating that the signers thereof were, at the time of signing, legal voters of said city and the number of signers at the time the affidavit was made. [32 G. A., ch. 48, § 22.]

SEC. **1056-a41. Flood protection—division of work—power to continue levy.** That the law as it appears in title five, chapter fourteen-C of the supplement to the code, 1907, be amended by adding thereto the following additional provisions for the government of cities now or hereafter organized under said act:

That whenever in any such city proceedings have been or shall be begun for the purpose of providing flood protection under the provisions of chapter eight-A of title five of the supplement to the code, 1907, the council shall have power after the election in said chapter provided for has been had, and without again submitting the matter at an election, to divide the work into parts, sections or districts, and determine what property would be benefited by the work or improvement in each part, section or district; to omit parts of said work or any part, section or district; and to contract for any part, section or district separately and proceed therewith the same as if the entire work or improvement was contracted for, done or made. And provided further, that whenever in any such city the tax provided for

in said chapter eight-A of title five of the supplement to the code, 1907, has not been levied beginning on the date fixed in the resolution of necessity and in the proposition submitted to a vote of the electors, and a part of the period in which such levy is authorized to be made by such vote has expired without such levy having been made, and no certificates or bonds have been issued or sold for the payment of the improvement as provided in said chapter and title, the council shall have the power to continue the levy provided for in said chapter and title, and in the proposition theretofore submitted to a vote of the electors for a period not exceeding twenty years, including the several years, if any, for which such tax has heretofore been levied; and it is hereby made the duty of the council to make the levy in the manner provided in sections eight hundred forty-nine-c and eight hundred forty-nine-e of chapter eight-A of title five of the supplement to the code, 1907, and to appropriate and apply the proceeds collected after January first, nineteen hundred fourteen, from such tax so levied to the payment of flood protection bonds issued by such city under senate file number four hundred thirty-five enacted by the thirty-fifth general assembly, if any such there be. [35 G. A., ch. 87, § 1; 33 G. A., ch. 67, § 1.]

[Senate File No. 435, 35 G. A. appears in this supplement as §§ 849-j and 849-k. EDITOR.]

SEC. **1056-a42. Special assessments.** That in all cases where special assessments are authorized and no other mode of proceeding is provided by law, the assessment shall be made as nearly as practicable in the manner provided for assessing the cost of street improvement and sewers. [33 G. A., ch. 67, § 2.]

SEC. **1056-a43. Certificate for repair of bridges.** That any such city shall have power to issue certificates as provided in sections seven hundred fifty-eight-a, seven hundred fifty-eight-b and seven hundred fifty-eight-c of the supplement to the code, 1907, for the whole or any part of the expense of repairing bridges. [33 G. A., ch. 67, § 3.]

SEC. **1056-a44. Repairs by street railway companies.** That in every such city the owner of any street railway occupying or using any bridge shall construct, reconstruct and repair the paving or flooring on said bridge three and one-half feet each way from the center line of the space between the rails of its tracks, the same to be ordered, done, assessed and paid for in the manner provided for paving in sections eight hundred thirty-four and eight hundred thirty-five of the code. [33 G. A., ch. 67, § 4.]

SEC. **1056-a45. Taxes for parks and cemeteries.** That in addition to the taxes now or hereafter authorized by law every such city shall have the power to levy upon all taxable property therein the following taxes, viz.: a tax of not more than one and five-tenths mills on the dollar for the purpose of caring for and improving the parks of said city; a tax of not more than one mill on the dollar for the purpose of caring for and improving any cemetery owned by such city. [33 G. A., ch. 67, § 5.]

SEC. **1056-a46. Cemetery fund—how invested.** That every such city shall have power to create a fund from tax levies heretofore or hereafter authorized for cemeteries or from the sale of lots in cemeteries, or from sources, including bequests or donations for the permanent maintenance of cemeteries, and the fund thus created shall not be used for any other purpose; and the city council shall have authority to cause such accumulations to be invested in bonds of the United States or in municipal

bonds or certificates or other evidence of indebtedness issued by authority of and according to law of this or any other state when such bonds are at or above par. [33 G. A., ch. 67, § 6.]

SEC. **1056-a47. Authority to lease city property.** That any such city, by a two-thirds vote of its council, shall have authority to lease any city property for a term of not exceeding one year from the date of leasing the same, where, in the judgment of the council expressed by a two-thirds vote thereof, any such property may not be needed for the immediate use of such city. [33 G. A., ch. 67, § 7.]

SEC. **1056-a48. River front improvement commission—powers and duties—election of—terms.** That all cities, which have heretofore been organized and acting under special charters and which have heretofore, or shall hereafter adopt the plan of government provided in chapter forty-eight of the acts of the thirty-second general assembly of Iowa, as the same appears in chapter fourteen-C, title five, of the supplement to the code, 1907, and in which river front improvement commissions have been or shall hereafter be organized, under chapter two hundred ten of the acts of the twenty-ninth general assembly of Iowa as the same appears in chapter nine-A, title five, of the supplement to the code, 1907, shall have and may exercise all the right and powers conferred by said act on the said river front improvement commission, and all such rights and powers are hereby transferred to and vested in the city council of any such city or cities. Said council shall have the power to elect and shall elect a commission of three persons, to be known as the river front improvement commission, whose duties shall be to carry out the powers and duties with respect to the beds and banks of streams in such cities, herein conferred upon said city council, or such limited powers in respect thereto as the council may prescribe by ordinance. Said commission shall be elected biennially on the first Tuesday in May, and shall hold office for a term of six years and until their successors are elected and qualified. The members of the river front improvement commission shall be elected, one for two years, one for four years, and one for six years. [33 G. A., ch. 66, § 1.]

SEC. **1056-a49. Control over meandered streams—prevention and abatement of nuisances—condemnation—assessment of benefits—tax—bonds.** Every city specified in section one of this act shall have control of all the meandered streams within the boundaries thereof, and of the beds, banks and waters of such streams. Said cities shall have power to prevent the placing or maintenance of nuisances and obstructions in such streams, or on or along the banks thereof, and to abate and remove such nuisances or obstructions therefrom, and to recover the expense thereof from the person or persons causing, placing or maintaining such nuisances therein or thereon; to deepen, widen, straighten or change the channels of such streams; to improve and beautify the banks of such streams; to construct levees, embankments and other works to protect the city and its property and its inhabitants and their property from floods; to acquire and take by purchase or condemnation any real property necessary for any such works or improvements; to assess upon property benefited by any such works or improvements, the cost thereof, to the extent of the special benefits conferred thereby, but not in excess of such special benefit and not in excess of twenty-five per cent. of the actual value of the property benefited; to provide funds for any of the expenditures herein authorized, by levy upon all the taxable property in such city of a continuous tax of not more than two mills on the dollar each year for not more than ten years, and to issue bonds in anticipation of such tax, and to pledge the proceeds of

said tax to the payment of said bonds. The said special tax levy and the issuance of bonds in anticipation thereof and the general plans recommended by the river front improvement commission and the estimated costs of said improvement based upon surveys, plans and estimates made by the city engineer shall be provided for by ordinance. [33 G. A., ch. 66, § 2.]

SEC. **1056-a50. Duty of county treasurer—tax sales—redemptions.** Whenever any property shall have been heretofore sold for any taxes or special assessment by any city specified in section one of this act, or by the treasurer thereof, the county treasurer shall have the power and it shall be his duty to collect said taxes and on any such sale to issue tax sale deeds therefor in the same manner and under the same provisions of law as are or may hereafter be applicable to tax sales made by the county treasurer, and any tax sale deed heretofore or hereafter issued on any such sale shall have the same force and effect as though the tax sales had been made by the county treasurer. Redemptions from such tax sales shall be made as from sales made by the county treasurer. [33 G. A., ch. 66, § 3.]

SEC. **1056-a51. Care of streets—road districts—fund.** The council, or any city specified in section one of this act, shall have the power to divide the city into not less than five road districts for the purpose of cleaning, sprinkling and repairing the streets and public places, or any of said purposes, and to provide for the manner of doing the same and for the payment of the cost thereof out of the district road fund, and shall determine the amount of money necessary for such purposes in each district; and such city council may levy a special tax not exceeding two mills on the dollar on all taxable property in each of said road districts, to be known as the road district fund and to be used only to pay the cost of cleaning, sprinkling and repairing the streets and public places in such districts. [33 G. A., ch. 66, § 4.]

SEC. **1056-a52. Tax for fire department.** The council of any city, specified in section one of this act, shall have the power to levy a special tax upon all taxable property in said city, not exceeding six mills on the dollar each year, for the purpose of acquiring property for the use of the fire department and equipping and maintaining such department. But the levies of general and special taxes in such cities shall not exceed, in the aggregate, forty-eight mills on the dollar of the taxable value of the property therein. [33 G. A., ch. 66, § 5.]

SEC. **1056-a53. Transfer of special taxes heretofore levied.** That, in order to adjust the finances of any city specified in section one of this act, the city council thereof may, by a three-fourths vote of all its members, transfer any special tax heretofore, but not hereafter, levied from the improvement and grading fund, when the same is not needed and cannot be used therein for the best interests of the city, to the fire department fund or general fund. [33 G. A., ch. 66, § 6.]

SEC. **1056-a54. Additional provisions.** That chapter forty-eight of the acts of the thirty-second general assembly of Iowa as the same appears in chapter fourteen-C of title five of the supplement to the code, 1907, be and it is hereby amended by adding thereto the following additional provisions for the government of cities now and hereafter organized under said act. [35 G. A., ch. 96, § 1.]

SEC. **1056-a55. Tax for police service equipment.** The council of any city specified in section one of this act shall have the power to levy a special tax upon all taxable property in said city, not to exceed one mill on the dollar each year, for the purpose of purchasing and maintaining appa-

ratus and equipment for use in police service in the department of public safety, but nothing in this act shall be held to extend the powers of such cities to make annual levies for general and special taxes in excess of forty-eight mills on the dollar of the taxable value of the property therein. [35 G. A., ch. 96, § 2.]

SEC. **1056-a56. Levy of whole or partial cost—percentage—certificates of levy.** When the whole or any part of the cost of purchasing and maintaining apparatus and equipment for use in police service in the department of public safety of any city organized under chapter forty-eight of the acts of the thirty-second general assembly of Iowa as the same appears in chapter fourteen-C of title five of the supplement to the code, 1907, shall be ordered paid from the city fund designated to purchase and maintain apparatus and equipment for use in police service in the department of public safety, to be levied upon all the taxable property within such city, it shall have the power after the purchase of said apparatus and equipment, by ordinance or resolution, to levy at any one time the whole or any part of the cost of such apparatus and equipment upon all the taxable property within such city and determine the whole percentage of taxes necessary to pay the same, and the percentage to be paid each year not exceeding one half of the maximum annual limit of the tax such city may levy for funds to purchase and maintain apparatus and equipment for police service in the department of public safety, and the number of years, not exceeding ten, given for the maturity of each installment thereof, but no part of such costs shall be levied against property owned by the city, county, state or the United States. Certificates of such levy shall be filed with the auditor of the county or counties in which said city is located, setting forth the amount or percentage and maturity of said tax, or each installment thereof, upon the assessed valuation of all taxable property in said city, certified as correct by the city clerk or auditor, and thereupon said tax shall be placed upon the tax lists of the proper county or counties. [35 G. A., ch. 96, § 3.]

SEC. **1056-a57. Police equipment fund bonds.** Any such city may anticipate the collection of taxes authorized to be levied for the purchase and maintenance of apparatus and equipment for police service in the department of public safety, and for that purpose may issue police equipment fund certificates or bonds with interest coupons, and the provisions of chapter twelve, title five, of the code shall be operative as to such certificates, bonds and coupons, in so far as they may be applicable. [35 G. A., ch. 96, § 4.]

SEC. **1056-a58. How secured and paid—separate fund.** Said certificates, bonds and interest thereon shall be secured by said assessments and levies and shall be payable only out of the funds derived from such levies and pledged to the payment of the same, and no certificates, or bonds shall be issued in excess of taxes authorized and levied to secure the payment of the same. It shall be the duty of such city to collect such funds with interest thereon and to hold the same separate and apart in trust for the payment of said certificates, bonds and interest and to apply the proceeds of such funds pledged for such purpose to the payment of said certificates, bonds and interest. [35 G. A., ch. 96, § 5.]

SEC. **1056-a59. To what cities applicable.** Provided, however, that this act shall apply only to cities having a population of eighty thousand or more as shown by either the last United States or state census. [35 G. A., ch. 96, § 6.]

SEC. **1056-a60. Additional provisions.** That chapter forty-eight of the acts of the thirty-second general assembly of Iowa, as the same appears in chapter fourteen-C of title five of the supplement to the code, 1907, be and it is hereby amended by adding thereto the following additional provisions for the government of cities now and hereafter organized under said act. [35 G. A., ch. 98, § 1.]

SEC. **1056-a61. Tax for garbage disposal plant.** The council of any city having a population of eighty thousand or more specified in section one of this act shall have the power to levy a tax upon all taxable property in said city not to exceed one mill on the dollar each year for the purpose of acquiring a location for and equipment, maintenance and construction of a garbage disposal plant or system, but nothing in this act shall be held to extend the powers of such cities to make annual levies for general and special taxes in excess of forty-eight mills on the dollar of the taxable value of the property therein. [35 G. A., ch. 98, § 2.]

SEC. **1056-a62. Levy of whole or partial cost—percentage—certificates of levy.** When the whole or any part of the cost of purchasing a location for and equipment, maintenance and construction of a garbage disposal plant or system by any such city, shall be ordered paid from the city fund designated for such purchase, equipment, maintenance and construction, to be levied upon all taxable property within such city, it shall have the power after purchase of the property, equipment, maintenance and construction of any such plant or system, by ordinance or resolution, to levy at any one time, the whole or any part of the total cost of such plant or system and the maintenance thereof upon all the taxable property within such city and determine the whole percentage of taxes necessary to pay the same, and the percentage to be paid each year not exceeding one half of the maximum annual limit of the tax such city may levy for funds to purchase a location for, maintain, equip and construct a garbage disposal plant or system, and the number of years, not exceeding ten, given for the maturity of each installment thereof, but no part of such cost shall be levied against property owned by the city, county, state or the United States. Certificates of such levy shall be filed with the auditor of the county or counties in which said city is located, setting forth the amount or percentage and maturity of said tax, or each installment thereof, upon the assessed valuation of all taxable property in said city, certified as correct by the city clerk or auditor, and thereupon said tax shall be placed upon the tax list of the proper county or counties. [35 G. A., ch. 98, § 3.]

SEC. **1056-a63. Garbage disposal plant bonds.** Any such city may anticipate the collection of taxes authorized to be levied for the purchase of its location and for the equipment, maintenance and construction of a garbage disposal plant or system, and for that purpose may issue garbage disposal plant certificates or bonds with interest coupons, and the provisions of chapter twelve, title five, of the act shall be operative as to such certificates, bonds and coupons, in so far as they may be applicable. [35 G. A., ch. 98, § 4.]

SEC. **1056-a64. How secured and paid—separate fund.** Said certificates, bonds and interest thereon shall be secured by said assessments and levies and shall be payable only out of the funds derived from such levies and pledged to the payment of the same, and no certificates or bonds shall be issued in excess of taxes authorized and levied to secure the payment of the same. It shall be the duty of such city to collect such funds, with interest thereon, and to hold the same separate and apart in trust for the payment of said certificates, bonds and interest and to apply the pro-

ceeds of such funds pledged for that purpose to the payment of said certificates, bonds and interest. [35 G. A., ch. 98, § 5.]

SEC. **1056-a65. Care of trees and shrubbery.** Cities now or hereafter having a population of twenty-five thousand or over and organized under chapter fourteen-C of title five of the supplement to the code, 1907, and amendments thereto, shall have power by ordinance to take and assume charge, custody and control of all trees and shrubbery upon the public streets, and to plant, prune, care for and maintain all trees and shrubbery upon the public streets in such manner as not to interfere with public travel and to pay for the same out of the general fund or to provide by ordinance for assessing the cost thereof upon the lots and parcels of land in front of which trees or shrubbery are planted and maintained. No power shall exist to remove other than dead, damaged or unsightly trees and shrubbery. The carrying into effect of the provisions of any ordinance enacted hereunder shall be vested in the department of parks and public property. [35 G. A., ch. 101, § 1.]

TITLE VI.

OF ELECTIONS AND OFFICERS.

CHAPTER 1.

OF THE ELECTION OF OFFICERS AND THEIR TERMS.

SECTION **1057. General election—repeal.** That sections ten hundred fifty-seven, ten hundred sixty-four, ten hundred sixty-five, ten hundred sixty-six, ten hundred seventy and ten hundred seventy-one be and the same are hereby repealed and the following enacted in lieu thereof: [31 G. A., ch. 36, § 1.]

SEC. **1057-a. General election.** The general election for state, district, county and township officers shall be held throughout the state on Tuesday, next after the first Monday in November in the year nineteen hundred and six and each two years thereafter. [31 G. A., ch. 36, § 2.]

The statutory prohibition of sales of liquor under the mulct law on "any election day" relates not only to the day of a general election but also to any day on which a school election is provided to be held. *Hammond v. King*, 137-548, 114 N. W. 1062.

SEC. **1060. Term of office.** The term of office of all officers chosen at a general election for a full term shall commence on the second secular day of January next thereafter, except when otherwise provided by the constitution or by statute; that of an officer chosen to fill a vacancy shall commence as soon as he has qualified therefor. [33 G. A., ch. 68, § 1.] [31 G. A., ch. 37, § 1; 16 G. A., ch. 72; C. '73, § 576; R. § 462.]

See const., art. IV, § 15.

SEC. **1060-a. Acts in conflict repealed.** All parts of acts in conflict with this act are hereby repealed. [33 G. A., ch. 68, § 2.]

SEC. **1064. In odd-numbered years—repealed.** [31 G. A., ch. 36, § 1.]

[See § 1057.]

SEC. **1065. State officers.** The governor, lieutenant governor, secretary of state, auditor of state, treasurer of state and attorney-general shall be chosen at the general election in each even-numbered year and their terms of office shall be for two years. [35 G. A., ch. 103, § 9.] [31 G. A., ch. 36, § 3.]

[For repeal of original code section see § 1057. EDITOR.]

As to secretary, auditor and treasurer, see const., art. IV, § 22. As to attorney-general, see const., art. V, § 12.

SEC. **1066. Judges of the supreme court.** Two judges of the supreme court shall be chosen at the general election in the year nineteen hundred and six and two shall be chosen at each general election thereafter, whose terms of office shall continue for six years. Of the judges whose terms of office first expire, the senior in time of service shall be chief justice for one year, and, if there be but two of them, the junior for one year,

and so on in rotation. If two or more are equal in time of service, then the right to the position and the order in which they serve shall be determined by seniority in age. And at the last term in each year, the supreme court shall determine and enter of record, who, under these rules, shall be chief justice for the year next ensuing; and at the session of the supreme court next preceding the commencement of the first of the said two years, the supreme court shall cause a record to be made as to who shall be the chief justice for the year next ensuing. [35 G. A., ch. 22, § 4.] [31 G. A., ch. 36, § 4; 26 G. A., ch. 72; 25 G. A., ch. 69, § 2; 16 G. A., ch. 7, § 2; C. '73, § 582; R. § 467.]

[Acts inconsistent with § 4, ch. 22, 35 G. A., are repealed by § 194-a. EDITOR.]

[For repeal of original code section see § 1057. EDITOR.]

[See const., art. V, §§ 3, 11.]

SEC. 1067. **Clerk and reporter of supreme court—repeal.** That section ten hundred sixty-seven of the code be and the same is hereby repealed. [35 G. A., ch. 106, § 1.]

[See §§ 207-a and 207-b. EDITOR.]

SEC. 1068. **Railroad commissioners—election and term.** Section ten hundred sixty-eight of the code is hereby repealed, and the following enacted in lieu thereof:

"At the general election in the year nineteen hundred and six, and every four years thereafter, there shall be elected two railroad commissioners, whose term of office shall be for a period of four years; and at the general election in the year nineteen hundred and eight, and every four years thereafter, there shall be elected one railroad commissioner, whose term of office shall be for a period of four years; and the present incumbents of the office of railroad commissioner shall continue in office until their successors are elected and qualified, as in this act provided." [31 G. A., ch. 38; 22 G. A., ch. 29, § 2; 17 G. A., ch. 77, § 2.]

SEC. 1070. **Representatives.** Members of the house of representatives shall be elected in the respective representative districts in each even-numbered year, and hold office for the term of two years. [31 G. A., ch. 36, § 5; C. '73, § 587; R. § 470; C. '51, § 239.]

[For repeal of original code section see § 1057. EDITOR.]

See const., art. III, § 3.

SEC. 1071. **Senators.** Senators in the general assembly, to succeed those whose terms are about to expire, shall be elected in the respective senatorial districts in each even-numbered year, and shall hold office for the term of four years. [31 G. A., ch. 36, § 6; C. '73, § 588; R. § 471; C. '51, § 239.]

[For repeal of original code section see § 1057. EDITOR.]

See const., art. III, § 5.

SEC. 1072. **County officers—election of county superintendent of schools by convention.** That section ten hundred seventy-two of the code be and the same is hereby repealed, and the following enacted in lieu thereof:

"There shall be elected in each county, at the general election in nineteen hundred and six, and in each even-numbered year thereafter an auditor, a treasurer, a clerk of the district court, a sheriff, a recorder of deeds, a county attorney, and a coroner, who shall hold office for the term

of two years or until their successors are elected and qualified." On the first Tuesday in April in the year nineteen hundred fifteen, and each third year thereafter, and whenever a vacancy occurs in the office of county superintendent of schools, a convention shall be held at the county seat for the purpose of electing a county superintendent of schools, at which convention each school township, city, town or village independent district and each independent consolidated district in the county shall be entitled to one vote. Each such school corporation shall be represented at the convention by the president of the school board, or in his absence or inability to act, by some member of such school board, to be selected by the board. It is further provided, however, that where a congressional township is composed in whole or in part of rural independent districts that such rural independent districts shall be entitled to one vote in the convention, which vote shall be cast by such person as may be selected by the presidents of the component rural independent districts within such township at a meeting to be held at such time and place as the county auditor shall fix in the written notice hereinafter provided for. All representatives to such convention shall serve until a county superintendent is elected and qualified. Such conventions shall be called by the county auditor by mailing a written notice to the president and secretary of each school corporation at least ten days prior to the date of such convention and by the publication of such notice in the official newspapers published in the county. The county auditor shall be the secretary of such convention and shall call same to order and submit a list of the school corporations entitled to participate in such conventions. Said convention shall organize by the selection of a chairman and when so organized, shall elect a county superintendent of schools, who shall possess the qualifications required by law and shall hold the office for the term of three years and until his successor is elected and qualified. Such convention may by a majority vote select a committee consisting of five members whose duty shall be to investigate the various candidates for the office of county superintendent and report to said convention at a subsequent day to which the convention may adjourn; or by a three-fourths vote of such convention, said committee may be authorized to elect a county superintendent and file its election with the county auditor, and said person shall be deemed duly elected to such office. A majority of representatives herein provided shall constitute a quorum, such representatives to receive ten cents per mile one way for the distance necessarily traveled in attending such convention, to be paid from the county treasury. [35 G. A., ch. 107, § 1; 34 G. A., ch. 24, § 1.] [31 G. A., ch. 39; 23 G. A., ch. 37, § 2; 21 G. A., ch. 73, § 1; C. '73, § 589; R. §§ 224, 472–3; C. '51, § 96.]

[Women are by § 2748 made eligible to school offices, and by § 493 to the office of county recorder.]

SEC. 1073. Justices and constables.

As two justices of the peace are to be elected for each township and the mayor of a city situated within the township has to some extent a jurisdiction coördinate with that of the justices of the peace, held that the acceptance by the mayor of a city of the office of justice of the peace in the township created a vacancy in the office of mayor. *State v. Anderson*, 155–271, 136 N. W. 128.

SEC. **1074. Township trustees—election—term.** That section ten hundred seventy-four of the code be and the same is hereby repealed and the following enacted in lieu thereof:

"At the general election in the year nineteen hundred and six there shall be elected in each township a successor to those trustees whose term of

office will expire January first, nineteen hundred and seven; and at the general election in the year nineteen hundred and eight, and biennially thereafter, there shall be elected in each township three trustees, whose term of office shall be for a period of two years, and until their successors are elected and qualified, and those trustees whose term of office does not expire until the first day of January, nineteen hundred and eight, shall continue in office until their successors are elected and qualified." [31 G. A., ch. 37, § 2; 17 G. A., ch. 12, §§ 1, 2; C. '73, § 591; R. § 475.]

SEC. **1074-a. In new townships—special election.** At any time when a new township has been created in a year in which no general election is held by law, the county board of supervisors of the county affected shall call a special election for the election of three trustees and other township officers of the new township, which officers shall continue in office until their successors are elected and qualified. [32 G. A., ch. 49.]

SEC. **1075. Township clerk—assessor.** At the general election in each even-numbered year, there shall be elected in each civil township one township clerk, and, where not otherwise provided, one assessor, to be elected by the voters of such district, who shall hold their offices for the term of two years. [29 G. A., ch. 53, § 1; 18 G. A., ch. 161, § 1; C. '73, § 591; R. § 475.]

CHAPTER 2.

OF THE REGISTRATION OF VOTERS.

SECTION **1076. Board of registers—village precincts.** In cities having a population of thirty-five hundred or more, not including the inmates of any state institution, the council, on or before the sixth Monday preceding each general election, and on or before the third Monday prior to any city election to be held during the year nineteen hundred and six, shall appoint one suitable person from each of the two political parties which cast the greatest number of votes at the last general election, from three names presented by each chairman of the city central political committee of such parties, to be registers in each election precinct in the city for the registration of voters therein, who shall be electors of the precinct in which they are to serve, of good clerical ability, speaking the English language understandingly, temperate, of good habits and reputation, who shall qualify by taking an oath or affirmation to the effect that they will well and truly discharge all of the duties required of them by law. They shall hold their office for two years, but registers appointed for city elections during the year nineteen hundred and six shall hold such office only until such election is completed, and receive compensation at the rate of two dollars and fifty cents for each calendar day engaged in the discharge of their duties, to be paid by the county, except in case of city elections, when they shall be paid by the city. If for any cause such registers, or any of them, shall not be appointed at or before the time above mentioned, or, if appointed, shall be unable for any cause to discharge the duties of such office, the mayor of such city shall forthwith, on similar recommendation, make such appointments and fill all vacancies. Should the mayor, upon the request of five freehold electors, fail for a period of three days to perform the duties aforesaid, he shall forfeit and pay, at the action of any such elector, the sum of one hundred dollars per day, for the equal benefit of the city and plaintiff. The provisions of this title shall apply to cities acting under special charters, with like effect as though said cities

were acting under the general incorporation laws of the state. If any voting precinct or one or more adjoining, contains a village having a population of thirty-five hundred or more, the board of supervisors of the county shall appoint two registrars for each of such voting precincts for the purpose of registering the voters thereof for general election. One registrar for each political party shall be appointed from names presented by the chairman of the county central committee of the two political parties in each of said precincts casting the greatest number of votes therein at the last general election. In all other respects relating to registration of voters in such precincts, the law applicable to voters at the general election in cities shall be applicable to such voting precincts, and registrars and voters of such voting precincts shall be governed thereby except that the expense thereof shall be paid by the county. [35 G. A., ch. 108, §§ 1, 2.] [31 G. A., ch. 41; 31 G. A., ch. 40, § 1; 26 G. A., ch. 62; 22 G. A., ch. 48, §§ 5, 12; 21 G. A., ch. 167, § 3.]

[The above section is made applicable to special charter cities by § 1076-a. EDITOR.]

The provisions of this title of the code relating to election contests are applicable to cities under special charter. *Sterne v. Off*, 149–96, 127 N. W. 1038.

SEC. **1076-a. Applicable to special charter cities.** This act shall apply to cities under special charters with same effect as to cities under the general laws. [31 G. A., ch. 40, § 2.]

SEC. **1077. Registration.** The registers shall meet on the second Thursday prior to any general, city, or special election, at the usual voting place in the precinct in which they have been appointed, and shall hold continuous sessions for two consecutive days, from eight o'clock in the forenoon until nine o'clock in the afternoon, and, in presidential years, such sessions shall be held for three days. Any person claiming to be a voter, or that he will be on election day, may appear before them in the election precinct where he claims he is or will be entitled to vote, and make and subscribe, under oath, a statement in a registry book, to be provided by the clerk and furnished the registers, at the equal expense of the city and county, and kept open for public inspection and examination during the time fixed for the registration, which statement shall be in the following form and contain the following matter:

REGISTER OF VOTERS,.....PRECINCT.....WARD.

Number.	Residence.	Name.	Age.	Nativity.	Color.	TERM OF RESIDENCE.			Naturalized.							SIGNATURE.
						Precinct, street, number.	County.	State.	Date of papers.	Court.	By act of Congress.	Qualified voter.	Date of application.	Last preceding place of residence.		

The signature of the applicant shall be made at the right hand end of the line under the column "Signature," one of the registers having first administered to him this form of oath: "You do solemnly swear (or affirm) that you will fully and truly answer all such questions as shall be put to you touching your place of residence, name, place of birth, your qualifications as an elector, and your right as such to register and vote under the laws of this state"; after which, the registers, or either of them, shall propound questions to the applicant for registration in relation to his name; his then place of residence, street and number; how long he has resided in the precinct where the vote is claimed; the last place of his residence before coming into that precinct; and also as to his citizenship, whether native or naturalized; if the latter, when, where, and in what court, or before what officer, or whether by act of congress; whether he came into the precinct for the purpose of voting at that election; how long he contemplates residing in the precinct; and such other questions as may tend to test his qualifications as a resident of the precinct, citizenship and right to vote at the poll; then, if the applicant appears to have the right to be registered, the registers shall fill out the above prescribed form of statement, which the applicant shall sign and swear to, as above provided. [28 G. A., ch. 33, § 1; 22 G. A., ch. 48, § 1; 21 G. A., ch. 161, § 5.]

CHAPTER 2-A.

PRIMARY ELECTIONS.

SECTION **1087-a1. Primary elections authorized—offices affected.** That from and after the passage of this act the candidates of political parties for all offices which under the law are filled by the direct vote of the voters of this state at the general election in November (except candidates for the office of judge of the supreme, district and superior courts), for the office of senator in the congress of the United States, and for the office of elector of the president and vice president of the United States, shall be nominated by a primary election, and delegates to the county conventions of said political parties or organizations and party county committeemen shall be elected at said primary election, at the times and in the manner hereinafter provided. The provisions of chapters three and four, title six, and chapter eight, title twenty-four, of the code, shall apply so far as applicable to all such primary elections, the same as general elections, except as hereinafter provided. [33 G. A., ch. 69, § 1.] [32 G. A., ch. 51, § 1.]

The method of nomination provided for in the statute is exclusive and supersedes provisions as to nomination by district central committees found in code § 1102. *State v. Hayward*, 141–196, 119 N. W. 620.

The courts have no jurisdiction to determine the validity of certificates or nomination papers of candidates for state offices. *Ibid.*

SEC. **1087-a2. Primary election defined.** The term "primary election" as used in this act shall be construed to apply to an election by the members of various political parties for the purpose of placing in nomination candidates for public office, for selecting delegates to conventions, and for the selection of party committeemen. [32 G. A., ch. 51, § 2.]

[The above section is made applicable to §§ 1087-a36 to 1087-a46 by § 1087-a47. EDITOR.]

SEC. **1087-a3. Political party defined.** The title "political party" shall mean a party which, at the last preceding general election, cast for its candidate for governor at least two per centum of the total vote cast at said election, provided that such other political organizations as may, under sections ten hundred ninety-eight and ten hundred ninety-nine of the code, nominate and certify candidates and have their names placed upon the ballot for the November election, shall have the right so to do in the manner and under the conditions therein prescribed. [32 G. A., ch. 51, § 3.]

[The above section is made applicable to §§ 1087-a36 to 1087-a46 by § 1087-a47. EDITOR.]

SEC. **1087-a4. When held.** The primary election herein provided for shall consist of an election by all political parties and shall be held at the usual voting places of the several precincts on the first Monday in June, in the year nineteen hundred twelve, and biennially thereafter, for the nomination of candidates for such offices as are to be filled at the general election in November next ensuing (except candidates for the office of judge of the supreme, district and superior courts), for senator in the congress of the United States in the next year preceding the filling of that office by the general assembly, and for the electors of the president and vice president of the United States, in the year in which a president and vice president are to be elected. [34 G. A., ch. 58, § 1.] [32 G. A., ch. 51, § 4.]

SEC. **1087-a5. Judges and clerks—how selected—oath—expenses.** The judges and clerks of all primary elections under this act shall be made up and selected and appointed in the same manner as for the general election held in November, and they shall take the same oath and the judges are hereby authorized to administer oaths as hereinafter provided. Vacancies shall be filled as provided for the judges and clerks of the general election. The expenses of the primary election shall be audited by the board of supervisors of each county and be paid the same as the expenses of the general election. The compensation of the judges and clerks of the primary election shall be the sum of twenty-five cents per hour for all official services rendered by any such judge or clerk at any such election. [33 G. A., ch. 69, § 2.] [32 G. A., ch. 51, § 5.]

[The above section is made applicable to §§ 1087-a36 to 1087-a46 by § 1087-a47. EDITOR.]

The certification by the board of supervisors to the executive council of the expenses of primary elections is a part of its proceedings to be published under the provisions of code § 441. *Index Ptg. Co. v. Board of Supervisors*, 150–411, 130 N. W. 401.

SEC. **1087-a6. Australian ballot—polls open—ballots.** The Australian ballot system as now used in this state, except as hereinafter provided, shall be used at said primary election in all precincts. The voter shall in all cases mark the ballot in the square before the name of each person for whom he desires to vote. In cities where registration is required by law, the polls shall be open from seven [o'clock] a. m. to eight [o'clock] p. m., and in all other precincts from nine o'clock a. m. to eight o'clock p. m. The elector voting at said primary election shall be allowed to vote for candidates for nomination on the ticket of only one political party, and that shall be the party with which he is registered as affiliated. The endorsement of the judges of election and the facsimile of the auditor's signature shall appear upon the ballots as provided by law for the ballots used for the November election. The voter shall return the ballot, folded, to one of the judges of election who shall deposit it in the ballot box. If any primary elector write upon his ticket the name of any person

who is a candidate for the same office upon some other party ticket than that upon which his name shall be so written, such ballot shall be so counted for such person only as a candidate of the party upon whose ballot his name is written, and shall in no case be counted for such person as a candidate upon any other ticket. In case the person is nominated upon more than one ticket, he shall forthwith file with the proper officer a written declaration indicating the party designation under which his name is to be printed on the official ballot for the general election following such primary election. [33 G. A., ch. 69, § 3.] [32 G. A., ch. 51, § 6.]

[The above section is made applicable to §§ 1087-a36 to 1087-a46 by § 1087-a47. EDITOR.]

SEC. **1087-a7. First declaration of party affiliation—record.** At the primary election to be held in June in the year nineteen hundred and eight any person shall be entitled to participate therein who is a qualified elector in such precinct at the time of said primary election, and when the voter seeks to pass the guard rail he shall indicate the party ballot he desires, and one of the judges of the primary election board shall give him such primary ballot (unless challenged, and if so challenged, then only in the event that the challenge is determined in favor of the voter), and such person shall thereupon be allowed to vote. The voter's selection shall constitute his declaration of party affiliation, and it shall be the duty of the primary election board to record his name and check his declaration of party affiliation on the poll books used by the clerks of the primary election board, and said list properly certified to by said primary election board shall be returned to the county auditor for preservation. Copies of the names and party entries on such list, together with the changes of party affiliation as hereinafter provided, arranged alphabetically by surnames, shall be used at subsequent primaries for determining with what party the voter has been enrolled, and no voter enrolled under the provisions of this act shall be allowed to receive the ballot of any political party except that with which he is enrolled, but he may change his enrollment as hereinafter provided. The county auditor shall prepare for each voting precinct two of the above mentioned lists duly certified by him, and taken from the poll books of the last preceding primary election, which he shall deliver to the succeeding primary election boards in the year nineteen hundred ten and biennially thereafter, at least one day prior to the day of the primary election, and which lists together with the poll books of the primary election shall be returned to the said auditor in good condition within twenty-four hours after the primary election, to be preserved by him. [32 G. A., ch. 51, § 7.]

[The above section is made applicable to §§ 1087-a36 to 1087-a46 by § 1087-a47. EDITOR.]

SEC. **1087-a8. Change of affiliation—first voter—removal.** Any person who has thus declared his party affiliation shall thereafter be listed on the poll books as a member of that political party, and such person while a resident of the same voting precinct need not declare his party affiliation at succeeding primary elections unless he desires to change his party affiliation. Any elector, who, having declared his party affiliation, desires to change the same, may, not less than ten days prior to the date of any primary election, file a written declaration with the county auditor stating his change of party affiliation, and the auditor shall enter a record of such change on the poll books of the last preceding primary election in the proper column opposite the voter's name and on the voting list. Any elector whose party affiliation has for any reason not been registered or any elector

who has changed his residence to another precinct, or a first voter or citizen of this state casting his first vote in this state shall be entitled to vote at any subsequent primary election in the same manner and upon the same terms as provided in section seven of this act, and the clerks of the primary election shall record his party affiliation and the county auditor shall add his name to the alphabetical lists for use in subsequent primary elections as provided for in section seven of this act. [32 G. A., ch. 51, § 8.]

[The above section is made applicable to §§ 1087-a36 to 1087-a46 by § 1087-a47. EDITOR.]

SEC. **1087-a9. Challengers—affidavit.** Each political party shall be entitled to have two party challengers present at each polling place, to be appointed by the respective party committeemen. Any judge or clerk of the primary election or any party challenger may challenge any voter upon the grounds mentioned in section eleven hundred fifteen of the code and such challenge shall be determined as there provided. Any elector whose party affiliation has been recorded as provided by this act and who desires to change his party affiliation on the primary election day, shall be subject to challenge. If the person challenged insists that he is entitled to vote the ticket of the political party to which he has transferred his political affiliation and the challenge is not withdrawn, one of the judges shall tender to him the following oath: "You do solemnly swear (or affirm) that you have in good faith changed your party affiliation to and desire to be a member of the.....party." And if he take such oath he shall thereupon be given a ticket of such political party and the clerks of the primary election shall change his enrollment of party affiliation accordingly. [32 G. A., ch. 51, § 9.]

[The above section is made applicable to §§ 1087-a36 to 1087-a46 by § 1087-a47. EDITOR.]

The judges of a primary election have no duty imposed upon them with reference to the right of one proposing to cast a ballot at such election, save that of entertaining the challenge and requiring the proposed voter to take the prescribed oath as to his qualifications. *Jones v. Fisher*, 156–582, 137 N. W. 940.

SEC. **1087-a10. Nomination papers—candidates—affidavit—statements by candidates for legislature.** No candidate for an elective county office shall have his name printed upon the official primary ballot of his party unless at least thirty days prior to the day fixed for holding the primary election a nomination paper shall have been filed in his behalf in the office of the county auditor; and no candidate for nomination for an elective state office, or for representative in the congress of the United States, or member of the general assembly, shall have his name printed upon the official primary ballot of his party unless at least forty days prior to such primary election a nomination paper shall have been filed in his behalf in the office of the secretary of state; and no member of a political party desiring or intending to be a candidate for the office of senator in the congress of the United States, or a candidate for the office of elector of the president and vice president of the United States, shall have his name printed upon the official primary ballot of his party in any election precinct unless at least forty days prior to such primary election a nomination paper shall have been filed in his behalf in the office of the secretary of state. A candidate for an office to be filled by the voters of any subdivision of a county, or a candidate for party committeeman, shall not be required to file any nomination paper or papers. All nomination papers shall be in substantially the following form:

"I, the undersigned, a qualified elector of.....county, and state of Iowa, and a member of the.....party, hereby nominate..... of.....county, state of Iowa, who has affiliated with and is a member of the.....party, as a candidate for the office of.....to be voted for at the primary election to be held in June, 19....," and shall consist of sheets of uniform size about eight and one half by thirteen inches. No signatures shall be counted unless they are on sheets each having such form written or printed at the top thereof. Each signer of a nomination paper shall sign but one such nomination paper for the same office, except where more than one officer is to be elected to the same office, in which case he may sign as many nomination papers as there are officers to be elected, and only one candidate shall be petitioned for or nominated in the same nomination paper. Each signer of a nomination paper shall add his residence with street and number, if any, and the date of signing. For all nominations, all signers of each separate part of a nomination paper shall reside in the same county. When more than one sheet is used for any nomination paper, the sheets shall be laid one upon the other and neatly, evenly, and securely fastened together before filing, and shall be considered as one nomination paper only. A nomination paper, when filed, shall not be withdrawn nor added to, nor any signature thereon revoked. The affidavit of a qualified elector shall be appended to each such nomination paper, or papers, if more than one for any candidate, stating that he is personally acquainted with all the persons who have signed the same; that he knows them to be electors of that county and believes them to be affiliated with the party named therein; that he knows that they signed the same with full knowledge of the contents thereof; that their respective residences are truly stated therein; and that each signer signed the same on the date stated opposite his name, but such affidavit shall not be made by the candidate. Each and every candidate shall make and file his affidavit stating that he is eligible to the office for the township, county, district or state in which he is and will be a bona fide candidate for nomination for said office, and shall file such affidavit with the said nomination paper or papers, when such paper or papers are required. If no such paper or papers are required, then he shall file such affidavit alone, or there shall be filed a nomination paper signed by ten qualified voters of any subdivision of a county, with the county auditor, at least fifteen days prior to such primary election, and the filing of such affidavit or such nomination paper shall entitle such candidate to have his name printed on the official primary ballot of his party. Such affidavit shall be in form and substance as follows:

"I, ...being duly sworn, say that I reside at.....street, (city or town) of.....county of.....in the state of Iowa; that I am eligible to the office for which I am a candidate, and that the political party with which I affiliate is the.....party; that I am a candidate for nomination to the office of.....to be made at the primary election to be held in June, 19...., and hereby request that my name be printed upon the official primary ballot as provided by law, as a candidate of the.....party. I furthermore declare that if I am nominated and elected I will qualify as such officer.

(Signed).....

Subscribed and sworn to (or affirmed) before me.....by.....on this.....day of....., 19.....

....."

The nomination papers above required shall be signed as follows:

(1). If for a state office, United States senator, or elector at large, by at least one per centum of the voters of the party (as shown by the returns of the last general election) of such candidates, in each of at least ten counties of the state, and in the aggregate not less than one half of one per centum of the total vote of his party in the state, as shown by the last general election.

(2). If for a representative in congress, district elector, or senator in the general assembly in districts composed of more than one county, by at least two per centum of the voters of his party, as shown by the last general election, in at least one half of the counties of the district, and in the aggregate not less than one per centum of the total vote of his party in such district, as shown by the last general election.

(3). If for an office to be filled by the voters of the county, by at least two per centum of the party vote in the county, as shown by the last general election.

In each of the above cases, the vote to be taken for the purpose of computing the percentage shall be the vote cast for the head of the ticket.

All nomination papers shall be destroyed at the same time and in the manner in which the primary election ballots are destroyed.

In case an elector seeks the nomination for office of senator or representative in the general assembly he shall be furnished, on application to the secretary of state, an affidavit blank in the form as required herein, save that there shall be printed in blank form and on the same sheet of paper, by way of addition thereto, the following statements, either of which he may sign, but if he does not do so, the secretary of state shall not on that account refuse to file his nomination paper:

STATEMENT NO. 1.

I further state to the people of Iowa and of my legislative district, that, during my term of office I will always vote for the candidate for senator in congress from this state who has received the highest number of the people's votes for that position in the entire state at the general election next preceding the election of a senator in congress of the United States without regard to my individual preference.

.....
Signature of Candidate.

STATEMENT NO. 2.

I hereby declare that if elected to the office which I seek, I shall consider the vote of the people for senator in the congress of the United States nothing more than a recommendation, and shall feel free to wholly disregard the same.

.....
Signature of Candidate.

Upon the primary ballot, below the name of such candidate, shall be printed one of the following statements, according to which of the preceding statements, if either, is signed by such candidate:

1. Promises to abide by vote of the people on United States Senator.
2. Refuses to be bound by vote of people on United States Senator.
3. Refuses to make any statement on United States Senator. [35 G. A., ch. 110, § 1; 35 G. A., ch. 109, § 1; 33 G. A., ch. 69, § 4.] [32 G. A., ch. 51, § 10.]

SEC. **1087-a11. Blank nomination papers.** The secretary of state shall cause to be printed and keep on hand a sufficient quantity of nomination paper blanks in form as provided for in this act and shall furnish the same on application to any qualified elector in the state desiring to petition for the nomination of any candidate, or to a person who intends to be a candidate, for any office whose nomination paper is required to be filed in his office; and the county auditor of each county shall likewise cause to be printed and keep on hand a sufficient quantity of such nomination paper blanks and furnish the same on application to any qualified elector in his county desiring to petition for the nomination of any candidate, or to a person who intends to be a candidate, for any office whose nomination paper is required to be filed in his office. [32 G. A., ch. 51, § 11.]

[The above section is made applicable to §§ 1087-a36 to 1087-a46 by § 1087-a47. EDITOR.]

SEC. **1087-a12. Nominations certified to county auditor—order on ballot designated—notice published.** At least thirty days before any such primary election, the secretary of state shall transmit to each county auditor a certified list containing the name and post-office address of each person for whom a nomination paper has been filed in his office, in accordance with the provisions of section ten[1] of this act and entitled to be voted for at such primary election by the voters of such county, together with a designation of the office for which he is a candidate, and the party from which he seeks a nomination. Such lists shall also designate the order in which the names of all candidates for the office of senator in the congress of the United States and for offices to be filled by the voters of the entire state shall be arranged and printed upon the primary election ballots in each county, in the following manner, to wit: The secretary of state shall prepare a list of the counties of the state for each political party by arranging the various counties in the order of the vote cast by each political party in each county for its candidate for governor at the last preceding general election, or for the head of the ticket of any political party when it had no candidate for governor at such election, numbering the counties consecutively on each list from one to ninety-nine, both inclusive, beginning with the county which cast the largest vote, which shall be numbered "1." He shall then arrange the surnames of such candidates in alphabetical order for the respective offices for the several political parties for the first county on the respective lists; thereafter, for each succeeding county, the names appearing first for the respective offices in the last preceding county shall be placed last, so that the names that occupied second position before the change shall occupy first position after the change. Such auditor shall forthwith publish a proclamation of the time of holding the primary election, the hours during which the polls will be open, the offices for which candidates are to be nominated and that the primary election will be held in the regular polling places in each precinct. Such notice shall be published once each week for two consecutive weeks before the primary election, in not to exceed two newspapers of general circulation in such county. One of such newspapers shall represent the political party which cast the largest vote in such county at the last preceding general election, and the other, if any, that shall represent the political party which cast the next largest vote in such county at such general election. The county auditor shall correct any errors or omissions in the names of candidates and any other errors brought to his knowledge before the printing of the ballots. [33 G. A., ch. 69, § 5.] [32 G. A., ch. 51, § 12.]

[1]See § 1087-a10 herein. EDITOR.]

SEC. **1087-a13. Printing—order of names on ballot.** That the law as it appears in section ten hundred eighty-seven-a thirteen of the supplement to the code, 1907, be and the same is hereby repealed and the following enacted as a substitute therefor:

"The names of the candidates of each political party for nomination for the several offices, and for party committeemen and blank spaces for the delegates to the county convention shall be printed in black ink on separate sheets of paper, uniform in color, quality, texture and size, with the name of the political party printed at the head of said ballots, which ballots shall be prepared by the county auditor in the same manner as for the general election, except as in this chapter otherwise provided. The names of candidates for the office of senator in the congress of the United States and for offices to be filled by the voters of the entire state shall be arranged and printed on the primary election ballots in the order in which they are certified by the secretary of state. The names of candidates for offices to be filled by the voters of a county, and by the voters of any district of the state composed of more than one county, shall be arranged and printed upon the primary election ballots in the following manner, to wit: The county auditor shall prepare a list of the election precincts of his county, by arranging the various townships, towns and cities in the county in alphabetical order and the wards or precincts of each city, town or township in numerical order under the name of such city, town or township. He shall then arrange the surnames of all candidates for such offices alphabetically for the respective offices for the first precinct in the list; thereafter, for each succeeding precinct, the names appearing first for the respective offices in the last preceding precinct shall be placed last, so that the names that were second before the change shall be first after the change. The names of candidates for all offices to be filled by the voters of a territory smaller than a county shall be arranged and printed alphabetically according to the surnames for the respective offices. [33 G. A., ch. 69, § 6.] [32 G. A., ch. 51, § 13.]

SEC. **1087-a14. Ballot—form.** The official primary election ballot shall be prepared, arranged and printed substantially in the following form:

.....PRIMARY ELECTION BALLOT

(Name of Party)

of

.....Township or Precinct,.....Ward, City or Town of.....County of....., State of Iowa.

Primary election held on the ..... day of June, 19....

FOR UNITED STATES SENATOR.

(Vote for one.)

☐ William K. Brown
☐ J. R. Wayne
☐ .....

FOR GOVERNOR.

(Vote for one.)

☐ Howard Collins
☐ William Longley
☐ .....

(Followed by other elective state and district officers in order.)

FOR COUNTY AUDITOR.
(Vote for one.)
☐ William Strong
☐ Robert Thompson
☐ .....
(Followed by other elective county officers in order.)

FOR DELEGATES TO COUNTY CONVENTION.
(Vote for .....)
☐ .....
☐ .....
☐ .....
☐ .....
☐ .....

FOR TOWNSHIP CLERK.
(Vote for one.)
☐ John H. Black
☐ Joseph Raymond
☐ .....

FOR TOWNSHIP TRUSTEES.
(Vote for two.)
☐ Clarence Foster
☐ William Jones
☐ H. S. Wilson
☐ .....
(Followed by other elective township officers in order.)

FOR PARTY COMMITTEEMAN.
(Vote for one.)
☐ John Doe
☐ Richard Roe
☐ .....

[33 G. A., ch. 69, § 7.] [32 G. A., ch. 51, § 14.]

SEC. **1087-a15. Sample ballots.** That the law as it appears in section ten hundred eighty-seven-a fifteen of the supplement to the code, 1907, be and the same is hereby repealed and the following enacted as a substitute therefor:

"After the printing of the official ballots, the county auditor shall change a sufficient number thereof to supply each voting precinct in the county with ten sample ballots of each political party. The auditor shall change the same by writing or stamping the words 'sample ballot' in red ink near the top of such ballots, and by signing his name or stamping a facsimile thereof and his title of office immediately thereunder. Such sample ballots shall not be voted, received or counted in any primary election. The county auditor shall distribute such sample ballots with the official ballots, and it shall be the duty of the judges of election to see that such sample ballots are posted in and about the polling places upon the day of the primary election and before the opening of the polls." [33 G. A., ch. 69, § 8.] [32 G. A., ch. 51, § 15.]

[The above section is made applicable to §§ 1087-a36 to 1087-a46 by § 1087-a47. EDITOR.]

SEC. **1087-a16. Supplies—poll books.** All necessary election supplies, including poll books as provided by law, for the general election, together with a sufficient number of official primary ballots of each party, shall be furnished for the primary election board for each precinct by the county auditor, and such poll books shall contain blank spaces for the names of the candidates of the several parties for the different offices to be written in, and blank spaces for entering by the clerks the names of the electors voting at said primary election; and upon the pages provided for entering the names of said voters there shall be ruled spaces for the listing of the names of said voters and for the designation of the party ticket voted by said elector in manner and form substantially as follows:

No.	Name	Republican	Democrat	Prohibitionist	Socialist
1	James Smith	X			
2	Tom Jones		X		
3	Dan Brown			X	
4	George White				X

It shall be the duty of the clerks of the primary election when entering the name of a voter to place in the poll books a cross, thus (X), in the column designating the party ticket which was given to said voter upon his application for a ticket. [32 G. A., ch. 51, § 16.]

[The above section is made applicable to §§ 1087-a36 to 1087-a46 by § 1087-a47. EDITOR.]

SEC. **1087-a17. Ballots counted—returns.** Upon the closing of the polls the clerks and judges shall immediately open the ballot box and proceed to take therefrom the ballots. Said officers shall count the number of ballots cast for each party, at the same time bunching the tickets cast for each party, in separate piles. As soon as the clerks and judges shall have sorted the ballots of each party, separately, they shall take the tally sheets provided in the poll books and shall count all the ballots for each party separately until the count is completed, and shall certify to the number of votes cast for each candidate for each office upon the ticket of each party. After all have been counted and certified to by the clerks and judges, they shall seal the ballots cast by each of the parties in separate envelopes, on the outside of which shall be printed or written the names of that party's candidates for the different offices, and opposite each candidate's name shall be placed the number of votes cast for such candidate in said precinct, and then seal the envelopes containing the votes of the different political parties, in one large envelope, on the outside of which, or on a paper attached thereto, shall be printed or written, in perpendicular columns, the names of the several political parties with the names of the candidates for the different offices under their respective party headings, and opposite each candidate's name shall be placed the number of votes cast for such candidate in said precinct, and at the bottom the total vote cast by each political party in said precinct, and such envelopes shall be returned to the county auditor, who shall carefully preserve the same in said condition and deliver them to the county board of canvassers. But any elector of the county shall have the right, before the day fixed for canvassing the returns, to ascertain the vote cast for any candidate in any precinct in the county, as shown on the outside of the large envelope. Said judges of election shall deliver the returns so made, together with the poll books, including tally

sheets and certificates of the judges and clerks written thereon, to the county auditor within twenty-four hours after the primary election has closed; and if the returns from any precinct be not so delivered within the said time, the county auditor shall forthwith send a messenger for any such missing returns, and said messenger shall be paid, as provided by law, for the general election. [32 G. A., ch. 51, § 17.]

[The above section is made applicable to §§ 1087-a36 to 1087-a46 by § 1087-a47. EDITOR.]

In case the returns from any precinct are challenged the board of supervisors has no authority to do more than to recount the ballots and verify and correct the returns. It has no authority to pass upon the qualifications to vote of persons who in fact vote at such election. *Jones v. Fisher*, 156–582, 137 N. W. 940.

SEC. **1087-a18. Recount of ballots.** That the law as it appears in section ten hundred eighty-seven-a eighteen of the supplement to the code, 1907, be and the same is hereby repealed and the following enacted as a substitute therefor:

"Any candidate whose name appears upon the official primary ballot of any voting precinct may require the board of supervisors of the county in which such precinct is situated to recount the ballots cast in any such precinct as to the office for which he was a candidate, at the time fixed for canvassing the returns of the judges of election, by filing with the county auditor not later than the day before such meeting, a showing in writing, duly sworn to by such candidate, that fraud was committed, or error or mistake made, in counting or returning the votes cast in any such precinct as to the office for which he was a candidate. The showing must be specified and from it there must appear reasonable ground to believe that a recount of the ballots would produce a result as to his candidacy different from the returns made by the judges. If such showing is made to the satisfaction of the board, it shall thereupon recount the ballots cast in any such precinct for the office for which the contestant was a candidate, and if the result reached by the board on the recount of the ballots as to such office be different from that returned by the judges of election it shall be substituted therefor as the true and correct return and so regarded in all subsequent proceedings. The action of the board shall be final and no other contest of any kind shall be permitted. The term 'candidate' as used in this section shall include and apply to persons voted for for delegates and party committeemen." [33 G. A., ch. 69, § 9.] [32 G. A., ch. 51, § 18.]

[The above section is made applicable to §§ 1087-a36 to 1087-a46 by § 1087-a47. EDITOR.]

Under this section as amended by 33 G. A., ch. 69, § 9, held that the power conferred upon the board of supervisors is to recount the ballots actually cast for the purpose of correcting the returns if they be found erroneous through fraud or mistake. No authority is conferred upon the board to determine whether the persons who cast ballots in the precinct at the primary election were entitled to cast such ballots. *Jones v. Fisher*, 156–582, 137 N. W. 940.

Where the returns from a precinct were counted and the board ascertained by examination of the voting machines used that the votes shown were correctly returned, held that the board could not proceed further to hear witnesses for the purpose of finding whether persons had voted at the primary election in such precinct who were not qualified to vote. *Ibid.*

In a proceeding by certiorari to annul alleged illegal action of the board as a board of canvassers in declaring the result of a recount of the ballots cast at the primary election, held that the court might determine that the action of the board in announcing a result based upon the receipt of evidence that persons had voted at such primary election who were not authorized to so vote, was illegal. *Ibid.*

SEC. **1087-a19. Canvass by board of supervisors—certificates.** That the law as it appears in section ten hundred eighty-seven-a nineteen of the supplement to the code, 1907, as amended by section ten, chapter

sixty-nine, acts of the thirty-third general assembly, is hereby repealed and the following substitute enacted in lieu thereof:

"On the second Tuesday next following the primary election in June, the board of supervisors shall meet, open, and canvass the returns from each voting precinct in the county, and make abstracts thereof, stating in words written at length the number of ballots cast in the county by each political party, separately, for each office, the name of each person voted for and the number of votes given to each person for each different office and shall sign and certify thereto and file the same with the county auditor. Such canvass and certificate shall be final as to all candidates for nomination to any elective county office or office of a subdivision of a county; and the candidate or candidates of each political party for each office to be filled by the voters of any subdivision of a county having received the highest number of votes shall be duly and legally nominated as the candidate of his party for such office. Provided, however, that no candidate whose name is not printed on the official primary ballot, who received less than five per centum of the votes cast in such subdivision for governor on the party ticket with which he affiliates, at the last general election, nor less than five votes [,] shall be declared to have been nominated to any such office; and the candidate or candidates of each political party for each office to be filled by the voters of the county having received the highest number of votes, and not less than thirty-five per centum of all the votes cast by the party for such office, shall be duly and legally nominated as the candidate of his party for such office. Provided, however, that no candidate whose name is not printed on the official ballot who receives less than ten per centum of the whole number of votes cast in the county for governor on the party ticket with which he affiliates, at the last general election shall be declared to have been nominated to any such office; and each candidate so nominated shall be entitled to have his name printed on the official ballot to be voted for at the general election without other certificate, and the board shall prepare and certify a list of the candidates of each party so nominated, separately, and deliver to the chairman of each party central committee for the county a copy of the list of candidates nominated by the party he represents; and shall also prepare, certify and deliver to such chairman a list of the offices to be filled by the voters of a county for which no candidate of his party was nominated, together with the names of the candidate for each of such offices voted for at the primary election and the number of votes received by each of such candidates." [34 G. A., ch. 59, § 1; 34 G. A., ch. 58, § 2; 33 G. A., ch. 69, § 10.] [32 G. A., ch. 51, § 19.]

Nominations of county supervisors by districts does not give the nominees a vested right to be placed on the official ballot, and if under the provisions of code § 416 supervisor districts are abolished after the nomination of candidates for supervisors therein, such nominees are not entitled to have their names on the official ballots for election in such districts. *Lahart v. Thompson*, 140–298, 118 N. W. 398.

The certificate of nomination from the board of supervisors is final as to all candidates for nomination to any county office or office of a subdivision of a county; but held that where a vacancy was created in the nomination for county supervisor by a redistricting of the county the certificate was no longer of any effect. *State v. Parker*, 147–69, 125 N. W. 856.

SEC. **1087-a20. Abstracts forwarded to secretary of state.** The county board of canvassers shall also make a separate abstract of the canvass as to the following offices and certify to the same and forthwith forward it to the secretary of state, viz.:

United States senator,

Electors of the president and vice president of the United States,
All state offices,
Representative in congress,
Senators and representatives in the general assembly. [32 G. A., ch. 51, § 20.]

SEC. **1087-a21. County returns filed—published proceedings of canvassing board.** When the canvass is concluded, the board shall deliver the original returns to the auditor, who shall file the same and record each of the abstracts above mentioned in the election book. The published proceedings of the board of supervisors as a canvassing board shall contain only a brief statement of the names of the candidates nominated by the electors of any county or subdivision thereof under the title of the office for which they are nominated, and a statement of the title of the office for which they are nominated, and a statement of the title of the county officers, if any, for which no nomination was made by any political party participating in the primary election for the failure of any one of its candidates for any office to receive thirty-five per centum of all the votes cast by the party for such office. [33 G. A., ch. 69, § 11.] [32 G. A., ch. 51, § 21.]

SEC. **1087-a22. Canvass by state board—certificates.** On the second Monday after the June primary election, the executive council shall meet as a canvassing board, and open and canvass the abstract returns received from each county in the state. If returns are not received from all the counties, the secretary of state shall immediately send a messenger after the abstract returns and the board may adjourn from day to day until they are received. The board shall make an abstract of its canvass, stating in words written at length, the number of ballots cast by each political party, separately, for each office designated in section twenty hereof, the names of all the persons voted for, and the number of votes received by each person for each office, and shall sign and certify thereto. Such canvass and certificates shall be final as to all candidates named therein; and the candidate of each political party for each office to be filled by vote of the people, including the office of senator in the congress of the United States, having received the highest number of votes in the state or district of the state, as the case may be, provided he received not less than thirty-five per centum of all the votes cast by the party for such office, shall be duly and legally nominated as the candidate of his party for such office and entitled to have his name printed on the official ballot to be voted at the general election without other certificate; and the board shall prepare and certify a list of the candidates of each party so nominated, separately, and deliver to the chairman of each party central committee for the state a copy of the list of candidates nominated by the party he represents; and shall also forthwith prepare a certificate as to each office, separately, for which no candidate was nominated, by reason of the failure of any candidate for any such office to receive thirty-five per centum of all votes cast by such party for such office, together with the names of the several candidates for each of such offices voted for at the primary election and the number of votes received by each of such candidates and send such certificate to the chairman of the party central committee for the state, in case of offices to be filled by the voters of the entire state, and to the chairman of the party central committee for a district of the state, if known, in case of offices to be filled by the voters of any such district of the state composed of more than one county, and to the county auditor of each county in any such district, and to the county auditor and the chairman of the party central

committee for the county, in case any such district is composed of one county. The candidate of any party for the office of senator in the congress of the United States having received the highest number of votes of his party in the state, shall be the nominee of his party for such office and the secretary of state shall certify the result of said primary election as to such office to the next convening general assembly. [35 G. A., ch. 109, § 2; 33 G. A., ch. 69, § 12.] [32 G. A., ch. 51, § 22.]

SEC. **1087-a23. State returns filed—nominations certified to county auditor.** When the canvass is concluded, the board shall deliver the original abstract returns to the secretary of state, who shall file the same in his office and record the abstracts of the canvass of the state board and certificates attached thereto in the book kept by him known as the election book; and not less than fifteen days before the general election he shall certify to the auditor of each county, under separate party headings, the name of each person nominated as shown by the official canvass made by the executive council, or as certified to him by the proper persons when any person has been nominated by a convention or party committee, his place of residence, the office to which he is nominated, and the order in which the tickets of the several political parties shall appear on the official ballot. Should a vacancy in the nominations occur and be filled after such certificate has been forwarded, a like certificate shall at once be made and sent to the proper officer together with a statement showing the reason for its subsequent issue. [33 G. A., ch. 69, § 17.] [32 G. A., ch. 51, § 23.]

SEC. **1087-a24. Tie vote—vacancies.** In case of a tie vote resulting in no nomination for any office, or election of delegates or party committeeman, the tie shall forthwith be determined by lot by the board of canvassers, or judges of election, as the case may be. Vacancies occurring in nominations made in the primary election before the holding of the county, district or state convention, shall be filled by the county convention if the office in which the vacancy in nomination occurs is to be filled by the voters of the county; by a district convention if the office in which the vacancy in nomination occurs is to be filled by the voters of a district composed of more than one county; by the state convention if the office in which the vacancy occurs is to be filled by the voters of the entire state. Vacancies in nominations in such offices occurring after the holding of a county, district or state convention, or on failure of any such convention to fill a vacancy in a nomination, as aforesaid, then it shall be filled by the party committee for the county, district or state, as the case may be. If a vacancy shall occur in any such office too late for the filing of nomination papers for candidates therefor in the primary election and before the holding of a county, district or state convention, as the case may be, then the convention having jurisdiction shall make nomination for such office; and if a vacancy in any such office shall occur after the holding of a county, district or state convention, then nomination for such office may be made by the party committee for the county, district or state, as the case may be. Vacancies in nominations for offices to be filled by the voters of a territory smaller than a county shall be filled by the members of the party committee for the county from such subdivision. Nominations made as above provided and as provided in sections ten hundred eighty-seven-a twenty-five, ten hundred eighty-seven-a twenty-six and ten hundred eighty-seven-a twenty-seven of the supplement to the code, 1907, shall be certified forthwith to the proper officer by the chairman and secretary of the convention or committee as the case may be, and if received in time shall be printed upon the official ballots the same as if the nomination had been made in

the primary election. Such certificate of nomination shall state the name, place of residence, and post-office address of the person nominated, the office to which he is nominated and the name of the political party making the nomination. [35 G. A., ch. 109, § 9; 33 G. A., ch. 69, § 13; 32 Ex. G. A., ch. 1, § 1.] [32 G. A., ch. 51, § 24.]

[The above section is made applicable to §§ 1087-a36 to 1087-a46 by § 1087-a47. EDITOR.]

The authority of a party committee is limited to cases where nominations have previously been made at the primaries and vacancies have occurred. This section does not authorize a party committee to make a nomination in the first instance. *State v. Hayward*, 141–196, 119 N. W. 620.

Where after the nomination of the candidate for supervisor for a particular district the county was redistricted, held that there was a vacancy in the nomination. *State v. Parker*, 147–69, 125 N. W. 856.

SEC. **1087-a24a. United States senator — vacancy — nomination.** Chapter one of the acts of the special session of the thirty-second general assembly is hereby repealed and the following enacted as a substitute therefor:

"In case of death, withdrawal, or inability to act, for any cause, of a party's candidate for senator in the congress of the United States, as expressed in the regular June primary, such vacancy shall be filled by the state convention of said party, held in accordance with the provisions of section ten hundred eighty-seven-a twenty-seven of the supplement to the code, 1907; provided that if such vacancy occurs after the holding of said convention and thirty days prior to the holding of the regular November election, said delegates to said convention shall be reconvened within ten days after such vacancy has occurred, by the chairman of said party's state central committee, and a party candidate shall be named in said convention to fill such vacancy. If such vacancy occur too late to be filled in the manner above provided prior to the regular November election, the vote and pledge here provided for[1] shall not be binding upon the members of the general assembly." [35 G. A., ch. 109, § 9; 32 Ex. G. A., ch. 1, § 1.]

[1]"The vote and pledge here provided for"—see § 1, ch. 109, 35 G. A., which is incorporated in § 1087-a10 of this supplement. EDITOR.]

SEC. **1087-a25. County convention—delegates—committeemen.** In each county there shall be held in each year in which a general election in November is to take place a county convention of each political party. Said county convention shall be composed of delegates elected at the last preceding primary election, and shall be held on the fourth Saturday following the primary election, convening at eleven o'clock a. m. The number of delegates from each voting precinct shall be determined by a ratio adopted by the respective party county central committees, and shall be thus determined and a statement designating the number from each voting precinct in the county filed in the office of the county auditor at least thirty days before the primary election; if not so done, the auditor shall fix the number. The requisite number of names of candidates of his choice for delegates to the county convention to which each precinct is entitled shall be written, or pasted with uniform white pasters, on the blank lines upon the ballot by the voter while in the booth, or by someone designated by a voter unable to write, after the ballots are received and before they are deposited, and the requisite number of persons from each precinct who receive the highest number of votes shall be the delegates from the precinct to the county convention. The term of office of such delegate shall begin on the day following the final canvass of the votes by the board of supervisors, and shall continue for two years and until their successors are elected. One member of the county central committee for each political

party from each precinct shall be elected. His term of office shall begin on the day of the county convention and immediately following the adjournment thereof and shall continue for two years and until his successor is elected and qualified, unless such committeeman shall be removed by the county central committee for inattention to the duties of his position, incompetency or failure to support the ticket nominated by the party which elected him to such position. The county central committee elected in the primary election shall organize on the day of the convention, immediately following the same. Vacancies in such committee may be filled by majority vote of the committee. Returns shall be made by the judges of election respecting delegates and members of the county central committee in the same manner as for other offices, except that the judges of election shall canvass the returns as to delegates and members of the county central committee, and certify the result to the auditor with the returns. The auditor shall, immediately after the final count and canvass of the votes and returns by the board of supervisors, notify the delegates and members of the county central committee who have thus been elected, of their election, and of the time and place of holding the county convention, and shall on the second Thursday following the primary election, deliver a certified list thereof to the chairmen of the respective party central committees for the county. When the delegates, or a majority thereof, or when delegates representing a majority of the precincts, thus elected, shall have assembled in the county convention at the time herein prescribed and at the county seat, the convention shall be called to order by the chairman of the county central committee, who shall present the certified list of delegates and members of the county central committee, and a list of the offices for which no nomination was made at the primary election, by reason of the failure of any candidate for any such office to receive thirty-five per centum of all votes cast by such party therefor. If any precinct shall not be fully represented the delegates present from such precinct shall cast the full vote thereof, but there shall be no proxies. The said county convention shall make nominations of candidates for the party for any office to be filled by the voters of a county when no candidate for such office has been nominated at the preceding primary election by reason of the failure of any candidate for any such office to receive thirty-five per centum of all votes cast by such party therefor, as shown by the canvass of the returns provided for in section nineteen[1] of this act, and shall nominate candidates for the office of judge of the district court in counties comprising one judicial district of the state, and shall select delegates to the next ensuing state and district conventions of that year upon such ratio of representation as may be determined by the party organization for the state, district or districts of the state, as the case may be, but no delegates shall be so selected to any of the district conventions referred to in section twenty-six[2] of this act, except judicial conventions, unless a call therefor has been issued as therein provided. The said county convention shall also elect a member of the party central committee for the senatorial, judicial, and congressional districts composed of more than one county. But in no case shall the county convention make a nomination for an office for which no person was voted for in the primary election of such party, except for judges of the superior and district courts. [33 G. A., ch. 69, § 14.] [32 G. A., ch. 51, § 25.]

[1]See § 1087-a19 herein. EDITOR.]

[2]See § 1087-a26 herein. EDITOR.]

[The above section is made applicable to §§ 1087-a36 to 1087-a46 by § 1078-a47. EDITOR.]

SEC. **1087-a25a. Nomination of judges in certain districts.** That in any county of this state which is or shall hereafter become a judicial district of itself and which has a population of seventy-five thousand or more as shown by any national or state census, the judges of the district court of such judicial district shall be nominated at the primary election provided for by the laws of this state and all the provisions[1] of the primary law relative to the nomination of county officers shall apply to the nomination of judges of the district court in such judicial districts. [35 G. A., ch. 25, § 1.]

[1"provision" in enrolled bill. EDITOR.]

[For statute respecting nonpartisan state wide nomination of judges, see § 1087-b to § 1087-b5 inclusive. EDITOR.]

SEC. **1087-a25b. Acts in conflict repealed—when not applicable.** That all acts and parts of acts in conflict herewith are hereby repealed. Provided, however, that this act shall not apply when by statute provision is made for state-wide nonpolitical judicial nominations. [35 G. A., ch. 25, § 2.]

SEC. **1087-a26. District convention.** In any senatorial, judicial, or congressional district composed of more than one county, in any year in which a senator in the general assembly, a judge of the district court, or a representative in the congress of the United States, is to be elected, a senatorial or congressional convention may be held, and a judicial convention shall be held by each political party participating in the primary election of that year. Not less than ten days and not more than sixty days before the day fixed for holding the county convention a call for such senatorial, judicial and congressional convention to be held shall be issued by the party central committee for any such district and published in at least one newspaper of general circulation of each county composing any such district and which call shall state among other things the number of delegates each county of the district shall be entitled to and the time and place of holding the convention. Any such call shall be signed by the chairman of the party central committee for any such district, and be filed by him with the county auditor not less than five days before the county convention and the county auditor shall attach a true copy thereof to the certified list of delegates required to be delivered by him to the chairmen of the respective party county central committees. In case no nomination was made in the primary election for the office of senator in the general assembly in any district composed of more than one county, or for the office of representative in congress of the United States, by reason of the failure of any candidate for any office to receive thirty-five per centum of all votes cast by his party therefor, as shown by the certificate issued by the state board of canvassers provided for in this act, then in any such district the chairman of the party central committee therefor shall forthwith issue such call for a convention in such district and deliver the same to the county auditor of each county in the district and in such case said call need not be published. No such district convention shall be held earlier than the first Thursday or later than the fifth Thursday following the county convention. The convention when organized shall make nominations of candidates for the party for any such district office when no candidate for such office has been nominated at the preceding primary election, by reason of the failure of any candidate for any such office to receive thirty-five per centum of all votes cast by such party therefor, as shown by the canvass of the votes provided for in section twenty-two[1] hereof. The organization of and procedure in any such district convention shall be the same as in the state convention.

Such district conventions may adopt party platforms and transact such other business as may properly be brought before them. But in no case shall any such convention of a party make a nomination for an office for which no person was voted for in the primary election of such party, except for judges of the district court. [33 G. A., ch. 69, § 15.] [32 G. A., ch. 51, § 26.]

[1See § 1087-a22 herein. EDITOR.]

[The above section is made applicable to §§ 1087-a36 to 1087-a46 by § 1087-a47. EDITOR.]

Where there has been a failure to nominate at a primary election the vacancy should be filled by the convention as herein provided. *State v. Hayward*, 141–196, 119 N. W. 620.

SEC. **1087-a27. State convention—state central committee.** A state convention of each political party, composed of delegates chosen in the manner herein provided, shall be held not earlier than the first Wednesday and not later than the fifth Wednesday following the county convention, in the year nineteen hundred and eight, and biennially thereafter, convening at such time and place as may be determined upon by the party organization. The convention shall be called to order by the chairman of the state central committee, who shall thereupon present a list of delegates, as certified by the various county conventions, and effect a temporary organization. If any county shall not be fully represented, the delegates present from such county shall cast the full vote thereof, but there shall be no proxies. Such convention when permanently organized shall formulate and adopt the state platform of the party it represents, and shall make nominations of candidates for the party for any state office to be filled by the voters of the entire state, including the office of senator in the congress of the United States, when no candidate for such office has been nominated at the preceding primary election, by reason of the failure of any candidate for any such office to receive thirty-five per centum of all votes cast by such party therefor, as shown by the canvass of the returns provided for in section twenty-two[1] hereof; and shall nominate candidates for the office of judge of the supreme court. It shall also elect a state central committee consisting of not less than one member from each congressional district and transact such other business as may properly be brought before it. The state central committee elected at said state convention may organize at pleasure for political work as is usual and customary with such committees and shall continue to act until succeeded by another committee duly elected. But in no case shall the state convention of a party make a nomination for an office for which no person was voted for in the primary election of such party, except for judges of the supreme court. [35 G. A., ch. 109, § 3; 33 G. A., ch. 69, § 16.] [32 G. A., ch. 51, § 27.]

[1See § 1087-a22 herein. EDITOR.]

[The above section is made applicable to §§ 1087-a36 to 1087-a46 by § 1087-a47. EDITOR.]

SEC. **1087-a28. Existing party committees.** The regularly organized political committees of each party as at present or hereafter constituted may continue to act until supplanted by the committees elected under the provisions of this act. [32 G. A., ch. 51, § 28.]

SEC. **1087-a29. Nomination by petition.** Nothing contained in this act shall be construed so as to prohibit nomination of candidates for office by petition as now authorized by law; but no person so nominated shall be

permitted to use the name of any political party authorized or entitled under this act to nominate a ticket by primary vote or that has nominated a ticket by primary vote under the provisions of this act. [32 G. A., ch. 51, § 29.]

SEC. **1087-a30. Special elections.** This act shall not apply to special elections to fill vacancies. [32 G. A., ch. 51, § 30.]

SEC. **1087-a31. Misconduct of election officials—penalty.** Any party committeeman or any primary election or other public officer upon whom a duty is imposed by this act or by acts herein made applicable to primary elections, who shall wilfully neglect to perform any such duty, or who shall wilfully perform it in such a way as to hinder the objects thereof, or shall disclose to anyone, except as may be ordered by any court of justice, the contents of any ballot or any part thereof, as to the manner in which the same may have been voted, shall be punished by a fine of not less than one hundred dollars nor more than one thousand dollars, or by imprisonment in the penitentiary not to exceed five years, or by both such fine and imprisonment. [32 G. A., ch. 51, § 31.]

[The above section is made applicable to §§ 1087-a36 to 1087-a46 by § 1087-a47. EDITOR.]

SEC. **1087-a32. Services for hire—penalty.** Any person who shall agree to perform any services in the interest of any candidate in consideration of any money or other valuable thing, or who shall accept any money or other valuable thing for such services performed in the interest of any candidate, or any person paying or offering to pay or giving or offering to give money or other valuable things for such services, shall be punished by a fine of not more than three hundred dollars, or by imprisonment in the county jail not exceeding ninety days. But nothing herein shall be construed to prohibit any person from making contracts in good faith for the announcement of his candidacy in the newspapers and for securing the names of voters required to file preliminary nomination papers and the payment of any reasonable compensation for such services. [32 G. A., ch. 51, § 32.]

[The above section is made applicable to §§ 1087-a36 to 1087-a46 by § 1087-a47. EDITOR.]

SEC. **1087-a33. Bribery—illegal voting—penalty.** Any person offering or giving a bribe, either in money or other consideration, to any elector for the purpose of influencing his vote at a primary election, or any elector entitled to vote at such primary election receiving and accepting such bribe; any person making false answer to any of the provisions of this act relative to his qualifications and party affiliations; any person wilfully voting or offering to vote at a primary election who has not been a resident of this state for six months next preceding said primary election; or who, at the primary election, is not twenty-one years of age, or is not a citizen of the United States; or knowing himself not to be a qualified elector of such precinct where he offers to vote; or any person violating any of the provisions of this act, or of any provisions of the code as may be hereto applied, and any person knowingly procuring, aiding or abetting such violation, shall be deemed guilty of a misdemeanor, and, upon conviction, shall be fined not less than one hundred dollars nor more than five hundred dollars, or be imprisoned in the county jail not less than thirty days nor more than six months. [32 G. A., ch. 51, § 33.]

[The above section is made applicable to §§ 1087-a36 to 1087-a46 by § 1087-a47. EDITOR.]

SEC. **1087-a34. Primary elections in certain cities.** The provisions of this act shall, so far as applicable, govern the nominations of candidates by political parties for all offices to be filled by a direct vote of the people in cities of the first class and cities acting under a special charter having a population of over fifteen thousand, except all such special charter cities and cities of the first class as have by vote of the people adopted a plan of municipal government which specifically provides for a nonpartisan primary election. The duties devolving upon the county auditor, by the foregoing provisions of this act, shall, in municipal elections, devolve upon the city auditor and the duties devolving upon the board of supervisors by the foregoing provisions of this act [shall] devolve upon the city council which shall meet to perform said duties within two days next following the primary election. The date of the municipal primary election shall be the last Monday in February of each year in which a municipal election is held in said cities, after the year nineteen hundred and seven, and the percentage of voters signing petitions required for printing the name of a candidate upon the official primary ballot shall be the same as is required of a candidate for a county office and shall be based upon the vote cast for mayor by the respective parties in the preceding city election. The names of candidates for ward aldermen, for city precinct committeemen and for delegates to the city convention, shall not be printed upon the official primary ballot but in each case a blank line or lines shall be provided therefor. A plurality shall nominate the party candidate for alderman and a plurality shall elect the precinct committeemen and delegates to the city convention. The entire expense of conducting a primary election provided for in this section shall be audited by the city council and paid by the city. This section shall not be held to repeal any law which provides for the adoption of a plan of municipal government by vote of the people and which embraces a nonpartisan primary election. [32 G. A., ch. 51, § 35.]

SEC. **1087-a35. Repeal.** Chapter forty of the laws of the thirtieth general assembly, relating to primary elections; and chapters forty-five and forty-six of the laws of the thirty-first general assembly, relating to primary elections, are hereby repealed. [32 G. A., ch. 51, § 34.]

SEC. **1087-a36. Delegates to national conventions—national committeemen—delegates to county conventions.** That from and after the passage of this act in the years in which a president and vice president of the United States are to be elected, there shall be held a primary election for the election of delegates and alternate delegates to the national conventions of all political parties at which candidates for president and vice president are to be nominated, for the election of a party national committeeman for each party, and for the election of delegates to county conventions, which shall choose delegates to the state convention. [35 G. A., ch. 111, § 1.]

SEC. **1087-a37. Number of delegates.** The number of delegates to national conventions to be elected under the provisions of this act for each party shall be the number of delegates for each congressional district, and the number of delegates at large to which each party is entitled as set forth in the call for the national convention by the national committee for each party and certified to the secretary of state by the state chairman of each of the different parties. There shall also be elected one alternate delegate for each district delegate and one alternate for each delegate at large. [35 G. A., ch. 111, § 2.]

SEC. **1087-a38. Election—when held—president and vice president.** The primary election herein provided for shall consist of an election by all political parties and shall be held at the usual voting places of the several precincts on the second Monday in April in the year nineteen hundred sixteen, and quadrennially thereafter for the election of officers provided in section one of this act, and for the purpose of ascertaining the sentiment of the voters of the state in the respective parties as to candidates for president and vice president of the United States. [35 G. A., ch. 111, § 3.]

SEC. **1087-a39. Nomination papers—affidavit of candidate.** No candidate for district delegate or alternate or delegates at large or alternate at large to the national convention of any political party, and no candidate for national committeeman shall have his name printed upon the official ballot of his party to be used at the primary election herein provided, unless at least thirty days prior to the day fixed for holding such primary election, a nomination paper shall have been filed in his behalf in the office of the secretary of state in the form and manner provided in section ten hundred eighty-seven-a ten, supplement to the code, 1907, and the number of signers of such nomination paper for district delegates and alternate delegates shall be equal to one half the number as is in said section provided for representatives in congress, and the number of signers of such nomination paper for delegates at large and alternate delegates at large and for the office of party national committeeman shall be equal to one half the number as in said section provided for senators in the congress of the United States, and each candidate shall take the oath as provided in said section. Candidates for delegates to the county conventions shall be elected in the same manner as provided in section ten hundred eighty-seven-a twenty-five, supplement to the code, 1907, as amended by chapter sixty-nine of the acts of the thirty-third general assembly. No candidate for nomination to the office of president or vice president of the United States shall have his name printed upon the official ballot of his party as herein provided for, unless at least thirty days prior to the day fixed for holding the primary election herein provided for, he shall cause to be filed in the office of the secretary of state his affidavit that he is eligible to the office for which he is a candidate, and that he is a bona fide candidate for such office, and that he will, in good faith, submit his candidacy to the national convention of his political party. Such affidavit shall be in form and substance as follows:

I, ... being duly sworn, say that I reside in the city of ..... county of .....and state of .....; that I am eligible to the office for which I am a candidate, and that the political party with which I affiliate is the ..... party; that I am a bona fide candidate for the office of ..... and that I shall in good faith submit my candidacy to the national convention of my political party in the year ..... and I hereby request that my name be printed upon the official primary ballot as provided by law as a candidate of the ..... party. I furthermore declare that if I am nominated and elected, I will qualify as such officer.

Signed.....

Subscribed in my presence and sworn to (or affirmed) before me by ..... this ..... day of ..... 19....

.....

Title of officer.

[35 G. A., ch. 111, § 4.]

SEC. **1087-a40. Ballot—form.** The official primary election ballot herein provided for shall be prepared, arranged and printed substantially in the following form:

PRIMARY ELECTION BALLOT.

(Name of party)

of

..... township, or precinct, ... ward, city or town of ..... county of ....., state of Iowa.
Primary election held on the ..... day of April, 19....

FOR PRESIDENT OF THE UNITED STATES.

☐ John B. Sullivan
☐ Henry Smith
☐ .....

FOR VICE PRESIDENT OF THE UNITED STATES.

☐ Thomas H. Stevens
☐ Christopher Swanson
☐ .....

FOR PARTY NATIONAL COMMITTEEMAN.

☐ Theodore Thompson
☐ .....

FOR DELEGATES AT LARGE TO NATIONAL CONVENTION.

☐ .....
☐ .....
☐ .....
☐ .....

FOR DISTRICT DELEGATES TO NATIONAL CONVENTION.

☐ .....
☐ .....
☐ .....

FOR ALTERNATE DELEGATES AT LARGE TO NATIONAL CONVENTION.

☐ .....
☐ .....
☐ .....
☐ .....

FOR ALTERNATE DISTRICT DELEGATES TO NATIONAL CONVENTION.

☐ .....
☐ .....
☐ .....

FOR DELEGATES TO COUNTY CONVENTION.

☐ .....
☐ .....
☐ .....

SHALL THE DISTRICT DELEGATES TO THE NATIONAL CONVENTION BE INSTRUCTED BY THE VOTE OF THE STATE AT LARGE?

☐ Yes
☐ No

SHALL THE DISTRICT DELEGATES TO THE NATIONAL CONVENTION BE INSTRUCTED BY THE VOTE OF THE CONGRESSIONAL DISTRICT?

☐ Yes
☐ No

[35 G. A., ch. 111, § 5.]

SEC. **1087-a41. Certified list of nominations—publication.** At least twenty days before the holding of the primary election herein provided for, the secretary of state shall transmit to each county auditor a certified list containing the name and post-office address of each person for whom a nomination paper has been filed in his office, as provided in section one hereof, and entitled to be voted for at such primary election by the voters of such county, together with a designation of the office for which he is a candidate and the party from which he seeks an election. Such auditor shall forthwith, upon receipt thereof, publish under the proper party designation the title of each office to be filled, the names and proper designation of all for whom nominations have been filed in the office of the secretary of state, giving the name and address of each, and the number of delegates from each precinct of the county to which each party is entitled, the date of the primary, the hours during which the polls will be open and that the primary will be held in the regular polling place in each precinct. It shall be the duty of said auditor to publish said notice once each week for two consecutive weeks prior to the said election; each publication shall be made in at least two, and not to exceed four newspapers of general circulation in such county; one of such newspapers shall represent the political party which cast the largest vote in such county at the last preceding general election, and one of such newspapers shall represent the political party which cast the next largest vote in such county at said general election. In any case where the publication of a notice cannot be made as herein required, it may be made in any newspaper having a general circulation in the county in which the notice is required to be published. [35 G. A., ch. 111, § 6.]

SEC. **1087-a42. How printed.** The names of the candidates of each political party for election to the several offices provided in section one hereof and blank space for delegates to county conventions shall be printed in black ink on separate sheets of paper uniform in color, quality, texture and size, with the name of the political party printed at the head of said ballot; each ballot shall be prepared by the county auditor in the same manner as for a general election except as provided in section ten hundred eighty-seven-a thirteen, chapter sixty-nine, acts of the thirty-third general assembly. [35 G. A., ch. 111, § 7.]

SEC. **1087-a43. Canvass and certification of returns by board of supervisors.** On the first Monday following the holding of the primary election herein provided for the board of supervisors of each county shall meet, open and canvass the returns in the manner provided in section ten hundred eighty-seven-a seventeen, supplement to the code, 1907, as amended, and shall certify the result of said canvass to the county auditor, who shall certify to the county chairman of the respective parties a list of the delegates elected to the county convention; the county auditor shall

certify to the secretary of state the result as to all other offices in the form and manner as provided in sections ten hundred eighty-seven-a nineteen and ten hundred eighty-seven-a twenty, supplement to the code, 1907, for representation in congress and for the office of senator in congress of the United States. [35 G. A., ch. 111, § 8.]

SEC. **1087-a44. Canvass and certification by state board.** On the second Monday following the primary election herein provided for, the executive council shall meet as a canvassing board and open and canvass the abstract returns received from each county in the state. If returns are not received from all the counties, the secretary of state shall immediately send a messenger after the abstract returns and the board may adjourn from day to day until they are received. The board shall make an abstract of its canvass, stating in words written at length the number of ballots cast by each political party separately for each office designated in section one hereof, the names of all the persons voted for and the number of votes received for each person for each office, the number of votes cast in favor of instructing delegates by the vote of the state at large, the number of votes cast in favor of instructing the delegates by congressional districts, and shall sign and certify thereto. Such canvass and certificates shall be final as to all candidates named herein, and the candidate of each political party for each office to be filled under the provisions of this act having received the highest number of votes in the state or district, as the case may be, shall be held to be duly and legally elected to such office, and shall be entitled to represent his political party as delegate at large or as a district delegate to the national convention, or as party national committeeman, as the case may be, and the alternate delegates herein provided to be elected shall be entitled to represent the state or district of the state, as the case may be, in case the delegate elected fails or refuses to qualify or act. [35 G. A., ch. 111, § 9.]

SEC. **1087-a45. Abstracts—filed with secretary of state—certificates of election.** When the canvass is concluded the board shall deliver the original abstract returns with their certificate, to the secretary of state, who shall file the same in his office and record the abstracts of the canvass by the state board and certificates attached thereto in the book kept by him, known as the election book; and shall forthwith issue a certificate of election to each candidate whom the certificate of the executive council shows to have been elected in the state or district, as the case may be, including alternate delegates to the national convention of each political party, and shall forward said certificate by mail to such officer at the post-office address as shown by the records of his office; and shall certify the vote of the state on president and vice president to the state chairman of each political party, and each candidate for president and vice president whose names have appeared upon the official primary ballot used at said election, and shall prepare a list of the candidates elected by the several political parties, including alternate delegates in their rank as herein provided, and a certificate as to each office separately for which no candidate was elected, the result of the vote on question of instructing delegates, which result shall be determined by the vote of the entire state and shall forward to the chairman of the state central committee and to the party national committeeman for the state of Iowa, a copy of such list for the party which he represents. [35 G. A., ch. 111, § 10.]

SEC. **1087-a46. Alternate delegates—when to act.** The alternate delegates to the national convention, both at large and district delegates of each political party, shall not be entitled to represent such party unless

the delegates or some one or more of them should fail or refuse to qualify or act as such delegate, and in such case the alternate delegate receiving the highest number of votes shall be entitled to act in place of the first duly elected delegate who fails to act under the provisions of this chapter for the state or district in which he was elected, and so on, to each alternate delegate. [35 G. A., ch. 111, § 11.]

SEC. **1087-a47. Certain sections made applicable.** Except as herein otherwise provided, sections ten hundred eighty-seven-a two; ten hundred eighty-seven-a three; ten hundred eighty-seven-a five, as amended by chapter sixty-nine, acts of the thirty-third general assembly; ten hundred eighty-seven-a six, as amended by chapter sixty-nine, acts of the thirty-third general assembly; ten hundred eighty-seven-a seven; ten hundred eighty-seven-a eight; ten hundred eighty-seven-a nine; ten hundred eighty-seven-a eleven; ten hundred eighty-seven-a fifteen, as amended by chapter sixty-nine, acts of the thirty-third general assembly; ten hundred eighty-seven-a sixteen; ten hundred eighty-seven-a seventeen; ten hundred eighty-seven-a eighteen, as amended by chapter sixty-nine, acts of the thirty-third general assembly; ten hundred eighty-seven-a twenty-four, as amended by chapter sixty-nine, acts of the thirty-third general assembly; ten hundred eighty-seven-a twenty-five; ten hundred eighty-seven-a twenty-six; ten hundred eighty-seven-a twenty-seven; ten hundred eighty-seven-a thirty-one; ten hundred eighty-seven-a thirty-two; ten hundred eighty-seven-a thirty-three of the supplement to the code, 1907, are hereby made applicable to and shall govern and control in the conduct of the election herein provided. [35 G. A., ch. 111, § 12.]

CHAPTER 2-B.

OF THE NONPARTISAN NOMINATION AND ELECTION OF JUDGES.

SECTION **1087-b. Primary nomination — election.** That from and after the passage of this act, all candidates for the office of judge of the supreme, district and superior court, in the state of Iowa, shall be nominated at the regular primary election, and elected at the general election in November, in the manner hereinafter provided. [35 G. A., ch. 104, § 1.]

SEC. **1087-b1. Petition—requisites.** Any person desiring to become a candidate for the office of supreme or district judge at the regular primary election shall, not less than forty days prior to the date of such primary election, file in the office of the secretary of state, a petition favoring his nomination signed by qualified electors as follows: If the person on whose behalf said petition is filed is a candidate for nomination for judge of the supreme court, said petition shall be signed by not less than five thousand qualified electors of the state of which at least thirty shall reside in each county of the state, and the name of such candidate shall not appear upon the primary ballot in any county where the petition of the required thirty qualified electors has not been filed. If the person on whose behalf said petition is filed is a candidate for nomination for judge of the district court, said petition shall be signed by not less than five hundred qualified electors of the judicial district for which he is a candidate, and at least fifty of such qualified electors shall reside in each county of such district, and the name of any such candidate shall not be printed upon the primary ballot in any county of such district where the petition

signed by the required fifty qualified electors has not been filed. Any person desiring to become a candidate for the office of judge of the superior court at the regular primary election shall, not less than forty days before such primary election, file in the office of the county auditor in the county in which said court is located a petition favoring his nomination signed by not less than two hundred fifty qualified electors of the municipality in which said superior court is located. [35 G. A., ch. 104, § 2.]

SEC. **1087-b2. Primary ticket—tie vote.** At all primary elections at which candidates for judges are to be nominated, there shall be provided on each ballot for each political party, a ticket entitled "nonpartisan judiciary ticket," and the names of such candidates as shall have complied with the requirements of this act shall be placed thereon in the same order as the names of the party candidates, but without any party designation; and the ticket shall be the same on all ballots, except as varied to change the alphabetical rotation. The number of judges each elector is entitled to vote for shall be stated on the ballot. Each elector shall be allowed to vote at each primary for twice as many candidates to be nominated as there are number of places to be filled at the election. In case of a tie vote which leaves it unsettled as to which candidates are nominated, the secretary of state shall determine it by lot, except as to superior judge in which case the county auditor instead of the secretary of state shall determine who is nominated in the same manner by lot. [35 G. A., ch. 104, § 3.]

SEC. **1087-b3. Election ticket—election.** At the general election in November there shall be placed on the ballots a separate ticket entitled "nonpartisan judicial ticket," upon which shall be placed the names of the candidates nominated for judges of the supreme court, district, or superior courts in the state, and in the several districts and cities who have been nominated as herein provided. The names of all candidates shall be placed on said ticket and in the same order as far as possible as other candidates and with the same provisions with reference to alphabetical rotation and the number of candidates for each office to which the elector is entitled to vote. The candidate or candidates on such judicial ticket receiving the highest number of votes shall be considered elected. [35 G. A., ch. 104, § 4.]

SEC. **1087-b4. Regular primary and general election statutes applicable.** The method of withdrawal, filling vacancies, conducting such primary and general elections, of preparation of the ballot, of canvassing the vote, of announcing the result, of recounting the ballot, of publishing notice of nomination and election, and the penalty for the illegal voting, misconduct of the election officials, and the making of the sworn return of nomination and election expenses, shall, so far as applicable, be the same as now provided for the regular primary and general election laws of Iowa. [35 G. A., ch. 104, § 5.]

SEC. **1087-b5. Acts in conflict repealed.** All acts and parts of acts inconsistent with this act are hereby repealed. [35 G. A., ch. 104, § 6.]

CHAPTER 2-C.

OF THE NOMINATION AND ELECTION OF UNITED STATES SENATORS BY THE VOTE OF THE PEOPLE.

SECTION **1087-c. Names of candidates on official ballot—statutes applicable.** The names of the candidates of the different parties for United States senator shall, at the primary election and the general elec-

tion in the year preceding the expiration of the term of office of United States senator, or in case of a vacancy in said office, be placed on the official ballot in the proper place, and there shall be nominated and elected a United States senator or senators, as the case may be, in the manner now provided by law for the nomination and election of state officers, and all provisions of the law pertaining to the nomination and election of state officers, congressmen and presidential electors shall apply to the nomination and election of United States senators in so far as the same may be applicable, the same as though the words "United States senator" were specifically written therein. [35 G. A., ch. 105, § 1.]

CHAPTER 3.

OF ELECTIONS.

SECTION 1088. All elections except school.

Notwithstanding the provision of this chapter making a distinction between general elections and school elections, the statutory prohibition of the sale of liquors under the mulct law "on any election day" includes days on which school elections are held. *Hammond v. King*, 137–548, 114 N. W. 1062.

SEC. 1089. General and special.

The Australian ballot law as originally adopted (24 G. A., ch. 33) did not apply to special elections held for the purpose of voting taxes in aid of railroads or bridges. *Pritchard v. Magoun*, 109–364, 80 N. W. 512; *Bras v. McConnell*, 114–401, 87 N. W. 290.

SEC. 1090. Election precincts. Each township, or, in case a township contains a city or a portion thereof, such portion of the township as is outside the limits of the city, and each ward of a city, shall, respectively, constitute an election precinct. But the board of supervisors or the council, as the case may be, shall have power to divide a township or part thereof, or a ward, into two or more precincts, or to change or abolish the same; or the board of supervisors and the council of any city of less than thirty-five hundred inhabitants, not including the inmates of any state institution, may combine any part of the township outside of such city with any or all the wards thereof as one election precinct, or change or abolish such precinct; or the council of such city may combine the several wards into one or more precincts. No precinct shall contain different townships or parts thereof, except that where an incorporated town embraces within its limits territory situated in different townships of any county, the board of supervisors may, for the convenience of the electors, constitute such town and, if desired, additional territory thereto abutting, into an election precinct. The board of supervisors in the order establishing such precinct shall define its boundaries and may change same if in their judgment occasion arises. In such cases, separate ballots and ballot boxes shall be provided for voting for township officers only. Each incorporated town shall constitute a precinct for town elections. No person shall vote in any precinct but that of his residence. [33 G. A., ch. 70, § 1.] [25 G. A., ch. 60; 21 G. A., ch. 141, § 2; C. '73, §§ 501, 603, 605; R. § 480; C. '51, § 245.]

The vital inquiry in determining the residence of a person is as to where is his home. This is not purely a matter of intention. A person cannot live in one place and by force of imagination constitute some other his place of abode. The intent and the fact must concur. *State v. Savre*, 129–122, 105 N. W. 387.

The home of an unmarried man is where he has his rooms, in which he keeps

such personal effects as he has, where he rests when not at work, and spends his evenings and Sundays, and not the boarding house at which he takes his meals. *Ibid.*

Evidence in a particular case as to the actual residence of a voter considered. *Kelso v. Wright*, 110–560, 81 N. W. 805.

SEC. **1091. Polling places for country precincts.** That section ten hundred ninety-one of the code be and the same is hereby repealed and the following enacted in lieu thereof:

"Polling places for precincts outside the limits of a city, but within the township, or originally within and set off as a separate township from the township in which the city is in whole or in part situated, may, for the convenience of the voters, be fixed at some room or rooms in the courthouse or in some other building within the limits of the city as the board of supervisors may provide." [33 G. A., ch. 71, § 1.] [21 G. A., ch. 161, § 14.]

SEC. **1093. Election boards.** Election boards shall consist of three judges and two clerks. Not more than two judges and not more than one clerk shall belong to the same political party or organization, if there be one or more electors qualified and willing to act as such judge or clerk, and a member or members of opposite parties. In cities and towns, the councilmen shall be judges of election; but in case more than two councilmen belonging to the same political party or organization are residents of the same election precinct, the county board of supervisors may designate which of them shall serve as judges. In township precincts, the clerk of the township shall be a clerk of election of the precinct in which he resides, and the trustees of the township shall be judges of election, except that, in townships not divided into election precincts, if all the trustees be of the same political party, the board of supervisors shall determine by lot which two of the three trustees shall be judges of such precinct. The membership of such election board shall be made up or completed by the board of supervisors from the parties which cast the largest and next largest number of votes in said precinct at the last general election, or that one which is unrepresented; but, in city and town elections, the powers given in this chapter and duties herein made incumbent upon the board of supervisors shall be performed by the council. If, at the opening of the polls in any precinct, there shall be a vacancy in the office of clerk or judge of election, the same shall be filled by the members of the board present, and from the political party which is entitled to such vacant office under the provisions of this chapter. The election board at any special election shall be the same as at the last preceding general election. In case of vacancies happening therein, the county auditor may make the appointments to fill the same when the board of supervisors is not in session. [35 G. A., ch. 112, § 1.] [31 G. A., ch. 42; 26 G. A., ch. 68, § 3; C. '73, §§ 606–8; R. §§ 481–3; C. '51, §§ 246–8.]

SEC. **1096. Polls open.** At all elections the polls shall be opened at eight o'clock in the forenoon, except in cities where registration is required, when the polls shall be opened at seven o'clock in the forenoon, or in each case as soon thereafter as vacancies in the places of judges or clerks of election have been filled. In all cases the polls shall be closed at seven o'clock in the evening. [28 G. A., ch. 34, § 1; 24 G. A., ch. 33, § 32; C. '73, § 611; R. § 486; C. '51, § 251.]

SEC. **1102. Vacancies filled.**

When a certificate of nomination of candidates is held by the county auditor not to have been filed with him in time, the vacancies in nominations for such office may be filled in accordance with the provisions of this section. The holding of the auditor that the filing is not as required by law is a holding that the nominating cer-

tificate is insufficient and inoperative. *Reese v. Hogan*, 117–603, 91 N. W. 907.

These provisions as to filling vacancies by a party central committee are superseded by the provision as to primary elections found in code supp. § 1087-a24. *State v. Hayward*, 141–196, 119 N. W. 620

SEC. 1103. Objections.

This section creates a tribunal for the determination of all questions arising in relation to nominations or nomination papers and makes the decision of such tribunal final. *State v. Hayward*, 141–196, 119 N. W. 620.

While objections to a relator's nomination can only be made as here provided, yet where by redistricting a nomination for county supervisor is rendered ineffectual, there is a vacancy as to such nomination. *State v. Parker*, 147–69, 125 N. W. 856.

SEC. 1106. **Ballot—form—candidates for United States senator—district judge—separate ballot for constitutional amendments.** The names of all candidates to be voted for in each election precinct shall be printed on one ballot, all nominations of any political party or group of petitioners being placed under the party name or title of such party or group, as designated by them in their certificates of nomination or petitions, or, if none be designated, then under some suitable title, and the ballot shall contain no other names, except that, in case of electors for president and vice president of the United States, the names of the candidates for president and vice president may be added to the party or political designation; provided further, however, that at all general elections next preceding the election of a senator in the congress of the United States there shall be placed upon the official ballot the names of all candidates for the office of senator in the congress that have been nominated by any of the methods now or which may hereafter be provided by law, for the nomination of state officers, the votes for which candidates shall be counted and certified to by the election judges in the same manner as the votes for other candidates. Each list of candidates for the several parties and groups of petitioners shall be placed in a separate column on the ballot, in such order as the authorities charged with the printing of the ballots shall decide, except as otherwise provided, and be called a ticket. But the name of no candidate shall appear upon the ballot in more than one place for the same office, whether nominated by convention, primary, caucus or petition, except as hereinafter provided. Where two or more conventions, primaries or caucuses, or any two of them, may nominate the same candidate for any office, the name of such candidate shall be printed under the name of the party first filing nomination papers bearing such name, unless the candidate himself shall, in writing duly verified, request the officer with whom the nomination papers are filed to cause the name to be printed upon some other ticket, provided, that in any judicial district of the state in which the bar association, or a convention of attorneys of the district nominates or recommends candidate or candidates for the office of district judge, and such candidates are also nominated or indorsed by any political party, in preparing the ballots for the general election, the names of such candidate or candidates shall be printed as candidate or candidates for each party by whom they are nominated, whether by primary, convention or petition. Each of the columns containing the list of candidates, including the party name, shall be separated by a distinct line. Said ballot shall be substantially in the following form:

REPUBLICAN.	DEMOCRATIC.	PROHIBITION.	UNION LABOR.
For Governor,	For Governor,	For Governor,	For Governor,
☐ A.....B..... of.....County.	☐ G.....H..... of.....County.	☐ M.....N..... of.....County.	☐ S.....T..... of.....County.
For Lieutenant Governor,	For Lieutenant Governor,	For Lieutenant Governor,	For Lieutenant Governor,
☐ C.....D..... of.....County.	☐ I.....J..... of.....County.	☐ O.....P..... of.....County.	☐ U.....V..... of.....County.
For Judge of Supreme Court,	For Judge of Supreme Court,	For Judge of Supreme Court,	For Judge of Supreme Court,
☐ E.....F..... of.....County.	☐ K.....L..... of.....County.	☐ Q.....R..... of.....County.	☐ W.....X..... of.....County.

When a constitutional amendment or other public measure is to be voted upon by the electors, it shall be printed in full upon a separate ballot, preceded by the words, "Shall the following amendment to the constitution (or public measure) be adopted?" and upon the right-hand margin, opposite these words, two spaces shall be left, one for votes favoring such amendment or public measure, and the other for votes opposing the same. In one of these spaces the word "yes" or other word required by law shall be printed; in the other, the word "no" or other word required, and to the right of each space a square shall be printed to receive the voting cross, all of which shall be substantially in the following form:

"Shall the following amendment to the constitution (or public measure) be adopted?"

(Here insert in full the proposed constitutional amendment or public measure.)

Yes.	
No.	

The elector shall designate his vote by a cross mark, thus, X, placed in the proper square. At the top of such ballots shall be printed the following words, enclosed in brackets: [Notice to voters. For an affirmative vote upon any question submitted upon this ballot make a cross (x) mark in the square after the word "Yes." For a negative vote make a similar mark in the square following the word "No."] If more than one constitutional amendment or public measure is to be voted upon, they shall be printed upon the same ballot, one below the other, with one inch space between each constitutional amendment or public measure that is to be submitted. All of such ballots for the same polling place shall be of the same size, similarly printed, upon yellow colored paper. On the back of each such ballot shall be printed appropriate words, showing that such ballot relates to a constitutional or other question to be submitted to the electors, so as to distinguish the said ballots from the official ballot for candidates for office, and a facsimile of the signature of the auditor or other officer who has caused the ballot to be printed. Such ballots shall be endorsed and given to each voter by the judges of election, as provided in section eleven hundred sixteen, and shall be subject to all other laws governing ballots for candidates, so far as the same shall be applicable. [35 G. A., ch. 109, § 4.] [31 G. A., chs. 43–44; 28 G. A., ch. 35, § 1; 24 G. A., ch. 33, §§ 14, 16.]

SEC. 1109. **Method of printing.** The ballot shall be on plain white paper, through which the printing or writing cannot be read. The party name or title shall be printed in capital letters, not less than one fourth of an inch in height. The names of candidates shall be printed in capital letters not less than one eighth nor more than one fourth of an inch in height, and, at the beginning of each line in which the name of a candidate is

printed, a square shall be printed, the sides of which shall not be less than one fourth of an inch in length. On the back or outside of the ballot, so as to appear when folded, shall be printed the words "official ballot," followed by the designation of the polling place for which the ballot is prepared, the date of the election, and a facsimile of the signature of the auditor or other officer who has caused the ballot to be printed. [31 G. A., ch. 44, § 2; 24 G. A., ch. 33, § 14.]

SEC. 1115. **Challenges.**

The duties and powers conferred by this section on judges of election are ministerial and such judges cannot refuse to administer the oath provided for or to receive the ballot after the oath has been taken. *Lane v. Mitchell*, 153–139, 133 N. W. 381.

A wilful and malicious refusal to receive a ballot which the voter is entitled to cast may subject an election judge to liability beyond merely nominal damages. *Ibid.*

SEC. 1117. **Depositing ballot.**

A ballot not bearing the indorsement of the judge should not be counted. *Kelso v. Wright*, 110–560, 81 N. W. 805.

SEC. 1119. **Marking the ballot.** Upon retiring to the voting booth, the voter shall prepare his ballot by placing a cross in the square opposite the name of each candidate for whom he desires to vote. The voter may also insert in writing, in the proper place, the name of any person for whom he desires to vote, making a cross opposite thereto. The writing of such name without making a cross opposite thereto, or the making a cross opposite such blank without writing a name therein shall not affect the validity of his vote. [31 G. A., ch. 44, § 3; 28 G. A., ch. 36, § 1; 24 G. A., ch. 33, § 22.]

The law does not recognize the writing of the name of a candidate on the ballot, except by inserting it in the ballot in the proper place, with a cross in the square opposite the name as written. *Voorhees v. Arnold*, 108–77, 78 N. W. 795.

The amendment of this section, made by 28 G. A., ch. 36, held not applicable in a case tried and appealed before the amendment went into effect. *Morrison v. Pepperman*, 112–471, 84 N. W. 522.

The statute providing for primary elections in cities adopting the commission form of government is not to be construed as preventing the electors from voting for any candidates of their choice. *Eckerson v. Des Moines*, 137–452, 115 N. W. 177.

SEC. 1120. **How counted.** Ballots marked as provided in the preceding section shall be counted for the candidates designated by the marks in the squares. When only one candidate for any office is to be elected, if the voter marks in squares opposite the names of more than one candidate therefor, such vote shall not be counted for such office. When two or more officers of the same kind are to be elected, if more squares opposite the names of candidates for such office are marked than there are officers to be elected to such office, the ballot shall not be counted for any such candidates. If for any reason it is impossible to determine the voter's choice for any office to be filled, his ballot shall not be counted for such office. Any ballot marked by the voter in any other manner than as authorized in this chapter, and so that such mark may be used for the purpose of identifying such ballot, shall be rejected. [31 G. A., ch. 44, § 4; 24 G. A., ch. 33, §§ 22, 27.]

The law by implication prohibits any person, including the voter, from so marking the ballot that the mark may be used for the purpose of identification, and a ballot so marked should be rejected. The unauthorized marks, to be objectionable as identification marks, must be deliberately made, and not merely accidentally, or as the result of inexperience. Whether the marks in particular cases are identification marks is for the jury. The question is whether there has been a delib-

erate departure in the marking and in a way that might enable the marks to be used to identify the ballot. *Voorhees v. Arnold*, 108–77, 78 N. W. 795.

What constitutes an identifying mark upon a ballot is generally a question of fact for the trial court, and its finding, or the finding of the jury, if the case is submitted to the jury, is conclusive upon appeal. The unnecessary marking of a cross in the square below the marked circle does not affect the validity of the ballot. *Kelso v. Wright*, 110–560, 81 N. W. 805.

Where a ballot had crosses in squares opposite all the names on the republican ticket, except that of the candidate for township trustee, and as to that office had a cross on another ticket in front of a blank space, held that it was properly rejected. *Morrison v. Pepperman*, 112–471, 84 N. W. 522.

This section makes the cross in the circle effective as a vote for all names printed upon the ticket below it, and if in front of the name of the candidate to any office there is a blank in such ticket, then a cross on another ticket for such office will authorize the counting of the ballot for the candidate thus designated. *Spurrier v. McLennan*, 115–461, 88 N. W. 1062.

Whether unnecessary crosses in places where no provision for marking with a cross is made, as for instance in front of the names of the candidates for president and vice president, constitute identifying marks such as to vitiate the ballot is a question of fact for the trial court. *Ibid.*

Where there is a cross in the circle marked at the head of one ticket, the marking of a cross in the square before the name on another ticket has no effect other than to nullify the vote for the officer thus doubly voted for. This rule is in nowise altered by the marking of the squares below the marked circle. *Ibid.*

SEC. 1121. **Voting mark—spoiled ballots.** The voting mark shall be a cross in the square opposite to the name of the candidate for whom the voter desires to vote. Any voter who shall spoil his ballot may, on returning the same to the judges, receive another in place thereof, but no voter shall receive more than three ballots, including the one first delivered to him. None but ballots provided in accordance with the provisions of this chapter shall be counted. [31 G. A., ch. 44, § 5; 24 G. A., ch. 33, §§ 22, 25.]

The provisions of this section are mandatory. *Lehigh Sewer Pipe & Tile Co. v. Lehigh*, 156–386, 136 N. W. 934.

SEC. 1122. **Defects in printed ballot.**

The election law was enacted to aid the elector in expressing his free choice and not by technical obstructions to make the right of voting difficult and insecure. When the elector receives a ballot from the proper officials he may rely upon it as genuine and, when properly marked by him, have it counted for all candidates for whom he had the right to vote and did vote. There is a distinction between errors of officers which would have the effect to deprive voters of the franchise and a disregard of the law by the electors themselves. *State v. Bernholtz*, 106–157, 76 N. W. 662.

SEC. 1125. **Special policemen.**

Special policemen, appointed by the city council on the nomination of political parties are not entitled to compensation either from the city or the county as the statute makes no provision for such compensation. *Mousseau v. Sioux City*, 113–246, 84 N. W. 1027.

SEC. 1129. **Expenses—special policemen—compensation.** The special policemen appointed under the provisions of this chapter shall be entitled to receive two dollars a day as compensation for their services, which with the expense of providing booths, guard rails, and other things required in this chapter shall be paid in the same manner as other election expenses. The printing and distributing of ballots and cards of instruction to the voters, described in this chapter, for any general election, shall be at the expense of the county, and shall be provided for in the same manner as other county election expenses. The printing and distribution of ballots for use in city elections shall be at the expense of the city or town in which the election shall be held. [30 G. A., ch. 39; 24 G. A., ch. 33, §§ 2, 20.]

The provisions of this section do not cover compensation to special policemen appointed under code § 1125. *Mousseau v. Sioux City*, 113–246, 84 N. W. 1027.

SEC. **1130. Ballot boxes.** The board of supervisors shall provide for each precinct in the county, for the purpose of elections, one box, with lock and key. When any township precinct includes a town or part thereof, together with territory outside the limits of such town, the township trustees shall prepare a separate ballot box to receive the votes for township assessor, which shall be on separate ballots, and only the ballots of persons living outside of the limits of such town shall be placed in said ballot box. The judges of election shall place each ballot in its proper ballot box. The judges of election shall have the right to administer an oath to any voter, and to examine him under oath as to the assessor for whom such elector is entitled to vote. [29 G. A., ch. 53, § 2; 17 G. A., ch. 71, §§ 2, 3; C. '73, § 614; R. § 489; C. '51, § 254.]

SEC. **1131. Voting by women.**

Women have the right to vote at city elections on questions involving either the issuance of bonds or increasing of taxation. *Coggeshall v. Des Moines*, 138–730, 117 N. W. 309.

These provisions as to women voting at municipal elections in certain cases are not unconstitutional. *Ibid.*

While these provisions are not unconstitutional, they do not make women qualified electors within the proper meaning of that term. *In re Application of Carragher*, 149–225, 128 N. W. 352.

SEC. **1132. Registry and poll books.**

It is not required that the poll lists show in what town in the county the voter resides. *Porter v. Butterfield*, 116–725, 89 N. W. 199.

SEC. **1134-a. Promise of position prohibited.** It shall be unlawful for any candidate for any office to be voted for at any primary, municipal or general election, prior to his nomination or election, to promise, either directly or indirectly, to support or use his influence in behalf of any person or persons for any position, place or office, or to promise directly or indirectly to name or appoint any person or persons to any place, position or office in consideration of any person or persons supporting him or using his, her or their influence in securing his or her nomination, election or appointment. [35 G. A., ch. 303, § 1.]

SEC. **1134-b. Promise of influence prohibited.** It shall be unlawful for any person to solicit from any candidate for any office to be voted for at any primary, municipal or general election, or any candidate for appointment to any public office, prior to his nomination, election or appointment, to promise, directly or indirectly, to support or use his or her influence in behalf of any person or persons for any position, place or office, or to promise either directly or indirectly to name or appoint any person or persons to any place, position or office in consideration of any person or persons supporting him or her, or using his, her or their influence in securing his or her nomination, election or appointment. [35 G. A., ch. 303, § 2.]

SEC. **1134-c. Penalty.** Any person violating any of the provisions of this act shall be deemed guilty of a misdemeanor and punished as provided in section eleven hundred thirty-seven-a six, supplement to the code, 1907. [35 G. A., ch. 303, § 3.]

SEC. **1137-a1. Candidates to make sworn statement of election expenses—where filed.** Every candidate for any office to be voted for at any primary, municipal or general election shall, within ten days after the holding of such primary, municipal or general election, file a true, cor-

rect, detailed, sworn statement showing each and all sums of money or other things of value disbursed, expended or promised directly or indirectly by him, and to the best of his knowledge and belief by any other person or persons in his behalf for the purpose of aiding or securing his nomination or election. If the person be a candidate for a municipal or a county office, such statement shall be filed with the county auditor; if for a state office, or any other office to be voted for by the electors of more than one county, such statement shall be filed with the secretary of state. Such statement shall show the dates, amounts, and from whom such sums of money or other things of value were received, and the dates, amounts, purposes and to whom paid or disbursed, and shall include the assessment of any person, committee, or organization in charge of the campaign of such candidate. [32 G. A., ch. 50, § 2.]

SEC. **1137-a2. Testimony—immunity from prosecution.** In prosecutions under this act, no witness shall be excused from giving testimony on the ground that his testimony would tend to render him criminally liable or expose him to public ignominy, but any matter so elicited shall not be used against him, and said witness shall not be prosecuted for any crime connected with or growing out of the act on which the prosecution is based in the cause in which his evidence is used for the state, under the provisions of this section. [32 G. A., ch. 50, § 3.]

SEC. **1137-a3. Statements by committee chairmen.** The chairman of each party central committee for the state, district or county, shall file a statement of receipts and expenditures within ten days after the general election. The chairmen of state and district central committees shall file said statements with the secretary of state; and the chairmen of county central committees, with the county auditor. Such statements shall contain all the information required to be filed by candidates as set forth in section two of this act, and in addition thereto shall state the amounts or balances remaining on hand. The person filing the same shall make oath that it is a full, true and correct statement. [32 G. A., ch. 50, § 4.]

SEC. **1137-a4. Statements open to public inspection.** The statements provided for in this act shall be open at all times to the inspection of the public, and remain on file and become a part of the permanent records in the office where filed. [32 G. A., ch. 50, § 5.]

SEC. **1137-a5. Treating near the polls—duty of judges and clerks.** It shall be the duty of the judges and clerks of all municipal, general and primary elections to prohibit the placing, keeping, and giving to the voters by any person of any cigars, food or other refreshments or treats, in or about the polling place. [32 G. A., ch. 50, § 6.]

SEC. **1137-a6. Penalty.** Any person violating any of the provisions of the last five preceding sections shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not less than fifty dollars nor more than three hundred dollars, or by imprisonment in the county jail not less than thirty days nor more than six months. [32 G. A., ch. 50, § 7.]

CHAPTER 3-A.

OF VOTING MACHINES.

SECTION **1137-a7. Use of voting machines authorized.** That at all state, county, city, town, primary and township elections hereafter held in

the state of Iowa, ballots or votes may be cast, registered, recorded, and counted by means of voting machines, as hereinafter provided. [33 G. A., ch. 72, § 1.] [28 G. A., ch. 37, § 1.]

Voting by a machine is voting by ballot within the constitutional provisions, and a court of equity has no authority to enjoin the use of a voting machine at an election, the right to vote being only a political and not a civil right. *United States Standard Voting Mch. Co. v. Hobson*, 132–38, 109 N. W. 458.

A tax payer cannot invoke the jurisdiction of a court of equity to restrain the performance of a contract by the board of supervisors for the purchase of voting machines on the ground that they are inefficient. *Shoemaker v. Des Moines*, 129–244, 105 N. W. 520.

A voter has no right which a court of equity will intervene to protect, with reference to the right to cast his ballot. *Ibid.*

SEC. **1137-a8. Board of supervisors to purchase.** Hereafter the board of county supervisors of any county, or the council of any incorporated city or town in the state of Iowa may, by a two-thirds vote, authorize, purchase, and order the use of voting machines in any one or more voting precincts within said county, city, or town, until otherwise ordered by said board of county supervisors or city or town council. [28 G. A., ch. 37, § 2.]

SEC. **1137-a9. Commissioners—term—removal.** Within thirty days after this act goes into effect, the governor shall appoint three commissioners and not more than two of whom shall be from the same political party. The said commissioners shall hold office for the term of five years, subject to removal at the pleasure of the governor. [28 G. A., ch. 37, § 3.]

SEC. **1137-a10. Examination of machine—report of commissioners—compensation.** Any person or corporation owning or being interested in any voting machine may call upon the said commissioners to examine the said machine, and make report to the secretary of state upon the capacity of the said machine to register the will of voters, its accuracy and efficiency, and with respect to its mechanical perfections and imperfections. Their report shall be filed in the office of the secretary of state and shall state whether in their opinion the kind of machine so examined can be safely used by such voters at elections under the conditions prescribed in this act. If the report states that the machine can be so used, it shall be deemed approved by the commissioners, and machines of its kind may be adopted for use at elections as herein provided. Any form of voting machine not so approved cannot be used at any election. Each commissioner is entitled to one hundred fifty dollars for his compensation and expenses in making such examination and report, to be paid by the person or corporation applying for such examination. No commissioner shall have any interest whatever in any machine reported upon. Provided, that said commissioner shall not receive to exceed fifteen hundred dollars and reasonable expenses in any one year; and all sums collected for such examinations over and above said maximum salaries and expenses shall be turned into the state treasury. [28 G. A., ch. 37, § 4.]

SEC. **1137-a11. Provisions as to the construction of machine approved.** A voting machine approved by the state board of voting machine commissioners must be so constructed as to provide facilities for voting for the candidates of at least seven different parties or organizations, must permit a voter to vote for any person for any office although not nominated as a candidate by any party or organization, and must permit voting in absolute secrecy. It must also be so constructed as to prevent voting for more than one person for the same office, except where the voter is lawfully entitled to vote for more than one person for that office; and it must afford

him an opportunity to vote for any or all persons for that office as he is by law entitled to vote for and no more, at the same time preventing his voting for the same person twice. It may also be provided with one ballot in each party column or row containing only the words "presidential electors," preceded by the party name, and a vote for such ballot shall operate as a vote for all the candidates of such party for presidential electors. Such machine shall be so constructed as to accurately account for every vote cast upon it. [28 G. A., ch. 37, § 5.]

SEC. **1137-a12. Experimental use.** The board of supervisors of any county, the council of any city or town, may provide for the experimental use at an election in one or more districts, of a machine which it might lawfully adopt, without a formal adoption thereof; and its use at such election shall be as valid for all purposes as if it had been lawfully adopted. [28 G. A., ch. 37, § 6.]

SEC. **1137-a13. Duties of local authorities.** The local authorities adopting a voting machine shall, as soon as practical thereafter, provide for each polling place one or more voting machines in complete working order, and shall thereafter keep them in repair, and shall have the custody thereof and of the furniture and equipment of the polling place when not in use at an election. If it shall be impracticable to supply each and every election district with a voting machine or voting machines at any election following such adoption, as many may be supplied as it is practicable to procure, and the same may be used in such election district or districts within the county, city, or town as the officers adopting the same may direct. [28 G. A., ch. 37, § 7.]

SEC. **1137-a14. Bonds—certificates of indebtedness.** The local authorities, on the adoption and purchase of a voting machine, may provide for the payment therefor in such manner as they may deem for the best interest of the locality, and may for that purpose issue bonds, certificates of indebtedness, or other obligations which shall be a charge on the county, city, or town. Such bonds, certificates, or other obligations may be issued with or without interest, payable at such time or times as the authorities may determine, but shall not be issued or sold at less than par. [28 G. A., ch. 37, § 8.]

The county is given authority to issue bonds in the purchase of voting machines, with or without interest, payable at such time as may seem best. Impliedly it has the power to make such bonds negotiable in form and effect. *Security Trust Co. v. Des Moines County*, (C. C.) 198 Fed. 331.

SEC. **1137-a15. Ballots—form.** All ballots shall be printed in black ink on clear, white material, of such size as will fit the ballot frame, and in plain, clear type as the space will reasonably permit. The party name for each political party represented on the machine shall be prefixed to the list of candidates of such party. The order of the list of candidates of the several parties or organizations shall be arranged as provided in section eleven hundred and six of the code, except that the lists may be arranged in horizontal rows or vertical columns. [28 G. A., ch. 37, § 9.]

SEC. **1137-a16. Sample ballots.** The officers or board charged with the duty of providing ballots for any polling place shall provide therefor two sample ballots, which shall be arranged in the form of a diagram showing the entire front of the voting machine as it will appear after the official ballots are arranged for voting on election day. Such sample ballots shall be open to public inspection at such polling place during the day of election and the day next preceding election day. [28 G. A., ch. 37, § 10.]

SEC. **1137-a17. Two sets of ballots.** Two sets of ballots shall be provided for each polling place for each election for use in the voting machine. [28 G. A., ch. 37, § 11.]

SEC. **1137-a18. Delivery of ballots.** The ballots and stationery shall be delivered to the election board of each election district before ten o'clock in the forenoon of the day next preceding the election. [28 G. A., ch. 37, § 12.]

SEC. **1137-a19. Duties of election officers—independent ballots.** The judges of election and clerks of each district shall meet at the polling place therein, at least three quarters of an hour before the time set for the opening of the polls at each election, and shall proceed to arrange within the guard rail the furniture, stationery, and voting machines for the conduct of the election. The judges of election shall then and there have the voting machine, ballots, and stationery required to be delivered to them for such election; and, if it be an election at which registered voters only can vote, the registry of such electors required to be made and kept therefor. The judges shall thereupon cause at least two instruction cards to be posted conspicuously within the polling place. If not previously done, they shall arrange in their proper place on the voting machine, the ballots containing the names of the offices to be filled at such election, and the names of the candidates nominated therefor. If not previously done, the machine shall be so arranged as to show that no vote has been cast, and the same shall not be thereafter operated, except by electors in voting. Before the polls are open for election, each judge shall carefully examine every machine and see that no vote has been cast, and the same shall be subject to inspection of the election officers. Ballots voted for any person, whose name does not appear on the machine as a nominated candidate for office, are herein referred to as independent ballots. When two or more persons are to be elected to the same office, and the machine requires that all independent ballots voted for that office be deposited in a single receptacle or device, an elector may vote in or by such receptacle or device for one or more persons whose names do not appear upon the machine with or without the names of one or more persons whose names do so appear. With that exception, and except for presidential electors, no independent ballot shall be voted for any person for any office whose name appears on the machine as a nominated candidate for that office; any independent ballot so voted shall not be counted. An independent ballot must be cast in its appropriate place on the machine, or it shall be void and not counted. [28 G. A., ch. 37, § 13.]

SEC. **1137-a20. Voting machine in plain view—guard rail.** The exterior of the voting machine and every part of the polling place shall be in plain view of the election officers. The voting machine shall be placed at least three feet from every wall and partition of the polling place, and at least three feet from the guard rail, and at least four feet from the clerk's table. A guard rail shall be constructed at least three feet from the machine, with openings to admit electors to and from the machine. [28 G. A., ch. 37, § 14.]

SEC. **1137-a21. Method of voting.** After the opening of the polls, the judges shall not allow any voter to pass within the guard rail until they ascertain that he is duly entitled to vote. Only one voter at a time shall be permitted to pass within the guard rail to vote. The operating of the voting machine by the elector while voting shall be secret and obscured from all other persons except as provided by this chapter in cases of voting by assisted electors. No voter shall remain within the voting machine booth longer than one minute, and if he shall refuse to leave it after the

lapse of one minute, he shall be removed by the judges. [28 G. A., ch. 37, § 15.]

SEC. **1137-a22. Additional instructions.** In case any elector after entering the voting machine booth shall ask for further instructions concerning the manner of voting, two judges of opposite political parties shall give such instructions to him; but no judge or other election officer or person assisting an elector shall in any manner request, suggest, or seek to persuade or induce any such elector to vote any particular ticket, or for any particular candidate, or for or against any particular amendment, question, or proposition. After receiving such instructions, such elector shall vote as in the case of an unassisted voter. [28 G. A., ch. 37, § 16.]

SEC. **1137-a23. Injury to the machine.** No voter, or other person, shall deface or injure the voting machine or the ballot thereon. It shall be the duty of the judges to enforce the provisions of this section. During the entire period of an election, at least one of their number, designated by them from time to time, shall be stationed beside the entrance to the booth and shall see that it is properly closed after a voter has entered it to vote. He shall also, at such intervals as he may deem proper or necessary, examine the face of the machine to ascertain whether it has been defaced, or injured, to detect the wrongdoer and to repair any injury. [28 G. A., ch. 37, § 17.]

SEC. **1137-a24. Canvass of vote.** As soon as the polls of the election are closed, the judges of the election thereat shall immediately lock the voting machine against voting and open the counting compartments in the presence of all persons who may be lawfully within the polling place, and proceed to canvass the vote. [28 G. A., ch. 37, § 18.]

SEC. **1137-a25. Judges to lock machine.** The judges of election shall, as soon as the count is completed and fully ascertained as in this act required, lock the machine against voting, and it shall so remain for the period of thirty days. Whenever independent ballots have been voted, the judges shall return all of such ballots properly secured in a sealed package as prescribed by section eleven hundred forty-two of the code. [28 G. A., ch. 37, § 19.]

SEC. **1137-a26. Written statements of election.** After the total vote for each candidate has been ascertained, and before leaving the room or voting place, the judges shall make and sign written statements of election, as required by the election laws now in force, except that such statements of the canvass need not contain any ballots except the independent ballots as herein provided. [28 G. A., ch. 37, § 20.]

SEC. **1137-a27. What statutes apply—separate ballots.** All of the provisions of the election law now in force and not inconsistent with the provisions of this act shall apply with full force to all counties, cities, and towns adopting the use of voting machines. Nothing in this act shall be construed as prohibiting the use of a separate ballot for constitutional amendments and other public measures. [28 G. A., ch. 37, § 21.]

CHAPTER 4.

OF THE CANVASS OF VOTES.

SECTION 1142. **Proclamation of result—preservation of ballots.**

The poll books and the registration lists prepared as provided by law furnish the best evidence as to who cast ballots at the election. So held where the question

was as to the sufficiency of the petition of consent under the mulct tax law. *State v. Pressman*, 103–449, 72 N. W. 660.

The law provides for the strictest vigilance in the care and preservation of the ballots, and where it appears that these precautions have not been observed and there has been opportunity to tamper with them they will not be considered in an election contest for the purpose of overthrowing the result of the canvass by the proper officers. *Davenport v. Olerich*, 104–194, 73 N. W. 603.

The duty of preserving the ballots is not a negative one of noninterference, but a positive requirement to do whatever may be necessary in order to accomplish the purposes of the law in keeping them inviolate. *Ibid.*

The ballots when properly authenticated afford the very best evidence of who has been chosen by the electors to an office, but in order that the result of the canvass shall be overturned by the evidence of such ballots it must appear that they have been preserved with the care which precludes the suspicion of having been tampered with and the opportunity of alteration or change, and in a particular case, held that it appeared that there had been such opportunity for tampering with the ballots that they should not be considered for the purpose of overturning the result as announced by the canvassing board. *Ibid.*

The ballots should be preserved in such way as not to afford a reasonable possibility of their having been changed or tampered with by unauthorized persons. *Mentzer v. Davis*, 109–528, 80 N. W. 557

As the manner and mode of preservation of ballots has been enjoined by statute, a substantial compliance therewith must be shown preliminary to the introduction of the ballots in evidence. This preliminary proof, unless waived, is essential to the competency of the ballots as evidence for any purpose as against the official count, and no averment in the pleading is required as a basis for an objection to their competency. *DeLong v. Brown*, 113–370, 85 N. W. 624.

The question of the competency of the ballots as evidence is one of fact to be determined by the trial court. *Ibid.*

Where it appeared that the ballots had been so kept that they might have been tampered with, held that they were not admissible. *Ibid.*

The fact that the ballots are in the custody of one acting as deputy auditor *de facto*, but not *de jure*, will not prevent their being received in evidence in an election contest. *Murphy v. Lentz*, 131–328, 108 N. W. 530.

The provisions as to the folding, wiring and sealing of the ballots by the election officers are directory in character, and mere irregularities will not prevent such ballots from being admissible in evidence in an election contest. *Ibid.*

The provisions of the statute with reference to the conduct of election officers upon whom duties are enjoined, are mandatory, but as to the particular methods of preserving the ballots they are directory only. *Ibid.*

Before the ballots are admissible as evidence in a case of contest it must be made to appear affirmatively by the contestants that they have been preserved in the method required by statute; and where it appears that the custodian of ballots was personally interested in the result of the election his interest is a proper matter of consideration in determining whether they have been properly preserved. *Doak v. Briggs*, 139–520, 116 N. W. 114.

SEC. **1143. Destruction of ballots—in case of contest.** The parties to any contested election shall have the right, in open session of the court or tribunal trying the contest, and in the presence of the officer having them in custody, to have the ballots opened, and all errors of the judges in counting or refusing to count ballots corrected by such court or tribunal. If at the expiration of six months no contest is pending, the officer having the ballots in custody, without opening the package in which they have been inclosed, shall, in the presence of two electors to be designated by the chairman of the board of supervisors, one each from the two leading political parties, or, in municipal elections, by the mayor of the city or town in which they are kept, destroy the same by burning; provided, however, that the ballots cast at a primary election shall, where no contest is pending, be destroyed ten days prior to the holding of the general election following the primary election at which said ballots were cast. If a contest is pending, the ballots shall be kept until the same is finally determined, and then so destroyed. [33 G. A., ch. 73, §1.] [24 G. A., ch. 33, § 25.]

SEC. 1145. Poll books returned and preserved.

Previous to the time when the poll books are directed to be destroyed they may be used by the board of supervisors in determining whether the number of signers to a petition of consent for the sale of intoxicating liquors is sufficient. *Cameron v. Fellows*, 109–534, 80 N. W. 567.

Where the poll books have not been destroyed by reason of the commencement of some legal proceeding involving their use in evidence, they are admissible in evidence after the expiration of the time when, in the usual course, they would have been destroyed. *Reed v. Jugenheimer*, 118–610, 92 N. W. 859.

In determining the sufficiency of signatures to a statement of consent for the sale of intoxicating liquors as provided in code § 2448, the poll books filed with the auditor and not those filed with the township, city or town clerk are to be considered. *DeBoard v. Williams*, 155–149, 134 N. W. 620.

In the case of a city election one of the poll books is to be delivered within two days by one of the judges to the county auditor and the other to the city clerk. *Jackman v. Board of Supervisors*, 156–620, 137 N. W. 906.

SEC. 1149. Canvass by board of supervisors.

The judges of election who have made defective returns may correct such returns so as to authorize the board of supervisors to canvass the same. *Rummel v. Dealy*, 112–503, 84 N. W. 526.

The board is required to make an abstract of the election returns as canvassed and received from the various precincts and such abstract should be published as a part of the proceedings of the board under the provisions of code § 441. *Clark v. Lake*, 146–109, 124 N. W. 866.

The proceedings of the county board of canvassers are the proceedings of the county board of supervisors and as such are to be published as provided under code § 441. *Index Ptg. Co. v. Board of Supervisors*, 150–411, 130 N. W. 401.

SEC. 1150. **Abstracts.** The abstract of the votes for each of the following classes shall be made on a different sheet:

1. Presidential electors;
2. Governor and lieutenant governor;
3. All state officers not otherwise provided for;
4. Representatives in congress;
5. Senators and representatives in the general assembly for the county alone;
6. Senators and representatives in the general assembly by districts comprising more than one county;
7. Judges of the district court;
8. County officers;
9. Senators in the congress of the United States.

[35 G. A., ch. 109, § 5.] [C. '73, §§ 636, 662; R. §§ 507, 538–9; C. '51, §§ 272, 304–5.]

SEC. 1151. **For United States senators, congressmen, electors and state and district officers.** Abstracts of all the votes cast for senators in the congress of the United States, congressmen, presidential electors, state or judicial district officers, shall be made in duplicate, and signed by the board of county canvassers, one of which shall be forwarded to the secretary of state, and the other filed by the county auditor. [35 G. A., ch. 109, § 6.] [C. '73, §§ 637, 662; R. §§ 507, 538–9; C. '51, §§ 272, 304–5.]

SEC. 1157. **Abstracts forwarded to secretary of state.** Within ten days after the election, one of the abstracts of votes for governor and lieutenant governor shall be sealed up by the auditor, indorsed "Abstract of votes for governor and lieutenant governor from ..... county (naming the county)," and be by him forwarded to the speaker of the house of representatives; those for presidential electors, senators and representatives in congress, and all other state and district officers, shall be separately sealed up, indorsed in like manner, with necessary changes, and

then all placed in one package and forwarded to the secretary of state. Abstracts of votes cast at special elections to fill vacancies in office shall be forwarded as soon as canvassed. [35 G. A., ch. 109, § 7.] [C. '73, §§ 645, 662; R. §§ 517, 518, 538–9; C. '51, §§ 283–4, 304–5.]

SEC. **1162. Canvass by state board including votes for United States senator.** The board of state canvassers shall open the abstracts for state senators and representatives transmitted to the secretary of state, and canvass the votes therein returned, at the time and in the manner of canvassing the state vote, or at such other time as they may fix, at least twenty days prior to the time fixed by law for the meeting of the next general assembly, and in case of a special election, within five days after the receipt of such abstracts, and shall immediately make out, certify, and transmit by mail to the county auditor of each county in the district, to be by him filed in his office, a copy of the abstract of such canvass required in the next section, which shall be recorded by him in the election book. The said board shall at the same time and in the same manner open the abstracts of the vote for senator in the congress of the United States, transmitted to the secretary of state, and canvass the vote therein returned. They shall make an abstract of said returns in duplicate and duly certify the same and deliver the same to the secretary of state, properly sealed, who shall retain the same in his office until the convening of the next general assembly, when he shall transmit one of said certified abstracts to the president of the senate and one to the speaker of the house of representatives, who shall open the same respectively and lay them before the respective houses when the same bodies shall be in session for the election of a senator in the congress of the United States. [35 G. A., ch. 109, § 8.] [C. '73, § 647.]

SEC. **1164. Record of canvass.** That section eleven hundred sixty-four of the code is hereby repealed and the following enacted in lieu thereof:

"The secretary of state shall file the abstracts when received and shall have the same bound in book form to be kept by him as a record of the result of said state election, to be known as the state election book." [32 G. A., ch. 52; C. '73, § 654; R. § 524; C. '51, § 290.]

CHAPTER 5.

OF PRESIDENTIAL ELECTORS.

SECTION **1173. Election of.** At the general election in the years of the presidential election, or at such other times as the congress of the United States may direct, there shall be elected by the electors of the state, one person from each congressional district into which the state is divided, as elector of president and vice president, and two from the state at large, no one of whom shall be a person holding the office of senator or representative in congress, or any office of trust or profit under the United States. Such election shall be conducted, and the canvass of the votes and the returns thereof made, in the same manner as for state officers and representatives in congress. [28 G. A., ch. 38, § 1; 16 G. A., ch. 23; C. '73, §§ 659, 660; R. §§ 535–6; C. '51, §§ 301–2.]

See U. S. const., art. II, § 1.

CHAPTER 6.

OF QUALIFICATION FOR OFFICE.

SECTION 1177. **Oath and bond—time in which to qualify.** The several officers, before entering upon their duties as such, shall qualify by taking the prescribed oath and by giving, when required, a bond, which qualification shall be perfected, unless otherwise specified, before noon of the second secular day in January of the first year of the term for which such officers were elected, but city and town officers shall so qualify within ten days after their election has been declared by the board of canvassers. When, on account of sickness or the inclement state of the weather or other unavoidable casualty, an officer has been prevented from qualifying within the prescribed time, he may do so within ten days after the time herein fixed, and in case of a contest, within ten days after the decision. [33 G. A., ch. 74, § 1.] [21 G. A., ch. 54, § 1; C. '73, §§ 670, 685, 686, 687; R. §§ 549, 564, 565; C. '51, §§ 319, 334, 335.]

One who is elected to an office, but does not qualify nor act, is not an officer *de facto*. *Herkimer v. Keeler*, 109–680, 81 N. W. 178.

SEC. 1177-a. **Bond.** When a bond is required by law to be given by or for any public officer, deputy or employe of such public officer, or by any person holding a fiduciary office or trust, administrator, executor, guardian, trustee, officer or employe of any public or private corporation or association, when not otherwise specifically provided, [it] shall be conditioned as provided in section eleven hundred eighty-three of the code. [29 G. A., ch. 54, § 1.]

These provisions relating to bonds given by public officers and others and providing for cancellation do not apply to a bond executed in compliance with the provision of the mulct law (code § 2448) and such bond cannot be canceled by the surety during any year as to which it has taken effect prior to the effort at cancellation. *Fidelity & Dep. Co. v. Jenness*, 138–725, 116 N. W. 709.

SEC. 1177-b. **Sureties relieved—how.** If any surety on said bond shall so elect, his liability thereon may be canceled at any time by giving thirty days' notice in writing to the person or persons authorized to approve said bond, and to the officer or person with whom the same is required to be filed or deposited by law, and refunding the premium paid, if any, less a pro rata part thereof for the time said bond shall have been in force. The liability and indemnity created by said bond shall extend to the date of cancellation as provided by chapter eleven, title six of the code. [29 G. A., ch. 54, § 2.]

SEC. 1177-c. **Contract or stipulation.** No contract, stipulation, or condition limiting the liability created by said bond shall be of any force or validity. [29 G. A., ch. 54, § 3.]

SEC. 1177-d. **Other bonds.** All other bonds, public or private, required to be given by law, when not otherwise specifically provided, shall be substantially conditioned as required in this act and subject to the limitations thereof. [29 G. A., ch. 54, § 4.]

SEC. 1182. **Bond not required.** The governor, lieutenant governor, members of the general assembly, judges of courts, township trustees, aldermen, and councilmen of cities and towns, are not required to give bond. [35 G. A., ch. 113, § 1.] [C. '73, § 674; R. §§ 550, 553; C. '51, § 323.]

[Enrolled bill, H. F. 58, ch. 113, 35 G. A., directs that § 1182 of the code be amended by striking out the words "county supervisors" in line six of said section. The section as it appears in the code consists of four lines only, the words "county supervisors" appearing in line two. The words have been dropped from line two. EDITOR.]

SEC. **1182-a. County supervisors shall give bond—amount of.** That all county supervisors in the state of Iowa shall be compelled to give bonds for the faithful performance of their duties in such sums as shall be approved by one of the district judges of their respective districts where the supervisor resides. The amount of such bond shall not be less than five thousand dollars, and shall be approved by and left in the custody of the clerk of the district court. [35 G. A., ch. 113, § 2.]

SEC. **1183. Bond required.**

The sureties of a county treasurer are liable for money in his hands at the expiration of his term which is subsequently converted by him before his successor comes into office and not paid over to such successor. *Plymouth County v. Kersebom*, 108–304, 79 N. W. 67.

Where the clerk of the courts in his official capacity receives a fund to hold for a claimant thereof and deposits it at interest with a bank, the claimant having established his right to the fund may recover against the clerk and his bondsmen the interest accrued on the fund. *Rhea v. Brewster*, 130–729, 107 N. W. 940.

There is nothing in this section requiring any action on the part of an officer in canceling a bond when notice of such cancellation is given by the surety under the provisions of code supp. § 1177-a. *Fidelity & Dep. Co. v. Jenness*, 138–725, 116 N. W. 709.

The liability of the county treasurer on his official bond may be released so far as the public funds are concerned by a curative act. *McSurely v. McGrew*, 140–163, 118 N. W. 415.

The provision as to bonds has no application to a special constable appointed to serve a search warrant. *Hoeg v. Pine*, 143–243, 121 N. W. 1019.

A bond executed in such case without authority is not valid as a common law bond. *Ibid.*

As it would be lawful for the county to receive a bond executed by a surety company only, without the county treasurer being a party to such bond, the fact that a surety company executes a bond to the county, contemplating the signature also of the county treasurer before delivery, and entrusts it to the county treasurer to be delivered when signed by him, such bond being accepted and acted upon by the county without the signature of the treasurer, estops the surety company from contending that such bond is not binding upon it. *Empire State Surety Co. v. Carroll County*, (C. C. A.) 194 Fed. 593.

Individual sureties on the treasurer's bond, purporting to cover the balance of his term and all funds coming into his hands as treasurer, cannot show by parol evidence a prior understanding that such bond was to be for a shorter term and for specific funds only. *Ibid.*

SEC. **1185. County and municipal officers—bond.** That section eleven hundred eighty-five of the code be and the same is hereby repealed, and the following enacted in lieu thereof:

"The bonds of the following county officers, viz.: treasurers, clerks of the district courts, county attorneys, recorders, coroners, surveyors, auditors, superintendents of schools, sheriffs, justices of the peace and constables, and city, town and township assessors, shall each be in a penal sum to be fixed by the board of supervisors; but those of treasurers, clerks of the district courts, county auditors, sheriffs and county attorneys shall not be in less sum than five thousand dollars each, and those of justices and constables, not less than five hundred dollars each. The bonds of all municipal officers who are required to give bonds shall each be in such penal sum as may be provided by law or as the council shall from time to time prescribe by ordinance, provided that the bonds of mayors shall not be in less sum than five hundred dollars each. If any county treasurer shall elect to furnish a bond with any association or incorporation as surety as provided in this chapter the reasonable cost of such bond shall be paid by the county where the bond is filed." [33 G. A., ch. 75, § 1.] [18 G. A., ch. 201, § 1; 17 G. A., ch. 20, § 2; 16 G. A., ch. 33, § 2; C. '73, §§ 390, 504, 514, 678; R. §§ 128, 135, 165, 556–7, 1084, 1132; C. '51, §§ 326–7.]

SEC. **1188. Form—approval.** That section eleven hundred eighty-eight of the code be and the same is hereby repealed, and the following enacted in lieu thereof:

"All official bonds shall run to the state, and be for the use and benefit of any corporation, public or private, or person injured or sustaining loss, with a right of action in the name of the state for its or his use. Those given by state and district officers shall be approved by the governor; those of county officers, township clerk and assessor, by the board of supervisors; those of other township officers by the township clerk; and those of city and town officers by the mayor, or as may be provided by ordinance, except that the bond of the mayor shall be approved by the council. All bonds shall be approved or disapproved within five days after their presentation for that purpose, and endorsed, in case of approval, to that effect and filed, and, unless otherwise provided by law, kept in the office of the approving officer." [33 G. A., ch. 75, § 2.] [C. '73, §§ 677, 680; R. §§ 555, 560; C. '51, §§ 325, 330.]

SEC. **1193. Accounting before approval.**

Where an officer has accounted, as required by law, and produced the funds and property with which he is chargeable, the settlement with him, in the absence of fraud or mistake, is conclusive, not only as against him, but also as against his sureties, and the burden is cast on the sureties to show his failure to produce funds and that such funds were misappropriated prior to the taking effect of the bond on which they are sureties. But the sureties are not estopped from showing that the defalcation for which they are sought to be charged in fact occurred prior to the making of such settlement, if at the time of settlement the funds were not in fact produced. *Independent School Dist. v. Hubbard*, 110–58, 81 N. W. 241.

SEC. **1195. Officer holding over.** When it is ascertained that the incumbent is entitled to hold over by reason of the nonelection of a successor, or for the neglect or refusal of the successor to qualify, he shall qualify anew, within the time provided by section twelve hundred seventy-five of the code. [33 G. A., ch. 76, § 1.] [C. '73, § 690; R. § 568; C. '51, § 338.]

SEC. **1196. Recording.** That section eleven hundred ninety-six of the code be and the same is hereby repealed, and the following enacted in lieu thereof:

"The auditor of each county shall keep in his office a book, to be known as the record book of officers' bonds, and record in said book the official bonds of all county officers, including justices of the peace, township clerks, constables, assessors and mayors filed in his county; and also keep an index to said book, in which, under the title of each office, shall be entered the names of each principal and his sureties, and the date of the filing of the bond. All bonds when recorded shall be returned to the officers charged by law with the custody thereof." [33 G. A., ch. 75, § 3.] [C. '73, § 683.]

CHAPTER 7.

OF CONTESTING ELECTIONS.

SECTION **1198. Grounds of contest.**

The provisions of this section are cumulative and not exclusive of those authorized by code § 4313 to test the right of an incumbent of a county office to hold the same. *Haverstock v. Aylesworth*, 113–378, 85 N. W. 634.

Voters at an election in a township for which defective returns are made may by action of mandamus compel the board of supervisors to canvass corrected returns. *Rummel v. Dealy*, 112–503, 84 N. W. 526.

The provisions as to election contests have no application to primary elections now provided for in code supp. §§ 1087-a1–1087-a35, as amended by 33 G. A., ch. 69. *Jones v. Fisher*, 156–582, 137 N. W. 940.

SEC. 1203. Statement of contest.

The provisions of this section as to what the statement of contest must show have reference to the paper filed by the contestant as the basis for his proceedings, and it is doubtful whether they apply to the answer filed by the incumbent. *Kelso v. Wright*, 110–560, 81 N. W. 805.

SEC. 1208. Procedure—powers of court.

The proceedings in contest cases should be assimilated to those in an action so far as practicable and the defendant, that is, the incumbent in such a contest, is not required, as a general rule, to give bond. *Kelso v. Wright*, 110–560, 81 N. W. 805.

The incumbent may meet the case made by the contestant by showing that the illegal votes counted for him were without prejudice because of the illegal votes cast for the contestant. *Ibid.*

SEC. 1217. Costs.

The payment of costs in an election contest in which the contestant is unsuccessful is to be determined by the rules applicable in criminal cases where the prosecution has failed. See code § 4318. *Hull v. Eby*, 123–257, 98 N. W. 774.

SEC. 1222. Appeal. The party against whom judgment is rendered may appeal within twenty days to the district court, but, if he be in possession of the office, such appeal will not supersede the execution of the judgment of the court as provided in the preceding section, unless he gives a bond, with security to be approved by the district judge, in a sum to be fixed by him, and which shall be at least double the probable compensation of such officer for six months, which bond shall be conditioned that he will prosecute his appeal without delay, and that, if the judgment appealed from be affirmed, he will pay over to the successful party all compensation received by him while in possession of said office after the judgment appealed from was rendered. The court shall hear the appeal in equity and determine anew all questions arising in the case. [28 G. A., ch. 39, § 1; C. '73, § 716.]

After the judges of contest have in fact announced their decision, the notice of appeal may be served although the decision has not yet been formally reduced to writing and filed with the proper authorities. *Mentzer v. Davis*, 109–528, 80 N. W. 557.

The statute does not require the giving of bond where no stay of proceedings is sought. *Ibid.*

Ballots should not be received in evidence unless they have been so kept as not to be exposed to the reach of unauthorized persons in such a way as to afford a reasonable possibility of their having been changed or tampered with. *Ibid.* And see notes to § 1142.

The fact that contestant claims that the returns for a certain township or precinct were not such as to entitle the votes from that precinct to be counted will not prevent a determination of the contest by a recounting of votes of which proper returns were made. *Brown v. Crosson*, 115–256, 88 N. W. 366.

The proceedings before the board are not binding on the court hearing the appeal. *Ibid.*

The supreme court does not on appeal in an election contest try the case *de novo*, but only upon errors assigned. *Spurrier v. McLennan*, 115–461, 88 N. W. 1062.

The appeal in an election contest is triable in the court in equity, and is therefore triable *de novo;* and an appeal to the supreme court from the decision of the district court is also to be heard *de novo. Murphy v. Lentz*, 131–328, 108 N. W. 530.

The officer obtaining possession of an office by judgment of a court in a contest cannot recover from the county the salary or compensation of which he has been deprived by the incumbency of the *de facto* officer who is ousted by the contest. *Brown v. Tama County*, 122–745, 98 N. W. 562.

These provisions as to appeal in contested election cases are applicable to special charter cities. *Sterne v. Off*, 149–96, 127 N. W. 1038.

SEC. 1250. Provisions applicable.

The provisions of this title as to contesting elections are applicable to elections in special charter cities. *Sterne v. Off*, 149–96, 127 N. W. 1038.

CHAPTER 8.

OF REMOVAL FROM OFFICE.

SECTION 1251. Causes.

Misconduct during a preceding term of office may be ground for the removal of a sheriff. *State v. Welsh*, 109–19, 79 N. W. 369.

The neglect of duty must be habitual or wilful to require removal. *Ibid.*

Voluntary intoxication while engaged in the performance of an official duty is such wilful misconduct as to be a ground for removal. *Ibid.*

To constitute wilful misconduct or maladministration something more is necessary than the mere breach of an official duty without intent to derive an advantage from such breach. The good faith and innocence of intentional wrong is a question upon which the officer to be removed is entitled to the verdict of a jury. *State v. Meek*, 148–671, 127 N. W. 1023.

As to removal of county attorney for failure to enforce the provisions relating to the mulct tax, see notes to code § 2446 in this supplement.

SEC. 1252. Complaint.

The power of suspension is not postponed to the filing of formal charges. The statute contemplates summary action and as preliminary thereto it requires no formalities and specifies no procedure. If the jurisdiction in fact exists at the time the order is made it is not essential that such facts be recited in the order. *Battey v. Wheeler*, 145–16, 123 N. W. 737.

SEC. 1256. Suspension—clerk or sheriff summarily.

To support the action of the court on charge in suspending an officer on his own motion for causes coming to his knowledge it is immaterial how such knowledge is acquired. *Battey v. Wheeler*, 145–16, 123 N. W. 737.

SEC. 1258-a. **Applicable to special charter cities.** The provisions of chapter eight of title six of the code are also made applicable to cities acting under special charters. [32 G. A., ch. 53.]

SEC. 1258-b. **By executive council—for what causes.** Members of the board of curators of the state historical society, members of the board of educational examiners appointed by the governor, the director of the weather and crop service, the fish and game warden, members of the commission of pharmacy, members of the board of dental examiners, members of the board of parole, dairy commissioner, custodian of public buildings and property, state veterinary surgeon, inspectors of products of petroleum, members of state board of veterinary medical examiners, inspectors of passenger boats, members of the board of optometry examiners, and members of the library commission appointed by the governor may be removed by a majority vote of the executive council, for any of the following causes:

1. For habitual or wilful neglect of duty;
2. For any disability preventing a proper discharge of the duties of his office;
3. For gross partiality;
4. For oppression;
5. For extortion;
6. For corruption;
7. For wilful misconduct or maladministration in office;
8. Upon conviction of felony;
9. For a failure to produce and fully account for all public funds and property in his hands at any inspection or settlement.

[33 G. A., ch. 77, § 1.]

SEC. 1258-c. **By district court or judge—for what causes.** Any county attorney, any member of the board of supervisors, sheriff, mayor, police officer, marshal or constable shall be removed from office by the

district court or judge upon charges made in writing and hearing thereunder for the following causes:

1. For wilful or habitual neglect or refusal to perform the duties of his office;
2. For wilful misconduct or maladministration in office;
3. For corruption;
4. For extortion;
5. Upon conviction of a felony;
6. For intoxication or upon conviction of being intoxicated.

[34 G. A., ch. 60, § 1; 33 G. A., ch. 78, § 1.]

In a particular case held that the showing of negligence or incompetency in the prosecution of certain criminal cases was not such as to require a removal of the county attorney from office. *State v. Hospers*, 147–712, 126 N. W. 818.

An officer such as described in this section is subject to removal for voluntary intoxication disabling him from performing the duties of his office. *State v. Henderson*, 145–657, 124 N. W. 767.

In a proceeding under this statute the defendant is not entitled to a jury trial. *Ibid.*

This action is not unconstitutional as violating the provisions of constitution, art. 3, § 20, relating to removals from office. The constitutional language expressly contemplates provisions by the legislature for removal from office of civil officers other than those expressly specified. *Ibid.*

SEC. **1258-d. Complaint or petition—who may file—county attorney to prosecute.** The complaint or petition shall be entitled in the name of the state of Iowa, and may be filed upon the relation of any five qualified electors of the county in which the person charged is an officer, the county attorney of such county, or the attorney-general, and shall be filed by the attorney-general when directed so to do by the governor. It shall be the duty of the county attorney to appear and prosecute this proceeding when the officer sought to be removed is one other than himself; and when the proceeding is brought to remove the county attorney, the court may appoint an attorney to appear in behalf of the state and prosecute such proceedings. [33 G. A., ch. 78, § 2.]

SEC. **1258-e. Governor to direct attorney-general to act—procedure.** It shall be the duty of the governor, whenever he has knowledge that reasonable grounds exist for the filing of complaint against any of the within-named officers, to direct the attorney-general to file the same against the offending party and prosecute said action. The accused shall be named as defendant and the petition, unless filed by the attorney-general, shall be verified. The petition shall state the charges against the accused and may be amended as in ordinary actions, and shall be filed in the office of the clerk of the district court of the county in which the person charged is an officer. The accused may at any time prior to the time fixed for hearing file in the office of the clerk of the district court his answer which shall be verified. [33 G. A., ch. 78, § 3.]

SEC. **1258-f. Trial judge—time of hearing.** If the person or persons filing the complaint or the defendant believe that the cause ought not to be heard before any of the judges in such district, he shall at the time he files his petition or answer in the office of the clerk of the district court, file a copy thereof in the office of the clerk of the supreme court, together with an application to the supreme court asking for the appointment of a judge outside of such district to hear the complaint. Upon the filing of the copy of said complaint, together with the application, in the office of the clerk of the supreme court, it shall be the duty of the chief justice of the supreme court, or in his absence or inability to act, any justice thereof, to forthwith issue a written commission directing a district judge in the state of Iowa outside of such district to proceed to the county in which the com-

plaint was filed and hear the same. Upon the receipt of such commission, said judge shall immediately make an order fixing a time for hearing, which shall be not less than ten nor more than twenty days thereafter, and forward said order to the clerk of the district court of the county in which the hearing is to be had. The clerk shall file said order and forthwith cause a copy thereof or a notice of the time and place of hearing to be served on the accused. If the cause is to be heard by a judge within the judicial district, upon the presentation of the petition, or a copy thereof, to such judge, he shall make the order fixing a time for the hearing as hereinbefore specified. [33 G. A., ch. 78, § 4.]

SEC. **1258-g. Summary proceeding—suspension from office—temporary vacancy—how filled.** The proceeding shall be summary in its nature and triable as an equitable action and may be heard either in vacation or term time, and shall be heard before the court or judge without the intervention of a jury. Upon the filing of the petition in the office of the clerk of the district court, and presentation of the same to the judge, the court or judge may suspend the accused from office, if in his judgment sufficient cause appear from the petition and affidavit or affidavits which may be presented in support of the charges contained therein. In case of suspension, as herein provided, the temporary vacancy shall be filled in the manner specified in section twelve hundred fifty-seven of the code. [33 G. A., ch. 78, § 5.]

SEC. **1258-h. Order of removal—vacancy—how filled.** If upon the hearing herein provided for, the district court or judge shall find that the accused should be removed from office, he shall make and enter of record an order of removal and the vacancy thus created shall be filled as provided in section twelve hundred seventy-two of the supplement to the code, 1907. [33 G. A., ch. 78, § 6.]

SEC. **1258-i. Appeal—procedure—bond shall not restore to office—expenses—costs.** In case of appeal to the supreme court, the cause shall be advanced and take precedence over all other causes upon the court calendar, and shall be heard at the next term after the appeal is taken, provided the abstract and arguments are filed in said court in time for said action to be heard. The supreme court shall fix the time of hearing and the filing of arguments. The taking of an appeal by the defendant and the filing of a supersedeas bond shall not operate to stay the proceedings of the district court or judge, or restore said defendant to office pending such appeal. If the final termination of such proceedings be favorable to any accused officer, said officer shall be allowed the reasonable and necessary expense, including a reasonable attorney fee to be fixed by the court or judge, he has incurred in making his defense, by the county if he be a county officer, or by the city or town in which he holds office if he be a mayor, police officer or marshal. If the action is instituted upon complaint of citizens as herein provided, and it appears to the court that there was no reasonable cause for filing the complaint, the costs may be taxed against the complaining parties. [33 G. A., ch. 78, § 7.]

SEC. **1258-j. Expenses of judge and reporter.** Any judge who is required to preside at a hearing, herein provided for, outside of his judicial district, shall be allowed his necessary and actual expenses incurred by reason of such hearing, and the necessary and actual expenses of his official reporter. An itemized sworn statement shall be made by such judge and official reporter showing the amount of expenses incurred, and the same shall be filed with the auditor of state. Thereupon, the auditor shall draw

his warrant upon the treasurer of state for such amount. [33 G. A., ch. 78, § 8.]

SEC. **1258-k. Acts in conflict repealed.** All acts and parts of acts in conflict with this act, in so far as they apply to the officers herein designated, are hereby repealed. [33 G. A., ch. 78, § 9.]

CHAPTER 10.

OF VACANCIES IN OFFICE.

SECTION 1265. Holding over.

Where the council of a city met at the time fixed by ordinance to elect a street commissioner and without doing so adjourned without date, held that the incumbent who thereafter gave bond as a holdover officer was entitled to the office as against a person elected at a subsequent meeting of the council. *State ex rel. v. Alexander*, 107–177, 77 N. W. 841.

SEC. 1266. What constitutes vacancy.

The office of justice of the peace becomes vacant if the incumbent becomes a resident of another state. *State ex rel. v. Hemsworth*, 112–1, 83 N. W. 728.

But mere temporary residence for a short time in another township does not operate to create a vacancy. *Ibid.*

In determining whether a vacancy exists in an office, a court is not confined to the statutory causes but may declare a vacancy if an office accepted is incompatible with one already held. While occupying one office, the acceptance of another incompatible with the first *ipso facto* vacates the first. *State v. Anderson*, 155–271, 136 N. W. 128.

The test of incompatibility is whether there is an inconsistency in the functions of the two offices. Therefore held that the acceptance of the office of justice of the peace in the township resulted in a vacancy in the office of mayor inasmuch as that to some extent the jurisdiction of the two officers is coördinate. *Ibid.*

SEC. **1272. Filling vacancies.** Vacancies in the offices of clerk and reporter of the supreme court shall be filled by the supreme court; in all other state offices, judges of courts of record, officers elected in districts larger than a county, except state senators and representatives, officers, trustees, inspectors, and members of all boards or commissions, officers chosen by the general assembly if the legislature is not in session, and all persons filling any position of trust or profit in the state, by the governor, except when some other method is specially provided, and he shall issue the proper commission to the appointee; in county offices, including those of justices of the peace and constables, by the board of supervisors; and in the membership of such board, by the clerk of the district court, auditor and recorder; and when by death, or otherwise, a vacancy occurs in the office of the clerk of the district court, said court, or judge thereof, may, by order entered of record in the court journal, appoint a suitable and proper person to act as clerk until the vacancy shall be filled in the manner provided by law; in all other township offices, including trustees, by the trustees, but where the offices of the three trustees are all vacant, the county auditor shall appoint; in the office of councilman or mayor of any city, and all other elective city offices, the council may appoint any qualified elector to fill such vacancy, who shall qualify in the same manner as persons regularly elected to fill such office, and shall hold such office until the qualification of the officer elected to fill such vacancy, who shall be elected at the next regular municipal election; in all city appointive offices, unless otherwise provided by law, in the same manner as the original appointment was made; in all town offices, by the council at its first regular meeting after

such vacancy occurs, or as soon thereafter as practicable. [30 G. A., ch. 41; 24 G. A., ch. 1, § 1; 23 G. A., ch. 3, § 2; 22 G. A., ch. 1, § 1; 19 G. A., ch. 124, § 1; C. '73, §§ 390, 530, 783, 794–5; R. §§ 664, 1101; C. '51, § 436.]

See const., art. IV, § 10.

The board of supervisors alone has authority to fill a vacancy in the office of clerk of the district court. The authority of the court or a judge is to appoint a suitable person to act as clerk until the vacancy shall be so filled. One appointed by the court is not entitled to hold until the next general election and until his successor is elected and qualified. *State v. Brown*, 144–739, 123 N. W. 779.

SEC. 1275. Qualification.

Where there is an election of a person disqualified to hold the office, who therefore is unable to qualify, the vacancy is for failure to qualify and not for failure to elect, and the preceding officer is entitled to qualify within ten days after the failure of the newly elected officer to qualify. *State ex rel. v. Cahill*, 131–155, 105 N. W. 691.

The failure to elect within the statutory provision as to the vacancy refers to a failure to hold an election or a failure to make a choice as provided by law. *Ibid.*

CHAPTER 10-A.

OF THE DIVULGING OF CONTENTS OF SEALED BIDS BY PUBLIC OFFICERS.

SECTION **1279-a. Prohibited—damages—liability on bond.** No public officer or deputy thereof, if any, shall directly or indirectly or in any manner whatsoever, at any other time or in any other manner than as provided by law, open any sealed bid or convey or divulge to any person any part of the contents of a sealed bid, on any proposed contract concerning which a sealed bid is required or permitted by law. A violation of the provisions of this section shall, in addition to criminal liability, render the violator liable, personally and on his bond, if any, to liquidated damages in the sum of ten hundred dollars for each violation, to inure to, and be collected by the state, county, city, town, school district or other municipal corporation of which the violator is an officer or deputy. [35 G. A., ch. 15, § 1.]

SEC. **1279-b. Witnesses—not privileged from testifying—immunity.** In any action in any court wherein the matter of a violation of the preceding section is at issue, no witness shall be privileged from testifying to any matter or from producing any books, papers, or letters, on the ground that the same might or would tend to render such witness criminally liable, but such witness shall not be prosecuted for any offense whatever growing out of or connected with the matters and things so testified to or produced by him, provided such witness shall not be exempt from prosecution for perjury committed in so testifying. [35 G. A., ch. 15, § 2.]

CHAPTER 10-B.

OF LIABILITY ON CONTRACTS WITH THE STATE, OR ANY COUNTY, TOWN OR MUNICIPAL CORPORATION.

SECTION **1279-c. Provision deemed to be a part of every contract—forfeit.** The following provision shall be deemed and held to be a part of every contract hereafter entered into by any person, firm or private corporation with the state of Iowa, or with any county, city, town, city acting

under special charter, cities acting under commission form of government, school corporation or with any municipal corporation, now or hereafter created, whether said provision be inserted in such contract or not, to wit:

The party to whom this contract has been awarded, hereby represents and guarantees that he has not, nor has any other person for or in his behalf, directly or indirectly, entered into any arrangement or agreement with any other bidder, or with any public officer, whereby he has paid or is to pay to any other bidder or public officer any sum of money or anything of value whatever in order to obtain this contract; and that he has not, nor has another person, for or in his behalf, directly or indirectly, entered into any agreement or arrangement with any other person, firm, corporation or association which tends to or does lessen or destroy free competition in the letting of this contract and agrees that the establishment of the falsity of these representations and guaranties, or any of them,[1] and he hereby agrees that in case it hereafter be established that such representations or guaranties, or any of them, are false, he will forfeit and pay not less than five per cent. of the contract price but in no event be less than three hundred dollars, as liquidated damages to the other contracting party. [35 G. A., ch. 21, § 1.]

[1This clause seems incomplete, but is the precise language of the enrolled bill. EDITOR.]

SEC. **1279-d. Witnesses not privileged from testifying—immunity.** In any action in any court wherein the falsity of such representations and guaranties are at issue, no witness shall be privileged from testifying to any matter or from producing any books, papers, or letters, on the ground that the same might or would tend to render such witness criminally liable, but such witness shall not be prosecuted for any offense whatever growing out of or connected with the matters and things so testified to or produced by him, provided such witness shall not be exempt from prosecution for perjury committed in so testifying. [35 G. A., ch. 21, § 2.]

CHAPTER 11.

OF ADDITIONAL SECURITY AND THE DISCHARGE OF SURETIES.

SECTIONS **1280-1288.**

[For provisions relating to the release of sureties from an obligation, and manner of procedure, as enacted by 29 G. A., ch. 54, §§ 1, 2, 3 and 4, and made amendatory of this chapter, see §§ 1177-a, 1177-b, 1177-c and 1177-d, *supra.*]

CHAPTER 12.

OF GENERAL PROVISIONS AS TO COMPENSATION.

SECTION **1290-a. Appraisers—compensation of generally.** That the compensation of appraisers appointed to appraise property belonging to any estate as a basis for the assessment of the collateral inheritance tax and in other cases where the compensation of appraisers is not now fixed by statute, shall be two dollars per day for each appraiser and five cents a mile for the distance traveled in going to and returning from the place of appraisement, to be paid out of the property appraised or by the owner or owners thereof. [29 G. A., ch. 55, § 1.]

SEC. **1293. Publication of legal notices.** The compensation, when not otherwise fixed, for the publication in a newspaper of any notice, order, citation or other publication required or allowed by law, shall not exceed one dollar for one insertion, and fifty cents for each subsequent insertion, for each ten lines of brevier type, or its equivalent, in a column not less than two and one-sixth inches in width. For publication of the official ballot, forty cents for each ten lines of brevier or its equivalent may be charged, the space necessarily occupied thereby being measured as if it were in brevier type set solid. In no case shall the cost of publishing the official ballot exceed forty dollars for each of the two papers in which it shall be published, except in presidential years, when it shall not exceed the sum of seventy dollars for each of said papers. Weekly publications may be made in a daily or weekly newspaper. The plaintiff or executor, in all publications concerning actions, executions and estates, may designate the newspaper in which such publication shall be made. If any newspaper refuse to make publication thereof, when copy therefor, with the cost or security for payment of the cost, is tendered, such publication may be made in some other newspaper of general circulation at or nearest to the county seat, with the same effect as if made in the newspaper so refusing. [31 G. A., ch. 47; 25 G. A., ch. 105; C. '73, § 3832.]

SEC. **1293-a. Succeeding publications.** That in the publication of notices as provided for by this act, when the same shall be published in any paper published oftener than once each week, the succeeding publications of such notice shall be on the same day of the week as the first publication. [31 G. A., ch. 9, § 32; 30 G. A., ch. 2, § 14.]

[The 31 G. A., ch. 9, § 32, enacted identically the same section as the one shown above, except that the words "once a week" instead of "once each week" are used therein, but it was not deemed best to insert both.]

SEC. 1297. Taking higher fees.

While the compensation of a public officer cannot be affected by contract, yet, if a city provides for a police matron without regard to the statutory provisions as to such office, it may fix the compensation by contract. *Daniels v. Des Moines*, 108–484, 79 N. W. 269.

SEC. 1298. Fees paid in advance.

A witness for the defendant in a criminal prosecution is not bound to attend without prepayment of fees, unless the subpoena is issued under the order of the judge, as provided in this section. *State v. Keenan*, 111–286, 82 N. W. 792.

SEC. 1299. Fee bill.

The unsuccessful party to a suit is primarily liable for the costs, and the successful party has no interest in and no right to collect any portion of such costs, except such as have been advanced by him. *Hidy v. Hanson*, 116–8, 89 N. W. 36.

A party having paid costs may cause the issuance of a fee bill although it includes other costs to which the party is not entitled. *Charles City v. Surety Trust & Sav. Bank*, 143–324, 120 N. W. 114.

SEC. 1300. Fees payable by state or county.

Where, by providing a salary for police judge and marshal the city becomes entitled to their fees in criminal cases, it may recover such fees in an action against the county. *Des Moines v. Polk County*, 107–525, 78 N. W. 249.

A claim or demand against the county on an unliquidated claim must be in writing. *Escher v. Carroll County*, 146–738, 125 N. W. 810.

SEC. 1302. Report of forfeited bonds.

This section does not confer any authority on the board with reference to fines, penalties and forfeitures but they are paid to the county treasurer. *Gunn v. Mahaska County*, 155–527, 136 N. W. 929.

TITLE VII.

OF THE REVENUE.

CHAPTER 1.

OF THE ASSESSMENT OF TAXES.

SECTION **1303. Levy—amount of.** The board of supervisors of each county shall, annually, at its September session, levy the following taxes upon the assessed value of the taxable property in the county:

1. For state revenue, such rate of tax as shall be fixed by the executive council as hereinafter provided;

2. For ordinary county revenue, not more than six mills on a dollar in counties having a population of less than twenty thousand, and in counties having a population of twenty thousand or more, four mills, with a poll tax in either case of fifty cents on each male resident over twenty-one years of age. But in any county in which the levy is limited to four mills the board of supervisors may, at any general election, submit the question of increasing such levy to six mills or less to a vote of the electors, and if such proposition is adopted the board of supervisors may make the next general levy at the proposed rate; provided, however, that in any county where, by reason of extraordinary or unusual litigation the rates herein fixed for ordinary county revenue are found to be insufficient to pay the same, the board of supervisors may create an additional fund to be known as court expense fund, and may levy for such fund such rate of taxes as shall be necessary to pay all court expenses chargeable to the county. Such fund shall be used for no other purpose, and the levy therefor shall be dispensed with when the authorized levy for the ordinary county revenue is sufficient to meet the necessary county expenditures including such court expenses. Provided, further, that the levy for the purpose of providing an additional fund shall not exceed three mills on a dollar;

3. For support of schools, not less than one nor more than three mills on a dollar;

4. For making and repairing bridges, not more than five mills on a dollar; but such tax shall not be levied upon any property assessable within the limits of any city of the first class, and none of such bridge tax shall be used in the construction or repair of bridges within the limits of such city;

5. For the grading and building of roads two mills on a dollar, to be known as the county road building fund, but such tax shall not be levied upon any property assessable within the limits of any city or incorporated town and none of such road tax shall be used in the grading or building of any roads within the limits of such cities or incorporated towns. [35 G. A., ch. 122, § 21; 34 G. A., ch. 24, § 3; 33 G. A., ch. 79, § 1; 33 G. A., ch. 80, § 1.] [30 G. A., ch. 42; 25 G. A., ch. 114; 22 G. A., ch. 43; 20 G. A., ch. 182; 18 G. A., ch. 13; 15 G. A., ch. 28; C. '73, § 796; R. § 710; C. '51, § 454.]

There can be no taxation except as authorized by statute or constitutional provision, and the taxing power can be exercised only in accordance with the forms of law. *Chicago, M. & St. P. R. Co. v. Phillips*, 111–377, 82 N. W. 787.

Provisions for levying a mulct tax on sellers of intoxicating liquor at the September session of the board of supervisors, held directory only and that a levy in December was valid. *Hubbell v. Polk County*, 106–618, 76 N. W. 854.

The territory of the county outside of a city of the first class embraced therein constitutes the county for bridge purposes and while indebtedness for bridges erected outside of the limits of such city may be considered a county indebtedness, still the property within the city is not taxable for the payment of funding bonds issued on account of the indebtedness for county bridges. *Slutts v. Dana*, 138–244, 115 N. W. 1115.

The board of supervisors has no authority to levy a general bridge tax on property within the limits of a special charter city which has adopted the commission form of government. *Keokuk v. Kennedy*, 156–680, 137 N. W. 914.

SEC. 1304. **Exemptions.** The following classes of property are not to be taxed:

1. The property of the United States and this state, including university, agricultural college and school lands; the property of a county, township, city, town or school district or militia company, when devoted entirely to public use and not held for pecuniary profit; municipal, school, and drainage bonds or certificates hereafter issued; public grounds, including all places for the burial of the dead, crematoriums, the land on which they are built and appurtenant thereto not exceeding one acre, so long as no dividends or profits are derived therefrom; fire engines and all implements for extinguishing fires, with the grounds used exclusively for their buildings and meetings of the fire companies; no deduction from the assessment of the stock of any bank or trust company shall be permitted because of such bank or trust company holding such bonds and certificates as may be exempted above;

2. All grounds and buildings used for public libraries, including libraries owned and kept up by private individuals, associations or corporations for public use and not for private profit, for cemetery associations and societies, and for literary, scientific, charitable, benevolent, agricultural and religious institutions, and societies devoted solely to the appropriate objects of these institutions, not exceeding one hundred sixty acres in extent, and not leased or otherwise used with a view to pecuniary profit, but all deeds or leases by which such property is held shall be filed for record before the property above described shall be omitted from the assessment; the books, papers and apparatus belonging to the above institutions, used solely for the purposes above contemplated, and the like property of students in any such institution used for their education; moneys and credits belonging exclusively to such institutions, and devoted solely to sustaining them, but not exceeding in amount or income the amount prescribed by their charters or articles of incorporation; real estate to the extent of not to exceed one hundred sixty acres in any civil township, owned by any educational institution of this state as a part of its endowment fund, shall not be taxed;

3. The farm produce of the person assessed, harvested by him, and all wool shorn from his sheep, within one year previous to the listing; all poultry, ten stands of bees, all swine and sheep under six months of age; and all other domestic animals under one year of age not hereinbefore exempt; obligations for rent not yet due, in the hands of the original payees, private libraries, professional libraries to the actual value of three hundred dollars; family pictures; household furniture to the actual value of three hundred dollars and kitchen furniture; beds and bedding requisite

for each family; all wearing apparel in actual use; and all food provided for the family; but the exemptions allowed in this subdivision shall not be held to apply to hotels and boarding houses except so far as said exempted classes of property shall be for the actual use of the family managing the same;

4. The polls or estates, or both, of persons who by reason of age or infirmity may in the opinion of the assessor be unable to contribute to the public revenue, such opinion and the fact on which it is based being in all cases entered on the assessment roll, and subject to reversal by the board of review;

5. The farming utensils of any person who makes his livelihood by farming, the team, wagon and harness of the teamster or drayman who makes his living by their use in hauling for others, and the tools of any mechanic, not in any case to exceed three hundred dollars in actual value;

6. Government lands entered and located, or lands purchased from this state, for the year in which the entry, location or purchase is made;

7. The property, not to exceed twelve hundred dollars in actual value, of any honorably discharged union soldier or sailor of the Mexican War or of the War of the Rebellion or of the widow remaining unmarried of such soldier or sailor. It shall be the duty of every assessor annually to make a list of such soldiers, sailors [and] widows, and to return such list to the county auditor upon forms to be furnished by such auditor for that purpose; but the failure on the part of any assessor so to do shall not affect the validity of any exemption. All soldiers, sailors or widows thereof referred to herein shall receive a reduction of twelve hundred dollars, the same to be made from the homestead of such soldier or widow, if he or she shall so own a homestead of the value of such exemption, otherwise out of such property as shall be designated and owned by the soldier, sailor or widow, such designation to be made either to the assessor or by writing filed with the county auditor on or before July first, each year;

8. The accumulations and funds held or possessed by fraternal beneficiary associations for the purposes of paying the benefits contemplated by section eighteen hundred twenty-two of the code, or for the payment of the expenses of such association. [35 G. A., ch. 117, § 1; 35 G. A., ch. 116, § 1; 35 G. A., ch. 115, § 1; 34 G. A., ch. 61, § 1; 34 G. A., ch. 62, § 1; 33 G. A., ch. 81, §§ 1, 2.] [32 G. A., ch. 54; 31 G. A., ch. 48; 29 G. A., ch. 56, § 1; 26 G. A., ch. 29; 21 G. A., ch. 97; C. '73, § 797; R. § 711; C. '51, § 455.]

[Subdivision 7 of the above is the enactment of ch. 62, 34 G. A., as amended by ch. 115, 35 G. A., which has been treated here as an amendment, although the prefatory clause of said chapter 62 reads "That subdivision seven of § 1304, supplement to the code, 1907, be and the same is hereby repealed and the following enacted in lieu thereof." EDITOR.]

In general: A general exemption from taxation, not embodied in a contract, is not irrepealable even though property has been acquired or expenses incurred in reliance thereon. *Miller v. Hageman*, 114–195, 86 N. W. 281.

One who claims an exemption must be able to point out some statute or rule of law which sustains such exemption. *In re Assessment of Boyd*, 138–583, 116 N. W. 700.

Exemptions from taxation should be expressed in unmistakable terms. They are not to be inferred or implied from doubtful or ambiguous language. The presumption is that all property is taxable. *Morril v. Bentley*, 150–677, 130 N. W. 734.

Par. 1: The fact that the property of a county is exempt from general taxation does not exempt it from liability for a special assessment for street improvements in a city. *Edwards & Walsh Const. Co. v. Jasper County*, 117–365, 90 N. W. 1006.

Land which has been acquired by condemnation by a school district for a schoolhouse site cannot be sold at tax sale for

taxes already due thereon at the time of condemnation. *Independent School Dist. v. Hewitt*, 105–663, 75 N. W. 497.

The unsold lots of a cemetery held and owned by a private individual for sale at a profit are not exempt from taxation. *Simcoke v. Sayre*, 148–132, 126 N. W. 816.

Par. 2: To be entitled to an exemption as a charitable, benevolent or religious institution it must appear that the body is such institution and that the property is devoted solely to the appropriate objects of such institution. The presumption is in favor of taxation and against exemption. *Lacy v. Davis*, 112–106, 83 N. W. 784.

The exemption as to grounds and buildings used for literary and scientific institutions and societies devoted solely to the appropriate objects of these institutions, and not leased or otherwise used with a view to pecuniary profit, does not cover the case of buildings and apparatus employed in conducting an educational institution for private profit. *In re Dille*, 119–575, 93 N. W. 571.

The exemption of the property of religious, charitable and educational institutions from taxation does not create an exemption from a business or license tax. *Iowa Mut. Tornado Ins. Assn. v. Gilbertson*, 129–658, 106 N. W. 153.

A public library privately endowed is an educational institution within the contemplation of this section as amended by 32 G. A., ch. 54, and the exemption of real estate owned by such instituion as part of its endowment fund extends to land situated in another county. *Webster City v. Wright County*, 144–502, 123 N. W. 193.

While it seems that a local Masonic lodge is not an institution whose grounds and buildings are devoted solely to the appropriate objects of charitable institutions, nevertheless held that under the somewhat different language used in stating the exemption from the collateral inheritance tax (code § 1467) a devise to such a lodge was exempt from such tax. *Morrow v. Smith*, 145–514, 124 N. W. 316.

Real estate owned by an educational institution as part of its endowment fund is exempted from taxation. The statute comprehends equitable as well as legal ownership. *Ellsworth College v. Emmet County*, 156–52, 135 N. W. 594.

In the application of the statute as to exemptions the doctrine of equitable conversion may be resorted to in order to ascertain the nature of the equitable ownership of the beneficiary under a will. *Ibid.*

Where an educational institution became the equitable owner of lands subject to a devise for the benefit of a home for the aged subsequently to be created, held that to the extent of such devise, the educational institution was taxable on such land. *Ibid.*

The substitute for paragraph 2 of this section (34 G. A., ch. 61) has no application to a devise already made. *Ibid.*

Par. 6: While it is true that when the full equitable title to public land has passed from the government, even prior to the issue of a patent conveying the legal title, the land is subject to taxation; yet until such equitable title has passed and while the land is still subject to the control of the government, it is beyond the reach of the state's power to tax. *Hussman v. Durham*, 165 U. S. 144.

Lands claimed under a railroad grant may by statute be made taxable from the time such lands are earned and selected. *Chicago, M. & St. P. R. Co. v. Hemenway*, 117–598, 91 N. W. 910.

Land which is part of the public domain at the time of assessment is not subject to taxation. *Davis v. Magoun*, 109–308, 80 N. W. 423.

But where a homestead entry was canceled only because in supposed conflict with a railway grant, and was subsequently established, held that such cancellation did not prevent the land from being taxable to the claimant. *Ibid.*

From the date of the location of a land warrant the land located ceases to be a part of the general domain and the legal title is thereafter held by the government in the nature of a trust for the use of a person showing himself entitled to the benefit of such location. The fact that patent is suspended during some investigation or controversy concerning the rights of the person claiming such patent does not necessarily prevent the application of this rule. *Herrick v. Sargent*, 140–590, 117 N. W. 751.

Exemption from taxation of land located under a soldier's warrant is a personal privilege not passing with the right of entry to the assignee of such warrant. *Ibid.*

An equitable owner with a right to a patent from the government is taxable for the land in which he has such right. *Bishop v. O'Brien County*, 144–567, 123 N. W. 351.

Although the swamp land grant is *in praesenti*, passing title as of its date but requiring identification of the lands to render the title perfect, the doctrine of relation back to the date of the grant does not of itself validate tax sales of such land during the time the title is in either the government or the county. Until the United States issues its patent to the state neither the state nor county could subject such land to taxation unless it appeared that the equitable title had passed to the state or county and from the state or county to a purchaser. *Hart v. Delphey*, 157–—, 136 N. W. 702.

Par. 7: The provision of § 876 of the code of '73 that where the homestead is listed separately it shall be liable only for the taxes thereon, is not retained in

the present code. *Bitzer v. Becke*, 120–66, 94 N. W. 287.

This section as amended does not exempt from taxation property purchased with pension money. *Beers v. Langenfeld*, 149–581, 128 N. W. 847.

Further as to pension money, see notes to code § 1309 in this supplement.

It is not incompetent in the first instance for a soldier who claims an exemption on that account to show that his wife has no property or property less than $5,000 in value. *White v. Marion*, 139–479, 117 N. W. 254.

It is the fact of the ownership of property of the actual value of $5,000 which defeats the exemption. It is immaterial whether or not such property appears on the assessment rolls or is subject to taxation. *Ibid.*

The exemption is not defeated by a joint ownership by husband and wife of property of the value of $5,000. *Ibid.*

SEC. **1304-a. Beet sugar industry—limited exemption.** That the following named property is exempt from taxation until January first, nineteen hundred seventeen, viz.: All mills, buildings, machinery, tools, apparatus and appliances for the manufacture of sugar, the land upon which said mill is situated, not to exceed ten acres, the capital invested in the business of the manufacture of sugar from beets raised in the state of Iowa, all personal property used in connection with said business, also the stock, shares, and certificates of any company or corporation actually engaged in said business. [32 G. A., ch. 55; 28 G. A., ch. 40, § 1.]

SEC. **1305. Valuation.** All property subject to taxation shall be valued at its actual value, which shall be entered opposite each item, and shall be assessed at twenty-five per cent. of such actual value. Such assessed value shall be taken and considered as the taxable value of such property, upon which the levy shall be made. Actual value of property as used in this chapter shall mean its value in the market in the ordinary course of trade. This section shall not apply to special charter cities. [31 G. A., ch. 33, § 3; 27 G. A., ch. 30, § 1.]

As to whether the provision that property shall be valued for purposes of taxation at its actual value and assessed at twenty-five per cent. of such value is applicable to railroad property in special charter cities, the court was equally divided. *Chicago & N. W. R. Co. v. Cedar Rapids*, 127–678, 103 N. W. 997; *Chicago, M. & St. P. R. Co. v. Davenport*, 127–677, 103 N. W. 996.

The constitutional limitation as to municipal indebtedness to five per cent. of the actual value of property subject to taxation is not affected by the provision that property is to be assessed at twenty-five per cent. of the actual value at which it is listed. *Halsey v. Belle Plaine*, 128–467, 104 N. W. 494.

This provision held not applicable where the holder of bonds issued prior to the adoption of such provision sought by mandamus to compel the levy of a tax in the payment of such bonds in accordance with the provisions in force when the bonds were issued. *Ft. Madison v. Ft. Madison Water Co.*, 134 Fed. 214.

In determining the limitation of municipal indebtedness under constitution, art. XI, § 3, the actual value, and not the value of the property for assessment, is to be taken into account. *Nash v. Council Bluffs*, (C. C.) 174 Fed. 182.

The only object in entering the total value of the property listed is to facilitate computation and assure the accuracy of the taxable value at which property is listed and on which taxes are to be levied. *In re Appeal of Seaman*, 135–543, 113 N. W. 354.

Even though property is returned for taxation at a full cash value, the property owner is not entitled to have the collection of the tax enjoined in equity. His remedy is by securing correction of the assessment. *Reed v. Cedar Rapids*, 138–366, 116 N. W. 140.

SEC. **1306. Levy and indebtedness not to be increased—repealed.** [28 G. A., ch. 41, § 1.]

[See § 1306-a.]

SEC. **1306-a. Repeal.** That section thirteen hundred and six of the code be and is hereby repealed, and the following enacted in lieu thereof: [28 G. A., ch. 41, § 1.]

SEC. **1306-b. Amount of indebtedness limited.** That section thirteen hundred and six-b of the supplement to the code [1902] and chapter forty-three of the acts of the thirtieth general assembly be and the same are hereby repealed, and the following enacted in lieu thereof:

"No county or other political or municipal corporation shall be allowed to become indebted in any manner or for any purpose to an amount exceeding in the aggregate the amount of one and one-fourth per centum of the actual value of the taxable property within such county or corporation, except that cities and incorporated towns may for the purpose of purchasing, erecting, extending or maintaining and operating waterworks, electric light and power plants, gasworks and heating plants or of building and constructing sewers, incur an indebtedness, not exceeding in the aggregate, added to all other indebtedness, five per centum of the actual value of the taxable property within such city or incorporated town. The amount of such taxable property shall be ascertained by the last state and county tax list previous to the incurring of such indebtedness." [33 G. A., ch. 82, § 1.] [31 G. A., ch. 49, § 1; 30 G. A., ch. 43; 28 G. A., ch. 41, § 2.]

The debt limit provision of the constitution has relation only to the actual value of property as the same may be found and returned by the assessor for taxation purposes, and an indebtedness which does not exceed five per cent. of the value of the property subject to taxation valued at its actual value is not unconstitutional. The constitutional limitation refers to the actual value, and not to the taxable value as prescribed by code § 1305, providing that property is to be assessed at twenty-five per cent. of the actual value at which it is listed. *Halsey v. Belle Plaine*, 128–467, 104 N. W. 494.

This section is not applicable to cities under special charter there being no express provision in the statute making it applicable to such cities. *Reed v. Cedar Rapids*, 136–191, 113 N. W. 773.

In the absence of any statutory provision having express reference to special charter cities, the limitation of their indebtedness is that found in constitution, art. XI, § 3. *Ibid.*

SEC. **1306-c. Procedure to exceed limitation in cities and towns.** Provided; that before such indebtedness can be contracted in excess of one and one-quarter per centum of the actual value of the taxable property ascertained as above provided in this act, a petition signed by a majority of the qualified electors of such city or town shall be filed with the council of such city or town, asking that an election shall be called, stating the purposes for which the money is to be used and that the necessary waterworks, electric light and power plants, gasworks, heating plants, or sewers, cannot be purchased, erected, built or furnished within the limit of one and one-quarter per centum of the valuation. And provided that in cities having a population of more than ten thousand, the petition need not be signed by more than two hundred qualified electors. [31 G. A., ch. 49, § 2.]

SEC. **1306-d. Election called—notice—ballot.** The council of such city or town on the receipt of such petition shall at the next regular meeting call such election, fixing the time and place thereof, and give four weeks' notice thereof, by publication once each week, in some newspaper published in the said town or city, or if none be published there, then in the next nearest town or city in the county. At such election the ballots shall be prepared, and used in substantially the following form:

For the issuance of bonds in the sum of $———— for waterworks, electric light and power plants, gasworks, heating plants, or sewer purposes, ☐

Against the issuance of bonds in the sum of $———— for waterworks, electric light and power plants, gasworks, heating plants, or sewer purposes, ☐

[31 G. A., ch. 49, § 3; 31 G. A., ch. 9, § 31; 30 G. A., ch. 43, § 3.]

[§ 3, ch. 43, acts of 30 G. A., was amended by § 31, ch. 9, 31 G. A., but ch. 43, acts of 30 G. A., was repealed by ch. 49, 31 G. A., but as § 3 of ch. 43, 30 G. A., was the same as the above section the amendment is shown here. The amendment was by adding the words, "by publication once each week," after the word "thereof," in line 4.]

SEC. **1306-e. Issuance of bonds.** If a majority[1] of all the electors voting at such election, provided said affirmative vote be as large as a majority of all the votes cast at the last preceding municipal election, vote in favor of the issuance of such bonds, the council of such city or town shall issue the same as provided by section seven hundred twenty-six of the code and make provision for the payment of the bonds and interest thereon as provided by title five of the code. [35 G. A., ch. 118, § 1; 33 G. A., ch. 83, § 1.] [31 G. A., ch. 49, § 4.]

[[1]35 G. A., by ch. 118 directed that ch. 83, 33 G. A., be amended by striking all therefrom following the word "majority" down to and including the word "more." The intention seems to have been to strike out all down to and including the word "more" where it appears the second time, and such has been done here. EDITOR.]

SEC. **1306-e1. Applicable to certain cities.** This act shall be held to apply to any city or town whose qualified electors have heretofore authorized the issuance of such bonds by such election. [33 G. A., ch. 83, § 2.]

SEC. **1306-f. How construed.** Nothing in this act contained shall be construed to repeal the provisions of chapter one hundred fourteen of the acts of the thirtieth general assembly nor shall anything in this act contained be construed as being applicable to bonds issued under section seven hundred forty-five of the supplement to the code. [31 G. A., ch. 49, § 5.]

SEC. **1308. What taxable—lands of other counties.**

Animals held with a view of traffic therein, as in merchandise, are assessable under the provisions of code § 1318, providing for the taxation of merchants; otherwise, although bought with the intention of owning them for a limited time only, they should be taxed to the owner as other personal property. *Jewell v. Board of Trustees*, 113–47, 84 N. W. 973.

Money in the hands of an executor or administrator is not exempt from taxation simply for the reason it is not being loaned or invested, and even though the administration is ancillary, the money and property of the estate located in this state is subject to taxation, unless at least taxes thereon have been paid in the state of principal administration. *Dorris v. Miller*, 105–564, 75 N. W. 482.

Shares of corporation stocks are not by this section included in "credits." *Morril v. Bentley*, 150–677, 130 N. W. 734.

It is the general rule that all property is subject to taxation except such as has been specifically exempted therefrom by the legislature. *Beers v. Langenfeld*, 149–581, 128 N. W. 847.

SEC. **1309. Credits defined.**

Credits: The word "due" as employed in this section does not have reference to the time of payment or fulfillment of an obligation, but is synonymous with "owing." *Tally v. Brown*, 146–360, 125 N. W. 248.

An unadjusted claim under a fire insurance policy is subject to assessment. *Ibid.*

Shares of corporation stock are not credits in such sense that they may be offset by debts for purposes of taxation. *Morril v. Bentley*, 150–677, 130 N. W. 734.

Pension money which has been paid to the guardian of an insane pensioner still remains subject to the jurisdiction and control of the federal government, and is therefore exempt from taxation under the provisions of § 4747 of the revised statutes of the United States. *Manning v. Spry*, 121–191, 96 N. W. 873.

Interest accruing from pension money is not exempt from taxation. *Bednar v. Carroll*, 138–338, 116 N. W. 315.

This exception as to pension money does not apply to property purchased with such money. *Beers v. Langenfeld*, 149–581, 128 N. W. 847.

SEC. **1310. Moneys—credits—annuities—bank notes—stock.** Moneys, credits and corporation shares or stocks, except as otherwise provided, cash, circulating notes of national banking associations, and United States legal tender notes, and other notes, and certificates of the United States

payable on demand, and circulating or intended to circulate as currency, notes, including those secured by mortgage, accounts, contracts for cash or labor, bills of exchange, judgments, choses in action, liens of any kind, securities, debentures, bonds other than those of the United States, annuities, and corporation shares or stocks not otherwise taxed in kind, shall be assessed, and, excepting shares of stock of national, state and savings banks and loan and trust companies, and moneyed capital as hereinafter defined, shall be taxed upon the uniform basis throughout the state of five mills on the dollar of actual valuation, same to be assessed and collected where the owner resides. The millage tax here provided for shall be in lieu of all other taxes upon moneys and credits and shall be levied by the board of supervisors, placed upon the tax list and collected by the county treasurer, and the amount collected in the various taxing districts of the state shall be divided between the various funds upon the same pro rata basis as other taxes collected in such taxing district are apportioned. All moneyed capital within the meaning of section fifty-two hundred nineteen of the revised statutes of the United States shall be listed and assessed against the owner thereof at his place of business, and if a corporation at its principal place of business, at the same rate as state, savings, national bank and loan and trust company stock is taxed, in the same taxing district, and at the actual value of the moneyed capital so invested. The person or corporation using moneyed capital in competition with bank capital shall furnish the assessor upon demand a full and complete itemized sworn statement showing the amount of moneyed capital so used. [34 G. A., ch. 63, § 1.] [C. '73, § 813; R. § 721; C. '51, § 466.]

A contract for the conveyance of land creating an absolute indebtedness gives rise to a credit in favor of the grantor which is subject to taxation. *Clark v. Horn*, 122–375, 98 N. W. 148.

Deferred payments due on a mutually obligatory contract for the sale of land are taxable as credits. *Cross v. Snakenberg*, 126–636, 102 N. W. 508.

The owner of land who has given to a tenant the option to purchase at a specified price, which option has not been exercised so as to bind the prospective purchaser for the payment of the balance of the price, cannot be taxed on such option as moneys and credits. *Schoonover v. Petcina*, 126–261, 100 N. W. 490.

One having a contract for the purchase of real property which gives him no more than the right to exercise an option does not have a taxable credit nor such interest in the land as subjects him to taxation on account thereof. *In re Shields Bros.*, 134–559, 111 N. W. 963.

Where one holds an enforceable contract for the sale of land he has such a credit as to be subject to taxation. *In re Assessment of Boyd*, 138–583, 116 N. W. 700.

The county and its officials, being strangers to a contract as to the conveyance of land, may show that a proposed modification thereof was a mere pretense and sham for the purpose of evading taxation. *Montgomery v. Marshall County*, 152–161, 129 N. W. 329.

A contract for the sale of land under which the seller may enforce performance by the buyer or rely upon a penalty for nonperformance is different from a mere option on the part of the buyer and constitutes a credit subject to taxation. *Rampton v. Dobson*, 156–315, 136 N. W. 682.

A contract for an option for the sale of real property is not taxable. *Bissell v. Board of Review*, 157– —, 138 N. W. 830.

One who indorses and transfers negotiable paper to a bank does not remain the owner thereof in such sense that he is subject to taxation for such paper as moneys and credits. *Schoonover v. Petcina*, 126–261, 100 N. W. 490.

SEC. 1311. **Deducting debts.** In making up the amount of money or credits which any person is required to list, or to have listed or assessed, including actual value of any building and loan shares, he will be entitled to deduct from the actual value thereof the gross amount of all debts in good faith owing by him, but no acknowledgment of indebtedness not founded on actual consideration, and no such acknowledgment made for the purpose of being so deducted, shall be considered a debt within the intent of this section, and so much only of any liability of such person as

security for another shall be deducted as he believes he will be compelled to pay on account of the inability of the principal debtor, and if there are other sureties able to contribute, then so much only as he in whose name the list is made will be bound to contribute; but no person will be entitled to any deduction on account of any deposit or security note given in aid of the organization of a mutual insurance company for the premiums of insurance, nor on account of any unpaid subscription to any institution, society, corporation or company; and no person shall be entitled to any deduction on account of any indebtedness contracted for the purchase of United States bonds or other nontaxable property. Provided, however, that no deduction for debts shall be allowed from the shares of stock of any state, savings or national bank or loan and trust company, nor from moneyed capital used in competition with banks, within the meaning of section fifty-two hundred nineteen, of the revised statutes of the United States. [34 G. A., ch. 63, § 2.] [C. '73, § 814; R. § 722; C. '51, § 467.]

The fact that in returning moneys and credits for assessments the taxpayer specifies liabilities which he claims the right to have deducted does not estop him, in a subsequent proceeding by the treasurer to enforce an assessment for moneys and credits omitted from taxation, from showing other debts than those previously returned. *Schoonover v. Petcina*, 126–261, 100 N. W. 490.

The taxpayer may waive the right to have his indebtedness offset against his moneys and credits for taxation, and although he does so for the purpose of concealing such indebtedness and to avoid a showing of insolvency, his assignee, for the benefit of creditors, cannot complain of the tax thus assessed. *Carpenter v. Jones County*, 130–494, 107 N. W. 435.

The valuation of corporate stock cannot be offset by indebtedness. *In re Kauffman's Est.*, 104–639, 74 N. W. 8.

If a bank pays the taxes for its stockholders on their shares in the bank it should, as to those stockholders who are entitled to offset indebtedness as against the assessment of their shares as moneys and credits, pay over by way of dividends the amount of such assessments. The bank has no right except by way of declaration of a dividend to appropriate its assets to the payment of the interest on the shares of the stock of its stockholders. *Redhead v. Iowa National Bank*, 127–572, 103 N. W. 796.

The term "credits" as used in this section does not include shares of corporation stock except shares in building and loan associations. *Morril v. Bentley*, 150–677, 130 N. W. 734.

An indorser on promissory notes transferred by him with mortgage security is not entitled to deduct such contingent liability as a debt from his moneys and credits. *Schoonover v. Petcina*, 126–261, 100 N. W. 490.

The debts which may be deducted from moneys and credits due do not include delinquent taxes of a previous year. *In re Appeal of Bailies*, 127–124, 102 N. W. 813.

The existence of the debts to be offset may be shown otherwise than by the production of the notes evidencing such indebtedness. And held that the statements of the debtor confirmed by his creditor might be taken as sufficient evidence of the fact. *Stein v. Board of Review*, 135–539, 113 N. W. 339.

A note given on a valid consideration to a college for the benefit of its endowment fund constitutes a debt which may properly be deducted from moneys and credits for the purposes of taxation. Such a note does not constitute a subscription "to any institution, society, corporation or company" under the exception in this section. Such exception relates to subscriptions with reference to the organization of such institution or association. *King v. Carroll*, 129–364, 105 N. W. 705.

SEC. 1312. **Listing—by whom.** Every inhabitant of this state, of full age and sound mind, shall list for the assessor all property subject to taxation in the state, of which he is the owner, or has the control or management, in the manner herein directed: The property of one under disability, by the person having charge thereof; that of a married woman, by herself or husband; that of a beneficiary for whom the property is held in trust, by the trustee, and the personal property of a decedent by the executor or administrator, or if there is none, by any person interested therein; that of a body corporate, company, society or partnership, by its principal accountant, officer, agent or partner, as the assessor may demand.

Property under mortgage or lease is to be listed by and taxed to the mortgagor or lessor, unless listed by the mortgagee or lessee. In listing moneys and credits as herein provided, any administrator, executor, trustee or agent shall be entitled to deductions, as prescribed in section thirteen hundred eleven of the code, of debts owing by the legatee, devisee, beneficiary or principal to the same extent as such fund might be reduced if it were held by such legatee, devisee, beneficiary or principal who may be entitled to the income on such trust or fiduciary fund. [33 G. A., ch. 84, § 1.] [C. '73, § 803; R. § 714; C. '51, § 458.]

The owner is required to list his personal property, including moneys and credits, although it may be in the hands of an agent in another taxing district of the state. *German Trust Co. v. Board of Equalization*, 121–325, 96 N. W. 878.

The administrator of a nonresident should list for taxation in this state funds which have been sent into the state and placed in the hands of an agent for investment, as contemplated by code § 1320. *In re Miller's Est.*, 116–446, 90 N. W. 89.

The fact that local or ancillary administration was delayed by the acts of the agent will not be taken into consideration in determining whether the funds remained subject to taxation. *Ibid.*

A referee appointed by a court as a commissioner to make a sale of property in a partition proceeding is not a trustee in such a sense as to be taxable for the property to be partitioned. *In re Assessment of Boyd*, 138–583, 116 N. W. 700.

Real and personal property held under a testamentary or other trust is taxable to the trustee and not to the beneficiary. *Ellsworth College v. Emmet County*, 156–52, 135 N. W. 594.

This section requires the listing of property of foreign corporations. *Morril v. Bentley*, 150–677, 130 N. W. 734.

The duty of listing property for assessment is imposed upon the taxpayer and the act of the assessor in returning or failing to return property for assessment to the board of review is ministerial and not judicial. *Tally v. Brown*, 146–360, 125 N. W. 248.

The time within which the assessor is required to act in returning a mulct tax does not limit the action of citizens under code supp. § 2435 in case the assessor fails to perform his duty. *National Loan & Inv. Co. v. Board of Supervisors*, 138–11, 115 N. W. 480.

SEC. 1313. Place of listing.

If the owner is a resident the listing of moneys and credits is to be made by him and not by his agent in whose possession such moneys and credits are, in another taxing district. *German Trust Co. v. Board of Equalization*, 121–325, 96 N. W. 878.

Property which has been wrongfully taxed in a county in which it is not subject to taxation may be taxed as omitted property in the county where it should have been taxed, but the county cannot recover taxes on property omitted from taxation in the property district if it has been in fact taxed in another district of the same county. *Snakenburg v. Stein*, 126–650, 102 N. W. 533.

Choses in action are taxable to the owner at his domicile, and not elsewhere, unless the owner has himself given to the property a different situs. *Gilbertson v. Oliver*, 129–568, 105 N. W. 1002.

It is doubtful whether by "assessment districts" in this section is meant any subdivision less than one having an assessor and a local board of review. Within a school township personal property may well be assessed to the owner in the school district where he resides. *Independent School Dist. v. Board of Review*, 131–195, 108 N. W. 220.

Shares of stock in a foreign corporation owned by a resident of the state are not exempt from taxation in his hands, although the property of the corporation has been taxed in the state in which it is created. *Judy v. Beckwith*, 137–24, 114 N. W. 565.

Such taxation is not open to constitutional objection. *Ibid.*

Moneys and credits are to be listed and assessed where the owner lives,—that is, at the place of his residence; and residence having once been established continues until there is evidence of an abandonment. A mere intent to change a residence for the purpose of taxation only is ineffectual. *Cover v. Hatten*, 136–63, 113 N. W. 470.

Fact and intent must concur in order that one may gain a residence or domicile in another jurisdiction than that in which his original domicile is found to have existed. *Shirk v. Twp. Board of Review*, 137–230, 114 N. W. 884.

The place where a person lives within the meaning of this section is his residence, and a mere intention to change residence is not alone sufficient to terminate his liability to taxation in the place in which he has resided. *Glotfelty v. Brown*, 148–124, 126 N. W. 797.

As a man must have a domicile or taxing residence somewhere, his old residence will be deemed to continue until a new one is acquired. For purposes of taxation the word "residence" as used in our statutes means "domicile." *Barhydt v. Cross*, 156–271, 136 N. W. 525.

SEC. 1314. Who deemed owners—commission merchants.

A transfer company to which property has been consigned by an owner out of the state and which is held by it for the purposes of delivery and shipment under the owner's orders is subject to taxation for such property. *Merchants Transfer Co. v. Board of Review*, 128–732, 105 N. W. 211.

A referee in partition is not so related to the property as to be taxable therefor. *In re Assessment of Boyd*, 138–583, 116 N. W. 700.

SEC. 1316. Listing property of another.

Property may be listed to one as agent without giving the name of the person for whom he holds it. *Securitu Savings Bank v. Carroll*, 131–605, 109 N. W. 212.

SEC. 1317. Business in different districts—partners.

Notes taken by a branch bank in the ordinary course of business and held as a part of its assets are taxable in the district where such bank is located. *Farmers' Loan & Trust Co. v. Fonda*, 114–728, 87 N. W. 724.

Transfer of such notes to another branch of the same parent institution, and giving credit to the branch from which they are taken for the amount thereof, will not affect the question of taxation. *Ibid.*

Taxes levied against a firm become an individual debt of the partner, and must be paid from his estate in bankruptcy as a preferred claim. *In re Green*, 116 Fed. 118.

SEC. 1318. Merchants.

The assessable value of merchandise is not its value on January first, but its average value during the year. *Larson v. Hamilton County*, 123–485, 99 N. W. 133.

One who purchases stock with a view of fattening and reselling is not a merchant and should be assessed on the stock owned by him on the first of January. *Jewell v. Board of Trustees*, 113–47, 84 N. W. 973.

One to whom property has been assigned and transferred by a nonresident owner for the purpose of being held subject to disposal at the order of the owner, is taxable for such property. *Merchants' Transfer Co. v. Board of Review*, 128–732, 105 N. W. 211.

Whether it is within the jurisdiction of the county treasurer to review an assessment determining the liability of property to taxation and hold that a corporation should be taxed under this section rather than under the provisions of code § 1323, his action in doing so is not without jurisdiction and cannot be controlled by mandamus. *Woodbury County v. Talley*, 147–498, 123 N. W. 746.

SEC. 1319. Manufacturers.

This section has reference only to domestic corporations, and shares of stock in a foreign manufacturing corporation held by residents of this state are to be taxed without regard to these provisions. *Morril v. Bentley*, 150–677, 130 N. W. 734.

SEC. 1320. Agent personally liable.

Where funds are sent into this state and placed in the hands of an agent for investment so as to subject them to taxation, the death of the principal does not terminate the right to impose such tax. Such funds continue subject to taxation until removed from the state under the process of administration. *In re Miller's Estate*, 116–446, 90 N. W. 89.

One in possession of money, notes and credits of a nonresident may be assessed as agent, although the name of his principal is not disclosed. *Security Savings Bank v. Carroll*, 131–605, 109 N. W. 212.

To justify the assessor in requiring one person to list the property of another, it must appear first that there is an agency of the party required to list, and second that he has possession or control of the moneys, notes or other credits of his principal, and third, that such possession or control is held by the agent with a view to investing or loaning or in some other manner holding or using the money for the pecuniary profit of himself or his principal. No agent is liable to taxation for the property of another in his possession or under his control unless he holds that possession or is vested with that control for the particular purposes named in the statute. *German Trust Co. v. Board of Equalization*, 121–325, 96 N. W. 878; *Heinz v. Board of Equalization*, 121–445, 96 N. W. 967.

But where the principal puts his money into the purchase of securities through an agent who reserves the right to an interest in the proceeds, the agent is bound to list the securities for his principal. *Ibid.*

The statutory provision does not, however, contemplate the listing by an agent of money or securities of a principal who is a resident of the state and subject to taxation where he resides. *Ibid.*

The fact that the nonresident owner of property which is required to be listed by his agent in this state having possession and control thereof may also be taxed therefor in the state of his residence does not render the statutory provisions requiring listing by the agent unconstitutional. *Heinz v. Board of Equalization*, 121–445, 96 N. W. 967.

SEC. **1321. Private bankers.** Private banks or bankers, or any persons other than corporations hereinafter specified, a part of whose business is the receiving of deposits subject to check, on certificates, receipts, or otherwise, or the selling of exchange, shall prepare and furnish to the assessor a sworn statement, showing the assets, aside from real estate, and liabilities of such bank or banker on January first of the current year, as follows:

1. The amount of moneys, specifying separately the amount of moneys on hand or in transit, the funds in the hands of other banks, bankers, brokers or other persons or corporations, and the amount of checks or other cash items not included in either of the preceding items;
2. The actual value of credits, consisting of bills receivable owned by them, and other credits due or to become due;
3. The amount of all deposits made with them by others, and also the amount of bills payable;
4. The actual value of bonds and stocks of every kind and shares of capital stock or joint stock of other corporations or companies held as an investment, or in any way representing assets, and the specific kinds and description thereof exempt from taxation;
5. All other property pertaining to said business, including real estate, which shall be specially listed and valued by the usual description thereof; the aggregate actual value of moneys and credits, after deducting therefrom the amount of deposits, and the aggregate actual value of bonds and stocks, after deducting the portion thereof otherwise taxed in this state, and also the other property pertaining to the business, shall be assessed as provided by section thirteen hundred and five of this chapter, not including real estate, which shall be listed and assessed as other real estate. [34 G. A., ch. 63, § 3.] [27 G. A., ch. 30, § 2; 15 G. A., ch. 63; C. '73, § 812; R. §§ 719, 720; C. '51, §§ 460, 465.]

Where a branch bank had just prior to the first day of January as a part of its assets notes taken in the usual course of business, and the parent bank then transferred such notes to another branch, giving credit to the first branch therefor on the books of the parent institution, held that such transfer did not relieve the branch from which the notes had been transferred of liability for assessment thereon. *Farmers' Loan & Trust Co. v. Fonda*, 114–728, 87 N. W. 724.

On the transfer of the assets of a private bank to a national bank the assets of the private bank cease to be taxable as moneys and credits. *Schoonover v. Petcina*, 126–261, 100 N. W. 490.

SEC. **1322. National, state and savings banks—refusal to comply with statute—penalty.** Section thirteen hundred twenty-two of the supplement to the code, 1907, is hereby repealed and the following enacted in lieu thereof:

"Shares of stock of national banks and state and savings banks, and loan and trust companies, located in this state, shall be assessed to the individual stockholders at the place where the bank or loan and trust company is located. At the time the assessment is made the officers of national

banks and state and savings banks and loan and trust companies shall furnish the assessor with lists of all the stockholders and the number of shares owned by each, and the assessor shall list to each stockholder under the head of corporation stock the total value of such shares. To aid the assessor in fixing the value of such shares, the said corporation shall furnish him a verified statement of all the matter provided in section thirteen hundred twenty-one of the supplement to the code, 1907, which shall also show separately the amount of the capital stock and the surplus and undivided earnings, and the assessor from such statement shall fix the value of such stock based upon the capital, surplus, and undivided earnings. In arriving at the total value of the shares of stock of such corporations, the amount of their capital actually invested in real estate owned by them and in the shares of stock of corporations owning only the real estate (inclusive of leasehold interests, if any,) on or in which the bank or trust company is located, shall be deducted from the real value of such shares, and such real estate shall be assessed as other real estate, and the property of such corporation shall not be otherwise assessed. A refusal to furnish the assessor with the list of stockholders and the information required under this section shall be deemed a misdemeanor and any bank or officer thereof so refusing shall be punished by a fine not exceeding five hundred dollars. [35 G. A., ch. 114, § 1; 34 G. A., ch. 63, § 4.] [31 G. A., ch. 50, § 1; 23 G. A., ch. 39; 15 G. A., ch. 60, § 28; 15 G. A., ch. 63; C. '73, §§ 812, 818–20; R. §§ 719, 720; C. '51, §§ 460, 465.]

National banks: The assessor is not bound by the showing of the books of a national bank in arriving at the valuation of its stock for the purposes of assessment. In making such valuation the assessor is to determine the value of the stock on the market without regard to whether such value is based upon assets that are tangible or intangible. *First Nat. Bank v. City Council*, 112 N. W. 829, 136 N. W. 203.

Although stock of a national bank is assessed to the shareholders, the bank is itself a party in interest as representing the shareholders and may appear before the board of review and prosecute an appeal from its findings. *First Nat. Bank of Independence v. Independence*, 123–482, 99 N. W. 142.

The bank has no right to pay out of its assets the taxes on the shares of stock held by the stockholders. And if it does so, such action amounts practically to the declaration of a dividend. *Redhead v. Iowa National Bank*, 127–572, 103 N. W. 796.

As the statute does not provide for the taxation of shares of stock in state or savings banks (as interpreted by the federal court) the taxation of shares of stock of national banks is invalid as in violation of the federal statute prohibiting discrimination against national bank stock in the matter of taxes as compared with other moneyed capital. *First Nat. Bank v. City Council*, 150–95, 129 N. W. 475.

The taxation of state and savings banks upon their assets, while national banks are taxed on their shares of stock, constitutes a discrimination against national banks and is in violation of the federal statute. *Des Moines Nat. Bank v. Des Moines*, 153–336, 133 N. W. 767.

Bank stock: Where by mutual agreement stockholders deposit a fund which becomes a part of the capital of the bank it should be taxed by taxing the shares of stock, and not as the individual deposit of the stockholders. *State Exchange Bank v. Parkersburg*, 112–104, 83 N. W. 793.

For the purpose of taxation, the corporation represents its stockholders in such sense that notice of appeal given to the corporation is sufficient to enable the court to determine the value of the shares and the amount to be paid by the corporation on account of the holders of such shares irrespective of their residence. *In re Assessment of Sioux City Stock Yards Co.*, 149–5, 127 N. W. 1102.

United States bonds: The tax on the shares of stock of a bank is not a tax on its capital, and as against a tax on the shares of stock held by individuals, the bank has no right to deduct the amount of its capital invested in United States bonds. *German-American Sav. Bank v. Council, etc.*, 118–84, 91 N. W. 829.

In estimating the value of shares of stock in a national bank for the purpose of taxation, the value of United States bonds owned by the bank may be taken into account. *National State Bank v. Mayor*, 119–696, 94 N. W. 234.

The fact that private banks and bankers are assessed on a valuation determined by finding the aggregate amount of moneys and credits of the bank, after deducting deposits and debts, and also the aggregate value of bonds and stocks, excluding

United States bonds, while in the case of corporate banks, including national, state and savings banks, the taxation is on the basis of the stock, in estimating which the property of the bank, including United States bonds, is taken into account does not constitute a discrimination between national and state banks such as to render the statute void under the provisions of the federal law relating to the taxation of national banks. *Ibid.*

In determining the value of national bank stock for the purpose of taxation, the value of government bonds held by the bank should be considered. *First Nat. Bank of Independence v. Independence*, 123–482, 99 N. W. 142.

As United States bonds belonging to the bank are to be taken into account in fixing the valuation of the shares on which taxes are to be paid by the holders, the treasurer is not authorized to tax such bonds to the bank or the stockholders as omitted property where the stock has in fact been assessed for taxation to such stockholders. *Security Savings Bank v. Carroll*, 128–230, 103 N. W. 379.

The treasurer and auditor have no right to assess against the stockholders of a bank as an element in determining the value of their stock the amount of United States bonds held by the bank where the assessor to whom a full report of the facts has been made has excluded such element of value in determining the taxable value of the shares. *Judy v. National State Bank*, 133–252, 110 N. W. 605.

The statutory provision for taxation of bank stock does not authorize the assessment of such stock on a valuation which includes the United States bonds held by the bank. (In effect overruling *People's Savings Bank v. Layman*, 134 Fed. 635.) *Home Savings Bank v. Des Moines*, 205 U. S., 503.

SEC. **1322-1a. Bank stocks—moneyed capital—taxable value.** "For the purpose of placing the taxation of bank and loan and trust company stock and moneyed capital as nearly as possible upon a taxable value relatively equal to the taxable value at which other property is now actually assessed throughout the state as compared with the actual value thereof, it is hereby provided that state, savings and national bank stock and loan and trust company stock and moneyed capital shall be assessed and taxed upon the taxable value of twenty per cent. of the actual value thereof, determined as herein provided, which twenty per cent. of the actual value shall be taken and considered as the taxable value and shall be taxed as other property in such taxing district. [34 G. A., ch. 63, § 5.]

SEC. **1322-2a. When in effect—adjustment of irregularity.** "The provisions of this act shall be in effect and govern the assessments made in the year nineteen hundred eleven, and subsequent years. If assessment of any such stock or moneyed capital is not made during nineteen hundred eleven within the time now provided by law, or is illegally or irregularly made, the assessor of the taxing district is hereby granted until June first, nineteen hundred eleven, in which to rectify the irregularity or correct the illegality, or reassess such stock or moneyed capital, and the board of review of the taxing district is, during the month of June, nineteen hundred eleven, authorized and directed to review such assessment following the proceedings now provided by law as to original assessments. [34 G. A., ch. 63, § 6.]

SEC. **1322-3a. In special charter cities.** "The provisions of this act, so far as applicable, shall apply to cities acting under special charter and in such cities stocks and moneyed capital referred to in section five hereof shall be assessed at the taxable value of eighty per cent. of that applied to other property. If the taxable value of such other property is fixed at any portion thereof except twenty-five per cent. of the actual value thereof, as shown by the assessment, the city council, when the levy for all city purposes has been determined, shall ascertain the equivalent thereof based upon such twenty-five per cent. valuation and shall certify the aggregate of the levy so ascertained to the county treasurer of the county in which such city is located. When the millage tax provided in section one hereof is collected the county treasurer shall pay to

the treasurer of such city such portion of said millage tax collected as the aggregate levy so certified is of the total levy obtained by adding such certified levy to the levy for all purposes except city purposes, and such city shall not be permitted to impose taxes upon the property referred to in section one hereof. [34 G. A., ch. 63, § 7.]

SEC. **1322-4a. Not applicable to taxes levied for nineteen hundred eleven.** "The provisions of this act as to the assessment and taxation of moneys and credits other than moneyed capital and shares of stock of state, savings and national banks and loan and trust companies, shall not apply to taxes levied for the year nineteen hundred eleven." [34 G. A., ch. 63, § 8.]

SEC. **1322-a. Applicable to nineteen hundred and six tax.** This act shall apply to the assessment for the tax of nineteen hundred and six. [31 G. A., ch. 50, § 2.]

SEC. 1323. Shares of corporation stock.

The fact that the statutory provisions as to methods of ascertaining the value of personal property and fixing the situs thereof are different as to corporate property than as to property of private individuals does not render the provisions as to assessment of the corporate property invalid. *Layman v. Iowa Telephone Co.*, 123–591, 99 N. W. 205.

As the statute provides a method for the assessment of the property of loan and trust companies that method is exclusive. *Wahkonsa Inv. Co. v. Ft. Dodge*, 125–148, 100 N. W. 517.

The shares of stock in a corporation organized under the laws of this state, except as otherwise provided, are to be assessed to the owners thereof at the place where the principal business is transacted. *Layman v. Iowa Telephone Co.*, 123–591, 99 N. W. 205.

This section relates solely to corporations organized under the laws of this state. *Morril v. Bentley*, 150–677, 130 N. W. 734.

The action of a county treasurer taxing shares of stock under this section when the board of review has found that the corporation should be taxed under the provisions of code § 1318 is judicial and not without jurisdiction and cannot be controlled by an action of mandamus. *Woodbury County v. Talley*, 147–498, 123 N. W. 746.

Where the board of review refuses to make an assessment on the stock of a corporation on the theory that it is taxable under code § 1318 relating to assessment of merchants, the question of the correctness of the action of the board of review may be determined on appeal by officers or taxpayers under code § 1373 as amended, and the district court on such appeal may in a proper case order the stock to be taxed under this section. The assessment of the stockholders on the value of their shares of stock is, in practical effect, an assessment of the corporation. *In re Assessment of Sioux City Stock Yards Co.*, 149–5, 127 N. W. 1102.

Statements made by the corporation for the purposes of assessment may be considered as admissions by it without regard to whether such statements have been actually before the assessor. *Woodbury County v. Talley*, 153–28, 129 N. W. 967.

SEC. 1324. Valuation of corporate stock.

Where the capital stock of a savings bank has been listed and an assessment made by the proper assessor, the county treasurer has no authority to enter an assessment based on the difference between the assessed value and the real value of the stock as found by him. *German Sav. Bank v. Trowbridge*, 124–514, 100 N. W. 333.

The diminution of the value of corporate stock on account of the amount of capital invested in real estate is to be determined by the actual value of such real estate as fixed by the assessor and not by the amount of capital invested in such real estate. *In re Appeal of Valley Investment Co.*, 152–84, 131 N. W. 669.

SEC. 1325. Corporation liable.

The bank having paid the taxes on its capital stock for the holders thereof is entitled to retain the amount from any dividends becoming due to such stockholders, and such claims for repayment are assets of the bank for the recovery of which an individual stockholder cannot maintain an action against the bank for his own benefit or against the other stockholders for whom such taxes have been paid. *Kennedy v. Citizens' Nat. Bank*, 128–561, 104 N. W. 1021.

SEC. 1326. **Stock of building and loan associations.** Section thirteen hundred twenty-six of the code is hereby repealed and the following enacted in lieu thereof:

"The shares of stock of mutual building and loan, or savings and loan associations, exclusively engaged in such business, shall be assessed and taxed to the individual holders thereof at their place of residence. When such association owns real estate, or maintains a reserve, expense or other fund, or its equivalent, the real estate and the total amount of such fund or funds shall be subject to taxation at the principal place of business of the association and shall be assessed against the association as real estate or other personal property, the tax of same to be paid by the association. Every domestic and domestic local building and loan, or savings and loan association, on or before the thirty-first day of January of each year, shall furnish to the assessor of the assessment district in which its principal place of business is located a verified statement, showing specifically, with reference to the year preceding the first day of January last past, the total amount of their reserve, expense or other fund, or its equivalent, and the description and value of each tract of real estate owned by such association. The auditor of state shall, on or before the tenth day of February of each year, send to the county auditor of each county a statement of the name and post-office address of each stockholder of a foreign building and loan, or savings and loan association residing in their respective counties, together with the number of shares owned by each person on the first day of January preceding, and the actual value of each share of stock on said first day of January, which facts shall be reported to him by such associations under the law governing building and loan, or savings and loan associations. It shall be the duty of the county auditor to immediately furnish to each assessor in his county the name of each stockholder in any such foreign association residing in such assessor's district, together with the number of shares held by each person, and the actual value of each share on the first day of January preceding." [35 G. A., ch. 119, § 1.]

SEC. 1327. **Real estate of corporations.**

This section has reference to real estate of domestic corporations. *Morril v. Bentley*, 150–677, 130 N. W. 734.

SEC. 1328. **Telegraph and telephone companies.** Every telegraph and telephone company operating a line in this state shall, on or before the first day of May in each year, furnish to the executive council of Iowa a statement verified by its president or secretary showing:

1. The total number of miles owned, operated or leased within the state, with a separate showing of the number leased;
2. The average number of poles per mile, and the whole number of poles on their lines in this state;
3. The total number of miles in each separate line or division thereof, also the average number of separate wires thereon;
4. The whole number of stations on each line, and the value of the same, including furniture;
5. The whole number of instruments on each separate line, and the gross rental charges per instrument, where the same are rented to patrons of the company making the return, together with the number of stations maintained, other than railroad stations;
6. The gross receipts and operating expenses of said company for the year ending December thirty-first next preceding on business originating and terminating in this state;

7. The gross receipts and operating expenses of said company for the year ending December thirty-first next preceding, and not included in the statement made under subsection six hereof;

8. The total capital stock of said company;

9. The number of shares of capital stock issued and outstanding, and the par or face value of each share;

10. The market value of such shares of stock on the first day of January next preceding, and if such shares have no market value, the actual value thereof;

11. All real estate and other property owned by such company and subject to local taxation within this state;

12. The specific real estate, together with the permanent improvements thereon, owned by such company and situated outside this state and taxed as other real estate in the state where located, with a specific description of each piece, where located and the purpose for which the same is used, and the actual value thereof in the locality where situated;

13. All mortgages upon the whole or any part of its property, together with the dates and amounts thereof;

14. *a.* The total length of the lines of said company;

b. The total length of the lines of said company outside this state.

[30 G. A., ch. 44, § 1; 17 G. A., ch. 59, §§ 1, 2.]

SEC. **1329. Failure to make statement.** Upon the receipt of said statements from the several companies, the executive council shall examine said statements and if it shall deem the same sufficient and that further information is requisite, it shall require the officer making same to make such other or further statement as it may desire. In case of failure or refusal of any company to make out or deliver to the auditor of state the statements required in this chapter, such company shall forfeit and pay to the state of Iowa one hundred dollars for each day such report is delayed beyond the first day of May, to be sued and recovered in any proper form of action in the name of the state, and on the relation of the executive council of Iowa, and such penalty, when collected, shall be paid into the general fund of the state. [30 G. A., ch. 44, § 2; 17 G. A., ch. 59, § 3.]

SEC. **1330. Assessment by executive council.** The executive council shall, at its meeting on the second Monday in July in each year, proceed to find the actual value of the property of such companies in this state, taking into consideration the information obtained from the statements above required, and any further information they can obtain, using the same as a means for determining the actual cash value of the property of such companies within this state; also taking into consideration the valuation of all property of such companies, including franchises and the use of the property in connection with lines outside the state, and making such deductions as may be necessary on account of extra value of property outside the state as compared with the value of property in the state, in order that the actual cash value of the property of the company within this state may be ascertained. Said assessment shall include all property of every kind and character whatsoever, real, personal, or mixed, used by said companies in the transaction of telegraph and telephone business; and the property so included in said assessment shall not be taxed in any other manner than as provided in this act. [28 G. A., ch. 42, § 1.]

[Acts in conflict with § 1, ch. 42, 28 G. A., are repealed by § 1331-a. EDITOR.]

The certification to the board of supervisors by the executive council of the length of lines of telegraph and telephone companies within the county becomes a part of the record of the board, proper to be published under the provisions of code § 441. *Index Printing Co. v. Board of Supervisors*, 150–411, 130 N. W. 401.

SEC. 1330-a. **Actual value per mile—taxable value.** The executive council shall ascertain the value per mile of the property of each of said companies within this state by dividing the total value, as above ascertained, by the number of miles of line of such company within the state, and the result shall be deemed and held to be the actual value per mile of line of the property of such company within this state. The taxable value shall be determined by taking the percentage of the actual value so ascertained, as provided by section thirteen hundred and five of the code, and the ratio between the actual value and the assessed or taxable value of the property of each of said companies shall be the same as in the case of property of private individuals. At such meeting in July any company interested shall have the right to appear, by its officers or agents, before the executive council and be heard on the question of the valuation of its property for taxation. [28 G. A., ch. 42, § 2.]

[Acts in conflict with § 2, ch. 42, 28 G. A., are repealed by § 1331-a. EDITOR.]

SEC. 1330-b. **Assessment in each county—how certified.** The executive council shall, for the purpose of determining what amount shall be assessed to any one of said companies in each county of the state into which the line of the said company extends, multiply the assessed or taxable value per mile of line of said company, as above ascertained, by the number of miles in each of said counties, and the result thereof shall be by said council certified to the several county auditors of the respective counties into, over or through which said line extends. [30 G. A., ch. 45; 28 G. A., ch. 42, § 3.]

[Acts in conflict with § 3, ch. 42, 28 G. A., are repealed by § 1331-a. EDITOR.]

SEC. 1330-c. **Levy and collection of tax.** At the first meeting of the board of supervisors held after such statement is received by the county auditor it shall cause such statement to be entered in its minute book, and make and enter therein an order stating the length of the lines and the assessed value of the property of each of said companies situated in each city, town, township, or lesser taxing district in its county, as fixed by the executive council, which shall constitute the taxable value of said property for taxing purposes, and the taxes on said property when collected by the county treasurer shall be disposed of as other taxes on real estate. The county auditor shall transmit a copy of said order to the council or trustees of each city, town, or township in which the lines of said company extend. [28 G. A., ch. 42, § 4.]

[Acts in conflict with § 4, ch. 42, 28 G. A., are repealed by § 1331-a. EDITOR.]

SEC. 1330-d. **Rates—purposes.** All telegraph and telephone property shall be taxable upon said assessment at the same rates, by the same officers, and for the same purposes as the property of individuals within such counties, cities, towns, townships, or lesser taxing districts, and the county treasurer shall collect such taxes at the same time and in the same manner as other taxes, and the same penalties for the nonpayment shall be due and collectible as for the nonpayment of individual taxes. [28 G. A., ch. 42, § 5.]

[Acts in conflict with § 5, ch. 42, 28 G. A., are repealed by § 1331-a. EDITOR.]

Prior to the repeal of code § 1331, it was held that all the sections of the code relating to the taxation of telegraph companies were void because the result was that corporations engaged in conducting the telegraph or telephone business were not thereby taxed on the same basis as individuals. *Layman v. Iowa Telephone Co.*, 123–591, 99 N. W. 205.

SEC. **1330-e. Other real and personal property.** Land, lots, and other real estate and personal property belonging to any telegraph company or telephone company not used exclusively in its telegraph or telephone business shall be subject to assessment and taxation on the same basis as other property of individuals in the several counties where situated. [28 G. A., ch. 42, § 6.]

[Acts in conflict with § 6, ch. 42, 28 G. A., are repealed by § 1331-a. EDITOR.]

SEC. **1330-f. "Company" defined.** The word "company" as used in this act shall be deemed and construed to mean and include any person, copartnership, association, corporation, or syndicate that shall own or operate, or be engaged in operating, any telegraph or telephone line whether formed or organized under the laws of this state or elsewhere. [28 G. A., ch. 42, § 7.]

[Acts in conflict with § 7, ch. 42, 28 G. A., are repealed by § 1331-a. EDITOR.]

SEC. **1330-g. Owners of capital stock exempt.** The owner of the capital stock in any telegraph or telephone company operating any line or lines in this state shall not be assessed for taxation upon said capital stock. [28 G. A., ch. 42, § 8.]

[Acts in conflict with § 8, ch. 42, 28 G. A., are repealed by § 1331-a. EDITOR.]

SEC. **1330-h. Reassessment and relevy.** When by reason of nonconformity to any law, or by any omission, informality, or irregularity, or for any other cause, any tax heretofore or hereafter levied and assessed against any person, company, association, or corporation by the executive council is invalid or is adjudged illegal, the executive council may assess and levy a tax against such person, company, association, or corporation for the year or years for which such tax is invalid or illegal, or when necessary may assess and certify the same to the proper county officers, who shall levy such tax as by law in such cases made and provided, with the same force and effect as though done at the proper time and under any valid law, whether in force at the time of said levy and assessment or thereafter enacted. [28 G. A., ch. 49, § 1.]

SEC. **1330-i. Voluntary payments.** When any person, company, association, or corporation, against whom any tax has been assessed and levied by the executive council and held invalid or illegal, shall have paid the same voluntarily or shall otherwise waive such invalidity and illegality, the executive council shall accept such tax in lieu of the tax to be raised by the reassessment and relevy provided for in section one hereof. [28 G. A., ch. 49, § 2.]

SEC. **1331. Rate of tax—when due—repealed.** [28 G. A., ch. 42, § 9.]

[See § 1331-a.]

SEC. **1331-a. Repeal.** Section thirteen hundred thirty-one of the code, and all laws and parts of laws in conflict herewith are hereby repealed. [28 G. A., ch. 42, § 9.]

SEC. **1332. Line operated by railroad.**

A telegraph line owned by a railroad company and not used exclusively for the transaction of railroad business is taxable under code § 1328, notwithstanding the provisions of code § 1336, by which telegraph lines exclusively used in railroad business are to be taken into account in the valuation of railroad property for taxation; and it is immaterial that the line has been in fact valued as a portion of the property of the railroad and that the taxes of the railroad have been paid in accordance with such valuation. *Chicago, B. & Q. R. Co. v. Rhein*, 135–404, 112 N. W. 823.

SEC. 1333. **Insurance companies.** Every insurance company or association organized or incorporated under the laws of any state or nation other than the United States, and every other insurance company whose charter may be owned or a majority of whose stock may be controlled or whose business shall be carried on in the interest or for the benefit of any insurance company or association incorporated under the laws of any state or nation other than the United States, shall, at the time of making the annual statements as required by law, pay into the state treasury as taxes two and one-half per cent. of the gross amount of premiums received by it[1] or its agents, in cash, promissory obligation or other form of settlement for business done in this state, including all insurance upon property situated in this state and upon the lives of persons resident in this state during the preceding year. Every insurance company incorporated under the laws of any state of the United States other than the state of Iowa, not including associations operating under the provisions of chapter seven, title nine of this code, or fraternal beneficiary associations doing business in the United States, shall, at the time of making the annual statements as required by law, pay into the state treasury as taxes two and one-half per cent. of the gross amount of premiums received by it for business done in this state, including all insurance upon property situated in this state and upon the lives of persons resident in this state during the preceding year. At the time of paying said taxes, said companies and associations shall take duplicate receipts therefor, one of which shall be filed with the auditor of state, and upon filing of said receipt, and not till then, the auditor shall issue the annual certificate as provided by law. No deduction or exemption from the taxes herein provided shall be allowed for or on account of any indebtedness owing by any such insurance company or association. Provided, however, that companies doing a fire insurance business may deduct from the gross amount of premiums received, the amount of premiums returned upon canceled policies issued upon property situated in this state. [34 G. A., ch. 18, § 2.] [32 G. A., ch. 56; 29 G. A., ch. 57, § 1; 28 G. A., ch. 43, § 1; C. '73, § 807; R. § 718; C. '51, § 464.]

[1]The amendment by 34 G. A., is inserted here, where it manifestly belongs, as it could not be placed in line 8 as directed in the enrolled bill. EDITOR.]

This section which requires insurance companies to pay a tax on gross earnings within the state and exempts them from payment of all other taxes, state or local, except taxes on real property and special assessments is unconstitutional under constitution, art. 8, § 2, which subjects property of all corporations for pecuniary profit to taxation the same as that of individuals. *Hawkeye Ins. Co. v. French*, 109–585, 80 N. W. 660.

The tax here provided for is not unconstitutional on account of lack of uniformity. There is no requirement that taxes on business or on privileges shall be uniform. *Scottish U. & N. Ins. Co. v. Herriott*, 109–606, 80 N. W. 665.

The officers of the state are not authorized to collect this tax by suit or distraint of property. The only effect of the nonpayment is that the auditor will not issue a certificate authorizing the delinquent company to do business in the state during the ensuing year. *Manchester Ins. Co. v. Herriott*, 91 Fed. 711.

This section is not unconstitutional on account of lack of uniformity. *Ibid.*

SEC. 1333-a. **Domestic companies.** The shares of stock of every insurance corporation or association having capital stock, organized under the laws of this state, shall be assessed for taxation in the manner provided for the assessment of the shares of corporate stock in sections thirteen hundred twenty-three, thirteen hundred twenty-four and thirteen hundred twenty-five of the code, and as in this act provided, and said shares of stock shall not be otherwise assessed. In addition to the statement required in section thirteen hundred twenty-three of the code, the corporation shall

furnish to the assessor a copy of its annual report made to the auditor of state. [28 G. A., ch. 43, § 2.]

SEC. **1333-b. Statement furnished local assessor—what to contain —duty of assessor.** Every insurance corporation or association organized under the laws of this state, not including corporations with capital stock, county mutuals, and fraternal beneficiary associations, which county mutuals and fraternal beneficiary associations are not organized for pecuniary profit, shall on or before the twenty-sixth day of January in each year, for the purpose of assessment of its property, furnish to the assessor of the assessment district in which its principal place of business is located, a statement verified by its president, showing specifically with reference to the year next preceding the first day of January, then last past: (1) a duplicate of the statement required by law to be made to the auditor of state for the said year last past; (2) a detailed statement of all its property and assets of every kind and nature whatsoever, and the value of each item thereof, including surplus, guaranty and reserve fund, and the amount of each. It shall be the duty of the assessor, upon the receipt of said statements, and from other information acquired by him, to assess against every corporation or association referred to in this section, the value of all personal property owned by such corporation or association, together with the actual value of each parcel of real estate situated in the assessment district of such assessor, and all the said property shall be assessed at the same rate, and for the same purposes as the property of private individuals, as provided in section thirteen hundred and five of the code. [28 G. A., ch. 43, § 3.]

SEC. **1333-c. Assessment of moneys and credits.** In assessing for taxation the moneys and credits of every insurance corporation, company or association organized under the laws of this state, except county mutuals and fraternal beneficiary associations, which county mutuals and fraternal beneficiary associations are not organized for pecuniary profit, the assessor shall ascertain the debts or liabilities, if any, of such corporation, company or association to its shareholders or other persons, which debts and liabilities shall be deducted, as provided in section thirteen hundred eleven of the code, but in ascertaining the indebtedness or liability of such corporation, company or association, a debt shall be deemed to exist on account of its liability on the policies, certificates or other contracts of insurance issued by it equal to the amount of the surplus or other funds accumulated by any such corporation or association, pursuant to law, its contracts of insurance or its articles of incorporation for the purpose of fulfilling its policies, certificates or other contracts of insurance, and which can be used for no other purpose. [28 G. A., ch. 43, § 4.]

The purpose of the legislature as indicated by statutory provisions with reference to the taxation of insurance companies is to make the moneys and credits of such companies taxable, subject only to certain definite exceptions, and these exceptions are limited to funds which may be accumulated pursuant to law or the contract of insurance or the articles of incorporation of the company for the purpose of fulfilling its policies, certificates or other contracts of insurance. Therefore held that an unassigned or surplus fund was not within the exception. *Chicago Life Ins. Co. v. Board of Review*, 131–254, 108 N. W. 305.

SEC. **1333-d. State tax—date payable.** Every insurance corporation or association of whatever kind or character, organized under the laws of the state of Iowa, not including county mutuals or fraternal beneficiary associations, which county mutuals and fraternal beneficiary associations are not organized for pecuniary profit, shall, on or before the first day of March of each year, pay to the treasurer of state a sum equivalent to one

per centum of the gross receipts from premiums, assessments, fees and promissory obligations required by insurance contracts which are received during the next year preceding the first day of January last past, after deducting the amounts actually paid for losses, matured endowments, dividends to policy holders and the increase in the amount of the reserve as certified by the department actuary in his official statement to the auditor of state on the thirty-first day of December previous, based on the actuaries' table of mortality and four per cent., and the amounts returned to members upon canceled policies, certificates and rejected applications, during said year, and not until such payment shall the auditor of state issue the annual certificate, as provided by law. Provided that fire insurance companies organized under the provisions of chapter four of title nine of the code shall only be required to pay to the treasurer of state a sum equivalent to one per centum upon the gross receipts from premiums, assessments, fees and promissory obligations for business done within this state, including all insurance upon property situated in the state, after deducting the amount actually paid for losses on property located within the state and the amount returned upon canceled policies and rejected applications covering property situated within this state. [32 G. A., ch. 57; 28 G. A., ch. 43, § 5.]

The statute requiring every insurance corporation or association to pay to the state treasurer by way of tax one per cent. of its gross receipts, and which is expressly declared not to be applicable to county mutual or fraternal beneficiary associations which are not organized for pecuniary profit, is not unconstitutional on account of this discrimination, the classification being one which the legislature has authority to make. *Iowa Mut. Tornado Ins. Assn v. Gilbertson*, 129–658, 106 N. W. 153.

SEC. **1333-e. Supervisors to correct assessments—when and how.** In the event that any insurance corporation or association, affected by this act, shall pay to the treasurer of state prior to May first, nineteen hundred, a sum so that the amount of its payment to said treasurer of state for the year nineteen hundred shall equal what said corporation or association would be compelled to pay to said treasurer of state had this act been in force prior to the granting of the annual certificate by the auditor of state for the year nineteen hundred, then such corporation or association shall, for the levy made in the year nineteen hundred, be subject to the provisions of this act, respecting the levy and assessment of taxes by local and municipal authorities, and upon presentation of the receipt from the said treasurer of state showing a compliance with this section by such insurance corporation or association, it is hereby made the duty of the board of supervisors of the proper county to alter and correct the assessment of such corporation, association or shareholder made in the year nineteen hundred, so that said assessment shall be the same in amount as though it had been made under the provisions of this act, and the tax levied by the local or municipal authorities against every such corporation or association or its shareholders entitled to the benefit of this section, is corrected accordingly. Any corporation or association entitled to, but failing to take advantage of, the provisions of this section, shall not be relieved from any local or municipal tax heretofore levied by any of the provisions of this act. [28 G. A., ch. 43, § 6.]

SEC. **1334. Railway companies—when made—verified statement —when furnished.** On the second Monday in July in each year, the executive council shall assess all the property of each railway corporation in the state, excepting the lands, lots and other real estate belonging thereto

not used in the operation of any railway, and excepting railway bridges across the Mississippi and Missouri rivers, and excepting grain elevators; and for the purpose of making such assessment its president, vice president, general manager, general superintendent, receiver or such other officer as the council may designate, shall on or before the first day of April in each year, furnish it a verified statement, showing in detail, for the year ended December thirty-first next preceding:

1. The whole number of miles of railway owned, operated or leased by such corporation or company within and without the state;

2. The whole number of miles of railway owned, operated or leased within the state, including double tracks and side tracks, the mileage of the main line and branch lines to be stated separately, and showing the number of miles of track in each county;

3. A full and complete statement of the cost and actual present value of all buildings of every description owned by said railway company within the state not otherwise assessed;

4. The total number of ties per mile used on all its tracks within the state;

5. The weight of rails per yard in main line, double tracks and side tracks;

6. The number of miles of telegraph lines owned and used within the state;

7. The total number of engines, and passenger, chair, dining, official, express, mail, baggage, freight and other cars, including hand cars and boarding cars used in constructing and repairing such railway, in use on its whole line, and the sleeping cars owned by it, and the number of each class on its line within the state, each class to be valued separately;

8. Any and all other movable property owned by said railway within the state, classified and scheduled in such manner as may be required by said council;

9. The gross earnings of the entire road, and the gross earnings in this state;

10. The operating expenses of the entire road, and the operating expenses within this state;

11. The net earnings of the entire road, and the net earnings within this state.

[30 G. A., ch. 46, § 3; 29 G. A., ch. 58, § 1; C. '73, §§ 810, 1317, 1318.]

A street railway, although engaged to some extent in transporting goods and express matter for hire, is not subject to assessment under the provisions of this section. So held as to a street railway which had been extended along the public highway beyond the city limits to a neighboring town. *Cedar Rapids & M. C. R. Co. v. Cedar Rapids*, 106–476, 76 N. W. 728.

Interurban railways are to be assessed by the executive council of the state in the same manner in which steam railways are assessed. *Cedar Rapids & M. C. R. Co. v. Cummins*, 125–430, 101 N. W. 176.

Where an interurban railway system includes a street railway system in a city, it may be taxed by the executive council as a unit. *Waterloo & C. F. R. T. Co. v. Board of Supervisors*, 131–237, 108 N. W. 316.

SEC. 1334-a. **Detailed statements—what to include.** Each railway or other corporation required by law to report to the executive council under the provisions of the law as it appears in section thirteen hundred thirty-four of the supplement to the code shall, on or before the first day of April, nineteen hundred and five, make to the executive council a detailed statement showing the amount of real estate owned or used by it on December thirty-first, nineteen hundred and four, for railway purposes, in each county in the state in which said real estate is situated, including the

right of way, roadbed, bridges, culverts, depot grounds, station buildings, yards, section and tool houses, roundhouses, machine and repair shops, water tanks, turntables, gravel beds and stone quarries, and for all other purposes, with the estimated actual value thereof, in such manner as may be required by the executive council. Only one such detailed statement by any corporation shall be necessary, and when received by the council it shall become the record of railway lands of such corporation, and be deemed as annually thereafter reported for valuation and assessment by the executive council. On or before the first day of April of each subsequent year such corporation shall in like manner report all real estate acquired for any of the railway purposes above named during the preceding calendar year; and also a list of any real estate, previously reported, disposed of during the same period, which disposition shall be noted by the council in an appropriate column opposite to the description of said tract in the original report of the same in the record of railway land. [30 G. A., ch. 46, § 1.]

SEC. **1334-b. Record of railway lands.** The executive council shall, by some convenient method of binding, arrange the statements required to be made under the provision of the preceding section so as to form a consolidated list of all real estate reported to it as being owned or used for railway purposes within the state of Iowa, which list shall be known as the record of railway lands. [30 G. A., ch. 46, § 2.]

SEC. **1334-c. Acts in conflict repealed.** Subsection three of the law as it appears in section thirteen hundred thirty-four of the supplement to the code [1902] and all other statutes or parts of statutes in conflict herewith are hereby repealed. [30 G. A., ch. 46, § 3.]

SEC. **1336. Valuation.**

The tax here provided for is on real and personal property without discrimination, and therefore a sewer district tax which can only be enforced against real property within the sewer district is not enforceable against the real property of a railroad company which is included in its general assessment for taxation. *Chicago, M. & St. P. R. Co. v. Phillips*, 111–377, 82 N. W. 787.

If a railroad company owns and operates a telegraph line which is not exclusively used in the operation of its road, such line is taxable under code § 1328, relating to the taxation of telegraph lines. *Chicago, B. & Q. R. Co. v. Rhein*, 135–404, 112 N. W. 823.

SEC. **1337. Statement sent county auditors.** On or before the first Monday in August of each year, the council shall transmit to the county auditor of each county, through and into which any railway may extend, a statement showing the length of the main track within the county, and the assessed value per mile of the same, as fixed by a ratable distribution per mile of the assessed valuation of the whole property. [29 G. A., ch. 58, § 2; 16 G. A., ch. 153; C. '73, § 1320.]

The assessed value per mile is simply the unit of calculation for determining the aggregate value of the property. *Dubuque & S. C. R. Co. v. Mitchell*, 152–187, 131 N. W. 25.

SEC. **1337-a. Plats—when filed.** That every railroad company owning or operating a line of railroad within this state, shall on or before the first day of August, A. D. nineteen hundred and two, place on file in the office of the county auditor of each county in the state, into which any part of the lines of any said company lies, a plat of the lines of said companies within said county, showing the length of their said lines and the area of the land owned or occupied, by said companies in each government subdivision of land, not included within the platted portion of any town or city, within each of said counties, and the length of the said lines within the

platted portion of cities and towns. Companies having on file such plats of part or all of their lines, in any of said counties, shall be required to file plats only of that part of their lines not fully shown as above required on the plats now on file. On the first day of January of each year hereafter, like plats shall be filed of all new lines or extensions of existing lines built or completed within the calendar year preceding. [29 G. A., ch. 60, § 1.]

SEC. **1337-b. Refusal to file.** In the event of the failure or refusal of any railroad company to file the plats required under the provisions of section one of this act, at the time or according to the conditions named, then the county auditor may cause the same to be prepared by the county surveyor and the cost thereof shall, in the first place, be audited and paid by the board of supervisors out of the county fund, and the amount thereof shall be by said board levied as a special tax against said company and the property of said company which shall be collected as county taxes and when collected be paid into the county fund. [29 G. A., ch. 60, § 2.]

SEC. **1338. Levy and collection of tax.**

The order of the executive council as to the length of the main track of each railroad within the county and the assessed valuation thereof per mile becomes a part of the records of the board of supervisors for the county and is to be published as a part of its proceedings under the provisions of code § 441. *Index Printing Co. v. Board of Supervisors*, 150-411, 130 N. W. 401.

SEC. **1339. Rate.**

As to whether in taxing railway property in special charter cities the provisions of code § 1305, as to assessment of property at twenty-five per cent. of its actual value, are applicable, the court was equally divided. *Chicago, M. & St. P. R. Co. v. Davenport*, 127-677, 103 N. W. 996; *Chicago & N. W. R. Co. v. Cedar Rapids*, 127-678, 103 N. W. 997.

SEC. **1340. Number of sleeping and dining cars.** In addition to the matters required to be contained in the statement made by the company for the purposes of taxation, such statement shall show the number of sleeping and dining cars not owned by such corporation, but used by it in operating its railway in this state during each month of the year for which the return is made, the value of each car so used, and also the number of miles each month said cars have been run or operated on such railway within the state, and the total number of miles said cars have been run or operated each month within and without the state. Such statement shall show the average daily sleeping car and dining car service or wheelage operated on each part or division of the line or system within the state, designating the points on the line where variations occur, with the mileage of that part having the same daily service or wheelage. [28 G. A., ch. 44, § 1; 17 G. A., ch. 114, § 1.]

SEC. **1340-a. Gross earnings—proportion.** That for the purpose of making reports to the executive council, the gross earnings of railway companies, owning or operating a line or lines of railway partly within this state, and partly within another state, or other states, or territory, or territories, upon their line or lines within this state, shall be ascertained and reported by said railway companies as follows, to wit: The aggregate of the earnings upon business originating and terminating within this state, upon business originating in this state and terminating elsewhere, upon business originating elsewhere and terminating in this state, and upon business neither originating or terminating in this state but carried on or done over the line or lines in this state or over some part thereof, shall be reported; and with respect to all such interstate business the earnings in this state for the purpose of report shall be actually computed upon the

basis of the length of haul or carriage in this state as compared with the length of haul or carriage elsewhere. It being hereby declared that for the purpose of making reports looking to the assessment of railway property for taxation the gross earnings or business done or carried partly within this state and partly in another state, or other states, or territories, shall be that proportion of the entire earnings of such business that the haul or carriage in this state bears to the entire haul or carriage. [29 G. A., ch. 61, § 1.]

SEC. **1340-b. Rules and regulations—power of executive council.** The executive council shall have the power to prescribe such rules and regulations with respect to the keeping of accounts by the railway companies doing business in this state as will insure the accurate division of earnings as aforesaid, and uniformity in reporting the same to the executive council. [29 G. A., ch. 61, § 2.]

SEC. **1340-c. Net earnings.** The executive council shall have the power to prescribe a method for all railway companies doing business in this state, together with the rules and regulations for the ascertainment of the net earnings of the railway lines in this state, to the end that all such railway companies, in ascertaining and making report of net earnings, shall proceed upon the same basis and in a uniform manner. [29 G. A., ch. 61, § 3.]

SEC. **1340-d. Reports additional—when made.** The reports herein provided for are not in lieu of, but in addition to, the reports provided for by law, and they shall be made at the time and as a part of the reports already required. [29 G. A., ch. 61, § 4.]

SEC. **1340-e. Additional rules and regulations.** The rules, regulations, method, and requirements herein provided to be made by the executive council shall be made and communicated in writing or print to the said several railway companies within thirty days from and after the passage and taking effect of this act, and shall be and become binding upon said railway companies from the time they are so communicated; provided, however, that the said executive council shall have the power to prescribe supplemental or additional rules, regulations, and requirements at any time, and communicate them to the several railway companies in the manner aforesaid, and with respect to such additional or supplemental rules, regulations, and requirements, they shall be and become binding upon the said railway companies within thirty days after they are so communicated. [29 G. A., ch. 61, § 5.]

SEC. **1340-f. Refusal to conform to rules—penalty.** If any railway company shall fail or refuse to obey or conform to the rules, regulations, method, and requirements so made or prescribed by the executive council under the provisions of this act, or to make the reports as herein provided for, the executive council shall proceed and assess the property of such railway company so failing or refusing, according to the best information obtainable, and shall then add to the taxable valuation of such railway company twenty-five per centum thereof, which valuation and penalty shall be separately shown, and together shall constitute the assessment for that year. [29 G. A., ch. 61, § 6.]

SEC. **1342. Real property of railways.**

In determining whether real property claimed by a railroad company is included in its property as assessed by the executive council and is therefore exempt from taxation in any other form, the return of the railroad company to the executive council is not conclusive, and the council may reject property so returned as not coming within the statutory provisions as to such taxation; therefore to defeat the

collection of taxes levied on lots claimed by the railroad company on assessments made by local authorities, not simply the return of the railroad company of such property to the executive council, but the inclusion of such property in the assessment of the railroad by the executive council must be shown. *Chicago, B. & Q. R. Co. v. Kelley*, 105–106, 74 N. W. 935.

A railroad company is not taxable under this section for the value of elevators owned by it and situated on its right of way, though leased by tenants for a nominal rent, if exclusively used in storing or taking in grain for shipment over the road; otherwise if the elevators are used by the tenants for general purposes of storage for hire. *Herter v. Chicago, M. & St. P. R. Co.*, 114–330, 86 N. W. 266.

SEC. **1342-a. Freight line and equipment companies.** Every company engaged in the business of operating cars, not otherwise listed for taxation or taxed in Iowa, for the transportation of freight, whether such freight be owned by such company, or any other person or company, over any railway line or lines, in whole or in part within this state, such line or lines, not being owned, leased or operated by such company, whether such cars be termed box, flat, coal, ore, tank, stock, gondola, furniture or refrigerator cars, or by some other name, shall be deemed to be a freight line company. Every company engaged in the business of furnishing or leasing cars of whatsoever kind or description, to be used in the operation of any railway line or lines, wholly or partially within this state, such line or lines not being owned, leased or operated by such company, and such cars not being otherwise listed for taxation in Iowa shall be deemed to be an equipment company. [29 G. A., ch. 62, § 1.]

SEC. **1342-b. Verified statement—what to include.** Every freight line and every equipment company, as designated in the preceding section, doing business, or owning cars which are operated in this state, shall, annually, on or before the first Monday of June, in each year, commencing with the year nineteen hundred and three, make out and deliver to the executive council a statement, verified by oath of an officer or agent of such company making such statement, with reference to the first day of January next preceding, showing:

First.—The name of the company.

Second.—The nature of the company, whether a person or persons, an association, copartnership, corporation or syndicate, and under the laws of what state or county organized.

Third.—The location of its principal office or place of business.

Fourth.—The name and post-office address of the president, secretary, auditor, treasurer and superintendent or general manager.

Fifth.—The name and post-office address of the chief officer or managing agent of the company in Iowa.

Sixth.—The aggregate number of miles traveled within the state of Iowa by its cars during the preceding calendar year.

Seventh.—The average number of miles traveled by the cars of each class of its cars during the preceding calendar year. The number of cars necessary for the mileage traveled within the state of Iowa, under the circumstances that ordinarily attend the use of such cars, and where different classes of cars are used by said company, as to the matters embraced in this and the preceding paragraph, it shall furnish the required information as to each class of said cars, in the form prescribed by blanks to be furnished by the executive council.

Eighth.—The actual cash value, on the first day of January next preceding, of the said number of cars necessary to provide for the mileage, to be reported as required by paragraph six of this section.

Ninth.—The real estate, personal property, structure, machinery, fixtures and appliances, owned by said company, subject to local taxation within the state, and the location and the actual value thereof in the county, township or district where the same is assessed for local taxation. [30 G. A., ch. 47, §§ 1, 2; 29 G. A., ch. 62, § 2.]

SEC. **1342-c. Additional statements—refusal to furnish—penalty.** Upon the filing of such statements the executive council shall examine each of them, and if it[1] shall deem the same insufficient, or if they fail to fully set out the matters required to be reported, it shall require such officer or agent to make such other and further statements as to such matters as it[1] may deem proper. In case of the failure or refusal of any company to make and deliver to the executive council any statement or statements required by this act, such company shall forfeit and pay to the state of Iowa one hundred dollars each day such report is delayed beyond the first Monday of June, to be sued and recovered in any proper form of action, in the name of the state of Iowa, and such penalty when collected shall be paid into the general fund of the state. [29 G. A., ch. 62, § 3.]

[1]"he" in 29 G. A. session laws. EDITOR.]

SEC. **1342-d. Assessment by executive council.** Upon the meeting of the executive council on the second Monday of July in each year, it shall value and assess as the property of said company within this state, the cars of the said company necessary, under the circumstances ordinarily attending the use of such cars, for the mileage to be reported under paragraphs six and seven of section two of this act, after examining such statements and after ascertaining the actual value of said property of such company therefrom, and from such other information as it may have or obtain. For that purpose the executive council may require such company, by its agents or officers, to appear before said council with such books, papers, or additional statements as the council may require, and may compel the attendance of witnesses in case said council shall deem it necessary to enable it to ascertain the actual value of such property. From the entire actual value of the property within the state so ascertained, there shall be deducted by the said council the actual value of all cars locally assessed, and one fourth of the residue of such actual value so ascertained shall be by the executive council assessed to said company. [30 G. A., ch. 47, § 3; 29 G. A., ch. 62, § 4.]

SEC. **1342-e. Tax—when due.** The council shall also at said meeting determine the rate of tax to be levied and collected upon said assessments, which shall be equal, as nearly as may be, to the average rate of taxes, state, county, municipal and local, levied throughout the state during the previous year, which rate shall be ascertained from the records and files in the auditor's office, and said tax shall be in full of all taxes except on real estate, personal property locally assessed, and special assessments, and shall become due and payable at the state treasury on the first day of February following the levy thereof, and if not so paid, the state treasurer shall collect the same by distress and sale of any property belonging to such company in the state in the same manner as is required of county treasurers in like cases; and the order of the executive council in such cases shall be sufficient authority therefor. [29 G. A., ch. 62, § 6.]

SEC. **1342-f. "Company" defined.** The word "company" as used in this act, shall be deemed and construed to mean any person, copartnership, association, corporation or syndicate that may own or operate, or be engaged in operating, furnishing or leasing cars, as defined and described in

section one of this act, whether formed or organized under the laws of this state, or any other state or territory, or any foreign country. [29 G. A., ch. 62, § 7.]

SEC. **1342-g. Stockholders.** The individual stockholders or owners of interests of said companies shall not be required to list their shares or interests in such companies so long as the companies pay the taxes on their property as herein provided. [29 G. A., ch. 62, § 8.]

SEC. **1343. Water and gasworks—electric plants—street railways.**

The provisions of this section exclude the idea of making the franchise a distinct item of valuation in the assessment of such property for taxation. But on the other hand, the entire physical property of such plant, as, for instance, an electric railway, or some specific portion thereof, located within a taxing district, is to be subject to taxation, and not merely the material of which it has been constructed. *City Council v. Cedar Rapids & M. C. R. Co.*, 120–259, 94 N. W. 501.

In the taxation of an electric light company, the franchise should not be valued as distinct from the plant; but in valuing the plant, the franchise may be taken into consideration. *Lake City Elec. Light Co. v. McCrary*, 132-624, 110 N. W. 19.

The portion of an interurban railway which is within the limits of a city is to be included with the other property of the interurban railway in the taxation of the system under the provisions of code § 1334. *Cedar Rapids & M. C. R. Co. v. Cummins*, 125–430, 101 N. W. 176.

SEC. **1344. Roadbeds and highways.**

This section relates to the raising of general revenues, and not to assessment of railway property for street improvements. *Chicago, R. I. & P. Co. v. Ottumwa*, 112–300, 83 N. W. 1074.

SEC. **1345. Express companies—repealed.** [28 G. A., ch. 45, § 10.]

[See § 1346-j.]

[This section is provisionally repealed at § 1346-j, all rights of the state accrued under said section being saved from the operation of the repeal. EDITOR.]

SEC. **1346. Statements—repealed.** [28 G. A., ch. 45, § 10; 27 G. A., ch. 31.]

[See § 1346-j.]

[This section is provisionally repealed at § 1346-j, all rights of the state accrued under said section being saved from the operation of the repeal. EDITOR.]

SEC. **1346-a. Express companies—annual statement—what to contain.** Every company engaged in conveying to, from, through, in, or across this state, or any part thereof, money, packages, gold, silver, plate, merchandise, or any other article, by express, under a contract, express or implied, with any railroad company, or the managers, lessees, agents, or receivers thereof, provided such company is not a railroad company, a freight line company, nor an equipment company, shall be deemed and held to be an express company within the meaning of this act, and every such express company shall on or before the first Monday in May, nineteen hundred, and annually thereafter between the first day of February and the first day of March, make out and deliver to the executive council a statement verified by the oath of an officer or agent of said company, making such statement, with reference to the first day of January next preceding, showing:

First.—The name of the company, and whether a corporation, partnership, or person, and under the laws of what state or country organized.

Second.—The principal place of business, and the location of its principal office and the name and post-office address of its president, secretary, and superintendent or general manager and the name and post-office address of its principal officers or managing agent in Iowa.

Third.—The total capital stock of said company; (a) authorized; (b) issued.

Fourth.—The number of shares of capital stock issued and outstanding, and the par face value of each share, and in case no shares of stock are issued, in what manner the capital stock thereof is divided, and in what manner such holdings are evidenced.

Fifth.—The market value of said shares of stock on the first day of January next preceding, and if such shares have no market value then the actual value thereof; and in case no shares of stock have been issued state the market value, or the actual value, in case there is no market value of the capital thereof, and the manner in which the same is divided.

Sixth.—The real estate, buildings, machinery, fixtures, appliances, and personal property owned by said company and subject to local taxation within the state of Iowa, and the location and actual value thereof in the county, township, or district where the same is assessed for local taxation.

Seventh.—The specific real estate, together with the improvements thereon, and all bonds, mortgages, and other personal property owned by said company, situated outside of the state of Iowa, and used exclusively outside the conduct of the business, with a specific description of all bonds, mortgages, and other personal property, and the cash value thereof, the purposes for which the same are used, and where the same are kept or deposited and each piece of real estate, where located, the purpose for which the same is used, and the actual value thereof, in the locality where situated.

Eighth.—All mortgages upon the whole or any part of its property, together with the dates and amounts thereof.

Ninth.—(a) The total length of lines or routes over which the company transports such merchandise, freight, or express.

(b) The total length of such lines or routes as are outside of the state of Iowa.

(c) The length of such lines or routes within each of the counties, townships, and assessment districts within the state of Iowa.

[29 G. A., ch. 164, § 1; 28 G. A., ch. 45, § 1.]

SEC. **1346-b. Additional statement—delay—penalty.** That section two, chapter forty-five acts of the twenty-eighth general assembly be and the same is hereby repealed, and the following enacted in lieu thereof:

"Upon the filing of such statements, the executive council shall examine each of them, and if it shall deem the same insufficient, or in case it shall deem that other information is requisite, it shall require such officer or agent to make such other and further statements as the executive council may call for. In the case of the failure or refusal of any company to make out and deliver to the executive council any statement or statements required by this act, such company shall forfeit and pay to the state of Iowa one hundred dollars for each day such report is delayed beyond the first Monday in March of that year, to be sued and recovered in any proper form of action in the name of the state of Iowa, on the relation of the executive council, and such penalty when collected shall be paid into the general fund of the state." [29 G. A., ch. 164, § 2; 28 G. A., ch. 45, § 2.]

SEC. **1346-c. Assessment by executive council.** That section three, chapter forty-five, acts of the twenty-eighth general assembly be and the same is hereby repealed, and the following enacted in lieu thereof:

"The executive council shall meet on the second Monday in July in each year, and it shall thereupon value and assess the property of such company, in the manner hereinafter set forth, after examining such statements, and after ascertaining the actual value of the property of such company therefrom, and from such other information as it may have or

obtain. For that purpose the executive council may require such company, by its agents or officers, to appear before said council with such books, papers, or statements as the council may require, or it may require additional statements to be made by such company, and may compel the attendance of witnesses, in case said council shall deem it necessary, to enable it to ascertain the actual value of such property; any such company interested may, upon written application, appear before the executive council at such meeting, and be heard in the matter of the valuation of the property of such company for taxation." [29 G. A., ch. 164, § 3; 28 G. A., ch. 45, § 3.]

SEC. **1346-d. Actual value—how ascertained.** That section thirteen hundred forty-six-d of the supplement to the code [1902] be repealed and the following enacted in lieu thereof:

"The executive council shall first ascertain the actual value of the entire property owned by said company, from said statements or otherwise, for that purpose taking the aggregate market value of all shares of capital stock, in case said shares have a market value, and in case they have none taking the actual value thereof or of the capital of said company, in whatever manner the same is divided, in case no shares of capital stock have been issued; provided, however, that in case the whole or any portion of the property of said company shall be encumbered by a mortgage or mortgages, such council shall ascertain the actual value of such property by adding to the market value or the aggregate shares of stock or to the value of the capital, in case there shall be no such shares, the aggregate amount of the market or cash value of such mortgage or mortgages, and the result shall be deemed and treated as the actual value of the property of such company. The executive council shall, for the purpose of ascertaining the actual value of the property within the state of Iowa, next ascertain from such statements or otherwise the actual value of the property, both real and personal, owned by the company, and which is used exclusively outside the general business of the company, and also the actual value of that part of its property, if any, without the state which cannot lawfully be considered in determining the mileage value of its routes; and the aggregate of such values shall be deducted from the entire actual value of the property as above ascertained. The executive council shall next ascertain and deduct the actual value of the sea or ocean routes of any such company, and in ascertaining the same may take into consideration the earnings, both gross and net per mile, of such sea or ocean routes, as compared with the earnings, gross and net, of the land routes of such company or may ascertain their value in any other practicable manner, and may require that the reports heretofore provided for shall show such earnings. Thereupon the executive council shall ascertain the actual value of the property of such company within the state of Iowa, and for that purpose may take into consideration the proportional value of the company's property without and within the state, and shall take as a basis of valuation of the company's property in this state the proportion of the whole aggregate value of the property of said company, as above ascertained, after making the deductions above provided for which the length of the routes within the state of Iowa bears to the whole length of the routes of such company other than sea or ocean routes, and such amount so ascertained shall be considered and taken to be the entire actual value of the property of such company within the state of Iowa. From the entire actual value of the property within the state so ascertained, there shall be deducted by the said council the actual value of all the real estate, buildings, machinery, appliances, and

personal property not used exclusively in the conduct of the business within the state that are subject to local taxation within the counties, townships, and other assessment districts as hereinbefore described in the sixth item of section one of this act." [32 G. A., ch. 58; 28 G. A., ch. 45, § 4.]

SEC. **1346-e. Actual value per mile—taxable value.** The executive council shall thereupon ascertain the value per mile of the property within the state, by dividing the total value as above ascertained, after deducting the specific properties locally assessed within the state, by the number of miles within the state, and the result shall be deemed and held to be the actual value per mile of the property of such company within the state of Iowa. The assessed or taxable value shall be determined by taking that percentage of the actual value so ascertained, as is provided by section thirteen hundred and five of the code, and such valuation and assessment shall be in the same ratio as that of the property of individuals. [28 G. A., ch. 45, § 5.]

SEC. **1346-f. Assessment in each county—how certified.** That section six, chapter forty-five, acts of the twenty-eighth general assembly be and the same is hereby repealed and the following enacted in lieu thereof:

"Said executive council shall thereupon, for the purpose of determining what amount shall be assessed by it to said company, in each county of the state, through, across, into, or over which the route of said company extends, multiply the value per mile, as above ascertained, by the number of miles in each of said counties, as reported in said statements, or as otherwise ascertained, and the result thereof, with the mileage and the rate of assessment per mile, shall be by said council certified to the auditors respectively of the several counties through, into, over and across which the routes of said company extend." [29 G. A., ch. 164, § 4; 28 G. A., ch. 45, § 6.]

SEC. **1346-g. Levy and collection of tax—rates.** That section seven, chapter forty-five, acts of the twenty-eighth general assembly be and the same is hereby repealed, and the following enacted in lieu thereof:

"At the first meeting of the board of supervisors held after such certificate is received by the county auditor, it shall cause the same to be entered in its minute book and make and enter therein an order stating the length of the routes and the assessed value of each in each city, town, township, or other taxing district in its county, through or into which said routes extend, which shall constitute the taxable value of said property for taxing purposes, and the taxes on said property, when collected by the county treasurer, shall be disposed of as other taxes. The county auditor shall immediately thereafter transmit a copy of said order to the councils of cities, or towns, and to the trustees of each township, in the county. The county auditor shall also add to the value so apportioned the assessed value of the real estate, buildings, machinery, fixtures, appliances, and personal property not used exclusively in the conduct of the business situated in any township or taxing district as returned by the assessor thereof, and extend the taxes thereon upon the tax list as in other cases. All such property shall be taxable upon said assessment at the same rates, by the same officers, and for the same purposes as the property of individuals within such counties, townships, or taxing districts. The property so included in said assessment and the shares of stock in such companies so assessed shall not be taxed in this state, except as provided in this act." [29 G. A., ch. 164, § 5; 28 G. A., ch. 45, § 7.]

The certification to the board of supervisors of a county of the length of routes of express companies within the county and the assessed value of each becomes a part of the records of the board proper to be published under the provisions of code § 441. *Index Printing Co. v. Board of Supervisors*, 150–411, 130 N. W. 401.

SEC. **1346-h. Penalty.** In case any such company shall fail or refuse to pay any taxes assessed against it in any county, township, or assessment district in the state, in addition to other remedies provided by law for the collection of taxes, an action may be prosecuted in the name of the state of Iowa by the county attorneys of the different counties of the state, on the relation of the auditors of the different counties of the state, and judgment in such action shall include a penalty of fifty per cent. of the amount of the taxes so assessed and unpaid, together with reasonable attorney's fees for the prosecution of such action, which action may be prosecuted in any county into, through, over, or across which the routes of any such company shall extend, or in any county where such company shall have an officer or agent for the transaction of business. [28 G. A., ch. 45, § 8.]

SEC. **1346-i. "Company" defined.** The word "company," as used in this act, shall be deemed and construed to mean and include any person, copartnership, association, corporation, or syndicate that may own or operate, or be engaged in operating, any express route as herein defined, whether formed or organized under the laws of this state, any other state or territory, or of any foreign country. [28 G. A., ch. 45, § 9.]

SEC. **1346-j. Acts in conflict repealed.** The provisions of this act are intended to take the place of sections thirteen hundred forty-five, and thirteen hundred forty-six of the code, and such sections and each of them, and all other laws and parts of laws in conflict with this act are hereby repealed; provided, that all moneys now due the state on account of any assessment or charge made against any of such persons, copartnerships, associations, corporations, or syndicates, and all penalties and charges therein growing out of any of said repealed section[s], shall be paid and collected under the provisions of said repealed sections, the same as if said sections were not repealed, and it is hereby expressly provided that all rights of the state now accrued under said sections are hereby saved from the operation of the aforesaid repealing clauses. [28 G. A., ch. 45, § 10.]

SEC. **1347. Peddlers—amount of tax—repealed.** [30 G. A., ch. 48; 27 G. A., ch. 32, § 1.]

[See § 1347-a.]

This section, as amended by 27 G. A., ch. 32, and 30 G. A., ch. 48, does not apply to a traveling solicitor taking orders for goods from samples which are subject to the approval of his employer, and which on approval are to be filled by the delivery of the goods by the solicitor sent to him by his employer for that purpose. *State v. Bristow*, 131–664, 109 N. W. 199.

This section is unconstitutional on account of the exception as to persons who have served in the union army or navy. The classification attempted is based on no apparent necessity or difference in conditions or circumstances. *State v. Garbroski*, 111–496, 82 N. W. 959.

SEC. **1347-a. Peddlers—amount of tax.** That chapter forty-eight, acts of the thirtieth general assembly, be and the same is hereby repealed and the following is enacted in lieu thereof:

"Peddlers plying their vocation in any county in this state outside of a city or incorporated town, shall pay an annual county tax of twenty-five dollars for each pack peddler or hawker on foot, fifty dollars for each one-horse conveyance, and seventy-five dollars for each two-horse conveyance. Such tax shall be paid to the county treasurer, who shall issue to the person making such payment duplicate receipts therefor and upon presentation of one of same to the county auditor, he shall issue to the person presenting such receipt a license which shall not be transferable authorizing such person to ply the vocation of a peddler in such county for the term of one year from the date thereof. The word 'peddlers' under the provisions of this act, and wherever found in the code, shall be held to include and apply to

all transient merchants and itinerant vendors selling by sample or by taking orders, whether for immediate or future delivery. The provisions of this act shall not be construed to apply to persons selling at wholesale to merchants, nor to transient vendors of drugs, nor to persons running a huckster wagon, or selling and distributing fresh meats, fish, fruit, or vegetables, nor to persons selling their own work or production either by themselves or employes." [32 G. A., ch. 59; 30 G. A., ch. 48, § 1; 27 G. A., ch. 32, § 1; 15 G. A., ch. 62; C. '73, § 906; R. § 791; C. '51, § 510.]

SEC. **1348. License.** Any person peddling outside the limits of a city or town without such license or after the expiration thereof, shall be guilty of a misdemeanor, whether he be the owner of the goods sold or carried by him or not, and, on conviction thereof, shall forfeit and pay into the county treasury, in addition to the penalty imposed therefor, double the amount of the tax for one year as fixed in the preceding section. The license shall be good only in the county in which issued, and shall not authorize peddling in cities and towns. [28 G. A., ch. 46, § 1; C. '73, § 907; R. § 792; C. '51, §§ 511, 512.]

SEC. **1350. Personal property—real estate—buildings.**

Assessments of personal property relate back to the first of January previous. *In re Kauffman's Estate*, 104–639, 74 N. W. 8.

Assessments may properly be made in the name of the owner of the personal property on the first of January, although at the time of the assessment the owner is deceased. *Ibid.*

A claim for a loss under a fire insurance policy not yet adjusted should be listed for taxation. *Tally v. Brown*, 146–360, 125 N. W. 248.

In estimating the value of property on January first the assessor is not limited to conditions known at that time but may use such information available at the time the assessment is made. *Ibid.*

SEC. **1352. Listing property—valuation.**

An assessment in the absence of evidence to the contrary will be presumed to have been properly made. *In re Kauffman's Estate*, 104–639, 74 N. W. 8.

The description is sufficiently definite if it enables a competent person to identify the property. Abbreviations may be used if generally understood. *Watkins v. Couch*, 134-1, 111 N. W. 315.

The assessor acts ministerially and not judicially in returning an assessment roll including or omitting the property of the taxpayer. *Tally v. Brown*, 146–360, 125 N. W. 248.

SEC. **1354. Duty of assessor—owner to assist.** The assessor shall list every person in his township, and assess all the property, personal and real, therein, except such as is heretofore exempted or otherwise assessed, and any person who shall refuse to assist in making out a list of his property, or of any property which he is by law required to assist in listing, or who shall refuse to make either of the oaths or affirmations or combinations thereof required by the next section, shall be guilty of a misdemeanor, and, upon conviction thereof, shall be fined in a sum not to exceed five hundred dollars. [33 G. A., ch. 85, § 3.] [C. '73, § 823; R. § 734.]

Cattle brought into the state for feeding purposes and kept in the state until after the first of January, are subject to taxation, although the owner is a nonresident. The case is different where the property is taken through the state merely in the course of transportation. *Fennell v. Pauley*, 112–94, 83 N. W. 799.

Where, through clerical mistake, the amount of the valuation fixed by the assessor is erroneously entered on the list, the taxpayer is not precluded from questioning the amount of the assessment by failure to go before the board of equalization for relief. *Smith v. McQuiston*, 108–363, 79 N. W. 130.

The property owner is entitled to the judgment of the assessor as to the value of his property, but the statute does not require the assessor to personally list all property. Such work is clerical and even where an assistant fixes the value in the first instance the assessment is not invalid if the assessor afterwards examines and adopts it as his act. *Reed v. Cedar Rapids*, 138–366, 116 N. W. 140.

SEC. **1354-a. Deaf and blind persons—enumeration.** That it shall be the duty of the assessor at the time of making the assessments, as provided by law, to record the names, ages, sex and post-office address of all deaf or blind persons who reside within his jurisdiction. [33 G. A., ch. 88, § 1.]

SEC. **1354-b. Blanks provided.** It shall be the duty of the secretary of state to supply the county auditors in each county with suitable blanks for the purpose of carrying out the provisions of section one hereof, which blanks shall be furnished to each assessor by the county auditor at the time he supplies the assessor with the blank assessment rolls and books. [33 G. A., ch. 88, § 2.]

SEC. **1354-c. Returns—forwarded by county auditor.** It shall be the duty of the county auditor to forward to the secretary of the board of control of state institutions the returns of the assessor, as herein provided, within thirty days after the returns are filed in his office. [33 G. A., ch. 88, § 3.]

SEC. **1355. Oath.** The assessor shall administer the oath or affirmation printed on the assessment rolls hereinafter prescribed, or combination thereof, to each person assessed, and require the person taking such oath to subscribe the same, and in case any one refuses so to do, he shall note the fact in the column of remarks opposite such person's name. [33 G. A., ch. 85, § 2.] [C. '73, § 824; R. § 735; C. '51, §§ 474-5.]

SEC. **1356. Notice of valuation.**

The omission of the assessor to give written notice to the person assessed of the valuation placed upon his property will not render the assessment invalid. *In re Kauffman's Estate*, 104–639, 74 N. W. 8.

The act of the assessor in listing or omitting property is not a final determination as to the liability of the property for taxation. *Tally v. Brown*, 146–360, 125 N. W. 248.

SEC. **1357. Refusal to furnish statement.**

The penalty for failure to make return as required cannot be avoided by subsequently making a return after the assessor's books have been placed before the board of review. *Farmers' Loan & Trust Co. v. Fonda*, 114–728, 87 N. W. 724.

The penalty for refusing to furnish to the assessor a verified statement or to list property subject to taxation is not applicable to a false statement by a taxpayer respecting the amount of indebtedness for which he claims an offset as against his moneys and credits. *Stein v. Board of Review*, 135–539, 113 N. W. 339.

SEC. **1360. Assessment rolls and books.** The auditor shall procure and furnish to each assessor a supply of blank assessment rolls, on which to enter, separately, the names of all persons, partnerships, corporations or associations assessed, which rolls shall be made in duplicate, except that the oath form in the original may be omitted and the following inserted in lieu thereof: "If you are not satisfied that the foregoing assessment is correct, you can appear before the board of review, which meets at.....on the first Monday of April next. Dated.....day of.....19.... .....Assessor." Said duplicate shall be signed by the assessor, detached from the original, and delivered to the person assessed. He shall also furnish to each assessor a supply of blanks in this chapter described as "Assessment Roll, Form No. 2," which shall be in duplicate, and subject to the same conditions as the roll above provided for. The auditor shall also furnish to the assessor two assessment books, each page of which shall be headed "Assessor's book for.....township, ...county, Iowa, independent district of.....," and shall contain columns ruled and headed for the information required by this act, which rolls and books shall be substantially in the following form:

ASSESSMENT ROLL.

Name.....Age..... Address.....No. Dogs.....male.....female.....

No. road district. / Name or number of school district.	PART OF SECTION OR NAME OF TOWN	Section or lot.	Township or block.	Range.	Value of new buildings.	No. of acres improved.	No. of acres unimproved.	TOTAL NUMBER OF ACRES TAXABLE Acr's	100	LANDS Actual value per acre.	LANDS Actual value.	LTS Actual value.	Total taxable value of real estate.	EXEMPTIONS For roads	EXEMPTIONS For homestead.	Net value of lands and lots.	No. of articles.	DESCRIPTION OF PERSONAL PROPERTY	Actual value.	Remarks.
																		Colts 1 year old		
																		Colts 2 years old		
																		Colts 3 years old		
																		Horses over 3 years old		
																		Stallions		
																		Mules and asses over 1 year old		
																		Heifers 1 year old		
																		Heifers 2 years old		
																		Cows		
																		Steers 1 year old		
																		Steers 2 years old		
																		Steers 3 years old or over		
																		Bulls		
																		Work oxen		
																		Sheep over 6 months old		
																		Swine over 6 months old		
																		Vehicles		
																		Household furniture of hotel and boarding house	$	
																		Moneys and credits from form No. 2	$	
																		Merchandise	$	
																		Other personal property.	$	
																		Corporation stock	$	
																		Total actual value personal		
																		Total taxable value personal		
																		Total actual value real estate		
																		Total net taxable value real estate		
Total number of acres																				
Total actual value of real estate													$		$					
Total taxable value of real estate												$		$		$				
Total exemptions															$		$			
Net total value of lands and lots																	$			

Date of Inventory.....

Report name of soldier or sailor; or widow of soldier or sailor, and names of persons who by reason of age or infirmity claim to be unable to contribute to public revenue.

Notice of right to appear before board of review given.....A. D.....

Changes by board of review are as follows:

STATE OF IOWA, }
.....COUNTY. } ss.

I, ..., do solemnly swear (or affirm) that I am the person assessed above, that I have read the foregoing assessment roll of property listed or assessed to me, and that the same is a full, true and correct list of my taxable property, both real and personal property, subject to taxation within this district, and all property which should be listed on this assessment roll to me or by me.

.....

Subscribed and sworn to (or affirmed) this .....day of.....A. D.....,
before me.

.....Assessor.

ASSESSOR'S BOOK.

.....Township, ...County, Iowa.

Independent District of.....

Owner's name.	
Polls.	Under 45.
	Over 45.
Number of road district.	
Name or number of school district.	
Part of section or name of town.	
Section or lot.	
Township or block.	
Range.	
Number of acres improved.	
Number of acres unimproved.	
Total No. of acres taxable.	Acres. / 100
Value of new buildings.	
LANDS.	Actual value per acre. / Actual value.
Lots	Actual value.
Total actual value of real estate.	
Exemption.	For Roads. / For Homesteads.
Net actual value of lands and lots.	
Total taxable value of real estate.	
HORSES.	Number. / Actual value. — Colts 1 year old.
	Number. / Actual value. — Colts 2 years old.
	Number. / Actual value. — Horses 3 years old and over
	Number. / Actual value. — Stallions.
MULES.	Number. / Actual value.

(CONTINUED)

CATTLE.	Number. / Actual value. — Heifers 1 year old.
	Number. / Actual value. — Heifers 2 years old.
	Number. / Actual value. — Cows.
	Number. / Actual value. — Steers 1 year old.
	Number. / Actual va'ue. — Steers 2 years old.
	Number. / Actual value. — Steers 3 years old or over.
	Number. / Actual value. — Bulls.
SWINE.	Number. / Actual value.
	Number. / Actual va'ue. — Sheep over 6 months.
	Number. / Actual value — Vehicles.
	Actual value. — H'sld f'n'tre, hotel and boarding house.
	Actual value. — Moneys and credits.
	Corporation stocks.
	Merchandise.
	Other personal property.
	Actual value. / Taxable value. — Total personal property.
	Actual value of all property.
	Taxable value.
	Male. / Female. — Dogs.

ASSESSMENT ROLL—FORM No. 2.

ASSESSMENT OF MONEYS AND CREDITS.

Of.....of.....township of.....state of Iowa, January 1,.....

NOTES, BONDS AND OTHER EVIDENCE OF CREDIT.	ACTUAL VALUE.
Aggregate amount of notes	
Aggregate amount of bonds	
Aggregate amount of other written evidences of credit	
Aggregate amount of money in bank	
Aggregate amount of other money	
Aggregate amount of book accounts—good	
Aggregate amount of book accounts—doubtful	
Aggregate amount of checks, drafts and other cash items	
Total moneys and credits	
LIABILITIES.	
Total amount of notes	
Total amount of accounts	
Total amount of other debts	
Total amount of debts	
Net amount of moneys and credits	

The party assessed need list only such of his liabilities as he may desire to have subtracted from his moneys and credits.

STATE OF IOWA,.....County, ss.

I, ...do solemnly swear (or affirm) that the above is a full, true and correct statement of all moneys and credits owned by me, and that the liabilities above given to be deducted therefrom are obligations in good faith actually owned by me.

Signed.....

Subscribed and sworn to (or affirmed) before me by.....

this.....day of.....

.....Assessor.

[27 G. A., ch. 30, § 3; C. '73, § 821; R. § 732–3.]

The act of the assessor in returning to the board of review an assessment roll showing the listing or omission to list certain property is ministerial and not judicial. *Tally v. Brown*, 146–360, 125 N. W. 248.

There is no provision that the board of review shall list the kind and character of items under the head of moneys and credits in making an assessment on moneys and credits not returned by the assessor. *Barhydt v. Cross*, 156–271, 136 N. W. 525.

SEC. **1361. Schedules returned.** The assessor shall furnish to each person, partnership, corporation or association, except those otherwise assessed as provided by law, a blank known as "Assessment Roll—Form No. 2," as provided in the preceding section, upon which such person, partnership, corporation or association shall enter and set out all moneys and credits of whatsoever kind or nature belonging to such person, partnership, corporation or association, and such liabilities as they claim should be deducted from the total of their moneys and credits. The assessor shall carry the aggregate moneys and credits of such persons, partnerships, corporation or associations to the regular schedule. The assessor shall return all schedules with the assessment books to the county auditor as is provided in this chapter, and the county auditor shall carefully keep all schedules known and described in this chapter as "Assessment Roll—Form No. 2," for the period of five years from the time of filing of the same in his

office. Provided, however, that it shall be lawful to combine the affidavit with reference to real and personal property, and the affidavit as to moneys and credits, into one affidavit. [33 G. A., ch. 85, § 1.] [27 G. A., ch. 30, § 4.]

SEC. **1363. Statistics—Iowa year book of agriculture.** That section thirteen hundred sixty-three of the code is hereby repealed and the following enacted in lieu thereof:

"Each year the county auditor shall deliver to each assessor the necessary blanks for recording, as to each person whose property is listed, statistics of the previous year as to the number of acres, average and total yield of corn, oats, wheat, and such other crops and information as may be in their possession which may be called for relative to agriculture, agricultural production, agricultural labor, live stock, poultry and egg production, for publication in the Iowa year book of agriculture. The assessor shall require each person whose property is listed to make answers to such inquiries as may be necessary to enable him to return the foregoing statistics; and said blanks with such entries shall be returned to the county auditor on or before the fifteenth day of April, who shall tabulate the same by townships, and forward the returns thereof to the secretary of the state board of agriculture not later than the tenth day of May. The secretary of the state board of agriculture shall provide and cause to be delivered to the county auditor before the first week in January the blanks to be used by the assessors and county auditor for the proper return of the information required in this section." [33 G. A., ch. 86, § 1.] [24 G. A., ch. 57, § 1.]

SEC. **1365. Completion of assessment.**

Failure of the assessor to attach to the assessment rolls his oath, as required by statute, renders the taxes based on such assessment void. *Warfield-P.-H. Co. v. Averill Groc. Co.*, 119–75, 93 N. W. 80.

The assessment rolls are the lists or rolls of taxable property of persons, completed, verified and deposited by the assessors, and not the books or lists which shall thereafter be made up for other purposes. *Reed v. Cedar Rapids*, 138–366, 116 N. W. 140.

SEC. **1366. Assessors' books returned.** That section thirteen hundred sixty-six of the code be and the same is hereby repealed and the following enacted in lieu thereof:

"Such rolls shall be laid before the local board of review on or before the first Monday of April in each year for correction, and when such correction has been completed, the assessor shall proceed to make up the assessor's books in duplicate from such assessment rolls, allotting a sufficient number of pages to each letter, and return to the county auditor, together with the assessment rolls, plat book, and all statements which have been furnished to him in connection with the assessment, and the county auditor shall foot up each column of numbers and values on each page and enter such footings in recapitulation sheets, and not later than the tenth day of May, return one of the books to the township clerk, and to the city or town clerk." [33 G. A., ch. 87, § 1.] [C. '73, § 825; R. § 736; C. '51, § 478.]

SEC. **1370. Local board of review.** The township trustees shall constitute the local board of review for the township or the portion thereof not included within any city or town, and the city or town council shall constitute such board for such city or town. The board shall meet on the first Monday of April, at the office of the township, city or town clerk or recorder, and sit from day to day until its duties are completed, which shall be not later than the first day of May, and shall adjust assessments for the township, city or town by raising or lowering the assessment of any person, partnership, corporation or association as to any or all of the items of his assessment, in such manner as to secure the listing of property at its

actual value and the assessment of property at its taxable value, and shall also add to the assessment rolls any taxable property not included therein, assessing the same in the name of the owner thereof, as the assessor should have done. Provided, however, that in townships having a population of twenty thousand or more, and situated entirely within the limits of a city under special charter, and in cities having a population of twenty thousand or more, including cities under special charter, the board of review may begin the performance of the duties herein defined on and after the first day of March each year. [34 G. A., ch. 64, § 1.] [C. '73, §§ 829, 830.]

[The above section is made applicable to special charter cities by § 1004 hereof. EDITOR.]

The statutory provisions as to the local board of review do not confer authority upon such tribunal to transfer property for assessment purposes from one school district to another. The determination of a question as to the locality within the township at which personal property shall be entered on the assessment rolls is left entirely to the assessor. *Independent School District v. Board of Rview*, 131–195, 108 N. W. 220.

In determining what property is taxable and in ascertaining its value for the purpose of taxation the taxing officers act judicially. *In re Assessment of Sioux City Stock Yards Co.*, 149–5, 127 N. W. 1102.

SEC. 1371. **Clerk—correction of assessments.** The clerk or recorder of the township, city or town, as the case may be, shall be clerk of the board of review, and keep a record of its proceedings, and the assessor shall be present at its meeting and make upon the assessment rolls all corrections or additions directed by the board. At such meetings it shall be the duty of the assessor to read each and every taxpayer's name and assessment on the assessment rolls, and, if the assessment is approved, pass to the next name. After checking the same, the board shall then take up the unchecked names in alphabetical order, and raise or lower the same as in their opinion will be just, checking off each taxpayer as the same is adjusted. [27 G. A., ch. 33, § 1; 18 G. A., ch. 109, § 1; C. '73, § 831; R. § 740.]

[The above section is made applicable to cities under special charter by § 1004. EDITOR.]

The board of review in fixing the value of bank stock has the right to avail itself of any information within reach for the purpose of determining the real or market value of such stock. *First Nat. Bank v. City Council*, 136–203, 112 N. W. 829.

It is the order of the board of review if not appealed from which is final. The act of the assessor in returning or omitting property is ministerial and not judicial. *Tally v. Brown*, 146–360, 125 N. W. 248.

SEC. 1372. **Notice of assessments raised.** In case the value of any specific property or the entire assessment of any person, partnership, corporation or association is raised, or new property is added by the board, the clerk shall give immediate notice thereof by mail to each at the post-office address shown on the assessment rolls, and at the conclusion of the action of the board therein the clerk shall post an alphabetical list of those whose assessments are thus raised and added, in a conspicuous place in the office or place of meeting of the board, and enter upon the records a statement that such posting has been made, which entry shall be conclusive evidence of the giving of the notice required. The board shall hold an adjourned meeting, with at least five days intervening after the posting of said notices, before final action with reference to the raising of assessments or the adding of property to the rolls is taken, and the posted notices shall state the time and place of holding such adjourned meeting, which time and place shall also be stated in the proceedings of the board. [27 G. A., ch. 30, § 5; 18 G. A., ch. 109, § 3.]

[The above section is made applicable to cities under special charter by § 1004. EDITOR.]

Where the board of equalization increases the assessed value of a taxpayer's property without posting notice of its intention to do so, such increase will be invalid. *Cedar Rapids & M. C. R. Co. v. Redmond*, 120–601, 94 N. W. 1096.

SEC. 1373. **Complaint to board of review—appeal.** Any person aggrieved by the action of the assessor in assessing his property may make oral or written complaint thereof to the board of review, which shall consist simply of a statement of the errors complained of, with such facts as may lead to their correction, and any person whose assessment has been raised or whose property has been added to the assessment rolls, as provided in the preceding section, shall make such complaint before the meeting of the board for final action with reference thereto, as provided in said section, and appeals may be taken from the action of the board with reference to such complaints to the district court of the county in which such board holds its sessions, within twenty days after its adjournment. Appeals shall be taken by a written notice to that effect to the chairman or presiding officer of the reviewing board, and served as an original notice. The court shall hear the appeal in equity and determine anew all questions arising before the board which relate to the liability of the property to assessment or the amount thereof, and its decision shall be certified by the clerk of the court to the county auditor, who shall correct the assessment books in his office accordingly. Any officer of a county, city, town, township or school district interested or a taxpayer thereof may in like manner make complaint before said board of review in respect to the assessment of any property in the township, city or town and an appeal from the action of the board of review in fixing the amount of assessment on any property concerning which such complaint is made, may be taken by any of such aforementioned officers. Such appeal is in addition to the appeal allowed to the person whose property is assessed and shall be taken in the name of the county, city, town, township or school district interested and tried in the same manner, except that the notice of appeal shall also be served upon the owner of the property concerning which the complaint is made and affected thereby or person required to return said property for assessment. Upon trial of any appeal from the action of the board of review fixing the amount of assessment upon any property concerning which complaint is made, the court may increase, decrease or affirm the amount of the assessment appealed from. [32 G. A., ch. 60, § 1; 18 G. A., ch. 109, § 1; C. '73, § 831; R. § 740.]

[The above section is made applicable to cities under special charter by § 1004. EDITOR.]

Appeal—what questions: Before the amendment by 32 G. A., ch. 60, held that no appeal could be taken from the action of the assessing tribunal refusing to make an assessment. *In re Assessment of Farmers' L. & T. Co.*, 129–588, 105 N. W. 1023.

On all appeals from the action of the treasurer in assessing omitted property the matter stands before the district court in the same situation as before the treasurer, and the court should determine whether or not the property owner was liable to assessment on the property with which the treasurer has assessed him. *Schoonover v. Petcina*, 126–261, 100 N. W. 490.

If the treasurer has attempted to assess the person complaining with moneys and credits as omitted from assessment, it is for the court to fix the amount of moneys and credits for which the complainant should have been assessed. *Ibid.*

If the court on appeal finds that no assessment should have been made the assessment by the treasurer should be set aside *in toto*, and if it appears that as to any items included in the treasurer's assessment the complainant was not liable to assessment, then the court should reduce the assessment accordingly. *Ibid.*

The district court must have something before it to show what complaint was made to the board of review and what action was taken thereon, and the burden of proof is on the appellant to show that the decision of the board was erroneous. The taking of an appeal does not make an

assessing tribunal out of the district court. *Frost v. Board of Review*, 114–103, 86 N. W. 213.

The court will presume that the board of review acted properly and upon sufficient evidence as to values, and the burden is upon the appealing taxpayer to overcome this presumption by evidence of injustice or inequity of the assessment as raised by the board of review. *First Nat. Bank v. City Council*, 136–203, 112 N. W. 829.

It is the questions arising before the board which the district court is required to try on appeals from the board of equalization. Such objections may be raised in the most informal way, and may be quite indefinite and general in statement and need not be reduced to writing, yet they must be in some manner brought to the attention of the tax tribunal. *Gibson v. Cooley*, 129–529, 105 N. W. 1011.

The court on appeal may correct the assessment of property in accordance with the application made in the first instance to the board of equalization, but it cannot include property for assessment as to which no assessment has been made, and no question raised before the board of equalization. *Cedar Rapids & M. C. R. Co. v. Cedar Rapids*, 106–476, 76 N. W. 728.

The district court on appeal is authorized to determine only the correctness of the assessment with reference to the complaints made, and cannot increase the assessment of appellant. *Farmers' L. & T. Co. v. Fonda*, 114–728, 87 N. W. 724.

Courts have no authority either to make or correct assessments. *Judy v. National State Bank*, 133–252, 110 N. W. 605.

Under this section as amended by 32 G. A., ch. 60, the district court on appeal taken by officers or taxpayers from the action of the board of review in refusing to assess stock of a corporation on the ground that the corporation is properly assessable as a merchant under code § 1318, may order such assessment as should have been made. *In re Assessment of Sioux City Stock Yards Co.*, 149–5, 127 N. W. 1102.

On appeal from the action of the board of review, the court has no authority to make a new assessment or increase that of the board. *Woodbury County v. Talley*, 153–28, 129 N. W. 967.

In the absence of evidence of fraud, the discretion of the board of review in assessing property cannot be interfered with on appeal. *Ibid.*

Where it appears that the board of review has exercised its honest judgment in the valuation of property, the treasurer has no power to assess as omitted property any portion of that which has thus been valued by the board of review. *Ibid.*

Until by final adjournment the board has placed it beyond its power to further review the assessment complained of, no right of appeal exists. *Barz v. Board of Equalization*, 133–563, 111 N. W. 41.

Jurisdictional questions may be raised upon the appeal as well as by other proceedings. *Shirk v. Twp. Board of Review*, 137–230, 114 N. W. 884.

On appeal from the action of the board of review, the person assessed is confined to the objections made before the board. *Barhydt v. Cross*, 156–271, 136 N. W. 525.

Notwithstanding the provisions as to appeal, it is still the rule that all assessments must be as equal as the facts will justify and equitable among the several property owners. *Reiniger v. Board of Review*, 157–193, 138 N. W. 399.

Effect of judgment: An adjudication of the court on an appeal from an assessment of land contracts for one year where it was decided that they were not assessable, held binding as an adjudication with reference to the assessment of the same contracts to the same person for a subsequent year. *Defries v. McMeans*, 121–540, 97 N. W. 65.

Procedure: The notice here contemplated must be served on the mayor, who is by law the presiding officer of the city council, unless another presiding officer has been appointed of record. *Frost v. Board of Review*, 113–547, 85 N. W. 770.

While jurisdiction is conferred by the service and filing of a proper appeal, a transcript of the proceedings of the board of review should be required not only that the proceedings upon which the appeal is passed may be clearly and fairly brought to the attention of the court, but that the court record may furnish a proper basis upon which to rest a decree. *City Council v. National Loan & Inv. Co.*, 122–629, 98 N. W. 488.

The notice need not recite the fact of the complaint by the appealing party to the board of review, but such facts should appear in the transcript. A mere allegation of that fact in a petition filed by the appellant and not denied by responsive pleading is not sufficient to show the jurisdiction of the court. *Ibid.*

While pleadings may properly be filed, the rules governing the making up of issues in equity actions in general, do not apply. *Ibid.*

Jurisdiction of an appeal to the district court is obtained by service of a notice. When a notice has been served, if the board of review neglects to send up the transcript, such neglect may result in a dismissal of the appeal if the appellant does not obtain the proper order or rule requiring the performance of that duty by the board. But the appellant may be allowed by the court to introduce a transcript during the progress of the trial. *City Council v. Cedar Rapids & M. C. R. Co.*, 120–259, 94 N. W. 501.

There is nowhere any direction or suggestion requiring a bond on such appeal, and the court has no power to impose any such condition. *Ibid.*

The notice of appeal gives the district court jurisdiction, and whether or not after acquiring jurisdiction it has sufficient evidence before it upon which to act intelligently, must be determined from the proceedings, and a judgment entered as the result of such proceedings will not be void. *German-American Sav. Bank v. Council, etc.*, 118–84, 91 N. W. 829.

If the appellant neglects to present a transcript of the proceedings and to docket the appeal, the appellee may cause the appeal to be docketed and dismissed under the provisions of code § 3660. *Stephens v. City Council*, 132–490, 107 N. W. 614.

While a notice of appeal duly served is sufficient to give the court jurisdiction, such notice of itself presents nothing on which the court may try the merits of the appeal, but to that end the appellant must provide and file a proper transcript of the proceedings of the board with reference to the assessment in controversy. *Peterson v. Board of Review*, 138–717, 116 N. W. 818.

All that is required to enable the court to review the action of the board is that it appear what the complaint was before the board, its decision thereon and the taking of an appeal. *White v. Marion*, 139–479, 117 N. W. 254.

In an appeal to review the action of the board in refusing to tax the stock of a corporation, notice to the corporation is sufficient. For the purposes of taxation, the corporation represents its stockholders irrespective of their residence and the possibility of serving notice on them individually. *In re Assessment of Sioux City Stock Yards Co.*, 149–5, 127 N. W. 1102.

In an appeal from the action of the treasurer in taxing omitted property, a transcript of the assessment certified by the treasurer is not essential. It is sufficient if the taxpayer recites the facts and the objections made before the treasurer. *Morril v. Bentley*, 150–677, 130 N. W. 734.

A member of the board of supervisors of the county is an officer of such county authorized under this section (as amended) to appeal from the action of the board of review. *In re Assessment of Farmers' L. & T. Co.*, 155–536, 136 N. W. 543.

The objections contemplated in this section which may be made by an officer of the county or city to the action of the board of review need not be specific. It is sufficient that they indicate with reasonable certainty the matters in the assessment to which exception is taken. *Ibid.*

The statute authorizes a hearing *de novo* in the district court and the objections are to be heard in such court on such evidence as might be adduced. *Ibid.*

Other remedies — when allowable: After reversal in the supreme court of the finding of the district court relieving a taxpayer from taxes assessed against him, the reversal being on the ground that no sufficient complaint of the assessment was made before the board of review, the taxpayer cannot in the lower court interpose objections not thus made. *City Council v. National Loan & Inv. Co.*, 130–511, 107 N. W. 309.

A national bank representing its stockholders is a party in interest as to the taxtion of its stock and may appear before the board of review and make complaint of the assessment of such stock and prosecute an appeal from adverse decision. *First National Bank of Independence v. Independence*, 123–482, 99 N. W. 142.

Where a loan and trust company objects before the board of review to an assessment on its moneys and credits, it is not required to point out the manner in which its property should be assessed, and it may object on appeal from the action of the board of review to such assessment on moneys and credits although it might have been assessed on its corporate stock. *Wahkonsa Inv. Co. v. Ft. Dodge*, 125–148, 100 N. W. 517.

A prior contention with reference to assessments for other years that the company was assessable only as a savings bank did not estop it from objecting as to the year in question to an assessment on moneys and credits. *Ibid.*

Where the value fixed by the assessor is by mistake erroneously entered on the tax list, the property owner is not precluded from seeking other relief by failing to apply to the board of review for correction. *Smith v. McQuiston*, 108–363, 79 N. W. 130.

Irregularities and inequalities in assessment are to be complained of only by appeal to the board of review and from it to the district court. *Carpenter v. Jones County*, 130–494, 107 N. W. 435.

Where the board of review or the treasurer, in assessing property omitted from taxtion, acts within the scope of the judicial or quasi-judicial power involved, such action is to be reviewed on appeal, and not in a proceeding for injunction, nor in an action to recover damages for an illegal act. *Stevens v. Carroll*, 130–463, 104 N. W. 433.

Injunction: The provision as to complaints to the board of review is broad enough to permit the correction of excessive assessments fraudulently made, and therefore one who complains that his property has been assessed too high on account of discriminations against him as a nonresident should ask relief by application to the board of review, and not by action in equity. The jurisdiction conferred upon the board is exclusive, unless otherwise expressed or clearly manifested. *Crawford v. Polk County*, 112–118, 83 N. W. 825.

If the tax is illegal, and not merely irregular, its enforcement may be restrained by injunction. *Montis v. McQuiston*, 107–651, 78 N. W. 704.

An excessive valuation can be corrected only on appeal, and not by an action to enjoin the collection of the tax. *Lake City Elec. Light Co. v. McCrary*, 132–624, 110 N. W. 19.

Equity will interfere by injunction to restrain the enforcement of a tax not supported by an assessment, but injunction will not lie to correct the error or wrong of an excessive assessment. *Collins v. Keokuk*, 118–30, 91 N. W. 791.

The fact that no appeal is authorized from an equalization board does not justify the interposition of the court by injunction to restrain the enforcement and levy of a tax based upon an assessment. *Ibid.*

Certiorari: The board of review having properly acquired jurisdiction to determine the correctness of the assessment, its subsequent action in raising the assessment cannot be questioned by certiorari on the ground that there was not sufficient evidence before it on which to base such increase. The remedy in such case is by appeal. *Ferguson v. Board of Review*, 119–338, 93 N. W. 352.

The board acts with reference to the assessment returned by the assessor, and is authorized to act on the same sources of information. *Ibid.*

SEC. 1373-a. **Not applicable to pending litigation.** The provisions of this act shall not apply to pending litigation. [32 G. A., ch. 60, § 2.]

SEC. 1374. **Withholding property from assessment—penalty.**

In general: Although the language of this section does not expressly make it retroactive, yet as it refers to an existing condition it may be applied to the collection of taxes on property omitted from taxtion before the code took effect. *Galusha v. Wendt*, 114–597, 87 N. W. 512; *Beresheim v. Arnd*, 117–83, 90 N. W. 506.

The act of the treasurer in determining that property has been omitted and ascertaining the tax due on account thereof is a substitute for the assessment by the duly constituted authorities. *Ibid.*

The act of the assessor for previous years in assessing only a portion of the moneys and credits of a taxpayer does not constitute such an adjudication as to preclude assessments for moneys and credits omitted where such omission resulted from the fraud of the officer or the failure of the taxpayer to return the full amount of his moneys and credits for taxation. *Galusha v. Wendt*, 114–597, 87 N. W. 512.

But the mere fact that it appears that subsequently the taxpayer had a larger amount of moneys and credits than had been returned for assessment for previous years will not in itself show liability for taxes on omitted property. *Ibid.*

No penalty can be enforced with reference to taxes which should have been assessed prior to the taking effect of the code, nor can interest on such taxes be collected from the time when they should have been assessed. *Ibid.*

The fact that the penalty provided cannot be imposed in such case does not defeat the effect of the entire provision as to property previously omitted from taxation. *Beresheim v. Arnd*, 117–83, 90 N. W. 506.

The fact that the treasurer is authorized to determine the amount for which suit shall be brought in such case and that by code § 490, a commission on the money collected is allowed to the treasurer does not render the section unconstitutional as making the treasurer a judge in a matter in which he is interested. Under the provision as to treasurer's compensation he is only collaterally and not directly interested in the result of the action. *Ibid.*

The return of property at much less than its real value constitutes such fraud on the part of the owner as to deprive an assessment based on such value of any binding force as against the taxing authorities and the fact of such fraud in returning the property for assessment may be shown to support a further assessment for omitted property although there is no special pleading of such fraud. *In re Appeal of Seaman*, 135–543, 113 N. W. 354.

The treasurer may assess property as omitted although the question as to whether it is taxable has been passed upon by the assessor. *Tally v. Brown*, 146–360, 125 N. W. 248.

It is presumed that the treasurer acted upon sufficient evidence in fixing the value of property for the purposes of assessment unless there is competent evidence to the contrary. *Morril v. Bentley*, 150–677, 130 N. W. 734.

The county treasurer is not authorized to enter an assessment against property already assessed by the assessor and the board of equalization and returned to the county officials. *Brainard v. Harlan*, 139 N. W. 885.

A notice naming "moneys and credits" as the omitted property proposed to be assessed but describing such moneys and credits as consisting of "notes and corporation stock," held sufficient to authorize the treasurer to assess corporation stock. *Woodbury County v. Talley*, 153–28, 129 N. W. 967.

In a particular case, held that the treasurer properly reached the conclusion that certain capital stock of a corporation had been already assessed and was not, therefore, property omitted from assessment. *Ibid.*

No appeal by the county lies from the final determination by the treasurer in the matter of assessment of omitted property. *Ibid.*

The treasurer being clothed with authority to determine the value of omitted property, his valuation cannot be inquired into on certiorari. *Ibid.*

It is the entry on the tax list which constitutes the assessment and not the opinion filed by the treasurer finding the ground on which the assessment should be made. *Ibid.*

Under this section the treasurer has no authority to assess a mulct law tax. *In re Appeal of Des Moines U. R. Co.*, 137–730, 115 N. W. 740.

Mandamus will not lie to compel the treasurer to reverse and set aside his decision as to the taxation of omitted property. His action in that respect is judicial. *Woodbury County v. Talley*, 147–498, 123 N. W. 746.

This section is not repealed by the enactment of ch. 50, acts of 28 G. A. (See supp. §§ 1407-a–1407-e.) *Lambe v. McCormick*, 116–169, 89 N. W. 241.

Discovery of omitted property by agents: A county may contract with agents to discover property omitted or concealed from taxation. *Shinn v. Cunningham*, 120–383, 94 N. W. 941.

The provisions of 28 G. A., ch. 50, limiting the percentage which may be allowed to an agent under such contract, do not affect the compensation for services previously rendered under a valid contract. *Ibid.*

The board of supervisors has the authority to employ persons to discover property which has been omitted from taxation, for the purpose of enabling the treasurer to bring action for the taxes due thereon. *Disbrow v. Board of Supervisors*, 119–538, 93 N. W. 585.

The property owner cannot in a suit by the county for taxes on omitted property raise the question as to the validity of the contract between the county and attorneys employed for the purpose of discovering omitted property. *Galusha v. Wendt*, 114–597, 87 N. W. 512.

Demand: While the notice of the action in which the treasurer seeks to recover taxes on omitted property is not the demand contemplated by this section, nevertheless an original notice in another action, indicating that payment of such taxes is demanded, which action is dismissed or otherwise disposed of, may constitute the demand contemplated. *Bell v. Stevens*, 116–451, 90 N. W. 87.

If such original notice is signed by the treasurer with words indicating that he acts in his official capacity, the court will take judicial notice that he was the treasurer of the county at the date when such notice was served. *Ibid.*

Further as to notice, listing and appeal, see supp. § 1407-a, and notes.

Action: Aside from the provisions of this section, an action cannot be maintained to recover taxes upon omitted property. *Judy v. National State Bank*, 133–252, 110 N. W. 605.

If the petition follows the language of the statute with reference to the treasurer's knowledge as to omitted taxes, it is not vulnerable to attack on the ground that the allegation is by way of information and belief. *Robinson v. Ferguson*, 119–325, 93 N. W. 350.

Limitation: The fact that a time limit is fixed within which corrections by the treasurer may be made, while under code § 1385 with reference to entry on tax lists of omitted property by the auditor no limit is fixed, indicates that the authority of the auditor is limited to the current tax lists. *Mead's Estate v. Story County*, 119–69, 93 N. W. 88.

The treasurer alone has power to demand taxes on omitted property within five years from the date at which the assessment should have been made. The power of the auditor, under code § 1385, is limited to the current tax list. *Jewett v. Foot*, 119–359, 93 N. W. 364; *Mead's Estate v. Story County*, 119–69, 93 N. W. 88.

The five-year limitation begins to run from the date when the assessment should by law be completed, and not from the date when the tax lists are by law to be transmitted from the auditor to the treasurer. *Thornburg v. Cardell*, 123–313, 95 N. W. 239, 98 N. W. 791.

The provisions of 28 G. A., ch. 50 (see supp. §§ 1407-a–1407-e) are to be construed with reference to the language of this section, and therefore the five-year limitation of this section is applicable. *Siberling v. Cropper*, 119–420, 93 N. W. 494.

The limitation of such an action is to be found in the language of that section, and not in the general statute of limitations. *Ibid.*

The action of the treasurer must be brought within five years after the expiration of the thirty days given by his notice within which to appear and make objection. But the treasurer cannot delay the running of the statute by failing to make demand and give notice. *Shearer v. Citizens' Bank*, 129–564, 105 N. W. 1025.

The five-year limitation against an assessment of property omitted from taxation commences to run from the time when the assessment of such property should have been made. *Schoonover v. Petcina*, 126–261, 100 N. W. 490.

The five-year limitation on the treasurer's right to recover taxes on property omitted from assessment is to be computed from the completion of the work of the assessor. *Thornburg v. Cardell*, 123–313, 95 N. W. 239, 98 N. W. 791.

SEC. 1375. **County board of review.**

The power of county boards of equalization is plainly limited to equalizing by adding to, or taking from, the aggregate valuation of townships, cities and towns as a whole, and not as to parts thereof. Such board has no authority to equalize among assessment districts which are embraced in the same city. The city board has ample power to remedy inequality as among assessment districts by raising or lowering the assessments throughout the city. *Montis v. McQuiston*, 107–651, 78 N. W. 704.

SEC. 1378. **State board of review.** The executive council shall constitute the state board of review, and shall meet at the seat of government on the second Monday of July in each year. The auditor of state shall lay before it the abstracts transmitted to him by the auditor, as required by the preceding section. [32 G. A., ch. 5, § 3; C. '73, § 834; R. § 742; C. '51, §§ 481-2.]

SEC. 1380. **State levy—repealed.** [27 G. A., ch. 34, § 4.]

[See § 1380-a.]

SEC. 1380-a. **Repeal.** Section thirteen hundred eighty of the code is hereby repealed. [27 G. A., ch. 34, § 4.]

SEC. 1380-b. **State levy for certain years.** The executive council shall, in the year eighteen hundred ninety-eight, fix the rate per centum to be levied upon the valuation of the taxable property of the state necessary to yield for general state purposes approximately the sum of sixteen hundred thousand dollars and in the year eighteen hundred ninety-nine shall fix the rate necessary to yield approximately fifteen hundred thousand dollars. [27 G. A., ch. 34, § 1.]

[See § 170-b. EDITOR.]

SEC. 1380-c. **Annual levy fixed by general assembly.** In the year nineteen hundred and each subsequent year the executive council shall fix the rate per centum to be levied upon the valuation of the taxable property of the state necessary to raise such amount for general state purposes as shall be designated by the general assembly, either by statute or joint resolution. [27 G. A., ch. 34, § 2.]

SEC. 1380-d. **Executive council to certify to county auditor.** The executive council shall certify the rate so fixed to the auditor of each county. [27 G. A., ch. 34, § 3.]

SEC. 1382. **Adjustment by county auditor.** The board shall keep a record of its proceedings, and finish its review and adjustment on or before the first Monday of August. The county auditor shall thereupon add to or deduct from the valuation of each kind or class of property in his county the required percentage, rejecting all fractions of fifty cents or less in the result, and counting all over fifty cents as one dollar. [32 G. A., ch. 5, § 3; C. '73, § 836; R. § 743; C. '51, § 483.]

SEC. 1382-a. **Acts in conflict amended.** That all statutes in conflict with any of the provisions of this act be, and are, hereby amended so as not to be in conflict with the provisions of this act. [32 G. A., ch. 5, § 3.]

SEC. 1383. **Tax list.** All taxes, except road taxes,[1] which are uniform throughout any township or school district shall be formed into a single tax, and entered upon the tax list in a single column, to be known as a consolidated tax, and each receipt shall show the percentage levied for each separate fund. Before the first day of January in each year, the county auditor shall transcribe the assessments of the several townships, towns or cities into a book, to be provided at the expense of the county for that purpose, to be known as the tax list, properly ruled and headed, with distinct columns, in which shall be entered the names of taxpayers, descrip-

tions of lands, number of acres and value, number of town lots and value, value of personal property and each description of tax, with a column for polls and one for payments, and shall complete the same by carrying out the totals and footings of columns. At the end of the list for each township, town or city he shall make an abstract thereof, and apportion the consolidated tax among the respective funds to which it belongs, according to the number of mills levied for each. [30 G. A., ch. 50, § 1; C. '73, §§ 837-9; R. §§ 745-6; C. '51, §§ 485-6.]

["tax" in 30 G. A. session laws. EDITOR.]

The statute does not require the entry of the names in alphabetical order or that all the taxes due from one person appear at one place. *Watkins v. Couch*, 142–164, 120 N. W. 485.

SEC. 1385. Errors corrected—repealed. [28 G. A., ch. 47, § 1.]

[See § 1385-a.]

The auditor has authority to determine when a mistake on the tax list, not due to error of judgment on the part of the assessor, has been made, but when the determination of whether there is a mistake depends upon facts outside of the record, it is wise for the auditor to decline to act. *Smith v. McQuiston*, 108–363, 79 N. W. 130.

The extension of the application of this section by 28 G. A., ch. 47 (supp. §§ 1385-a–1385-c), and the enactment of 28 G. A., ch. 50 (supp. §§ 1407-a–1407-e), which may be construed as relating to code § 1398, do not amount to an implied repeal of code § 1374. *Lambe v. McCormick*, 116–169, 89 N. W. 241.

The auditor can act with reference to omitted property only for the purpose of adding such property to the tax list for the current year. *Thornburg v. Cardell*, 123–313, 95 N. W. 239, 98 N. W. 791.

The county auditor has no duty or authority with respect to the collection of taxes on property withheld from assessment save of adding such omitted property to the tax list for the current year. *Heath v. Albrook*, 123–559, 98 N. W. 619.

The auditor's power to list omitted property under this section as amended by 28 G. A., ch. 47, (supp. §§ 1385-a–1385-c) is limited to the current tax list and cannot be exercised without limitation as to the time. *Mead's Estate v. Story County*, 119–69, 93 N. W. 88; *Jewett v. Foot*, 119–359, 93 N. W. 364; *Thornburg v. Cardell*, 123–313, 95 N. W. 239, 98 N. W. 791.

SEC. 1385-a. Repeal. That section thirteen hundred eighty-five of the code be and the same is hereby repealed and the following enacted in lieu thereof: [28 G. A., ch. 47, § 1.]

SEC. 1385-b. Errors corrected—omitted property. The auditor may correct any error in the assessment or tax list, and may assess and list for taxation any omitted property; but before assessing and listing for taxation any omitted property he shall notify by registered letter the person, firm, corporation, or administrator, or other person in whose name the property is taxed, to appear before him at his office within ten days from the time of said notice and show cause, if any there be, why such correction or assessment should not be made, and should such party feel aggrieved at the action of said auditor he shall have the right of appeal therefrom to the district court. And if such correction or assessment is made after the books have passed into the hands of the treasurer he shall be charged or credited therefor as the case may be. All expense incurred in the making of said correction or assessment shall be borne pro rata by the funds which are affected by said correction and the proceedings to be reported to the board of supervisors. [28 G. A., ch. 47, § 2; C. '73, § 841; R. § 747.]

A mere notice by the auditor to the taxpayer with reference to omitted property is not such assessment as is contemplated by law. *Judy v. National State Bank*, 133–252, 110 N. W. 605.

The statutory provision authorizing the auditor to assess omitted property for taxation is not unconstitutional. *Clark v. Horn, Auditor*, 122–375, 98 N. W. 148.

The fact that the assessor has intentionally omitted property in his return of the assessment rolls to the board of

review does not prevent its being omitted property within the purview of this section. *Tally v. Brown*, 146–360, 125 N. W. 248.

Where the county auditor in fact makes the assessment, it is immaterial that he does so on the recommendation of a "tax ferret." *Montgomery v. Marshall County*, 152–161, 129 N. W. 329.

Although the imposition of objection to an assessment by an auditor is essential to a review by the courts, such objection need not be formal and may be expressed orally. *Moffit v. Fitzer*, 141 N. W. 935.

SEC. **1385-c. Appeal.** The appeal herein provided for shall be taken within ten days from the time of the final action of the auditor, by a written notice to that effect to the auditor, and served as an original notice. The court on appeal shall hear and determine the rights of the parties in the same manner as appeals from the board of review, as prescribed in section thirteen hundred seventy-three of the code. [28 G. A., ch. 47, § 3.]

SEC. **1387. Tax list delivered.**

No mere informality in the making of the list will affect the validity of proceedings for the collection of taxes. *Watkins v. Couch*, 142–164, 120 N. W. 485.

SEC. **1389. Treasurer to enter delinquent taxes—repealed.** [28 G. A., ch. 48, § 1.]

[See § 1389-a.]

Where the taxes have not been brought forward as required by statute a sale therefor is invalid and the owner should be permitted to redeem. *Smith v. Callanan*, 103–218, 72 N. W. 513.

Special assessments certified to the auditor by a city for collection if not brought forward on the treasurer's books as required with reference to general taxes, cease to be a lien upon the property. *Fitzgerald v. Sioux City*, 125–396, 101 N. W. 268.

SEC. **1389-a. Delinquent personal tax—treasurer to keep record.** Section thirteen hundred eighty-nine of the code is hereby repealed, and the following enacted in lieu thereof:

The treasurer shall, after October first, and before December thirty-first, of each year, enter in a book to be kept in his office as a part of the records thereof, to be known as the delinquent personal tax list, all delinquent personal taxes of any preceding year. [28 G. A., ch. 48, § 1.]

The design of this section is to provide a convenient and accessible record of personal taxes without repetition after once being entered. The taxes of any previous year are to be placed in the book kept for that purpose and in such a manner as to show the year levied and the location of the property. *Watkins v. Couch*, 142–164, 120 N. W. 485.

SEC. **1389-b. Record—what to contain.** Such entry of tax on delinquent personal tax list shall give the names of delinquents alphabetically arranged, with amounts of tax and for what year or years, and where property was located when assessed. [28 G. A., ch. 48, § 2.]

Abbreviations in describing the location of the property will not render the entry void. *Watkins v. Couch*, 134–1, 111 N. W. 315.

SEC. **1389-c. Lien on real estate.** Personal tax entered on delinquent personal tax list, as provided in sections one and two of this act, shall constitute a lien on any real estate owned or acquired by any such delinquent, and so remain until the same has been paid or legally canceled, and taxes not so entered for each year shall cease to be a lien. [28 G. A., ch. 48, § 3.]

SEC. **1389-d. Entry of delinquent real estate taxes.** The treasurer shall each year, upon receiving the tax list, enter upon the same in separate columns opposite each parcel of real estate on which the tax remains unpaid for any previous year, the amount of such unpaid tax, and unless such delinquent real estate tax is so brought forward and entered it shall cease

to be a lien upon the real estate upon which the same was levied, and upon any other real estate of the owner. But to preserve such lien it shall only be necessary to enter such tax, as aforesaid, opposite any tract upon which it was a lien. Any sale for the whole or any part of such delinquent tax not so entered shall be invalid. [28 G. A., ch. 48, § 4.]

SEC. **1390. Treasurer to collect.**

This section relates wholly to the collection of taxes in the ordinary way and has no reference to an action for the collection thereof. *McCrary v. Lake City Elec. Light Co.*, 139–548, 117 N. W. 964.

SEC. **1391. Penalty on taxes not brought forward—unavailable taxes—delinquent taxes.** That section thirteen hundred ninety-one of the code be and the same is hereby repealed and the following enacted in lieu thereof:

"No penalty or interest shall be collected upon taxes remaining unpaid four years or more from the thirty-first day of December of the year in which the tax books containing the same were first placed in the hands of the county treasurer, and the board of supervisors at the January meeting may declare such tax unavailable, and when so declared by the board, the amount shall be credited to the treasurer by the auditor as unavailable and he shall apportion such tax among the funds to which it belongs. Any portion of such tax belonging to the state shall be reported by him in his semiannual settlement sheets to the auditor of state as unavailable, whereupon the auditor of state shall credit the county with the amount so reported, but nothing in this act shall be construed to in any way release the county treasurer from any duty required of him in the collection of delinquent taxes, nor to release the taxpayer from his liability for the same. Should any of such tax afterward be collected, the county treasurer shall distribute the net amount collected among the several funds the same as though it had never been declared unavailable, and the portion belonging to the state shall be credited back to the state and included in the treasurer's remittance of other state taxes to the treasurer of state and shall be reported by the county auditor in his semiannual settlement sheets to the auditor of state, who shall recharge the same to the county." [31 G. A., ch. 51; 15 G. A., ch. 29, § 1.]

SEC. **1398. Assessment of omitted property.**

Although the provisions of 28 G. A., ch. 50 (supp. §§ 1407-a–1407-e) may be construed as relating to this section, and those of 28 G. A., ch. 47 (supp. §§ 1385-a–1385-c), as amplifying the provisions of code § 1385, nevertheless these acts are not to be regarded as repealing code § 1374. *Lambe v. McCormick*, 116–169, 89 N. W. 241.

SEC. **1400. Lien of taxes.** Taxes upon real estate shall be a lien thereon against all persons except the state. Taxes due from any person upon personal property shall be a lien upon any and all real estate owned by such person or to which he may acquire title. As against a purchaser, such liens shall attach to real estate on and after the thirty-first day of December in each year. Taxes upon stocks of goods or merchandise shall be a lien thereon and shall continue a lien thereon when sold in bulk, and may be collected from the owner, purchaser or vendee. In all cases where buildings are assessed as personal property, the taxes shall be and remain a lien on said buildings from the date of levy until paid. [29 G. A., ch. 59, § 1; 21 G. A., ch. 133; 20 G. A., ch. 194, § 1; C. '73, §§ 853, 865; R. § 759; C. '51, § 495.]

The lien provided for by this section attached, as to taxes already due on stocks of goods, on the day when the code went into effect. *Plymouth County v. Moore*, 114–700, 87 N. W. 662.

The lien of a general tax has priority

over a special tax not chargeable on the property at the time the lien for the general tax attaches and sale thereunder is made. *Harrington v. Valley Sav. Bank*, 119–312, 93 N. W. 347.

The particular time at which taxes attach as a lien against a stock of goods is not specifically designated by statute but inferentially it is when they become due. But a sale of the stock in bulk after assessment and before the levying of the tax will not pass the title free from the lien of such tax when duly levied. *Larson v. Hamilton County*, 123–485, 99 N. W. 133.

The purchaser of a stock of goods taken subject to the taxes assessed thereon does not become personally liable for the payment of such taxes. *Ibid.*

Sale of goods at retail divests the lien of the taxes upon the stock and a subsequent payment of the tax by the purchaser of the stock to save other property from distraint is a voluntary payment which cannot be recovered from the vendor. The tax on a stock of goods is not a charge against the purchaser of such stock. *Iowa Mercantile Co. v. Blair*, 123–290, 98 N. W. 789.

As between vendor and vendee, the liability for taxes depends on the intent of the parties as to passing of title. The mere use of language indicating the passing of title at the time of execution of the contract is not controlling, but the usual test is the transfer of possession. *Nunngesser v. Hart*, 122–647, 98 N. W. 505.

The provision as to the date when the tax lien attaches between the seller and buyer does not affect the question as to which of the parties to a contract to convey shall pay the taxes accruing between the date of the contract and when the conveyance is to be made. In the absence of any controlling stipulation the vendor retaining possession, rents and profits until the conveyance is due is under obligation to pay the accruing taxes until the conveyance is made. *Clinton v. Shugart*, 126–179, 101 N. W. 785.

The lien of taxes has priority over the claims and interests of all parties in the land save those of the state and the United States, and a tax deed therefore cuts off the contingent dower interest of the wife of the owner. *Lucas v. Purdy*, 142–359, 120 N. W. 1063.

Although the mortgagee has not had notice of the proceedings, the tax assessed on the mortgaged property constitutes a lien thereon prior to the lien of his mortgage. *Fitchpatrick v. Botheras*, 150–376, 130 N. W. 163.

SEC. 1400-a. **Telegraph and telephone plats—when filed.** That on or before the first day of August, A. D. nineteen hundred and four, each telephone or telegraph company owning or operating a telephone or telegraph line, any part of which lies within the state of Iowa, shall file with the several county auditors of the counties within which any part of its line is located, a map of all its lines within said county, except its line within any platted city or town, drawn to a scale of not less than one inch to four miles, on which the location of the line or lines of said company is correctly shown. The map of any line situated upon any highway or street which is the dividing line between taxing districts, shall show on which side of said street or highway said line is situated and shall locate all points at which said line may cross said street or highway. A statement showing the length of pole line in each taxing district, of each company shall be filed when no map of the pole lines of such company is required under the terms of this act. A telephone or telegraph company whose line is situated upon the right of way of a railway may file, in lieu of the map required to be filed by the provisions of this section, a certificate setting forth along what lines of railway said company's telephone or telegraph line extends. On or before the first day of March, A. D. nineteen hundred and five, and annually thereafter, like maps, statements or certificates shall be filed with the several county auditors of counties in which any part of said lines may have been extended, constructed, relocated or taken down entirely, during the preceding calendar year, showing the correct location of all such new or relocated lines, and the location of any part abandoned or taken down, as the same existed on the thirty-first day of December preceding; provided, county auditors of the several counties shall, upon application of any company, owning or operating a telephone or telegraph line in their respective counties, furnish a map or maps accurately showing the boundaries of all taxing districts in said county, and the public highways located within such taxing districts. [30 G. A., ch. 49, § 1.]

SEC. **1400-b. Failure or refusal to file.** In the event of the failure or refusal of any telephone or telegraph company, owning or operating any telephone or telegraph line not situated upon the right of way of a railway, to file the map required under the provisions of section one of this act, at the time and according to the conditions named, then the county auditor may cause the same to be prepared by the county surveyor and the cost thereof shall, in the first place, be audited and paid by the board of supervisors of the county, out of the county fund, and the amount thereof shall be by said board levied as a special tax against said company and the property of said company, which shall be collected in the same manner as county taxes and become a part of the county fund. [30 G. A., ch. 49, § 2.]

SEC. **1400-c. Forest and fruit-tree reservations.** That on any tract of land in the state of Iowa the owner or owners may select a permanent forest reservation not less than two acres in continuous area, or a fruit-tree reservation not less than one nor more than five acres in area, or both, and that upon compliance with the provisions of this act, such owner or owners shall be entitled to the benefits hereinafter set forth. [31 G. A., ch. 52, § 1.]

SEC. **1400-d. Forest reservation.** A forest reservation shall contain not less than two hundred growing forest trees on each acre. If the area selected is an original forest containing the required number of growing forest trees, it shall be accepted as a forest reservation under the provisions of this act. If the area selected is an original forest containing less than two hundred forest trees to the acre, or if it is an artificial grove, the owner or owners thereof shall have planted, cultivated and otherwise properly cared for the number of forest trees necessary to bring the total number of growing trees to not less than two hundred on each acre, during a period of not less than two years, before it can be accepted as a forest reservation within the meaning of this act, provided that no ground upon which any farm buildings stand shall be recognized as part of any such reservation. [31 G. A., ch. 52, § 2.]

SEC. **1400-e. Annual removal of trees.** Not more than one fifth of the total number of trees in any forest reservation may be removed in any one year, excepting in cases where the trees die naturally. [31 G. A., ch. 52, § 3.]

SEC. **1400-f. What considered forest trees.** The ash, black cherry, black walnut, butternut, catalpa, coffee tree, the elms, hackberry, the hickories, honey locust, Norway and Carolina poplars, mulberry, the oaks, sugar maple, European larch and other coniferous trees, and all other forest trees introduced into the state for experimental purposes, shall be considered forest trees within the meaning of this act. In forest reservations which are artificial groves, the willows, box elder, soft maple, cottonwood, and other poplars, shall be included among forest trees for the purposes of this act when they are used as protecting borders not exceeding two rows in width around a forest reservation, or when they are used as nurse trees for forest trees in such forest reservation, the number of such nurse trees not to exceed one hundred on each acre; provided that only box elder and soft maple shall be used as nurse trees. [34 G. A., ch. 65, § 1.] [31 G. A., ch. 52, § 4.]

SEC. **1400-g. Groves.** The trees of a forest reservation shall be in groves not less than four rods wide. [31 G. A., ch. 52, § 5.]

SEC. **1400-h. Fruit-tree reservation.** A fruit-tree reservation shall contain not less than seventy fruit trees on each acre, growing under proper care, and may be claimed as such for a period of eight years after planting. [31 G. A., ch. 52, § 6.]

SEC. 1400-i. **What considered fruit trees.** The cultivated varieties of apples, crabs, plums, cherries, peaches and pears shall be considered fruit trees within the meaning of this act. [31 G. A., ch. 52, § 7.]

SEC. 1400-j. **Replacing dead or removed trees.** Whenever any tree or trees on a fruit-tree or forest reservation shall be removed or die, the owner or owners of such reservation shall, within one year, plant and care for other fruit or forest trees, in order that the number of such trees may not fall below that required by this act. [31 G. A., ch. 52, § 8.]

SEC. 1400-k. **Restraint of live stock.** Cattle, horses, mules, sheep, goats and hogs shall not be permitted upon a fruit-tree or forest reservation. [31 G. A., ch. 52, § 9.]

SEC. 1400-l. **Taxable valution.** Forest reservations fulfilling the conditions of this act shall be assessed on a taxable valuation of one dollar per acre. Fruit-tree reservations shall be assessed on a taxable valuation of one dollar per acre for a period of eight years from the time of planting. In all other cases where trees are planted upon any tract of land, without regard to area, for forest, fruit, shade or ornamental purposes, or for windbreaks, the assessor shall not increase the valuation of such property because of such improvements. [31 G. A., ch. 52, § 10.]

SEC. 1400-m. **Penalty for violations.** If the owner or owners of a fruit or forest reservation violate any provision of this act within the two years preceding the making of an assessment, the assessor shall not list any tract belonging to such owner or owners, as a reservation within the meaning of this act, for the ensuing two years. [31 G. A., ch. 52, § 11.]

SEC. 1400-n. **Duties of assessor.** It shall be the duty of the assessor to secure the facts relative to fruit and forest reservations by taking the sworn statement, or affirmation, of the owner or owners making application under this act; and to make special report to the county auditor of all reservations made in the county under the provisions of this act. [31 G. A., ch. 52, § 12.]

SEC. 1400-o. **Duties of county auditor.** It shall be the duty of the county auditor in every county to keep a record of all forest and fruit-tree reservations within his county; and to make report of the same to the secretary of the state horticultural society on or before November fifteenth of each year. [31 G. A., ch. 52, § 13.]

SEC. 1400-p. **State forestry commissioner.** The secretary of the Iowa state horticultural society shall be state forestry commissioner, without salary. It shall be his duty to promote the objects of this act, and he shall have power to appoint deputies without salary for each county, or group of counties, who shall assist him, and who shall make an annual report to him of forestry matters and of the operations of this act, within their respective territories, for the use of the state horticultural society. [31 G. A., ch. 52, § 14.]

CHAPTER 1-A.

OF THE LEVY OF SPECIAL TAXES FOR STATE INSTITUTIONS AND OTHER STATE PURPOSES.

SECTION 1400-q. **State board of education—for erection, improvement and repair of buildings.** For the purpose of providing for the erection, repair, improvement, and equipment of such necessary buildings as shall be determined upon by the state board of education, there shall be

levied annually for five years a special tax of one fifth of a mill on the dollar for the benefit of the state university, one fifth of a mill on the dollar for the benefit of the state college of agriculture and mechanic arts, and one tenth of a mill on the dollar for the benefit of the state teachers college, upon the assessed valuation of the taxable property of the state; and the proceeds thereof shall be carried into the state treasury to the credit of the state university, the state college of agriculture and mechanic arts, and the state teachers college respectively. Said levies shall first be made for said purposes in the year nineteen hundred twelve, and the same levies shall be made annually for four consecutive years thereafter. The money realized from such levies shall be held by the treasurer of state for the institutions and purposes hereinbefore provided, and drawn upon requisition of the state board of education; but the funds to be realized from the said tax levies herein provided shall not be anticipated by issuing warrants or other obligations of the state. [34 G. A., ch. 201, § 1.]

SEC. **1400-q1. Plans and specifications—how approved.** No part of the said levies shall be expended for new buildings without first submitting to the general assembly for its approval plans and specifications prepared by the state architect, together with estimates of the cost of such buildings or betterments, and such plans and specifications, together with the said estimates of cost, shall be so submitted within thirty days from the first day of any regular session; provided that if the state board of education deems it advisable to make deviation from or additions to the plans, specifications, and estimated cost so submitted to the general assembly, the board shall first secure the approval thereof by a majority vote of the executive council; but the executive council shall not approve any deviation from such plans and specifications during any session of the general assembly nor costing more than twenty-five thousand dollars as to any one building. The executive council may, however, during the interim between sessions of the general assembly, on application of the state board of education, approve plans, specifications, and expenditures for buildings the necessity for which is created by fire or other casualty. The funds provided for by this act shall be drawn from the state treasury as provided in sections one hundred and nine and one hundred ten of the code. Nothing in this act shall be held to exclude the state board of education from employing an architect other than the state architect. [35 G. A., ch. 326, §§ 1, 2; 34 G. A., ch. 201, § 2.]

SEC. **1400-r. Board of control—for erection and improvement of buildings.** That for the purpose of providing for the erection and improvement of buildings, for appurtenances and connections, for the Iowa soldiers' home, Iowa soldiers' orphans' home, school for the deaf, institution for feeble-minded children, state sanatorium for the treatment of tuberculosis, state industrial school, state hospitals, penitentiary, reformatory, Iowa industrial reformatory for females, district custodial farm, and state colony for epileptics, for the purchase of land for one or more of said institutions, including a new location for the Iowa industrial reformatory for females, and for establishing and maintaining industries in any or all of said institutions, there shall be levied annually for five years a special tax of one-half mill on the dollar upon the assessed valuation of the taxable property of the state and the proceeds thereof shall be paid into the state treasury to the credit of the institutions specified. Said levy shall first be made in the year nineteen hundred thirteen, and annually thereafter. The money realized from such levies shall be held by the treasurer of state for the institutions and purposes herein stated and shall be drawn from the

state treasury on vouchers and abstracts executed and approved as provided by the law as it appears in sections twenty-seven hundred twenty-seven-a forty-one, twenty-seven hundred twenty-seven-a forty-two and twenty-seven hundred twenty-seven-a forty-three of the supplement to the code, 1907, so far as applicable, and when not applicable upon vouchers and abstracts approved by the board of control of state institutions. [35 G. A., ch. 17, § 1.]

SEC. **1400-r1. Plans and specifications—how approved.** No part of the levies herein provided for shall be expended for new buildings the probable cost of which shall exceed five thousand dollars, without first submitting to the general assembly for its approval plans and specifications prepared by an architect, together with estimates of the cost of such buildings; provided, that if the board of control of state institutions deem it advisable to make any deviation from or addition to the plans, specifications and estimated cost so submitted to the general assembly, the board shall first secure the approval thereof by a majority vote of the executive council, but the executive council shall not approve any deviation from such plans and specifications during any session of the general assembly nor which will probably cost more than twenty-five thousand dollars as to any one building. The executive council may, however, during the interim between sessions of the general assembly on application of said board, approve plans, specifications and expenditures for buildings the necessity for which is created by fire or other casualty. [35 G. A., ch. 17, § 2.]

SEC. **1400-r2. Acts in conflict repealed.** All acts and parts of acts in conflict with this act are hereby repealed. [35 G. A., ch. 17, § 3.]

SEC. **1400-s. Iowa state college of agriculture and mechanic arts —equipment and extension work.** For the purpose of creating a fund for the further equipment and support of extension work, experimentation, collegiate and noncollegiate courses of study at the Iowa state college of agriculture and mechanic arts, there shall be levied for two years a special tax of one half of a mill on the dollar upon the taxable property of the state, the proceeds whereof shall be carried into the treasury of the state to be used for the several purposes mentioned in this act in amount hereinafter specified. Said levy shall be made in the years nineteen hundred thirteen and nineteen hundred fourteen. [35 G. A., ch. 228, § 1.]

SEC. **1400-s1. Amounts—how distributed.** For the further equipment and support of extension work, experimentation, collegiate and noncollegiate courses of study at the Iowa state college of agriculture and mechanic arts, there shall be set aside from the fund created by this act for each of the two consecutive years beginning with nineteen hundred fourteen, sums as follows: For additional support of collegiate departments, one hundred twenty-five thousand dollars; for agricultural extension, forty-eight thousand dollars; for agricultural experiment station, fifty-seven thousand dollars, of which a sum not exceeding thirty-five thousand dollars may be used for the purchase of an additional farm for experimental purposes; for agricultural one-year and two-year noncollegiate courses, twelve thousand five hundred dollars; for trade school and engineering extension work, twenty-five thousand dollars; for engineering experiment station, five thousand dollars; for veterinary practitioners' course, five thousand dollars; for veterinary investigations, ten thousand dollars; for repair and contingent fund, ten thousand dollars; for the support of two and four-year courses in home economics for home makers and teachers, twenty thousand dollars; for equipment of departments and buildings, forty thousand dollars; for maintenance and improvements of public

grounds, ten thousand dollars; for the enlargement of buildings and small additional buildings, ten thousand dollars. The sums specified in this section shall be drawn from the treasury of the state upon warrants drawn by the auditor of the state upon the order of the Iowa state board of education. [35 G. A., ch. 228, § 2.]

SEC. 1400-s2. **Balance transferred to general revenues.** Any balance of the annual fund created by this levy not used for the purposes specified in section two of this act, shall be covered into the general revenues of the state on the first day of April, nineteen hundred fifteen, and on the first day of April each year thereafter during the period of the levy of the tax herein provided. [35 G. A., ch. 228, § 3.]

SEC. 1400-t. **Capitol grounds extension.** That for the purpose of providing for the purchase of real estate for the extension of the capitol grounds and improvement of the same, there shall be levied annually for a period of ten years, commencing with the first levy made after the passage of this act, a special tax as follows: In each of the years nineteen hundred thirteen and nineteen hundred fourteen one-half mill on the dollar of the taxable property in the state, and in each of the remaining eight years such rate of levy to be fixed by the executive council, as will yield approximately one hundred fifty thousand dollars annually. The proceeds of such levies shall be carried into the state treasury to the credit of a fund to be called the capitol grounds extension and improvement fund. The amount so realized by said levies shall be in lieu of all of the appropriations for said purposes during the said period of ten years. [35 G. A., ch. 14, § 1.]

SEC. 1400-t1. **Boundaries.** That for the purpose of the extension of the capitol grounds the executive council is hereby authorized, empowered and directed to purchase from time to time within said period of ten years any or all of the real estate not already owned by the state of Iowa within the following limits: Beginning at a point where the east line of Pennsylvania avenue crosses the north line of East Locust street, thence northerly along the east line of Pennsylvania avenue to the north line of the alley between Locust street and Grand avenue, thence easterly along the north line of said alley between Locust street and Grand avenue to a point one hundred thirty feet west of the west line of East Ninth street, thence northerly parallel with the west line of East Ninth street to the south line of Des Moines street, thence easterly to a point where the south line of Des Moines street crosses the east line of East Twelfth street, thence southerly to where the east line of East Twelfth street crosses the north line of East Grand avenue, thence easterly to where the north line of East Grand avenue crosses the east line of East Thirteenth street, thence southerly to where the east line of East Thirteenth street crosses the south line of Walnut street, thence westerly along the south line of Walnut street to where the same crosses the east line of East Twelfth street, thence southerly to the north line of the right of way of the Des Moines Union Railway Company, thence westerly along the north line of the right of way of the Des Moines Union Railway Company to the east line of the alley running north and south east of East Seventh street, thence northerly along the east line of said alley to the south line of East Locust street, then northwesterly to the place of beginning. [35 G. A., ch. 14, § 2.]

SEC. 1400-t2. **Allison memorial commission plan.** That all buildings, monuments, statuary, memorials, fountains and improvements hereafter erected upon said capitol grounds shall be located in accordance with the plan covering said extended grounds as contemplated herein submitted as the Allison memorial commission plan now on file in the office of the sec-

retary of state and that said grounds shall be laid out with respect to drives, streets, avenues, malls, walks, bridges, terraces and other improvements in all respects as contemplated and suggested by said plan and said plan is hereby adopted and made a part of this act. [35 G. A., ch. 14, § 3.]

SEC. 1400-t3. **Purchase of real estate by executive council—how effected.** That the executive council is hereby authorized, empowered and directed to acquire any or all the real estate included within the territory described in section two hereof for the state and may purchase the same on option or contracts or in any other way which said council may deem expedient but payment for said real estate shall be made only upon the certificate of the attorney-general that the vendor has furnished the state an abstract of title showing perfect title of record. The executive council may make said purchase or enter into said contracts at any time within said period of ten years at its discretion and as the amount of money in said fund at any time may enable them to do but only after the most diligent inquiry and investigation as to the fair, just and reasonable value of said property. Payment for said real estate may be made by the said executive council certifying to the state auditor the amount due to any person at any time, and the auditor then drawing a warrant in his favor on the state treasury payable out of the fund herein created. [35 G. A., ch. 14, § 4.]

SEC. 1400-t4. **Condemnation proceedings.** That if the executive council shall at any time be unable to purchase said real estate, or any part of it at such price or prices as it may deem just and reasonable upon its request the attorney-general shall on behalf and in the name of the state and in accordance with the statute applicable to such cases institute and prosecute to a final determination an action or actions for the condemnation of the premises to said use as is contemplated by this act. [35 G. A., ch. 14, § 5.]

SEC. 1400-t5. **Leases—removal of buildings.** That the executive council shall have charge of all buildings that may be on any of the grounds acquired under the provisions of this act and may lease any or all of said buildings and grounds on behalf of the state until, in the judgment of said council, it is advisable to remove them. That at such times said buildings may be sold by said council or are [be] razed and the salvage thereon sold or such other disposition made of said buildings as said council may deem to the best advantage of the state. And all money realized from such sources and from rentals shall be carried into the state treasury to the credit of the capitol grounds extension and improvement fund. [35 G. A., ch. 14, § 6.]

SEC. 1400-t6. **Sale of Governor Square.** That the executive council is hereby authorized, empowered and directed to sell or cause to be sold either as it now stands or to cause the same to be platted and subdivided into lots and sold in parcels the real estate now owned by the state known as Governor Square and more particularly described as follows, to wit: Commencing at a point south thirty-two degrees west thirty minutes west, one and sixty-five one hundredths chains from the northwest corner of the southwest quarter of section two, township seventy-eight north range twenty-four west of the fifth principal meridian, thence north seventy-four degrees, thirty minutes east, six hundred eighty feet to a stone, thence south fifteen degrees thirty minutes east three hundred sixty feet, thence south seventy-four degrees thirty minutes west six hundred eighty feet to a stone, thence north fifteen degrees thirty minutes west three hundred

sixty feet to the place of beginning, containing five and sixty one hundredths acres more or less. All proceeds derived from the sale of said real estate, except the expense of selling the same including agent's commission, if any, shall be carried into the state treasury to the credit of the capitol grounds extension and improvement fund herein created. All patents or deeds of conveyance to said above described real estate shall be executed and acknowledged by the governor in the name of the state upon resolution of the executive council authorizing such conveyance. [35 G. A., ch. 14, § 7.]

SEC. **1400-t7. Payment from general fund prohibited.** That no part of the purchase price of any of said grounds nor of any warrants or certificates issued in payment for the same and no part of the interest accruing thereon shall ever be paid from the general revenues or funds of the state or out of any fund or from the proceeds of any tax other than funds arising from the tax provided for herein and from the sale of the real estate herein authorized to be sold or from the proceeds or accumulations thereof. [35 G. A., ch. 14, § 8.]

SEC. **1400-t8. Warrants—collection anticipated.** That for the purpose of accomplishing the earliest possible completion of the work contemplated herein and the carrying out of the plans provided for in this act the executive council may anticipate the collection of the tax herein authorized to be levied for the extension and improvement of the capitol grounds, and for that purpose may issue interest-bearing warrants or certificates carrying a rate of interest not to exceed five per cent. per annum to be denominated capitol grounds extension and improvement warrants or certificates and said warrants or certificates and interest thereon shall be secured by said assessment and levy and shall be payable out of the respective funds hereinbefore named, pledged to the payment of the same, and no warrants shall be issued in excess of taxes authorized or to be levied to secure the payment of the same. It shall be the duty of the state treasurer to collect said several funds and to hold the same separate and apart in trust for the payment of said warrants or certificates and interest and to apply the proceeds of said funds pledged for that purpose to the payment of said warrants or certificates and interest. Such warrants or certificates shall be issued in sums of not less than one hundred nor more than one thousand dollars each running not more than ten years bearing interest not exceeding five per cent. per annum, payable annually or semiannually and shall be substantially in the following form:

The state of Iowa, for value received, promises to pay to bearer .... dollars, lawful money of the United States of America, on ..... with interest on said sum from the date hereof until paid, at the rate of ..... per cent. per annum, payable ..... annually on the first day of ....., and ..... in each year, both principal and interest payable at Des Moines, Iowa. This warrant or certificate is issued by the state of Iowa pursuant to the provisions of section [nine], chapter [fourteen], of the acts of the thirty-fifth general assembly of Iowa. And it is hereby certified and recited that all acts, conditions and things required by the laws and constitution of the state of Iowa to be done precedent and in the issue of this warrant or certificate, have been properly done, happened and been performed in regular and due form, as required by law.

In testimony whereof said state, by its executive council, has caused this warrant or certificate to be signed by its chairman, and attested by its

secretary, with the seal of said executive council attached this ..... day of .....

.....
Chairman of the Executive Council
of the State of Iowa.

Attest:

.....
Secretary of the Executive Council
of the State of Iowa.
[35 G. A., ch. 14, § 9.]

SEC. 1400-t9. **Terms of warrants to be specified by executive council.** That all warrants or certificates issued under the provisions of this act shall be issued pursuant to and in conformity with a resolution adopted by the executive council, which shall specify the amount authorized to be issued, purpose for which issued, the rate of interest they shall bear, and whether payable annually or semiannually, the place where the principal and interest shall be payable, and when to become due, and such other provisions, not inconsistent with law, in reference thereto, as the council shall think proper, which resolution shall be entered of record upon the minutes of the proceedings of the executive council, and a true and complete copy thereof printed on the back of each warrant or certificate (which resolution shall constitute a contract between the state and the purchasers or holders of said warrants or certificates). [35 G. A., ch. 14, § 10.]

SEC. 1400-t10. **Registration of certificates by treasurer.** That when warrants or certificates have been executed as aforesaid, they shall be delivered to the treasurer of state of the state of Iowa and his receipt taken therefor, who shall register the same in a book provided for that purpose, which shall show the number of each warrant or certificate, its date, date of sale, amount, date of maturity, and the name and address of the purchaser, which record shall at all times be open to the inspection of the citizens of said state. The treasurer of state of the state of Iowa shall thereupon certify upon the back of each warrant or certificate as follows:

"This warrant (or certificate) duly and properly registered is in my office this ..... day of .....

.....
Treasurer of State of the State of Iowa."

and shall stand charged on his official bond with all warrants or certificates so delivered to him and the proceeds thereof. [35 G. A., ch. 14, § 11.]

SEC. 1400-t11. **Sale of certificates.** The treasurer of state of the state of Iowa shall, under resolution and the direction of the executive council, sell the warrants or certificates for cash on the best available terms, and the proceeds shall be applied and exclusively used as hereinbefore provided and for the purposes for which said warrants or certificates are issued. In no case shall they be sold for a less sum than their face value, and all interest accrued at the date of sale. After registration the treasurer of state of the state of Iowa shall deliver said warrants or certificates to the purchaser thereof. If, in the judgment of the executive council, it should be deemed expedient warrants or certificates may be issued direct to the vendor in payment for any property purchased under the provisions of this act. [35 G. A., ch. 14, § 12.]

CHAPTER 2.

OF THE COLLECTION OF TAXES.

SECTION 1403. Payment—installments.

Where the land is taxed as one parcel and the mortgage covers a portion only, the mortgagee cannot purchase the entire parcel at tax sale and acquire title so as to divest the owner of the balance of the tract of his title. *Cone v. Wood*, 108–260, 79 N. W. 86, and see notes to § 1440.

The weight of authority is that the particular remedy provided by statute for the collection of taxes is exclusive, and held that an action in equity for the enforcement of the lien of the mulct tax against the premises on which a liquor nuisance was situated could not be maintained. *Crawford County v. Laub*, 110–355, 81 N. W. 590. So held also as to enforcement of personal property tax under § 1406. *Plymouth County v. Moore*, 114–700, 87 N. W. 662.

The payment and acceptance of a tax as assessed by the assessor does not operate as an estoppel to enforce against such taxpayer an additional assessment made by the board of review. *City Council v. National Loan & Inv. Co.*, 130–511, 107 N. W. 309.

One who makes voluntary payment of taxes cannot recover them back on the ground that they were not legal. *Odendahl v. Rich*, 112–182, 83 N. W. 886.

One whose title rests on forged instruments and is therefore invalid may recover of the true owner taxes paid by him under the mistaken belief as to his ownership, if such belief is not the result of his own carelessness or want of knowledge of the law, and such property may be had in an action at law. *Govern v. Russ*, 125–188, 100 N. W. 325.

As literal compliance with the statute in reference to the payment of taxes within a specified time is sometimes impracticable, the action of the treasurer in accordance with an established custom and method of doing business, although not strictly in accordance with the statutory provisions, will not require his removal from office for misconduct where no injury to the county was intended and where there was no design to secure personal benefit. In such a case the question of wilfulness is for the jury. *State v. Meek*, 148–671, 127 N. W. 1023.

SEC. 1406. Sale of personal property.

The provisions of this section as to the collection of personal property tax are exclusive of any other remedy, except as provided by statute, and a personal action cannot be maintained for such tax. *Plymouth County v. Moore*, 114–700, 87 N. W. 662.

The method of enforcing the lien of a tax being provided by statute, an action at law cannot be maintained against the owner of property to recover the amount thereof. *Carroll County v. Ley*, 127–230, 103 N. W. 101.

This section has reference only to collection of taxes by distress and sale and not to their collection by an act such as is authorized by code supp. § 1452-a. *McCrary v. Lake City Elec. Light Co.*, 139–548, 117 N. W. 964.

SEC. 1407. Collectors—appointment of—compensation—sheriff. Immediately after the taxes become delinquent, each county treasurer shall proceed to collect the same by distress and sale of the personal property of the delinquent taxpayers, and for this purpose he may appoint one or more collectors to assist him in collecting the same. Each collector appointed shall receive for his services and expenses the sum of five per cent. on the amount of all taxes collected and paid over by him, which percentage he shall collect from the delinquent, together with the whole amount of delinquent taxes and interest; and pay the same to the treasurer at the end of each month, and in the discharge of his duties as collector, should it become necessary to make the delinquent taxes by distress and sale, or should no collector be appointed, or should the collector fail to institute proceedings to collect said delinquent taxes, the treasurer shall place the same in the hands of the sheriff, or a constable, who shall proceed to collect the same, and either shall be entitled to receive the same compensation, in addition to the five per cent., as constables are entitled to receive for the sale of property on execution. And the boards of supervisors may in their discretion authorize the appointment by the treasurer of one or

more collectors to assist in the collection of such delinquent personal property tax as the board may designate and may pay such collector as full compensation for all services rendered and expenses incurred a sum not to exceed ten per cent. of the amount collected which sum shall in no event be paid or allowed until all such taxes collected have been paid over to the county treasurer by such collector. [33 G. A., ch. 89, § 1.] [31 G. A., ch. 53; C. '73, § 859.]

[The above section is made applicable to cities under special charter by § 1020. EDITOR.]

The county cannot contract with the collector that he is to receive a larger sum than that specified, nor can he recover his statutory compensation after receiving under contract a larger percentage than authorized by law. Any amount paid under such contract in excess of the statutory compensation may be recovered back. *Massie v. Harrison County*, 129–277, 105 N. W. 507.

To support such a contract it is not competent to show that the collector agreed to compile a delinquent tax list, as the compilation of such list pertained to the duties of the treasurer's office. *Ibid.*

SEC. **1407-1a. Compensation deducted ratably from the several funds.** The amount allowed as compensation to such collector shall be deducted ratably from the several funds to which such taxes so collected by the collector belong. [33 G. A., ch. 89, § 2.]

SEC. **1407-a. Discovery of property withheld from taxation—contract—notice—appeal—repeal.** That the law as it appears in sections fourteen hundred and seven-a, fourteen hundred and seven-b, fourteen hundred and seven-c, fourteen hundred and seven-d, and fourteen hundred and seven-e, supplement to the code, 1907, be and the same is hereby repealed. [34 G. A., ch. 66, § 2.] [28 G. A., ch. 50, § 1.]

In general: This act is not unconstitutional as embracing more than one subject matter or subject matter not embraced in the title. *Beresheim v. Arnd*, 117–83, 90 N. W. 506.

The provisions of this act are not to be construed as impliedly repealing code § 1374. *Lambe v. McCormick*, 116–169, 89 N. W. 241.

What property: Before the county treasurer may act with reference to the enforcement of taxes for property wrongfully withheld from assessment, it must appear that the property withheld was subject to taxation in the county. *Layman v. Iowa Telephone Co.*, 123–591, 99 N. W. 205.

Where a savings bank has been in fact assessed, the treasurer has no authority to make an additional assessment for the difference between the value of the stock as assessed and its real value. The statutory provision for assessment of omited property by the assessor has no application to those cases where property, the subject of taxation, has been in fact entered on the assessment books and has not been withheld, overlooked, or for any other cause, not listed. *German Sav. Bank v. Trowbridge*, 124–514, 100 N. W. 333.

It is no defense to a proceeding to collect taxes on property omitted from taxation in the proper taxing district that it has been in fact taxed for the year in question in another county, but if it has been taxed in the same county, though in another district than that in which it should have been taxed, the county is estopped by receiving the tax actually imposed from insisting on further taxation. *Snakenberg v. Stein*, 126–650, 102 N. W. 533.

If the item of property charged to have been omitted has in fact been listed and the value fixed thereon by the proper officers, no recovery of taxes therefor can be had. *Security Savings Bank v. Carroll*, 128–230, 103 N. W. 379.

An assessment by the treasurer cannot be sustained except upon proof of the ownership of taxable property, and that it was withheld from taxation. *Gibson v. Clark*, 131–325, 108 N. W. 527.

Proof of ownership at a subsequent date is not proof of ownership as of the date when it is alleged the property was withheld from taxation. *Ibid.*

Where the assessor has made an assessment without fraud on his part, or concealment on the part of the property owner, and no steps have been taken to review such assessment in the manner provided by statute through the board of equalization, it becomes a finality, and the property thus assessed cannot be reassessed as omitted property for the same year, though the valuation by the assessor through mistake of law is inadequate. *People's Savings Bank v. Layman*, 134 Fed. 635.

Contracts: Prior to the enactment of this chapter the board of supervisors could

make a valid agreement for services rendered or to be rendered in the discovery of omitted property, for a reasonable compensation. *Reed v. Cunningham*, 121–555, 96 N. W. 1119.

While the board of supervisors may contract with an attorney to prosecute action against the owners of property omitted from assessment, it cannot contract with an attorney to render services in collecting such taxes for a percentage of the amount collected in addition to the amount which the county may pay under the provisions of this section. *Heath v. Albrook*, 123–559, 98 N. W. 619.

Any amount paid to an attorney under such illegal contract may be recovered back. *Ibid.*

Further as to contracts, see § 1374 and notes to that section in supplement.

Although tax ferrets may have no authority to deal with taxes regularly assessed and which are not the subject of controversy, they undoubtedly have authority to settle with property owners for the amount they should pay on property omitted from taxation and if in so doing they take into account the amount of taxes already assessed, there is no reason why the county should be permitted to repudiate the settlement. *Barthell v. Hermanson*, 138 N. W. 1108..

The county or its officers, having taken the benefit of such settlement, do so subject to the burdens involved therein. *Ibid.*

Notice: The treasurer must give notice to the owner of the proceeding by him to enforce payment of taxes on property omitted from assessment. *Thornburg v. Cardell*, 123–313, 95 N. W. 239, 98 N. W. 791.

Notice by the treasurer to the taxpayer to appear and show cause why he should not be assessed for omitted property is neither an assessment of such property nor a demand for payment of the taxes such as to render a subsequent voluntary payment of the taxes in pursuance of such notice and claim recoverable as having been illegally exacted. *Kehe v. Blackhawk County*, 125–549, 101 N. W. 281.

The agent of the county, sending out a notice as to the assessment by the treasurer of omitted property, is not liable in damages as for libel, although the property owner has not in fact been guilty of any fraud or perjury. *O'Connell v. Shontz*, 126–709, 102 N. W. 807.

The notice by the treasurer to appear and make objection to the proposed listing and assessment of omitted property for taxation may designate any reasonable place which may be at his office or anywhere else within the county. *In re Appeal of Seaman*, 135–543, 113 N. W. 354.

Where the property owner responding to the notice fixing the time for hearing of complaint is referred to the tax ferret to whom his objections are made, such objections are to be considered on appeal. *Murrow v. Heath*, 146–347, 125 N. W. 259.

The objection may be oral or in writing but need not be formal, though essential to a review in the district court. *Ibid.*

Listing: A notice by the treasurer to the taxpayer is not an assessment of taxes against him on property claimed to have been omitted from taxation. *Kehe v. Blackhawk County*, 125–549, 101 N. W. 281.

Nor is the demand made by the treasurer for payment of taxes on omitted property such an assessment as is contemplated. *Judy v. National State Bank*, 133–252, 110 N. W. 605.

The county treasurer need not list omitted property for taxation on the day specified in the notice to the taxpayer, but may do so within a reasonable time thereafter. *Snakenberg v. Stein*, 126–650, 102 N. W. 533.

The listing of the property and assessment of the tax by the treasurer is not a judgment, nor does it in any way affect the bar of the statute as to actions for the collection of taxes upon omitted property. It is simply a condition precedent to the right of action. *Shearer v. Citizens' Bank*, 129–564, 105 N. W. 1025.

Where the person in possession of the personal property of a nonresident is notified to appear and show cause why the property in his possession should not be assessed, and he appears and denies that he has in possession or under his control as agent the property in question, the treasurer may assess the property to him as agent without specifying the name of the principal. *Security Savings Bank v. Carroll*, 131–605, 109 N. W. 212.

The determination by the county treasurer that property has been omitted, and ascertainment of the amount of tax due thereon, is a substitute for the assessment required by general provisions of the statute, and the treasurer should make the fact of such determination appear of record in his office. But the entry may be made by another under his direction. *In re Morgan's Estate*, 125–247, 101 N. W. 127.

The statute as it now stands contemplates the listing of an assessment by the treasurer after the delinquent has been offered an opportunity to be heard and exacts an entry in the tax list by the treasurer, either in a book delivered to him by the auditor or another kept for that purpose. Such entry constitutes the final determination of the treasurer. *Woodbury County v. Talley*, 153–28, 129 N. W. 967.

Appeal: No formal pleadings are necessary before the treasurer on objection to the assessment of omitted property nor on the appeal to the district court from such assessment, and the general allegation that items of moneys and credits scheduled and proposed to be listed and assessed are not items for which the complaining party is liable to assessment for

the years specified is sufficient. Upon appeal the complaining party is entitled to have determined every question which the treasurer was called upon to determine with reference to liability of complainant to assessment on moneys and credits for years specified. *Schoonover v. Petcina*, 126–261, 100 N. W. 490.

The requirement for notice implies the right of the property owner to appear and make known his objections, and the duty of the treasurer to consider and pass upon the same. But it was not intended that the procedure be invested with all the formalities which pertain to an action in court. *Gibson v. Cooley*, 129–529, 105 N. W. 1011.

On the appeal, however, the district court is called upon to determine only such objections as have been in some manner raised before the treasurer. *Ibid.*

The burden of proof is upon the person seeking to reverse or set aside the treasurer's assessment. *Ibid.*

The treasurer cannot appeal from his own action in refusing to make an assessment on omitted property on the application of persons acting under contract with the county to discover omitted property. *In re Assessment of Farmers' L. & T. Co.*, 129–588, 105 N. W. 1023.

Jurisdiction is conferred on the district court by the serving and filing of the notice of appeal, and the introduction in evidence of the treasurer's assessment is equivalent to a transcript of the assessment. *Murrow v. Heath*, 146–347, 125 N. W. 259.

Even after the treasurer has entered property for taxation on notice to the taxpayer and his failure to attend, if later in the same day such party appears before him desiring in good faith to show cause why his property should not be listed, the treasurer may set aside his entry and make another from which an appeal will lie. *Ream v. Brown*, 153–301, 133 N. W. 714.

In order to authorize a review of the finding of the treasurer or auditor, objection to the assessment must be interposed before such officer. But there is no requirement that the objection be reduced to writing or inserted as part of the assessment in order that it appear in the transcript filed by the clerk of the district court on appeal. *Dowling v. Webster County*, 154–603, 134 N. W. 870.

Other remedy: An attempt at assessment by the treasurer of property not subject to assessment in the county is void and the owner is not required to resort to an appeal from the assessment, but may attack it collaterally. *Layman v. Iowa Telephone Co.*, 123–591, 99 N. W. 205.

The threatened action of the treasurer in proceeding to assess omitted property is not to be enjoined before he has proceeded to act. The findings of the treasurer are not conclusive, but any error therein may be corrected on appeal. *Security Savings Bank v. Carroll*, 128–230, 103 N. W. 379.

Where the treasurer is acting within the scope of his statutory power in taxing property as omitted, the correctness of his action is to be determined on appeal and not by injunction, nor is he liable in an action for damages for an erroneous exercise of power within the scope of his judicial or quasi-judicial capacity. *Stevens v. Carroll*, 130–463, 104 N. W. 433.

An appeal being provided for an action in equity to restrain the treasurer from acting will not lie unless it be made clearly to appear that an assessment by him would be absolutely illegal and void. *Security Savings Bank v. Carroll*, 131–605, 109 N. W. 212.

The treasurer having authority to assess omitted personal property to an agent in possession and control thereof for a nonresident, his assessment thereon is not illegal and void, and the sufficiency of the evidence on which the assessment is made can be called in question only by an appeal. *Ibid.*

If the treasurer makes an assessment within his jurisdiction the taxpayer can only be heard to complain of error in his finding by an appeal. He cannot set up such error by way of defense in an action by the treasurer to recover the taxes so assessed. *Judy v. National State Bank*, 133–252, 110 N. W. 605.

If the taxpayer fraudulently conceals his property he cannot rely by way of adjudication upon the assessment made by the assessor. *Ibid.*

If it appears that the taxpayer had property omitted from assessment, the treasurer has jurisdiction and any question as to the amount of such omitted property should be raised by appeal and not in an equitable action to enjoin the enforcement of the assessment made by the treasurer. *Bednar v. Carroll*, 138–338, 116 N. W. 315.

The parties to a hearing before the treasurer as to an assessment of property omitted from taxation are bound to take notice thereof and if dissatisfied therewith, their remedy is by appeal. Not having done so equity will afford them no relief. *Saar v. Carson*, 145–525, 124 N. W. 204.

Voluntary payment: One who, being charged by the treasurer or his agents for the collection of taxes on omitted property, with taxes on account of such property, voluntarily pays the same, cannot afterwards recover back the taxes so paid on proof that he was not liable therefor. *Kehe v. Blackhawk County*, 125–549, 101 N. W. 281; *In re Morgan's Estate*, 125–247, 101 N. W. 127.

SEC. 1407-b. **Compensation—repealed.** [34 G. A., ch. 66, § 2.] [28 G. A., ch. 50, § 2.]

[See § 1407-a. EDITOR.]

SEC. 1407-c. **Bond—approval—repealed.** [34 G. A., ch. 66, § 2.] [28 G. A., ch. 50, § 3.]

[See § 1407-a. EDITOR.]

SEC. 1407-d. **Disposition of taxes recovered—repealed.** [34 G. A., ch. 66, § 2.] [28 G. A., ch. 50, § 4.]

[See § 1407-a. EDITOR.]

SEC. 1407-e. **Existing contracts—repealed.** [34 G. A., ch. 66, § 2.] [28 G. A., ch. 50, § 5.]

[See § 1407-a. EDITOR.]

SEC. 1407-f. **Contracts for discovery of unassessed property prohibited—acts in conflict repealed.** It shall be unlawful for the council of any city or town, including cities under special charter and the commission plan, or for the board of supervisors of any county, to employ or contract with any person, corporation or firm to assist the proper officers in the discovery of property not listed or assessed for taxation as required by law. Any acts or parts of acts in conflict herewith are hereby repealed. [34 G. A., ch. 66, § 1.]

SEC. 1409. **Taxes certified to another county.**

It is only when a taxpayer has removed from the county, leaving no property therein out of which the taxes can be made, that certification of his taxes to another county is authorized. *Union Cent. L. Ins. Co. v. Chapin*, 113–411, 85 N. W. 791.

SEC. 1413. **When taxes delinquent—penalties.**

Interest and penalties collected by the treasurer for nonpayment of paving certificates should be turned over to the holder of the certificates and not to the city. *Barber Asphalt Pav. Co. v. Webster County*, 143–255, 121 N. W. 1072.

SEC. 1415. **Apportionment—recovery on treasurer's bond of interest or penalty misapplied.** That section fourteen hundred fifteen of the code be and the same is hereby repealed and the following enacted in lieu thereof:

"On or before the tenth day of each month the treasurer shall apportion all taxes and interest on same collected during the preceding month among the several funds to which it belongs according to the number of mills levied for each fund and enter the same upon his cash account, and report the amount of each tax and interest collected on same to the county auditor who shall charge him in each fund with the same. Any interest or penalty on delinquent taxes apportioned or transferred to any fund other than the fund upon which same was collected, together with a penalty of ten per cent. and interest at six per cent. on the aggregate from the time such tax was due and payable, may be recovered in a civil action brought against the county treasurer and his bondsmen by any person in control of the fund affected thereby." [33 G. A., ch. 90, § 1.] [C. '73, § 868.]

SEC. 1417. **Refunding erroneous tax.**

This section has reference to the county officers, and not to the recovery against a city of taxes collected by a county officer on certification from the city. *Hawkeye L. & B. Co. v. Marion*, 110–468, 81 N. W. 718.

Taxes volutarily paid under a mistake of law cannot be recovered back. *Ahlers v. Estherville*, 130–272, 104 N. W. 453.

The taxpayer who voluntarily appears and without protest pays taxes on prop-

erty which he is charged with having omitted or concealed in returning his property for taxation, cannot recover back the taxes thus paid on proof that he was not properly chargeable with reference thereto. *Kehe v. Blackhawk County*, 125–549, 101 N. W. 281.

After payment of taxes a portion of which are due and collectible, the taxpayer cannot maintain an action to recover back another portion erroneously assessed. *Ibid.*

One who, being a purchaser of goods, in order to prevent their seizure for alleged taxes, pays such taxes assessed to the seller, which are invalid, cannot recover the same from the seller. *Warfield-P.-H. Co. v. Averill Groc. Co.*, 119–75, 93 N. W. 80.

The right of action for taxes subsequently paid by a tax purchaser on property as to which it is found that the sale is invalid is barred in five years from the time of payment of such taxes, and is not extended by the provisions of code § 3448, with reference to an action based on fraud or mistake. *Lonsdale v. Carroll County*, 105–452, 75 N. W. 332.

The right to demand repayment of taxes illegally exacted arises at once, and the statute of limitations runs from the time of payment. The party making such payment cannot insist that the running of the statute be postponed until the legal character of the tax has been judicially determined. *Sioux City & St. P. R. Co. v. O'Brien County*, 118–582, 92 N. W. 857.

Under this section a taxpayer may by action recover back taxes found to have been erroneously or illegally exacted or paid, even though paid voluntarily and without protest. *Slimmer v. Chickasaw County*, 140–448, 118 N. W. 779.

But where the taxpayer has by his own act procured the taxation of his property in one county by mistake of law he cannot recover back the taxes paid on such property, although it subsequently appears that it was properly subject to taxation and taxed in another county. *Ibid.*

The law authorizes the holder of a tax sale certificate to protect his interest therein by paying the subsequent taxes, and this section expressly provides for the refunding of taxes erroneously or illegally exacted or paid. *Howard v. Emmet County*, 140–527, 118 N. W. 882.

In an action founded on this section there is no right to recover interest on the amount to be refunded. *Home Sav. Bank v. Morris*, 141–560, 120 N. W. 100.

This section has no application to the refunding of taxes paid to the county treasurer on special assessments for city improvements. *First Nat. Bank v. Kelly*, 139 N. W. 564.

Where the county has voluntarily refunded taxes as improperly collected, it cannot afterwards on a contention that such refund was erroneous, recover back the taxes so refunded. *Adair County v. Johnston*, 142 N. W. 210.

SEC. 1418. Tax sale—when and how made.

Irregularity, such as over assessment, will not render a tax void, nor authorize the interposition of a court of equity to restrain its enforcement. *Collins v. Keokuk*, 118–30, 91 N. W. 791.

Where there is an ambiguity on the face of the record as to whether taxes have been paid on the property sold, parol evidence is admissible with reference to the fact. *McCash v. Penrod*, 131–631, 109 N. W. 180.

After the treasurer has on complaint of the property owner made an entry of cancellation of a sale he cannot afterwards by erasing such entry render a deed, executed in pursuance of the sale, valid. *Burchardt v. Scofield*, 141–336, 117 N. W. 1061.

SEC. 1419. Notice. Notice of the time and place of such sale shall be given by the treasurer, and shall contain a description of each separate tract to be sold as taken from the tax list, the amount of taxes for which it is liable delinquent for each year, and the amount of penalty, interest and costs thereon, the name of the owner, if known, or the person, if any, to whom it is taxed, by publication in some newspaper in the county, once each week, for three consecutive weeks, the last of which shall be at least one week before the day of sale, and by immediately posting a copy of the first publication thereof at the door of the courthouse, if there be one, if not, at the door of the place where the last term of district court was held. The compensation for such publication shall not exceed twenty cents for each description, and shall be paid by the county. The amount paid therefor shall be collected as a part of the costs of sale and paid into the county treasury. If the treasurer cannot procure the publication of the notice for the sum herein fixed, then the notice may be given by posting the same in four of the most public places in the county, to be selected by him, for four

weeks, and filing a copy thereof with the auditor before the day of sale, with his verified statement thereon that it had been posted as and for the time herein required, and that he could not obtain a publication thereof at the legal rate. [30 G. A., ch. 2, § 2; 20 G. A., ch. 194, § 3; C. '73, §§ 872–4, 3833; R. § 764; C. '51, § 498.]

The provision for posting notices of a tax sale "on the door of the county courthouse" held to be satisfied by a posting thereof on a bulletin board provided for such purposes at the courthouse door. *Hoskins v. Iowa Land Co.*, 121–299, 96 N. W. 977.

Publication of notice in a particular case held sufficient. *Davis v. Magoun*, 109–308, 80 N. W. 423.

SEC. 1421. Advertisement.

The term "advertisement" here used is meant to include both publication and posting, and irregularity in the posting will not affect the validity of the sale. *Davis v. Magoun*, 109–308, 80 N. W. 423.

The provision that no irregularity or infirmity in the advertisement shall affect the legality of the sale is applicable to any irregularity as to the place or manner of posting the notice at the courthouse door. *Hoskins v. Iowa Land Co.*, 121–299, 96 N. W. 977.

SEC. 1422. Offer for sale.

The sale of two lots in a lump is void. *Hintrager v. McElhinny*, 112–325, 82 N. W. 1008, 83 N. W. 1063.

SEC. 1423. Bid—purchaser.

It is of the highest importance to the owners that the bidders know from the description what is being offered for sale. In a particular case held that a description was not sufficient which described the property as eighteen acres "part of section," etc., with no specification as to the exact boundaries or designation by which the particular part of the section could be identified. *Armour v. Officer*, 116–675, 88 N. W. 1058.

SEC. 1425. Sale of property remaining unsold.

Under the provisions of this section, land which is subject to a lien for taxes and remains unsold for want of bidders, may be sold by the treasurer for a portion of the tax, but redemption from such sale can only be made by the payment of the full amount of the tax which is a lien on such property. (See code § 1437.) *Everson v. Woodbury County*, 118–99, 91 N. W. 9.

The purchaser at a tax sale for taxes, including special assessment for street improvements certified to the county auditor by the officers of the city, acquires title free from the lien of any installments of special assessments not certified or which have not been brought forward so as to continue to be a lien on the property. *Fitzgerald v. Sioux City*, 125–396, 101 N. W. 268.

SEC. 1426. Resale.

The intention is that payment for each parcel or portion sold shall be made immediately upon the completion of the sale, and held that a third person paying the amount bid by the purchaser could not recover from the purchaser the amount of his bid. *Sheldon v. Steele*, 114–616, 87 N. W. 683.

It will not render the sale illegal if the treasurer allows the bidder to postpone payment of the bid until after the conclusion of the sale. *Farmers' L. & T. Co. v. Wall*, 129–651, 106 N. W. 160.

SEC. 1432. **Certificate of purchase.** The treasurer shall prepare, sign, and deliver to the purchaser of any real estate sold for the nonpayment of taxes a certificate of purchase, describing it as shown in the record of sales, giving the part of each tract or lot sold, the amount of each kind of tax, interest and costs for each tract or lot as described in such record, and that payment has been made therefor. If any person is the purchaser of more than one parcel, he may have the whole included in one certificate, but each parcel shall be separately described. And in case of loss of said certificate of purchase, the owner thereof, as appears on record, may, by

filing an affidavit of such loss or destruction with the county treasurer, receive a duplicate thereof, which shall take the place of the original certificate and have the same force and effect in law and be subject to the same rules and regulations. [32 G. A., ch. 61, § 1; C. '73, § 887; R. § 777; C. '51, § 503.]

The certificates are intended to be delivered when the sale is completed, and if the money bid is not then paid, a new sale should be made under the provisions of code § 1426. *Sheldon v. Steele*, 114–616, 87 N. W. 683.

Mere delay in issuing the certificate of purchase, no prejudice to the owner being shown, will not invalidate the sale. *Fisk v. Keokuk*, 144–187, 122 N. W. 896.

SEC. 1433. **Assignment.** Section fourteen hundred thirty-three of the code is hereby repealed and the following is enacted in lieu thereof:

"The certificate of purchase shall be assignable by endorsement and entry in the register of tax sales in the office of county treasurer of the county from which said certificate issued, and when such assignment is so entered in the register of tax sales in the treasurer's office, it shall vest in the assignee or his legal representatives all the right and title of the assignor. The statement in the treasurer's deed of the fact of the assignment shall be presumptive evidence thereof." [32 G. A., ch. 61, § 2; C. '73, § 888; R. § 778.]

No notation of the assignment of the certificate is necessary provided the person to whom the deed is made is in fact the holder of the certificate. *McCash v. Penrod*, 131–631, 109 N. W. 180.

The statutory presumption is that the grantee in the deed bought the land at the sale or succeeded to the rights of the bidder. *Farmers' L. & T. Co. v. Wall*, 129–651, 106 N. W. 160.

One who takes the certificate by assignment is subject to notice of all infirmities existing therein. *Young v. Iowa Toilers' Protective Association*, 106–447, 76 N. W. 822.

One who by reason of his interest in the property is bound to pay the taxes, cannot take an assignment of the certificate of sale of the property. Such assignment amounts to a redemption. *Blumenthal v. Culver*, 116–326, 89 N. W. 1116.

SEC. 1436. **Redemption—how effected.** Real estate sold under the provisions of this chapter may be redeemed at any time before the right of redemption is cut off, by the payment to the auditor, to be held by him subject to the order of the purchaser, of the amount for which the same was sold and eight per cent. of such amount added as a penalty, with eight per cent. interest per annum on the whole amount thus made from the day of sale, and the amount of all taxes, interest and costs paid by the purchaser or his assignee for any subsequent year or years, with a similar penalty added as before on the amount of the payment for each subsequent year, and eight per cent. per annum on the whole of such amount or amounts from the day or days of payment; but the penalty for nonpayment of taxes of any subsequent year or years shall not attach, unless the same shall have remained unpaid until the first day of April after they become due and have become delinquent, nor shall said penalties apply to taxes voted in aid of the construction of any railroad. In redeeming from a sale of a leasehold interest in agricultural college land, the amount to be paid shall include any amount paid by the holder of the certificate as interest or principal due by the terms of the lease or otherwise to prevent a forfeiture thereof, as provided by law, and for which proper voucher shall have been filed with the auditor, with interest thereon at eight per cent. per annum from date of payment, which amount shall be paid by the auditor to the holder of the certificate, and the certificate of redemption shall show the amount so paid by the party redeeming. [27 G. A., ch. 35, § 1; 19 G. A., ch. 45; C. '73, § 890; R. § 779; C. '51, § 505.]

The term "owner" as used in determining who may redeem from a tax sale is construed to include mortgagees, judgment creditors and holders of contingent interests; and a lien holder thus having a right to redeem cannot by a purchase or taking an assignment of a certificate of purchase acquire title as against a senior lien holder. *Lane v. Wright*, 121–376, 96 N. W. 902.

A judgment creditor may redeem from tax sale the land on which his judgment is a lien. *Swan v. Harvey*, 117–58, 90 N. W. 489.

A mortgagee has the right to redeem the mortgaged property from tax sale. *Busch v. Hall*, 119–279, 93 N. W. 356.

Where one of several lien holders upon land sold at tax sale takes an assignment of the certificate of purchase, he is to be treated as having redeemed from such sale for the benefit of all the lien holders. Equity will not permit one lien holder to absorb the common security by purchase at a tax sale. *Lane v. Wright*, 121–376, 96 N. W. 902.

Where a person, entitled by decree to redeem from tax sale, deposited the money with the clerk and moved to compel a conveyance, and was unsuccessful, and thereupon withdrew his money, and the tax title claimant by himself and grantee remained in possession for fifteen years, held that the right to redeem was thereby abandoned. *Cooper v. Cook*, 108–301, 79 N. W. 71.

The issuing of a deed before the expiration of the statutory period cannot affect the owner's rights, nor entitle him to redeem in equity from the tax sale, where he had not attempted to make statutory redemption within the time allowed him for doing so. It is not the execution or nonexecution of the deed which fixes the time within which redemption must be made, but the completed service according to law and the filing of the notice of the expiration of the right to redeem. *Wood v. Coad*, 120–111, 94 N. W. 264.

One who has voluntarily paid a tax, although under protest, cannot recover the amount thereof from one who has redeemed the property from tax sale. *Anderson v. Cameron*, 122–183, 97 N. W. 1085.

One who by reason of his interest in the property is under obligation to pay the taxes cannot acquire title thereto by tax deed, nor take an assignment of the certificate of sale. Such a transaction amounts to a redemption. *Blumenthal v. Culver*, 116–326, 89 N. W. 1116.

The husband of the owner of land has no such title or interest therein as to authorize redemption by him. *Hart v. Delphey*, 157– —, 136 N. W. 702.

SEC. 1437. Redemption from sale for part of tax.

Terms of redemption: When land has been sold as provided in code § 1425, for a portion only of the tax which is a lien thereon, the owner in making redemption must pay the full amount of the taxes legally due. *Everson v. Woodbury County*, 118–99, 91 N. W. 900.

The board of supervisors has no authority to allow redemption in such case for less than the full amount of the taxes due. *Ibid.*

SEC. 1439. Minors and lunatics.

Under this section, providing that real property of any minor or lunatic sold at tax sale may be redeemed within one year after disability is removed in the manner provided by code § 1440, that is, by equitable action, held that the action by the heirs of an insane person whose real estate had been sold for taxes before his death, and who continued insane from the time of such sale until his death, might be commenced within one year after the death of such insane person, but that the commencement of the action was to be determined by the actual service of notice, as provided by code § 3514, and not by the placing of the notice in the hands of the sheriff with intent that it be immediately served, as provided by code § 3450, relating to the sufficiency of the commencement of action for the purpose of avoiding the general bar of the statute of limitations. The one year provision in the section of the code relating to redemption is not a limitation upon the action, but a condition of the exercise of the right. *Hawley v. Griffin*, 121–667, 92 N. W. 113, 97 N. W. 86.

Evidence in a particular case held sufficient to show that one whose lands had been sold for taxes was at the time insane, and that his heirs were therefore entitled to redeem the lands from such tax sale. *Ibid.*

SEC. 1440. Equitable action.

In general: Where proper notice of expiration of period for redemption has not been served, the property owner may have relief under this section, although the deed has in fact been issued. *Hintrager v. McElhinny*, 112–325, 82 N. W. 1008, 83 N. W. 1063; *Swan v. Harvey*, 117–58, 90 N. W. 489.

The action is deemed commenced when the notice is placed in the hands of the sheriff for service, the same rule being applicable as under the general statute of limitations. (See code § 3450.) *Smith v. Callanan*, 103–218, 72 N. W. 513.

Ordinarily the owner whose land has been sold for taxes must make redemption within three years from the date of sale and cannot insist on that right after the period has expired, even though no deed has been issued. *Bitzer v. Becke*, 120–66, 94 N. W. 287.

But where, by reason of mistake of law, the owner supposed that he was entitled to redeem his homestead from tax sale on payment of the taxes on the homestead alone, although it had been sold for the entire taxes due by him on his property, and he had commenced an equitable action to secure such redemption, offering to pay the amount of taxes which should be found to be due on his homestead, held that he might be allowed, by order of court, to make redemption after the expiration of the statutory period, although the court found that such redemption could be made only on payment of the entire amount of taxes for which the property had been sold. *Ibid.*

One who seeks to make equitable redemption must show that he was the owner of or had an interest in the property. *Petersborough Sav. Bank v. Des Moines Sav. Bank*, 110–519, 81 N. W. 786.

Where right to redeem from a tax deed has been decreed the time within which redemption may be made is a mere incident to the enforcement of the decree, and though the district court loses jurisdiction on appeal from such decree, it still has authority to extend the period of redemption. *Swan v. Harvey*, 123–192, 98 N. W. 641.

One who seeks to redeem in an equitable action on the ground that no proper notice of the expiration of the period of redemption has been given is not required to show payment of taxes. *Iowa Loan & Trust Co. v. Pond*, 128–600, 105 N. W. 119.

Under the provision that when the real estate of a minor or lunatic is sold for taxes the same may be redeemed at any time within one year after removal of the disability in an action in equity brought for that purpose, the right to relief is a right granted to be exercised by bringing action within one year from the removal of the disability, and the action must be in fact commenced within the period prescribed. It is not enough that notice of such action be placed in the hands of the sheriff for service as provided by code § 3450, which prescribes what shall be deemed the commencement of an action with reference to the general statute of limitations. *Hawley v. Griffin*, 121–667, 92 N. W. 113, 97 N. W. 86.

One who has been made defendant in a proceeding involving the title to property and asserts a title by tax deed prior to the tax deed relied upon by plaintiff, is not required to do more than show the invalidity of plaintiff's tax deed. *National Surety Co. v. Walker*, 148–157, 125 N. W. 338.

A deed which does not describe the property so as to identify it is void. *Mahaska County v. Bennett*, 150–216, 129 N. W. 838.

The holder of a valid outstanding mortgage may redeem if the deed is prematurely issued. *Wood v. Yearous*, 140 N. W. 362.

Under the evidence held that there was not such possession of real property as entitled one who had inherited it from his father to notice of expiration of the time of redemption. *Reynolds v. Western Securities Co.*, 140 N. W. 371.

Amount to be paid: In an equitable action by a minor to redeem from a tax deed, if there is no showing as to the amount of taxes paid or of any other of the material items necessary to a computation of the sum to which the defendant is entitled, the case will be remanded to the trial court in order that these matters may be shown. *Bemis v. Plato*, 119–127, 93 N. W. 83.

In an action to redeem from the deed on the ground that the redemption notice was defective, the plaintiff should be required to pay the amount paid by the purchaser with penalty and interest on the total amount at eight per cent. and may be allowed a reasonable time within which to make such payment. *Barcroft v. Mann*, 125–530, 101 N. W. 276.

Rents and profits: Where a property owner was found entitled to redeem in equity, held that the defendant should be charged with the rents received and with interest on the amount received each year, and credited with the amount paid at the tax sale with interest and penalty and with the amounts paid for subsequent taxes with interest, and also for amounts paid for repairs and care of the property with interest. *Hintrager v. McElhinny*, 112–325, 82 N. W. 1008, 83 N. W. 1063.

Where it appears that the rents and profits received by the person in possession are at least equal to the amount which should be paid in making redemption, a decree may be entered without compelling plaintiff to pay anything, and in a particular case held that as the case must be reversed it would be remanded with permission to the person in possession to present his claim for improvements to the lower court for allowance. *Hall v. Cardell*, 111–206, 82 N. W. 503.

Who may acquire title: Where the agent for the owner of land is not chargeable with the payment of taxes, he may,

after his discharge as agent, acquire title to such land from one who has secured a tax title thereon. *Bemis v. Plato*, 119–127, 93 N. W. 83.

A person having such interest in land as entitles him to redeem from a tax sale cannot by taking a tax title eliminate the rights of others jointly interested with him in the property, as persons thus jointly interested may in equity redeem from a tax title thus acquired. *First Congregational Church v. Terry*, 130–513, 107 N. W. 305.

One who is under obligation to pay taxes upon the property or who has money of another in his possession for the purpose of paying such taxes cannot acquire a tax title as against other interested parties. *Young v. Iowa Toilers' Protective Association*, 106–447, 76 N. W. 822.

A mortgagee has the right to pay taxes and cannot by purchase at a tax sale defeat a senior mortgage nor acquire title against mortgagor. *Cone v. Wood*, 108–260, 79 N. W. 86.

A mortgagee alleging that a tax deed was fraudulently obtained through a transaction which amounted to a payment of the taxes by those under obligation to discharge the tax lien, may have the title acquired under such tax sale declared invalid as against him. *Busch v. Hall*, 119–279, 93 N. W. 356.

One who takes title to property in extinguishment of indebtedness evidenced by one of two or more notes secured by mortgage on such property excepting the liability of the property for the payment of the other notes cannot subsequently by acquiring a tax title to the premises cut out the rights of the holders of the other notes and the latter may redeem from the holder of such tax title. *Gilman v. Heitman*, 137–336, 113 N. W. 932.

Mere relationship as prospective heir to the owner is not sufficient to render fraudulent the acquisition of a tax title by such prospective heir. *Wilson v. Godfrey*, 145–696, 124 N. W. 875.

The agent of the owner of property cannot, by purchase of a tax certificate, acquire a tax title as against the owner of such property. *Hoyt v. Brown*, 153–324, 133 N. W. 905.

Concurrent owners: A tenant in common cannot acquire a valid tax title to property owned in common as against his cotenant. *Funson v. Bradt*, 105–471, 75 N. W. 337.

A tenant in common cannot allow the property to go to tax sale and cut off the interest of his cotenant by taking a tax deed, as between him and his cotenant such acquisition of title constitutes a redemption. *Crawford v. Meis*, 123–610, 99 N. W. 186.

But this rule has no application to the acquisition of such title by a remainderman. *Ibid.*

A life tenant is charged with the duty of paying taxes on the property and cannot, by collusively permitting the same to be sold and thereby acquiring a tax title either in his own name or in the name of another, cut off the rights of the remainderman. As against a tax title thus acquired the remainderman is entitled to have a redemption in equity. *First Congregational Church v. Terry*, 130–513, 107 N. W. 305.

SEC. 1441. **Notice of expiration of right of redemption.** After two years and nine months from the date of sale, the holder of the certificate of purchase may cause to be served upon the person in possession of such real estate, and also upon the person in whose name the same is taxed, if such person resides in the county where the land is situated, in the manner provided for the service of original notices, a notice signed by him, his agent or attorney, stating the date of sale, the description of the property sold, the name of the purchaser, and that the right of redemption will expire and a deed for the land be made unless redemption is made within ninety days from the completed service thereof. Service may be made upon nonresidents of the county by publishing the same, once each week, for three consecutive weeks in some newspaper of said county, or by personal service thereof elsewhere in the same manner original notices may be served; but any such nonresident may in writing appoint a resident of the county in which said land is situated an agent, and file said appointment with the treasurer of said county, who shall forthwith record the same in a record kept in his office therefor, and index the same, after which personal service of said notice shall be made upon said agent. Service shall be complete only after an affidavit has been filed with the treasurer, showing the making of the service, the manner thereof, the time when and place where made, and under whose direction the same was made; such affidavit to be made

by the holder of the certificate or by his agent or attorney, and in either of the latter cases stating that such affiant is the agent or attorney, as the case may be, of the holder of such certificate; which affidavit shall be filed by the treasurer and entered upon the sale book opposite the entry of the sale, and said record or affidavit shall be presumptive evidence of the completed service of said notice, and the right of redemption shall not expire until ninety days after service is complete. Any person knowingly and wilfully swearing falsely to any fact or statement contained in said affidavit shall be guilty of perjury. The cost of serving the notice and affidavit of publication shall be added to the anount necessary to redeem. The fee for serving the notice shall be the same as for service of an original notice, including copy fee and mileage. The treasurer shall, upon the filing of proof of service and statement of costs, forthwith report the same in writing to the auditor, who shall enter it in the sale book against the proper tract of real estate. The holder of the certificate of sale or his agent may report in writing to the county auditor the amount of costs incurred in giving such notice, and the auditor shall enter the same in the sale book as aforesaid, and no redemption shall be complete until such costs are paid. [30 G. A., ch. 2, § 3; 25 G. A., ch. 81; C. '73, § 894; R. § 781.]

Notice necessary: The title holder is entitled to have a tax deed set aside which had been issued without notice of the expiration of the period for redemption. *Grimes v. Ellyson*, 130–286, 105 N. W. 418.

The provision as to notice to the owner is not applicable where the person owning the property at the time of the tax sale is deceased. In such case service of notice is to be made as though the property had been assessed and taxed to an unknown owner. *Ibid.*

The requirement for notice is limited to the person in possession of the premises in whose name the property is assessed or taxed, and proof of service upon the real owner is not sufficient. *Ibid.*

Unless the right of redemption be terminated by proper notice the issuance of a treasurer's deed is no obstacle to the exercise of the right, but it must be asserted by an action as provided in the preceding section. *Swan v. Harvey*, 117–58, 90 N. W. 489.

The authority of the treasurer to issue the deed is dependent on the service of redemption notice upon the person to whom the land is taxed and the person in possession, and in the absence of such notice the deed is void and the statutory limitation does not run in his favor. *Chicago, B. & Q. R. Co. v. Kelley*, 105–106, 74 N. W. 935.

A notice of expiration of the time for redemption directed to a railway by the initials of its name, such railway being in possession of the property, held not to be sufficient in the absence of evidence showing that the railway was commonly known and customarily referred to by such abbreviation. *Ibid.*

Insufficiency of the notice given of the expiration of the period of redemption may be made a ground of attack on the deed. *Pease v. Globe Realty Co.*, 141–482, 119 N. W. 975.

The description in the notice must not be ambiguous or misleading but must point out with reasonable certainty the property of which the purchaser means to demand a conveyance. *Wallace v. Weld*, 145–710, 124 N. W. 789.

Failure to serve valid notice of the expiration of the right to redeem prevents the application of the requirements of code §§ 1445 and 1448 as to showing of payment of taxes and limitation of action attacking the title. *Neilan v. Unity Inv. Co.*, 147–677, 126 N. W. 947.

The description in a particular case held to be insufficient in the notice to cut off the right of redemption. *Wood v. Yearous*, 140 N. W. 362.

By publication: Where the land was taxed to M. K. G., and there was no such person in the county at the time for serving notice of expiration of the period of redemption, service by publication was held sufficient, although the premises were in the possession of K. G., who was a resident of the county. *Hawkeye Loan & Brokerage Co. v. Gordon*, 115–561, 88 N. W. 1081.

Notice by publication to an owner who is a nonresident is sufficient where no one is in actual possession of the land at the time notice is given. *McCash v. Penrod*, 131–631, 109 N. W. 180.

The fact that the person in whose name the notice was given was stated as "Karney," and an affidavit as to publication was in the name of "Carney," held not to be a fatal defect, it appearing that the names referred to the same person. *Ibid.*

The omission of the abbreviation Jr. or Sr. after a name in the notice for redemption does not render the notice insuffi-

cient. *Peterson v. Wallace*, 140–22, 118 N. W. 37.

The statute requires that the affidavit must state under whose direction the notice is served and no presumption can be indulged in. *Ibid.*

By whom given: Notice of the expiration of the redemption period may properly be given by the lawful holder of the certificate without regard to who is the beneficial owner. *Nugent v. Cook*, 129–381, 105 N. W. 421.

Where it appears that the person to whom the property is taxed is dead, the proceedings are to be the same as though the owner was "unknown" and no notice is necessary. It is not necessary that the notice be given to the heirs or legal representatives of such person. *Ibid.*

Notice cannot be given by a purchaser who has assigned the certificate. *Sickles v. Union Investment Co.*, 109–450, 80 N. W. 534.

It is the mandatory duty of the county treasurer to report the fact of service of notice of the expiration of the period of redemption to the county auditor and if such report is not made the notice is not effectual. *Ashenfelter v. Seiling*, 141–512, 119 N. W. 984.

The statute requires the notice to show at whose direction the service is made. *Ibid.*

The person who seeks to cut off the right of redemption from tax sale must subsequently comply with all the provisions enacted for the protection of the owner. *Ibid.*

If it fairly appears from the notice and affidavit who made or gave the direction for the service this is all that should be required. *Lindsey v. Booge*, 144–168, 122 N. W. 819.

To whom given: The notice must be served upon the person in possession. *Hintrager v. McElhinny*, 112–325, 82 N. W. 1008, 83 N. W. 1063.

In a particular case held that the return of service of notice was not sufficient. *Ibid.*

The notice of the expiration of the period for redemption is to be given to the person in whose name the land is assessed and taxed at the time the notice is given rather than at the expiration of two years and nine months from the sale, where the giving of the notice is postponed to a later date than that at which it might first have been given. *Smith v. Callanan*, 103–218, 72 N. W. 513.

One who is not the owner is not entitled to notice of redemption in the absence of a showing that he is in the actual occupancy of the property. *Barcroft v. Mann*, 125–530, 101 N. W. 276.

In order for the owner of vacant lots to be in the possession thereof within the meaning of the statutory provision, he is not required to show any other acts of possession or control than such as are usually exercised by resident owners having title to property of that kind. *Foy v. Houstman*, 128–220, 103 N. W. 369.

Proof of notice: Reference in the affidavit of the purchaser to the printed notice, a copy of which is attached to the affidavit, is sufficient. *Hoskins v. Iowa Land Co.*, 121–299, 96 N. W. 977.

The place of service of notice must be stated in the proof required by statute of the making of such service. *Barcroft v. Mann*, 125–530, 101 N. W. 276.

While an affidavit of a proprietor of a newspaper in which the notice was published is not competent to prove such publication, yet if such affidavit is made a part of the agent's affidavit of notice, the proof is sufficient. *Funson v. Bradt*, 105–471, 75 N. W. 337.

An affidavit of notice which does not show that the person making it was the agent or attorney of the holder of the tax certificate is not competent evidence of the facts recited. *Ibid.*

Where the description of the property in the redemption notice is such as to call the attention of the person upon whom it is served to the sale intended and the property sold, it is sufficient. *Ibid.*

The affidavit should show by whom the service was made and the facts constituting such service. *Wood v. Yearous*, 140 N. W. 362.

Where the notice was printed on the reverse side of the affidavit of service, a reference in the affidavit to the "attached notice" held insufficient. *Ibid.*

SEC. 1442. Deed executed.

Where the description does not furnish the means for determining the boundary line of the tract covered, the deed is not valid. *Tucker v. Carlson*, 113–449, 85 N. W. 901.

The description must contain in itself sufficient facts when applied to identify the particular tract intended to be conveyed. *Armour v. Officer*, 116–675, 88 N. W. 1058.

A deed issued to one who is in fact the owner of the certificate is valid, although such owner holds by assignment not recorded. *McCash v. Penrod*, 131–631, 109 N. W. 180.

SEC. 1444. Effect of deed—vests title.

What vests in purchaser: There is no privity between the holder of the fee and one who claims a tax title upon the land. The latter title is not derived from, but is antagonistic to, the former. The holder of the tax title is not a privy in estate with

the holder of the fee. Neither owes any duty to the other, nor is estopped from making any claim against the other. *Hussman v. Durham*, 165 U. S. 144.

A tax title is not derivative, but a new title in the nature of an independent grant from the sovereign, and the one who claims under a tax deed does not therefore claim title from the same source as the person attacking the deed whose title is derived from a foreclosure proceeding, and who does not show title in the person who executed the mortgage. *Petersborough Sav. Bank v. Des Moines Sav. Bank*, 110–519, 81 N. W. 786.

The effect of a tax deed is to be determined by the statute in force at the time it is executed. *Fitzgerald v. Sioux City*, 125–396, 101 N. W. 268.

Where the city certifies special assessments to the county auditor for collection, a purchaser at a sale for taxes including such special assessments by his deed acquires title free from the remaining installments of such special assessments which have not been brought forward so as to preserve the lien thereof on the property. *Ibid.*

A tax deed may be attacked for insufficiency of the notice given by the holder of the certificate of sale of the expiration of the period of redemption. *Pease v. Globe Realty Co.*, 141–482, 119 N. W. 975.

The title passing by a tax deed is original and not derivative and cuts off the contingent dower right of the wife of the owner. *Lucas v. Purdy*, 142–359, 120 N. W. 1063; *Byington v. Carlin*, 146–301, 125 N. W. 233.

A purchaser at a tax sale gets nothing through his purchase if the land was not subject to taxation. The doctrine of *caveat emptor* applies to such a purchaser. *Hart v. Delphey*, 157– —, 136 N. W. 702.

Deed as evidence: It is presumed in favor of the tax deed that service of notice of redemption was not required to be made on a person in possession if the contrary does not appear. *Funson v. Bradt*, 105–471, 75 N. W. 337.

The fact that a deed is issued is prima-facie evidence of the giving of notice of expiration of the period of redemption. *Young v. Iowa Toilers' Protective Association*, 106–447, 76 N. W. 822.

The holder of a tax deed regular upon its face, makes out a prima-facie case in an action to quiet title and the burden is upon the defendant to establish its invalidity. Even if the invalidity of the deed is shown, it may be sufficient basis for establishing title by adverse possession. *McCash v. Penrod*, 131–631, 109 N. W. 180.

A tax deed is at least prima-facie evidence of the fact that the grantee named therein was the purchaser at the sale, or one who succeeded to his rights. *Farmers' L. & T. Co. v. Wall*, 129–651, 106 N. W. 160.

Where lands covered by a railroad grant were sold for taxes, not having been patented to the railroad at the time of the assessment of the tax, held that the presumption of regularity in favor of the tax sale would warrant the assumption that such lands had been earned and selected prior to the assessment of the tax. *Chicago, M. & St. P. R. Co. v. Hemenway*, 117–598, 91 N. W. 910.

Irregularity in posting of notice of tax sale will not affect the validity of the deed. *Davis v. Magoun*, 109–308, 80 N. W. 423.

SEC. 1445. Who may question.

One who attacks a tax deed does not make sufficient showing of title by the introduction of the record of foreclosure proceedings and the acquisition of title by him under such proceedings. The title required to be shown is such an one as that the party claiming thereunder might, if plaintiff, recover thereon. *Petersborough Sav. Bank v. Des Moines Sav. Bank*, 110–519, 81 N. W. 786.

Whether or not the plaintiff in an action attacking a tax deed must show that a subsequent sale of the land for taxes has been redeemed from, when the land was purchased at such sale by a stranger, *quaere. Ibid.*

Where the landowner seeks by equitable action to redeem under the provisions of § 1440, he is not required to show title or any payment of taxes as required by this section. A judgment creditor entitled to redeem may maintain such action. *Swan v. Harvey*, 117–58, 90 N. W. 489; *Roth v. Munzenmaier*, 118–326, 91 N. W. 1072; *Busch v. Hall*, 119–279, 93 N. W. 356.

The plaintiff in such a case must show some title, but title by adverse possession is sufficient. *Roth v. Munzenmaier*, 118–326, 91 N. W. 1072.

Any one having a right to redeem may maintain such equitable action. *Busch v. Hall*, 119–279, 93 N. W. 356.

One who attacks a tax deed on the ground that he has not had notice of the expiration of the right of redemption is not required to show payment of taxes. *Iowa Loan & Trust Co. v. Pond*, 128–600, 105 N. W. 119.

The provisions of this section have application to actions in equity brought to redeem. *Hawkeye Sav. & Loan Assn. v. Moore*, 139–133, 117 N. W. 51.

Where a valid notice of the expiration of the period of redemption has not been given the provisions of this section are not applicable. *Neilan v. Unity Inv. Co.*, 147–677, 126 N. W. 947.

Proof of title is a condition precedent to the right of a party litigant to take advantage of the five-year limitation provided for in code § 1448. *King v. Bolt*, 151–1, 130 N. W. 818.

SEC. 1446. Sales wrongfully made—purchaser indemnified.

The provisions of this section entitle the purchaser to recover only where the mistake or error is that of the treasurer, and not where it is due to the auditor, although the land may by reason of such mistake of the auditor not be subject to sale. *Lonsdale v. Carroll County*, 105–452, 75 N. W. 332.

Such provisions do not entitle the tax purchaser to recover from the county, in case the sale is invalid by reason of mistake or error, the taxes subsequently paid by him on the property. *Ibid.*

One who pays an illegal tax on real estate in which he has no interest cannot recover the amount paid on the ground of its illegality. Code '73, § 899, providing that when, by mistake or wrongful act of the county treasurer, land has been sold on which no tax was due, the county shall hold the purchaser harmless; and § 901, providing that whenever any tract is sold for taxes which is not subject to taxation, or on which the taxes have been previously paid, the purchase money shall be refunded to the purchaser, apply to county officers and do not authorize the maintenance by the holder of a tax certificate of an action to recover from a city an illegal assessment extended by the county auditor and paid by the holder of the certificate to the county treasurer and by the latter turned over to the city. *Hawkeye L. & B. Co. v. Marion*, 110–468, 81 N. W. 718.

The wrongful act or mistake of the treasurer which will subject the county to an action for the recovery of taxes under this section is one which the person seeking recovery had no agency in bringing about. And where the bondsmen of one selling intoxicating liquor under the mulct law bought in the real property used for that purpose at a tax sale for the mulct tax, for which his bondsmen were liable, the sale being made at his request, held that he could not recover from the county the amount paid by him at such tax sale, which was afterwards set aside. *Guedert v. Emmet County*, 116–40, 89 N. W. 85.

Evidence in a particular case, showing but little competition at a tax sale, although quite a number of bidders were present, held not sufficient to prove fraud on the part of the purchaser. *Gallaher v. Head*, 108–588, 79 N. W. 387.

SEC. 1447. Land not subject to taxation.

After having made an entry of cancellation as provided in this section the treasurer cannot subsequently erase such entry and execute a deed in pursuance of the sale, without notice or opportunity to the property owners to redeem or otherwise protect their rights in the premises. *Burchardt v. Scofield*, 141–336, 117 N. W. 1061.

SEC. 1448. Limitation of actions.

The statute begins to run from the time the purchaser is entitled to a deed, but if the holder of the fee title makes a surrender to the holder of the tax title, by payment or rent before the five-year limit has expired, this will constitute such surrender of possession as to stop the running of the statute. *Gallaher v. Head*, 108–588, 79 N. W. 387.

The statute of limitations against the tax deed does not begin to run when the deed is issued without redemption notice being served on the person in whose name the land is taxed, and the same rule applies where the deed is invalid by reason of the failure to notify the person in possession. *Chicago, B. & Q. R. Co. v. Kelley*, 105–106, 74 N. W. 935.

The five-year limitation is only available to one who was the owner of the title at the time of the sale, and if such owner, attacking the tax deed, introduces no evidence of title whatever, he cannot recover. *Gill v. Candler*, 114–332, 86 N. W. 300.

The statute begins to run at the time when the tax sale purchaser might have obtained his deed, that is, three years from the date of sale. If no action is brought by such purchaser within five years thereafter, the tax title is extinguished. *Roth v. Munzenmaier*, 118–326, 91 N. W. 1072.

As against an action to defeat a tax title in the hands of the agent of the owner of the property, the five-year limitation is applicable. *Bemis v. Plato*, 119–127, 93 N. W. 83.

The provisions of this section limiting the action attacking a tax title to five years after the tax deed is executed and recorded, constitute a condition as to the right to maintain such action, and therefore the question whether the action is commenced in proper time is not to be determined by code § 3450, which provides that with reference to the general statute of limitations an action is to be deemed commenced when the notice is placed in the hands of the sheriff for service, but by the provisions of code § 3514, declaring that an action is commenced by service on the defendant. *Hawley v. Griffin*, 121–667, 92 N. W. 113, 97 N. W. 86.

Possession of land by the owner in order to bar an action under a tax title, need not be such as is required to make it adverse, hostile and exclusive, under the general statute of limitations. It is sufficient if it is such as would entitle the tax title owner to an action against the

fee owner. *Clark v. Sexton*, 122–310, 98 N. W. 127.

If the tax deed is simply irregular and not void, the tax title holder relying thereon in an action to quiet title is not subject to having his title attacked after five years. *McCash v. Penrod*, 131–631, 109 N. W. 180.

One who seeks to redeem from a tax title on the ground that the holder of such tax title was under obligation to hold the same for the benefit of others having an interest in the property, is not limited by the provision with reference to actions attacking a tax title being brought within five years. *Gilman v. Heitman*, 137–336, 113 N. W. 932.

The limitations of this section do not apply to a tax sale in a special charter city under its charter and the statutes applicable to such cities. *Fisk v. Keokuk*, 144–187, 122 N. W. 896.

The limitation of this action is not applicable in a case where no valid notice of the expiration of the period of redemption has been given. *Neilan v. Unity Inv. Co.*, 147–677, 126 N. W. 947.

Proof of title is a condition precedent to the right of a party litigant to take advantage of the five-year limitation; but title by adverse possession is sufficient. *King v. Bolt*, 151–1, 130 N. W. 818.

The statutory bar is applicable also as against a claim for taxes paid. *Ibid.*

SEC. **1452-a. Actions authorized.** In addition to all other remedies and proceedings now provided by law for the collection of taxes on personal property, the county treasurer is hereby authorized to bring or cause an ordinary suit at law to be commenced and prosecuted in his name for the use and benefit of the county for the collection of taxes from any person, persons, firm or corporation as shown by the tax list in his office, and the same shall be in all respects commenced, tried and prosecuted to final judgment the same as provided by the code for ordinary actions. [32 G. A., ch. 62, § 1.]

Prior to the enactment of this statutory provision, it was held that the treasurer could not maintain an action at law against the owner of property to recover taxes and to meet this rule this statute was passed. *McCrary v. Lake City Elec. Light Co.*, 139–548, 117 N. W. 964.

SEC. **1452-b. Statutes applicable—writ of attachment—damages.** All the provisions of chapters one and two of title nineteen of the code and acts amendatory thereto are hereby made applicable to any proceedings instituted by a county treasurer under the provisions of section one hereof, and a writ of attachment shall be issued upon the county treasurer complying with the provisions of said chapter, for taxes, whether due or not due, except that no bond shall be required from the treasurer or county in such cases, but the county shall be liable for damages, only, as provided by section thirty-eight hundred eighty-seven of the code. [32 G. A., ch. 62, § 2.]

CHAPTER 3.

OF THE SECURITY OF THE REVENUE.

SECTION **1457. Loaning or depositing public funds—interest on daily balances.** That the law as it appears in section fourteen hundred fifty-seven of the supplement to the code, 1907, be and the same is hereby repealed and the following enacted in lieu thereof:

"A county treasurer shall be liable to a like fine for loaning out, or in any manner using for private purposes, state, county or other funds in his hands, but the county treasurer shall, with the approval of the board of supervisors as to place of deposit, by resolution entered of record, deposit such funds in any bank or banks in the state to an amount fixed by such resolution at interest at the rate of at least two per cent. per annum on ninety per cent. of the daily balances payable at the end of each month all

of which shall accrue to the benefit of the general county fund; but before such deposit is made, such bank shall file a bond with sureties to be approved by the treasurer and the board of supervisors in double the amount deposited, conditioned to hold the treasurer harmless from all loss by reason of such deposit or deposits; provided that in cases where an approved surety company's bond is furnished, said bond may be accepted in an amount equal to ten per cent. more than the amount deposited. Said bond shall be filed with the county auditor and action may be brought thereon either by the treasurer or the county as the board of supervisors may elect; and the state treasurer shall be liable to a fine of not more than ten thousand dollars for a like misdemeanor. But nothing done under the provisions of this section shall alter or affect the liability of the treasurer or the sureties of his official bonds." [33 G. A., ch. 91, § 1.] [27 G. A., ch. 36, § 1; 17 G. A., ch. 155; C. '73, § 912; R. § 797.]

The treasurer has no authority to collect taxes through a bank, and is primarily liable for loss of taxes thus collected by failure of the bank. Under such circumstances, the bank holds the taxes thus collected as a trust fund for the county. *Page County v Rose*, 130–296, 106 N. W. 744.

The board may, in reliance on a bond already given, authorize deposits, as therein contemplated, and the surety on such bond is only liable for deposits thus authorized. *Fremont County v. Fremont County Bank*, 138–167, 115 N. W. 925.

The validation of a prior unauthorized bond will not render the surety thereon liable for losses which had already occurred. *Ibid.*

The sureties on such a bond have the right to rely on the compliance by the county treasurer with the order of the board. *Ibid.*

A deposit of public moneys wrongfully made by a county treasurer does not give rise to any contract rights, and as between the treasurer and the bank no trust arises which renders the treasurer a preferred creditor. *Brown v. Sheldon State Bank*, 139–83, 117 N. W. 289.

Nor is the treasurer subrogated on accounting for the money to any right which the county would have had if the deposit had been lawful. *Ibid.*

The county has no preference as to a deposit in a national bank, subsequently becoming insolvent, unless it appears that the assets of the bank have been increased by such deposit and that the preference can be effected without prejudice to the rights of other creditors. To justify a preference, the trust fund must be traced into the assets of the bank which have been augmented thereby. *Lucas County v. Jamison*, (C. C.) 170 Fed. 338.

A county whose funds have been unlawfully deposited in an insolvent bank by its treasurer is not entitled to preference as against other depositors in such insolvent bank. *Empire State Surety Co. v. Carroll County*, (C. C. A.) 194 Fed. 593.

The provisions of this section do not prevent a curative act releasing a county treasurer from liability on his bond for the deposit of public money made without complying with the provisions of the statute. *McSurely v. McGrew*, 140–163, 118 N. W. 415.

Where the attempt is to execute a bond in compliance with the provisions of this section the county treasurer cannot rely on the bond if the deposit has not been authorized or made in pursuance of the statutory provisions. *Kuhl v. Chamberlain*, 140–546, 118 N. W. 776.

The circumstance that money deposited in depository banks is brought into the treasurer's office to be counted does not in itself constitute payment to the treasurer such as to relieve the sureties on the bond from liability. *Fremont County v. Fremont County Bank*, 145–8, 123 N. W. 782.

When a designated depository gives a bond for the repayment of all money "now or hereafter placed in said bank or under its care or control," the sureties on the bond become liable for all money on deposit at the time the bond is given. *Sawyer v. Stilson*, 146–707, 125 N. W. 822.

As against the sureties the treasurer is entitled to apply subsequent payments by the bank to obligations antedating the execution of the bond. *Ibid.*

Taxes paid to the depository bank in accordance with a custom by which the bank turns such taxes over to the treasurer, securing receipts therefor which are delivered to the taxpayer, constitute deposits by the treasurer. *Ibid.*

The records of the treasurer as to moneys deposited in the bank are evidence of such deposits. *Ibid.*

Under this section as amended, it is only on the nomination of the county treasurer that the board of supervisors is authorized to designate a county depository of funds. The sole function of the board is to fix the limit of deposit, "approve the place" where it is to be made and, with the concurrence of the treasurer, pass upon the sufficiency of the bond offered by the selected depository. *State v. Rhein*, 149–76, 127 N. W. 1079.

SEC. 1460. **Statement of account—repeal.** That section fourteen hunhundred sixty of the code, relating to the statement by the auditor of state of the county treasurer's account with the treasurer of state, be and the same is hereby repealed. [32 G. A., ch. 63.]

SEC. 1461. **Settlement with county treasurer.**

When a county treasurer is indicted upon the charge of receiving public money and failing to account therefor under the last provision found in code § 4840, it must be alleged and proved that demand was made upon him by the person or officer entitled to receive the funds so demanded. *State v. McKinney*, 130-370, 106 N. W. 931.

Where the balance in the hands of an outgoing county treasurer has been ascertained on the final settlement with the board of supervisors, his successor in office becomes the person entitled to receive the balance on hand, and is the only person who can make demand therefor, refusal of which will charge the outgoing officer with criminal liability for failure to account. *Ibid.*

SEC. 1462. **Public funds—how kept and accounted for.** That section fourteen hundred sixty-two of the code be and the same is hereby repealed, and the following enacted in lieu thereof:

"The state treasurer and each county treasurer shall at all times keep all funds coming into their possession as public money, in a vault or safe, to be provided for that purpose, or in some bank legally designated as a depositary for such funds. At the time of any examination of any such office, or at the time of any settlement with the treasurer in charge of any such public funds, the treasurer shall produce and count in the presence of the officer or officers making such examination or settlement, all moneys or funds then on deposit in the safe or vault in his office, and shall produce a statement of all money or funds on deposit with any depositary wherein he is authorized to deposit such funds, which statement shall be certified by one or more officers of such depositary, and shall correctly show the balance remaining on deposit in such depositary at the close of business on the day preceding the day of such settlement. The treasurer shall also file a statement setting forth the numbers, dates, and amounts of all outstanding checks, or other items of difference, reconciling the balance as shown by the treasurer's books with those of the depositaries. It shall be the duty of the officer or officers making such settlement to see that the amount of money produced and counted, together with the amounts so certified by the legally designated depositaries, agrees with the balance with which such treasurer should be charged, and he shall make a report in writing of any such settlement or examination, and attach thereto the certified statement of all such depositaries. The report of any such settlement with the treasurer of state shall be filed in the office of the auditor of state, and the report of a settlement with a county treasurer with the auditor of the county. [34 G. A., ch. 67, §§ 1, 2.] [C. '73, § 918; R. § 804.]

SEC. 1462-a. **False statements or reports—penalty.** "Any officer or other person making a false statement or report or in any manner violating any of the provisions hereof, shall be guilty of a misdemeanor and shall be liable to a fine of not less than five hundred dollars." [34 G. A., ch. 67, § 3.]

CHAPTER 4.

OF ASSESSMENT AND COLLECTION OF COLLATERAL INHERITANCE TAX.

SECTION **1467. Rate—repealed.** [34 G. A., ch. 68, § 48; 33 G. A., ch. 92, § 1.] [31 G. A., chs. 54, 55; 30 G. A., ch. 51.]

[See § 1481-a47. EDITOR.]

A tax upon succession with an exemption of one thousand dollars is not unconstitutional. *In re McGhee's Estate*, 105–9, 74 N. W. 695.

The statute exempts from taxation one thousand dollars of the entire estate and not one thousand dollars of the share coming to each distributee. *Ibid.*

The valuation of the property is to be made by appraisement and not determined by the regular assessment. Such value is the price which the property will command in the market. *Ibid.*

The expression, "above the sum of one thousand dollars," is descriptive of an estate which is to be exempt from taxation, and not of a portion of the estate which is to be exempt. *Herriott v. Bacon*, 110–342, 81 N. W. 701; *Gilbertson v. McAuley*, 117–522, 91 N. W. 788.

The situs of the property, and not the testator's domicile, determines the liability of the property for the inheritance tax, and where a resident of Iowa died possessed of cattle in an adjoining state which passed under his will to collateral heirs, held that such cattle, or the proceeds thereof, were not liable to the tax. *In re Weaver's Estate*, 110–328, 81 N. W. 603.

Where a son devised property to his mother, who died before the testator's death leaving as heirs a brother and sister of testator, held that the devised property passed directly from testator to his brother and sister as collateral heirs, and thus became subject to the collateral inheritance tax. *In re Hulett's Estate*, 121–423, 96 N. W. 952.

Property which passed to collateral heirs on the death of a testator, prior to the passage of the collateral inheritance tax law, is not subject to such a tax. *Gilbertson v. Ballard*, 125–420, 101 N. W. 108.

Choses in action held by a nonresident against residents of the state are not subject to collateral inheritance tax on the death of the former. *Gilbertson v Oliver*, 129–568. 105 N. W. 1002.

An order made in a probate proceeding on application of the state treasurer that the executor file an inventory of real property for the purpose of having a collateral inheritance tax assessed against it, held to be such intermediate order substantially affecting the merits or determining a right that the executor might appeal therefrom. *In re Stone's Estate*, 132–136, 109 N. W. 455.

The devisee of an interest in real property taken collaterally, and therefore subject to an inheritance tax, may renounce the devise in favor of the direct heirs and thus prevent the attaching of the obligation to pay such tax. *Ibid.*

Property of an estate not distributed prior to the taking effect of 27 G. A., ch. 37, held to be subject to the collateral inheritance tax. *Montgomery v. Gilbertson*, 134–291, 111 N. W. 964.

While the owner of an estate cannot defeat the tax by any device which secures to him for life the income, profits or enjoyment, while passing title before his death, the conveyance, to be objectionable, must be such as does not pass the possession and title of the property in the grantor's lifetime. *Lamb v. Morrow*, 140–89, 117 N. W. 1118.

The collateral inheritance tax is not a tax on the property itself but upon the right to succession to property. *Morrow v. Durant*, 140–437, 118 N. W. 781.

The state cannot complain that a reservation in a will for the erection of a tomb is unreasonable. *Ibid.*

The constitutionality of the collateral inheritance tax statute can be sustained only on the ground that it is not a tax upon the property itself, but upon the right to succession to the property. *Wicting v. Morrow*, 151–590, 132 N. W. 193.

The nonresident owner of shares of stock in a corporation has an interest in the property of said corporation which is subject to the collateral inheritance tax. *In re Culver's Estate*, 145–1, 123 N. W. 743.

In an action to determine whether a devise to a local Masonic lodge was within the exception of this section, held that such lodge was a charitable institution and the devise was therefore not subject to the tax. *Morrow v. Smith*, 145–514, 124 N. W. 316.

A bequest to the local branch of the salvation army to be expended within the state comes within the exemption of this section although the society itself may be elsewhere incorporated. The fact that the local branch is not incorporated will not defeat the trust. *In re Crawford's Estate*, 148–60, 126 N. W. 774.

A devise to the dependent poor of a specified county who are maintained wholly or in part at the expense of the county, constituting the board of supervisors trustees to receive and carry into effect the trust for the benefit of the beneficiaries, is a charitable gift within the exception of this section. *In re Spangler's Estate*, 148–333, 127 N. W. 625.

By the reference to "deed, grant, sale or gift made or intended to take effect in possession or in enjoyment after the death of the grantor," is meant estates granted in deeds or conveyances which in some way make the estate granted dependent upon the grantor's death. Such provision relates only to interests in real estate, the possession or enjoyment of which is postponed until after the death of the grantor. *In re Bell's Estate*, 150–725, 130 N. W. 798.

The collateral inheritance statute is not to be given a retroactive effect. *Lacey v. Treasurer of State*, 152–477, 132 N. W. 843.

The statute has no application to interests in land passing to heirs prior to its taking effect although such heirs have not asserted their rights or gone into possession until after the taking effect of the statute. *Ibid.*

Where rights have been created by a contract of conveyance prior to the taking effect of the statute which are not subject to any contingency dependent on the exercise of any power reserved to the grantor which might defeat the grant, the rights thus passing are not subject to the collateral inheritance tax. *Ibid.*

An interest in property created by will or deed in the nature of a remainder becomes vested from the time the will or deed takes effect. *Ibid.*

The collateral inheritance tax law contains no provision making it retroactive or applicable to any interests in property which became vested prior to its taking effect, even though such interests might be subject to conditions or contingencies which would affect their future enjoyment. *Morrow v. Depper*, 153–341, 133 N. W. 729.

SEC. 1467-a. Debts deducted—repealed. [34 G. A., ch. 68, § 48.] [28 G. A., ch. 51, § 1.]

[See § 1481-a47. EDITOR.]

The evident purpose of this section is that an estate whose value is near the dividing line shall not be carried into the exempt class by extraordinary charges under the guise of funeral expenses or by the presentation of stale or fictitious claims which are not allowed within the time specified. *Morrow v. Durant*, 140–437, 118 N. W. 781.

SEC. 1467-b. Property subject to tax—repealed. [34 G. A., ch. 68, § 48.] [28 G. A., ch. 51, § 2.]

[See § 1481-a47. EDITOR.]

This section does not qualify code § 1467 as to the description of property subject to collateral inheritance tax. *Morrow v. Durant*, 140–437, 118 N. W. 781.

Money paid out by legatees under a will in order to prevent a contest of the will should not be deducted from the value of the estate in ascertaining the collateral inheritance tax. *In re Wells' Estate*, 142–255, 120 N. W. 713.

SEC. 1467-c. Construction—repealed. [34 G. A., ch. 68, § 48.] [28 G. A., ch. 51, § 12.]

[See § 1481-a47. EDITOR.]

SEC. 1467-d. Foreign estates and deduction of debts—repealed. [34 G. A., ch. 68, § 48.] [28 G. A., ch. 51, § 3.]

[See § 1481-a47. EDITOR.]

SEC. 1467-e. Foreign estates and direct and collateral beneficiaries—repealed. [34 G. A., ch. 68, § 48.] [28 G. A., ch. 51, § 4.]

[See § 1481-a47. EDITOR.]

In determining the collateral inheritance tax on property of a nonresident which is situated in this state, the widow of such nonresident is entitled to take one third of the property charged with the debts of the testator pro rata with other property in the state. *Wieting v. Morrow*, 151–590, 132 N. W. 193.

SEC. 1469. Appraisal.

The appraisement made of the personal property by the regularly appointed appraisers seems to be made the basis for the limitation of the tax on that kind of property. No notice to the heirs, legatees or devisees is provided for or required, and therefore this section as it originally stood was unconstitutional. The tax is a property tax, and not a tax on succession. But the provision for notice contained in 27 G. A., ch. 37, which is made retroactive, cures the defect as to estates not settled at the time the act was passed and a tax previously levied is rendered valid by said

act. *Ferry v. Campbell*, 110–290, 81 N. W. 604.

Where title to the real property belonging to deceased had vested absolutely in heirs prior to the enactment of 27 G. A., ch. 37, held that the legalizing act did not cure the defect in the law existing at the time inheritance was cast, and therefore did not render the tax valid as against the inheritance by the heirs. *Herriott v. Potter*, 115–648, 89 N. W. 91.

SEC. **1471-a. Valuation of life, term and deferred estates—repealed.** [34 G. A., ch. 68, § 48.] [28 G. A., ch. 51, § 7.]

[See § 1481-a47. EDITOR.]

In an action for permanent personal injury, mortality tables published in pursuance of this section are admissible in evidence. *Clark v. Van Vleck*, 135–194, 112 N. W. 648.

SEC. **1475-a. Surplus tax—how and when refunded—repealed.** [34 G. A., ch. 68, § 48.] [29 G. A., ch. 63, § 1.]

[See § 1481-a47. EDITOR.]

The statute does not provide for the payment of interest on any claim for taxes overpaid. *Wieting v. Morrow*, 151–590, 132 N. W. 193.

SEC. **1475-b. Notice of hearing—repealed.** [34 G. A., ch. 68, § 48.] [29 G. A., ch. 63, § 2.]

[See § 1481-a47. EDITOR.]

SEC. **1476. Method of appraisement—notice—hearing—appeal—repealed.** [34 G. A., ch. 68, § 48.] [27 G. A., ch. 37, § 1; 26 G. A., ch. 28, § 10.]

[See § 1481-a47. EDITOR.]

SEC. **1476-a. Appraisements and relief therefrom—repealed.** [34 G. A., ch. 68, § 48.] [28 G. A., ch. 51, § 5.]

[See § 1481-a47. EDITOR.]

SEC. **1476-b. Rules and regulations—repealed.** [34 G. A., ch. 68, § 48.] [27 G. A., ch. 37, § 6.]

[See § 1481-a47. EDITOR.]

SEC. **1477. Collection.**

Where the district court in a probate proceeding has jurisdiction of the parties to determine the liability of the estate to a collateral inheritance tax, it is binding and cannot be collaterally attacked. *In re Culver's Estate, Gould v. Morrow*, 140 N. W. 878.

SEC. **1477-a. Real estate—repealed.** [34 G. A., ch. 68, § 48.] [27 G. A., ch. 37, § 2.]

[See § 1481-a47. EDITOR.]

SEC. **1477-b. Corporate stock—repealed.** [34 G. A., ch. 68, § 48.] [27 G. A., ch. 37, § 3.]

[See § 1481-a47. EDITOR.]

SEC. **1477-c. Securities and assets—repealed.** [34 G. A., ch. 68, § 48.] [27 G. A., ch. 37, § 4.]

[See § 1481-a47. EDITOR.]

SEC. **1477-d. County attorney—compensation—repealed.** [34 G. A., ch. 68, § 48.] [27 G. A., ch. 37, § 7.]

[See § 1481-a47. EDITOR.]

SEC. 1477-e. **Regulations as to fees of county attorneys—repealed.** [34 G. A., ch. 68, § 48.] [28 G. A., ch. 51, § 11.]

[See § 1481-a47. EDITOR.]

SEC. 1478-a. **Reports to be filed with treasurer of state—repealed.** [34 G. A., ch. 68, § 48.] [28 G. A., ch. 51, § 9.]

[See § 1481-a47. EDITOR.]

SEC. 1478-b. **Compromise settlements—repealed.** [34 G. A., ch. 68, § 48.] [28 G. A., ch. 51, § 8.]

[See § 1481-a47. EDITOR.]

SEC. 1478-c. **Payment of costs—repealed.** [34 G. A., ch. 68, § 48.] [28 G. A., ch. 51, § 10.]

[See § 1481-a47. EDITOR.]

SEC. 1479-a. **List of heirs—repealed.** [34 G. A., ch. 68, § 48.] [27 G. A., ch. 37, § 5.]

[See § 1481-a47. EDITOR.]

The duty imposed on the executor or administrator by the collateral inheritance tax law to file an inventory of real and personal property arises only when there is some property or interest passing under the will or by law which is subject to the payment of such tax. *In re Stone's Estate*, 132–136, 109 N. W. 455.

SEC. 1479-b. **Date of filing inventories of personalty—repealed.** [34 G. A., ch. 68, § 48.] [28 G. A., ch. 51, § 6.]

[See § 1481-a47. EDITOR.]

SEC. 1481. **Jurisdiction of court.**

The proceedings contemplated in this section, while special, are at law and not equitable in character and the supreme court will not upon appeal review such proceedings save on exceptions duly taken and preserved. *In re Culver's Estate, Gould v. Mororw*, 153–461, 133 N. W. 722.

SEC. 1481-a. **Property subject to tax—rate—foreign beneficiaries—lien.** The estates of all deceased persons, whether they be inhabitants of this state or not, and whether such estate consists of real, personal or mixed property, tangible or intangible, and any interest in, or income from any such estate or property, which property is, at the death of the decedent owner, within this state or is subject to, or thereafter, for the purpose of distribution, is brought within this state and becomes subject to the jurisdiction of the courts of this state, or the property of any decedent, domiciled within this state at the time of the death of such decedent, even though the property of such decedent so domiciled was situated outside of the state, except real estate located outside of the state passing in fee from the decedent owner, which shall pass by will or by the statutes of inheritance of this or any other state or country, or by deed, grant, sale, gift, or transfer made in contemplation of the death of the donor, or made or intended to take effect in possession or enjoyment after the death of the grantor or donor, to any person, or for any use in trust or otherwise, other than to or for the use of persons, or uses exempt by this act shall be subject to a tax of five per centum; provided, however, that when property or any interest therein shall pass to heirs, devisees or other beneficiaries subject to the tax imposed by this act who are aliens, nonresidents of the United States, the same shall be subject to a tax of twenty per centum of its true value except when such foreign beneficiaries are brothers or sisters of the decedent owner, when the rate of tax to be assessed and collected therefrom shall be ten per centum of the value of the property or interest

so passing. Any person beneficially entitled to any property or interest therein because of any such gift, legacy, devise, annuity, transfer or inheritance, and all administrators, executors, referees and trustees, and any such grantee under a conveyance, and any such donee under a gift, and any such legatee, annuitant, devisee, heir or beneficiary, shall be respectively liable for all such taxes to be paid by them respectively. The tax aforesaid shall be for the use of the state, shall accrue at the death of the decedent owner, and shall be paid to the treasurer of state within eighteen months thereafter, except when otherwise provided in this act, and shall be and remain a legal charge against and a lien upon such estate, and any and all of the property thereof from the death of the decedent owner until paid. Real estate sold under order of court shall be released from the lien imposed by this act and the lien shall attach to the proceeds of such sale, provided that prior to the approval of such sale there shall have been given by the person making such sale a good and sufficient bond conditioned to secure the payment of all tax secured by the lien so released. This provision shall not be construed to relieve from personal liability any person owing such tax or whose duty it is to collect and pay such tax to the treasurer of state. [35 G. A., ch. 120, § 1; 34 G. A., ch. 68, § 1.]

SEC. **1481-a1. Exceptions.** The tax imposed by this act shall not be collected,

1. When the entire estate of the decedent does not exceed the sum of one thousand dollars after deducting the debts as defined in this act;
2. When the property passes to the husband or wife;
3. When the property passes to the father, mother, lineal descendant, adopted child, or the lineal descendant of an adopted child of decedent;
4. When the property passes to educational and religious societies or institutions, public libraries and public art galleries within this state and open to the free use of the public;
5. Property passing to or for hospitals within this state open to the public, and not operated for gain, or to societies within this state organized for purposes of public charity, including cemetery associations, but not including societies maintained by fees, dues, or assessments in whose benefits the public may not share;
6. Bequests for the care and maintenance of the cemetery or burial lot of decedent and his family, and bequests not to exceed five hundred dollars in any estate, to or for the performance of a religious service or services by some person regularly ordained, authorized or licensed by any religious society to perform such service to be performed for or in behalf of the testator, or some person named in his last will, provided such person so named is, or would be exempt from the tax imposed by this act;
7. When the property passes to a municipal or political corporation within this state for a purely public purpose. [34 G. A., ch. 68, § 2.]

SEC. **1481-a2. "Debts" defined—when deducted.** The term "debts" as used in this act shall include, in addition to debts owing by the decedent at the time of his death, the local or state taxes due from the estate in January of the year of his death, a reasonable sum for funeral expenses, court costs, the cost of appraisement made for the purpose of assessing the collateral inheritance tax, the statutory fees of executors, administrators, or trustees estimated upon the appraised value of the property, the amount paid by the executor or administrator for a bond, the attorney fee in a reasonable amount, to be approved by the court, for the ordinary probate proceedings in said estate and no other sum; but said debts shall not be deducted unless the same are approved and allowed by the court within

eighteen months from the death of the decedent, as established claims against the estate, unless otherwise ordered by the judge or court of the proper county. [34 G. A., ch. 68, § 3.]

SEC. **1481-a3. Administrator—appointment on application of treasurer—bond of nonresident administrator.** If, upon the death of any person leaving an estate that may be liable to a tax under the provisions of this act, a will disposing of such estate is not offered for probate, or an application for administration made within four months from the time of such decease, the treasurer of state may, at any time thereafter, make application to the proper court, setting forth such fact and praying that an administrator may be appointed, and thereupon said court shall appoint an administrator to administer upon such estate. When the heirs or persons entitled to inherit the property of an estate subject to the tax hereby imposed, desire to avoid the appointment of an administrator as provided in this section, they or one of them shall, before the expiration of four months from the death of the decedent file under oath the inventories and reports and perform all the duties required by this act, of administrators, including the filing of the lien; proceedings for the collection of the tax when no administrator is appointed, shall conform as nearly as may be to the provisions of this act in other cases. A nonresident of this state shall not be appointed as executor, administrator or trustee of any estate that may be subject to the tax imposed by this act, unless such nonresident first file a bond conditioned upon the payment of all tax, interest and costs for which the estate may be liable, such bond to be signed by not less than two resident freeholders or by an approved surety company and in an amount not less than twenty-five per cent. of the total value of the estate, or of the property within this state if the estate is a foreign estate. [34 G. A., ch. 68, § 4.]

SEC. **1481-a4. Appraisers—appointment—term—bond not required—removal—vacancies.** In each county, the court shall annually at the first term of the court therein appoint three competent residents and freeholders of said county, to act as appraisers of all property within its jurisdiction which is charged or sought to be charged with the collateral inheritance tax. Said appraisers shall serve for one year, and until their successors are appointed and qualified. They shall each take an oath to faithfully and impartially perform the duties of the office, but shall not be required to give bond. They shall be subject to removal at any time at the discretion of the court, and the court or judge thereof in vacation, may also in its discretion, either before or after the appointment of the regular appraisers, appoint other appraisers to act in any given case. Vacancies occurring otherwise than by expiration of term, shall be filled by the appointent of the court or by a judge in vacation. No person interested in any manner in the estate to be appraised may serve as an appraiser of such estate. [34 G. A., ch. 68, § 5.]

SEC. **1481-a5. Commission to appraisers—when issued.** Whenever it appears that an estate or any property or interest therein is or may be subject to the tax imposed by this act, the clerk shall issue a commission to the appraisers, who shall fix a time and place for appraisement, except that if the only interest that is subject to such tax is a remainder or deferred interest upon which the tax is not payable until the determination of a prior estate or interest for life or term of years, he shall not issue such commission until the determination of such prior estate, except at the request of parties in interest who desire to remove the lien thereon. [34 G. A., ch. 68, § 6.]

SEC. **1481-a6. Notice of appraisement—returns filed—appraisement when property is in more than one county.** It shall be the duty of all appraisers appointed under the provisions of this act, upon receiving a commission as herein provided, to forthwith give notice to the treasurer of state and other persons known to be interested in the property to be appraised, of the time and place at which they will appraise such property, which time shall not be less than ten days from the date of such notice. The notice shall be served in the same manner as is prescribed for the commencement of civil actions, and if not practicable to serve the notice provided for by statute, they shall apply to the court or a judge thereof in vacation for an order as to notice and upon service of such notice and the making of such appraisement, the said notice, return thereon and appraisement shall be filed with the clerk, and a copy of such appraisement shall at once be filed by the clerk with the treasurer of state. When property is located in more than one county, the appraisers of the county in which the estate is being administered may appraise the whole estate, or those of the several counties may serve for the property within their respective counties or other appraisers be appointed as the district court if in session, or judge thereof in vacation, may direct. [34 G. A., ch. 68, § 7.]

SEC. **1481-a7. Objections—when filed—appraisement approved or set aside—appeal.** The treasurer of state or any person interested in the estate or property appraised, may, within twenty days thereafter, file objections to said appraisement and give notice thereof as in beginning civil actions, on the hearing of which as an action in equity either party may produce evidence competent or material to the matters therein involved. If upon such hearing the court finds the amount at which the property is appraised is its value on the market in the ordinary course of trade, and the appraisement was fairly and in good faith made, it shall approve such appraisement; but if it finds that the appraisement was made at a greater or less sum than the value of the property in the ordinary course of trade, or that the same was not fairly or in good faith made, it shall set aside the appraisement, appoint new appraisers and so proceed until a fair and good appraisement of the property is made at its value in the market in the ordinary course of trade. The treasurer of state or any one interested in the property appraised may appeal to the supreme court from the order of the district court approving or setting aside any appraisement to which exceptions have been filed. Notice of appeal shall be served within sixty days from the date of the order appealed from, and the appeal shall be perfected in the time now provided for appeals in equitable actions. In case of appeal the appellant, if he is not the treasurer of state, shall give bond to be approved by the clerk of the court, which bond shall provide that the said appellant and sureties shall pay the tax for which the property may by liable with cost of appeal. If upon the hearing of objections to the appraisement the court finds that the property is not subject to the tax, the court shall upon expiration of time for appeal, when no appeal has been taken, order the clerk to enter upon the lien book a cancellation of any claim or lien for taxes. If at the end of twenty days from the filing of the appraisement with the clerk, no objections are filed, the appraisement shall stand approved. [34 G. A., ch. 68, § 8.]

SEC. **1481-a8. Transferred property—appraisement of—foreign and domestic—market value—deduction of debts.** Within ninety days after the transfer of any property that may be liable for a tax under the

provisions of this act, except as herein otherwise provided, the clerk of the proper county upon his own motion or upon the application of the treasurer of state, county attorney, or person interested in the property, shall cause the property to be appraised as provided herein. If there be an estate or property subject to said tax wherein the records in the clerk's office do not disclose that there may be a tax due under the provisions of this act, the person or persons interested in the property shall report the matter to the clerk with an application that the property be appraised. The appraised value of the property shall in all cases be its market value in the ordinary course of trade, and in domestic estates the tax shall be calculated thereon after deducting the debts as defined herein; provided, however, that the debt of a domestic estate owing for or secured by property outside of the state, shall not be deducted before estimating the tax, except when the property for which the debt is owing or by which it is secured is subject to the tax imposed by this act, or when the foreign debt exceeds the value of the property securing it or for which it was contracted, then the excess may be deducted provided that satisfactory proof of the value of the foreign property and the amount of such debt is furnished to the treasurer of state. [34 G. A., ch. 68, § 9.]

SEC. **1481-a9. Relief from appraisement.** All estates subject in whole or in part to the tax imposed by this act shall be appraised for the purpose of computing said tax by the regular collateral inheritance tax appraisers; provided that estates liable for the payment of the inheritance tax upon specific legacies, annuities, bequests of money or other property the value of which may be determined without appraisement, and estates which consist of money, book accounts, bank deposits, notes, mortgages and bonds, need not be appraised by the collateral inheritance tax appraisers if the administrator, executor or trustee or the persons entitled to or claiming such property are willing to charge themselves with the full face value of such bequests or property, together with the interest, earnings or undivided profits which may be due on said properties, at the time of death of the testator or intestate, as the basis for the assessment of said tax, but in all cases the relief from appraisement for the collateral inheritance tax is dependent upon the consent of the treasurer of state, and the subsequent approval thereof by the court or judge thereof in vacation. In the event that the estate has been duly appraised under the ordinary statutes of inheritance or the property has been sold and such appraisement or selling price is accepted by the treasurer of state as satisfactory for collateral inheritance tax purposes, the court or judge thereof in vacation may, upon proper application, relieve the estate from the appraisement by the collateral inheritance tax appraisers; but in order to obtain such relief, the administrator, executor, trustee or other party interested must file an application for relief with the consent of the treasurer of state thereto in the office of the clerk of the court before said clerk issues a commission to the collateral inheritance tax appraisers. The court or judge thereof in vacation may, upon application of the representatives of the estate or parties interested, relieve the estate of the appraisement for collateral tax purposes if it be shown to said court that the market value of the entire estate will not exceed one thousand dollars; provided, that prior to the application to said court or judge the written consent of the treasurer of state to such relief is procured. In all cases where an estate is relieved from an appraisement for collateral inheritance tax purposes, the order granting relief shall be recorded in the clerk's office, and the fact of

such relief and reasons therefor shall be duly noted in the decree or order of final settlement made by the court. [34 G. A., ch. 68, § 10.]

SEC. **1481-a10. Remainders in realty after term estates to exempted persons—when appraised.** When any person, whose estate over and above the amount of his debts, as defined in this act, exceeds the sum of one thousand dollars, shall bequeath or devise any real property to or for the use of persons exempt from the tax imposed by this act, during life or for a term of years, and the remainder to a collateral heir, said property upon the determination of such estate for life or years, shall be appraised at its then actual market value from which shall be deducted the value of any improvements thereon, or betterments thereto, if any, made by the remainderman during the time of the prior estate, to be ascertained and determined by the appraisers and the tax on the remainder shall be paid by such remainderman as provided in the next succeeding section. [34 G. A., ch. 68, § 11.]

SEC. **1481-a11. Life and term estates in realty to those not exempt—appraisement—payment of tax—determination of prior estates—report—tax to be paid by remainderman.** Whenever any real property of a decedent shall be subject to such tax and there be an estate or interest for life or term of years given to a party other than those especially exempt by this act, the clerk shall cause such property to be appraised at the actual market value thereof, as is provided in ordinary cases, and the party entitled to such estate or interest shall within one year from the death of decedent owner pay such tax, and in default thereof the court shall order such interest in said estate, or so much thereof as shall be necessary to pay such tax and interest, to be sold. Upon the determination of any prior estate or interest, when the remainder or deferred estate or interest or any part thereof is subject to such tax and the tax upon such remainder or deferred interest has not been paid, the person or persons entitled to such remainder or deferred interest shall immediately report to the clerk of the proper court the fact of the determination of the prior estate, and upon receipt of such report, or upon information from any source, of the determination of any such prior estate when the remainder interest has not been appraised for the purpose of assessing such tax, the clerk shall forthwith issue a commission to the collateral inheritance tax appraisers, who shall immediately proceed to appraise the property as provided in like cases in the next preceding section, and the tax upon such remainder interest shall be paid by the remainderman within one year next after the determination of the prior estate. If such tax is not paid within said time the court shall then order said property, or so much thereof as may be necessary to pay such tax and interest, to be sold. [34 G. A., ch. 68, § 12.]

SEC. **1481-a12. Life and term estates in personal property—appraisement—payment of tax.** Whenever any personal property shall be subject to the tax imposed by this act and there be an estate or interest for life or term of years given to one or more persons and remainder or deferred estate to others, the clerk shall cause the property so devised or conveyed to be appraised as provided herein in ordinary estates and the value of the several estates or interests so devised or conveyed shall be determined as provided in section seventeen of this act, and the tax upon such estates or interests as are liable for the tax imposed by this act shall be paid to the treasurer of state from the property appraised or by the persons entitled to such estate or interest within eighteen months from the death of the testator, grantor, or donor; provided, however, that pay-

ment of the tax upon any deferred estate or remainder interest may be deferred until the determination of the prior estate by the giving of a good and sufficient bond as provided in the next succeeding section. [34 G. A., ch. 68, § 13.]

SEC. **1481-a13. Bond to defer payment of tax until determination of prior estate—exception.** When in case of deferred estates or remainder interests in personal property or in the proceeds of any real estate that may be sold during the time of a life, term or prior estate, the persons interested who may desire to defer the payment of the tax until the determination of the prior estate, shall file with the clerk of the proper district court a bond as provided herein in other cases, such bond to be renewed every two years until the tax upon such deferred estate is paid. If at the end of any two-year period the bond is not promptly renewed as herein provided and the tax has not been paid, the bond shall be declared forfeited, and the amount thereof be forthwith collected. When the estate of a decedent consists in part of real and in part of personal property, and there be an estate for life or for a term of years to one or more persons and a deferred or remainder estate to others, and such deferred or remainder estate is in whole or in part subject to the tax imposed by this act, if the deferred or remainder estates or interests are so disposed that good and sufficient security for the payment of the tax for which such deferred or remainder estates may be liable can be had because of the lien imposed by this act upon the real property of such estate, then payment of the tax upon such deferred or remainder estates may be postponed until the determination of the prior estate without giving bond as herein required to secure payment of such tax, and the tax shall remain a lien upon such real estate until this tax upon such deferred estate or interest is paid. [34 G. A., ch. 68, § 14.]

SEC. **1481-a14. Bonds—conditions.** All bonds required by this act shall be payable to the treasurer of state and shall be conditioned upon the payment of the tax, interest and costs for which the estate may be liable, and for the faithful performance of all the duties hereby imposed upon and required of the person whose acts are by such bond to be guaranteed, and shall be in an amount equal to twice the amount of the tax, interest and costs that may be due, but in no case less than five hundred dollars and must be secured by not less than two resident freeholders or by a fidelity or surety company authorized by the auditor of state to do business in this state. [34 G. A., ch. 68, § 15.]

SEC. **1481-a15. Removal of taxable property from state—penalty—bond.** It shall be unlawful for any person to remove from this state any property, or the proceeds thereof, that may be subject to the tax imposed by this act, without paying the said tax to the treasurer of state. Any person violating the provisions of this section shall be guilty of a felony and upon conviction shall be fined an amount equal to twice the amount of tax, interest and costs for which the estate may be liable, but in no case less than two hundred dollars and imprisoned as the court shall direct, until the fine is paid. Provided, however, that the penalty hereby imposed shall not be enforced, if prior to the removal of such property or the proceeds thereof, the person desiring to effect such removal files with the clerk a bond conditioned upon the payment of the tax, interest and costs, as is provided in the preceding section hereof. [34 G. A., ch. 68, § 16.]

SEC. **1481-a16. Determination of value of annuities and life and term estates—basis of computation—release of lien on remainders and reversions.** The value of any annuity, deferred estate, or interest,

or any estate for life or term of years, subject to the collateral inheritance tax, shall be determined for the purpose of computing said tax by the rule of standards of mortality and of value commonly used in actuaries' combined experience tables as now provided by law. The taxable value of annuities, life or term, deferred or future estates, shall be computed at the rate of four per cent. per annum of the appraised value of the property in which such estate of interest exists or is founded. Whenever it is desired to remove the lien of the collateral inheritance tax on remainders, reversions, or deferred estates, parties owning the beneficial interest may pay at any time the said tax on the present worth of such interests determined according to the rules herein fixed. [34 G. A., ch. 68, § 17.]

SEC. **1481-a17. Executors, administrators, trustees—powers and duties—suit by treasurer—extension of time of payment.** It is hereby made the duty of all executors, administrators, trustees, or other persons charged with the management or settlement of any estate subject to the tax provided for in this act, to collect and pay to the treasurer of state the amount of the tax due from any devisee, grantee, donee, heir or beneficiary of the decedent, except in cases where payment of the tax is deferred until the determination of a prior estate in which cases the treasurer of state shall collect the same. Executors, administrators, trustees, or the state treasurer, shall have power to sell so much of the property of the decedent as will enable them to pay said tax, in the same manner as is now provided by law for the sale of such property for the payment of debts of testators or intestates. The treasurer of state may bring, or cause to be brought in his name of office, suit, for the collection of said tax, interest and costs, against the executor, administrator, or trustee, or against the person entitled to property subject to said tax, or upon any bond given to secure payment thereof, either jointly or severally and obtaining judgment may cause execution to be issued thereon as is provided by statute in other cases. The proceedings shall conform as nearly as may be to those for the collection of ordinary debt by suit. If because of necessary litigation or other unavoidable cause of delay enforced payment of the tax hereby imposed, by suit and execution, would result in loss or be to the detriment of the best interests of the estate, the court may extend the time for the payment of the tax. Such extensions of time shall not be granted except in cases where security is given for payment of the tax, interest and costs. [34 G. A., ch. 68, § 18.]

SEC. **1481-a18. Tax deducted from legacy or collected from legatee.** Every executor, administrator, referee or trustee having in charge or trust any property of an estate subject to said tax, and which is made payable by him, shall deduct the tax therefrom or shall collect the tax thereon from the legatee or person entitled to said property and pay the same to the treasurer of state, and he shall not deliver any specific legacy or property subject to said tax to any person until he has collected the tax thereon. [34 G. A., ch. 68, § 19.]

SEC. **1481-a19. Order on final settlement void if taxes not paid—recording of treasurer's receipt on lien book.** No final settlement of the account of any executor, administrator, or trustee shall be accepted or allowed unless it shall show, and the court shall find, that all taxes imposed by the provisions of this act upon any property or interest therein, that is hereby made payable by such executors, administrators or trustees, and to be settled by said account, shall have been paid, and the receipt of the treasurer of state for such tax shall be the proper voucher for such payment. Any order contravening the provision of this section shall be

void. Upon the filing of such receipt showing payment of the tax, the clerk shall record the same upon the collateral inheritance tax lien book in his office. [34 G. A., ch. 68, § 20.]

SEC. **1481-a20. Jurisdiction—treasurer to represent state.** The district court in the county in which some part of the property is situated, of the decedent who was not a resident, or such court in the county of which the deceased was a resident at the time of his death or where such estate is administered, shall have jurisdiction to hear and determine all questions regularly brought before it in relation to said tax that may arise affecting any devise, legacy, annuity, transfer, grant, gift or inheritance, subject to appeal as in other cases, and the treasurer of state shall in his name of office, with all the rights and privileges of a party in interest, represent the state in any such proceedings. [34 G. A., ch. 68, § 21.]

SEC. **1481-a21. Bequests to executors, trustees—when subject to tax.** Whenever a decedent appoints one or more executors or trustees and in lieu of their allowance or commission, makes a bequest or devise of property to them which would otherwise be liable to said tax, or appoints them his residuary legatees, and said bequests, devises or residuary legacies exceed the statutory fees as compensation for their services, such excess shall be liable to such tax. [34 G. A., ch. 68, § 22.]

SEC. **1481-a22. Legacies charged upon real estate—lien.** Whenever any legacies subject to said tax are charged upon or payable out of any real estate, the heir or devisee, before paying the same, shall deduct said tax therefrom and pay it to the executor, administrator, trustee or treasurer of state, and the same shall remain a charge against and be a lien upon said real estate until it is paid; and payment thereof shall be enforced by the executor, administrator, trustee or treasurer of state in his name of office as herein provided. [34 G. A., ch. 68, § 23.]

SEC. **1481-a23. Delinquent taxes—interest on—duplicate receipts.** All taxes imposed by this act shall be payable to the treasurer of state, and except when otherwise provided in this act, shall be paid within eighteen months from the death of the testator or intestate. All taxes not paid within the time prescribed in this act shall draw interest at the rate of eight per centum per annum thereafter until paid, and upon payment of such tax the treasurer of state shall forthwith transmit a duplicate receipt, to the clerk of the court of the county in which the estate is being settled, showing the payment of such tax. [35 G. A., ch. 121, § 1; 34 G. A., ch. 68, § 24.]

SEC. **1481-a24. Proofs of amount of tax due—treasurer may demand—assessment without deduction of debts.** Before issuing his receipt for the tax, the treasurer of state may demand from administrators, executors, trustees or beneficiaries such information as may be necessary to verify the correctness of the amount of the tax and interest, and when such demand is made they shall send to said treasurer certified copies of wills, deeds, or other papers, or of such parts of their reports as he may demand, and upon the refusal or neglect of said parties to comply with the demand of the treasurer of state, it is the duty of the clerk of the court to comply with such demand, and the expenses of making such copies and transcripts shall be charged against the estate, as are other costs in probate, or the tax may be assessed without deducting debts for which the estate may be liable. [34 G. A., ch. 68, § 25.]

SEC. **1481-a25. Collateral inheritance tax and lien book.** The clerk of the district court in and for each county shall provide and keep a

suitable book, substantially bound and suitably ruled, to be known as the collateral inheritance tax and lien book, in which shall be kept a full and accurate record of all proceedings in cases where property is charged or sought to be charged with the payment of a collateral inheritance tax under the laws of this state, to be printed and ruled so as to show upon one page:

1. The name, place of residence, and date of death of the decedent;
2. Whether the decedent died testate, or intestate, and if testate, the record and page where the will was probated and recorded;
3. The name and post-office address of the executor, administrator, trustee, or grantee, with date of appointment or transfer;
4. The names, post-office addresses and relationship, if known, of all the heirs, devisees and grantees;
5. The appraised valuation of the personal property;
6. The amount of inheritance tax due upon said personal property;
7. A record of payment with amount and date;
8. Date of filing objections and names of objectors;
9. Blank for index and reference to all proceedings and for memorandum entries of the court or judge in relation thereto.

Upon the opposite page of such record shall be printed:

1. Real estate derived from ..... (naming decedent) which is subject to the lien prescribed by the statute for collateral inheritance tax;
2. A full and accurate description of such real estate, by forty-acre or fractional tracts, or by lots, or other complete individual description;
3. The appraised valuation as reported by the appraisers, with a reference to the record of their report, as to each piece of such real estate;
4. The amount of the inheritance tax due upon each such piece;
5. A record of payments, with dates and amounts. [34 G. A., ch. 68, § 26.]

SEC. **1481-a26. Report by executor, administrator or trustee—delinquency—order—entry of tax lien.** Upon the appointment and qualification of such executor, administrator and testamentary trustee, the clerk issuing the letters shall at the same time deliver to him a blank form upon which he shall be required to make detailed report of the following facts:

1. Name and last residence of decedent;
2. Date of death;
3. Whether or not he left a will;
4. Name and post office of executor, administrator or trustee;
5. Name and post office of surviving wife or husband if any;
6. If testate, name and post office of each beneficiary under will;
7. Relationship of each beneficiary to the testator;
8. If intestate, name and post office of each heir at law;
9. Relationship of each heir at law to decedent;
10. Inventory of all the real estate of the decedent giving amount and description of each tract;
11. Whether the property passes in possession and enjoyment in fee for life or for a term of years.

Within thirty days after his qualification, each executor, administrator, and testamentary trustee shall make and return to the clerk, under oath, a full and detailed report as indicated in the preceding paragraph, any will to the contrary notwithstanding, and upon his failure to do so, the clerk shall forthwith report his delinquency to the district court if in session, or to a judge of said court if in vacation, for such order as may be

necessary to enforce an observance of this section. If it appears from the inventory or report so filed that the real estate or any part of it is subject to an inheritance tax, it shall be the duty of the executor or administrator or of any person interested in the property if there be no administration, to cause the lien of the same to be entered upon the lien book in the office of the clerk of the court in each county where each particular tract of said real estate is situated, and when said real estate or any interest therein, is subject to such tax, no conveyance either before or after the entering of said lien, shall discharge the real estate so conveyed from said lien, no final settlement of the account of any executor, administrator or trustee shall be accepted or allowed unless a strict compliance with the provisions of this section has been had by such person. Upon the filing of such report, the clerk of the court shall immediately forward a true copy thereof to the treasurer of state. [34 G. A., ch. 68, § 27.]

SEC. **1481-a27. Extension of time of appraisement—complicated estates.** Whenever, by reason of the complicated nature of an estate, or by reason of the confused condition of the decedent's affairs, it is impracticable for the executor, administrator, trustee or beneficiary of said estate to file with the clerk of the court a full, complete and itemized inventory of the personal assets belonging to the estate, within the time required by statute for filing inventories of the estates, the court may, upon the application of such representatives or parties in interest, extend the time for making the collateral inheritance appraisement for a period not to exceed three months beyond the time fixed by this act. [34 G. A., ch. 68, § 28.]

SEC. **1481-a28. Heirs at law to make report—failure to report does not relieve estate from lien.** Whenever any property passing under the intestate laws may be subject to the tax imposed by this act, the person or persons entitled to such property shall make or cause to be made to the clerk of the courts of the county wherein such property is located, within ninety days next following the death of such intestate, a report in writing embodying therein substantially the information required by the second preceding section of this act. Failure to furnish such report or to probate the will in a testate estate shall not relieve the estate from the lien created hereby or the persons entitled to the property of such decedent from payment of the tax, interest or other penalties imposed by this act. [34 G. A., ch. 68, § 29.]

SEC. **1481-a29. Entries made by clerk.** The clerk shall enter upon the collateral inheritance tax and lien book, the title of all estates subject to the inheritance tax as shown by the inventories or lists of heirs filed in his office, or as reported to him by the county attorney, treasurer of state, or other person, and shall enter in said book as against each estate or title at the appropriate place, all such information relating to the situation and condition of the estate as he may be able to obtain from the papers filed in his office, or from any other source, as may be necessary to the collection and enforcement of the tax. He shall also immediately index in the book kept in his office for that purpose, all liens entered upon the collateral inheritance tax and lien book. Failure to make such entries as are herein required, shall not operate to relieve the estate from the lien or defeat the collection of the tax. [34 G. A., ch. 68, § 30.]

SEC. **1481-a30. Probate record.** In all cases entered upon the inheritance tax and lien book, the clerk shall make a complete record in the proper probate record, of all the proceedings, orders, reports, inventory, appraisements and all other matters and proceedings therein. [34 G. A., ch. 68, § 31.]

SEC. **1481-a31. Clerk to examine probate records and report estates subject to tax—fee.** It shall be the duty of each clerk of the district court to make examination from time to time of all reports filed with him by administrators, executors and trustees, pursuant to law; also to make examination of all foreign wills offered for probate or recorded within his county, as well as of the record of deeds and conveyances in the recorder's office of said county, and if from such examination or from information or knowledge coming to him from any other source, he finds or believes that any property within his county, or within the jurisdiction of the district court of said county has, since July fourth, eighteen hundred ninety-six, passed by will or by the intestate laws of this or any other state, or by deed or other method of conveyance, made in anticipation of or intended to take effect, in possession or in enjoyment after the death of the testator, donor or grantor, to any person other than to or for the use of the persons, societies, or organizations exempt from the tax hereby imposed, he shall make report thereof in writing to the treasurer of state, embodying in such report such information as he may be able to obtain as to the name and residence of decedent, date of death, name and address of administrator, executor, or trustee, the description of any property liable to said tax and the county in which it is located and name and relationship of all beneficiaries or heirs. Any citizen of the state having knowledge of property liable to such tax, against which no proceeding for enforcing collection thereof is pending, may report the same to the clerk and it shall be the duty of such officer to investigate the case, and if he has reason to believe the information to be true, he shall forthwith enter the estate and report the same substantially as above indicated. For reporting such estates or property the clerk shall receive a compensation of one dollar for each one hundred dollars or fraction thereof of tax paid, but not to exceed the sum of five dollars in any one estate, the same to be in addition to the compensation now allowed him by law. Except when this information has first been received from another source, the treasurer of state, when he has issued his receipt for the tax in such estate, shall certify to the auditor of state the amount due the clerk for such service and the auditor of state shall issue his warrant on the treasurer of state in favor of said clerk for the sum due as herein provided. [34 G. A., ch. 68, § 32.]

SEC. **1481-a32. Duties of county attorney—compensation—other counsel may be employed.** It shall be the duty of the county attorney of each county, when directed by the treasurer of state, to perform such legal services as shall be necessary in the enforcement of said tax, but such attorney shall have no authority to receipt for or receive any of such tax. He shall advise and assist the clerk and appraisers in the discharge of their duties in collateral inheritance tax matters, and see that the notices required by law are properly made and returned. In each estate where the county attorney has performed such legal services, he shall receive a compensation as follows, viz.: On the first one hundred dollars or fraction thereof of tax paid, ten per cent.; on the excess of one hundred dollars to five hundred dollars, five per cent.; on the excess of five hundred dollars to one thousand dollars, three per cent.; on all sums in excess of one thousand dollars, one per cent. but not to exceed one hundred and fifty dollars from any one estate. Provided, however, that except in cases of litigation requiring the filing of a petition or answer in court, the fee in any case shall not exceed the sum of fifty dollars. When the treasurer of state has issued his receipt for the tax in an estate, in which the county attorney has been directed to render legal services, and has performed such services, the

treasurer of state shall certify the amount due for such services to the auditor of state, who shall issue his warrant on the treasurer of state in favor of said county attorney for the sum due. If the county attorney is attorney for the executor, administrator or other person interested in the estate, the treasurer of state may employ another attorney to represent the state. [34 G. A., ch. 68, § 33.]

SEC. **1481-a33. Conflicting claims for fees—treasurer to adjust.** In the event of uncertainty or of conflicting claims as to fees due county attorneys or clerks under this act, the treasurer of state is empowered to determine the amount of fees, to whom payable, and when the same are due, and as far as possible, such determination shall be in accord with fixed rules made by the treasurer of state. [34 G. A., ch. 68, § 34.]

SEC. **1481-a34. Regular inspection of records and reports by court—order instituting proceedings.** On the first day of each regular term, the court shall require the clerk to present for its inspection the inheritance tax and lien book hereinbefore provided for, together with all reports of administrators, executors and trustees which have been filed pursuant to this act, since the last preceding term. The county attorney shall also attend and make report to the court concerning the progress of all cases pending for the collection of such taxes, together with any other facts, which in his judgment may aid the court in enforcing the general observance of the collateral inheritance tax law. If from information obtained from the records or reports, or from any other source, the court has reason to believe that there is property within its jurisdiction liable to the payment of an inheritance tax, against which proceedings for collection are not already pending, it shall enter an order of record, directing the county attorney to institute such proceedings forthwith. Should any estate, or the name of any grantee or grantees be placed upon the book at the suggestion of the county attorney, the treasurer of state, or other person, in which the papers already on file in the clerk's office do not disclose that an inheritance tax is due or payable, the county attorney shall forthwith give to all parties in interest such notice as the court or judge may prescribe, requiring them to appear on a day to be fixed by the said court or judge, and show cause why the property should not be appraised and subjected to said tax. At any such hearing any person may be required to appear and answer as to his knowledge of any such estate or property. If upon any such hearing the court is satisfied that any property of the decedent or any property devised, granted or donated by him, is subject to the tax, the same proceedings shall be had as in other cases, so far as applicable. [34 G. A., ch. 68, § 35.]

SEC. **1481-a35. Costs charged against estate—exceptions.** In all cases where an estate or interest therein so passes as to be liable to taxation under this act, all costs of the proceedings had for the assessment of such tax shall be chargeable to such estate as other costs in probate proceedings and to discharge the lien, all costs, as well as the taxes must be paid. In all other cases the costs are to be paid as ordered by the court. When a decision adverse to the state has been rendered, with an order that the state pay the costs, it shall be the duty of the clerk of the court in which such action was pending to certify the amount of such costs to the treasurer of state, who shall, if said costs be correctly certified, and the case has been finally terminated, and the tax if any due has been paid, present the claim to the executive council to audit, and said claim being allowed by said council, the auditor of state is directed to issue a warrant on the treasurer of state in payment of such costs. [34 G. A., ch. 68, § 36.]

SEC. **1481-a36. Securities and assets held by bank or trust company—notice of transfer.** No safe deposit company, trust company, bank or other institution, person or persons holding securities or assets of the decedent shall deliver or transfer the same to the executor, administrator or legal representative of said decedent unless the tax for which such securities or assets are liable under this act shall be first paid, or the payment thereof is secured by bond as herein provided. It shall be lawful for and the duty of the treasurer of state personally, or by any person by him duly authorized, to examine such securities or assets at the time of any proposed delivery or transfer. Failure to serve ten days' notice of such proposed transfer upon the treasurer of state or to allow such examination on the delivery of such securities or assets to such executor, administrator or legal representative shall render such safe deposit company, trust company, bank or other institution, person or persons liable for the payment of the tax upon such securities or assets as provided in this act. [34 G. A., ch. 68, § 37.]

SEC. **1481-a37. Transfer of corporation stock by foreign executor, administrator or trustee—liability of corporation for tax.** If a foreign executor, administrator or trustee shall assign or transfer any corporate stock or obligations in this state standing in the name of a decedent, or in trust for a decedent, liable to such tax, the tax shall be paid to the treasurer of state on or before the transfer thereof; otherwise the corporation permitting its stock to be so transferred shall be liable to pay such tax, interest, and costs, and it is the duty of the treasurer of state to enforce the payment thereof. [34 G. A., ch. 68, § 38.]

SEC. **1481-a38. Annual reports by corporations of certain transfers of stock—liability for payment of tax.** All Iowa corporations organized for pecuniary profit, shall on July first of each year, by its proper officers under oath make a full and correct report to the treasurer of state of all transfers of its stocks made during the preceding year by any person who appears on the books of such corporation as the owner of such stock, when such transfer is made to take effect at or after the death of the owner or transferor, and all transfers which are made by an administrator, executor, trustee, referee, or any person other than the owner or person in whose name the stocks appeared of record on the books of such corporation, prior to the transfer thereof. Such report shall show the name of the owner of such stocks and his place of residence, the name of the person at whose request the stock was transferred, his place of residence and the authority by virtue of which he acted in making such transfer, the name of the person to whom the transfer was made, and the residence of such person; together with such other information as the officers reporting may have relating to estates of persons deceased who may have been owners of stock in such corporation. If it appears that any such stock so transferred is subject to tax under the provisions of this act, and the tax has not been paid, the treasurer of state shall notify the corporation in writing of its liability for the payment thereof, and shall bring suit against such corporation as in other cases herein provided unless payment of the tax is made within sixty days from the date of such notice. [34 G. A., ch. 68, § 39.]

SEC. **1481-a39. Foreign estates—deduction of debts.** Whenever any property belonging to a foreign estate, which estate in whole or in part passes to persons not exempt herein from such tax, the said tax shall be assessed upon the market value of said property remaining after the payment of such debts and expenses as are chargeable to the property under the laws of this state. In the event that the executor, administrator or

trustee of such foreign estate files with the clerk of the court having ancillary jurisdiction, and with the treasurer of state, duly certified statements exhibiting the true market value of the entire estate of the decedent owner, and the indebtedness for which the said estate has been adjudged liable, which statements shall be duly attested by the judge of the court having original jurisdiction, the beneficiaries of said estate shall then be entitled to have deducted such proportion of the said indebtedness of the decedent from the value of the property as the value of the property within this state bears to the value of the entire estate. [34 G. A., ch. 68, § 40.]

SEC. **1481-a40. Property in this state belonging to a foreign estate and not specifically devised—how assessed.** Whenever any property, real or personal, within this state belongs to a foreign estate and said foreign estate passes in part exempt from the tax imposed by this act and in part subject to said tax and there is no specific devise of the property within this state to direct heirs or if it is within the authority or discretion of the foreign executor, administrator or trustee administering the estate to dispose of the property not specifically devised to direct heirs or devisees in the payment of debts owing by the decedent at the time of his death, or in the satisfaction of legacies, devises, or trusts given to direct or collateral legatees or devisees or in payment of the distributive shares of any direct and collateral heirs, then the property within the jurisdiction of this state, belonging to such foreign estate, shall be subject to the tax imposed by this act, and the tax due thereon shall be assessed as provided in the next preceding section of this act relating to the deduction of the proportionate share of indebtedness. Provided, however, that if the value of the property so situated exceeds the total amount of the estate passing to other persons than those exempt hereby from the tax imposed by this act such excess shall not be subject to said tax. [34 G. A., ch. 68, § 41.]

SEC. **1481-a41. Compromise settlement—how effected—discharge of lien.** Whenever an estate charged or sought to be charged with the collateral inheritance tax is of such a nature, or is so disposed, that the liability of the estate is doubtful, or the value thereof cannot with reasonable certainty be ascertained under the provisions of law, the treasurer of state may, with the written approval of the attorney-general, which approval shall set forth the reasons therefor, compromise with the beneficiaries or representatives of such estates, and compound the tax thereon; but said settlement must be approved by the district court or judge of the proper court, and after such approval the payment of the amount of the taxes so agreed upon shall discharge the lien against the property of the estate. [34 G. A., ch. 68, § 42.]

SEC. **1481-a42. Unknown heirs.** Whenever the heirs or persons entitled to any estate or any interest therein, are unknown or their place of residence cannot with reasonable certainty, be ascertained, a tax of five per cent. shall be paid to the treasurer of state upon all such estates or interests, subject to refund as provided herein in other cases; provided, however, that if it be afterwards determined that any estate or interest passes to aliens, there shall be paid within sixty days after such determination and before delivery of such estate or property, an amount equal to the difference between five per centum, the amount paid, and the amount which such person should pay under the provisions of this act. [34 G. A., ch. 68, § 43.]

SEC. **1481-a43. Refund of tax improperly paid.** When within five years after the payment of the tax, a court of competent jurisdiction may determine that property upon which a collateral inheritance tax has been

paid is not subject to or liable for the payment of such tax, or that the amount of tax paid was excessive, so much of such tax as has been overpaid to the treasurer of state shall be returned or refunded to the executor or administrator of such estate, or to those entitled thereto, when a certified copy of the record of such court showing the fact of nonliability of such property to the payment of such tax has been filed with the executive council of the state, the executive council shall if the case has been finally determined issue an order to the auditor of state directing him to issue a warrant upon the treasurer of state to refund such tax. Such order of court shall not be given until fifteen days' notice of the application therefor shall have been given to the treasurer of state of the time and place of the hearing of such application, which notice shall be served in the same manner as provided for original notices. [34 G. A., ch. 68, § 44.]

SEC. **1481-a44. Contingent estates—appraisement—refund of excess payment.** Estates in expectancy which are contingent or defeasible and in which proceedings for the determination of the tax have not been taken or where the taxation thereof has been held in abeyance, shall be appraised at their full, undiminished value when the persons entitled thereto shall come into the beneficial enjoyment or possession thereof, without diminution for or on account of any valuation theretofore made of the particular estates for purposes of taxation, upon which said estates in expectancy may have been limited. When an estate, devise, or legacy can be divested by the act or omission of the legatee or devisee, it shall be taxed as if there were no possibility of such divesting. When a devise, bequest or transfer is one in part contingent, and in part vested so that the beneficiary will come into possession and enjoyment of a portion of his inheritance on or before the happening of the event upon which the possible defeating contingency is based, a tax shall be imposed and collected upon such bequest or transfer as upon a vested interest, at the highest rate possible under the terms of this act if no such contingency existed; provided, that in the event such contingency reduces the value of the estate or interest so taxed, and the amount of tax so paid is in excess of the tax for which such bequest or transfer is liable upon the removal of such contingency, such excess shall be refunded as is provided in section forty-four of this act in other cases. [34 G. A., ch. 68, § 45.]

SEC. **1481-a45. Definitions—construction respecting county attorney.** In the construction of this act, the words "collateral heirs" shall be held to mean all persons who are not specifically exempt from the tax imposed by the provisions hereof. The word "person" shall include a plural as well as singular, and artificial as well as natural persons. This act shall not be construed to confer upon a county attorney authority to represent the state in any case, and he shall represent the treasurer of state only when especially authorized by him to do so. This act shall apply to all estates subject to taxation under the law repealed by this act if the tax for which such estates are liable shall not have been paid prior to the taking effect of this act. [34 G. A., ch. 68, § 46.]

SEC. **1481-a46. Record of estates by treasurer—form.** The treasurer of state shall record in a book kept in his office for that purpose, all estates reported to him as liable for a tax under the provisions of this act, showing:

1. The name of the decedent;
2. The place of his residence or county from which such estate was reported;
3. The date of his death;

4. The name of the administrator, executor or trustee;
5. The appraised value of the property, or the value of any taxable pecuniary legacy;
6. The amount of indebtedness that was deducted before estimating the tax;
7. The amount of tax collected;
8. The amount of fees paid for reporting and collecting such tax;
9. The amount of tax, if any refunded.

He shall also keep a separate record of any deferred estate upon which the tax due is not paid within eighteen months from the death of the decedent, showing substantially the same facts as is required in other cases, and also showing:

a. The date and amount of all bonds given to secure the payment of the tax with a list of the sureties thereon;

b. The name of the person beneficially entitled to such estate or interest, with place of residence;

c. A description of the property or a statement of conditions upon which such deferred estate is based or limited. [34 G. A., ch. 68, § 47.]

SEC. **1481-a47. Repeal.** Chapter four, of title seven, of the supplement to the code, 1907, and chapter ninety-two of the acts of the thirty-third general assembly, and all other acts or parts of acts in conflict herewith, are hereby repealed. [34 G. A., ch. 68, § 48.]

TITLE VIII.

OF ROADS, BRIDGES AND FERRIES, AND THE DESTRUCTION OF THISTLES.

CHAPTER 1.

OF THE ESTABLISHMENT, ALTERATION AND VACATION OF ROADS.

SECTION 1482. Jurisdiction over.

Jurisdiction: The board of supervisors is without jurisdiction to establish a highway within the limits of an incorporated town. *Philbrick v. University Place*, 106–352, 76 N. W. 742.

The action of the board of supervisors in vacating a portion of a highway cannot be questioned by mandamus against a road supervisor to compel him to remove obstructions from the portion of the highway vacated. *Sullivan v. Robbins*, 109–235, 80 N. W. 340.

The fact that the board vacates a portion of the highway so as to leave the remainder less than forty feet in width is not such an irregularity as can be taken advantage of in a collateral proceeding. *Ibid.*

The right to the highway vests in the public generally, and but for statutory provisions giving the board of supervisors power to establish, maintain and discontinue highways, such power would be in the state, which is the representative of the general public. *Dickinson County v. Fouse*, 112–21, 83 N. W. 804.

The board is given general supervision of the highways in the county and the provision of § 1524 for the construction of cattle ways with permission, impliedly prohibits the construction of such way without its permission. *Davis v. Pickerell*, 139–186, 117 N. W. 276.

While the board has supervision of the roads of the county its members are not liable for an injury due to failure to repair. *Nolan v. Reed*, 139–68, 117 N. W. 25.

The board of supervisors may bind the county as to a highway by estoppel or abandonment. *Quinn v. Monona County*, 140–105, 117 N. W. 1100.

Dedication: The execution and filing with the county judge of an instrument giving or offering to give a right of way for a highway which was thereafter abandoned, held sufficient to show a dedication. *Agne v. Seitsinger*, 104–482, 73 N. W. 1048.

No particular form is necessary for the dedication of land for a highway, the vital question as against the owner being whether the *animus dedicandi* may be inferred from the facts proven; and held that the signature of the owner to a petition to the board of supervisors to lay out a highway was admissible as tending to show an intent to dedicate, although the board of supervisors was without jurisdiction in the matter. *Philbrick v. University Place*, 106–352, 76 N. W. 742.

While it is well settled that the dedication of a highway or street must be accepted to be effectual, nevertheless the public or a city or town may be estopped by its conduct to open a street or highway which has been closed or occupied for many years by a private person under a claim of right. *Uptagraff v. Smith*, 106–385, 76 N. W. 733.

To establish a highway by prescription there must be a general uninterrupted public use under a claim of right, continued for the statutory period. The mere fact that neighbors and those owning adjoining lands were permitted to use the way for hauling wood and otherwise, is not sufficient to show a dedication to public use. *Fairchild v. Stewart*, 117–734, 89 N. W. 1075.

Evidence in a particular case held not sufficient to show dedication of a highway. *Fountain v. Keen*, 116–406, 90 N. W. 82.

No particular form of dedication is necessary and any act clearly indicating the intention to set apart lands for the use of the public as a highway constitutes a sufficient dedication. But mere dedication without acceptance by the public is not sufficient to create a highway. *Carter v. Barkley*, 137–510, 115 N. W. 21.

To constitute a highway by dedication an intent to dedicate must clearly appear and the act relied upon to prove such intent must be unequivocal and convincing. *O'Malley v. Dillenbeck Lumber Co.*, 141–186, 119 N. W. 601.

Adverse possession: Mere nonuser will not operate to discontinue a legally established highway unless there has been such long continued adverse possession or transfer of the land by purchase and sale as

that justice demands the public should be estopped from asserting the right to open it up. *Bradley v. Appanoose County*, 106–105, 76 N. W. 519.

Where an adjacent owner fenced up the highway, claiming that it had been discontinued by reason of proceedings to relocate, and had exclusive possession by virtue of such acts, continued for ten years, held that the public was barred from asserting any rights thereto. *Rector v. Christy*, 114–471, 87 N. W. 489.

Acquiescence of county or township officers in the adverse possession of a lawful highway is not binding upon the public. *Weikamp v. Jungers*, 150–292, 129 N. W. 953.

The statute of limitations does not run against the public on account of adverse possession of a highway, but the public may be estopped by total abandonment for a period of ten years or more where private rights have been acquired by adverse claim. *McElroy v. Hite*, 154–453, 135 N. W. 20.

Adverse possession of a portion of a highway by enclosing such portion within a fence and maintaining such inclosure for ten years will not give title to such portion of the highway as against the public. *Ford v. Doolittle*, 157–210, 138 N. W. 397.

SEC. **1483. Width.** That section fourteen hundred eighty-three of the code be and the same is hereby repealed, and the following enacted in lieu thereof:

"Roads hereafter established, unless otherwise fixed by the board, shall be at least sixty-six feet wide, and in no case less than forty; within these limits they may be increased or diminished in width, altered in direction, or vacated, by pursuing the course prescribed in this chapter; provided, however, that said board may locate and establish consent roads, at its discretion, at a minimum width of not less than thirty feet." [32 G. A., ch. 64; C. '73, §921; R. §§ 820, 821; C. '51, §§ 515, 516.]

Where there is no record as to the width of the highway established, it will be presumed that it is sixty-six feet in width. *Biglow v. Ritter*, 131–213, 108 N. W. 218.

A highway by prescription may be of less width than sixty-six feet, if the evidence shows the use to have been restricted to a less width. *Haan v. Meester*, 132–709, 109 N. W. 211.

In view of the statutory provision as to the width of highways, it is not necessary to recite the width in a proceeding for establishment. *Quinn v. Baage*, 138–426, 114 N. W. 205.

SEC. **1487. Expediency.**

Where the opening of a road will require the removal of buildings, the property owner, having due notice, may waive objection to the opening of the highway on that ground and claim compensation by way of damages. *Stronsky v. Hickman*, 116–651, 88 N. W. 825.

The expediency of vacating a highway is for the board and is not reviewable on certiorari. *Chrisman v. Brandes*, 137–433, 112 N. W. 833.

SEC. **1488. Report.**

Although the board may be without jurisdiction to proceed with the establishment of a proposed road after an adverse report by the commissioner, nevertheless it will not be without jurisdiction to entertain an entirely new proceeding instituted by the filing of a new petition for the establishment of a new road on the same line or route contemplated by the first petition. *Lawrence v. Williams*, 146–671, 125 N. W. 656.

SEC. **1489. Survey made—commissioner sworn.**

It is only when the precise location cannot be given otherwise in his report that the commissioner is bound to cause the line thereof to be surveyed and plainly marked. *Palmer v. Clark*, 114–558, 87 N. W. 502.

SEC. **1495. Notice served.** Within twenty days after the day is fixed by the auditor as above provided, a notice shall be served on each owner of land lying in the proposed road, or abutting thereon, as shown by the transfer books in the auditor's office, who resides in the county, in the manner provided for the service of original notices. If the owner of the land as thus shown does not reside in the county, similar notice shall be served upon any person who is in the actual occupancy of such land. In

any case, notice shall be published, once each week, for four weeks in some newspaper printed in the county. The notice may be in the following form:

To all whom it may concern: The commissioner appointed to locate, vacate, or alter (as the case may be) a road commencing at.....in..... county, running thence (describe in general terms all the points as in the commissioner's report, giving the names of the owners of the land through which the proposed road passes as they appear upon the transfer books of the auditor's office) and terminating at ....., has reported in favor of the establishment, vacation, or alteration thereof, and all objections thereto, or claims for damages, must be filed in the auditor's office on or before noon of the ..... day of ....., A. D. ....., or such road will be established, vacated, or altered without reference thereto.

.....
County Auditor.

[30 G. A., ch. 2, § 4; 19 G. A., ch. 109; C. '73, § 936.]

The notice required by this section is for the purpose of giving the owners of land living or abutting on the road an opportunity to object to the establishment or vacation thereof, or to present their claims for damages. One who has signed a petition asking that action be taken cannot object for want of notice to him. *Sullivan v. Robbins*, 109–235, 80 N. W. 340.

Where the property owner has due notice he may interpose the objection that the opening of the highway will necessitate the removal of buildings, or he may waive that objection and demand compensation by way of damages. *Stronsky v. Hickman*, 116–651, 88 N. W. 825.

A notice to nonresidents of the establishment of a highway which is such as might have been authorized by the legislature may be made sufficient by a legalizing act, although not sufficient under the statute in force when it was given. *Fair v. Buss*, 117–164, 90 N. W. 527.

A general order of the board of supervisors for the opening of highways along all section lines in the county with notice simply "to whom it may concern" is insufficient and the subsequent abandonment of one of the highways claimed to have been thus established may be shown. *Hatch v. Barnes*, 124–251, 99 N. W. 1072.

The defect in the proceeding is not cured by a subsequent legalizing act. *Ibid.*

It is not necessary to serve notice on owners whose interests do not appear on the transfer books. *Berger v. Tracy*, 135–597, 113 N. W. 465.

Where the parties appear, the board of supervisors has jurisdiction in a proceeding to vacate a highway whether there has been service of notice or not. *Chrisman v. Brandes*, 137–433, 112 N. W. 833.

SEC. 1501. Final action.

The board of supervisors has discretion in determining whether a highway shall be established, even where its establishment is asked by consent. *Perry v. Board of Supervisors*, 133–281, 110 N. W. 591.

The board having acquired jurisdiction to establish a highway, every presumption thereafter is in favor of the legality of its proceedings. *Biglow v. Ritter*, 131–213, 108 N. W. 218.

Where the establishment of a highway is ordered by the board of supervisors on condition that the costs and damages be paid by the petitioner, it does not become a legal highway until such conditions are complied with. *Kirkhart v. Roberts*, 123–137, 98 N. W. 562.

Where the highway is established by the board on condition and that a specified requirement be complied with, no further action of the board is necessary. *McElroy v. Hite*, 154–453, 135 N. W. 20.

A highway established by an unauthorized general order for the establishment of highways along all county section lines and without proper notice may be subsequently abandoned so that a legalizing act will not render the original establishment valid. *Hatch v. Barnes*, 124–251, 99 N. W. 1072.

While an alteration of the road may involve the discontinuance of that part which is altered, it will not result in discontinuance of a portion of the old road which is not rendered unnecessary by reason of the change. *Rector v. Christy*, 114–471, 87 N. W. 489.

The right to vacate a public highway is different from that of a city to vacate a street which it has accepted by dedication. *Long v. Wilson*, 119–267, 93 N. W. 282.

A highway outside of the limits of a city or town can only be vacated by the order of the county board of supervisors. *Chrisman v. Omaha & Council Bluffs R. & B. Co.*, 125–133, 100 N. W. 63.

The owner of land abutting on a highway is entitled to recover from the county the damage that he has sustained by reason of the vacation of such highway. (Overruling *Brady v. Shinkle*, 40–576 and other cases.) *McCann v. Clarke County*, 149–13, 127 N. W. 1011.

Where a road as laid out is impassable and is never improved, it should after a lapse of many years be regarded as abandoned and the county will be estopped from asserting any claim under the original location. *Heller v. Cahill*, 138–301, 115 N. W. 1009.

A highway which has been duly and legally established may be abandoned by the public and its rights therein lost. *Lucas v. Payne*, 141–592, 120 N. W. 59.

SEC. 1503. Record.

A proposed highway described as commencing at a specified section corner and proceeding along the section line is sufficiently located, the line described being presumed to be the center of the highway. *Quinn v. Baage*, 138–426, 114 N. W. 205.

A record of the auditor's certificate to the township clerk and the clerk's directions to the road supervisors are not essential to the validity of the establishment of the highway. *Ibid.*

SEC. 1507. Streets in villages.

When the incorporation of a town has been abandoned the control of the streets and alleys reverts to the board of supervisors. *Chrisman v. Brandes*, 137–433, 112 N. W. 833.

SEC. 1508. In cities or towns.

The statutory provisions as to highways relate to the streets of cities and towns so far as they are applicable. *Newton v. Board of Supervisors*, 135–27, 112 N. W. 167.

The streets of a city or town plat are county highways and on the termination of the corporate capacity of the city or town pass completely under the control of the board of supervisors. *Chrisman v. Brandes*, 137–433, 112 N. W. 833.

SEC. 1509. By trustees of state institutions. The trustees or board of regents or board of control of the institutions belonging to the state may vacate, alter, change or establish public highways through the lands belonging to the state, and for the use of such institutions, as the said board of trustees or board of regents or board of control may deem for the best interests of the state and the public, subject, however, to the approval of the board of supervisors of the county, or the city council of the city, wherein such lands are situated. [33 G. A., ch. 93, § 1.] [26 G. A., ch. 45, § 1.]

SEC. 1510. County line roads.

A highway cannot be considered as established by joint action of two boards of supervisors where the action of each board is independent in character and in fact separated from that of the other board by a considerable interval of time. *Lamansky v. Williams*, 125–578, 101 N. W. 445.

While the statute does not expressly mention bridges in connection with the provisions for county line roads to be established by the joint action of the boards of supervisors of two adjoining counties, the provisions of such statute are equally applicable to the proceedings under code § 424 to construct a bridge across an unnavigable stream which is the boundary line of the counties. *Bremer County v. Walstead*, 130–164, 106 N. W. 352.

SEC. 1511. General control—concurrent action.

The fact that the boards of supervisors of adjoining counties have each, by independent action, established highways in their respective counties which are continuous with each other, does not necessitate joint action of the two boards in the vacation of that portion of the continuous highway located in one county. *Lamansky v. Williams*, 125–578, 101 N. W. 445.

The fact that the same petition for vacation was presented to the two boards does not preclude final action being taken by one board with reference to the portion of the highway located in its county, in case the independent action of such board would in itself be proper. *Ibid*

SEC. 1513. Appeals—from what taken.

The appeal in a proceeding for the establishment of a highway is from the final decision of the board. While the damages are assessed in the first instance by the appraisers, the finding may be reviewed by the board and the damages be increased or diminished. *Henderson v. Calhoun County*, 129–119, 105 N. W. 383.

Appeal does not lie from the order establishing a highway, but only from the award of damages. *In re Application of Dugan*, 129–241, 105 N. W. 514.

A notice of appeal will be liberally construed, and if it is sufficiently definite for a reasonably certain identification of the judgment, order or decision appealed from, it is good. *Ibid.*

SEC. 1516. Proceedings in court.

It is only upon a matter of damages that a claimant is entitled to a jury trial in road cases. *In re Bradley*, 108–476, 79 N. W. 280.

SEC. 1520. Proceedings—record.

The record of a second survey is not sufficient to establish a relocation of the highway where the surveyor does not make use of the field notes of the highway as originally established and the field notes attached to his survey do not purport to be those of a resurvey. *Caulkins v. Ward*, 127–609, 103 N. W. 956.

SEC. 1524. Cattle ways across highways.

The permission of the board contemplated by this section is not general or continuing but has reference to a particular way and when granted and acted upon furnishes no authority for another at a different place. *Davis v. Pickerell*, 139–186, 117 N. W. 276.

SEC. 1527-a. Encroachment of streams—purchase or condemnation of land. The board of supervisors at any regular meeting shall have the power to purchase or provide for the condemnation of, pay for out of the county bridge fund, enter upon and take any land necessary for the purpose of preventing the encroachment of a navigable or nonnavigable stream on a public highway, and for the purpose of straightening or altering a public highway when any such stream has encroached thereon, or some other condition in the highway exists that would, in the judgment of the board, render it necessary or advisable to straighten or alter the same, and the proceedings for condemnation of land as contemplated in this act shall be in accordance with the provisions relating to taking private property for works of internal improvement. [32 G. A., ch. 65.]

SEC. 1527-b. Water mains—supervisors may grant use to municipality for construction of—damages. Upon application to the board of supervisors of any county by any municipality for permission to construct its water mains and lay its pipes in the public highway from such municipality to its reservoir, the said board may grant the same upon condition that it shall not in any manner interfere with the public travel. The applicant shall be responsible for all damages that may arise from such construction, or from the same not being kept in repair. [32 G. A., ch. 66.]

SEC. 1527-c. Electric light and power transmission—supervisors may grant use—regulations—notice—damages. The board of supervisors of any county may, upon written application designating the particular highways, the use of which is desired, grant to any person or corporation engaged in the manufacture of electric light and power the right to erect and maintain poles and wires, for the purpose of conducting electricity for lighting, heat and power purposes, in any public highway in their county for a period not to exceed twenty years, subject to the following conditions and such further reasonable regulations as the legislature or the board of supervisors may hereafter prescribe: The grantee shall in no case have the exclusive right to use such highway for the con-

ducting of the electricity. The poles and fixtures shall be so constructed as to not incommode the public in the use of any road or the navigation of any stream. When any road along which such lines have been constructed shall be changed, the person or corporation shall, upon ninety days' notice in writing, remove said lines to said road as established. The grantee shall use only strong and proper wires, properly insulated, attached to strong and sufficient supports and insulated at all points of attachment. They shall replace all wires with new wires whenever by ordinary wear or other causes they are no longer safe, and remove all wires, the use of which is abandoned. They shall properly insulate every wire carrying electric light, heat or power currents where it enters a building and within such building so as to avoid danger from fires. Where such wires are carried across or under wires used for other service, there shall be suspended under or over said power, heat or light service lines, properly constructed and insulated guard nets, or shall be protected by such other equally efficient devices as will prevent contact with such other service lines, in case of sagging or breaking of such wires. After July first, nineteen hundred and nine, no such grant shall be made until notice of the hearing of said application shall be published once each week for two consecutive weeks in a newspaper printed and published in the county seat, and of general circulation in said county, stating the time when said application will be acted upon and designating the particular highways named in said application. The grantees shall be responsible for all damages that may arise from such construction and operation under this grant or from a failure to comply with said provisions. [33 G. A., ch. 94, § 1.]

SEC. **1527-d. Failure to comply with regulations—penalty.** Any person or corporation having received a grant as above stated who fails to comply with the provisions of the preceding section shall, upon conviction thereof, be punished by a fine of not less than fifty nor more than five hundred dollars. [33 G. A., ch. 94, § 2.]

SEC **1527-e. Gas mains and pipes—supervisors may grant use—damages.** Upon application to the board of supervisors of any county by any individual or corporation engaged, in any city or town, in the manufacture and distribution of gas for heating and illuminating purposes, asking permission to lay its mains and pipes in the public highways outside of such municipality for the purpose of supplying consumers beyond the territorial limits of the municipality in which the manufacturing plant of such individual or corporation is located, said board may grant the same upon such conditions as it may prescribe, but in all cases such mains and pipes shall be so laid as to not, in any manner, interfere with public travel or with the working of the public highway. The location of pipes and mains shall be changed upon reasonable notice whenever such change shall be made necessary by the working or improvement of the highway. The applicant shall be responsible for all damages that may arise from the construction or maintenance of such mains and pipes, and for any damages that may arise from the same not being kept in a proper state of repair. [34 G. A., ch. 69, § 1.]

SEC. **1527-f. Permanent improvement districts—how established—assessment of cost.** The board of supervisors of any county shall have jurisdiction, power and authority at any regular, special or adjourned session, to establish permanent road improvement district or districts and to cause to be constructed as hereinafter provided, by grading, guttering and curbing and paving or macadamizing permanent highways, and to provide for the making and reconstruction of any such highway improvement

and to assess not less than fifty per cent. of the cost thereof on abutting or adjacent property as provided in this act. [33 G. A., ch. 95, § 1.]

SEC. **1527-g. Petition—survey—notice.** Such highway improvement district may be ordered or established whenever a petition of persons residents in the county owning a majority of the acres of land within said proposed improvement district shall be first filed in the office of the county auditor, setting forth the necessity for the same, the starting point, route and terminus, and the lands to be included within said district. The auditor shall thereupon place a copy of the petition in the hands of the county surveyor or a competent engineer, as selected by the board, who shall make a survey of the proposed improvement and return a plat and profile thereof to the auditor, which return shall set forth a full and detailed description thereof, its availability, necessity and probable cost, with a description of each tract of land owned by different persons within said proposed improvement district and such other lands as in his opinion should be included, with such other facts as he may deem material, which shall be submitted to the board for its approval. If said report is approved the board shall direct the auditor immediately thereafter to cause notice in writing to be served on the owner of each tract of land within said improvement district who is a resident of the county, of the pendency and prayer of said petition and of the recommendations of the engineer and the session of the board of supervisors at which the same will be heard, which notice shall be served ten days prior to said session, in the same manner that original notices are required to be served. In case any such owner is a nonresident of the county, such notice as to him shall be published once each week for two consecutive weeks in some newspaper published in the county, proof thereof being made by affidavit as in case of legal notices published in newspapers, and like notice shall be served on those in possession of said land and mortgages of record, which proof shall be filed with the board and the expense of said service shall be paid out of the money collected by the tax herein provided. [33 G. A., ch. 95, § 2.]

SEC. **1527-h. Order of location by board.** The board at the session set for hearing said petition shall thereupon proceed to establish and determine the petition and if necessary view the premises and if they shall find that said proposed improvement is a necessary improvement they shall locate and establish the same on the route specified in the plat and return of the county surveyor or engineer but no such improvement shall be made or ordered unless the same starts at some county seat or other business center or unless said district connects with some improvement district which has already been ordered by the said supervisors within the county in which said improvement district is asked to be established. [33 G. A., ch. 95, § 3.]

SEC. **1527-i. Division into sections.** When the board shall have established said improvement it shall divide the same into suitable sections, and prescribe the time within which work upon each section shall be begun and completed. [33 G. A., ch. 95, § 4.]

SEC. **1527-j. Contracts—bids advertised for—bond—failure to fulfill—forfeit.** The auditor shall cause notice to be given of the time and place of letting the contracts and the time fixed for its completion, by a publication once each week for four consecutive weeks in some newspaper printed in said county and shall let it upon each separate section to the lowest bidder therefor, who shall be required to execute a bond with sufficient sureties, in an amount equal to twenty per cent. of the estimated cost of the work so let, or deposit such amount in cash with the auditor as

security for the performance of his contract. When the work shall have been completed the engineer in charge shall furnish the contractor an estimate of the amount of work done under the contract and the cost thereof, which said estimate he shall also file with the county auditor and when said work has been approved by the engineer and board of supervisors, the auditor shall issue a warrant on the treasurer for the portion of the expense of said improvement to be paid by the said county and the balance shall be paid out of the special taxes levied upon the improvement district as provided by this act. If any person to whom a portion of said work has been let shall fail to perform the same as and in the time specified in his contract, the cash deposited by him shall be forfeited to or the penalty named in the bond may be recovered in an action thereon by the county auditor for the benefit of the improvement district on said contract as liquidated damages and it shall be relet by the auditor in the manner as hereinbefore provided. [33 G. A., ch. 95, § 5.]

SEC. **1527-k. Compensation of engineer—other fees and costs.** The engineer shall be allowed for his services such sum as may be fixed by the board of supervisors and all other fees or costs shall be the same as is provided for by law for like services in relation thereto, all of which, together with damages assessed, shall be paid out of the county treasury from the funds collected for that purpose, upon the order of the county auditor. [33 G. A., ch. 95, § 6.]

SEC. **1527-l. Commissioners—powers and duties—apportionment of cost—hearing—assessment—compensation.** When any improvement district has been located and established as provided in this act or when it shall be necessary to cause the same to be repaired the board of supervisors shall appoint three persons, one of whom shall be a competent civil engineer and two of whom shall be resident freeholders of the county, not living within the township or townships where the improvement is or is to be located and not interested therein or in a like question nor related to any party whose land is affected thereby, who shall inspect and classify all the lands benefited by the proposed improvement and shall make an equitable apportionment of the costs, expenses, cost of construction and fees assessed for the construction of said improvement, or repairing or reopening the same and make report thereof in writing to the board of supervisors and file the same with the county auditor who shall immediately thereafter fix a time for hearing the objections thereto before the board of supervisors and cause to be served upon the owner of each tract of land or lot described in said report, as shown by the transfer books in the auditor's office, notice in writing of the filing and pendency of said report, the amount of special assessment apportioned to such owner, the day set for hearing the same, and that all objections thereto must be made in writing and filed with the county auditor on or before noon of the day set for such hearing, which notice as to residents of the county shall be served not less than ten days prior to the day set for such hearing, in the same manner that original notices are required to be served, and as to nonresidents of the county such notice shall be served by publishing the same in some newspaper published in the county, in the same manner as for notices of improvement districts. When the day set for hearing has arrived the board of supervisors shall proceed to hear all objections made and filed to said report and may increase, diminish, annul or affirm the apportionment made in said report or any part thereof as may appear to the board to be just and equitable, which apportionment shall be assessed among the owners of

the land within said improvement district to be benefited thereby and in proportion to the benefit to each of them and levied upon the lands of the owners so benefited in such proportions and collected in the same manner as other taxes are levied and collected for county purposes, and when so collected shall be kept separate from other county funds and shall be paid out only for purposes properly connected with such improvement on the order of the board of supervisors. The engineer shall receive for each day's services while so engaged five dollars and the other commissioners shall each receive two dollars per day, to be paid out of the funds so collected; provided, however, that not to exceed fifty per cent. of the entire cost of the improvement shall be paid by the said assessment on the property within said improvement district, the balance of the cost of said improvement to be paid by the county out of the funds hereinafter provided in this said act. [33 G. A., ch. 95, § 7.]

SEC. **1527-m. Appeal.** An appeal may be taken to the district court from the order of the board in fixing the assessment upon lands in the same manner appeals may be taken in the location of roads and within the same time, but on such appeal it shall not be competent to show that the lands assessed were not benefited by the improvement. [33 G. A., ch. 95, § 8.]

SEC. **1527-n. Special assessments—how levied and collected—payable in installments.** The special assessment for benefits made by the commissioners appointed for that purpose, as corrected and approved by the board of supervisors, shall be levied at one time by the board against the property so benefited, and when levied and certified shall be payable at the office of the county treasurer. If the owner of any parcel of land, lot or premises against which any such levy shall have been made and certified, which is embraced in any certificate provided for in this section, shall within thirty days from the time of such assessment promise and agree in writing endorsed upon such certificate or in a separate agreement, that in consideration of having the right to pay his assessment in installments he will not make any objections of illegality or irregularity as to the assessment of benefits or levy of such tax upon and against his property, but will pay said assessment with interest thereon at such rate, not exceeding six per cent. per annum, as shall be prescribed by resolution of the board, such tax so levied against the land, lot or premises of such owner shall be payable in ten equal installments, the first of which with interest on the whole assessment shall mature and be payable on the dates of such assessment, and the others with interest on the whole amount unpaid annually thereafter at the same time and in the same manner as the March semiannual payment of ordinary taxes but where no such terms and agreement in writing shall be made by the owner of any land, lot or premises, the whole of said special assessment, so levied upon and against the property of such owner, shall mature at one time and be due and payable with interest from the date of such assessment and shall be collected at the next succeeding March semiannual payment of ordinary taxes. All of said taxes with interest shall become delinquent on the first day of March next after maturity and shall bear the same rate [of] interest with the same penalty as ordinary taxes. [33 G. A., ch. 95, § 9.]

SEC. **1527-o. Recall of assessment and levy—new proceedings.** Where the assessment and levy on account of any highway improvement has been made by the board of supervisors of any county under the provisions of this act without notice or legal notice to the owner of the land affected thereby and the whole or any part thereof remains unpaid, the

board of supervisors shall have the authority to recall the assessment or levy thus made without notice and proceed anew as provided in this act to apportion and levy the cost of such improvement among the owners and upon the lands benefited thereby, taking as a basis the original apportionment and report of the commissioners upon which the board had theretofore acted and the new assessment and levy made upon notice and hearing in such cases shall be certified by the county auditor to the county treasurer, reëntered upon the tax list and collected as other taxes for county purposes, and all payments made under the prior assessment and levy shall be credited upon the new assessment and levy. [33 G. A., ch. 95, § 10.]

SEC. **1527-p. Invalid bonds or proceedings—tax recalled—reassessment and relevy.** When any improvement district is or shall hereafter be established by any board of supervisors of this state and contract or contracts let therefor and the improvement wholly or partly constructed, the improvement bonds issued on account thereof and the proceedings or taxes therefor have been or shall be for any cause found invalid and the board of supervisors has found or shall find that said improvement will be a public improvement and for the convenience and welfare, such board is authorized to provide for the completion of the work and the payment therefor and for the payment of the work already done and of the improvement certificates issued and to that end shall recall the tax already levied and shall reascertain the costs and expenses of such improvement and after a notice and hearing as provided in this act shall assess and levy the same upon the lands benefited thereby and the said board and other county officers shall proceed as provided by the sections heretofore provided in this act. Such reassessment and relevy of taxes shall be in proportion to and not in excess of benefits, and all taxes theretofore paid upon such improvement shall be credited as provided in this act. Such assessment shall fix the proportion for all future levies on account of such improvement or repair of the same and may be levied in one year or apportioned among a series of years and improvement certificates issued therefor as provided for in this act and appeals may be taken as provided in this said act. [33 G. A., ch. 95, § 11.]

SEC. **1527-q. Tax for permanent roads—how levied and collected—use of mulct tax.** The board of supervisors of each county may at the time of levying taxes for other purposes levy a tax of not more than two mills on the dollar of the assessed value of the taxable property in the county, including all taxable property in cities and incorporated towns, which shall be collected at the same time and in the same manner as other taxes and when collected shall be used only for making permanent improvements of highways as in this bill provided; and provided further that in paying for said improvements in those counties in which a mulct tax is collected by the county, said tax or such portions thereof as the board of supervisors may deem to the best interests of said county may also be used in the payment of permanent improvements. [33 G. A., ch. 95, § 12.]

SEC. **1527-r. Not applicable if certain levy is made.** The provisions of this act shall not be applicable, nor shall any levy be made hereunder by the board of supervisors if the levy provided for in section fifteen hundred thirty of the supplement to the code, 1907, is made by the board of supervisors as therein provided. [33 G. A., ch. 95, § 13.]

CHAPTER 1-A.

OF THE STATE HIGHWAY COMMISSION.

SECTION **1527-s. Members—term—removal—office—counsel.** The office of the state highway commission is hereby located at the state college of agriculture and mechanic arts. Said commission shall be composed of three members, one of which shall be the dean of engineering of said college, and the other two members of the commission shall be appointed by the governor immediately upon taking effect of this act, from different political parties for the period of two and four years, from July first, nineteen hundred thirteen, and terms of office shall thereafter be four years. Such commission when appointed shall fill the interim between the taking effect of this act and July first, nineteen hundred thirteen. Each commissioner shall be subject to removal from office as provided by chapter[1] seventy-seven, laws of the thirty-third general assembly. If for any reason, a vacancy occurs in the membership appointed by the governor, he shall fill such vacancy for the remainder of the unexpired term, from the same political party from which the vacancy occurred. The attorney-general shall act as attorney for the commission, and shall advise them upon all legal questions arising with reference to the duties of said commission. [35 G. A., ch. 122, § 1.]

[1] § 1258-b herein. EDITOR.]

SEC. **1527-s1. Compensation.** Each of the commissioners appointed by the governor shall receive for his services the sum of ten dollars per day for each day actually employed in the work of the commission. The total compensation to such commissioner shall not exceed ten hundred dollars per annum. [35 G. A., ch. 122, § 2.]

SEC. **1527-s2. Duties.** The duties of said commission shall be:

1. To devise and adopt plans of highway construction and maintenance suited to the needs of the different counties of the state, and furnish standard plans to the counties in accordance therewith.
2. To disseminate information and instruction to county supervisors and other highway officers, answer inquiries and advise such supervisors and officers on questions pertaining to highway improvements, construction and maintenance and of reasonable prices for materials and construction.
3. To keep a record of all important operations of the highway commission and to annually report the same to the governor by the first day of December, which report shall be printed as a public document.
4. To appoint such assistants as are necessary to carry on the work of the commission, define the duties and fix the compensation of each, and terminate at will the terms of employment of all employes, provide for necessary bonds, and fix the amount of same.
5. To make investigation as to conditions in any county, and to report any violation of duty, either of commission or omission, to the attorney-general, who shall take such steps as are deemed advisable by him to correct the same.
6. The state highway commission shall have general supervision of the various county and township officers named in this act in the performance of the duties here enjoined, and shall have full power and authority to enforce the provisions of this act.
7. To perform all other duties required by law. [35 G. A., ch. 122, § 3.] [30 G. A., ch. 105, § 1.]

SEC. **1527-s3. Engineers—employment of by supervisors—term—bonds—designation of roads in county road system.** The board of

supervisors of each county, within thirty days from the taking effect of this act, or as soon thereafter as practicable, shall employ a competent engineer or engineers, whose tenure of office may be terminated by the highway commission, who shall perform the duties as hereinafter provided, and who shall be employed for such length of time and at such compensation as may be fixed by the board of supervisors, and to be paid out of the county fund. Said engineer, or engineers, shall give bonds for the faithful performance of their duties in a sum not less than one thousand dollars, nor more than five thousand dollars. At the time of employing such engineer, or as soon thereafter as practicable, the board shall designate and select from the highways of the county not less than ten per cent. nor more than fifteen per cent. of the total mileage, same to be the main traveled roads of the county, and which must connect the principal market places of the county, as well as connect with the county roads in adjoining counties. The system of road construction herein provided shall apply only to highways outside of the limits of cities and towns, while the system of bridge and culvert work herein provided for shall apply to all highways throughout the county outside of the limits of cities of the first class. Such highways so designated for improvement under the supervision of the board of supervisors shall hereafter be known as the county road system. [35 G. A., ch. 123, § 1; 35 G. A., ch. 122, § 4.]

SEC. **1527-s4. Maps of county roads—petition for change—forwarding to commission.** As soon as said county roads are so designated, the board of supervisors shall cause said county roads to be plainly marked on a map, to be furnished by the state highway commission. Said map, after being so marked, shall be deposited with the county auditor, and shall be open to public inspection. At once, upon filing said map, the county auditor shall fix a date of hearing thereon, which shall not be more than twenty days distant from the date of filing same; and ten days' notice of the filing of said map with the county auditor and the date of hearing fixed, shall be published in one issue of each of the official county papers. At any time before said hearing is concluded, any ten freeholders of the county may file a petition with the county auditor, asking for any change in said designated roads which may be deemed advisable, which petition shall set forth their reasons for the proposed change, and shall be accompanied by a plat correctly showing such proposed change. If no agreement is reached between the county board and the petitioners at the hearing above provided for, the county auditor shall forward said map, together with all petitions and plats, if any, showing the proposed changes, to the state highway commission. If no objections are filed and no hearing had, or if agreements have been reached, the map shall nevertheless be forwarded to the state highway commission. [35 G. A., ch. 122, § 5.]

SEC. **1527-s5. Approval by commission—return to auditor.** The state highway commission shall, upon receipt of said maps, petitions and plats, proceed to examine the same, with a view of determining the correct lines to be followed by the county highway, having regard for volume of traffic, continuity and cost of construction. Such portions of said map as meet with the approval of said commission may be approved and returned as a preliminary map for immediate use and the original map, when completed in accordance with the decisions of said commission (which decisions shall be final), shall be returned to the county auditor not later than March first, nineteen hundred fourteen, and a copy of same retained in the office of the highway commission. [35 G. A., ch. 122, § 6.]

SEC. **1527-s6. Failure to designate—commission shall act—cost charged to county.** Should any county fail to make the designation of county roads, as herein provided, and fail to forward the same to the state highway commission within the time herein provided, said commission shall have the power to make a proper designation of said county roads for said county, and the designation so made shall be final and of the same force and effect as if made by the board of supervisors, and when so made by the commission, said commission shall certify to the county auditor of said county the actual cost of making said designation, and said county auditor shall thereupon issue warrant on the county road funds therefor. [35 G. A., ch. 122, § 7.]

SEC. **1527-s7. Division of roads by engineer—survey and report—county road book—reports—witness corners.** As soon as any part of said approved map is returned to the county auditor, showing the final designation of county roads, the engineer shall, in writing, divide said roads into sections, designating each section by some appropriate number, name or letter and clearly designating the starting point and terminus of each such section,[1] and such designation shall be recorded at length in a county road book, whereupon the engineer shall proceed to survey said roads and report to the board of supervisors the plan for the road, bridge, tile and culvert work thereon. Such survey and report shall be on the basis and with the object in view of the permanent improvement of said county roads, both as to bridge, culvert, tile and road work. Said survey and report shall consist of an accurate plan and profile of said roads, showing cuts and fills and outline of grades, with careful attention to surface, and lateral drainage and subdrainage, and shall show the location of all lines of tile and size thereof and of all bridges and culverts, their length, height and width, and foundation soundings, and an estimate of the watershed relating to each bridge and culvert. Culverts constructed under the provisions of this act shall have a clear roadway of not less than twenty feet. Proper bench marks shall be established on each permanent bridge and culvert, which shall be duly recorded on both profile and plan of road, for future reference. The engineer shall clearly designate and credit on said plan and profile all existing permanent bridges, culverts and grades. The board may cause all sections to be fully surveyed and a report made thereon before proceeding with the improvement contemplated by this act, or, in order to enable the board to proceed with the most necessary and urgent work, said board may designate the order in which the different sections shall be surveyed and planned, and may order the engineer to survey and report on certain named sections before completing the survey and report on all sections. Whenever it may become necessary in grading the highways to make a cut which will disturb or destroy, or a fill which will cover up a government or other established corner, it shall be the duty of the engineer to establish permanent witness corners, and make a record of the same, which shall show the distance and direction the witness corner is from the corner disturbed or covered up. A failure to perform this duty shall subject the engineer to a fine of not less than ten dollars, nor more than fifty dollars, to be collected on his bond. [35 G. A., ch. 122, § 8.]

[1]"sections" in enrolled bill. EDITOR.]

SEC. **1527-s8. Survey and report—submission to and approval by commission—construction and classification of work—funds.** The survey and report of each section, as soon as completed and approved by the board of supervisors, shall be submitted to the state highway commis-

sion, and the board of supervisors may designate to the said commission which sections, in their estimation, should be first passed upon by said state highway commission. The said commission is hereby charged with the duty of passing upon such reports and plans, and, in so doing, shall take into consideration the thoroughness, feasibility and practicability of such plans, and may approve or modify the same. After said survey and plan for each section is passed upon by the state highway commission, they shall be returned to the county auditor with full and explicit directions as to modifications, if there be any. The county auditor shall, upon receipt of the approved and modified survey and plans, record the same at length in a county road book, and the board of supervisors shall thereupon proceed to the construction of the road, bridge, tile and culvert work in accordance therewith, and as herein provided. The duty to construct and maintain all bridges and culverts throughout the county is imposed on the board of supervisors. All culverts having a span of four feet or less may be classified as road work, and may be paid for out of the county road funds. All culverts over four feet and all bridges shall be paid for out of the county bridge fund. All other moneys received by the board of supervisors for road purposes shall be paid out only on the order of the said board, for the purchase of tools, machinery and equipment, or for work done upon the county road system, or for tile and tiling or for culverts classified as road work, as herein provided. All moneys received by the township trustees for road purposes shall be expended for and upon the township road system. [35 G. A., ch. 122, § 9.]

SEC. **1527-s9. Township roads—addition to county system.** Whenever all the roads of the county road system have been improved according to the plans as herein provided, the board of supervisors shall add such roads from the township road system as have been improved by the township in accordance with the general plans and specifications furnished by the engineer and in accordance with the requirements of this act, and if the township roads so improved be not sufficient to use all county funds available for that purpose, the board of supervisors may select additional county roads, following the same proceedings in all regards as herein provided for the original selection and improvement of county roads, but no increase shall be made in the mileage of the county road system until that system is completed. [35 G. A., ch. 122, § 10.]

SEC. **1527-s10. Cost—how paid—repair work—liability of auditor.** All bills for road work, tile and tiling culvert and bridge construction or for repairs designated by the engineer, shall be filed in itemized form and certified to by the engineer before being allowed by the board and before warrants in payment therefor are drawn by the county auditor. Before any warrant shall be issued by the county auditor upon the funds of the county road system in payment for any work or construction of highways, except for dragging, maintenance or repairs not designated by the engineer, he must secure on this bill the certificate of the engineer employed by the board of supervisors, that such improvement has been made in accordance with the plans and specifications as herein provided, and when so endorsed, warrants may be drawn for the amount so certified by the county engineer; but if said engineer make said certificate when said work was not done in accordance with the plans and specifications, and same be not properly made good without additional cost, then the full cost of making same good may be recovered upon said engineer's bond, and his bond shall be liable therefor. Partial payments may be allowed by the board on contract work on the basis of the engineer's certified estimates

and the percentages specified in the standard specifications of the state highway commission. Repair work shall be known as work not designated by the highway engineer and work of a temporary character or of immediate necessity and work necessary to maintain finished roads completed under this act. A violation of this section shall render the county auditor liable on his bond for the amount of said warrant. [35 G. A., ch. 122, § 11.]

SEC. **1527-s11. Standard specifications—bids—approval of commission—construction by day labor.** Standard specifications for all bridges and culverts shall be furnished without cost to the counties by the state highway commission, and the work shall be done in accordance therewith, and when said work is completed and approved a duplicate statement of the cost thereof shall be filed at once with the state highway commission by the county auditor. All culverts and bridge construction, tile and tiling and repair work or materials therefor, of which the engineer's estimated cost shall be ten hundred dollars, or less, may be advertised and let at a public letting, or may be let privately at a cost not to exceed the engineer's estimate, or may be built by day labor. All culvert and bridge construction, tile and tiling and repair work, or materials therefor, of which the engineer's estimated cost shall exceed ten hundred dollars, shall be advertised and let at a public letting, provided, that the board shall have the power to reject all bids, in which event they may readvertise, or let privately by submitting contract to the state highway commission for approval, or build by day labor, at a cost not to exceed the lowest bid received. All bids received shall be publicly opened at the time and place specified in the advertisement and shall be recorded in detail, in a book kept for that purpose, by the county auditor; said book shall at all times be open to the public for inspection. Any proposed contract which shall exceed the sum of two thousand dollars for any one bridge or culvert, or repairs thereon, shall be first approved by the state highway commission before the same shall be effective as a contract. Before beginning the construction of any bridge or culvert by day labor or by contract, the plans, specifications, estimate of drainage area, estimates of cost and their specific location shall be filed in the county auditor's office by the engineer. On completion, a detailed statement of cost, and of any additions or alterations to the plans shall be added to the above records by the engineer, all of which shall be retained in the county auditor's office as permanent records, and when said work is completed and approved a duplicate statement of the cost thereof shall be filed at once with the state highway commission by the county auditor. The board of supervisors may authorize the county auditor to draw warrants for the amount of pay rolls for labor furnished under the day labor system, when said pay rolls are certified to by the engineer in charge of the work. Said bills shall be passed upon by the board at the first meeting following said payment. [35 G. A., ch. 122, § 12.]

SEC. **1527-s12. Resolution of necessity — notice — publication — hearing—new resolution.** It is hereby made the duty of the board of supervisors, whenever they shall determine to construct a permanent bridge or culvert, the engineer's estimated cost of which exceeds the sum of three hundred dollars, to adopt a resolution of necessity, which shall set forth the determination of said board to construct said bridge or culvert and shall contain the following matters, to wit:

1. The location of such bridge or culvert, which location shall be so plainly pointed out that the same can easily be determined.
2. The material of which such bridge or culvert is to be constructed.

3. The approximate width of the roadway and depth of fill, if any, over the crown or floor of said bridge or culvert.
4. The approximate length of span or arch of said bridge or culvert.
5. The approximate area of the watershed to be drained through said bridge or culvert.
6. The estimated cost of said bridge.
7. The time and place when said board will hear protests, if any, against the construction of said bridge or culvert, which time shall be at least ten days after the date of the last publication of any of said papers, hereinafter specified.

Immediately upon the adoption of said resolution the county auditor shall mail a copy of said resolution to each of the township trustees of the township or townships in which said bridge or culvert is to be located. The county auditor shall also cause said resolution to be published in one issue of each of the official papers of the county. At the time and place fixed for said hearing, the board shall hear all protests, if any, unless on account of some unforeseen contingency it is unable to do so, in which event a new time and place shall be fixed by the board or county auditor, of which time and place all parties shall take notice. Upon the termination of said hearing, the board shall adopt a resolution stating its final determination to construct said bridge or culvert or to abandon the construction of the same. The decision of the board shall be final and no appeal shall be allowed therefrom. The said resolution of necessity may embrace more than one bridge or culvert. If the final order of the board is for the construction of said bridge or culvert and the same is not constructed within one year from the date of such final determination, a new resolution of necessity shall be adopted and proceeding had as herein provided. The publication herein provided for shall be paid for at the rate specified in section four hundred forty-one of the supplement to the code, 1907. [35 G. A., ch. 122, § 13.]

SEC. 1527-s13. **Draggable roads—superintendent of township road system—bond—duties—compensation—amount expended—report.** At every February meeting, or as soon thereafter as possible, the township trustees of each township shall select from its township road system the roads to be dragged for the year, to be known as draggable roads, and shall employ a superintendent of the township road system, who shall give bond for the faithful performance of his duties in such sum as the township trustees may direct. Said superintendent shall have the general supervision of all dragging and repair work on the township road system, whose term of office and compensation shall be at the discretion of the township trustees. He shall see that the approaches to all the bridges on the said roads are maintained in such manner as to present smooth and uniform surfaces, [and] keep the openings to all culverts and ditches free from weeds, brush and other material that will in any manner prevent the free discharge of surface water. He shall have charge of all draggable roads of the township road system and make contracts for dragging, and shall see that all draggable roads of the township road system are properly dragged at such times as are necessary to maintain such roads in a smooth condition, at such price as is reasonable and necessary to secure such contracts. For this purpose there shall be expended, under the direction of the township trustees, through the road superintendent, upon the township road system not less than the one mill drag tax now authorized by law. The township trustees shall not allow any bills for dragging, maintenance, or repair work, nor shall warrants in payment therefor be drawn by the

township clerk upon funds of the township road system until itemized bills therefor shall have been certified to by the township road superintendent. A violation of this section shall render the township clerk liable on his bond for the amount of said warrant. The compensation of such superintendent for all duties, including any dragging actually performed by him, and the cost of all equipment for dragging, shall be paid for out of the township road funds. He shall at least once each year, or on demand, furnish the township trustees a report of all work done under and by him. [35 G. A., ch. 122, § 14.]

SEC. **1527-s14. Survey, plans and specifications for township work.** Before beginning any work upon the township road system, other than hereinbefore described as repair work, the trustees shall make application to the board of supervisors, who shall furnish them with an engineer, to be paid out of the county fund, who shall survey and lay off such roads according to the plans and specifications as hereinbefore provided for the county road system, and the work shall be done in accordance therewith. [35 G. A., ch. 122, § 15.]

SEC. **1527-s15. Repair and dragging of county road system—interest in contracts prohibited.** The county board of supervisors and the engineer are charged with the duty of repairing and dragging the county road system as is required to keep same in proper condition, and shall adopt such methods as are necessary to maintain continuously, in the best condition practicable, the entire mileage of this system. No member of the highway commission, their deputies, or assistants, or any other person in the employ of the commission, no county supervisor, township trustee, county engineer, road superintendent or any person in their employ or one holding an appointment under them, shall be, either directly or indirectly, interested in any contract for the construction or building of any bridge or bridges, culvert or culverts or any improvement of any road or parts of road coming under the provisions of this act. [35 G. A., ch. 122, § 16.]

SEC. **1527-s16. Report by township clerk—recommendation of trustees—report of engineer—uniform blanks.** Not later than the first Monday in November, or at any time upon the demand of the township trustees, the township clerk shall report the work accomplished on the township road system in his township, and said township trustees shall, as nearly as practicable, recommend what is to be done upon the township road system for the succeeding year. A duplicate report of the work accomplished shall be filed by the clerk with the county auditor; and the county engineer, as nearly as practicable, shall credit the same on the township road system of the county road map. It shall also be the duty of the engineer to make a written report to the board of supervisors of the work accomplished upon the roads for the current year, which report shall show what roads of the county and township systems have been completed or partially completed, and credit to such roads shall be shown upon the county road plan not later than November fifteenth, and a copy of said report shall be immediately forwarded to the state highway commission upon standard printed forms. All forms and blanks necessary to secure uniformity of records and reports in the systems herein provided, shall be furnished by the state highway commission. [35 G. A., ch. 122, § 17.]

SEC. **1527-s17. Obstructions—removal of—notice—poles and fences—expense.** County and township boards, charged with the duty of improving public highways, shall have power to remove all obstructions in the highways under their jurisdiction, but fences and poles used for telephone, telegraph or other transmission purposes shall not be removed

until notice, in writing, of not less than ten days has been given to the owner, occupant, or agent of the land enclosed in part by such fence or to the owner or company operating such lines. The notice to any owner or operator of any such telephone, telegraph or transmission line may be served on any agent or officer of such line, and all such fences and poles shall, within the time designated, be removed to such line on the highway, and as designated by the engineer, and if not removed by the date fixed in such notice, same may be forthwith removed by the proper officials. Any new lines, or parts of lines hereinafter constructed, shall be located by the engineer, and shall be removable according to the provisions of this section. The notice of removal may designate to which side of the highway the said poles shall be removed. Any removal made in compliance with this section shall be at the expense of the owners thereof, without liability on the part of any officer ordering or effecting the removal. [35 G. A., ch. 122, § 18.]

SEC. **1527-s18. Contractors' bonds—limitation of action.** The board of supervisors shall require all contractors to give a bond for the faithful performance of the contract, in such sum as the board of supervisors may deem necessary. The surety on any bond given to guarantee the faithful performance and execution of any work shall be deemed and held, any contract to the contrary notwithstanding, to consent without notice:

1. To any extension of time to the contractor in which to perform the contract when each particular extension does not exceed sixty days.

2. To any change in the plans, specifications or contract when such change does not involve an increase of more than twenty per cent. of the total contract price, and shall then be released only as to such excess increase.

No contract shall be valid which seeks to limit the time to less than five years in which an action may be brought upon the bond covering concrete work nor to less than one year upon the bond covering other work. [35 G. A., ch. 122, § 19.]

SEC. **1527-s19. Other procedure excluded—designation final.** The procedure herein provided for the designation and selection of county roads by the board of supervisors and the approval or modification of such selection by the state highway commission, shall exclude all other procedure, and the decision of the board of supervisors and the state highway commission in the designation and selection of the county road system shall be final. [35 G. A., ch. 122, § 20.]

SEC. **1527-s20. District road superintendents—terms ended—township districts consolidated—road funds.** The terms of the district road superintendents now serving under the provisions of chapter ninety-eight of the acts of the thirty-third general assembly shall cease and determine on the first day of February, nineteen hundred fourteen, at which time all road districts within each civil township created under the provisions of said chapter ninety-eight shall become consolidated under one township road district, and all township road funds belonging to said districts of said township shall at once become a general township road fund. The township trustees in all such townships shall at their February meeting, nineteen hundred fourteen, employ a superintendent of the township road system. Until the first day of February, nineteen hundred fourteen, all such district road superintendents shall perform within their respective districts the duties imposed upon the superintendent of the township road

system, by section fourteen[1] of this act. [35 G. A., ch. 122, § 22; 35 G. A., ch. 123, § 2.]

[1§ 1527-s13 herein. EDITOR.]

SEC. **1527-s21. Acts in conflict repealed.** All acts and parts of acts in conflict with this act are hereby repealed. [35 G. A., ch. 122, § 23.]

[For provisions respecting working prisoners on roads see § 5718-a28a to § 5718-a28i. EDITOR.]

REGISTRATION OF HIGHWAY ROUTES.

SEC. **1527-s22. Application for—priority of right to name and design.** Any association organized to promote the improvement of any continuous highway not less than twenty-five miles in length may, by making application to the state highway commission, register in the office of said commission the name, detailed route, color combination and design used in marking said route. The highway commission shall have power to determine priority of right in the use of said name, color combination and designs. [35 G. A., ch. 125, § 1.]

SEC. **1527-s23. Form—fee.** The application shall be in the form prescribed by the commission upon blanks furnished by it, and shall be properly acknowledged by the president and secretary of the association before a notary. Said application shall be accompanied by a registration fee of five dollars, which fee shall be returned to the association if the application be not granted. [35 G. A., ch. 125, § 2.]

SEC. **1527-s24. Certificate—what designated therein.** If the state highway commission shall, after investigation, adjudge the application meritorious and the route to be worthy of the protection of this act, it shall issue to the association a certificate which shall designate in detail the name, the starting and the terminal points, the color combination and designs used in marking the route; all of which facts shall be recorded as a part of the permanent records of the commission in a book kept for that purpose. [35 G. A., ch. 125, § 3.]

SEC. **1527-s25. Infringement prohibited.** It shall be unlawful for any person or association of persons to use for similar purposes the name, any recorded color combination and designs herein referred to. [35 G. A., ch. 125, § 4.]

SEC. **1527-s26. Injury or defacement of signs.** Any person who shall injure or deface any signboard, design or other markings designating routes, shall be subject to the provisions of section forty-eight hundred and one of the code. [35 G. A., ch. 125, § 5.]

SEC. **1527-s27. Cancellation—reassignment.** When any such highway association ceases to exist or when the interest in the route, name and markings has ceased, the state highway commission may, after proper investigation, cancel the records and registration herein referred to and reassign the name, color combination, designs or other markings to any association making application for their use. [35 G. A., ch. 125, § 6.]

SEC. **1527-s28. Fees covered into state treasury.** All fees received by the state highway commission under this act shall be turned into the state treasury. [35 G. A., ch. 125, § 7.]

SEC. **1527-s29. Violation constitutes misdemeanor.** Any person or officer of any association violating any of the provisions of this act shall be guilty of a misdemeanor. [35 G. A., ch. 125, § 8.]

CHAPTER 2.

OF WORKING ROADS.

SECTION **1528. Powers and duties of trustees.** That section fifteen hundred twenty-eight of the supplement to the code, 1907, is hereby repealed and the following enacted in lieu thereof:

"The township trustees of each township shall meet on the first Monday in February and on the first Monday in April, or as soon thereafter as the assessment book is received by the township clerk and on the first Monday in November in each year. At the February meeting said trustees shall select a superintendent of dragging and employ a road superintendent. At the April meeting said trustees shall determine:

1. The rate of property tax to be levied for the succeeding year for the repair of the roads, culverts and bridges and for guideboards, plows, scrapers, road drags, tools and machinery adapted to the repair of the roads, culverts and bridges and for the destruction of noxious weeds in public highways and other public places and for the payment of any indebtedness previously incurred for road purposes, and levy the same, which shall not be more than four mills on a dollar on the amount of the township assessment for that year, which when collected, shall be expended under the direction and order of the township trustees; and they may determine and certify to the board of supervisors a tax on the assessed property in the township of not exceeding five mills on a dollar of such assessment, which shall be applied, or so much thereof as may be necessary, in paying drainage taxes heretofore levied and still unpaid or for the payment of any drainage assessments that may be hereafter levied against the township on account of benefits to highways under the provisions of section sixteen of chapter one hundred eighteen of the acts of the thirty-third general assembly of Iowa, and the balance of such levy or the whole thereof in case there be no such drainage taxes due from the township, may be applied in paying the expense of draining highways of the township or in coöperating with those owning land in the township in securing the drainage of such highways; but in the event that the amount to be expended in any one place exceeds the sum of fifty dollars, the township shall not pay more than its just proportion of the benefits to be ascertained by a competent civil engineer and duly set forth in his report approving of such drainage, which report shall be filed with the township clerk before any money is paid out for such drainage.

2. The amount that will be allowed for a day's labor done by a man, and by a man and team, on the road. To certify to the board of supervisors the desire for an additional road tax, not to exceed one mill to be levied in whole or in part by the board of supervisors, as hereinafter provided. At the November meeting they shall settle with the township clerk and with all parties with whom contracts have been made for work in repairing or dragging of the roads." [34 G. A., ch. 24, § 8; 33 G. A., ch. 96, § 5.] [29 G. A., ch. 64, § 1; 29 G. A., ch. 53, § 3; 26 G. A., ch. 43; 25 G. A., ch. 22; C. '73, §§ 969, 971; R. §§ 880, 891, 895; C. '51, § 568.]

There is no obligation on the part of the county to keep the highways in repair. *Wilson v. Wapello County*, 129–77, 105 N. W. 363.

The board of supervisors has no authority to purchase machinery out of the road tax with which to work the roads. *Harrison County v. Ogden*, 133–9, 110 N. W. 32.

The board cannot incur obligations payable in the future out of the road fund. *Ibid.*

The county is not estopped by the unauthorized acts of its officers, either in in-

curring indebtedness payable out of such fund or in attempting to ratify unlawful obligations already entered into. *Ibid.*

The trustees have no authority to issue orders payable out of the funds of the district, nor to issue orders to the road supervisors in payment of their claims payable out of the general township funds. *Miller v. Hinke*, 135–520, 113 N. W. 325.

Where labor is furnished at the request of the road supervisor a contract will be implied to pay for the labor at its reasonable value, and therefore a township officer furnishing such labor for which he would otherwise be entitled to compensation violates the provisions of code supp. § 468-a which prohibits township trustees furnishing supplies, materials or labor to the township. *State v. York*, 135–529, 113 N. W. 324.

The duty of actually repairing the highways is not cast on the trustees. Their duty is to exercise general supervision, but the work should be done and the responsibility assumed by the contractor or superintendent who is subjected to the same accountability as the supervisor under code § 1557. *Theulen v. Township of Viola*, 139–61, 117 N. W. 26.

SEC. **1528-a. Repeal.** That section five of chapter ninety-six of the acts of the thirty-third general assembly be and the same is hereby repealed. [34 G. A., ch. 24, § 7.]

SEC. **1529. General township fund—clerk to give bond—custody of implements.**

The highway fund can only be used for the purpose authorized by the statute. There is no authority for paying attorney's fees out of such fund in an action brought against the township trustees for breach of duty in connection with the highway. *Davis v. Laughlin*, 147–478, 124 N. W. 876.

SEC. **1530. County road and drainage funds—how levied and paid out.** That the law as it appears in section fifteen hundred thirty of the supplement to the code, 1907, be and the same is hereby repealed and the following enacted in lieu thereof:

"The board of supervisors of each county shall, at the time of levying taxes for other purposes, levy a tax of not more than one mill on the dollar of the assessed value of the taxable properties in its county, including all taxable property in municipalities, which shall be collected at the same time and in the same manner as other taxes and be known as the county road fund and be paid out only on the order of the board of supervisors for the purchase of road tools or machinery or for work done on the roads in the county in such places as it shall determine; provided that on written petition of a majority of the electors who are freeholders of any township in any county the board of supervisors may levy an additional mill in said township to be expended by said board of supervisors on roads in the township where the same is levied; provided further that the board of supervisors of any county may levy an additional tax of not more than one mill on the dollar of the taxable property in the county, including all taxable property in cities and incorporated towns outside the limits of cities of the first class and cities acting under special charter, which tax shall be collected at the same time and in the same manner as other taxes and be known as the county drainage fund and be paid out only on the order of the board for drainage of highways and paying drainage assessments heretofore levied for benefits to highways in the county or that may hereafter be levied for such purposes. One half of the county road fund arising from the property within any municipality shall be paid over by the county treasurer to the treasurer of the municipality in the same manner as other municipal taxes and shall be expended on the roads or streets within such municipality by and under the direction of the council or commission. The county treasurer shall receive the same compensation for collecting this tax as he does for collecting corporation taxes, except as hereinafter provided. Taxes already collected under section fifteen hundred thirty of the

supplement to the code, 1907, and in the hands of the county treasurer shall be paid over to the treasurer of the municipality in the same manner as other municipal taxes. Moneys so collected shall not be transferable to any other fund nor used for any other purpose. The board of supervisors shall levy such additional sum for the benefit of such township as shall have certified a desire for such additional levy as provided for in section fifteen hundred twenty-eight of this chapter. [34 G. A., ch. 24, § 6; 33 G. A., ch. 97, § 1.] [32 G. A., ch. 67; 31 G. A., ch. 56; 29 G. A., ch. 65, § 1; 25 G. A., ch. 22; 20 G. A., ch. 200, § 1.]

[See § 1530-a to § 1530-c inclusive.]

This section contemplates the levying of such tax upon the property within city limits, as well as upon other property in the county, although the tax is not to be expended within the city limits. *Chicago, R. I. & P. Co. v. Murphy*, 106–43, 75 N. W. 680.

The part of the road fund collected within a city must be expended on the roads in and about the city as directed by the city council. *Newton v. Board of Supervisors*, 135–27, 112 N. W. 167.

The members of the board are not liable to any private party for injury due to negligence in the exercise of discretionary powers as to repair of highways where neither malice nor corruption is involved. *Nolan v. Reed*, 139–68, 117 N. W. 25.

SEC. 1530-a. **Portion due municipality—how expended.** "The administrative bodies of such municipalities shall have authority to appropriate out of the fund arising from such tax, the whole or any part thereof, for the improvement of roads outside of the limits of their municipality where the board of supervisors are making improvements on such roads, in which case the amount of such appropriation shall be paid over to the treasurer of the county for such specific improvement and disbursed by the board of supervisors. If expended by the administrative body of the municipality it shall be expended upon that part of the roads within its limits which are reserved and used for traveling purposes and only upon such roads as are a continuation of country roads which are main arteries of travel, and one half of the road fund collected within the municipality and retained for disbursement by the board of supervisors shall be by them used on such roads as are main arteries of travel immediately tributary to the municipality for which such tax has been collected. Nothing herein contained shall prevent the board of supervisors from paying over to the treasurer of the municipality the whole or any part of said tax raised within such municipality to be expended by such municipality as herein provided. [33 G. A., ch. 97, § 2.]

SEC. 1530-b. **No compensation to county treasurer.** "In municipalities where taxes are collected independent of the county treasurer no compensation shall be paid to the county treasurer for the collection of this tax. [33 G. A., ch. 97, § 3.]

SEC. 1530-c. **Municipality defined.** "The term municipality as herein used is defined to include cities, towns, cities acting under special charter and those under the commission form of government." [33 G. A., ch. 97, § 4.]

SEC. 1532. **Consolidation of township into one road district—roads adjoining state lands—how maintained.** That section fifteen hundred thirty-two of the code be and the same is hereby repealed, and the following enacted as a substitute therefor:

The board of township trustees of each civil township in this state, at its regular meeting in April, nineteen hundred and three, shall consolidate said township into one road district, except as provided herein, and all road funds belonging to the road districts of said township shall at once become a general township road fund, out of which all claims for work

done or material furnished for road purposes prior to the change, and unsettled, shall be paid. That all roads and highways within and adjacent to lands belonging to the state, including those under the supervision of the state board of education, shall constitute a separate road district under the control and supervision of the supervisor appointed by the board of control of state institutions with all the powers, duties and responsibilities imposed upon road supervisors, who shall require all able-bodied males, other than inmates of state institutions, residing within such road district, to perform the labor required by the provisions of section fifteen hundred fifty and section fifteen hundred fifty-one of the supplement to the code, 1907, and section fifteen hundred fifty-two of the code, upon the roads of the district within the counties where such persons reside. The supervisor shall make a report to the board of control under the provisions of section fifteen hundred fifty-four of the supplement to the code, 1907, so far as applicable. If it appears from such report that any person has failed to perform the two days' labor required, or any part thereof, and that the supervisor has neglected to collect the amount of money required to be paid in case of such default, the board of control shall certify the name of such person and the amount due from such person to the county auditor of the county where such person resides, who shall enter the amount on the property tax list as against such person and the treasurer of the county shall collect the same and when collected shall pay the amount so collected to the board of control of state institutions, who shall expend same upon the roads of the state district in the county where such money was collected. All cost of maintaining, repairing, renewing and improving the roads within the road district containing state lands, except county bridges, after the expenditure of the road poll tax, either in money collected or in labor, shall be paid out of any general funds in the hands of the state treasurer, not otherwise appropriated, upon warrants drawn by the state auditor after certificate of amount due shall have been filed in his office by the board of control. [35 G. A., ch. 124, § 1; 35 G. A., ch. 123, § 2; 33 G. A., ch. 98, § 1; 33 G. A., ch. 93, § 2.] [29 G. A., ch. 53, § 4; 20 G. A., ch. 200, §§ 4, 11.]

[Acts in conflict with § 4, ch. 53, 29 G. A., are repealed by § 1567-b. EDITOR.]

After consolidation of road districts the road funds of the separate districts cannot be made liable for claims which were not payable before such consolidation out of the funds of the districts. *Miller v. Hinke*, 135–520, 113 N. W. 325.

SEC. **1533. Duty of trustees—road superintendents.** Where the one-road district plan is adopted, the board of township trustees shall order and direct the expenditure of the road funds and labor belonging or owing to the township; may let, by contract, to the lowest responsible, competent bidder, any part or all of the work on the roads for the current year, or may appoint not to exceed four superintendents of roads, to oversee, subject to the direction of the board, all or any part of the work, but it shall not incur an indebtedness for such purposes unless the same has been or shall at the time be provided for by an authorized levy; and shall order the township road tax for the succeeding year paid in money and collected by the county treasurer. It shall cause both the property and poll road tax to be equitably and judiciously expended for road purposes in the entire road district; shall cause at least seventy-five per cent. of the township road tax locally assessed to be thus expended by the fifteenth day of July in each year; shall cause the noxious weeds growing in the roads to be cut twice a year, when necessary, and at such times as to prevent their seeding, and it may allow any land owner a reasonable compensation for the destruction

thereof, when growing in the roads abutting upon his land. If a superintendent, or superintendents of roads be employed, it shall fix the term of office, which shall not exceed one year, and compensation, which shall not exceed three dollars a day; and no contract shall be made without reserving the right of the board to dispense with his services at its pleasure. [31 G. A., ch. 58, § 1; 31 G. A., ch. 57; 30 G. A., ch. 50, § 2; 29 G. A., ch. 53, § 5; 29 G. A., ch. 64, § 2; 20 G. A., ch. 200, §§ 5–10, 17.]

[The amendment by 30 G. A., ch. 50, and the amendment by 31 G. A., ch. 58, struck out the words "as other taxes" in line 10, except the amendment by 30 G. A. ignored code supplement where the section appeared.]

[Acts in conflict with § 5, ch. 53, 29 G. A., are repealed by § 1567-b. EDITOR.]

The trustees are vested with authority to appoint the road superintendent and fix his compensation, and are prohibited by code supp. § 468-a from making contracts with him as individuals to furnish labor or material for the township. *State v. York*, 131–635, 109 N. W. 122.

Where the township trustees had executed a note for road machinery intended only to bind the township, but so executed as to make them individually liable, held that they might by way of equitable defense ask a reformation of that instrument so as to make it correspond to the intention of the parties. *Western Wheeled Scraper Co. v. Stickleman*, 122–396, 98 N. W. 139.

Under this section as amended a contractor or superintendent may be liable for damages resulting from a defect in the highway if previously notified in writing and sufficient time has elapsed in which to make repair. *Theulen v. Township of Viola*, 139–61, 117 N. W. 26.

The superintendent employed by the trustees may in his individual capacity maintain an action to enjoin the obstruction of the highway. *Myers v. Priest*, 145–81, 123 N. W. 943.

SEC. **1538. Compensation of trustees and treasurer.** The trustees shall receive the same compensation per day for time necessarily spent in looking after the roads as they do for other township business; the county treasurer shall receive the same per cent. for collecting the road taxes here contemplated that he does for collecting corporation taxes. [31 G. A., ch. 59; 20 G. A., ch. 200, § 13.]

SEC. **1540. Tax list—repealed.** [29 G. A., ch. 53, § 6.]

[See § 1540-a.]

SEC. **1540-a. Tax list.** That section fifteen hundred forty of the code is hereby repealed, and the following enacted as a substitute therefor:

"He shall, within four weeks after the trustees have levied the property road tax for the succeeding year, certify said levy to the county auditor, who shall enter it upon the tax books for collection by the county treasurer who shall collect in one installment and pay the same over to the clerk of the township entitled thereto. And he shall, not later than the fifteenth day of April, make out and deliver to the superintendent of roads a list of all persons required to pay road poll tax under the provisions of this act. To enable him to make out such list, the assessor shall furnish the clerk of said township, before the first day of April of each year, a complete copy of the assessment lists of said township for that year, which shall be the basis of such poll tax list. Provided, that the property road tax for the year nineteen hundred and three shall be levied as heretofore, that it shall be paid in cash and shall be collected by the superintendent of roads appointed by the trustees or the township clerk, as the board of trustees shall determine and direct. Provided, further, that all delinquent road tax for the year nineteen hundred and three shall be certified to the county auditor by the clerk of each township, for collection as provided by section fifteen hundred forty-two of the code, as amended by this act." [31 G. A., ch. 58, § 1; 29 G. A., ch. 53, § 6; C. '73, § 973; R. § 892.]

[Acts in conflict with § 6, ch. 53, 29 G. A., are repealed by § 1567-b. EDITOR.]

SEC. 1541. **Collection of tax—repealed.** [29 G. A., ch. 53, § 7.]

[See § 1541-a.]

SEC. 1541-a. **Repeal.** That section fifteen hundred forty-one of the code be and the same is hereby repealed. [29 G. A., ch. 53, § 7.]

SEC. 1542. **Delinquent tax certified—repealed.** [29 G. A., ch. 64, § 3.]

[See § 1542-a.]

SEC. 1542-a. **Delinquent tax certified.** That section fifteen hundred forty-two of the code be repealed and the following enacted in lieu of the same:

"He shall, on or before the second Monday of November of each year, make out a certified list of all property, including lands, town lots, personal property and property otherwise assessed, including assessments by the executive council on which the road tax has not been paid in full, and the amount of the tax charged on each separate assessment or parcel of said property, designating the district in which the same is situated and transmit the same to the county auditor, who shall enter the amount of tax on the lists the same as other taxes, and deliver the same to the county treasurer, charging him therewith, which shall be collected in the same manner as county taxes are collected. In case the township clerk shall fail or neglect to make such return, he shall forfeit and pay to the township for road purposes a sum equal to the amount of tax on said property, which may be collected by an action on his bond." [29 G. A., ch. 64, § 3; 29 G. A., ch. 53, § 8; 26 G. A., ch. 43; C. '73, § 975; R. § 898.]

[§ 1542 was first repealed by 29 G. A., ch. 64, § 3, which act was approved March 25, 1902, and took effect by publication March 27, 1902, while § 8 of ch. 53, acts of 29 G. A., which took effect July 4, 1902, attempts to amend the original § 1542.]

SEC. 1545. **Superintendent—qualification.** Each road superintendent or contractor shall give bond in such sum and with such security as the township clerk may require (but in no case shall a township trustee sign such bond as surety), conditioned that he will faithfully and impartially perform all the duties required of him, and devote all moneys that may come into his hands by virtue of his office, according to law. [29 G. A., ch. 53, § 9; 16 G. A., ch. 167; C. '73, §§ 977–8; R. §§ 881, 884.]

[Acts in conflict with § 9, ch. 53, 29 G. A., are repealed by § 1567-b. EDITOR.]

SEC. 1546. **Notice to—penalty for refusing to serve—repealed.** [29 G. A., ch. 53, § 10.]

[See § 1546-a.]

SEC. 1546-a. **Repeal.** That section fifteen hundred forty-six of the code is hereby repealed. [29 G. A., ch. 53, § 10.]

SEC. 1549. **In each district.**

The balance of the funds raised by the township levy (after the expenditure authorized by code § 1528) should be expended in the respective road districts in which it is raised; and the trustees have no authority to issue orders payable out of the township fund for material furnished or labor performed in the repair of the roads. For certain circumstances the road supervisors may issue certificates. *Miller v. Hinke*, 135–520, 113 N. W. 325.

SEC. 1550. **Who to perform labor.** The road supervisor shall require all able-bodied male residents of his district, between the ages of twenty-one and forty-five, to perform two days' labor upon the roads, be-

tween the first days of April and October of each year. [31 G. A., ch. 60; C. '73, § 983.]

One who works on the highway, under the direction of the road supervisors, is not liable, in the absence of trespass, for any injury to adjoining land occasioned by surface water improperly deflected from its natural channel by the improvement of the highway. *Mulvihill v. Thompson*, 114–734, 87 N. W. 693.

SEC. 1551. **Notice of time and place—receipts.** The road supervisor shall give at least three days' notice of the day or days and place to work the roads to all persons subject to work thereon, or who are charged with a road tax within his district, and all persons so notified must meet him at such time and place, with such tools, implements and teams as he may direct, and labor diligently under his direction for eight hours each day; and for such two days' labor the supervisor shall give to him a certificate, which shall be evidence that he has performed such labor on the public roads, and exempt him from performing labor in payment of road poll tax in that or any other road district for the same year. [29 G. A., ch. 53, § 11; C. '73, § 984; R. §§ 886, 896; C. '51, § 588.]

[Acts in conflict with § 11, ch. 53, 29 G. A., are repealed by § 1567-b. EDITOR.]

SEC. 1553. **Compensation of supervisor—repealed.** [29 G. A., ch. 53, § 12.]

[See § 1553-a.]

SEC. 1553-a. **Repeal.** That section fifteen hundred fifty-three of the code be and the same is hereby repealed. [29 G. A., ch. 53, § 12.]

SEC. 1554. **Report.** The superintendent of the township shall report to the township clerk on the first Monday of April and November of each year, which report shall embrace the following items:

1. The names of all persons in his district required to perform labor on the public road, and the amount performed by each;
2. The names of all persons against whom actions have been brought, and the amount collected of each;
3. The names of all persons who have paid their property road tax in labor, and the amount paid by each;
4. The amount of all moneys coming into his hands by virtue of his office, and from what sources;
5. The manner in which moneys coming into his hands have been expended, and the amount, if any, in his possession;
6. The number of days he has been employed in the discharge of his duty;
7. The condition of the roads in his district, and such other items and suggestions as he may wish to make, which report shall be signed and sworn to by him, and filed by the township clerk in his office.

[29 G. A., ch. 53, § 13; 29 G. A., ch. 64, § 4; 26 G. A., ch. 43; C. '73, § 987; R. § 897; C. '51, § 580.]

[§ 4 of ch. 64 of 29 G. A. attempts to amend said section by the insertion of the words "property including" between the words "all" and "lands" in subdivisions five and six, as formerly numbered, but which paragraphs had been stricken out by § 13, ch. 53, of 29 G. A.]

[Acts in conflict with § 13, ch. 53, 29 G. A., are repealed by § 1567-b. EDITOR.]

SEC. 1556. **Shade trees—timber—drainage.**

The mere fact of the planting and raising of trees in the highway does not constitute adverse possession of such portion of the highway as against the public. *Biglow v. Ritter*, 131–213, 108 N. W. 218.

Highway supervisors have some author-

ity in determining how roads are to be improved and within the scope of a reasonable discretion their plans ought not to be interfered with. *Heydon v. Whitaker*, 156–87, 135 N. W. 361.

But the statute specifically provides that ingress or egress to property or the natural drainage of the surface water shall not be interfered with to the injury of adjoining owners. *Ibid.*

SEC. 1557. Liability for unsafe bridge or highway.

A road supervisor is liable for all damages resulting from a defect in the highway allowed to remain after a reasonable time for making repair only where he has had written notice, as required by this section. *Sells v. Dermody*, 114–344, 86 N. W. 325.

A board of supervisors cannot be required by mandamus, at the suit of a private property owner, to restore or repair a county bridge, that being a matter of discretion with the board, to be exercised in the public interest. *Leonard v. Wakeman*, 120–140, 94 N. W. 281.

A contractor or superintendent is not liable for injury due to defect in the highway unless notified thereof so as to give sufficient time for making repair. *Theulen v. Township of Viola*, 139–61, 117 N. W. 26.

The superintendent of the highway district may maintain an action in his individual capacity, alleging that he is such superintendent, to enjoin an obstruction. *Myers v. Priest*, 145–81, 123 N. W. 943.

SEC. 1560. **Obstructions removed.** The road supervisor shall remove all obstructions in the roads, but must not throw down or remove fences which do not directly obstruct travel, until notice in writing, not exceeding six months, has been given to the owner or agent of the land inclosed in part by such fence. [28 G. A., ch. 52, § 1; C. '73, § 993; R. § 905; C. '51, § 594.]

The road supervisor may remove all obstructions in a highway, such as fences. *Quinn v. Baage*, 138–426, 114 N. W. 205.

The provisions of this section as amended relating to the removal of fences which do not directly obstruct travel have no reference to fences which are in no sense boundary fences. *Davis v. Pickerell*, 139–186, 117 N. W. 276.

The road superintendent or road supervisor may maintain an action to enjoin the obstruction of a public highway. *Ford v. Doolittle*, 157–210, 138 N. W. 397.

SEC. 1560-a. **Open ditches and water breaks—construction prohibited.** It shall be unlawful for any person, firm, corporation, road superintendent, township trustee, or board of supervisors, to construct open ditches, water breaks, or other obstructions of like character, on the traveled portion of any public highways, and such obstruction is hereby declared a nuisance and removable as such. [34 G. A., ch. 71, § 1.]

SEC. 1560-b. **Removal—duty of officers.** It shall be the duty of the township trustees, board of supervisors or other officer responsible for the care of public highways in each township or county in this state to remove all open ditches, water breaks, and such like obstructions mentioned in section one hereof, from the traveled portion of public highways within their several townships or counties, and to employ labor for this purpose in the same manner as for the repair of highways, and for neglect or failure to perform their work they shall be subjected to the penalties of this act. [34 G. A., ch. 71, § 2.]

SEC. 1560-c. **Failure to act—penalty.** Any person, firm, or corporation violating any of the provisions of this act, or any township trustee, road superintendent, inspector, member of the board of supervisors, or other officer, who neglects or fails to perform the duties incumbent upon him under the provisions of this act, or violates the provisions hereof, shall be guilty of a misdemeanor and shall be punished by a fine not exceeding ten dollars. [34 G. A., ch. 71, § 3.]

SEC. 1560-d. **Jurisdiction—justice of peace.** In case of prosecution for any violation of the provisions of this act, any justice of the peace within the county in which the violation is alleged to have been committed

shall have authority to decide whether or not the obstructions, of which complaint is made, are of a nature to unreasonably interfere with the passing of vehicles, or can be removed without too much expense, and with a reasonable consideration of the topography of the locality. [34 G. A., ch. 71, § 4.]

SEC. **1560-e. Not applicable to cities and towns.** The provisions of this act shall not apply to roads or streets in incorporated cities or towns. [34 G. A., ch. 71, § 5.]

SEC. **1561. Condition—guideboards.** The road supervisor shall keep the roads in as good condition as the funds at his disposal will permit, and may place guideboards at crossroads and at the forks of the roads in his district, which shall be made out of good timber, well painted and lettered, and placed upon good substantial hardwood posts, to be set four feet in, and at least eight feet above, ground. [33 G. A., ch. 99, § 1.] [C. '73, § 994; R. § 907; C. '51, § 577.]

The road supervisor is individually liable in damages for neglect in the performance of the ministerial duty of making repairs, but such liability only attaches after he has had the written notice required by code § 1557. *Sells v. Dermody*, 114–344, 86 N. W. 325.

SEC. **1562. Canada thistle—written notice—repealed.** [33 G. A., ch. 96, § 9.]

[§ 9, ch. 96, 33 G. A., repealed §§ 1562, 1562-a and 1563 of the 1907 supplement and §§ 1564, 1565 and 5024 of the code. The 35 G. A., by ch. 128, § 10 repealed all of ch. 96, 33 G. A. Assuming that the first of said repeals remains effective, all of the sections named are herein noted as repealed. EDITOR.]

SEC. **1562-a. Weeds—duty of road superintendent—when—repealed.** [33 G. A., ch. 96, § 9.]

[See editor's note at § 1562.]

SEC. **1563. Russian thistle—notice—repealed.** [33 G. A., ch. 96, § 9.]

[See editor's note at § 1562.]

SEC. **1564. Information—bulletin—repealed.** [33 G. A., ch. 96, § 9.]

[See editor's note at § 1562.]

SEC. **1565. Distribution—repealed.** [33 G. A., ch. 96, § 9.]

[See editor's note at § 1562.]

SEC. **1565-a. Weeds—destruction of.** It shall be the duty of each owner, occupant, person, company or corporation in control of any lands within the state of Iowa, whether the same shall consist of improved or unimproved lands, town or city lots, lands used for railway right of way or depot grounds, lands in which the public has an easement for road, street or other right of way, or lands used for any other purpose whatsoever, to cut, burn, or otherwise entirely destroy all noxious weeds as defined in section two hereof at such times in each year and in such manner as shall prevent the said weeds from blooming or coming to maturity, and to keep the said lands free from such growths of other weeds as shall render the streets or highways adjoining the same unsafe for public travel or shall interfere in any manner with the proper construction or repair of the said streets or highways, and shall cause to be cut, near the surface, all weeds on the streets or highways adjoining said lands between the fifteenth day of July and the fifteenth day of August of each year. But nothing herein shall prevent the land owner from harvesting the grass grown upon the roads along his land in proper season. [35 G. A., ch. 128, § 1.]

SEC. **1565-b. Noxious weeds designated.** The following weeds are hereby declared to be noxious weeds, namely: quack grass (agropyron repens), Canada thistle (cirsium arvense), cocklebur (xanthium canadense), wild mustard (brassica arvensis), sour or curled dock (rumex crispus), smooth dock (rumex altissimus), buckhorn or ribbed plantain (plantago lanceolata), wild parsnip (pastinaca sativa), horsenettle (solanum carolinense), velvetweed or buttonweed (abutilon theophrasti), burdock (arctium lappa), shoofly (hibiscus trionum), wild carrot (daucus carota) and Russian thistle (Salsola Kali, L. Var. Tagrus). [35 G. A., ch. 128, § 2.]

SEC. **1565-c. Failure to destroy—board of trustees may make order —notice—expense—how paid—tax—equalization of.** If any such owner, occupant, person, company or corporation in control of any such land shall fail or neglect to do the things necessary to prevent the said noxious weeds on any such land from blooming or coming to maturity, or shall permit weeds thereon contrary to the provisions of section one hereof, or if it shall appear that there is danger that any such noxious weeds on any such land may mature, then upon their own motion or upon complaint made to any member thereof, it shall be the duty of the board of trustees of the township in which such land lies or to which such land may be adjacent and within the same county, or of the town council or board of commissioners if within the limits of an incorporated town or city, to make investigation of such condition or complaint, and if it appears that there is danger that any such noxious weeds may mature or that weeds thereon render or are about to render the streets or highways adjoining the land unsafe for public travel or interfere or are about to interfere in any manner with the proper construction or repair of the said streets or highways, the said board of trustees, town council or commissioners, as the case may be, shall make an order fixing the time within which the weeds shall be prevented from maturing seed or the said weeds shall be destroyed, prescribing the manner of their destruction, and shall forthwith give notice in writing of the said order personally to the owner of the land upon which the same exist if service of such notice can be made within the township in which such land is situated, and if it cannot be so served, then by mailing said notice by registered mail to the owner at his last known address, and also by giving a copy of the notice to the person, company or corporation in the apparent control or occupancy of the said land, whose duty it shall also be to mail said notice to the owner, and if the order so made is not substantially complied with by the time fixed in the order and after reasonable notice as herein provided, then it shall be the duty of the board of trustees, town council or commissioners, as the case may be, forthwith to cause said order to be fully performed, and the expense of the same, including the costs of serving said notice and the special meetings of the board of trustees, town council or commissioners, if any were required, shall be advanced out of the township road fund, or town or city general fund, as the case may be; or if the said fund shall be insufficient therefor, the town council, commissioners, or the board of trustees may borrow the money necessary to advance the same by issuing warrants of a like amount upon the road fund, or upon the town or city general fund, and at any meeting of the board they shall assess all of the same against the said land and the owner thereof by a special tax which shall be certified and collected together with interest and penalty after due in the same manner as road taxes unpaid and shall be collected by the county treasurer and when collected shall be paid into the fund upon which said warrants were drawn.

Before making said assessment, ten days' notice shall be given such owner of the time and place of meeting of the trustees, council or commissioners, which notice shall also contain a statement of the work done and the expense thereof with costs, and shall be given in the same manner as originally given to owners as hereinbefore provided. At said time and place such owner may appear with the same rights given by law before boards of review upon increase in assessments. [35 G. A., ch. 128, § 3.]

SEC. 1565-d. **Date fixed—authority board of trustees and city and town councils.** It shall be the duty of the board of trustees of each township to consider the conditions of all lands and highways within the township and outside of incorporated towns and cities as to noxious weeds, and the town councils and commissions shall have the same duties with reference to lands within their respective towns or cities, and on complaint made to them or on their own motion, whenever it may appear that any of such lands within their jurisdiction are infested with noxious weeds or other weeds, whether about to bloom and mature or not, they shall order their destruction before a date to be fixed in the said notice and prescribe the manner in which the destruction shall be accomplished, notice of which order shall be given as provided in section three hereof, and if the said order shall not be complied with, the board may proceed to cause the said order to be performed and shall certify the expense thereof and it shall be paid and assessed to the lands upon which the same shall have been destroyed and to the owners or owner thereof and be collected in the same manner as is provided for the expense of proceedings under section three hereof. [35 G. A., ch. 128, § 4.]

SEC. 1565-e. **Other officers—shall make complaint.** It shall be the duty of all officers directly responsible for the care of public highways to make complaint to the proper township trustees or town councils or commissions, as the case may be, whenever it shall appear that the provisions of section one hereof may not be complied with in time to prevent the blooming and maturing of noxious weeds or the unlawful growth of weeds, whether in the streets or highways for which they are responsible or upon lands adjacent to the same. [35 G. A., ch. 128, § 5.]

SEC. 1565-f. **Applicable to cities and towns.** All of the provisions of this section relating to the duty of the owner of the lands to prevent the blooming and maturing of noxious weeds thereon and to destroy such growths of other weeds thereon as may interfere with the use of highways shall apply also to cities and towns and the proper officers there as to all streets, highways and lands of any kind within their borders the fee of which shall rest in the public. [35 G. A., ch. 128, § 6.]

SEC. 1565-g. **Notice—to contain list of noxious weeds—by township clerk—when posted.** It shall be the duty of the township clerk, between the first and the fifteenth days of May of each year, to post in two conspicuous places in each school district of the township a notice calling attention to the weed law of the state of Iowa and giving a list of the noxious weeds contained therein and notifying the property owners to meet the requirements of the law. [35 G. A., ch. 128, § 7.]

SEC. 1565-h. **Report—to whom made.** It shall be the duty of the township clerk, between the fifteenth and thirtieth days of October of each year, to make a report to the board of supervisors of the county in which his township is situated as to the presence and location of noxious weeds that have been reported or found within the township and the steps taken to bring about the destruction thereof, a copy of which report shall be forwarded to the board of supervisors to be kept on file and a copy of same to

be forwarded by them to the secretary of the Iowa department of agriculture not later than the first day of December following. [35 G. A., ch. 128, § 8.]

SEC. **1565-i. Penalty.** Any township trustee or road officer or other officer who neglects or fails to perform the duties incumbent upon him under the provisions of this act shall be guilty of a misdemeanor and shall be punished by a fine not exceeding one hundred dollars. [35 G. A., ch. 128, § 9.]

SEC. **1565-j. Repeal.** Chapter ninety-six of the acts of the thirty-third general assembly is hereby repealed. [35 G. A., ch. 129, §§ 1, 2; 35 G. A., ch. 128, § 10.]

[Ch. 129, 35 G. A., by §§ 1 and 2 amended ch. 96, 33 G. A., which is repealed as above shown. EDITOR.]

SEC. **1566-a. Itemized account—filed with county auditor.** That the trustees of each township shall take and file with the board of supervisors on or before the first Monday in each year a full and itemized account verified by the township clerk showing each item of expenditures and receipt of all moneys received and disbursed during the preceding year for road purposes in said township, which report shall remain on file with the county auditor, and, omitting certifications and verifications of township officers, a synopsis thereof showing the names of all persons to whom money has been paid and the amount paid to each shall be published in the published report of the proceedings of the January session of the board of supervisors. [31 G. A., ch. 61; 29 G. A., ch. 53, § 15.]

[Acts in conflict with § 15, ch. 53, 29 G. A., are repealed by § 1567-b. EDITOR.]

The board of supervisors should furnish for publication, under the provisions of code § 441, a synopsis of the itemized reports of the township trustees showing names of all persons to whom money has been paid out of the highway funds and the amounts paid to each, so far as the same can be determined from the reports and the accompanying vouchers on file. *Index Printing Co. v. Board of Supervisors*, 150–411, 130 N. W. 401.

SEC. **1566-b. Road supervisors—defined.** That wherever the term "road supervisors" appears in the code and amendments thereto it shall be held so far as applicable to mean the superintendent or contractor. [29 G. A., ch. 53, § 17.]

[Acts in conflict with § 17, ch. 53, 29 G. A., are repealed by § 1567-b. EDITOR.]

SEC. **1567. Orders issued—repealed.** [29 G. A., ch. 53, § 14.]

[See § 1567-a.]

SEC. **1567-a. Repeal.** That section fifteen hundred sixty-seven of the code be and the same is hereby repealed. [29 G. A., ch. 53, § 14.]

SEC. **1567-b. Acts in conflict repealed.** That all acts and parts of acts in conflict with the provisions of this act are hereby repealed. [29 G. A., ch. 53, § 18.]

SEC. **1569. Turning to right—rule when approaching from rear—penalty.** That section fifteen hundred sixty-nine of the code be and the same is hereby repealed and the following enacted in lieu thereof:

"Persons on horseback, or in vehicles, including motor vehicles, meeting each other on the public highway, shall give one half of the beaten path thereof by turning to the right. Whenever a person in any vehicle shall approach from the rear upon the public highway and desire to pass, it shall be the duty of the driver or operator of such vehicle ahead to give one half of the beaten path thereof, upon proper signal or request, by turning to

the right. The vehicle approaching from the rear shall turn to the left and shall not return to such road or path within less than thirty feet of the team or vehicle which has been passed; provided, however, that such vehicle need not give such right of way when it would jeopardize the safety of the driver or operator to do so. Failure to comply with the above shall be deemed a misdemeanor and punishable as such." [35 G. A., ch. 131, § 1.] [C. '73, § 1000; R. § 908.]

This provision is applicable where a person on a bicycle meets a person driving a horse and vehicle. *Cook v. Fogarty*, 103–500, 72 N. W. 677.

One driving along a highway is not bound to yield any portion thereof to allow another proceeding in the same direction to pass him. It is only to avoid a collision reasonably to be apprehended that he is required to turn aside. *Elenz v. Conrad*, 123–522, 99 N. W. 138.

Failure to turn to the right and give half of the road as required by the statute imposes liability in damages only where such failure is the proximate cause of a resulting injury. *Needy v. Littlejohn*, 137–704, 115 N. W. 483.

The general rule seems to be that where a collision occurs between a vehicle or a horse of the person on the wrong side of the road and that of a person coming towards him, the presumption is that it was caused by the negligence of the person who was on the wrong side of the road; but his presence on that side may be explained or justified. *Carpenter v. Campbell Automobile Co.*, 140 N. W. 225.

SEC. 1570. **Trimming hedges—annually—trees for posts.** Owners of osage orange, willow, or any other hedge fence along the public road, unless the same shall be used as a windbreak for orchards or feed lots, shall keep the same trimmed, by cutting back within five feet of the ground at least once every year, when so ordered by the trustees of their respective townships; provided, however, that the owner of said fence may grow on the average three trees to the rod, for posts, on condition that he keep the underbrush to said trees trimmed up to a height of three feet above the height they are required to be trimmed by said section, and burn or remove the trimmings so cut from the road.

Upon a failure to comply with the foregoing provision, the road supervisor shall immediately serve notice in writing upon the owner of the hedge to trim the same, and if he fails to do so for sixty days thereafter, such supervisor shall cause the same to be done at a cost not exceeding forty cents per rod, which shall be paid for out of the road fund, and make return thereof to the township clerk, who shall, in certifying the lands upon which the road tax has not been paid, include the lands along which the hedge has been trimmed, together with the amount paid therefor, which shall be collected by the county treasurer in the manner other county taxes are collected.

Where the one-district system is adopted as provided in this chapter, it shall be the duty of the township trustees to enforce the foregoing provisions. [33 G. A., ch. 100, §§ 1, 2.] [28 G. A., ch. 54, § 1; 26 G. A., ch. 48; 25 G. A., ch. 88, §§ 1, 2; 24 G. A., ch. 40.]

The duty of enforcing the provisions of this section as amended is laid primarily upon the road supervisors and devolves upon the trustees only when the one-district system for the township has been adopted. *Jones v. Thie*, 141–293, 119 N. W. 616.

SEC. 1570-a. **Apportionment of work by supervisors.** The boards of supervisors of the various counties of the state of Iowa bordering upon the state line are hereby authorized to meet the authorities in control and charge of the public highways in the adjoining counties of other states and agree upon and assign the portion or part of each public highway upon the state line between such states to be kept in repair by the authorities in the state of Iowa and such other states. [32 G. A., ch. 69.]

SEC. **1570-b. Road drag—approval—repealed.** [33 G. A., ch. 101, § 1.]

[See § 1570-b1 to § 1570-b5. EDITOR.]

SEC. **1570-b1. Road dragging districts—how numbered—boundaries.** That the law as it appears in chapter one hundred and one of the acts of the thirty-third general assembly of Iowa be and the same is hereby repealed and the following enacted in lieu thereof:

"It shall be the duty of the township trustees at their regular meeting in April, nineteen hundred eleven, or at a special meeting called for that purpose, to divide the public roads of the township into permanent road-dragging districts. The districts shall be numbered and designated as follows: Beginning at the northeast corner of section one (1), the public roads running through the township east and west shall be known as one-north (1-n), two-north (2-n), three-north (3-n), four-north (4-n), five-north (5-n), six-north (6-n), seven-north (7-n), eight-north (8-n), nine-north (9-n), ten-north (10-n), eleven-north (11-n), twelve-north (12-n), thirteen-north (13-n), fourteen-north (14-n), fifteen-north (15-n), sixteen-north (16-n), seventeen-north (17-n), eighteen-north (18-n), nineteen-north (19-n), twenty-north (20-n), twenty-one-north (21-n), twenty-two-north (22-n), twenty-three-north (23-n), twenty-four-north (24-n), twenty-five-north (25-n), twenty-six-north (26-n), twenty-seven-north (27-n), twenty-eight-north (28-n), twenty-nine-north (29-n), thirty-north (30-n), thirty-one-north (31-n), thirty-two-north (32-n), thirty-three-north (33-n), thirty-four-north (34-n), thirty-five-north (35-n), thirty-sixth-north (36-n); the public road running along the south side of the township shall be numbered and designated as district thirty-six-south (36-s), thirty-five-south (35-s), thirty-four-south (34-s), thirty-three-south (33-s), thirty-two-south (32-s), thirty-one-south (31-s); beginning at the northeast corner of section one (1), the public roads running north and south through the township shall be numbered and designated as dragging districts one-east (1-e), twelve-east (12-e), thirteen-east (13-e), twenty-four-east (24-e), twenty-five-east (25-e), thirty-six-east (36-e), thirty-five-east (35-e), twenty-six-east (26-e), twenty-three-east (23-e), fourteen-east (14-e), eleven-east (11-e), two-east (2-e), three-east (3-e), ten-east (10-e), fifteen-east (15-e), twenty-two-east (22-e), twenty-seven-east (27-e), thirty-four-east (34-e), thirty-three-east (33-e), twenty-eight-east (28-e), twenty-one-east (21-e), sixteen-east (16-e), nine-east (9-e), four-east (4-e), five-east (5-e), eight-east (8-e), seventeen-east (17-e), twenty-east (20-e), twenty-nine-east (29-e), thirty-two-east (32-e), thirty-one-east (31-e), thirty-east (30-e), nineteen-east (19-e), eighteen-east (18-e), seven-east (7-e), six-east (6-e); the public road running along the west side of the township shall be numbered and designated as dragging districts six-west (6-w), seven-west (7-w), eighteen-west (18-w), nineteen-west (19-w), thirty-west (30-w), thirty-one-west (31-w); in townships having a meandered public highway or highways not laid out on section lines the district shall be numbered to correspond with the number of the government section through which they are laid out and such highway or highways shall constitute one district. [34 G. A., ch. 70, § 1.]

SEC. **1570-b2. Duties of trustees—superintendent of dragging—contractors' return cards—record—claims—dragging fund.** The township trustees shall from time to time designate what districts shall be dragged, which must include all mail routes and all the main traveled roads

within the township; they shall at their regular meeting in April or at a special meeting called for that purpose, appoint a superintendent of dragging, who shall be a resident of the township, or any city or town within said township, who shall serve for one year unless sooner removed by the board; they shall fix the amount of his compensation which shall not exceed two dollars and fifty cents per day and actual expenses for each day of eight hours while engaged in necessary work for the township, and for giving notice to contractors who shall be required to drag he shall receive such additional compensation as the board may direct; they shall furnish suitable road drags for the township and pay for same out of the township road fund; they shall adopt a suitable form of notice to be given by the superintendent of dragging when ordering the roads dragged, stipulating the manner of serving same, and shall furnish each person contracted with to drag roads return cards which shall be substantially in the following form:

To ....., superintendent of drags for ..... township.

I received your notice to drag district No. ..... on the ..... day of ..... 191...., and did on the ..... day of ..... 191..., comply with same and have charged said district ..... for said dragging.

If not dragged, why not?.....

Signed .....

They shall provide a suitable book, in which the superintendent of dragging shall record the names of all persons who are entitled to compensation for dragging roads, said book to be known as the dragging record of the township and shall be substantially in the following form:

County of ..... State of Iowa.

Dragging District No. ..... Township of .....

.....

.....

Dragged by whom	Date	Date Notified	Date of Return Card	Am't Charged	Am't Allowed	Remarks

They shall allow all claims for dragging recorded therein, that are in accordance with the provisions of this act and have the approval of the superintendent of dragging. The township trustees shall at their regular meetings in November and April of each year, settle with the superintendent of dragging and pay all claims for dragging in each district that have the approval of the superintendent of dragging, and that are not inconsistent with this act, out of the dragging fund of the township, the amount to be paid for such dragging not to exceed the sum of fifty cents per mile for each mile traveled back and forth while dragging the roads; they shall not allow any claim for dragging unless return card has been duly returned to the superintendent showing said work to have been done by his orders and within twenty-four hours after receipt of notice to perform such service. The township trustees at the time of making the annual levy of the township for road purposes, as provided in section

fifteen hundred twenty-eight of the supplement to the code, 1907, shall each year levy one mill on the dollar on the amount of the township assessment for that year, which shall be designated as the dragging fund and shall be expended only for the purpose of dragging the roads within the township.

[1]If at the February meeting a balance remains in the drag fund for the preceding year or years, the said balance may be transferred to the general road fund. [35 G. A., ch. 319, § 1; 34 G. A., ch. 70, § 2.]

[1]That part of the above section following the figure 1, and providing for the transfer of the balance to the road fund, is the amendment of ch. 319, 35 G. A. The records fail to show that the said act passed the senate. EDITOR.]

SEC. **1570-b3. Dragging records—contracts—authority of superintendent.** "It shall be the duty of the superintendent of dragging to keep the dragging records of the township, recording therein the names of all persons entitled to compensation for dragging, the date of such service, date of giving notice for such service, date of return card, the amount allowed for such service, but no person's name shall be recorded therein as being entitled to compensation for dragging unless his return card has been filed with the superintendent of dragging showing said service as having been performed by order of the superintendent of dragging, and within the time limit required for such service. It shall be the duty of the superintendent of dragging to cause all roads to be dragged that the township trustees may from time to time direct at such times as in his judgment is most beneficial. He shall cause the work to be done by giving the parties contracted with for the performance of such service such notice as the township trustees may deem sufficient; he shall on or before the fifteenth day of April in each year contract with as many suitable persons as he deems necessary to drag the roads in the township for that year, but shall not apportion the dragging of more than six miles of road to any one person. The superintendent may at any time cancel such contract or contracts for dragging the roads when the stipulations therein contained have not been properly complied with, or when the work is not done in a satisfactory manner. [34 G. A., ch. 70, § 3.]

SEC. **1570-b4. Roads within corporation limits.** "It shall be the duty of the city or town council of cities and towns to cause the main traveled roads within the corporation limits leading into the city or town to be dragged, and so far as practicable and possible the provisions of this act shall apply. [34 G. A., ch. 70, § 4.]

SEC. **1570-b5. Penalties.** "Any violation of any of the provisions of this act by the superintendent of dragging, or any person, or persons who may be required under contract to drag district roads, or neglect on the part of any township clerk to set aside the funds required by this act shall, on conviction thereof, be fined not less than ten dollars or more than twenty-five dollars for the first offense, and for each subsequent offense shall be fined not less than twenty-five dollars nor more than fifty dollars." [34 G. A., ch. 70, § 5.]

SEC. **1570-c. How used—compensation—repealed.** [33 G. A., ch. 101, § 1.]

[See §§ 1570-b1 to 1570-b5. EDITOR.]

SEC. **1570-d. Wide tires—rebate for use of.** That all persons who shall in good faith use wagons on the public highways of this state with tires not less than three inches in width, for hauling loads exceeding eight hundred pounds in weight, for the year ending the first day of July nine-

teen hundred and seven, and each succeeding year thereafter, shall receive a rebate of one fourth of their assessed highway tax for that year, and in like manner each succeeding year thereafter; provided, that such rebate shall not exceed the sum of five dollars in any one year to any person. [31 G. A., ch. 63, § 1.]

SEC. 1570-e. **Affidavit—limit of rebate.** Any person complying with the provision of section one of this act, who shall make and subscribe to an affidavit that he has for the last preceding year of July first, nineteen hundred and seven or any succeeding year thereafter, used only such wagons with tires not less than three inches in width, for hauling loads exceeding eight hundred pounds in weight, on the public highways of this state, shall receive payment by the township trustees of the township in which such person resides, of one fourth of the road tax assessed and levied on the property of said person. Such payment shall not exceed in any one year the sum of five dollars and all township trustees and township clerks are hereby authorized to administer such oath. [31 G. A., ch. 63, § 2.]

SEC. 1571. **Steam engines on roads.** That section fifteen hundred seventy-one of the supplement to the code, 1907, be and the same is hereby repealed and the following enacted in lieu thereof:

"Whenever any traction engine is being propelled upon the public road, the whistle thereof shall not be blown, and the operator thereof shall exercise reasonable care and caution in the management of the same so as to avoid any accident that might occur from fright upon the part of any horse or other draft or domestic animal. Any person operating a traction engine upon the public highway shall, upon request, or signal by putting up the hand from the person riding or driving a restive horse or other draft or domestic animal, bring such traction engine immediately to a stop, and if traveling in the opposite direction, remain stationary so long as may be reasonable to allow such horse or animal to pass, and if traveling in the same direction, use reasonable caution while such horse or animal is passing and the operator or any other person employed by the owner of said traction engine shall render necessary assistance to the party having in charge said horse or other draft or domestic animal in so passing. [33 G. A., ch. 102, § 1.] [30 G. A., ch. 52; 28 G. A., ch. 55, § 1; 25 G. A., ch. 21, §§ 1, 2; 24 G. A., ch. 68, §§ 1–4.]

[See §§ 1571-1a, 1571-2a. EDITOR.]

The violation of the requirement that planks be placed under a steam engine crossing a bridge will not defeat recovery by the owner for injuries resulting from defects in the bridge for which the county is liable, if the failure to comply with the statute has not directly contributed to the injury. *Tackett v. Taylor County*, 123–149, 98 N. W. 730.

This section has no application to a case where a steam engine is hauled across a bridge by animal power. The statutory provision was intended to guard against the dangers peculiarly incident to the movement or propulsion of engines on the highway by steam power. *Young v. Madison County*, 137–515, 115 N. W. 23.

This section has no application to the operation of a traction engine not on a public highway. *Burke v. Mally*, 141–555, 120 N. W. 305.

SEC. 1571-1a. **Bridges—crossings—culverts—planks used.** "Until the first day of November, nineteen hundred ten, no traction engine shall cross any bridge, crossing or culvert in the public highway or street unless sound, strong planks not less than one foot wide and two inches thick be placed and kept continuously under the wheels. No traction engine having mud lugs or ice spurs attached to its wheels shall be moved over any bridge, culvert, or street crossing. [33 G. A., ch. 102, § 2.]

SEC. **1571-2a. Penalty.** "Any person violating any of the provisions of this act shall be deemed guilty of a misdemeanor and upon conviction shall be fined not to exceed one hundred dollars or be imprisoned in the county jail not to exceed thirty days." [33 G. A., ch. 102, § 3.]

SEC. **1571-3a. Culvert fund for nineteen hundred thirteen.** Within thirty days after the taking effect of this act, the township trustees shall, for the year nineteen hundred thirteen, set aside, from the township road fund, a sum of money equal to one mill on all taxable property of the township, which sum the township clerk shall keep as a separate fund to be known as the nineteen hundred thirteen culvert fund, and shall be used only for the payment of culverts constructed in such township on the township road system, by the board of supervisors during the year nineteen hundred thirteen. The cost of culverts constructed during nineteen hundred thirteen in such township on the township road system by the board of supervisors shall, to the extent of such special fund, be paid out of such fund by the trustees, on the certificate of the county auditor as to the correctness of such cost. [35 G. A., ch. 126, § 1.]

CHAPTER 2-A.

OF MOTOR VEHICLES.

SECTION **1571-a. Terms defined—repealed.** [34 G. A., ch. 72, § 1.]

[See § 1571-m. EDITOR.]

SEC. **1571-b. Statement—fees—repealed.** [34 G. A., ch. 72, § 1; 33 G. A., ch. 103, § 1.]

[See § 1571-m. EDITOR.]

The fact that an automobile is not registered does not defeat a recovery by a person operating it for negligence of a railroad company occasioning a collision to his injury. *Lockridge v. Minneapolis & St. L. R. Co.*, 140 N. W. 834.

SEC. **1571-c. Statement filed—registration number—repealed.** [34 G. A., ch. 72, § 1; 33 G. A., ch. 103, § 2.]

[See § 1571-m. EDITOR.]

SEC. **1571-d. Change of owner—reregistration—repealed.** [34 G. A., ch. 72, § 1.]

[See § 1571-m. EDITOR.]

SEC. **1571-e. Seal—repealed.** [34 G. A., ch. 72, § 1; 33 G. A., ch. 103, § 3.]

[See § 1571-m. EDITOR.]

SEC. **1571-f. Number displayed—repealed.** [34 G. A., ch. 72, § 1; 33 G. A., ch. 103, § 4.]

[See § 1571-m. EDITOR.]

SEC. **1571-g. Nonresident owner—repealed.** [34 G. A., ch. 72, § 1.]

[See § 1571-m. EDITOR.]

SEC. **1571-h. Regulations—repealed.** [34 G. A., ch. 72, § 1.]

[See § 1571-m. EDITOR.]

The statute expressly authorizes the use of automobiles on the highways and confers on the operators of such vehicles the same rights in the roads and streets

as are accorded to the drivers of other vehicles. *House v. Cramer*, 134–374, 112 N. W. 3.

But the operator of an automobile is liable for damages resulting from his negligence in not exercising care to avoid frightening horses. *Ibid.*

A finding that the driver of an automobile was not operating his machine at a rate of speed prohibited by the statute does not negative a finding that he was operating it at a speed not reasonable and proper to the use of the highway. *Walkup v. Beebe*, 139–395, 116 N. W. 321.

The statute does not declare that an automobile cannot lawfully be driven at a greater speed than twenty miles per hour on the country road. In determining the negligence of the owner the speed may be considered with reference to the facts as shown by the evidence. *Neidy v. Littlejohn*, 146–355, 125 N. W. 198.

In an action to recover damages for injuries resulting from negligent operation of an automobile, it is proper to instruct the jury that "operating an automobile at an average speed of more than twenty miles per hour is prima-facie negligence." *Scott v. O'Leary*, 157– —, 138 N. W. 512.

One operating an automobile is bound to know that people are likely to be traveling upon the highway. *Ibid.*

SEC. 1571-i. Caution—signals—repealed. [34 G. A., ch. 72, § 1.]

[See § 1571-m. EDITOR.]

If the operator of an automobile sees that a horse being driven toward him on the highway is frightened he is required to exercise ordinary care to prevent an accident although he has received no signal from the driver of the horse to stop the machine. *Strand v. Grinnell Automobile Garage Co.*, 136–68, 113 N. W. 488.

Under the facts of a particular case, held that the testimony was sufficient to show that the accident occurring at a dangerous place in the highway was due to the negligence of the operator of the automobile in running at a high rate of speed without turning out so as to allow the driver of the horse to pass in safety and without stopping after danger from the frightening of the horse became apparent. *Ibid.*

In the absence of a signal to stop the driver of an automobile in the exercise of reasonable care may be in duty bound to stop his machine on seeing another driving in the highway to be in peril by the frightening of his horse. *Walkup v. Beebe*, 139–395, 116 N. W. 321.

The statutory provisions define the duty of an operator of an automobile upon request or signal, but they do not relieve him of the liability of exercising ordinary care for the safety of others. Reasonable care depends on the speed, size and appearance, manner of movement, noise, and the like of such vehicle as well as the means of locomotion of other vehicles on the highway. *Delfs v. Dunshee*, 143–381, 122 N. W. 236.

Whether the sounding of a signal horn as a warning to others of the approach of the automobile is essential in the exercise of ordinary care is to be determined by the circumstances. *Ibid.*

It may constitute negligence to stop a machine after passing a frightened horse and so near as to cause further fright. *Ibid.*

One who uses a highway on which automobiles are operated assumes only the risk incident to their operation in a reasonably careful manner. *Ibid.*

SEC. 1571-j. Brakes—signal bell or horn—lamps—repealed. [34 G. A., ch. 72, § 1.]

[See § 1571-m. EDITOR.]

SEC. 1571-k. Powers of cities and towns—repealed. [34 G. A., ch. 72, § 1.]

[See § 1571-m. EDITOR.]

SEC. 1571-l. Penalties—repealed. [34 G. A., ch. 72, § 1.]

[See § 1571-m. EDITOR.]

CHAPTER 2-B.

OF REGISTRATION OF MOTOR VEHICLES.

SECTION 1571-m. Repeal. Chapter two-A, title eight, being sections fifteen hundred seventy-one-a to fifteen hundred seventy-one-l, both inclusive, of the supplement to the code, 1907, as amended, is hereby repealed and the following enacted as a substitute therefor: [34 G. A., ch. 72, § 1.]

SEC. **1571-m1. Terms defined.** That section two of chapter seventy-two of the acts of the thirty-fourth general assembly be and the same is hereby repealed and the following enacted in lieu thereof:

"The term 'motor vehicle' as used in this act, except where otherwise expressly provided, shall include all vehicles propelled by any power other than muscular power, except motor trucks, motor drays, motor delivery wagons, traction engines, road rollers, fire wagons and engines, police patrol wagons, ambulances and such vehicles as are run only upon tracks or rails. The term 'local authorities' shall include all officers of counties, cities or towns, as well as all boards, committees or other public officials of such counties, cities or towns. The term 'chauffeur' shall mean any person operating or driving a motor vehicle as an employe or for hire. The term 'owner' shall also include any person, firm, association or corporation renting a motor vehicle or having the exclusive use thereof, under a lease or otherwise, for a period greater than thirty days. The term 'public highways' shall include any highway, county road, state road, public street, avenue, alley, park, parkway, or public place in any county, city, town or village, except any speedway which may have been or may be expressly set apart by law for the exclusive use of horses and light carriages. The term 'motor drays,' 'motor trucks' and 'motor delivery wagons' shall include only such described vehicles which have a speed capacity of not more than ten miles per hour, and which shall be built for and used exclusively for trucking, draying or delivering." [35 G. A., ch. 130, § 1; 34 G. A., ch. 72, § 2.] [30 G. A., ch. 53, § 1.]

SEC. **1571-m2. Application—information contained.** "Every owner of a motor vehicle which shall be operated or driven upon the public highways of this state shall, except as herein otherwise expressly provided, cause to be filed in the office of the secretary of state a verified application for registration on a blank to be furnished by the secretary of state for that purpose, containing: (a) a brief description of the motor vehicle to be registered, including the name of the manufacturer and factory number of such vehicle, the character, and if the motive power be derived from the products of petroleum, the amount of the motive power stated in figures of horse power in accordance with the rating established by the association of licensed automobile manufacturers, and the number of cylinders, bore and stroke of each; (b) the name and post-office address, with street number if in a city, including county and business address of the owner of such motor vehicle. [34 G. A., ch. 72, § 3; 33 G. A., ch. 103, § 1.] [32 G. A., ch. 68, § 1; 30 G. A., ch. 53, § 2.]

SEC. **1571-m3. Age of operator.** "No person shall operate or drive a motor vehicle who is under fifteen years of age, unless such person is accompanied by the owner of the motor vehicle being operated. [34 G. A., ch. 72, § 4.]

SEC. **1571-m4. Registration—record open to inspection.** "Upon receipt of an application for registration of a motor vehicle, as provided in this act, the secretary of state shall file such application in his office and register such motor vehicle with the name, post-office address and business address of the owner, manufacturer or dealer, as the case may be, together with the facts stated in such application, in a book or index to be kept for the purpose, under the distinctive number assigned to such motor vehicles by the secretary of state, which book or index shall be open to public inspection during reasonable business hours. [34 G. A., ch. 72, § 5; 33 G. A., ch. 103, § 2.] [30 G. A., ch. 53, § 3.]

SEC. 1571-m5. **Number assigned — certificate — number plates— duplicate plates.** That section six of chapter seventy-two of the acts of the thirty-fourth general assembly be and the same is hereby repealed and the following enacted in lieu thereof:

"Upon the filing of such application and the payment of the fee hereinafter provided, the secretary of state shall assign to such motor vehicle a distinctive number and, without expense to the applicant, issue and deliver or forward by mail or express to the owner a certificate of registration, in such form as the secretary of state shall prescribe, and two number plates. In the event of the loss, mutilation or destruction of any number plate, the owner of a registered motor vehicle, or manufacturer or dealer, as the case may be, may obtain from the secretary of state a duplicate thereof upon filing in the office of the secretary of state an affidavit showing such facts and the payment of a fee of one dollar; duplicate certificates of registration may be issued by the secretary of state, in like cases, without the payment of any fee therefor. [35 G. A., ch. 130, § 2; 34 G. A., ch. 72, § 6.]

SEC. 1571-m6. **Renewal—made annually.** That section seven of chapter seventy-two of the acts of the thirty-fourth general assembly be and the same is hereby repealed and the following enacted in lieu thereof:

"Registration shall be renewed annually in the same manner and upon the payment of the annual fee as provided in section eight[1] for registration, to take effect on the first day of January in each year; provided, that the secretary of state shall withhold the reregistration of any motor vehicle the owner of which shall have failed to register the same for any previous period or periods for which it appears that registration should have been made, until the fee for such previous period or periods shall be paid. All certificates of registration issued under the provisions of this act shall expire on the last day of the calendar year in which they were issued. [35 G. A., ch. 130, § 3; 34 G. A., ch. 72, § 7.]

[1§ 1571-m7 herein. EDITOR.]

SEC. 1571-m7. **Fee—payable annually—half rate—manufacturer's or dealer's report.** That section eight of chapter seventy-two of the acts of the thirty-fourth general assembly be and the same is hereby repealed and the following enacted in lieu thereof:

"The following fee shall be paid to the secretary of state upon the registration or reregistration of a motor vehicle in accordance with the provisions of this act; eight dollars upon the registration of a motor vehicle having a rating of twenty horse power or less; and for each such vehicle which shall exceed twenty horse power in rating, the owner shall pay at the rate of forty cents per horse power; provided, that if a motor vehicle shall have been licensed for four separate successive years under the laws of this state, and for which there shall have been paid four registration fees as provided by statute therefor, or any motor vehicle which shall have been in use for a period of not less than four years prior to August first of such registration period for which registration is about to be made, the annual registration fee thereafter shall be one half that amount; and further provided, that the annual fee for the registration or reregistration of any electric or steam motor vehicle in accordance with the provisions of this act shall be fifteen dollars; and further provided, that the annual fee for the registration or reregistration of a motor bicycle or motor cycle in accordance with the provisions of this act shall be three dollars; and provided further, that the fee for registering any theretofore unregistered

motor vehicle under the provisions of this act, which motor vehicle shall be purchased on or after August first of any year, shall be one half of the annual fee therefor, for the remainder of that calendar year; and provided further, that each manufacturer or dealer selling or otherwise disposing of motor vehicles, theretofore unregistered in this state, to residents of this state shall report to the secretary of state each such sale made on or after August first of each calendar year; such reports shall be made on blanks to be furnished by the secretary of state upon request, and shall be made in such manner as he may direct; and provided further, that no motor vehicle shall be registered for less than the annual fee because of its having been purchased on or after September first until such manufacturer's or dealer's report shall have been filed as herein provided. [35 G. A., ch. 130, § 4; 34 G. A., ch. 72, § 8; 33 G. A., ch. 103, § 1.] [32 G. A., ch. 68, § 1; 30 G. A., ch. 53, § 2.]

SEC. **1571-m8. Fees in lieu of taxes—assessments for nineteen hundred eleven canceled.** "The registration fees imposed by this act upon motor vehicles, other than those of manufacturers and dealers, shall be in lieu of all taxes, general or local, to which motor vehicles may be subject. It shall be the duty of the county auditor of each county to cancel all assessments entered upon the assessor's books against automobiles for nineteen hundred eleven, and no assessments upon automobiles, as made by assessors for nineteen hundred eleven, shall be carried upon the tax lists. [34 G. A., ch. 72, § 9.]

SEC. **1571-m9. Change in ownership — notice of — transfer fee.** "Upon the sale or transfer of a motor vehicle registered in accordance with the provisions of this act, the vendor shall immediately give notice thereof with his name, post-office address and registration number, and the name and address of the vendee, to the secretary of state, and the vendee shall, within ten days after the date of such sale or transfer, notify the secretary of state thereof upon a blank furnished promptly by him for that purpose, stating the name, post-office address, and business address of the previous owner, the number under which such motor vehicle is registered, and the name, post-office address, with street number if in a city, including county and business address of the vendee. Upon filing such statement duly verified such vendee shall pay to the secretary of state a fee of one dollar, and upon receipt of such statement and fee the secretary of state shall file such statement in his office and note upon the registration book or index such change in ownership. [34 G. A., ch. 72, § 10.] [32 G. A., ch. 68, § 2; 30 G. A., ch. 53, § 4.]

SEC. **1571-m10. May operate fifteen days after purchase—application.** That section eleven of chapter seventy-two of the acts of the thirty-fourth general assembly, be and the same is hereby repealed and the following enacted in lieu thereof:

"Upon the sale of a motor vehicle by a manufacturer or dealer, the vendee shall at once make application by mail or otherwise for registration thereof, after which he may operate the same upon the public highways without its individual number plates thereon for a period of not more than fifteen days, providing that during such period the motor vehicle shall have attached thereto, in accordance with the provisions hereof, metal number plates to be furnished by the secretary of state to the dealer as provided in section fifteen[1] bearing the registration number of the manufacturer or dealer under which it might previously have been operated for demonstration purposes; and provided further, that no manufacturer or dealer shall permit the use of his demonstration or registration number by such vendee

until application for registration be so made as aforesaid, and it shall be his duty to assist the vendee in making out and filing his said application for registration, and for that purpose to keep on hand a supply of blanks to be furnished by the secretary of state upon request. [35 G. A., ch. 130, § 5; 34 G. A., ch. 72, § 11.]

[1§ 1571-m14 herein. EDITOR.]

SEC. **1571-m11. Number plates—conspicuously displayed.** "No person shall operate or drive a motor vehicle on the public highways of this state after the fourth of July, nineteen hundred eleven, unless such vehicle shall have a distinctive number assigned to it by the secretary of state, and two number plates with numbers corresponding to that of the certificate of registration conspicuously displayed, one on the front and one on the rear of such vehicle, each securely fastened so as to prevent the same from swinging. [34 G. A., ch. 72, § 12; 33 G. A., ch. 103, § 4.] [30 G. A., ch. 53, § 6.]

SEC. **1571-m12. Different colored plates each year.** "Such number plates shall be of a distinctively different color each year, and there shall be at all times a marked contrast between the colors of the number plates and that of the numerals or letters thereon, said colors to be designated by the secretary of state. [34 G. A., ch. 72, § 13.]

SEC. **1571-m13. Size and description of plates.** "Such number plates shall be of metal, at least six inches wide and not less than fifteen inches in length, on which there shall be the initials 'IA' and there shall be the distinctive number assigned to the vehicle set forth in numerals four inches long, each stroke of which shall be at least five eighths of an inch in width; provided that in the case of a motor vehicle registered by a manufacturer or dealer there shall be on such plate, in addition to the foregoing, the letter 'D', each stroke of such letter to be at least four inches long and five eighths of an inch in width, provided that the number plates for use on a motor bicycle or a motor cycle shall be one half the size above stated. No motor vehicle shall display the number plate of more than one state at any time. [34 G. A., ch. 72, § 14.]

SEC. **1571-m14. Dealer's number — application for — duplicates.** That section fifteen of chapter seventy-two of the acts of the thirty-fourth general assembly, be and the same is hereby repealed and the following enacted in lieu thereof:

"Every person, firm, association or corporation manufacturing or dealing in motor vehicles may, instead of registering each motor vehicle so manufactured or dealt in, make a verified application upon a blank to be furnished by the secretary of state, for a general distinctive number for all the motor vehicles owned or controlled by such manufacturer or dealer, such application to contain:

(a) A brief description of each style or type of motor vehicle manufactured or dealt in by such manufacturer or dealer, including the character of the motive power, the amount of such motive power stated in figures of horse power in accordance with the rating established by the association of licensed automobile manufacturers; and

(b) The name [and] residence, including county and business address, of such manufacturer or dealer.

On the payment of a registration fee of fifteen dollars such application shall be filed and registered in the office of the secretary of state in the manner provided in section three[1] of this act. The secretary of state shall thereupon assign and issue to such manufacturer or dealer a general dis-

tinctive number, and without expense to the applicant, issue and promptly deliver to such manufacturer or dealer a certificate of registration in such form as the secretary of state shall prescribe, and two number plates with a number corresponding to the number of such certificates of registration. Such number plates or duplicates thereof shall be displayed by every motor vehicle of such manufacturer or dealer when the same is operated or driven on the public highways. Such manufacturer or dealer may obtain as many duplicates of such number plates as may be desired upon the payment to the secretary of state of one dollar for each duplicate set, provided that if a manufacturer or dealer has an established place of business in more than one city or town, such manufacturer or dealer shall secure a separate and distinct certificate of registration and number plates for each such place of business. Nothing in this section shall be construed to apply to a motor vehicle operated by a manufacturer or dealer for private use or for hire, which said motor vehicle or vehicles shall be individually registered as provided in sections seven[2] and eight[3] of this act, but no dealer or manufacturer shall be required to keep more than one car registered for his private use." [35 G. A., ch. 130, § 6; 34 G. A., ch. 72, § 15.]

[1§ 1571-m2 herein, 2,3§§ 1571-m6, 1571-m7 herein. EDITOR.]

SEC. **1571-m15. Dealers to register annually—delinquent list—county attorney to act.** That section sixteen of chapter seventy-two of the acts of the thirty-fourth general assembly be and the same is hereby repealed and the following enacted in lieu thereof:

"Registration provided for in section fifteen[1] shall be renewed annually in the same manner and on the payment of the same fee as provided in section fifteen[1] for original registrations, such renewal to take effect on the first day of January of each year. The provisions of section seven[2] relating to renewals and duration of renewals under this act shall apply to registrations and reregistrations under this section. Within sixty days after the first of January, annually, the secretary of state shall prepare and forward to the county attorney of each county a list of the owners of motor vehicles in said county, who may have failed or neglected to pay the registration fee required by this act, whereupon the county attorney shall immediately proceed to enforce the provisions of this act, as herein provided. [35 G. A., ch. 130, § 7; 34 G. A., ch. 72, § 16.]

[1,2§§ 1571-m14, 1571-m6 herein. EDITOR.]

SEC. **1571-m16. Nonresident owners—not applicable to—exceptions.** "The provisions of the foregoing sections relative to registration and display of registration numbers shall not apply to a motor vehicle owned by a nonresident of this state, other than a foreign corporation, manufacturer or dealer doing business in this state, provided that the owner himself shall have complied with the provisions of the law of the foreign country, state, territory or federal district of his residence relative to registration of motor vehicles and the display of registration numbers thereon, and shall conspicuously display his registration numbers as required thereby. The provisions of this section, however, shall be operative as to a motor vehicle owned by a nonresident of this state only to the extent that under the laws of the foreign country, state, territory or federal district of his residence like exemptions and privileges are granted to motor vehicles duly registered under the laws of and owned by the residents of this state. [34 G. A., ch. 72, § 17.] [30 G. A., ch. 53, § 7.]

SEC. **1571-m17. Brakes—signal apparatus—lights.** "Every motor vehicle, operated or driven upon the public highways of this state, shall be

provided with adequate brakes in good working order and sufficient to control such motor vehicle at all times when the same is in use, and a suitable and adequate bell, horn or other device for signaling, and shall, during the period from one half hour after sunset to one half hour before sunrise, display at least two lighted lamps on the front and one on the rear of such motor vehicle, which rear lamp shall also display a red light visible from the rear; provided that each motor cycle and each motor bicycle shall be required to display but one lighted lamp in the front of each motor cycle or motor bicycle. The rays of such rear lamp shall shine upon the number plate carried in the rear of such vehicle in such manner as to render the numerals thereon visible for at least fifty feet in the direction from which the motor vehicle is proceeding. The light or lights of the front lamps shall be visible at least five hundred feet in the direction in which the motor vehicle is proceeding. [34 G. A., ch. 72, § 18.] [30 G. A., ch. 53, § 10.]

SEC. 1571-m18. **Care in meeting and passing—rules and regulations for operation.** "A person operating or driving a motor vehicle shall, on signal by raising the hand, from a person driving, leading or riding a horse or horses, or other draft animals, bring such motor vehicle immediately to a stop, and if traveling in the opposite direction, remain stationary so long as may be reasonable to allow such horses or animals to pass, and if traveling in the same direction, use reasonable caution in thereafter passing such horse or animal; provided that, in case such horse or animal appears badly frightened or the person operating such motor vehicle is so signaled to do, such person shall cause the motor of such vehicle to cease running so long as shall be reasonably necessary to prevent accident, and insure the safety of others. In approaching or passing a car of a street railway which has been stopped to allow passengers to alight or embark, the operator of every motor vehicle shall slow down, and if it be necessary for the safety of the public he shall bring said vehicle to a full stop. Upon approaching a pedestrian who is upon the traveled part of any highway and not upon a sidewalk, and upon approaching a branch or intersecting highway or a curve or a corner or other place in a highway where the operator's view is obstructed for a distance of two hundred feet or less, every person operating a motor vehicle shall slow down and give a timely signal with his bell or horn or other device for signaling.

1. The operator of a motor vehicle shall turn to the right when meeting another vehicle and in cities and towns shall at all times travel on the right-hand side of the street, as near the curb as the condition of the street will permit.

2. The operator of a motor vehicle, when overtaking and passing another vehicle, shall pass to the left where the surface of the ground will permit and shall not drive to the right until clear of such vehicle.

3. The operator of a motor vehicle shall, before stopping, turning or changing the course of such vehicle, first see that there is sufficient space to make such movement in safety and shall give a visible or audible signal to the crossing officer, if there be such, or to the drivers of vehicles following, of his intention to make such movement, by raising the hand and indicating with it the direction in which he wishes to turn.

4. The operator of a motor vehicle, in turning to the right from one street or highway into another, shall turn the corner as near the right-hand side as possible; and, in turning to the left from one street or high-

way into another, shall pass to the right of and beyond the center before turning.

5. The operator of a motor vehicle, in crossing from one side of a street or highway to the other side thereof, shall turn to the left, so as to head in the direction in which vehicles are moving.

6. In cities of the first class, it shall be unlawful to stop a motor vehicle unless the right side thereof is next to and parallel with the curb and as near thereto as the condition of the street will permit; provided that this rule shall not apply in cases of emergency, when the stop is made to avoid accident or to allow pedestrians or vehicles to cross in front of such motor vehicle, or when made in obedience to the signal of a police officer.

7. In cities and towns, it shall be unlawful for the operator of any motor vehicle to overtake and pass another vehicle at street intersections in the business district.

8. It shall be unlawful for the operator of a motor vehicle to permit the motor of same to operate in such a manner as to visibly emit an unduly great amount of steam, smoke or products of combustion from exhaust pipes or openings.

9. It shall be unlawful for the operator or owner of any motor vehicle to operate or permit to be operated upon the streets of any city or town any motor vehicle which has not a suitable muffler in a proper and efficient working condition; and it shall be further unlawful for any person to drive or permit to be driven on the streets of any city or town any motor vehicle with the muffler cut out or not in operation.

10. It shall be unlawful for any person to cause or permit any motor vehicle to be driven upon any public street or highway by any person under the age of fifteen years.

11. In cities and towns, motor vehicles turning to the right from one street into another shall have the right of way over vehicles traveling on the street into which same are turning.

12. In cities and towns, motor vehicles turning to the left into another street shall give the right of way to vehicles traveling on the street into which same are turning.

13. In cities and towns, it shall be unlawful for the operator of any motor vehicle to leave any such vehicle standing upon any street in the business district thereof within twenty feet of the corner or within twenty feet of any fire hydrant unless such vehicle is in charge of some person capable of driving same.

14. In cities and towns, no motor vehicle shall be left standing in front of or within fifteen feet of either side of the entrance to any theater, auditorium or other building where large assemblages of people are being held, except in taking on or discharging passengers or freight, and then only for such length of time as is necessary for such purpose.

15. At theaters and public gatherings in cities or towns, or under unusual circumstances, motor vehicles shall stand or move as directed by the police.

16. It shall be unlawful for the operator of any motor vehicle or person in charge thereof to leave unattended upon any street or highway a motor vehicle while any part of the machinery is in motion. [35 G. A., ch. 132, § 1; 34 G. A., ch. 72, § 19.] [30 G. A., ch. 53, §§ 8, 9.]

SEC. **1571-m19. Care and prudence in driving.** "Every person operating a motor vehicle on the public highways of this state shall drive the same in a careful and prudent manner, and at a rate of speed so as not to endanger the property of another, or the life or limb of any person;

provided, that a rate of speed in excess of twenty-five miles an hour shall be presumptive evidence of driving at a rate of speed which is not careful and prudent in case of injury to the person or property of another. [34 G. A., ch. 72, § 20.]

SEC. **1571-m20. Powers of local authorities—speed limitations.** "Except as herein otherwise provided, local authorities shall have no power to pass, enforce or maintain any ordinance, rule or regulation requiring from any owner to whom this act is applicable any fee license or permit for the use of the public highways, or excluding any such owner from the free use of such public highways, excepting such driveways, speedways or roads as have been expressly set apart by law for the exclusive use of horses and light carriages or in any other way regulating motor vehicles or their speed upon or use of the public highways; and no ordinance, rule or regulation contrary or in any wise inconsistent with the provisions of this act, now in force or hereafter enacted, shall have any effect; provided, however, that the power given to local authorities to regulate vehicles offered for hire, and processions, assemblages or parades in the streets or public places, and all ordinances, rules and regulations which may have been or which may be enacted in pursuance of such powers shall remain in full force and effect, and provided further, that local authorities may set aside for a given time a specified public highway for speed contests or races, to be conducted under proper restrictions for the safety of the public; and provided further, that local authorities may exclude motor vehicles from any cemetery or grounds used for the burial of the dead, and may by general rule, ordinance or regulation exclude motor vehicles used solely for commercial purposes from any park or part of a park system where such general rule, ordinance or regulation is applicable equally and generally to all other vehicles used for the same purpose; provided further, that the local authorities of cities and towns may limit by ordinance, rule or regulation the speed of motor vehicles on the public highways, such speed limitations not to be in any case less than one mile in six minutes, and the maintenance of a greater rate of speed for one eighth of a mile shall be presumptive evidence of driving at a rate of speed which is not careful and prudent; and on further condition that each city or town shall have placed conspicuously on each main public highway where the city or town line crosses the same, and on every main highway where the rate of speed changes, signs of sufficient size to be easily readable by a person using the highway, bearing the words 'City of ———,' 'Town of ———': 'Slow down to ——— miles' (the rate being inserted), and also an arrow pointing in the direction where the speed is to be reduced or changed, and also on further condition that such ordinance, rule or regulation shall fix the punishment for violation thereof, which punishment shall, during the existence of such ordinance, rule or regulation, supersede those specified in section twenty-three.[1] [34 G. A., ch. 72, § 21.] [30 G. A., ch. 53, § 11.]

[1] § 1571-m22 herein. EDITOR.]

SEC. **1571-m21. Penalty—judgment for registration fee.** That section twenty-two of chapter seventy-two of the acts of the thirty-fourth general assembly be and the same is hereby repealed and the following enacted in lieu thereof:

"The violation of any of the provisions of sections from three to fifteen,[1] both inclusive, of this act shall constitute a misdemeanor punishable by a fine not exceeding fifty dollars; provided, that on conviction for a violation of sections eight[2] and twelve[3] hereof, or either of them, in case such motor

vehicle shall not have been registered as required by this act, the court shall enter judgment against and collect from the person or persons so convicted, in addition to the penalty hereinabove provided, such sum as may be sufficient to pay the proper registration fee for said motor vehicle so unlawfully driven or operated, and forward such fee to the secretary of state at once, for the proper registration of such motor vehicle." [35 G. A., ch. 130, § 8; 34 G. A., ch. 72, § 22.]

[1§§ 1571-m2 to 1571-m14 inclusive herein. 2§ 1571-m7 herein. 3§ 1571-m11 herein. EDITOR.]

SEC. **1571-m22. Penalty for failure to use care in driving.** "The violation of any of the provisions of section twenty[1] of this act shall constitute a misdemeanor punishable by a fine not exceeding one hundred dollars. [34 G. A., ch. 72, § 23.]

[1§ 1571-m19 herein. EDITOR.]

SEC. **1571-m23. Operating machine while intoxicated—accidents —reports—penalties.** "Whoever operates a motor vehicle while in an intoxicated condition shall be guilty of a misdemeanor. Any person operating a motor vehicle who, knowing that injury has been caused to a person, due to the culpability of said operator, or to accident, leaves the place of said injury or accident without stopping and giving his name, post-office address, including street and number, and registration number of said motor vehicle, to the injured party, or to a police officer, or in case no police officer is in the vicinity of the place of said injury or accident, then reporting the same to the nearest police station or to a peace officer, shall be guilty of a felony punishable by a fine of not more than five hundred dollars or by imprisonment for a term not exceeding two years, or by both such fine and imprisonment; and if any person be convicted the second time of either of the foregoing offenses he shall be guilty of a felony punishable by imprisonment for a term of not less than one year and not more than five years. A conviction of a violation of this section shall be reported forthwith by the trial court or the clerk thereof to the secretary of state, who shall upon recommendation of the trial court suspend the certificate of registration of the motor vehicle operated by the person violating this section, or if he be an owner, the certificate of registration of his motor vehicle; and if no appeal therefrom be taken, or if an appeal duly taken be dismissed or the judgment affirmed, and upon notice thereof by said clerk, the secretary of state shall revoke the certificate of registration of said motor vehicle, or vehicle in which said accident may have happened, and shall order the certificate of registration delivered to the secretary of state and shall not reissue said certificate of registration or any other certificate of registration to such person unless the secretary of state in his discretion, after an investigation or upon a rehearing, decides to reissue or issue such certificate. [34 G. A., ch. 72, § 24.]

SEC. **1571-m24. Penalty for operating under revoked certificate.** "Any person who operates any motor vehicle while a certificate of registration of a motor vehicle issued to him is suspended or revoked, shall be guilty of a misdemeanor. [34 G. A., ch. 72, § 25.]

SEC. **1571-m25. Repeated violation—penalty.** "Upon a fourth or subsequent conviction of a chauffeur or owner for a violation of the provisions of section twenty,[1] or of an ordinance, rule or regulation regulating speed of motor vehicles under section twenty-one,[2] the secretary of state, upon the recommendation of the trial court, shall forthwith revoke the registration certificate of the owner of the motor vehicle used by the per-

son violating said section, ordinance, rule or regulation, and no new certificate shall be issued to such person for at least six months after date of such conviction, nor thereafter except in the discretion of the said secretary of state. [34 G. A., ch. 72, § 26.]

[[1]§ 1571-m19 herein. [2]§ 1571-m20 herein. EDITOR.]

SEC. **1571-m26. False statement—penalty.** "Any person making a false statement in the verified application for registration shall be guilty of a misdemeanor punishable by a fine not exceeding fifty dollars. [34 G. A., ch. 72, § 27.]

SEC. **1571-m27. Other violations—penalty.** "Any person violating any of the provisions of any section of this act for which violation no punishment has been specified shall be guilty of a misdemeanor punishable by a fine not exceeding twenty-five dollars. [34 G. A., ch. 72, § 28.] [30 G. A., ch. 53, § 12.]

SEC. **1571-m28. Convictions—recorded by secretary of state.** "Upon the conviction of any person for the violation of any of the provisions of this act, the trial court or the clerk thereof shall immediately certify the facts of the case, including the name and address of the offender, the judgment of the court and the sentence imposed, to the secretary of state, who shall enter the same either in the book or index of registration of owners of vehicles, opposite the name of the person so convicted, and in the case of any other person in a book or index of offenders to be kept for such purpose. If any such conviction shall be reversed upon appeal therefrom, the person whose conviction has been so reversed may serve on the secretary of state a certified copy of the order of reversal, whereupon the secretary of state shall enter the same in the proper book or index in connection with the record of such conviction. [34 G. A., ch. 72, § 29.]

SEC. **1571-m29. Jurisdiction—prosecution—procedure—bond.** "In case any person shall be taken into custody charged with a violation of any of the provisions of this act, he shall forthwith be taken before the nearest magistrate or police judge and be entitled to an immediate hearing or admission to bail, and if such hearing cannot then be had, be released from custody on giving a bond executed by a fidelity or surety company authorized to do business in this state, or other bail in the form provided by law, such bond to be in amount not exceeding one hundred dollars, if the charge be for a misdemeanor, for his appearance to answer for such violation at such time and place as shall then be indicated. In case a person is taken into custody charged with being guilty of a felony in violation of any of the provisions of this act, such bond shall be in amount not less than ten hundred dollars. On giving his personal bond to appear to answer any such violation at such time and place as shall then be indicated, secured by the depositing of a sum of money equal to the amount of such bond, or in lieu thereof, in case the person taken into custody is the owner, by leaving the motor vehicle, or in case such person taken into custody is not the owner, by leaving the motor vehicle, as herein provided with a written consent given at the time by the owner who must be present with such officer; or in case such person is taken into custody because of the violation of any of the provisions of this act other than on a charge of violation of any of the provisions of section twenty-four,[1] and such officer is not accessible, be forthwith released from custody on giving his name and address to the person making the arrest and depositing with such arresting officer the sum of one hundred dollars, or in lieu thereof, in

case the person taken into custody is the owner, by leaving the motor vehicle, or in case such person taken into custody is not the owner, by leaving the motor vehicle with the written consent given at the time by the owner, who must be present; provided, that in any case the officer making the arrest shall give a receipt in writing for such sum of money or vehicle deposited and notify such person to appear before the most accessible magistrate, describing him, and specifying the place and hour. In case such bond shall not be given or deposit made by the owner or other persons taken into custody, the provisions of law in reference to bail in case of misdemeanor shall apply. Where the charge is a violation of section twenty-four[1] of this act the provisions of law in reference to bail in cases of a misdemeanor or felony as the case may be, shall apply exclusively. [35 G. A., ch. 132, § 2; 34 G. A., ch. 72, § 30.]

[1§ 1571-m23 herein. EDITOR.]

SEC. **1571-m30. Conviction not a bar to prosecution for homicide or assault.** "A conviction of a violation of any of the provisions of this act shall not be a bar to a prosecution for an assault or for a homicide committed by any person in operating motor vehicles. [34 G. A., ch. 72, § 31.]

SEC. **1571-m31. Fees covered into state treasury—when.** "The registration fees provided herein shall be paid by the secretary of state into the state treasury, on the fifteenth day of each month after same is received. [34 G. A., ch. 72, § 32.]

SEC. **1571-m32. Apportionment of fees—county motor vehicle road fund—how expended—proportion to highway commission.** "Eighty-five per cent. of all moneys paid into the state treasury pursuant to the provisions of this act shall be apportioned among the several counties of the state in the same ratio as the number of townships in the several counties bears to the total number of townships in the state, said apportionment to be made by the state treasurer on the first day of April and the first day of August of each year. When such apportionment has been made the state treasurer shall forthwith remit to the county treasurers of the several counties of the state the amount of money so apportioned to the respective counties, and the county treasurer of each county, immediately upon the receipt of such money, shall charge himself therewith and credit the same to a fund to be designated as the county motor vehicle road fund, and he shall forthwith give notice to the county auditor of the amount of money so received. The said county motor vehicle road fund shall be expended for the following purposes only: the crowning, draining, dragging, graveling or macadamizing of public highways outside of the limits of cities and towns, and for the building of permanent culverts on such highways. Such culverts shall be constructed of concrete or stone, and said fund shall be under the control of the board of supervisors for said purposes only, and shall be paid out on warrants on said fund drawn by the county auditor, duly authorized by the board of supervisors entered on record. Before undertaking any work of permanent improvement in accordance with the provisions of this act, the board of supervisors shall cause the roads proposed to be improved to be surveyed and the location of all culverts shall be designated and the width and height of grade established, which survey, with specifications of the proposed improvement, shall be filed for record in the office of the county auditor and the work shall be done in accordance therewith. Eight per cent. of all moneys paid into the state treasury on and after January first, nineteen hundred thirteen, pursuant to the provisions of this act, shall be set aside

and shall constitute a maintenance fund for the state highway commission, which apportionment of said money shall be paid over to the treasurer of the Iowa state college [of agriculture and mechanic arts] by the state treasurer on the first day of April, nineteen hundred thirteen, and quarterly thereafter, except that the payment for April, nineteen hundred thirteen, shall be made within thirty days from the taking effect of this act. Said eight per cent. shall be used for no other purpose than as a maintenance fund for said state highway commission, and shall be drawn out only on warrants drawn by the treasurer of the Iowa state college [of agriculture and mechanic arts] on itemized vouchers audited by the state highway commission; and such expenditures shall be entered upon the books of both the secretary and treasurer of the Iowa state college [of agriculture and mechanic arts]. A full and complete report of all said expenditures shall be published in the annual report required under the act creating the state highway commission. [35 G. A., ch. 133, § 1; 34 G. A., ch. 72, § 33.]

SEC. **1571-m33. Acts in conflict repealed.** "All acts or parts of acts inconsistent with this act or contrary thereto are hereby repealed. [34 G. A., ch. 72, § 34.]

SEC. **1571-m34. Effective—when.** "This act shall take effect July fourth, nineteen hundred eleven, excepting that applications for registration may be had and number plates and licenses issued at any time within ninety days prior to said date, to be effective thereafter." [34 G. A., ch. 72, § 35.]

TITLE IX.

OF CORPORATIONS.

CHAPTER 1.

OF CORPORATIONS FOR PECUNIARY PROFIT.

SECTION 1607. Who may incorporate.

Any number of persons may unite to form a corporation for carrying on any lawful business. *Lewis v. Omaha & C. B. S. R. Co.*, 157– —, 138 N. W. 1092.

The statute authorizes an incorporation for any lawful business, and held that a corporation may properly engage in the sale of intoxicating liquors under the provisions of the mulct law. (But now see 33 G. A., ch. 143, supp. §§ 2383-a–2383-e.) *State v. Delahoyde*, 147–327, 126 N. W. 330.

SEC. 1609. Powers.

Par. 2. Name: To make notice to a corporation which is named only by the initials of its corporate name sufficient it must appear that at the time such notice was given the corporation was commonly known and customarily referred to by such abbreviations. *Chicago, B. & Q. R. Co. v. Kelley*, 105–106, 74 N. W. 935.

Par. 5. Exemption of property: The provisions of the articles in a particular case held sufficient to exempt private property of the stockholders in a mutual insurance company from liability for debts of the corporation, although there was a provision by which such property should be liable for money advanced for creating a guaranty fund. *Smith v. Sherman*, 113–601, 85 N. W. 747.

Corporations may be legally organized whose articles do not exempt private property of its stockholders from liability for corporate debts. *Berkson v. Anderson*, 115–674, 87 N. W. 402.

Par. 6. Powers: The powers given by statute to corporations are not required to be enumerated in its articles, and an omission to claim any such powers in the articles would not leave the corporation without such powers. *Sioux City Terminal R. & W. Co. v. Trust Co.*, 82 Fed. 124.

When the state courts have determined the extent of the powers and liabilities of corporations created under the state law, their decision is conclusive in the federal courts in cases involving no question of general or commercial law and no federal question. *Ibid.*

A corporation is itself a franchise, and the different powers which may be exercised by the corporation are also franchises. Thus, the right given to a corporation to supply a city with water and of occupying the streets for that purpose may be spoken of as a franchise. But such a privilege is not in the strict sense of the word a corporate franchise. *Cedar Rapids Water Co. v. Cedar Rapids*, 118–234, 91 N. W. 1081.

One who becomes shareholder in a corporation thereby assents to the transaction of business expressly or impliedly authorized by its charter. *Traer v. Lucas Prospecting Co.*, 124–107, 99 N. W. 290.

The corporation does not necessarily have all the powers which by statute are within the scope of corporate powers, but only such powers within the statutory scope as are given by the articles of incorporation. *Ibid.*

While as a general rule a corporation may not sell any part or all of its property for other than a cash consideration unless authorized by charter, yet where the company was authorized by its articles to purchase, sell and deal in corporate stocks of corporations authorized to conduct mining operations, but had not power to carry on business of mining, the power to exchange its property or sell it for stock in a corporation which should engage in the business of mining was clearly implied. *Ibid.*

A trading corporation unless prohibited by its charter may buy and sell the stock of another corporation. *Ibid.*

The articles contain the terms of agreement between the company and its stockholders and are to be construed in accordance with the general laws relating to charter grants and legislative power. By

accepting stock in the corporation, the stockholder assents to the terms and conditions found in the articles. *Dempster Mfg. Co. v. Downs*, 126–80, 101 N. W. 735.

A corporation may hold real or personal property in trust for any purpose that is not foreign to the business for which it was created, and a court of equity will enforce such trust. *State v. Higby Co.*, 130–69, 106 N. W. 382.

Whatever may fairly be regarded as incidental to and consequential upon those things which are authorized by the charter of a corporation will not be held *ultra vires* unless it is specially prohibited. *Marshalltown Stone Co. v. Des Moines Brick Mfg. Co.*, 149–141, 126 N. W. 190.

Par. 7. By-laws: By-laws may be binding on a corporation, although informally adopted, if recognized and acted upon by it. *Smith v. Sherman*, 113–601, 85 N. W. 747.

SEC. 1610. **Articles adopted and recorded—approval—fees—index book of county recorder.** That section sixteen hundred ten of the supplement to the code, 1907, be and the same is hereby repealed and the following enacted in lieu thereof:

"Before commencing any business except their own organization, they must adopt articles of incorporation, which must be signed and acknowledged by the incorporators, recorded in the office of the recorder of deeds of the county where the principal place of business is to be, in a book kept therefor; and the recorder must, within five days thereafter, indorse thereon the time when the same were filed and the book and page where the record will be found. Said articles thus indorsed shall then be forwarded to the secretary of state, and be by him recorded in a book kept for that purpose.

The county recorder shall keep in his office an index book for articles of incorporation, which shall be ruled and headed substantially after the following form, and shall make entries therein in the order in which they are filed in his office.

INDEX TO ARTICLES OF INCORPORATION.

Name	Place of Business	Date of Filing			Date of Inst.			Where Recorded		Capital Stock	Remarks
		Mo.	Day	Yr.	Mo.	Day	Yr.	B .	Pg.		

Such corporation shall pay to the secretary of state, before a certificate of incorporation is issued, a fee of twenty-five dollars, and, for all authorized stock in excess of ten thousand dollars, an additional fee of one dollar per thousand. Should any corporation increase its capital stock, it shall pay a fee to the secretary of state of one dollar for each one thousand dollars of such increase, and a recording fee of ten cents per one hundred words, no recording fee to be less than fifty cents. Farmers' mutual coöperative creamery associations, whose articles of incorporation provide that the business of the association be conducted on a purely mutual and coöperative plan, without capital stock, and whose patrons shall share equally in expense and profits, domestic and domestic local building and loan associations [and] incorporations organized for the manufacture of sugar from beets grown in the state of Iowa, shall be exempt from the payment of the incorporation filing fee provided herein in excess of twenty-

five dollars. When articles of incorporation are presented to the secretary of state for the purpose of being filed, if he is satisfied that they are in proper form to meet the requirements of law, that their object is a lawful one and not against public policy, that their plan for doing business, if any be provided for, is honest and lawful, he shall file them; but if he is of the opinion that they are not in proper form to meet the requirements of the law, or that their object is an unlawful one, or against public policy, or that their plan for doing business is dishonest or unlawful, he shall refuse to file them. Should a question of doubt arise as to the legality of the articles, he shall submit them to the attorney-general whose duty it shall be to forthwith examine and return them with an opinion in writing touching the point or points concerning which inquiry has been made of him. If such opinion is in favor of the legality of the articles, and no other objections are apparent, they shall then, upon payment of the proper fee, be filed and otherwise dealt with as the law provides. If, however, such opinion be against their legality they shall not be filed. Upon the rejection of any articles of incorporation by the secretary of state, except for the reason that they have been held by the attorney-general to be illegal, they shall, if the person or persons presenting them so request, be submitted to the executive council, which shall, as soon as practicable, consider the said articles and if the council determines that the articles are in proper form, of honest purpose, not against public policy, nor otherwise objectionable, it shall so advise the secretary of state in writing, whereupon he shall, upon the payment of the proper fees, file the same and proceed otherwise as the law directs; but if the council sustains the previous action of the secretary of state in rejecting said articles, such decision by the council shall be reported to the secretary of state in writing, and he shall then return said articles to the person or persons presenting them with such explanation as shall be proper in the case. Nothing in this act shall be construed as repealing or modifying any statute now in force in respect to the approval of articles of incorporation relating to insurance companies, building and loan associations or investment companies." [35 G. A., ch. 135, § 1; 34 G. A., ch. 73, § 1; 33 G. A., ch. 104, § 1.] [32 G. A., ch. 70; 29 G. A., ch. 66, § 1; 27 G. A., ch. 41, § 1; 27 G. A., ch. 40, §§ 1, 2; 26 G. A., ch. 98; 17 G. A., ch. 23; C. '73, § 1060; R. 1152; C. '51, § 675.]

It is not specifically required that the acknowledgment shall be in the same form as that required for conveyances of real property, and therefore, if the venue is given at the beginning of the certificate, and the officer taking the acknowledgment subscribes as "notary public" without reciting that he is a notary public in and for the county named, the acknowledgment is sufficient, it being presumed that the officer acts only within the scope of his authority. *Smith v. Sherman*, 113–601, 85 N. W. 747.

The object of requiring the filing and recording of articles of incorporation is to give them the same publicity as nearly as may be as statutory charters, and their provisions are binding on all who deal with the stock of the corporation. *Dempster Mfg. Co. v. Downs*, 126–80, 101 N. W. 735.

A corporation cannot be held for the acts of those purporting to be its officers prior to its incorporation without some acceptance of or acquiescence in such acts evidenced by its articles or the acts of those formally elected to represent it. *Middle Branch Mut. Tel. Co. v. Jones*, 137–396, 115 N. W. 3.

One who does not become a member of a corporation at its organization or afterwards cannot be charged with the expense of such organization. *Ibid.*

SEC. 1611. Limit of indebtedness.

It is doubtful whether an insurance company is required to recite the limit of indebtedness which it may incur by its policies of insurance. At any rate, if the amount of indebtedness is reasonably ascertainable the requirements of the statute have been complied with. *Smith v. Sherman*, 113–601, 85 N. W. 747.

A debt contracted in excess of the maximum limitation stated in the charter is

not void, but is enforceable against the corporation and parties holding under it, and gives rise only to a right of action on the part of the state because of the violation of statute, and perhaps also a liability on the officers of the corporation for the excessive debt so contracted. *Sioux City Terminal R. & W. Co. v. Trust Co.*, 173 U. S. 99; S. C. 82 Fed. 124.

A mortgage given by a debtor corporation on its own property is not intended to be governed by the last sentence of this section (embodying a proviso added to § 1061 of the code of '73 by ch. 22 of 20 G. A.). This sentence applies to the class and not the condition. It singles out this particular kind of corporation, and it is not meant to point out such a state of affairs which it was thought might exist with any corporation. *Beach v. Wakefield*, 107–567, 76 N. W. 688, 78 N. W. 197.

The corporation having received the full benefit of the consideration for indebtedness contracted in excess of the limitation of its indebtedness, it cannot question the validity of indebtedness thus incurred. And it is immaterial that money borrowed in excess of the limitation of indebtedness is used for an *ultra vires* purpose. *Traer v. Lucas Prospecting Co.*, 124–107, 99 N. W. 290.

The provisions of this section limiting the indebtedness of a railroad enlarge instead of limit the power of railway corporations in the matter of incurring indebtedness for construction, and such corporations may contract an indebtedness for that purpose to the extent of $16,000 per mile of single track notwithstanding the provision of code § 2049 that such corporation may issue bonds to refund indebtedness or improve its property. *Barnes v. Eastern Iowa R. Co.*, 155–721, 134 N. W. 90, 136 N. W. 1053.

SEC. **1612. Place of business—how changed—notice or process—upon whom and how served.** Any corporation organized under the laws of this state shall fix upon and designate in its articles of incorporation its principal place of business which must be in this state, and if outside the limits of a city or town then its post-office address must be given. The place of business so designated shall not be changed except through an amendment to its articles of incorporation. Its place of business shall be in charge of an agent of the corporation and shall be the place where it shall hold its meetings, keep a record of its proceedings and its stock and transfer books. Provided that any corporation organized under the laws of this state that does not maintain an office in the county of its organization, or transact business in this state, shall file with the secretary of state a written instrument duly signed and sealed, authorizing the secretary of state to acknowledge service of[1] notice or process for and in behalf of such corporation in this state, and consenting that service of notice or process may be made upon the secretary of state, and when so made shall be taken and held as valid as if served according to the laws of this state, and waiving all claim or right or error by reason of such acknowledgment of service. Such notice or process, with a copy thereof, may be mailed to the secretary of state at Des Moines, Iowa, in a registered letter addressed to him by his official title, and he shall immediately upon its receipt acknowledge service thereon in behalf of the defendant corporation by writing thereon, giving the date thereof, and shall immediately return such notice or process in a registered letter to the clerk of the court in which the suit is pending, addressed by his official title, and shall also forthwith mail such copy, with a copy of his acknowledgment of service written thereon, in a registered letter addressed to the corporation or person who shall be named or designated by the corporation in such written instrument. If any such corporation shall fail to file with the secretary of state the power and authority to acknowledge service as herein provided on or before July first, nineteen hundred and six, it shall be the duty of the secretary of state to notify such corporation to file such power and authority within thirty days thereafter, and in case of failure to comply with such notice it shall be the duty of the attorney-general of the state to proceed against such corporation to forfeit its charter and wind up its affairs. [33 G. A., ch. 105, § 10; 33 G. A., ch. 104, § 2.] [31 G. A., ch. 64.]

[1]"or" in 31 G. A. session laws. EDITOR.]

SEC. 1613. **Notice published—what to contain.** A notice must be published once each week for four weeks in succession in some newspaper as convenient as practicable to the principal place of business, which must contain:

1. The name of the corporation and its principal place of business;
2. The general nature of the business to be transacted;
3. The amount of capital stock authorized, and the times and conditions on which it is to be paid in;
4. The time of the commencement and termination of the corporation;
5. By what officers or persons its affairs are to be conducted, and the times when and manner in which they will be elected;
6. The highest amount of indebtedness to which it is at any time to subject itself;
7. Whether private property is to be exempt from corporate debts.

Proof of such publication, by affidavit of the publisher of the newspaper in which it is made, shall be filed with the secretary of state, and shall be evidence of the fact. [29 G. A., ch. 67, § 1; C. '73, §§ 1062–3; R., §§ 1154–5; C. '51, §§ 677–8.]

As corporations may be legally organized in whose articles there is no limitation which exempts the individual property of its stockholders, the requirements that the notice make disclosure on this question is important, and where the publication is in an obscure newspaper, published at a place remote from that of the principal place of business, such publication does not meet the requirements of the statute. *Berkson v. Anderson*, 115–674, 87 N. W. 402.

The publication of notice in a newspaper published at a place remote from the principal place of business is not sufficient compliance with the statute. *Clinton Novelty Iron Works v. Neiting*, 134–311, 111 N. W. 974.

It is not essential to state in the notice of incorporation the terms and conditions on which the amount of stock authorized to be issued in the future, in excess of that provided to be issued on organization, shall be paid. *Brinkley Car Works & Mfg. Co. v. Curfman*, 136–476, 114 N. W. 12.

Where the notice indicates that stockholders are not to be liable in suits against the corporation it sufficiently complies with the requirement that it shall state whether private property is to be exempt from corporation debts. *Commercial Nat. Bank v. Gilinsky*, 142–178, 120 N. W. 476.

The requirement that the affidavit for publication be filed with the secretary of state is not mandatory. If the form of notice is sufficient and it is published as required, the requirements as to publicity have substantially been complied with. *Ibid.*

SEC. 1613-a. **Defective publication—legalized.** That each corporation heretofore incorporated under the laws of the state of Iowa which have [has] caused notice of their [its] incorporation to be published once each week for four consecutive weeks in some daily, semiweekly or triweekly newspaper, instead of causing the same to be published in each issue of such newspaper for four consecutive weeks are hereby legalized and are declared legal incorporations the same as though the law had been complied with in all respects in regard to the publication of notice. [29 G. A., ch. 226, § 1.]

SEC. 1614. **May begin business.**

The filing with the secretary of state of the proof of publication of notice is not essential to the authority of the corporation to do business. *Commercial Nat. Bank v. Gilinsky*, 142–178, 120 N. W. 476.

Where the publication is made within three months after the date of the certificate of incorporation the stockholders will not be liable for any indebtedness contracted in the interval. *Lowden Sav. Bank v. Neiting*, 147–119, 124 N. W. 185.

SEC. 1614-a. **When time limit for publication has expired—legalized.** That in all instances where the incorporators of corporations for pecuniary profit have omitted to publish notice of incorporation within

three months from the date of the certificate of incorporation issued by the secretary of state, but have published notice thereafter, in manner and form as by law required, such notices are hereby legalized and shall have the same force and effect as though published within said period of three months, as to all acts of said corporation from the date of said completed publication. [33 G. A., ch. 272, § 1.]

SEC. **1614-b. Pending litigation—not affected.** Nothing herein contained shall be construed as to affect pending litigation. [33 G. A., ch. 272, § 2.]

SEC. **1614-c. Annual report—what shown.** Any corporation, organized under the laws of this state or under the laws of any other state, territory or any foreign country, which has complied with the laws of this state relating to the organization of corporations and secured a certificate of incorporation or permit to transact business in this state, and any corporation that may hereafter organize and become incorporated under the laws of this state, and shall secure a certificate of incorporation or permit to transact business in this state, and any foreign corporation that may hereafter comply with the laws of this state relating to foreign corporations and secure a permit to transact business within this state, shall, between the first day of July and the first day of August of each year, make an annual report to the secretary of state, said report to be in such form as he may prescribe, upon a blank to be prepared by him for that purpose, and such report shall contain the following information:

1. Name and post-office address of the corporation;
2. The amount of capital stock authorized;
3. The amount of capital stock actually issued and outstanding;
4. Par value of such stock, designating whether preferred or common stock, and amount of each kind;
5. The names and post-office addresses of its officers and directors and whether any change of place of business has been made during the year previous to making said report. [33 G. A., ch. 105, § 1.]

SEC. **1614-d. Signature and oath—by whom—permit—exemption.** The report required by section one of this act shall be signed and sworn to by an officer of the corporation and when filed with the secretary of state shall be accompanied by the fee required in section three hereof and also by an application for a permit to be issued to said corporation under the provisions of this act; said permit to be in such form as the secretary of state may prescribe and which shall be in force and effect for one year from and after the first day of July of the year in which it is issued, except that where the term of a corporate existence shall expire in less than a year from the first day of July aforesaid, then said permit shall be issued for such unexpired term only, provided, however, that any corporation organized under the laws of this state, and any foreign corporation filing a certified copy of its articles of incorporation after the first day of April of any year, shall be exempt from the provisions of this act for the period ending one year from the first day of July following, after which it shall be subject to all the provisions of this act. [33 G. A., ch. 105, § 2.]

SEC. **1614-e. Annual fee.** Every corporation whose corporate period has not expired, which has heretofore obtained, or may hereafter obtain, a certificate of incorporation or permit under the provisions of chapter one of title nine of the code to transact business in this state as a corporation, whether the same be a domestic or a foreign corporation, shall pay to the

secretary of state an annual fee in the sum of one dollar. [33 G. A., ch. 105, § 3.]

SEC. **1614-f. Failure to make report and pay fee—penalties—list of delinquents—action to collect.** Any corporation organized under the laws of this state, and any foreign corporation authorized to do business in this state, which shall fail to make the report and pay the annual fee provided for in this act, and within the time required in section one hereof, shall incur the following penalties beginning with the month of September and dating from the first day thereof, to wit: For the month of September the sum of two dollars, for the month of October the sum of four dollars, for the month of November the sum of six dollars, for the month of December the sum of eight dollars, and for each month thereafter the sum of ten dollars. If on the first day of May following, such corporation shall not have filed the annual report and paid the annual fee, together with all monthly penalties due at the time of filing said report and paying said fee, the secretary of state shall furnish to the attorney-general a list of delinquent domestic corporations and he may direct the county attorney of the county in which the corporation has its principal place of business to bring suit for the collection of the fee and penalties then due, or may bring such action himself. Any domestic corporation may, prior to the first day of May, nineteen hundred ten, and the first day of May of any subsequent year, escape the payment of fee and penalties by dissolving the corporation and filing with the secretary of state a proof of publication of notice of dissolution. Any foreign corporation that shall fail to make the annual report and pay the annual fee and penalties that may be due shall thereby forfeit its right to do business within this state. [33 G. A., ch. 105, § 4.]

SEC. **1614-g. Notice of delinquency.** During the month of August of each year the secretary of state shall prepare a list of all delinquent corporations and file the same in his office, and on or before the first day of September he shall send by registered mail to each delinquent a notice of such delinquency and of the penalties provided in section four of this act, and that if the annual report required is not filed and the annual fee paid, together with penalties due, on or before the last day of April, that on the first day of May following, notice of such delinquency will be filed with the attorney-general who may cause action to be brought for the collection of the fee and penalties due the state. [33 G. A., ch. 105, § 5.]

SEC. **1614-h. Forfeiture of permit—entry of cancellation.** On the first day of May following the date of the notice provided for in section five of this act, all foreign corporations that have not complied with the provisions of this act shall forfeit the right to transact business in this state and a declaration of forfeiture and cancellation shall be entered upon the margin of the record of the certified copy of the articles of incorporation of such company in the office of the secretary of state or in such other record as the secretary of state may provide. [33 G. A., ch. 105, 6.]

SEC. **1614-i. Certain corporations exempted.** Nothing in this chapter shall be construed as imposing an annual fee or requiring a report from any corporation organized for religious, educational, scientific or charitable purposes or other corporations organized under chapter two of title nine of the code, or of any corporation engaged in the banking business, nor to insurance companies or associations who have paid the taxes provided in sections thirteen hundred thirty-three and thirteen hundred thirty-three-d of the supplement to the code, 1907, and received a certificate of authority from the state auditor. [34 G. A., ch. 18, § 20; 33 G. A., ch. 105, § 7.]

SEC. **1614-j. Complying corporations listed with county recorder.** After the first day of November and not later than the first day of January of each year, the secretary of state shall compile an alphabetical list of the domestic and foreign corporations that have complied with the provisions of this act, together with post-office address, and mail a copy thereof to each county recorder in this state, who shall file the same in his office. [33 G. A., ch. 105, § 8.]

SEC. **1614-k. Annual notice of requirements by secretary of state.** It shall be the duty of the secretary of state between the first day of May and the first day of July of each year to notify all corporations whose corporate period has not expired, or that have not dissolved according to law, that are subject to the provisions of this act, of the requirements herein made, enclosing therewith a blank form of report and application as herein provided; and the mailing of said notice at Des Moines, Iowa, addressed to the corporation at its post-office address as shown by the records of his office shall be deemed a full, complete and legal notice for the purpose of this act. [33 G. A., ch. 105, § 9.]

SEC. **1615. Change of articles—fees.** That section sixteen hundred fifteen of the code be and the same is hereby repealed and the following enacted in lieu thereof:

"Amendments to articles of incorporation making changes in any of the provisions of the articles may be made at any annual meeting of the stockholders or special meeting called for that purpose, and they shall be valid only when recorded, approved and published as the original articles are required to be. If no increase is made in the amount of capital stock, a certificate fee of one dollar and a recording fee of ten cents per one hundred words must be paid; no recording fee less than fifty cents. Where capital stock is increased the certificate fee shall be omitted but a filing fee of one dollar per thousand dollars of such increase together with a recording fee of ten cents per one hundred words shall be paid. Such amendments need only be signed and acknowledged by such officers of the corporation as may be designated by the stockholders to perform such act." [33 G. A., ch. 104, § 5.] [22 G. A., ch. 88; C. '73, § 1065; R. § 1157; C. '51, § 680.]

Where a renewal of the corporate franchise is authorized it may be effected by amendment of the articles as provided in this section. *Lamb v. Dobson*, 117–124, 90 N. W. 607.

SEC. 1616. Individual property liable.

Aside from statute, stockholders of a *de facto* corporation cannot be held liable as partners on account of irregularities, omissions or mistakes in incorporating or organizing the corporation. The statute does not create a contract liability. Therefore, those dealing with a corporation having actual notice of the articles, and after publication of the notice required by statute, cannot hold the stockholders individually liable because of irregularity in the organization and publication. *Seaton v. Grimm*, 110–145, 81 N. W. 225.

Stockholders who participated in the organization of the company and became responsible to the same extent as other stockholders for failure to have notice published, cannot hold such other stockholders liable individually on the ground that there was not a proper publication of notice. *Ibid.*

"Organization and publicity" should be construed "organization or publicity." *Ibid.*

A subscriber to stock may disaffirm his contract on account of defects in the organization of the company, where it has been represented to him that the organization was legal and complete, and is not bound to go to the records or other sources of information before relying upon such representation. *Maine v. Midland Inv. Co.*, 132–272, 109 N. W. 801.

Whether one who buys stock in a defectively organized corporation incurs liability, in virtue of the statutory provision, for debts of the corporation incurred prior to the date of the purchase, is an open

question in this state. *Houts v. Sioux City Brass Works*, 134–484, 110 N. W. 166.

One who becomes a stockholder within the three months allowed for the publication of notice is liable for the debts incurred after he became a stockholder, if he had knowledge of the facts connected with the organization of the corporation at the time he became a member or when the indebtedness was contracted. It is immaterial that he was not in any way responsible for the failure of the corporation to give proper notice of its organization. *Clinton Novelty Iron Works v. Neiting*, 134–311, 111 N. W. 974.

Substantial compliance with the statute as to giving notice of organization is sufficient and irregularities which are purely technical and not likely to work appreciable injury to one dealing with the corporation will not have the effect of charging stockholders with personal liability for the corporate debts; and held that failure to state in the published notice the times and condition of payment of that portion of the capital stock authorized but not proposed to be at once issued was not such failure to comply with the statute as to render the stockholders individually liable. *Brinkley Car Works & Mfg. Co. v. Curfman*, 136–476, 114 N. W. 12.

The personal liability statute has no application to errors arising out of the subsequent conduct of the business of the corporation either as between the corporation and its stockholders or between the corporation and the general public. *Ibid.*

Defects in the proceeding for incorporation do not deprive the corporation of a *de facto* existence and are not grounds for winding up the corporation so long as it remains solvent and able to pay its obligations. *Troutman v. Council Bluffs Street Fair, etc. Co.*, 142–140, 120 N. W. 730.

SEC. 1617. Dissolution—notice of.

A sale of the assets of a corporation is not necessarily equivalent to a dissolution, and there is no statute denying such power of sale. *Beidenkopf v. Des Moines L. Ins. Co.*, 142 N. W. 434.

It is doubtful whether a dissolution by unanimous consent of the stockholders, without the notice contemplated in this section, is valid. *United States Gypsum Co. v. Hoxie*, (C. C.) 172 Fed. 504.

SEC. 1618. **Duration—renewal—certificate and articles to be recorded—fees—notice—proof filed—exemptions.** That section sixteen hundred eighteen of the supplement to the code, 1907, be and the same is hereby repealed and the following enacted in lieu thereof:

"Corporations for the construction and operation, or the operation alone, of steam railways, interurban railways and street railways, for the establishment and conduct of savings banks, or for the transaction of the business of life insurance, may be formed to endure fifty years; those for other purposes, not to exceed twenty years; but in either case they may be renewed from time to time for the same or shorter periods, within three months before or after the time for the termination thereof, if a majority of the votes cast at any regular election, or special election called for that purpose, be in favor of such renewal, and if those voting for such renewal will purchase at its real value the stock voted against such renewal. Such renewals shall date from the expiration of the corporate period which it succeeds and shall be limited in duration to a period not exceeding the time allowed by law to the same class of corporations. Within five days after the said action of the stockholders for the renewal of any corporation, a certificate, showing the proceedings resulting in such renewal, sworn to by the president and secretary of the corporation, or by such other officers as may be designated by the stockholders, together with the articles of incorporation, which may be the original articles of incorporation or amended and substituted articles, shall be filed for record in the office of the recorder of the county in which the principal place of business of said corporation is situated, and the same shall be recorded. Upon filing with the secretary of state the said certificate and articles of incorporation, within ten days after they are filed with the recorder, and upon the payment to the secretary of state of a fee of twenty-five dollars, together with a recording fee of ten cents per one hundred words and an additional fee of one dollar per thousand for all authorized stock in excess

of ten thousand dollars, the secretary of state shall record the said certificate and the said articles of incorporation in a book to be kept by him for that purpose, and shall issue a proper certificate for the renewal of the corporation. Within three months after the filing of the certificate and articles of incorporation with the secretary of state, the corporation so renewed shall publish a notice of renewal. Said notice shall be published once each week for four weeks in succession in a newspaper as convenient as practicable to the principal place of business of the corporation, and proof of publication filed in the office of the secretary of state, and shall contain the matters and things required to be published by section sixteen hundred thirteen of the code, relating to original incorporations. Farmers' mutual coöperative creamery associations, domestic and domestic local building and loan associations, and corporations organized for the manufacture of sugar from beets grown in the state of Iowa, shall be exempt from the payment of the incorporation fee, provided herein. [34 G. A., ch. 74, § 1; 34 G. A., ch. 73, § 2; 33 G. A., ch. 104, § 3.] [30 G. A., ch. 2, § 13; 29 G. A., ch. 66, § 2; 28 G. A., ch. 56, § 1; C. '73, § 1069; R. § 1158; C. '51, § 681.]

Where a corporation has reincorporated with the same membership and for the purpose of carrying on the same business and assuming the obligations of the old company, the new company is liable on the contracts of the old. *Benesh v. Mill Owners' Mut. F. Ins. Co.*, 103–465, 72 N. W. 674.

A corporation which took proper steps for renewal and tendered to the secretary of state the fees required at the time, held not subject to the provisions of the amending statute requiring higher fees in cases of renewal. *Lamb v. Dobson*, 117–124, 90 N. W. 607.

The renewal of a corporation may be made by an amendment of its articles as provided in code § 1615. *Ibid.*

SEC. **1618-a. Renewal of corporate existence.** The corporate existence of any state or savings bank may be renewed or extended, from time to time, for a period not longer than the time for which such banks may organize, by an affirmative vote of two thirds of the shareholders thereof, at a stockholders' meeting held for that purpose, within three months before or after the time of the expiration of its charter as shown by its certificate of incorporation issued by the secretary of state. Such meeting shall be called upon a notice signed by at least two of the officers of the bank and by a majority of its directors, specifying the object of the meeting, and the time and place thereof, published once a week for four consecutive weeks before the time at which the same is to be held, in some newspaper in the county wherein the bank is located. If at such meeting the required vote is given, a certificate of the proceedings showing compliance with the foregoing provisions and the time to which the corporate period is to be continued, shall be signed and verified by the affidavit of the chairman and secretary of the meeting, certified to by a majority of the board of directors, and together with the articles of incorporation, as they exist at the date of the meeting, shall be recorded in the office of the recorder of deeds of the proper county and filed, recorded and fees paid, as provided in section sixteen hundred eighteen of the code and shall be by the secretary of state certified to the auditor of state. When the meeting is held previous to the expiration of the charter of the bank, such amendments may be made to the articles of incorporation, subject to the provisions thereof, as may be deemed necessary and whether held before or after the extension of the corporate period, such changes may be made in the articles as are necessary to show the time to which the corporate period is extended and the names of the officers and directors at the time of the renewal or extension. When the above has been complied with, the auditor

of state shall issue to such bank a certificate as provided in section eighteen hundred forty-three of the code, notice of which shall be published as required by the provisions of said section. [31 G. A., ch. 65.]

[The above section is made applicable to §§ 1889-d to 1889-n by § 1889-m. EDITOR.]

SEC. 1618-b. Fees—since when due—repeal. That section sixteen hundred eighteen-b of the supplement to the code, 1907, be and the same is hereby repealed. [33 G. A., ch. 104, § 6.] [28 G. A., ch. 56, § 2.]

SEC. 1619. Legislative control.

By express provision of the statute, building and loan associations are subject to legislative control. *Wood v. Iowa Bldg. & Loan Assn.*, 126–464, 102 N. W. 410.

A franchise granted to a street railway company is subject to subsequent modification. *Marshalltown Light, P. & R. Co. v. Marshalltown*, 127–637, 103 N. W. 1005.

While the legislature cannot by the amendment of a corporate charter render invalid a contract executed by a corporation, it may require that the corporation continue in business only on compliance with new conditions imposed, even though that involves a modification of its contract rights. *St. John v. Iowa Business Men's B. & L. Assn.*, 136–448, 113 N. W. 863.

SEC. 1620. Fraud—penalty for.

These provisions authorize the winding up of all such associations as are engaged in the issuance of investment securities on the installment plan provided they do not comply with the provisions of § 1920-k. *State v. Syndicate Land Co.*, 142–22, 120 N. W. 327.

Where a creditor of a corporation sues in his own personal right to recover from an officer losses which he has sustained by extending credit to the corporation, his action must be founded on deceit and not upon negligence and it must ordinarily be brought at law and not in equity. *U. S. Fidelity & Guar. Co. v. Corning State Sav. Bank*, 154–588, 134 N. W. 857.

SEC. 1621. Diversion of funds.

It is only persons injured by the diversion of funds who are deemed to be defrauded thereby. One who is not a creditor at the time of the diversion is not injured thereby. *Benge v. Eppard*, 110–86, 81 N. W. 183.

As to one who is a creditor at the time of the diversion there is no liability if, notwithstanding the diversion, the corporation had sufficient property remaining to pay all debts. *Ibid.*

The officers or agents of an insolvent corporation who have absorbed its property may be made codefendants with the corporation in an action to recover a debt due by the corporation; and it is not necessary in such case to show that the assets of the corporation have been exhausted nor that its liability has already been adjudicated. *Swartley v. Oak Leaf Creamery Co.*, 135–573, 113 N. W. 496.

The stockholders of a corporation cannot divide its property or assets among themselves without first paying the corporate debts. *Luedecke v. Des Moines Cabinet Co.*, 140–223, 118 N. W. 456.

In a particular case held that what was relied upon as diversion of funds did not result in injury to creditors, being nothing more than a retirement of outstanding stock. *Commercial Nat. Bank v. Gilinsky*, 142–178, 120 N. W. 476.

The manifest object of these provisions is to enforce diligence and fidelity on the part of corporate officers and afford a prompt and efficient remedy to creditors who have been injuriously affected thereby. *Wisconsin & Ark. Lumber Co. v. Cable*, 140 N. W. 211.

Corporate creditors are entitled in equity to the payment of their debts before any distribution of corporate property is made among the stockholders. *Ibid.*

SEC. 1624. By-laws posted.

The statutory requirements that the corporation shall keep posted a copy of its by-laws and a statement of the amount of capital stock subscribed and the amount of indebtedness, is primarily for the benefit of the public, to be enforced by mandamus at the suit of a party injured. *Boardman v. Marshalltown Grocery Co.*, 105–445, 75 N. W. 343.

By-laws not posted as required by statute are not binding on a stranger without actual notice, but failure to post as required does not constitute a failure to adopt such by-laws. *Fee v. National Masonic Acc. Assn.*, 110–271, 81 N. W. 483.

SEC. 1626. Transfer of shares.

A transfer of stock not made upon the books of the company as required by statute will not be effectual as against an attachment of such stock for debts of the person who appears from the books to be the owner. Knowledge on the part of the attaching creditor or the officer of the transfer of the stock will not defeat the lien of the attachment. *Ottumwa Screen Co. v. Stodghill*, 103–437, 72 N. W. 669; *Perkins v. Lyons*, 111–192, 82 N. W. 486.

A stipulation for an assignment of shares of stock, actually in the custody of the transferee, implies an obligation to have a formal and effectual transfer thereof made on the books of the corporation. *First Nat. Bank v. Park*, 117–552, 91 N. W. 826.

The holder of stock as collateral has authority to have proper entry of transfer of such stock made upon the company's books. *Ibid.*

A person who is entitled to have shares of stock issued to him, or to have stock owned by him transferred on the books of the company, may maintain an action of mandamus to compel the proper issuance or transfer. *Hair v. Burnell*, 106 Fed. 280.

So long as the stock stands on the books in the name of the judgment debtor it can be levied on and sold, although the creditor has actual notice of a transfer thereof by the debtor. *Ibid.*

One who has purchased stock which is subject to assessment to the corporation, is not liable for the payment of such assessment until the stock has been transferred to him, and any person who has without right paid for such stock and had it transferred to himself on the books of the company, and has made payment of such assessment, has no claim on the stock except for the repayment of the assessment. *Loetscher v. Dillon*, 119–202, 93 N W. 98.

The transferee of shares of stock takes same subject to any lien thereon created by the articles in favor of the corporation as against a prior holder and such lien attaches also to dividends declared during its existence. *Dempster Mfg. Co. v. Downs*, 126–80, 101 N. W. 735.

These provisions relate to corporations organized under the laws of the state and doing business in the state, and the books referred to are required to be kept within the state where they can be inspected. *Perkins v. Lyons*, 111–192, 82 N. W. 486.

In a particular case held that a pencil notation on the stub of the stock book, made long prior to a levy on the stock, although not dated, was sufficient to constitute a transfer. *Ibid.*

The provisions of this section relating to transfer of stock as collateral security held not to be retroactive. *Ibid.*

A private individual cannot require that the books of the company be at all times kept open for public inspection. His right to inspect, if any, is personal. Neither can he have an order with reference to future inspection. *Boardman v. Marshalltown Grocery Co.*, 105–445, 75 N. W. 343.

The design of this section is to enable stockholders to hypothecate their shares of stock without cancellation thereof and the issuance of new stock and yet protect the pledgee against the claims of the pledgor and purchaser without notice. *Tierney v. Ledden*, 143–286, 121 N. W. 1050.

SEC. **1627. Amount paid in.** No certificate or shares of stock shall be issued, delivered or transferred by any corporation, officer or agent thereof, or by the owner of such certificate or shares, without having indorsed on the face thereof what amount or portion of the par value has been paid to the corporation issuing the same, and whether such payment has been in money or property. Any person violating the provisions of this section, or knowingly making a false statement on such certificate, shall be fined not less than one hundred dollars nor more than five hundred dollars, and shall stand committed to the county jail until such fine and costs are paid. This section shall not apply to railway or quasi public corporations organized before the first day of October, eighteen hundred ninety-seven. [28 G. A., ch. 57, § 1.]

Failure to endorse on a certificate of stock the amount and manner of payment therefor will not render a contract in relation to such stock void, especially where it appears that full value in property was paid for the stock, and that such endorsement would not have altered the situation of the parties. *French v. Northwestern Laundry*, 132–81, 107 N. W. 430.

SEC. 1628. Nonuser.

Nonuser of the franchises does not operate as a forfeiture in such sense as to prevent corporations doing business for the purpose of winding up their affairs. *Commercial Nat. Bank v. Gilinsky*, 142–178, 120 N. W. 476.

SEC. 1629. Expiration.

The fact that the charter of the corporation has expired will not show that it cannot be the owner of property. After the expiration of the term of the charter the corporation continues to live for the purpose of discharging its obligations and disposing of its property. *State v. Fogerty*, 105–32, 74 N. W. 754.

The corporate existence may continue after the period limited in the charter for the purpose of winding up the corporate affairs. *Rogers v. Western Mut. Life Assn.*, 123–722, 99 N. W. 589.

The statute contemplates the continuance of the liability of stockholders until the business of the corporation is wound up at least so far as valid indebtedness has been contracted while the corporation has a legal existence. The liability of stockholders does not become that of partners after the expiration of the period fixed by the charter. *Elson v. Wright*, 134–634, 112 N. W. 105.

It is only corporations whose charters expire by limitation, or the voluntary act of the stockholders, which continue for the purpose of winding up their affairs. Corporations dissolved by action of court have no further legal existence and cannot be represented by officers or agents. *State v. Fidelity L. & T. Co.*, 113–439, 85 N. W. 638.

A court of equity may wind up the affairs of a corporation whose charter has expired, if internal dissensions in the corporation make it necessary. This section only authorizes continuance of the business by the corporation managers for the amicable settlement of its affairs. But a corporation whose charter has not expired will not be dissolved at the suit of a stockholder, and it is error to direct a sale of its property in such suit. *Stewart v. Pierce*, 116–733, 89 N. W. 234.

The forfeiture of the corporate franchise does not of itself create of the stockholders a partnership nor does the transaction of business in the name of the corporation create a liability against the stockholders other than those who participate therein. *Commercial Nat. Bank v. Gilinsky*, 142–178, 120 N. W. 476.

A corporation cannot by its own voluntary dissolution and distribution of its property or assets among its stockholders relieve such property and assets from liability for unliquidated demands. *Wisconsin & Ark. Lumber Co. v. Cable*, 140 N. W. 200.

After dissolution of a corporation by unanimous consent of the stockholders, it still continues to exist for the purpose of winding up its affairs, and to this end it may rightly maintain actions at law or suits in equity to preserve or recover its property. *United States Gypsum Co. v. Hoxie*, (C. C.) 172 Fed. 504.

SEC. 1631. Liability of stockholders.

Although a certificate of stock recites that it is fully paid, yet if it expressly declares that it is subject to assessment for purposes named, such an assessment will be valid and can be enforced against the holder of the stock. *Western Imp. Co. v. Des Moines Nat. Bank*, 103–455, 72 N. W. 657.

Such stock is not fully paid up stock and the holder thereof is individually liable under statutory provisions, even if the articles of incorporation provide otherwise. *Ibid.*

The corporation may maintain an action against the stockholder for an assessment lawfully made and it is not necessary that it shall appear that the corporation is insolvent. *Ibid.*

Where a call for an assessment on stock does not specify the time, place or person to whom payment is to be made it will be presumed that the assessment is payable on demand at the place of business of the corporation and to the officer authorized to receive money due to it. *Ibid.*

When property is received by the corporation in payment of stock at an excessive valuation it is to be considered as constituting payment only to the extent of its real value and the owners of such stock are liable to creditors for the difference between the actual value of the property and the face value of the stock. *Stout v. Hubbell*, 104–499, 73 N. W. 1060.

It is immaterial that the articles of incorporation show that certain shares of stock have been issued as fully paid up in exchange for property. Creditors have a right to presume in such case that the property received is of the actual value of the face of the stock, and if it is of less value the holder of such stock is liable to the creditors for the difference. *Ibid.*

The stockholder after the transfer of his stock remains liable for indebtedness of the corporation existing at the time of such transfer. *White v. Green*, 105–176, 74 N. W. 928; *White v. Marquardt*, 105–145, 74 N. W. 930.

One who in fact becomes a holder of stock incurs the liability of a stockholder for unpaid installments, although the transfer of the stock to him is not recorded in the books of the company; and upon a subsequent transfer of the stock by him effected by means of a transfer at his instance directly from the original holder to the last purchaser, he nevertheless remains liable in the same way that other holders of stock remain liable after transfer for liabilities of the corporation existing at the time of such trans-

fer. *White v. Marquardt*, 105–145, 74 N. W. 930.

Indebtedness of the corporation not matured at the time of the transfer of stock is nevertheless a liability for which the stockholder remains liable to the extent of the unpaid installments of his stock. *White v. Green*, 105–176, 74 N. W. 928.

Property may be accepted in exchange for stock, providing it is taken at its true value. The parties have the right in good faith to agree on the value of the property taken, but this should not be speculative or fictitious. *State Trust Co. v. Turner*, 111–664, 82 N. W. 1029.

But a creditor of the corporation who has become such with knowledge that stock, although issued as fully paid, has not in fact been paid for, cannot enforce his claim against the holders of such stock, nor can his assignee do so. *Ibid.*

In an action against a stockholder for an unpaid subscription, the burden is on the creditor seeking to enforce payment by the stockholder to prove that payment by the stockholder has not been made. *Merrill v. Timbrell*, 123–375, 98 N. W. 879.

In a proceeding by the auditor of state to wind up a bank and distribute its assets among the creditors, the receiver may have an order for the assessment of stockholders based on an estimate of the amount for which they will be liable under the statutory provision for double liability, and the stockholders may be compelled to pay such assessment before the assets of the bank are distributed, subject to the right to a return of any assets left undisposed of after the debts are all paid. *State ex rel. v. Union Stock Yards State Bank*, 103–549, 70 N. W. 752, 72 N. W. 1076.

The court in a receivership proceeding may order an assessment against stockholders not made parties. *Elson v. Wright*, 134–634, 112 N. W. 105; *Paine v. Mueller*, 150–340, 130 N. W. 133.

The promoters of the corporation cannot purchase property and sell to the corporation at an advanced price unless the corporation has full and complete knowledge and consents thereto. *Caffee v. Berkley*, 141–344, 118 N. W. 267.

SEC. 1633. Indemnity—contribution.

A stockholder who has been compelled to pay more than his just proportion of unpaid subscriptions to the capital stock may enforce contribution from the other stockholders who have not paid their just proportion, and this rule is applicable to a case where a stockholder has voluntarily paid more than his just proportion, but liability in this respect may be determined by the contract between the parties, and if the stockholder pays creditors, knowing that the other stockholders have an agreement by which their stock is to be treated as fully paid up, he cannot recover against them for contribution. *Esgen v. Smith*, 113–25, 84 N. W. 954.

SEC. 1636. Estoppel.

In an action brought by a corporation to protect its property from wrongful acts the defendant cannot set up want of legal organization as a defense. *State Security Bank v. Hoskins*, 130–339, 106 N. W. 764.

SEC. 1637. Foreign corporation—filing articles—process—application—increase of capital—fees. Any corporation for pecuniary profit, other than for carrying on mercantile or manufacturing business as clearly defined and restricted by its articles of incorporation, organized under the laws of another state, or of any territory of the United States, or of any foreign country, which has transacted business in the state of Iowa since the first day of September, eighteen hundred eighty-six, or desires hereafter to transact business in this state, and which has not a permit to do such business, shall file with the secretary of state a certified copy of its articles of incorporation, duly attested by the secretary of state or other state officer in whose office the original articles were filed, accompanied by a resolution of its board of directors or stockholders authorizing the filing thereof, and also authorizing service of process to be made upon any of its officers or agents in this state engaged in transacting its business, and requesting the issuance to such corporation of a permit to transact business in this state; said application to contain a stipulation that such permit shall be subject to the provisions of this chapter. Said application shall also contain a statement subscribed and sworn to by at least two of the principal officers of the corporation, setting forth the following facts, to wit:

1. The total authorized capital of the corporation;

2. The total paid up capital of the corporation;

3. The total value of all assets of the corporation, including money and property other than money, represented by capital, surplus, undivided profits, bonds, promissory notes, certificates of indebtedness, or other designation, whether carried as money on hand or in bank, real estate or personal property of any description;

4. The total value of money and all other property the corporation has in use or held as investment in the state of Iowa, at the time the statement is made (if any);

5. The total value of money and all other property the corporation proposes or expects to make use of in the state of Iowa, during the ensuing year;

The secretary of state can make such independent and further investigation as to the property within this state owned by any such corporation as he may desire, and upon the true facts determine the value thereof, and fix the fee to be paid by such company. Before a permit is issued authorizing such corporation to transact business in the state of Iowa, said corporation shall pay to the secretary of state a fee of ten cents per one hundred words for recording the certified copy of the articles of incorporation, with resolution and statement as previously set forth, and a filing fee of twenty-five dollars upon ten thousand dollars or less of money and property of such company actually within the state of Iowa, and of one dollar for each one thousand dollars of such money or property within this state in excess of ten thousand dollars. If from time to time the amount of money or other property in use in the state of Iowa by said foreign corporation is increased, said corporation shall at the time of said increase, or at the time of making annual report to the secretary of state, in July of each year, file with the secretary of state a sworn statement showing the amount of such increase, and shall pay a filing fee thereon of one dollar for each one thousand dollars or fraction thereof of such increase, together with a recording fee of ten cents per one hundred words, but not less than fifty cents. The secretary of state shall upon request furnish a blank upon which to make report of such increase of capital in use within the state. Any corporation transacting business in this state prior to the first day of September, eighteen hundred eighty-six, shall be exempt from the payment of the fees required under the provisions of this section. The secretary of state shall thereupon issue to such corporation a permit, in such form as he may prescribe, for the transaction of the business of such corporation, and upon the receipt of such permit said corporation shall be permitted and authorized to conduct and carry on its business in this state. Nothing in this section shall be construed to prevent any foreign corporation from buying, selling and otherwise dealing in notes, bonds, mortgages and other securities. [34 G. A., ch. 75, § 1; 33 G. A., ch. 104, § 7.] [21 G. A., ch. 76, § 1.]

[The above section is made applicable to certain public utility corporations by § 1641-1 herein. EDITOR.]

It is within the power of the state to prescribe the method by which corporations doing business within its jurisdiction may be brought into court and to designate the officer or agent of such corporation upon whom the process necessary to commence an action may be served. *Green v. Equitable Mut. L. & End. Assn.*, 105–628, 75 N. W. 635.

The permit here required is not necessary to enable a foreign corporation to purchase property in this state and trans-

port the same through the state. *Ware Cattle Co. v. Anderson*, 107–231, 77 N. W. 1026.

The fact that statutory requirements as to foreign corporations have not been complied with by the corporation cannot be taken advantage of by one who has received the benefits of a contract with such corporation. *Spinney v. Miller*, 114–210, 86 N. W. 317.

The exception as to the doing business in the state by foreign corporations covers the transaction of receiving and accepting a note and mortgage for a valid consideration when such transaction is independent of and not connected with any form of business which the company is prohibited from transacting without a permit. *Prudential Ins. Co. v. Cushman*, 130–378, 106 N. W. 934.

A mortgagor who has received and retained the benefits of the transaction in which the mortgage is given cannot be heard to assert its invalidity on the ground that the mortgagee is a foreign corporation which has failed to comply with the statutes prescribing the terms upon which such corporations may do business in the state, the state alone being entitled to take advantage of the failure of the corporation to comply with the statute. *Ibid.*

It is no defense to a contract entered into by a foreign corporation that when the contract was made it did not have a permit to do business in the state. *Iowa Lillooet Gold Mining Co. v. United States F. & G. Co.*, 146 Fed. 437.

In a direct action by the state to oust a foreign corporation from doing business therein without a permit, a judgment of ouster will not be awarded if the corporation complies with the law within a reasonable time. *Ibid.*

Although this section and the sections following by their terms exclude a manufacturing corporation, yet they are applicable to foreign corporations organized to improve water power for the purpose of producing and transmitting electricity. *Hagerla v. Mississippi River Power Co.* (D. C.) 202 Fed. 776.

Where a foreign corporation has been recognized by the secretary of state as entitled to comply with these statutory provisions, its right to do so is not to be questioned in the courts. *Ibid.*

SEC. 1638. Permit.

The provisions of code § 1319 as to taxation of manufacturing corporations are applicable only to domestic corporations of that character. But the provisions of that section, such as those considered, do not amount to a discrimination between foreign and domestic manufacturing corporations. *Morril v. Bentley*, 150–677, 130 N. W. 734.

A foreign corporation, having complied with the statutory provisions, may proceed to condemn land for proper purposes. *Hagerla v. Mississippi River Power Co.* (D. C.) 202 Fed. 776.

SEC. 1640. Dissolution—receiver.

From the time of entry of dissolution by the court in a proper case the corporation is dead and cannot be represented by officers or agents. Therefore held that where the decree contained an order of dissolution, the corporation, without appealing from that portion of the decree, could not ask relief with reference to other orders in the same decree. *State v. Fidelity L. & T. Co.*, 113–439, 85 N. W. 638.

The "good cause shown" referred to in the first sentence of this section is such cause as prior to the adoption of the code would have been a ground for dissolution of the corporation by a court of equity. The substantial effect of the section is to authorize the attorney-general to maintain a suit in equity to wind up the corporation on account of some violation by it of the laws of the state or other such action as involves a violation of this chapter of the code. A court of equity is not authorized on complaint of the minority stockholders to dissolve the corporation on the grounds of lack of success in the business and mismanagement of its affairs by its officers. *Platner v. Kirby*, 138–259, 115 N. W. 1032

The attorney-general is authorized to maintain a suit in equity in the name of the state to wind up the corporation on account of some violation by it of the laws of the state. The remedy of the stockholder is not enlarged by these provisions. *State v. Syndicate Land Co.*, 142–22, 120 N. W. 327.

So long as the corporation is acting within the scope of its authority and is solvent a minority stockholder cannot institute proceedings to have it dissolved because he is dissatisfied with the method in which it is being conducted. *Troutman v. Council Bluffs Street Fair, etc., Co.*, 142–140, 120 N. W. 730.

A court of equity will not entertain a suit by stockholders to wind up the affairs of a corporation and distribute its assets in the absence of allegations of mismanagement and fraud on the part of the officers or insolvency, unless authorized to do so by statute. Mere difference among stockholders as to the advisability of the continuance of the corporate existence will not justify the appointment of a receiver. *Stockholders v. Jefferson County Agr. Assn.*, 155–634, 136 N. W. 672.

SEC. **1641. Ownership of property.** That section sixteen hundred forty-one of the code be repealed and the following enacted in lieu thereof:

"Corporations organized in any foreign country or corporations organized in this country, the stock of which is owned in whole or in part by nonresident aliens, shall have the same rights, powers and privileges with regard to the purchase and ownership of real estate in this state as are granted to nonresident aliens in section twenty-eight hundred ninety of the code." [30 G. A., ch. 54.]

SEC. **1641-a. Right to vote stock—attachment.** Every executor, administrator, guardian or trustee shall represent the stock in his hands at all corporate meetings, and may vote the same as a stockholder; and every person who shall pledge his stock, in the absence of a written agreement to the contrary, may represent the same at all such meetings and vote accordingly. The owner of corporate stock levied upon by attachment or other proceeding shall have the right to vote the same at all corporate meetings, until such time as that he shall have been divested of his title thereto by execution sale. But nothing contained in this section shall in any manner conflict with any provision in the articles of incorporation, or the by-laws of the corporation issuing the stock. [30 G. A., ch. 55.]

SEC. **1641-b. Capital stock—how issued—executive council to fix value—certain elements of value considered.** That from and after the passage of this act no corporation organized under the laws of the state of Iowa, except building and loan associations as defined and provided for in chapter thirteen, title nine of the code, shall issue any capital stock or any certificate or certificates of shares of capital stock, or any substitute therefor, until the corporation has received the par value thereof. If it is proposed to pay for said capital stock in property or in any other thing than money, the corporation proposing the same must, before issuing capital stock in any form, apply to the executive council of the state of Iowa for leave so to do. Such application shall state the amount of capital stock proposed to be issued for a consideration other than money, and set forth specifically the property or other thing to be received in payment for such stock. Thereupon, it shall be the duty of the executive council to make investigation, under such rules as it may prescribe, and to ascertain the real value of the property or other thing which the corporation is to receive for the stock; and shall enter its finding, fixing the value at which the corporation may receive the same in payment for capital stock; and no corporation shall issue capital stock for the said property or thing in a greater amount than the value so fixed and determined by the executive council. Provided that for the purpose of encouraging the construction of new steam or electric railways, and manufacturing industries within this state, the labor performed in effecting the organization and promotion of such corporation, and the reasonable discount allowed or reasonable commission paid in negotiating and effecting the sale of bonds for the construction and equipment of such railroad or manufacturing plant, shall be taken into consideration as elements of value in fixing the amount of capital stock that may be issued. [34 G. A., ch. 76, § 1.] [32 G. A., ch. 71, § 1.]

[The above section is made applicable to certain public utility corporations by § 1641-l herein. EDITOR.]

SEC. **1641-c. Certificate filed with secretary of state.** It shall be the duty of every corporation to file a certificate under oath with the secretary of state, within ten days after the issuance of any capital stock, stating the date of issue, the amount issued, the sum received therefor, if

payment be made in money, or the property or thing taken, if such be the method of payment. [32 G. A., ch. 71, § 2.]

[The above section is made applicable to certain public utility corporations by § 1641-l herein. EDITOR.]

SEC. **1641-d. Cancellation of stock—reimbursement.** That section sixteen hundred forty-one-d of the supplement to the code, 1907, be and the same is hereby repealed and the following enacted in lieu thereof:

"The capital stock of any corporation issued in violation of the terms and provisions hereof shall be void, and in a suit brought by the attorney-general on behalf of the state of Iowa in any court having jurisdiction, a decree of cancellation shall be entered; and if the corporation has received any money or thing of value for the said stock, such money or thing of value shall be returned to the individual, firm, company or corporation from whom it was received, and if represented by labor or other service of intangible nature, the value thereof shall constitute a claim against the corporation issuing stock in exchange therefor." [33 G. A., ch. 104, § 4.] [32 G. A., ch. 71, § 3.]

The mere issuance of certificates of stock constitutes a representation that the corporation has received par value therefor and a misrepresentation in this respect constitutes deceit for which the corporation and the officers in issuing such stock may be liable. *Sykes v. Pure Food Cider Co.*, 157– —, 138 N. W. 554.

The corporation and its officers are not only responsible to the persons dealing directly with them in the issuance of stock but to all who deal with the stock in reliance on the representations made. *Ibid.*

SEC. **1641-e. Dissolution of corporation—distribution of assets.** Any corporation violating the provisions hereof shall, upon the application of the attorney-general, in behalf of the state, made to any court of competent jurisdiction, be dissolved, its affairs wound up, and its assets distributed among the stockholders other than those who have received the stock so unlawfully issued. [32 G. A., ch. 71, § 4.]

SEC. **1641-f. Penalty.** Any officer, agent or representative of a corporation who violates any of the provisions hereof shall, upon conviction, be fined not less than two hundred dollars nor more than ten hundred dollars, and be imprisoned in the county jail for not less than thirty days nor more than six months. [32 G. A., ch. 71, § 5.]

SEC. **1641-g. False statements—penalty.** Every director, officer or agent of any corporation or joint-stock association, who knowingly concurs in making, publishing or posting, either generally or privately to the stockholders or other persons, any written report, exhibit, or statement of its affairs or pecuniary condition, or book or notice containing any material statement which is false, or any untrue or wilfully or fraudulently exaggerated report, prospectus, account, statement of operations, values, business, profits, expenditures, or prospects, or any other paper or document intended to produce or give, or having a tendency to produce or give, the shares of stock in such corporation a greater value or a less apparent or market value than they really possess, is guilty of a felony, and upon conviction thereof shall be punished by imprisonment in the penitentiary not to exceed one year, or by imprisonment in the county jail not to exceed six months or a fine not exceeding five hundred dollars. [32 G. A., ch. 72.]

SEC. **1641-h. Political contributions prohibited.** It shall be unlawful for any corporation doing business within the state, or any officer, agent or representative thereof acting for such corporation, to give or contribute any money, property, labor or thing of value, directly or indirectly,

to any member of any political committee, political party, or employe or representative thereof, or to any candidate for any public office or candidate for nomination to any public office or to the representative of such candidate, for campaign expenses or for any political purpose whatsoever, or to any person, partnership or corporation for the purpose of influencing or causing such person, partnership or corporation to influence any elector of the state to vote for or against any candidate for public office or for nomination for public office or to any public officer for the purpose of influencing his official action, but nothing in this act shall be construed to restrain or abridge the liberty of the press or prohibit the consideration and discussion therein of candidacies, nominations, public officers or political questions. [32 G. A., ch. 73, § 1.]

SEC. **1641-i. Solicitation from corporations prohibited.** It shall be unlawful for any member of any political committee, political party, or employe or representative thereof, or candidate for any office or the representative of such candidate, to solicit, request or knowingly receive from any corporation or any officer, agent or representative thereof, any money, property or thing of value belonging to such corporation, for campaign expenses or for any political purpose whatsoever. [32 G. A., ch. 73, § 2.]

SEC. **1641-j. Testimony—immunity from prosecution.** No person, and no agent or officer of any corporation within the purview of this act shall be privileged from testifying in relation to anything herein prohibited; and no person having so testified shall be liable to any prosecution or punishment for any offense concerning which he is required to give his testimony, provided that he shall not be exempted from prosecution and punishment for perjury committed in so testifying. [32 G. A., ch. 73, § 3.]

SEC. **1641-k. Penalty.** Any person convicted of a violation of any of the provisions of this act shall be punished by imprisonment in the county jail not less than six months or more than one year and in the discretion of the court, by fine not exceeding ten hundred dollars. [32 G. A., ch. 73, § 4.]

SEC. **1641-l. Capital stock of foreign public utility corporations—how issued—laws made applicable.** Section sixteen hundred forty-one-b of the supplement to the code, 1907, as amended by chapter seventy-six of the acts of the thirty-fourth general assembly of Iowa, section sixteen hundred forty-one-c of the supplement to the code, 1907, and section sixteen hundred thirty-seven of the code as amended by chapter one hundred and four of the acts of the thirty-third general assembly of Iowa and by chapter seventy-five of the acts of the thirty-fourth general assembly of Iowa, are hereby made applicable to any foreign corporation which directly or indirectly owns, uses, operates, controls or is concerned in the operation of any public gasworks, electric light plant, heating plant, waterworks, interurban or street railway located within the state of Iowa or the carrying on of any gas, electric light, electric power, heating business, waterworks, interurban or street railway business within the state of Iowa or that owns or controls, directly or indirectly, any of the capital stock of any corporation which owns, uses, operates or is concerned in the operation of any public gasworks, electric light plant, electric power plant, heating plant, waterworks, interurban or street railway located within the state of Iowa or any foreign corporation that exercises any control in any way or in any manner over any of said works, plants, interurban or street railways or the business carried on by said works, plants, interurban or street railways by or through the ownership of the capital stock of any corporation or corporations or in any other manner whatsoever, and the ownership, operation or control of any such works, plants, interurban or

street railways or the business carried on by any of such works or plants or the ownership or control of the capital stock in any corporation owning or operating any of such works, plants, interurban or street railways by any foreign corporation in violation of the provisions of this act is hereby declared to be unlawful. [35 G. A., ch. 136, § 1.]

SEC. **1641-m. Holding companies—provisions made applicable to.** The provisions hereof are hereby made applicable to all corporations, including so-called "holding companies" which by or through the ownership of the capital stock in any other corporation or corporations or a series of corporations owning or controlling the capital stock of each other can or may exercise control over the capital stock of any corporation which owns, uses, operates or is concerned in the operation of any public gasworks, electric light plant, electric power plant, heating plant, waterworks, interurban or street railway located in the state of Iowa, or the business carried on by such works or plants. [35 G. A., ch. 136, § 2.]

SEC. **1641-n. Annual report—fee.** All corporations subject to the provisions of this act are hereby required to pay the annual fee and to make the annual report in the form and manner and at the time as specified in chapter one hundred and five of the acts of the thirty-third general assembly of Iowa. [35 G. A., ch. 136, § 2-a.]

SEC. **1641-o. Sale of capital stock—obligations.** The provisions of this act are hereby made applicable to the sale of its own capital stock by any corporation subject to the provisions of this act, whether said capital stock has been heretofore issued by said corporation or not, including the sale of so-called "treasury stock" or stock of the corporation in the hands of a trustee or where the corporation participates in any way or manner in the benefits of said sales, and also to the sale of any of the obligations of any corporation subject to the provisions of this act, the payment of which is secured by the deposit or pledge of any of the capital stock of said corporation. [35 G. A., ch. 136, § 3.]

SEC. **1641-p. Violations—stock void.** Shares of capital stock of any corporation owned or controlled in violation of the provisions of this act shall be void and the holder thereof shall not be entitled to exercise the powers of a shareholder of said corporation or permitted to participate in or be entitled to any of the benefits accruing to shareholders of said corporation, and section sixteen hundred thirty-nine of the code is hereby made applicable to violations of the provisions of this act; and courts and juries shall construe this act so as to prevent evasion and to accomplish the intents and purposes hereof. [35 G. A., ch. 136, § 4.]

SEC. **1641-q. Dissolution—powers of courts of equity—receiver.** Courts of equity shall have full power to dissolve, close up or dispose of any business or property owned, operated or controlled in violation of the provisions of this act; to dissolve any corporation owning or controlling the capital stock of any other corporation in violation of the provisions of this act and to close up or dispose of the business or property of said corporation; and if the court finds that, in order to carry out the purposes of this act, it is necessary so to do, it may dissolve the corporation issuing the stock which is owned in violation of the provisions of this act, close up the business of said corporation and dispose of its property, and the court may also appoint a receiver who shall be a resident of Iowa for any business or for any corporation which has violated the provisions of this act or of the corporation issuing the stock which is held in violation of this act. Any action to enforce the provisions of this act may be instituted by the attorney-general in the name of the state of Iowa or by a citizen in the name of

the state of Iowa at his own proper cost and expense, reserving, however, to the stockholders owning capital stock not held in violation of this act all rights possessed by them. [35 G. A., ch. 136, § 5.]

SEC. **1641-r. Acts in conflict repealed.** All acts and parts of acts, so far as the same are in conflict herewith, are hereby repealed. [35 G. A., ch. 136, § 6.]

CHAPTER 2.

OF CORPORATIONS NOT FOR PECUNIARY PROFIT.

SECTION 1642. Organization—purposes—name.

The secular acts of religious corporations are to be governed by the same principles of law as those applied to civil corporations. *Moore v. First etc. Methodist Church*, 117–33, 90 N. W. 492.

The law presumes that meetings of trustees of a religious corporation are regular and upon proper notice and that contracts made by them and under which they have accepted benefits are binding. *Ibid.*

Corporations for religious purposes have no stock, and being without authority to levy assessments upon or enforce contributions from their members, the membership of an insolvent religious corporation may organize as a new corporation without becoming liable for the debts of the old in the absence of fraud and if no property of the old corporation is taken by the new. *Allen v. North Des Moines M. E. Church*, 127–96, 102 N. W. 808.

A religious society seeking to effectuate its ideals of religious life through the common ownership and management of the property of its members may acquire and hold real property and establish and conduct industrial enterprises so long as its property is owned and managed and its enterprises are conducted and extended simply to meet the needs of its members, and maintain them in a manner consistent with their religious faith, to which its total income and accumulation of property is devoted; and such a corporation will not be dissolved and its privileges forfeited on the ground that it has exceeded its corporate powers. *State v. Amana Society*, 132–304, 109 N. W. 894.

The management of the property of such a corporation so that it shall yield a profit to be used in promoting its business is not prohibited, the power to acquire and make use of property being incidental to and in aid of the power conferred to accomplish the business appropriate to the execution of the purposes of the organization. *Ibid.*

A mutual insurance company or association is a corporation for pecuniary profit, but under the provisions of code supp. § 1333-d it seems that there may be county mutual associations which are not corporations for pecuniary profit; the tax thus imposed is not a property tax, but a business or license tax. *Iowa Mut. Tornado Ins. Assn. v. Gilbertson*, 129–658, 106 N. W. 153.

A county agricultural association is an association not for pecuniary profit. *Stockholders v. Jefferson County Agr. Assn.*, 155–634, 136 N. W. 672.

SEC. **1642-a. Change of name or amendments—how effected by corporations heretofore organized.** Any corporation heretofore organized under chapter two of title nine of the code, for the maintenance of a hospital or home for destitute or unfortunate women or orphaned or abandoned children, and whose membership is made to depend on the payment of dues and is indefinite or uncertain for any reason, and which has not issued certificates of membership, may at any time change the name of such corporation or amend its articles of incorporation by a vote of at least three fourths of its governing board of directors or trustees at a meeting called and held for that purpose, after giving four weeks' notice thereof by publication, made in the same manner as original notices, of the time, place and purpose of such meeting. [32 G. A., ch. 250, § 1.]

SEC. **1642-b. Legalization.** Any corporation so organized under chapter two of title nine of the code which shall have heretofore adopted articles of incorporation, or changed its name or amended its articles and some question has arisen as to whether such articles, change in name or

amendment was adopted by a majority of the members of such corporation as required by section sixteen hundred fifty-one of the code, and such corporation shall have been engaged in the exercise of its corporate functions for the period of at least three years, such articles, change in name or amendment, shall be held and considered to have been duly adopted by a majority of all the members of such corporation, and are hereby legalized and made valid. [32 G. A., ch. 250, § 2.]

SEC. **1642-c. Pending litigation.** Nothing in this act contained shall affect any pending litigation. [32 G. A., ch. 250, § 3.]

SEC. **1643. Powers—duration—property of extinct religious societies.** Upon filing such articles, the persons signing and acknowledging the same, and their associates and successors, shall become a body corporate, with the name therein stated, and may sue and be sued. It may have a corporate seal, alterable at its pleasure, and may take by gift, purchase, devise or bequest real and personal property for purposes appropriate to its creation, and may make by-laws. Corporations so organized shall endure for fifty years, unless a shorter period is fixed in the articles, or they are sooner dissolved by three-fourths vote of all the members thereof, or by act of the general assembly, or by operation of law. State, diocesan or district religious organizations incorporated under this chapter, or those existing by voluntary association and having permanent funds, shall have the power to adopt and enforce rules as to the property of extinct local societies which at any time have been or which may be connected therewith and defining when such a local society shall be considered extinct, and to take charge of and to control the real and personal property of such extinct society. [34 G. A., ch. 77, § 1.] [22 G. A., ch. 87; 21 G. A., ch. 71; C. '73, §§ 1070, 1096, 1101; R. §§ 1185, 1194, 1198.]

A bishop of the Catholic church may be for some purposes denominated a corporation sole, but he is none the less an individual and as such may act as a trustee for any lawful purpose; and a devise to such bishop by name in trust for charitable uses is not in violation of the provisions of code § 3270 which prohibits devises to corporations of more than one fourth of the property of the testator. *Rine v. Wagner*, 135–626, 113 N. W. 471.

The corporations herein referred to may be dissolved by operation of law, but this section does not enlarge the recognized jurisdiction of courts of equity in such cases. *Stockholders v. Jefferson County Agr. Assn.*, 155–634, 136 N. W. 672.

SEC. **1644-a. Private cemeteries—additional land for—petition to condemn.** When any private cemetery association, incorporated under the provisions of chapter two, title nine of the code, relating to corporations not for pecuniary profit, and having its cemetery located outside the limits of an incorporated city or town, shall desire to acquire additional land for cemetery use, it may file with the auditor of the county in which its cemetery is situated, a petition, directed to the governor of the state, asking that it may be granted the right to condemn property. The petition shall be verified and shall contain a description of the land desired to be condemned, the amount of land comprised therein, the names and addresses of the owner or owners, so far as known, and a statement in general terms that the association has been unable to agree with the owner upon the price to be paid for the land, and that the land is reasonably needed by the association for use for cemetery purposes. [35 G. A., ch. 139, § 1.]

SEC. **1644-b. Notice—publication.** Notice that the petition is on file and will be heard at the next regular meeting of the board of supervisors, stating the first day of the said meeting, shall be prepared by the auditor,

and, at the expense of the association, be served upon the land owner, whose land they seek to condemn, the same as original notices are served. If the owner is a nonresident of the county where the property sought to be condemned is located, notice shall be given by publication in some newspaper of general circulation in the county for two consecutive weeks, said paper to be designated by the auditor, and the last publication to be at least ten days prior to the first day of the meeting of the board. [35 G. A., ch. 139, § 2.]

SEC. **1644-c. Hearing before board of supervisors—recommendation to governor.** The board of supervisors, at its regular meeting, shall hear the petitioner, and any persons appearing in opposition to the petition. If it appears to the board that the land is reasonably necessary for cemetery uses of the petitioner, the board shall recommend to the governor of the state that the petitioner be given the right to condemn the property, and the petition, with the recommendation of the board, shall be transmitted to the governor by the auditor. [35 G. A., ch. 139, § 3.]

SEC. **1644-d. Governor may grant right to condemn.** When such a petition is presented to the governor, with the recommendation of the board of supervisors of the county that the petition be granted, the governor may grant to the petitioner the right to condemn the property named in the petition. [35 G. A., ch. 139, § 4.]

SEC. **1644-e. Proceedings.** When the right to condemn is granted by the governor, proceedings for condemnation may be taken by the private cemetery association, as provided in title ten, chapter four of the code. In such proceedings, the grant of the right to condemn given by the governor shall be prima-facie evidence that the proceedings prior to the grant of the right by the governor were in due form. [35 G. A., ch. 139, § 5.]

SEC. **1645. Dividend—local religious societies—when deemed extinct.** No dividend nor distribution of property among the stockholders shall be made until the dissolution of the corporation. When a local religious society shall have ceased to support a minister or leader or regular services and work for two years or more, or as defined by the rules of any incorporated state, diocesan or district society with which it has been connected, it shall be deemed extinct, and its property may be taken charge of and controlled by such state or similar society of that denomination with which it had been connected. [34 G. A., ch. 77, § 2.] [C. '73, § 1093; R. § 1188; C. '51, § 710.]

SEC. **1650. Reincorporation—cemetery associations.** The trustees, directors, or members of any corporation organized under this chapter may reincorporate the same, and all the property and rights thereof shall vest in the corporation as reincorporated. The trustees acting at the time of reincorporation of any cemetery association organized as a corporation under the laws of the state of Iowa, whose incorporation may have expired by operation of law or by the terms of its articles of incorporation, may reincorporate the same and all of the property and rights thereof shall vest in the corporation as reincorporated, for the use and benefit of all of the shareholders in the original corporation. [33 G. A., ch. 106, § 1.] [C. '73, § 1102; R. § 1199.]

SEC. **1652-a. Endowment fund—representative bodies of religious societies may create board of trustees.** Any presbytery, synod, conference, state or diocesan convention, or other state or district representative body of any religious denomination in this state, now or hereafter incorporated under this chapter, or any assembly, synod, conference, convention or other general ecclesiastical body of any religious denomination in

the United States having local societies in this state and wherever incorporated, may in its articles of incorporation or by amendment thereto create a board, committee or commission of three or more members for any endowment fund or other fund or property of the denomination represented by such body, and at any regular meeting of such presbytery, synod, conference, state or diocesan convention or other representative assembly of such denomination in this state, or of such assembly, synod, conference, convention or other general ecclesiastical body in the United States, may elect not less than three members of such denomination, one of whom shall be a resident freeholder in this state, to serve as trustees of such fund or property; and a copy of such articles of incorporation and amendment, duly certified to by the officer with whom the same have been filed for record, shall be evidence in the courts of this state of the existence of such trust and of the powers of such trustees. [34 G. A., ch. 77, § 3.]

SEC. **1652-b. Powers of trustees.** Such trustees, if chosen to take charge of any endowment or other like fund, may invest, manage and dispose of the same in accordance with the purpose for which it was created, subject to such regulations as the body by which they were elected may from time to time prescribe; and shall have power to make contracts regarding, and to collect and sue for, and in all ways to control and protect, any property belonging or which should belong to any such funds. [34 G. A., ch. 77, § 3.]

SEC. **1652-c. Property of extinct societies controlled by trustees.** When any local religious society shall have become extinct, such trustees of the denomination with which it shall have been at any time connected shall take charge of its property, whether real or personal, and control, dispose of and use the same in trust, as part of the endowment or other like funds of such denomination within the territorial limits represented by such trustees and the corporation by which they were elected and especially for the work of such denomination at the place where such extinct local society shall have been situated. A transfer of such property by resolution or act of the remaining member or members, representative or representatives, of such extinct local society to such trustees shall operate to pass complete title. If on demand therefor there is a failure or refusal to transfer such property to such trustees, or if such trustees think proper so to do, they may commence action in equity in the district court of the county where such extinct local society was situated, making parties defendant thereto all persons known to have any interest in or claim upon such property; notice shall be given as in other equitable actions, and said court shall have jurisdiction to enter a decree whereby the title to all the property of such extinct society shall be transferred to such trustees, or for the sale thereof and transfer of the proceeds of such sale to such trustees. Such decree or sale thereunder shall pass good title to such property. Provisions shall be made for the protection of all having claims against such local society or its property. [34 G. A., ch. 77, § 3.]

SEC. **1652-d. Property held in trust—use of principal.** The property of any such extinct religious society shall be held and disposed of by such trustees in trust for the work of the denomination in the territorial limits represented by such trustees, and especially in trust for such work at the place where such extinct society was situated or its immediate vicinity within the judgment of the religious body by which such trustees were elected. Only income therefrom shall be used for the general work of such denomination in such territorial limits, but the principal shall be kept as a permanent fund except that it may be used in the locality where such

extinct local society was situated or its immediate vicinity if thought best by such body. No local society of such denomination at such place shall be allowed to demand the use of such principal for its benefit until it has been recognized and approved by and has complied with the reasonable requirements of the body so electing such trustees. [34 G. A., ch. 77, § 3.]

SEC. **1652-e. Existing contract and property rights not affected.** Existing contract and property rights arising under the organization, rules, laws or canons heretofore adopted by any corporation or organization of a religious character, shall not be affected by the provisions of this act except by consent of the interested parties. [34 G. A., ch. 77, § 3.]

SEC. **1652-f. Acts in conflict repealed.** All acts and parts of acts in conflict with this act are hereby repealed. [34 G. A., ch. 77, § 3.]

CHAPTER 3.

OF DEPARTMENT OF AGRICULTURE, AGRICULTURAL AND HORTICULTURAL SOCIETIES AND STOCKBREEDERS' ASSOCIATIONS AND STATE DAIRY ASSOCIATIONS.

SECTION **1653. Meeting of state agricultural society—repealed.** [28 G. A., ch. 58, § 18.]

[See § 1657-a.]

SEC. **1654. Officers—terms—repealed.** [28 G. A., ch. 58, § 18.]

[See § 1657-a.]

SEC. **1655. Premium list—repealed.** [28 G. A., ch. 58, § 18.]

[See § 1657-a.]

SEC. **1656. Annual report—repealed.** [28 G. A., ch. 58, § 18.]

[See § 1657-a.]

SEC. **1657. Distribution of reports—repealed.** [28 G. A., ch. 58, § 18.]

[See § 1657-a.]

SEC. **1657-a. Repeal.** That section sixteen hundred fifty-three, sixteen hundred fifty-four, sixteen hundred fifty-five, sixteen hundred fifty-six, sixteen hundred fifty-seven, sixteen hundred seventy-four, sixteen hundred eighty-two and sixteen hundred eighty-three of the code, and chapter forty-two of the acts of the twenty-seventh general assembly, be and the same are hereby repealed. [28 G. A., ch. 58, § 18.]

SEC. **1657-b. Department of agriculture—what embraced therein.** For the promotion of agriculture, horticulture, forestry, animal industry, manufactures, and the domestic arts, there is hereby established a department to be known as the department of agriculture, which shall embrace the district and county agricultural societies organized or to be organized under existing statutes and entitled to receive aid from the state, the state weather and crop service, and the offices of the dairy commissioner and state veterinarian. [28 G. A., ch. 58, § 1.]

SEC. **1657-c. State board of agriculture—ex-officio members—other members—how chosen.** The department shall be managed by a board, to be styled the state board of agriculture, of which the governor of

the state, the president of the state college of agriculture and mechanic arts, the state dairy commissioner, and the state veterinarian shall be members *ex officio*. The other members of the board shall consist of a president, vice president, secretary, treasurer and one director from each congressional district, to be chosen as hereinafter provided. [28 G. A., ch. 58, § 2.]

SEC. **1657-d. Agricultural convention—delegates to.** There shall be held at the capitol on the second Wednesday of December, nineteen hundred, and annually thereafter, a state agricultural convention, composed of the state board of agriculture, together with the president or secretary of each county or district society entitled to receive aid from the state, or a regularly elected delegate therefrom accredited in writing, who shall be a resident of the county; and in counties where there are no agricultural societies the board of supervisors may appoint a delegate who shall be a resident of the county. The president or an accredited representative of the following named associations shall be entitled to membership in the said convention, to wit: the state horticultural society, the state dairy association, the improved stock breeders' association, the swine breeders' association, and each farmers' institute organized under the provisions of section sixteen hundred seventy-five of the code. Provided, said farmers' institute has been organized at least one year, and has reported to the state secretary of agriculture, not later than November first, through its president and secretary or executive committee, that an institute was held according to law, the date thereof, the names and post-office address of its officers. They shall also furnish the state secretary of agriculture with a copy of program of each institute hereafter held and one or more papers read before such institute, if papers are read. On all questions arising for determination by the convention including the election of members of the board, each member present shall be entitled to but one vote, and no proxies shall be recognized by the convention. [31 G. A., ch. 66; 29 G. A., ch. 165, § 1; 28 G. A., ch. 58, § 3.]

SEC. **1657-e. Officers—directors—vacancies.** At the convention held on the second Wednesday in December, nineteen hundred, there shall be elected a president and vice president for the term of one year; also one director of the board of agriculture from each congressional district; those from even-numbered districts to serve two years and those from odd-numbered districts one year. At subsequent annual conventions, vacancies in the list of district directors shall be filled for two years. But vacancies occurring from death or other causes, shall be filled for the unexpired term; and the board may fill any vacancy in office until the next annual convention. [28 G. A., ch. 58, § 4.]

SEC. **1657-f. State farmers' institute.** In connection with the annual convention, either preceding or following the day on which the officers are elected, the board may hold a state farmers' institute, for the discussion of practical and scientific topics relating to the various branches of agriculture, the substance of which shall be published in the annual report of the board. [28 G. A., ch. 58, § 5.]

SEC. **1657-g. Duties of board.** The board shall have general supervision of the several branches, bureaus and offices embraced in the department of agriculture; and it shall be the duty of the board to look after and promote the interests of agriculture, of agricultural education and animal and other industries throughout the state; to investigate all subjects relating to the improvement of methods, appliances and machinery, and the diversification of crops and products; also to investigate reports of the

prevalence of contagious diseases among domestic animals, or destructive insects and fungus diseases in grains and grasses and other plants, the adulteration of foods, seeds and other products, and to report the result of investigation, together with recommendations of remedial measures for prevention of damage resulting therefrom. It shall be the duty of the Iowa agricultural experiment station to coöperate with the department of agriculture in carrying on these investigations. [28 G. A., ch. 58, § 6.]

SEC. **1657-h. Executive committee.** The president, vice president, and secretary shall constitute an executive committee, which shall transact such business as may be delegated to it by the board of agriculture. The president may call meetings of the board when the interests of the department require it. [28 G. A., ch. 58, § 7.]

SEC. **1657-i. State fair.** The board shall have full control of the state fair grounds and improvements thereon belonging to the state, with requisite powers to hold annual fairs and exhibits of the productive resources and industries of the state. They may prescribe all necessary rules and regulations thereon. The board may delegate the management of the state fair to the executive committee and two or more additional members of the board; and for special work pertaining to the fair they may employ an assistant secretary and such clerical assistance as may be deemed necessary. All expenditures connected with the fair, including the per diem and expenses of the managers thereof, shall be recorded separately and paid from the state fair receipts. The said board of agriculture shall have the power to authorize or forbid the construction of street railways within the state fair grounds and may define the motive power by which the cars thereon shall be propelled and to authorize or forbid the location and laying down of tracks for street railways in said grounds. [29 G. A., ch. 166, § 1; 28 G. A., ch. 58, § 8.]

SEC. **1657-j. Bequests—duties of officers regarding.** The department of agriculture is hereby authorized to take and hold property, real and personal, derived by gifts and bequests, and the president, secretary and treasurer shall have charge and control of the same, subject to the action of the board, and shall give bonds as required in case of executors, to be approved by the board of agriculture and filed with the secretary of state. [28 G. A., ch. 58, § 9.]

SEC. **1657-k. Secretary—duties—Iowa year book of agriculture.** The board shall elect a secretary for a term of one year, whose duties shall be such as usually pertain to the office of a secretary, under the direction of the board. He shall keep a complete record of the proceedings of the annual state agricultural convention and all meetings of the board; he shall draw all warrants on the treasurer and keep a correct account thereof; he shall compile and superintend the printing of the annual report of the state department of agriculture, which shall be entitled "The Iowa Year Book of Agriculture," and shall include the annual report of the dairy commissioner, the state dairy association, and the Iowa agricultural experiment station, the annual report of the state veterinarian, the Iowa weather and crop service, the Iowa improved stock breeders' association, or such part thereof as the executive committee may approve, and such other reports and statistics as the board may direct, which shall be published by the state; he shall perform such other duties as the board may direct. [28 G. A., ch. 58, § 10.]

SEC. **1657-l. Distribution of year book—competitive bids.** The Iowa year book of agriculture shall be printed and bound in cloth and such number as the executive council shall direct, to be distributed as follows:

One copy to each state officer and member of the general assembly; ten copies to the state library and ten copies to the libraries of the state university and the state college of agriculture and mechanic arts; one copy to each library in the state open to the general public; one copy to the president and secretary of each county and district agricultural society, and one copy to the board of supervisors of each county in which there is no such agricultural society, and the balance as may be directed by the board of agriculture. The executive council shall receive competitive bids for the printing and binding of the year book and let the contract to the lowest responsible bidder. Such bidding, however, shall be confined to concerns in Iowa and to persons or corporations paying the union scale of wages. [28 G. A., ch. 58, § 11.]

SEC. **1657-m. Present officers and directors.** The present officers and directors of the state agricultural society, upon taking effect of this act, shall be, and they are hereby made and constituted officers and directors of the department of agriculture, who, with the ex-officio members named in section two hereof, shall have full control and management of the department of agriculture until the members of the state board of agriculture are elected as provided in section three of this act. [28 G. A., ch. 58, § 12.]

SEC. **1657-n. Office—supplies—salary of secretary and assistant.** The office of the department of agriculture shall be in rooms numbers eleven and twelve, in the capitol building; the said office shall be entitled to such supplies, stationery, postage and express as may be required, which shall be furnished by the executive council in the same manner as other officers are supplied. The secretary shall receive as salary such compensation as may be fixed and allowed by the state board of agriculture from the funds derived from the state fair, but said salary shall not be increased more than four hundred dollars in any one year, and, in no event, be more than thirty-five hundred dollars. [35 G. A., ch. 141, § 1.] [31 G. A., ch. 67; 28 G. A., ch. 58, § 13.]

SEC. **1657-o. Treasurer—duties—bond—compensation.** The board shall elect a treasurer for a term of one year, whose duties shall be to keep a correct account of the receipts and disbursements of all moneys belonging to the department of agriculture, and shall make payments only on warrants signed by the president and secretary thereof, except in payment of premiums. He shall execute a bond for the faithful performance of his duty, to be approved by the board and filed with the secretary, and shall receive such compensation for his services as shall be fixed by the board, not exceeding one hundred dollars per annum. [28 G. A., ch. 58, § 14.]

SEC. **1657-p. Elective members—compensation.** The elective members of the state board of agriculture, for attending the meetings of the board, and for the special work pertaining to the holding of the state fair shall be allowed four dollars per day and five cents per mile in going and returning from the place where the business is transacted, the claim for which shall in all cases be verified and paid as provided in section eight. [28 G. A., ch. 58, § 15.]

SEC. **1657-q. Financial report—made by state accountant—publication.** That the law as it appears in section sixteen hundred fifty-seven-q of the supplement to the code, 1907, be and the same is hereby repealed and the following enacted in lieu thereof:

"Prior to the annual convention of the department of agriculture, the state accountant, provided for in section one hundred sixty-one-a of the supplement to the code, 1907, shall examine and report upon all financial

business of the department of agriculture, said report to be made to the executive council. Such report shall be edited under the direction of the executive council and be published in accordance with the provisions of section one hundred sixty-three of the code and acts amendatory thereof." [33 G. A., ch. 107, § 1.] [28 G. A., ch. 58, § 16.]

SEC. **1657-r. Premium list and rules.** The premium list and rules of exhibition shall be determined and published by the board prior to the first day of April in each year. [28 G. A., ch. 58, § 17.]

SEC. **1657-s. Certain terms construed.** That where the words "board of directors of the state agricultural society" occur in the code or the acts amendatory thereto, the same shall be construed to mean and to refer to the state board of agriculture; and the words "state society" and "state agricultural society" shall be construed to mean and refer to the department of agriculture. [28 G. A., ch. 58, § 20.]

SEC. **1657-t. Appropriations.** There is hereby appropriated annually from and after the first day of January nineteen hundred and one for the support of the office of the department of agriculture, twenty-four hundred dollars, and for insurance and improvements of buildings on the state fair grounds the sum of ten hundred dollars or so much thereof as shall be necessary, and the auditor of state shall draw a warrant therefor upon the order of the department of agriculture signed by the president and secretary thereof, in such sums and at such times as the board shall deem necessary. The state shall not be liable for the payment of any premiums offered by the state board of agriculture, nor for any expenses or liabilities incurred by said board, except, as expressly provided for in this act. [28 G. A., ch. 58, § 21.]

SEC. **1658. County societies—premiums.** County and district agricultural societies may annually offer and award premiums for the improvement of stock, tillage, crops, implements, mechanical fabrics, articles of domestic industry, and such other articles and improvements as they may think proper, and so regulate the amount thereof and the different grades as to induce general competition. [28 G. A., ch. 59, § 2; C. '73, § 1109; R. § 1697.]

Under the statutory provision authorizing agricultural societies to award premiums, etc., such society has power to authorize trials of speed on its grounds and such lawful games or amusements as its officers and directors may in their discretion see fit to arrange for in furnishing amusement and entertainment as well as instruction to those attending. Therefore the directors of such society are not liable in their individual capacity for neglect to provide protection to spectators against dangers incident to the playing of such games as are authorized. *Williams v. Dean*, 134–216, 111 N. W. 931.

SEC. **1659. List of awards.** Each county and district society shall annually publish a list of the awards, and an abstract of the treasurer's account, in one or more newspapers of the county, with a report of its proceedings during the year, and a synopsis of the awards. It shall also make a report of the condition of agriculture in the county to the board of directors of the state agricultural society, which shall be forwarded on or before the first day of November in each year to the secretary of said society. The auditor of state, before issuing a warrant in favor of such societies for any amount, shall demand the certificate of the secretary of the state society that such report has been made. Any society failing to report on or before the first day of November shall not receive state aid for that year. [28 G. A., ch. 59, § 2; C. '73, § 1110; R. § 1698.]

SEC. **1660. Appropriation from county—levy of tax for—question submitted—notice—title in county—control.** When a county agricul-

tural society shall have procured[1] in fee simple, free from incumbrance, land for fair grounds, not less than ten acres in extent, or hold and occupy such amount of land by virtue of a lease, and own and have thereon buildings and improvements worth at least two thousand dollars, the board of supervisors of the county may appropriate and pay to it a sum not exceeding one hundred dollars for every thousand inhabitants in the county, to be expended by it in fitting up or purchasing such fair grounds, but for no other purpose; but the aggregate amount so appropriated shall not exceed ten hundred dollars to any one society. The board of supervisors are further authorized to purchase real estate for county fair purposes, in sums not[2] exceeding ten hundred dollars, providing however, that the board of supervisors shall first have submitted to the legal voters of the county a proposition therefor, and voted for by a majority of all persons voting for and against such proposition at a general or special election; notice to be given as provided in section four hundred twenty-three of the supplement to the code. And the board of supervisors shall not exceed in the purchase of such real estate, the amount so voted for; the title of such real estate when purchased to be taken in the name of the county, and the board of supervisors shall place such real estate under the control and management of an incorporated county fair society, as long as an annual county fair is maintained by such corporation on said real estate. And said corporation is authorized to erect and maintain buildings and make such other improvements on said real estate as is necessary, but the county shall not be liable for such improvements, or the expenditures therefor. The right of such county fair society to the control and management of said real estate may be terminated by the board of supervisors whenever well conducted agricultural fairs are not annually held thereon. The board of supervisors of any county which has acquired real estate for county fair purposes and which has a county agricultural society using said real estate may submit, at any regular election, the question of aiding said agricultural society by a direct tax on all the property of the county, of not to exceed ten hundred dollars in any one year, for not to exceed ten years in succession; and if a majority of the votes cast on this proposition at such election are in favor of said tax, said board shall levy a tax for the benefit of said society, but such tax shall be expended only for the erection or repair of buildings or other permanent improvements on the fair grounds, or for the payment of debts contracted for the erection of such buildings or other permanent improvements. Shares of stock, nonassessable, shall be issued to the county at par value for amount of money received by said society from taxes raised under this act. [35 G. A., ch. 142, § 1.] [32 G. A., ch. 17, § 2; C. '73, § 1111.]

[1]This word erroneously appeared as "produced" in the 1907 supplement. [2]The word "not" erroneously appeared here in the same supplement. The records have been carefully examined and the said word "not" is not in the enrolled bill H. F. No. 1, 32 G. A. EDITOR.]

SEC. **1661. State aid to district or county society—repealed.** [28 G. A., ch. 59, § 1.]

[See § 1661-a.]

SEC. **1661-a. State aid to district or county society—failure to report.** That section sixteen hundred sixty-one of the code be and is hereby repealed and the following enacted in lieu thereof:

"Any county or district agricultural society, upon filing with the auditor of state affidavits of its president, secretary, and treasurer showing what

sum has actually been paid out during the current year for premiums, not including races, or money paid to secure games or other amusements, and that no gambling devices or other violations of law were permitted, together with a certificate from the secretary of the state society showing that it has reported according to law, shall be entitled to receive from the state treasury a sum equal to forty per cent. of the amount so paid in premiums, up to five hundred dollars, and ten per cent. additional of the amount paid in premiums over five hundred dollars; but in no case shall the amount paid to any society exceed the sum of three hundred dollars. When any society fails to report, according to law, on or before the first day of November, that society shall not receive a warrant from the state auditor for that year, but the secretary of the state board of agriculture shall notify the county auditor of the county in which the society is located of such failure, and the board of supervisors may appoint a delegate to the annual meeting or state agriculture [agricultural] convention, said delegate to be a resident of said county. [33 G. A., ch. 108, § 1.] [28 G. A., ch. 59, § 1; 27 G. A., ch. 43, § 1; C. '73, § 1112; R. § 1704.]

SEC. **1661-a1. Short course—organization of in counties—state aid for.** That section sixteen hundred and sixty-one-a and sixteen hundred seventy-five of the supplement to the code, 1907, be amended by adding thereto the following: Whenever one hundred citizens of any county in the state that does not have a county or district fair, receiving the state aid as above provided, or that in any year may not hold a county fair, shall organize what is known as a short course, with a president, secretary, treasurer and executive committee of not less than five members, and shall hold a session of four or more days at some place within the county and give a program, designated to promote the science of agriculture and domestic science, said short course organization upon filing with the auditor of state, by its president, secretary and treasurer, a statement showing what sums it has actually paid out in value for premiums during the period of the short course of that year, together with the certificate of the secretary of the state board of agriculture showing that it has reported according to law as provided in cases of county and district agricultural societies, shall be entitled to receive from the state treasurer a sum equal to forty per cent. of the amount paid in premiums, but in no case shall the amount so received in any county exceed two hundred dollars. The payment from the state treasury herein provided for shall be made by warrant of the state auditor as soon as due proof is made to him of the holding of said short course as herein provided; and there is hereby appropriated out of any money in the state treasury not otherwise appropriated, the sum necessary to pay the amount contemplated in this section. [33 G. A., ch. 109, § 1.]

SEC. **1661-a2. Farmers' institute fund—diversion to short course.** [In] all counties not holding a regular farmers' institute and where a short course is held, the money appropriated for such farmers' institute as provided in section sixteen hundred seventy-five of the supplement of the code, 1907, shall apply and be payable to said short course upon proof of such organization and such short course having been held, being filed with the state board of agriculture by the officers of said short course. [33 G. A., ch. 109, § 2.]

SEC. **1672. Printing and distribution.** There shall be printed four thousand copies of the report, which shall be bound in muslin covers, uniform in style with the reports heretofore made, which shall be distributed by the secretary of state, as follows: Six copies each to the governor, lieu-

tenant governor, secretary of state, auditor, treasurer, attorney-general, judges of the supreme court, and each member of the general assembly; one hundred to the agricultural college, five copies to the university, two to each incorporated college in the state, one to each auditor, and clerk of the district court, to be kept in his office, and one to each newspaper published in the state; the remainder to be distributed by direction of the society. [29 G. A., ch. 68, § 1; 18 G. A., ch. 6; C. '73, § 1120.]

SEC. 1673. **Appropriation.** The sum of four thousand dollars is hereby appropriated annually for the use and benefit of said society, which shall be paid upon the warrant of the auditor of state, upon the order of the president of said society, in such sums and at such times as may be for the interests of said society. [29 G. A., ch. 68, § 2; 20 G. A., ch. 128; C. '73, § 1121.]

SEC. 1674. **Publication of proceedings of improved stock breeders' association—repealed.** [28 G. A., ch. 58, § 18.]

[See § 1657-a.]

SEC. 1675. **Farmers' institutes—state aid—appropriation—failure to report.** That the law as it appears in section sixteen hundred seventy-five of the supplement to the code, 1907, be and the same is hereby repealed and the following enacted in lieu thereof:

"When forty or more farmers of a county organize a farmers' institute, with a president, secretary, treasurer, and an executive committee of not less than three outside of such officers and hold an institute, remaining in session not less than two days in each year, which institute may be adjourned from time to time and from place to place in said county, the secretary of the state board of agriculture, upon the filing with him a report of such institute and an itemized statement under oath showing that the same has been organized and held and for what purposes the money expended has been used, shall certify the same to the auditor of state, which state auditor shall remit to the county treasurer of such county his warrant for the amount so expended not to exceed seventy-five dollars and there is hereby appropriated out of the moneys in the state treasury not otherwise appropriated, a sum not to exceed seventy-five dollars annually for such institute work in each county. No officer of any such farmers' institute shall receive directly or indirectly any compensation from said fund for said services as such officer. The report provided for in this section shall be filed with the secretary of the state board of agriculture on or before the first day of June of each year. When any institute fails to report on or before the first day of June, that institute shall not receive state aid for that year." [33 G. A., ch. 110, § 1; 33 G. A., ch. 109, §§ 1, 2.] [29 G. A., ch. 69, § 1; 24 G. A., ch. 58, § 1.]

[See § 1661-a1, especially the first clause thereof; also § 1661-a2, the same being §§ 1 and 2 of ch. 109, 33 G. A. It may have been intended that both of the sections named should be added to § 1675 as well as to § 1661-a, but as the intent is not clear it has been thought advisable to place the sections as they appear above. Attention is called to the fact that ch. 110, 33 G. A. was approved April 1, 1909, and ch. 109, 33 G. A., was approved April 5, 1909. EDITOR.]

SEC. 1679. **Stations—observers—bulletins—speakers and lecturers.** The director shall coöperate with the board of directors of the state agricultural society to establish volunteer stations at one or more places in each county in the state, and in appointing observers thereat; to supervise such stations, receive reports of meteorological events and crop conditions therefrom, and tabulate the same for permanent record; to issue weekly weather and crop bulletins during the season from April first to October

first, and to edit and cause to be published at the office of the state printer a monthly weather and crop review, containing meteorological and agricultural matter of public interest and educational value. The state printer shall print three thousand copies thereof, which shall be distributed from the office of department of agriculture. The directors may require a larger issue for such subscribers as will pay the expense thereof. The director shall have advisory power to coöperate with the farmers' institute organizations of the several counties of the state, for the purpose of arranging dates and providing speakers or lecturers, with a view to economy of time and travel in attending institutes; such institutes to be held as nearly as practicable in circuits, and at such dates as will enable speakers to attend two or more such institutes each week. [28 G. A., ch. 58, § 19; 24 G. A., ch. 63, § 2; 23 G. A., ch. 29, § 4.]

SEC. 1681. **Appropriation.** There is hereby appropriated, out of any money in the state treasury not otherwise appropriated, the sum of twenty-seven hundred dollars annually, to be drawn and expended upon the order of the president and secretary of the department of agriculture, for such service, including the salary of the director, which shall not exceed fifteen hundred dollars per annum. [28 G. A., ch. 58, § 19; 24 G. A., ch. 63, § 1.]

SEC. 1682. **Publication of proceedings of state dairy association—repealed.** [28 G. A., ch. 58, § 18.]

[See § 1657-a.]

SEC. 1683. **Distribution—repealed.** [28 G. A., ch. 58, § 18.]

[See § 1657-a.]

SEC. 1683-a. **Body corporate in each county—purposes.** For the purpose of improving and advancing the science and art of agriculture, animal husbandry and horticulture, a body corporate is hereby authorized in each county in the state. [35 G. A., ch. 140, § 1.]

SEC. 1683-b. **How formed—articles filed.** Such body corporate may be formed by the acknowledging and filing for record with the county recorder of such county, of articles of incorporation by at least ten farmers, land owners, or other business men of each of the majority of the several townships of the county. [35 G. A., ch. 140, § 2.]

SEC. 1683-c. **Articles—what included.** The articles of incorporation shall be as follows: "We, the undersigned farmers, land owners and business residents of ..... county, Iowa, do hereby adopt the following articles of incorporation:

Article I. The objects of this incorporation shall be to advance and improve, in ..... county, Iowa, the science and art of agriculture, horticulture and animal husbandry.

Article 2. The name of this incorporation shall be The Farm Improvement Association of.....County, Iowa (inserting the name of the county of which the incorporators are residents).

Article 3. The affairs of this incorporation shall be conducted by a president, a vice president, a secretary and a treasurer, who shall perform the duties usually pertaining to such positions, and by a board of directors of nine members all of which officers and directors shall be elected by the members of said incorporation at an annual meeting on the first Monday of January of each year. Not more than two directors shall be residents of the same township, when elected. All officers and directors shall hold their positions for one year and until their successors are elected. We, the said incorporators, have elected the following provisional officers to hold

their respective positions until their successors are elected at the annual meeting in the year .....:

President .....
Vice president .....
Secretary .....
Treasurer .....

Board of Directors:

1 .....
2 .....
3 .....
4 .....
5 .....
6 .....
7 .....
8 .....
9 .....

Article 4. The yearly dues of the members of this incorporation shall be one dollar, payable at the time of applying for membership and on the first Monday in January of each year thereafter. No member having once paid dues, shall forfeit his membership until his or her subsequent dues are six months in arrears.

Article 5. Any citizen of the county and any nonresident owning land in the county shall have the right to become a member of the incorporation by paying one year's dues and thereafter complying with the articles of incorporation and by-laws.

Article 6. This incorporation shall endure until terminated by operation of law. [35 G. A., ch. 140, § 3.]

SEC. **1683-d. Private property exempt—seal.** Such body corporate may sue and be sued, but the private property of the members shall be exempt from corporate debts. It may have a seal which it may alter at pleasure. [35 G. A., ch. 140, § 4.]

SEC. **1683-e. By-laws—may receive bequests—experts employed—general powers—dues—prizes.** Such body corporate may, in such manner as it may see fit, adopt by-laws; shall have power to take by gift, purchase, devise or bequest real and personal property for purposes appropriate to its creation; may employ one or more experts or advisors to advance and improve agriculture, horticulture and animal husbandry in said county, provided that the president of the Iowa state college of agriculture and mechanic arts certifies to the qualification and fitness of such person to give expert instructions or advice in said sciences. Such body corporate shall have and exercise all powers necessary, appropriate and convenient for the successful carrying out of the objects of said incorporation. The said association shall have authority to use part or all of the sum annually received as dues from its members in the payment of prizes offered in any department of its work, including agriculture fairs, short courses or farmers' institutes. [35 G. A., ch. 140, § 5.]

SEC. **1683-f. Articles recorded—no fee.** The articles of incorporation shall be recorded by the recorder of deeds without fee of any kind. [35 G. A., ch. 140, § 6.]

SEC. **1683-g. No compensation.** No salary or compensation of any kind shall be paid to the president, vice president, treasurer or to any director. [35 G. A., ch. 140, § 7.]

SEC. **1683-h. No dividends—diversion of funds or property.** No dividend shall ever be declared by this incorporation. Any diversion of

the funds or property of such incorporation to any purpose except the purposes of incorporation shall constitute larceny and be punished accordingly. [35 G. A., ch. 140, § 8.]

SEC. **1683-i. Bond of treasurer—filed and recorded—minimum.** The treasurer shall give bond, the amount to be fixed by the board of directors in double the amount of money likely to come into his hands, with sureties. Said bond shall be filed with and approved by the county auditor and recorded without fee. In no case shall the bond of the treasurer be less than five thousand dollars. [35 G. A., ch. 140, § 9.]

SEC. **1683-j. Annual reports—records open to inspection.** The outgoing president and treasurer shall, on the first Monday of January of each year, file with the county auditor full and detailed reports under oath of all receipts and expenditures of said incorporation, showing from whom received and to whom paid and for what purpose. A duplicate of said report shall also be laid before the members at the annual meeting. The books, papers and records of said incorporation shall at all times be open to the inspection of the board of supervisors and to any one appointed by them to make examination. [35 G. A., ch. 140, § 10.]

SEC. **1683-k. Annual tax levy—submission of question.** Whenever the articles of incorporation are filed as herein provided and the president and secretary certifies to the board of supervisors that the incorporation of said association has been effected, the said board shall at the next regular election in said county submit to the voters of said county the question whether a yearly tax of not to exceed five thousand dollars shall be thereafter levied for the purpose of improving and advancing the science and art of agriculture, animal husbandry and horticulture. Said question shall be submitted on a separate ballot and substantially in the following form:

"Shall a yearly tax of not to exceed five thousand dollars be hereafter levied for the purpose of improving and advancing the science and art of agriculture, animal husbandry and horticulture."	☐ Yes ☐ No

The voter shall signify his vote on said proposition by placing a cross in the square opposite the word "yes" or "no." [35 G. A., ch. 140, § 11.]

SEC. **1683-l. Vote—how canvassed—board of supervisors to order levy—reimbursement of funds advanced.** The vote on said proposition shall be canvassed and returns made thereof as in other cases and if a majority of the votes are in favor of said proposition the board of supervisors shall, prior to the first day of January following said election, set aside, out of the general county fund, the sum of five thousand dollars, less any sum advanced to said association by the government of the United States in aid of its objects. Said sum so set aside shall be paid to the treasurer of said association, who shall be liable on his bond for the proper distribution thereof. If a majority of the votes be in favor of said proposition, the board of supervisors shall annually thereafter, and at the time of levying taxes generally, levy on all the property of the county a tax of five thousand dollars, less any amount advanced to said association, by the government of the United States in aid of its objects and at the first general levy of taxes following the advance of funds herein provided, levy an additional tax sufficient to reimburse said county for the funds so advanced. [35 G. A., ch. 140, § 12.]

SEC. **1683-m. Funds—how expended.** The treasurer of said incorporation shall receive all funds belonging to said incorporation and all taxes collected as herein provided and shall pay out the same only on bills

allowed by the board of directors, such allowance to be certified to by the president or secretary. [35 G. A., ch. 140, § 13.]

SEC. **1683-n. False certificate—penalty.** Any officer[1] making a certificate as provided herein, knowing the same to be false or incorrect in any particular, shall be guilty of a misdemeanor and punished accordingly. [35 G. A., ch. 140, § 14.]

[1"office" in enrolled bill. EDITOR.]

SEC. **1683-o. Misuse of funds by treasurer—penalty.** Any treasurer of such association who in any manner converts the funds or property of such association to his own use or pays out or disposes of the same in any manner different than as directed herein, shall be considered guilty of larceny and punished accordingly. [35 G. A., ch. 140, § 15.]

SEC. **1683-p. Funds advanced by government—certification of by officers.** The president and secretary of said association shall, prior to the time of making any levy or advancing any funds, as herein provided, certify to the board of supervisors the amount, if any, advanced to said association by the government of the United States for the ensuing year in aid of its objects. [35 G. A., ch. 140, § 16.]

SEC. **1683-q. Discontinuing levy—petition for submission of question.** After five successive levies have been made hereunder, any one hundred resident landowners of the county may petition the board of supervisors to submit to the voters of the county the question of discontinuing the levy herein provided for and upon said petition being found sufficient, the said board shall, at the next general election submit, on separate ballot, to the voters, the question whether said levy shall be discontinued. If a majority of the votes be in favor of discontinuing said levy, then no farther levies shall be made. [35 G. A., ch. 140, § 17.]

CHAPTER 3-A.

OF THE INSURANCE COMMISSIONER AND DEPARTMENT OF INSURANCE.

SECTION **1683-r. Appointment by governor—confirmation by senate—term—bond—compensation.** That there is hereby created and established a department to be known as the insurance department of Iowa. The chief officer of said department shall be styled "commissioner of insurance," and shall be appointed by the governor on or before the first day of July, nineteen hundred fourteen, said officer to serve until February first, nineteen hundred fifteen. On or before the date of the expiration of the term of office of the commissioner hereby provided for, the governor shall nominate, and with the consent of two thirds of the members of the senate in executive session, appoint a person for commissioner, who shall be selected solely with regard to his qualifications and fitness to discharge the duties of this position. No nomination shall be considered by the senate until the same shall have been referred to a committee of five, not more than three of whom shall belong to the same political party, to be appointed by the president of the senate without formality of a motion, which committee shall report to the senate in executive session, which report shall be made at any time when called for by the senate. The consideration of nominations by the senate shall not be had on the same legislative day that the nominations are so referred. Subsequent appointments shall be made as above provided and, except to fill vacancies, shall be for

a period of four years. He shall be subject to removal only under and according to the provisions of chapter seventy-eight of the acts of the thirty-third general assembly, as amended. The governor shall fill as in the first instance any vacancy which may arise in this office. Before entering upon the discharge of the duties of his office, the commissioner of insurance shall give a bond in the penal sum of twenty-five thousand dollars, conditioned as provided for in section eleven hundred eighty-three of the code, the same to be approved by the executive council and filed in the office of the secretary of state. He shall devote his entire time to the duties of his office and shall receive an annual salary of three thousand dollars. [35 G. A., ch. 146, § 1.]

SEC. **1683-r1. Office—equipment and supplies.** The executive council shall provide the insurance department of Iowa with suitable quarters at the seat of government and shall furnish said department with furniture, books, supplies, printing and stationery necessary to carry out the provisions of this act. All desks, chairs, filing cases and other furniture, and all books, papers, records and securities of whatsoever kind, and all other property of every character now in the office of the auditor of state and relating to or connected with the business and supervision of insurance in this state shall be transferred, delivered and surrendered to the commissioner of insurance upon the second secular day of January, nineteen hundred fifteen. [35 G. A., ch. 146, § 2.]

SEC. **1683-r2. Deputy — bond — examiners — assistants—clerks—compensation.** The commissioner of insurance is hereby directed to appoint a deputy commissioner to assist him in his work, who shall serve during the pleasure of the commissioner of insurance and receive an annual salary of eighteen hundred dollars. Before entering upon the duties of his office, the deputy commissioner shall give a bond in the penal sum of ten thousand dollars conditioned as provided in section eleven hundred eighty-three of the code, the same to be approved by the executive council and filed with the secretary of state. The commissioner of insurance is also empowered and directed to appoint two insurance examiners and the necessary assistant examiners, all as referred to and provided for in section eighteen hundred twenty-one-c, supplement to the code, 1907, as amended by chapter eighty, acts of the thirty-fourth general assembly; also a security clerk with an annual salary of sixteen hundred [dollars] ; a fee clerk with an annual salary of fourteen hundred dollars; a general insurance clerk with an annual salary of twelve hundred dollars; two stenographers with an annual salary of nine hundred dollars each; and such other clerks and assistants as shall be needed in the performance of the duties of his office; and he may contract such expenses as may be necessary in the performance of his official duties, including all actual and necessary expenses incurred in attending meetings of the insurance commissioners and such other expense as shall be approved by the executive council; but the total amount to be so expended for such contingent expenses shall not exceed the sum of ten hundred dollars annually; and there is hereby appropriated out of any funds in the state treasury not otherwise appropriated two thousand dollars annually or so much thereof as may be necessary to meet the expenses thus incurred. All salaries herein provided for shall be paid in the same manner as are the salaries of other state officers out of the general revenues of the state and on the first day of each month all such salaries and other expenses as are indicated herein shall be paid by warrant drawn by the auditor of state upon the treasurer of state. [35 G. A., ch. 146, § 3.]

SEC. **1683-r3. Powers and duties of commissioner.** The commissioner of insurance shall be the head of the insurance department of Iowa and shall have general control, supervision and direction of all insurance business transacted in the state of Iowa and shall be charged with the execution of the laws of this state relating to insurance; and all powers now vested in and all duties imposed upon the auditor of this state relating in any way to insurance matters, shall, from and after the taking effect of this act, be vested in and made incumbent upon the commissioner of insurance herein provided for. [35 G. A., ch. 146, § 4.]

SEC. **1683-r4. Documents and records—auditor shall deliver.** All books, records, files, documents, reports, and securities and all papers of every kind and character relating to the business of insurance and now enjoined and required by law to be delivered to or to be filed or be deposited with the auditor of state shall, from and after the taking effect of this act, be delivered to and filed or deposited with the said commissioner of insurance. [35 G. A., ch. 146, § 5.]

SEC. **1683-r5. Fees.** All fees and charges of every character whatsoever which are now required by law to be paid to the auditor of state by insurance companies and associations shall from and after the taking effect of this act be payable to the insurance commissioner whose duty it shall be to account for and pay over the same to the treasurer of state at the time and in the manner as now provided for by law for the auditor of state. [35 G. A., ch. 146, § 6.]

SEC. **1683-r6. Acts in conflict repealed.** All acts or parts of acts in so far as they are in conflict herewith are hereby repealed. [35 G. A., ch. 146, § 7.]

CHAPTER 4.

OF INSURANCE OTHER THAN LIFE.

SECTION **1687. Name.**

An insurance company, although authorized to do business by the auditor of state, may be enjoined from using a name which is so similar to the name of a foreign insurance company authorized to do business in the state that it is calculated to deceive the public. *Atlas Assurance Co. v. Atlas Insurance Co.*, 138-228, 112 N. W. 232, 114 N. W. 609.

SEC. **1689. Kind of company.** Every insurance company organized as provided in this chapter shall, if it be a mutual company, embody the word "mutual" in its title, which must appear upon the first page of every policy and renewal receipt; and every company doing business as a stock company shall, upon the face of its policies, express in some suitable manner that such policies are issued by a stock company. Provided that from and after July fourth, nineteen hundred and six, no company shall be organized upon the mutual plan, under the provisions of this chapter, for the purpose of transacting the business specified in subdivisions one and four of section seventeen hundred and nine of the supplement to the code [1902]. [31 G. A., ch. 68; C. '73, § 1140.]

The provisions as to mutual benefit associations are distinct from those for the incorporation of mutual companies, and the statutory requirement that the word "mutual" shall be included in the name of the company organized under the later provisions has no application to such a society. *Moore v. Union Fraternal Acc. Assn.*, 103-424, 72 N. W. 645.

SEC. 1690. Stock or mutual.

A mutual company cannot issue policies upon the stock plan, and such policies, if issued, are illegal and void. *Smith v. Sherman*, 113–601, 85 N. W. 747.

A company issuing a policy on the stock plan will be presumed to have authority to issue such a policy until the contrary appears. One contracting with the company is not bound to know at his peril whether the company has complied with the condition authorizing it to do a stock insurance business. *Harris-Emery Co. v. Pitcairn*, 122–595, 98 N. W. 476.

SEC. 1698. Secretary and other officers—by-laws—records.

By-laws duly adopted, but not posted as required by law, are valid and controlling as to all persons informed of their existence, the posting being required for the sole purpose of imparting constructive notice, and if the existence of the by-laws is expressly recognized, the person who receives such certificate is bound thereby. *Fee v. National Masonic Acc. Assn.*, 110–271, 81 N. W. 483.

While members of a mutual company may be bound by by-laws adopted after they become members, nevertheless the terms of a policy of insurance will be presumed to be governed by the by-laws in force when it is issued, and not to be affected by those subsequently adopted. *Farmers' Mut. Hail Ins. Assn. v. Slattery*, 115–410, 88 N. W. 949.

SEC. 1699. Funds invested. Section sixteen hundred ninety-nine of the code is hereby repealed and the following enacted in lieu thereof:

"Any company organized under this chapter shall invest its capital and funds in the following described securities and no other:

1. The bonds of the United States.

2. The bonds of this state or any other state when such bonds are at or above par.

3. Bonds or other evidences of indebtedness of any county, city, town or school district within the state or any other state, drainage district bonds of this state, improvement certificates issued by any municipal corporation of this state, such certificates being a first lien upon real estate within the corporate limits of the municipality issuing the same, where such bonds, or other evidences of indebtedness are issued by authority of and according to law and bearing interest.

4. Bonds and mortgages and other interest-bearing securities being first liens upon real estate within this state or any other state worth at least double the amount loaned thereon and secured thereby exclusive of improvements, or two and one-half times such amount including the improvements thereon, but no such improvement shall be considered in estimating the value unless the owner shall contract to keep the same insured during the life of the loan, in some reliable fire insurance company or companies authorized to do business in the state, other than the company making the investment, in a sum at least double the excess of the loan above one half the value of the ground exclusive of the improvements, the insurance to be made payable in case of loss to the company or association investing its funds, as its interest may appear at the time of loss; except that the surplus funds may be invested in stocks other than bank stock or in bonds or other evidences of indebtedness of any solvent dividend-paying corporation organized under the laws of any of the states, or of the United States, or may be loaned thereon upon pledge thereof, at not exceeding eighty per cent. of their current market value, but no investment shall be made in the company's own stock. [34 G. A., ch. 18, § 3; 33 G. A., ch. 111, § 1.] [C. '73, § 1130.]

While as between the state and the company the investment of its surplus in bank stock may be unauthorized, such a transaction entered into by the officers for the purpose of avoiding loss to the company may be so ratified by the directors in taking advantage of the benefits thereof as to estop the corporation from treating the transaction as *ultra vires*. *Fidelity Ins. Co. v. German Sav. Bank*, 127–591, 103 N. W. 958.

SEC. 1706. **Settlement of losses.**

The authority of making assessments conferred on the directors is exclusive and cannot be exercised by other officers under the direction of such directors. *Farmers' Milling Co. v. Mill Owners' Mut. Fire Ins. Co.*, 127-314, 103 N. W. 207.

SEC. 1709. **Kinds of insurance—limitation of risk.** Any company organized under this chapter or authorized to do business in this state may:

1. Insure houses, buildings, and all other kinds of property against loss or damage by fire, sprinkler leakage or other casualty, and make all kinds of insurance on goods, merchandise, moneys and securities or other property in the course of transportation, whether on land or water, or any vessel or boat wherever the same may be; and insure against loss of rents or use of buildings, when such loss or use is caused by fire, lightning, windstorms, cyclones or tornadoes;

2. Insure the fidelity of persons holding places of private or public trust, or execute as surety any bond or other obligation required or permitted by law to be made, given or filed, except bonds required in criminal causes. None but stock companies shall engage in fidelity and surety business;

3. Insure the safe keeping of books, papers, moneys, stocks, bonds and all kinds of personal property, and receive them on deposit;

4. Insure horses, cattle and other live stock against loss or damage by accident, theft or any unknown or contingent event which may be the subject of legal insurance, and stock companies may insure horses and registered cattle against loss by death from disease or accident;

5. Insure the health of persons and against personal injuries, disablement or death resulting from traveling or general accidents by land or water, insure against loss or damage to property caused by the accidental discharge or leakage of water from automatic sprinkling systems, and insure employers against loss in consequence of accidents or casualties of any kind to employes or other persons, or to property resulting from any act of an employe, or any accident or casualty to persons or property, or both, occurring in or connected with the transaction of their business, or from the operation of any machinery connected therewith; and insure against liability for loss or expense arising or resulting from accidents occurring by reason of the ownership, maintenance or use of automobiles or other conveyances, resulting in personal injuries or death, or damage to property belonging to others, or both. Provided that should an execution on a judgment against the owner of any such automobile or conveyance be returned unsatisfied in an action by a person who is injured or whose property is damaged by the use of such automobile or other conveyance, and such owner has insured his liability for such personal injury or property damage, the judgment creditor shall have a right of action against the insurer to the same extent that such owner could have enforced his claim against such insurer had such owner paid said judgment;

6. Insure against loss or injury to person or property, or both, growing out of explosion or rupture of steam boilers;

7. Any insurance company organized and incorporated on the stock or mutual plan may insure against loss or damage resulting from burglary or robbery, or attempt thereat. A mutual company organized under this subdivision shall not issue any policy to any person, firm, or corporation other than banks, bankers, loan companies, trust companies, and county treasurers. Provided, also, that companies organized to transact business as provided by this subdivision seven may hold their annual meetings in the month of July, instead of January;

8. Insure or guarantee and indemnify merchants, traders and those engaged in business and giving credit from loss and damage by reason of giving and extending credit to their customers and those dealing with them, which business shall be known as credit insurance;

9. Insure vessels, freights, goods, wares, merchandise, specie, bullion, jewels, profits, commissions, bank notes, bills of exchange and other evidences of debt, bottomry and respondentia interests and every insurance appertaining to or connected with marine risks of transportation and navigation, and insurance upon automobiles against loss or damage by fire from any cause whatsoever, explosion, self-ignition, lightning, salvage, theft, robbery, pilferage, collision, or marine or railroad perils. [35 G. A., ch. 144, § 1; 35 G. A., ch. 143, § 1; 34 G. A., ch. 18, § 4; 33 G. A., ch. 112, § 2.] [31 G. A., ch. 72, §§ 1, 2; 31 G. A., ch. 71, § 1; 31 G. A., ch. 70, § 1; 31 G. A., ch. 69; 29 G. A., ch. 71, § 1; 29 G. A., ch. 70, § 1; 28 G. A., ch. 60, § 1; 25 G. A., ch. 32; 24 G. A., ch. 29; C. '73, § 1132.]

Par. 1. A policy of insurance against loss by burglary, although issued prior to 28 G. A., ch. 60, is valid. *Bankers' Mut. Cas. Co. v. First National Bank*, 131–456, 108 N. W. 1046.

The statutory provision authorizing insurance against "loss or damage by fire or other casualty" is sufficiently broad to cover such casualty as burglary. *Ibid.*

In ordinary usage, "casualty" is commonly applied to losses and injuries which happen suddenly and unexpectedly, not in the usual course of events, and without any design on the part of the person suffering the injury, although the result is brought about by the conscious or intended act of another. *Ibid.*

Par. 5. The first clause of subdivision 5 of this section authorizes insurance against accidents that result in personal injury to the insured and not indemnity insurance against liability that may be imposed by law for some negligent or wrongful act of the insured. The second clause provides for liability insurance but limits it to employers. Therefore the second does not authorize the issuing of a policy to indemnify the owner of an automobile against liability that may be imposed upon him by law. *American Fidelity Co. v. Bleakley*, 157– —, 138 N. W. 508.

Foreign corporations are only permitted to do such insurance business in this state as is prescribed by statute. *Ibid.*

It would not be against public policy to permit indemnity insurance to owners of automobiles against liability that may be imposed upon them by law, if the statute should so provide. *Ibid.*

SEC. 1710. **Kinds of risks—limitation.** That the law as it appears in section seventeen hundred ten of the supplement to the code, 1907, be and the same is hereby repealed and the following enacted in lieu thereof:

"No company organized by either of the methods provided in this chapter, or authorized to do business in this state, shall issue policies of insurance for more than one of the nine purposes mentioned in the preceding section, or expose itself to loss on any one risk or hazard, to an amount exceeding ten per cent. of its paid up capital, unless the excess shall be reinsured in some other good and reliable company, except as in this section provided, as follows: Any stock company organized under the laws of this state, or authorized to do business in this state for the purpose of transacting the business specified in subdivision one of the preceding section, and whose charter will permit, is authorized, in addition to insuring against the casualties specified in subdivision one, to also insure against the casualties specified in subdivision nine of the preceding section. Any stock company organized under the laws of this state for the purpose of transacting the business specified in subdivision five of the preceding section with one hundred fifty thousand dollars capital stock, seventy-five thousand dollars of which is paid in cash, may in addition to insuring against the casualties specified in subdivision five, also insure against injury or loss to persons or property or both, growing out of explosion, or rupture of steam boilers and insure plate glass against breakage from

accident; and any stock company organized under the laws of any other state, or nation, and authorized under the laws of this state to transact the business specified in subdivision five of the preceding section, may if it has a paid up capital of two hundred fifty thousand dollars, in addition to insuring against the casualties specified in subdivision five of the preceding section, also insure against the casualties specified in subdivision six or insure plate glass against breakage from accident, or if such company is possessed of a paid up capital of three hundred thousand dollars, it may, in addition to insuring against the casualties specified in subdivision five, insure against the casualties specified in subdivision six and also insure plate glass against breakage from accident; and if said company is possessed of a paid up capital of five hundred thousand dollars, it may in addition to insuring against the casualty specified in subdivision five, insure against the casualty specified in subdivisions two and six and also insure plate glass against breakage from accident; provided further, however, that any stock company now or hereafter authorized under the laws of this state to transact the business described in [sub]division two or subdivision five of the preceding section shall, in addition to such insurance, also be authorized to insure against loss, or damage, resulting from theft, larceny, burglary, robbery, or attempt thereat. The restrictions as to the amount of risk a company may assume shall not apply to companies that receive on deposit and guarantee the safe keeping of books, papers, moneys, and other personal property. [34 G. A., ch. 78, § 1; 34 G. A., ch. 18, § 21; 33 G. A., ch. 112, § 3.] [31 G. A., ch. 71, § 2; 31 G. A., ch. 70, § 2; 29 G. A., ch. 72, § 1; 28 G. A., ch. 61, § 1; C. '73, § 1132.]

[§ 21, ch. 18, 34 G. A., attempts to make an amendment to § 1710 of the code; but, at the time ch. 18, 34 G. A., was enacted, the said § 1710 of the code had long since been repealed, as had also § 1710 of the supplement to the code, 1907. It is impossible to place the amendment proposed in said § 21, ch. 18, 34 G. A., in the above § 1710, but substantially the same amendment is included in § 360 of this supplement. EDITOR.]

SEC. 1711. **Loans—reinsurance.** Such company may lend money on bottomry or respondentia, and cause itself to be insured in companies only authorized to do business in this state, against any loss or risk it may have incurred in the course of its business, and upon the interest which it may have in any property on account of any such loan, and generally to do and perform all other matters and things proper to promote these objects. [34 G. A., ch. 18, § 5.] [C. '73, § 1132.]

SEC. 1714. **Annual statement.**

The statement required as to the financial condition of an insurance company is intended, not alone for the information of the auditor to enable him to determine whether he should issue a certificate, but also by way of information to the public. The fact that such statement is required to be published indicates such legislative intention. Therefore not only one who contracts for insurance, but also one who becomes a purchaser of stock of the company, is entitled to rely upon such statements, and a purchaser of stock may recover damages against an officer of a company for an intentional false statement which has operated to his prejudice. *Warfield v. Clark*, 118–69, 91 N. W. 833.

The provision that the statement shall show expenditures for the preceding year, and also the amount of losses paid during that time, how much subsequent to the date of the preceding statement, and the amount at which such losses were estimated in such statement, implies that some of the matters to be included in the statement are to be given by way of estimate. *Ibid.*

SEC. 1720. **Auditor's report—repealed.** [28 G. A., ch. 62, § 1.]
[See § 1720-a.]

SEC. 1720-a. **Auditor's report.** That section seventeen hundred twenty of the code be repealed, and the following enacted in lieu thereof:

"He shall cause the information contained in the statements required of the companies organized or doing business in the state to be arranged in detail, and prepare the same for printing, which report shall be made to the governor on or before the first day of May of each year." [28 G. A., ch. 62, § 1; 16 G. A., ch. 164; C. '73, § 1158.]

SEC. **1721. Foreign companies—capital required.** No insurance company, association or partnership incorporated, associated or organized under or by the laws of any other state or any foreign government, for the purposes specified in this chapter, shall directly or indirectly take risks or transact any business of insurance in the state, unless possessed of two hundred thousand dollars of actual paid up capital, exclusive of any assets deposited in other states and territories for the special benefit or security of the insured therein; but the provisions of this section shall not apply to mutual insurance companies or associations specifically organized for the purpose of and insuring a single class of property only; and companies organized to insure plate glass exclusively are not required to have a greater capital than one hundred thousand dollars; but such companies organized to insure the health of persons and against personal injuries, disablement or death resulting from traveling or general accidents by land or water, having an actual paid up capital of one hundred thousand dollars and surplus to be approved by the auditor of state, exclusive of any assets deposited in other states and territories for the special benefit or security of the insured therein, shall be deemed sufficient, within the meaning of this section. [34 G. A., ch. 18, § 6.] [21 G. A., ch. 145; 16 G. A., ch. 60; 15 G. A., ch. 55; C. '73, § 1144.]

SEC. **1722. Service of process—statement.**

It is the written consent of the corporation, and not the statute itself, which confers on the auditor power to acknowledge service. *Greaves v. Posner*, 111–651, 82 N. W. 1022.

SEC. **1724. Certificate.**

The power to exclude foreign corporations includes the right to preclude such corporations from continuing in business without complying with the provisions imposed by statute. *Manchester Fire Ins. Co. v. Herriott*, 91 Fed. 711.

It is only upon compliance with statutory requirements that foreign companies become entitled to do business within the state. *Hartman v. Hollowell*, 126–643, 102 N. W. 524.

SEC. **1725. Agent to have certificate of authority.**

An agent procuring insurance for his principal in a company not authorized to do business in the state becomes liable to the principal for any loss resulting from the failure to procure valid insurance. *Hartman v. Hollowell*, 126–643, 102 N. W. 524.

SEC. **1727. Forfeiture of policies.**

This section was designed to give to the assured at least thirty days from the mailing of the notice in which to make the payment to which the notice refers, and the time cannot be shortened by a direction on the envelope containing the notice that it shall be returned if not delivered within fifteen days. *Smith v. Continental Ins. Co.*, 108–382, 79 N. W. 126.

Where such notice treats two policies as one, although they are separate and distinct, it should specify the amount required to cancel each policy, and also the amount of the premium about to become due on account thereof. *Ibid. Born v. Home Ins. Co.*, 110–379, 81 N. W. 676.

Forfeitures are not favored and the provisions of this section are mandatory and must be strictly followed. *McDonald v. Anchor Mut. Ins. Co.*, 116–371, 89 N. W. 1091.

Error in stating the amount of the short rate, as fixed by the auditor under the provisions of code § 1729, will defeat the forfeiture. *Ibid.*

The provisions of 18 G. A., ch. 210, as to notice of forfeiture for nonpayment of premium note, had no application to a

forfeiture of membership in a mutual association for failure to pay assessments. *Beeman v. Farmers' Pioneer Mut. Ins. Assn.*, 104–83, 73 N. W. 597.

Notwithstanding the proper notice of forfeiture for failure to pay a premium note the failure in that respect will not defeat recovery under the policy if a copy of the note is not attached to the policy as a part of the application in which the provision as to forfeiture is contained. *Robey v. State Ins. Co.*, 146–23, 124 N. W. 775.

SEC. **1728. Cancellation of policy.** At any time after the maturity of a premium, assessment or installment provided for in the policy, or any note or contract for the payment thereof, or after the suspension, forfeiture or cancellation of any policy or contract of insurance, the insured may pay to the company the customary short rates and costs of action, if one has been commenced or judgment rendered thereon, and may then, if he so elect, have his policy and all contracts or obligations connected therewith, whether in judgment or otherwise, canceled, and they and each of them thereafter shall be void; and in case of suspension, forfeiture or cancellation of any policy or contract of insurance, the assured shall not be liable for any greater amount than the short rates earned at the date of such suspension, forfeiture or cancellation and the costs herein provided. The policy may be canceled by the insurance company by giving five days' notice of such cancellation, in which event it may retain only the pro rata premium. [34 G. A., ch. 18, § 7.] [18 G. A., ch. 210, § 3.]

An association purporting to be organized under the provisions of § 1160 of the code of '73, but in fact exacting premium notes instead of assessments from its members, thereby subjected itself to the requirements of 18 G. A., ch. 210 (code § 1727), as to giving notice of forfeiture on account of nonpayment of such notes. *Bradford v. Mut. Fire Ins. Co.*, 112–495, 84 N. W. 693.

SEC. **1731. Examination—dissolution.**

An insurance company may enforce assessments for the purpose of making good a depletion of its capital, without a requisition from the auditor of state directing such assessment. *Iowa National Bank v. Cooper*, 131–556, 107 N. W. 625.

SEC. **1737. Certificates of compliance—how published.** That section seventeen hundred thirty-seven of the code, be and the same is hereby repealed and the following enacted in lieu thereof:

"The auditor of state shall annually, as soon as practicable after the first of March, publish in two newspapers of general circulation, a statement made up from the annual report of every insurance company of the character provided for in this chapter and doing business in this state whether organized under the laws of this or any other state, which statements shall contain a synopsis of the company's annual report and shall show that the company has in all respects complied with the laws of the state relating to insurance and is authorized to transact business in the state. One publication as above contemplated, shall be made at the seat of government, and in case of companies organized in this state and located elsewhere than in the city of Des Moines, the other shall be made in the county in which the home office of the company is located. The fee for each publication shall be six dollars, which shall be paid to the auditor of state at the time and in the manner provided for in section seventeen hundred fifty-two, supplement to the code, [1902] and shall be by him paid to the papers making the publication upon receipt of a bill for same, together with an affidavit by the publisher or foreman showing that such publication has been properly made, the same to be filed within thirty days from the date of such publication." [31 G. A., ch. 73; C. '73, § 1155.]

SEC. **1741. Copy of application.**

The fact that the application is not embodied in or attached to the policy does not preclude proof of the terms of the application in a suit by the insured against

members and officers of a mutual benefit association to compel the payment of the assessment, where such evidence is sought to be introduced for the purpose of showing that the assured knew that the company was conducted on the assessment plan. *Moore v. Union Fraternal Acc. Assn.*, 103–424, 72 N. W. 645.

The purpose of the statutory provisions under which it is necessary to set the application out in or attach it to the policy is, that when the application is made a part of the contract, a true copy must be attached to the policy, so that the writings composing the contract may all appear together and that the insured may be in possession of the evidence of what his contract is. Therefore, held that the statute contemplates more than a mere substantial copy of the application and yet not a true likeness or fac simile. The copy must be so exact and accurate as that upon comparison it can be said to be a true copy without resorting to construction. *Johnson v. Des Moines L. Assn.*, 105–273, 75 N. W. 101.

Where a copy of an application attached to or incorporated in the policy is defective and incomplete, the company is precluded from proving the falsity of the representations in the application as a defense to an action on the policy. *Corson v. Anchor Mut. F. Ins. Co.*, 113–641, 85 N. W. 806.

Where the copy of an application attached to the policy is totally defective and insufficient, the company cannot show misrepresentations or breach of conditions contained in such application. *Corson v. Iowa Mut. Fire Ins. Assn.*, 115–485, 88 N. W. 1086.

The provisions of this section are applicable to mutual companies, notwithstanding the provisions of code § 1759. *Ibid.*

A premium note, nonpayment of which will by the terms of the application render the policy void, must be set out as a part of the application under the provisions of this section. (Following *Lewis v. Burlington Ins. Co.*, 71–97; S. C. 80–259.) *Summers v. Des Moines Ins. Co.*, 116–593, 88 N. W. 326.

The examiners' report on an application for life insurance is not a part of the application or representation of the assured, and is not required to be included in the copy of the application. The same is true as to notes of instructions given for making the application and answers and notes and indorsements upon the back of the application made for mere convenience. *Johnson v. Des Moines L. Assn.*, 105–273, 75 N. W. 101.

Where the copy of the application attached to the policy indicated that it had been signed, but did not show a copy of the signature, held that it was not such copy as required by the statute and the terms of the application could not be considered in an action on the policy. *Seiler v. Economic L. Assn.*, 105–87, 74 N. W. 941.

It is the application or representations of the assured only that is required to be attached to or indorsed upon the policy. It is not necessary to indorse thereon provisions found in the by-laws of a mutual company by which the policy is issued. *Fitzgerald v. Metropolitan Acc. Assn.*, 106–457, 76 N. W. 809.

Indorsement of a copy of the application upon the policy, or its attachment thereto, is a necessary foundation for pleading the falsity of statements made therein. *Parker v. Des Moines L. Assn.*, 108–117, 78 N. W. 826.

The provisions of ch. 211, acts of 18 G. A., embodied in this section, held applicable to fraternal societies issuing certificates on lives of members. *Stork v. Supreme Lodge K. of P.*, 113–724, 84 N. W. 721.

The statutory provision requiring insurance companies to attach a copy of the application to each policy of insurance is applicable to fidelity insurance companies. *United States F. & G. Co. v. Egg Shippers' Strawboard & F. Co.*, 148 Fed. 353.

The fact that warranties and representations embodied in the application cannot be proven because no copy of such application was attached to the policy, does not prevent the company from relying on such warranties and representations as are included in the policy itself. *Kirkpatrick v. London Guar. & Acc. Co.*, 139–370, 115 N. W. 1107.

Where no copy of the application is indorsed on the policy the defense of false representation in the application cannot be relied upon. *Salzman v. Machinery Mut. Ins. Assn.*, 142–99, 120 N. W. 697.

Where the provision as to forfeiture for nonpayment of premium note is contained in the application, failure to attach copy of application to the policy will prevent reliance on default in the payment of a premium note as a defense although notice of such default has been duly given. *Robey v. State Ins. Co.*, 146–23, 124 N. W. 775.

The statute does not require that a copy of any agreement made subsequently to the issuance or renewal of the policy shall be attached. *Wilson v. Royal Union Mut. Life Ins. Co.*, 137–184, 114 N. W. 1051.

SEC. 1742. Evidence of value—proofs—action.

Evidence of value: The statute does not attempt to fix, as the measure of recovery in case of the destruction of buildings, any other than the actual value of the building at the time of loss. If, after the prima-facie showing made by proof of

the amount of insurance, the company shall offer evidence to show the actual value to be less, then the amount of recovery becomes a question for the jury, and the actual value is as the jury shall find it. The parties may by contract stipulate for the ascertainment of this actual value by appraisers as a condition precedent to the right of action. *Zalesky v. Home Ins. Co.*, 108–341, 79 N. W. 69.

Whether the latter part of this section is applicable in case of loss of personal property covered by the policy, *quaere*. *Westenhaver v. German-American Ins. Co.*, 113–726, 84 N. W. 717.

Where a policy for four thousand dollars was issued under an arrangement with the soliciting agent that total insurance to the extent of seven thousand dollars should be procured on the property, held that in an action on the four thousand dollar policy the total amount of insurance contemplated was *prima facie* the value of the property insured. *Wensel v. Property Mutual Ins. Assn.*, 129–295, 105 N. W. 522.

An instruction directing the jury that the law presumes the building to have been of the value for which it was insured instead of saying that the amount stated in the policy should be received as prima-facie evidence of the insurable value of the property, held not erroneous, where the verdict was for less than half of the amount of the insurance. *Walrod v. Des Moines F. Ins. Co.*, 140 N. W. 218.

Proofs of loss furnished to the company are only admissible in evidence in the first instance to establish the fact that they were so furnished. If a schedule attached to such proofs is referred to by a witness as furnishing a correct statement of the items of property destroyed and the value thereof, it may be introduced in evidence in connection with such testimony, but the two purposes should be kept distinct. *Names v. Union Ins. Co.*, 104–612, 74 N. W. 14.

Under previous statutory provisions held that proofs of death in a particular case were not sufficient. *Stephenson v. Bankers' Life Assn.*, 108–637, 79 N. W. 459.

There is no statutory requirement of proof of loss as a condition precedent to the maintenance of an action for benefit or indemnity against a mutual assessment association. *Brinsmaid v. Iowa State Trav. Men's Assn.*, 152–134, 132 N. W. 34.

SEC. 1742-a. **Proofs of loss.** In furnishing proofs of loss under any contract of insurance for damages or loss of personal property it shall only be necessary for the assured, within sixty days from the time the loss occurs, to give notice in writing to the company issuing such contract of insurance accompanied by an affidavit, stating the facts as to how the loss occurred, so far as same are within his knowledge, and the extent of the loss, any agreement or contract to the contrary notwithstanding. [29 G. A., ch. 73, § 1.]

The provisions of the policy relating to proofs of loss are superseded by the statutory provisions so far as they are inconsistent. *American Cereal Co. v. Western Assur. Co.*, 148 Fed. 77.

SEC. 1743. **Conditions.** Any condition or stipulation in an application, policy or contract of insurance, making the policy void before the loss occurs, shall not prevent recovery thereon by the insured, if it shall be shown by the plaintiff that the failure to observe such provision or the violation thereof did not contribute to the loss: provided, however, that any condition or stipulation referring to any other insurance, valid or invalid, or to vacancy of the insured premises or the title or ownership of the property insured, or to lien, or incumbrances thereon created by voluntary act of the insured and within his control, or to the suspension or forfeiture of the policy during default or failure to pay any written obligation given to the insurance company for the premium, or to the assignment or transfer of such policy of insurance before loss without the consent of the insurance company, or to the removal of the property insured, or to a change in the occupancy or use of the property insured, if such change or use makes the risk more hazardous, or to the fraud of the insured in the procurement of the contract of insurance, shall not be changed or affected by this provision. No recovery on a policy or contract of insurance shall be defeated for failure of the insured to comply, after a loss occurs, with any arbitration or appraisement stipulation as to fixing value of property.

No arbitration shall take place except where the property was situated at the time of loss. Any agreement, stipulation or condition in any policy or contract of insurance by which any insurance company reserves or has the right to rebuild shall be void and of no effect in case of total loss, or where the amount of loss, upon the request of the insurance company, has been submitted to arbitration. Nothing herein shall be construed to change the limitations or restrictions respecting the pleading or proving of any defense by any insurance company to which it is subject by law. The provisions of this section shall apply to all contracts of insurance on real and personal property. [32 G. A., ch. 75; 28 G. A., ch. 64, § 1; 28 G. A., ch. 63, § 1.]

This provision has no application to the failure of the insured to comply with a condition precedent to the taking effect of the policy. *Banco De Sonora v. Bankers' Mut. Casualty Co.*, 124–576, 100 N. W. 532.

A breach of warranty or condition constitutes, generally speaking, no defense if it appears that such breach did not occasion or contribute to the loss; but the defense based on change in use or occupancy is good if such change makes the risk in fact more hazardous. *Krell v. Chickasaw Farmers' Mut. Fire Ins. Co.*, 127–748, 104 N. W. 364.

The burden is on the insured suing on the policy to show that change in use or occupancy in violation of the provisions of the policy did not contribute to the loss. *Ibid.*

The question whether a change in occupancy without consent increases the risk is for the jury. *Nicholas v. Iowa Merch. Mut. Ins. Co.*, 125–262, 101 N. W. 115.

The fact that the furniture in a dwelling house is insured after taking a policy on the house itself does not in the absence of fraud or over-insurance constitute an increase of hazard as to the building. *Ibid.*

Breach of an agreement to keep a set of books in an iron safe will not defeat recovery for a loss under the policy unless it is pleaded and proven that such breach contributed to the loss. *Johnson v. Farmers' Ins. Co.*, 126–565, 102 N. W. 502.

A provision in the policy that the removal of the property shall be deemed an increase of the risk as a matter of law is void in view of the statutory provision that the breach of the condition as to removal shall not affect the validity of the policy unless it increases the risk. The burden is on the insured to show that the removal, in violation of the terms of the policy, did not cause or contribute to the loss, but the burden is on the company to show, as a matter of defense, that it increased the risk. *Adams v. Atlas Mut. Ins. Co.*, 135–299, 112 N. W. 651.

This section does not apply to forfeitures accrued under policies previously issued. *Elliott v. Farmers' Ins. Co.*, 114–153, 86 N. W. 224.

This section does not apply to provisions making void the policy for vacancy or unoccupancy. *Cone v. Century Fire Ins. Co.*, 139–205, 117 N. W. 307.

The burden is on the plaintiff to show that a change of occupancy, if any, in violation of the provisions of the policy did not cause or contribute to the fire, and the burden is on the defendant to show that such change, if any, increased the risk. *Seaman v. Anchor Fire Ins. Co.*, 149–583, 128 N. W. 934.

This section has relation to cases where there is provision in the policy prohibiting the act complained of. Where there is no such provision, the burden does not rest on the plaintiff to show that there was in fact not an increase of hazard. When it is shown that the insured has done some act prohibited by the policy, then the burden rests on him to show that the violation did not increase the hazard. *Kinney v. Farmers' Mut. F. Ins. Soc'y*, 141 N. W. 706.

From the provision of this section it is evident that it was not intended by code § 1750 to invalidate a provision in a policy that the agent shall bind the company only in writing. *Mulrooney v. Royal Ins. Co.*, (C. C.) 157 Fed. 598.

SEC. 1744. Notice and proof of loss—time of bringing action—provisions not affected by contract. The notice of loss and proof thereof required in section seventeen hundred forty-two hereof, and the notice and proof of loss under oath in case of insurance on personal property, shall be given within sixty days from the time loss occurred, and no action for such loss shall be begun within forty days after such notice and proofs have been given to the company, nor shall the time within which action shall be brought be limited to less than one year from the time when a cause of action for the loss accrues. No provisions of any policy or con-

tract to the contrary shall affect the provisions of this and the three preceding sections. [27 G. A., ch. 44, § 1; 18 G. A., ch. 211, § 3.]

Proofs of loss: The statutory requirement as to notice and proofs of loss is all that can be made essential by the contract. A notice and affidavit are sufficient to constitute the proof required. The sufficiency of the document is not dependent on the intent, but on the contents. *Parks v. Anchor Mut. F. Ins. Co.*, 106–402, 76 N. W. 743.

This statute concerning proofs of loss supersedes the provisions of a policy of insurance with relation to the same matter. *Washburn-Halligan Coffee Co. v. Merchants' etc. Fire Ins. Co.*, 110–423, 81 N. W. 707.

Stipulations in a policy that no officer or agent shall have power to waive any provision or condition of the policy, except such as by the terms of the policy may be subject of agreement endorsed thereon or added thereto, do not prevent waiver of proofs of loss by an officer or agent having general authority to do so. Such a stipulation relates to the conditions and provisions of the policy and not to their performance. *Ibid*, and *Lake v. Farmers' Ins. Co.*, 110–473, 81 N. W. 710.

The provisions of 18 G. A., ch. 211, § 3, relating to proofs of loss, as originally enacted, held applicable to mutual benefit associations as well as fire insurance companies. *Parsons v. A. O. U. W.*, 108–6, 78 N. W. 676.

The legislature provides the character and kind of proofs that shall be made upon the happening of a loss, and no greater proof can be exacted; but the company may stipulate for less than is required by the statute in this respect. *Kinney v. Farmers' Mut. F. Ins. Soc'y*, 141 N. W. 706.

Waiver: Good faith requires that upon receipt of proofs of loss, if the company is not satisfied therewith, it should specify its objections thereto to the end that the proofs may be perfected if possible, and if the company fails to specify the objections at a time when they might be remedied it should not afterwards be heard to urge them. *Dyer v. Des Moines Ins. Co.*, 103–524, 72 N. W. 681.

The action of the company in asking for an arbitration to determine the amount to be paid is a waiver of defects in the proofs or notice of loss known to the company before the arbitration took place. *Dee & Sons Co. v. Key City F. Ins. Co.*, 104–167, 73 N. W. 594.

Notwithstanding a provision in the policy that none of its terms or conditions can be waived by any person except in writing by the secretary of the company, and that no agent has any authority to waive or modify any printed conditions of the policy, an adjusting agent having power to determine what proofs are satisfactory may waive those proofs which are regarded unimportant, although certain specified proofs are required by the policy. *Brock v. Des Moines Ins. Co.*, 106–30, 75 N. W. 683.

Failure to object to the proofs of loss because not accompanied by affidavit, as required, amounts to a waiver of objection on this ground. *Pringle v. Des Moines Ins. Co.*, 107–742, 77 N. W. 521.

Where the company refuses payment on the ground that the policy has been suspended in consequence of failure to pay an installment of premium, waiver of proofs of loss may be inferred. *Pray v. Life Indemnity & Security Co.*, 104–114, 73 N. W. 485; *Smith v. Continental Ins. Co.*, 108–382, 79 N. W. 126.

Unqualified refusal to pay constitutes a waiver on the part of the insurance company of proofs of death, where something purporting to be proofs of death has been received by the company and not objected to. *Stephenson v. Bankers' Life Assn.*, 108–637, 79 N. W. 459.

The promise of the company to pay is as effective as the waiver of proofs, as a denial of liability and the promise of settlement is inconsistent with insistence on strict compliance with the conditions of the contract. *Lake v. Farmers' Ins. Co.*, 110–473, 81 N. W. 710.

Telegrams from insured advising the company of the loss and giving it all information which the insured could be supposed to have may constitute sufficient proof of the loss and by failing to object for want of an affidavit to such proofs, the company waives the requirement. *Nicholas v. Iowa Merch. Mut. Ins. Co.*, 125–262, 101 N. W. 115.

An agent having power to adjust a loss has authority to waive formal proofs of loss. *Lake v. Farmers' Ins. Co.*, 110–473, 81 N. W. 710.

Where the adjuster requires the procurement of duplicate invoices, which are prepared at considerable expense, the company cannot afterwards object that the proofs of loss are not sufficient. If the conduct of the company is such as to induce the insured to rest, in good faith, under the well founded belief of strict compliance and that the conditions will not be insisted on, it cannot afterwards set up nonperformance of such conditions as a bar to recovery. *Ibid. Corson v. Anchor Mut. F. Ins. Co.*, 113–641, 85 N. W. 806.

Time for bringing action: Where action is prematurely brought because of failure of insured to demand an appraisement he cannot cure the defect in his proceeding by subsequently demanding such appraisal and setting out the fact in the supplemental petition. *Zalesky v. Home Ins. Co.*, 102–613, 71 N. W. 566.

The statutory provision cannot be waived and an action brought in less than ninety days after notice of loss or a waiver of notice and proof is premature. *Blood v. Hawkeye Ins. Co.*, 103–728, 69 N. W. 1141.

Although in the second action it is claimed that the first action was not prematurely brought, this will not sustain the second action brought after the period of limitation under the policy has expired. *Wilhelmi v. Des Moines Ins. Co.*, 103–532, 72 N. W. 685.

Where the first action for a loss under a policy was prematurely brought and subsequently another action was brought after the time limited in the policy for bringing action, held, that the second action was not to be deemed a continuation of the first action under the provisions of code § 3455. *Harrison v. Hartford F. Ins. Co.*, 67 Fed. 298.

The provisions of 18 G. A., ch. 211, as to time of bringing action were not applicable to associations organized under § 1160 of the code of '73, but associations collecting premiums instead of assessments from members were not properly organized under that section, and therefore were subject to the provisions of said act of 18 G. A. *Bradford v. Mutual Fire Ins. Co.*, 112–495, 84 N. W. 693.

Where the policy limited the time of bringing action to six months next after the fire, held that the six months commenced to run, not from the time of the fire, but from the time when the loss became payable, that is, sixty days after the notice and proof of loss were furnished. *Read v. State Ins. Co.*, 103–307, 72 N. W. 665.

The provision of this section as to time of bringing suit held applicable to a loss occurring prior to the taking effect of the code, when the statute provided that suit should not be brought within ninety days. Such a statutory provision relates to the remedy and is no part of the contract. *Jones v. German Ins. Co.*, 110–75, 81 N. W. 188.

The defense that action on a policy is not brought within the statutory period specified in the contract is one which must be affirmatively introduced, otherwise it will be deemed waived. *Miller Brewing Co. v. Capital Ins. Co.*, 111–590, 82 N. W. 1023.

Prior to the adoption of this section it was lawful for the parties to create a contract limitation which would be binding on the courts, and under this section the parties may contract as before, provided the limitation fixed by them is not less than one year. *Farmers' Co-Op. Creamery Co. v. Iowa State Ins. Co.*, 112–608, 84 N. W. 904.

The change in the statute is not applicable to contract limitations under a policy executed before the change in the statute, and which were valid when made. *Ibid.*

The time within which action on a policy may be brought cannot by stipulation be limited to less than one year from the time when a cause of action has accrued. *Kenny v. Bankers' Acc. Ins. Co.*, 136–140, 113 N. W. 566.

SEC. 1745. **Forms of policies.** The form of all policies or permits issued or proposed to be issued by any insurance company doing business in this state under the provisions of this chapter, shall first be examined and approved by the auditor of state [who] shall refuse to authorize it to do business or to renew its permission to do business when the form of policy issued or proposed to be issued does not provide for the cancellation of the same at the request of the insured upon equitable terms, and the return to the insured of any premium paid in excess of the customary short rates for the insurance up to the time of cancellation, or the release of the insured from any liability beyond such short rates, or for losses after the cancellation of the policy if the insurance be in a mutual company; and in case any company or association shall issue any policies not containing such provision, it shall be the duty of the auditor to revoke the authority of such company or association to do business. [34 G. A., ch. 18, § 8.] [17 G. A., ch. 39, § 1.]

The provision of a policy for cancellation by the insured should not be construed as requiring repayment of premiums by the company before such cancellation can become effective. *Parsons v. Northwestern Nat. Ins. Co.*, 133–532, 110 N. W. 907.

SEC. 1746. **Other insurance—coinsurance clause—prorating.** Any provision, contract or stipulation contained in any policy of insurance, issued by any insurance company doing business in the state under the provisions of this chapter, providing or stipulating that the insured shall maintain insurance on any property covered by such policy to any extent,

or shall to any extent be an insurer of the property insured in such policy, or shall bear any portion of the loss on the property insured, shall be void; and the auditor of state shall refuse to authorize any such company to do business or to renew the authority or the certificate of any such company when the form of policy issued or proposed to be issued contains any such provision, contract or stipulation; provided, that upon the written request of any person desiring insurance, a rider providing for coinsurance may be attached to and become a part of the policy, but in no case shall such rider apply to dwellings or farm property, nor to any risk where the total value of the property to be insured is less than twenty-five thousand dollars, except as to grain elevators and grain warehouses and their contents. The request for the application of the coinsurance clause or rider to any policy of insurance shall be written or printed on a single sheet of paper which shall contain nothing but the request hereinafter set out, and said request must be signed by the insured and a copy thereof be left with him by the agent at the time the insurance is applied for. No form of request for coinsurance except the following shall be used by any company doing business within this state:

REQUEST FOR THE APPLICATION OF THE COINSURANCE CLAUSE.

In consideration of a reduction from the established rate of ..... per cent. to ..... per cent. in premiums to be paid to the ..... insurance company for insurance upon the following described property .....
.....,
I hereby request that a coinsurance rider be attached to the policy to be issued by said company and hereby agree, that during the life of the policy I will maintain insurance on said property to the extent of at least ..... dollars, (or) ..... per cent. (whichever may be agreed upon) of the actual cash value thereof at the time of fire, and that failing to do so, I shall become a coinsurer to the extent of such deficit.

Before signing this request or the coinsurance rider to be attached to the policy to be issued I carefully read each of them and fully understand that in case I shall fail to maintain insurance on the previously described property to the extent above provided, then in the event of loss or damage this company shall not be liable for a greater per cent. of the loss or damage to said property than:

1. The total amount of insurance maintained bears to ..... dollars, or:
2. The total amount of insurance maintained bears to ..... per cent. of the actual cash value of the property insured at the time of fire.

Date..... .....Insured.

The coinsurance rider to be used shall be signed by both the agent and the insured and a copy thereof shall be left with the insured at the time the application is made for insurance. The rider shall be in form and restrictions as follows:

IOWA COINSURANCE AND REDUCED RATE CLAUSE.

(This clause must be signed by both the insured and the agent.)

In consideration of the acceptance by the insured of a reduction in premiums from the established rate of ..... per cent. to ..... per cent., it is hereby agreed that the insured shall maintain insurance during the life of this policy upon the property insured:

1. To the extent of ..... dollars, or
2. To the extent of at least ..... per cent. of the actual cash value thereof at the time of fire (whichever may be agreed upon) and, that failing to do so the insured shall be a coinsurer to the extent of such deficit.

This clause, at the request of the insured, is attached to and forms part of policy number ..... of the ..... insurance company of ..... and shall in no case apply to dwellings or farm property, nor to any risk wherein the total value of the property shall be less than twenty-five thousand dollars, except grain elevators and grain warehouses, and the contents of the same.

.....Insured.

....Agent.

Date

No condition or stipulation in a policy of insurance fixing the amount of liability or recovery under such policy with reference to prorating with other insurance on property insured shall be valid except as to other valid and collectible insurance, any agreement to the contrary notwithstanding. [34 G. A., ch. 79, § 1.] [25 G. A., ch. 31.]

A stipulation to include a void policy in determining the prorata liability of the company cannot be enforced, and the fact that the company issuing the void policy may have treated it as valid, cannot affect the liability of the company issuing a subsequent policy. *Gurnett v. Atlas Mut. Ins. Co.*, 124–547, 100 N. W. 542.

This section does not prohibit the use of the "average clause" where several distinct items of property are covered by one policy. *Dahms v. German F. Ins. Co.*, 153–168, 132 N. W. 870.

SEC. 1749. Advertisements—soliciting agents.

An agent instructed to procure insurance is liable to his principal for any loss resulting from procuring insurance in a company not authorized to do business in the state. *Hartman v. Hollowell*, 126–643, 102 N. W. 524.

SEC. 1750. Who deemed agent.

A soliciting agent with power to take and forward applications and receive money to be paid when the insurance is effected, does not have authority to bind the company by declarations as to the validity of the contract of insurance or as to the rights and liabilities of the company, when such declarations are not made while discharging his duties as agent in the transaction in question. *Schoep v. Bankers' Alliance Ins. Co.*, 104–354, 73 N. W. 825.

An adjusting agent with authority to ascertain and settle losses has of necessity power to determine what proofs are satisfactory and to waive those which are regarded as unimportant. *Brock v. Des Moines Ins. Co.*, 106–30, 75 N. W. 683.

An agent having the power to transact all the business within the apparent scope or usual extent of his employment in issuing policies may waive the conditions of a policy as to incumbrances, notwithstanding a provision in the policy denying such authority to the agent. *Liquid Carbonic Acid Mfg. Co. v. Phoenix Ins. Co.*, 126–225, 101 N. W. 749.

An adjuster of losses has authority to waive conditions affecting the validity of the policy. *Arispe Mercantile Co. v. Queen Ins. Co.*, 141–607, 120 N. W. 122.

Knowledge by a soliciting agent of the existence of other insurance is a waiver of a stipulation against such insurance. *Salzman v. Machinery Mut. Ins. Assn.*, 142–99, 120 N. W. 697.

Knowledge of a soliciting agent as to the habits of the applicant for life insurance constitutes knowledge on the part of the company. *Biermann v. Guar. Mut. Life Ins. Co.*, 142–341, 120 N. W. 963.

A company is chargeable with notice of other insurance of which the soliciting agent has knowledge. *Wilson v. Anchor F. Ins. Co.*, 143–458, 122 N. W. 157.

An insurance company is not chargeable with notice of other insurance on the part of a soliciting agent where the only scope of such agent's employment was to return the policy for correction. *Scrivner v. Anchor F. Ins. Co.*, 144–328, 122 N. W. 942.

If an agent has knowledge of past conditions or existing facts avoiding a policy which is secured by him, a company issuing a policy with such knowledge on the part of its agent cannot insist upon these facts for the purpose of avoiding it; but knowledge by a soliciting agent of the intention

to violate some condition of the policy in the future is not binding upon the company. *House v. Security F. Ins. Co.*, 145–462, 121 N. W. 509.

An adjuster of losses can waive compliance with the provisions of the policy requiring the insurer to separate the damaged from the undamaged goods. *Farmers' Mercantile Co. v. Farmers' Ins. Co.*, 141 N. W. 447.

Even though the secretary of a mutual company has no authority to agree to the removal of property beyond the limits of the county in which the association has authority to take risks, if after notice to the secretary of such removal the association makes assessments on the policy, the prohibition of the policy against removal is waived. *Kesler v. Farmers' Mut. F. & L. Ins. Assn.*, 141 N. W. 954.

Provisions of the policy are valid, notwithstanding this section, which prescribe the manner in which the local agent shall exercise his authority so as to bind the company. *Mulrooney v. Royal Ins. Co.* (D. C.) 157 Fed. 598, (C. C. A.) 163 Fed. 833.

Section applied. *McMaster v. New York L. Ins. Co.*, 78 Fed. 33; s. c. 90 Fed. 40; s. c. 99 Fed. 856.

SEC. 1752. **Fees.** There shall be paid to the auditor of state for services required under the provisions of this chapter the following fees, which shall be accounted for by him in the same manner as other fees received in the discharge of the duties of his office:

1. For filing and examination of the first application of any company and accompanying articles of incorporation for organization in this state, and the issuing of the permission to do business, ten dollars;

2. For filing application of any foreign company for certificate to do business in this state, and the accompanying certified copy of charter or article of incorporation, twenty-five dollars;

3. For permission to foreign company to do business in this state, or certified copy thereof, two dollars;

4. For filing annual statement of a domestic company, and issuing the renewal of the permission required by law to authorize continuance in business, three dollars;

5. For filing annual statement of a foreign company, twenty dollars, and issuing renewal of permission, two dollars;

6. For certificate of authority to agent of foreign company, two dollars;

7. For each certificate of authority to agent of domestic company, fifty cents;

8. For every copy of any paper filed, the sum of twenty cents per folio, and for affixing the official seal to such copy and certifying the same, one dollar;

9. For each certificate for publication of foreign companies, two dollars, and for each certificate for publication of Iowa companies, fifty cents. [27 G. A., ch. 45, §§ 1, 2, 3; C. '73, § 1153.]

SEC. 1754. **Combinations.**

The statutory prohibition of combinations between fire insurance companies in relation to rates, commissions, or the manner of transacting business are not in violation of the state constitution prohibiting the granting of special privileges and immunities, and requiring general laws to be uniform in operation. But so far as such provisions make it unlawful for two or more companies to enter into any agreement as to the amount of commissions to be allowed agents, they are invalid as depriving the companies of the liberty of contract secured by the federal constitution. *Greenwich Ins. Co. v. Carroll*, 125 Fed. 121. (As to the second point this case is reversed. *Carroll v. Greenwich Ins. Co.*, 199 U. S. 401.)

SEC. 1758-a. **Additions, riders and clauses permitted.** It shall be unlawful for any insurance company to issue any policy of fire insurance upon any property in this state except upon automobiles and marine risks other or different from the standard form of fire insurance policy herein set forth, except,

I. It may print in its policy its name, location, date of incorporation, amount of its paid up capital stock (if a stock company), names of its offi-

cers and agents, the number and date of the policy, the amount (under dollar mark) for which it is issued, and if issued through an agent the words: "This policy shall not be valid until countersigned by the duly authorized agent of this company at ....."

II. It may use in or upon its policy forms or slips of the description, location and specifications of the property insured, together with permits upon such conditions not in conflict with the provisions of law, as may be agreed upon, for the use or storage of electricity, gasoline, explosives, or other extra hazardous products or materials; for repairs or improvements; for the operation or ceasing to operate; and for the vacancy of the premises; and permits for hazards other than those specifically mentioned above; also a mortgagee's or loss payable clause, and other permits or riders, not in conflict with law.

III. It may also by written or printed clause upon such conditions not in conflict with the provisions of law as may be agreed upon, provide that a policy shall cover any loss or damage caused by lightning, tornadoes, cyclones, hail or windstorms not exceeding the sum insured or the interest of the insured in the property; provided, if there shall be other valid insurance on such property, whereby the same is insured against loss by lightning, tornadoes, cyclones, hail or windstorms, said company shall be liable only pro rate with such other valid and collectible insurance for any such loss by lightning, tornadoes, cyclones, hail or windstorms.

IV. Any company incorporated in this state, or authorized to do business herein, shall print in its policy or attach thereto any provision which such company is required by law to insert in its policies or attach thereto, not included in the provisions of this policy, but such provisions shall be printed apart from the other conditions and agreements of this policy and under a separate title as follows: "Provisions required by law to be stated in the policy of insurance."

V. It shall print upon its policy issued in compliance with the preceding provisions of this act, the words: IOWA STANDARD FIRE INSURANCE POLICY. [33 G. A., ch. 112, § 1.] [32 G. A., ch. 76, § 1.]

A rider to a blanket policy on several buildings incorporating therein an average clause is not prohibited by this section.

Dahms v. German F. Ins. Co., 153–168, 132 N. W. 870.

SEC. 1758-b. **Standard fire insurance policy—form.** The policy shall be plainly printed, and no part thereof shall be in type smaller than brevier; the conditions thereof shall be printed in uniform numbered lines, as adopted and approved by the auditor of state, and such policy shall be in terms and conditions as follows:

I. In consideration of the stipulations herein named and of ..... dollars, does insure ..... for the term of ..... from the .... day of ..... 19..... at noon (standard time), to the.... day of ..... 19.... at noon (standard time), against all direct loss or damage by fire, except as hereinafter provided, to an amount not exceeding ..... dollars, to the following described property, while located and contained as described herein, and not elsewhere, to wit:

.....

.....

It is hereby agreed that the insured may obtain $..... additional insurance in companies authorized to do business in the state of Iowa.

II. This company shall not be liable beyond the actual cash value of the property covered by this policy at the time any loss or damage occurs, and

said liability shall in no event exceed what it would cost the insured to repair or replace the property lost or damaged with material of like kind and quality. The sum for which this company is liable pursuant to this policy, shall be payable forty days after due notice and proofs of loss have been received by this company in accordance with law.

III. This policy shall be void if the insured has concealed or misrepresented any material fact or circumstance concerning this insurance or the subject thereof.

IV. Unless otherwise provided by agreement of this company this policy shall be void:

(a) If the insured now has or shall hereafter procure any other contract of insurance valid or invalid on the property covered in whole or in part by this policy; or

(b) If the subject of insurance be a manufacturing establishment, and it cease to be operated for more than ten consecutive days; or

(c) If the building herein described, whether intended for occupancy by the owner or tenant be or become vacant or unoccupied and so remain for ten consecutive days; or

(d) If the interest of the insured be other than unconditional and sole ownership; or

(e) If the subject of insurance be a building on ground not owned by the insured; or

(f) If any change other than by death of the insured whether by legal proceedings, judgment, voluntary act of the insured or otherwise, take place in the interest, title, possession or use of the subject of insurance, if such change in the possession or use makes the risk more hazardous; or

(g) If the subject of insurance or a part thereof (as to the part so encumbered) be or become encumbered by lien, mortgage or otherwise created by voluntary act of the insured or within his control; or

(h) If the property insured or any part thereof (as to the part so removed) be removed to any other building or location than that specified in the policy; or

(i) If this policy be assigned before loss.

V. Unless otherwise provided by agreement of this company, this policy shall be void:

(a) If the subject of insurance be a manufacturing establishment, and it be operated in whole or in part at night later than 10 o'clock; or

(b) If the hazard be increased by any means within the knowledge of the insured; or

(c) If mechanics be employed in building, altering or repairing the within described premises for more than fifteen days at any one time; or

(d) If illuminating gas or vapor be generated in any building covered hereby, or on any premises adjacent thereto for use upon the insured premises; or

(e) If there be kept, used, or allowed on the within described premises benzine, benzole, dynamite, ether, fireworks, gasoline, Greek fire, gunpowder exceeding twenty-five pounds in quantity, naphtha, nitroglycerine, or other explosives, phosphorus, calcium carbide, petroleum or any of its products of greater inflammability than kerosene of lawful standard, which last named article may be used for lights and kept for sale according to law, in quantities not exceeding five barrels; or

(f) If the insured permits the property which is the subject of insurance, or any part thereof, to be used for any unlawful purpose.

Provided that nothing contained in paragraph five herein shall operate to avoid this policy in any case, if the insured shall establish that the failure to observe and comply with such provisions and conditions did not contribute to the loss.

VI. This company shall not be liable for loss caused directly or indirectly by invasion, insurrection, riot, civil war, or military or usurped power, or by theft, or by neglect of the insured to use all reasonable means to save and preserve the property during and after a fire, or when the property is endangered by fire in neighboring premises; or (unless fire ensues, and, in that event, for damage by fire only) by explosion of any kind or by lightning; but liability for direct damage by lightning may be assumed by specific agreement.

VII. This company shall not be liable for loss or damage to any property covered by this policy if the insured shall fail to pay any written obligation given to the company for the premium or any assessment or installment of premium when due; provided the company shall have given the insured notice as required by law. Upon payment and acceptance by the company of the delinquent premium, assessment or installment of premium before loss occurs, or after loss, if the company shall have had notice thereof and accepts such payment, this policy shall be revived and in full force according to its terms.

VIII. If a building or any part thereof fall, except as the result of fire, all insurance by this policy on such building, or its contents, shall immediately cease.

IX. This company shall not be liable for loss to accounts, bills, currency, deeds, evidences of debt, money, notes or securities; nor, unless liability is specifically assumed thereon, for loss to awnings, bullion, casts, curiosities, drawings, dies, implements, jewels, manuscripts, medals, models, patterns, pictures, scientific apparatus, signs, store or office furniture or fixtures, sculpture, plate glass, frescoes or decorations; or property held in storage or for repairs; nor, beyond the actual value destroyed by fire for loss occasioned by ordinance or law regulating construction or repairs of buildings, or by interruption of business, manufacturing processes or otherwise.

X. Any application, survey, plan, or description of property signed by the insured and referred to in this policy shall, when a copy is attached hereto, be a part of this contract, and shall be held to be a representation and not a warranty.

XI. This policy shall be canceled at any time at the request of the insured; or by the company by giving five days' notice of such cancellation either by registered letter directed to the insured at his last known address, or by personal written notice. If this policy shall be canceled as hereinbefore provided, or becomes void or cease, the premium having been actually paid, the unearned portion shall be returned on surrender of this policy or last renewal, this company retaining the customary short rates; except that when this policy is canceled by this company by giving notice it shall retain only the pro rate premium.

XII. If, with the consent of this company, an interest under this policy shall exist in favor of a mortgagee or of any person or corporation having an interest in the subject of insurance other than the interest of the insured as described herein, the provisions and conditions hereinbefore contained shall apply in the manner expressed in such provisions and conditions of insurance relating to such interest, as shall be agreed upon by the company.

XIII. If property covered by this insurance is so endangered by fire as to require removal to a place of safety, and is so removed, that part of this policy in excess of its proportion of any loss and of the value of property remaining in the original location, shall, for the ensuing five days only, cover the property so removed in the new location; if removed to more than one location, such excess of this policy shall cover therein for such five days in the proportion that the value in any one new location bears to the value in all such new locations; but this company shall not in any case of removal, whether to one or more locations, be liable beyond the proportion that the amount hereby insured shall bear to the total valid and collectible insurance on the whole property at the time of fire, whether the same cover in new location or not.

XIV. If loss occur the insured shall as soon as practicable after he ascertains the fact of such loss, give notice in writing thereof to the company, protect the property from further damage, forthwith separate the damaged and undamaged personal property, and put it in the best possible order, and shall, within sixty days from date of loss, furnish this company with notice thereof in writing accompanied by affidavit stating the facts as to how the loss occurred and the extent thereof, so far as such facts are within his knowledge.

XV. The insured, as often as reasonably required, shall exhibit to any person designated by this company, all that remains of any property herein described as to which a claim for loss or damage is made, and submit to examination under oath by any person named by this company, and subscribe the same, and, as often as reasonably required, shall produce for examination all books of account, bills, invoices, and other vouchers, or certified copies thereof, if originals be lost, at such reasonable place as may be designated by this company or its representatives, and shall permit extracts and copies thereof to be made; provided, however, that this company shall not be held to have waived any of the provisions or conditions of this policy or any forfeiture thereof by any examination or investigation herein provided for.

XVI. This company shall not be liable under this policy for a greater proportion of any loss on the described property, or for loss by and expense of removal from premises endangered by fire, than the amount hereby insured shall bear to the whole amount of valid and collectible insurance covering such property.

XVII. No suit or action on this policy, for the recovery of any claim thereon, shall be sustainable in any court of law or equity, unless commenced within twelve months next after the right of action for the loss accrues.

XVIII. Wherever in this policy the word "insured" occurs, it shall be held to include the legal representative of the insured, and wherever the word "loss" occurs, it shall be deemed the equivalent of "loss or damage."

XIX. This policy is issued and accepted subject to the foregoing stipulations and conditions, together with such other provisions, agreements, or conditions now or hereafter specifically authorized by law as may be endorsed hereon or added hereto.

In witness whereof, this company has executed and attested these presents.

..... Secretary.
..... President.

Countersigned at ..... this ..... day of ..... 19....

..... Agent.

[34 G. A., ch. 18, §§ 9, 10.] [32 G. A., ch. 76, § 2.]

SEC. **1758-c. Violations—penalty.** Any insurance company, its officers or agents, or either of them, violating any of the provisions of this act, by issuing, delivering or offering to issue or deliver any policy of fire insurance on property in this state other or different from the standard form, herein provided for, shall be guilty of a misdemeanor, and upon complaint made by the auditor of state, or by any citizen of this state, shall, upon conviction thereof, be punished by a fine of not less than fifty dollars nor more than one hundred dollars for the first offense, and not less than one hundred dollars nor more than two hundred dollars for each subsequent offense, but any policy so issued or delivered shall, nevertheless, be binding upon the company issuing or delivering the same, and such company shall, until the payment of such fine, be disqualified from doing any insurance business in this state; but any policy so issued or delivered shall, nevertheless, be binding upon the company issuing or delivering the same. [32 G. A., ch. 76, § 3.]

SEC. **1758-d. Existing statutes—waiver in interest of insured.** Nothing contained in this act nor any provisions or conditions in the standard form of policy provided for herein, shall be deemed to repeal or in any way modify any existing statutes nor to prevent any insurance company issuing such policy, from waiving any of the provisions or conditions contained therein, if the waiver of such provisions or conditions shall be in the interest of the insured. [32 G. A., ch. 76, § 4.]

CHAPTER 5.

OF MUTUAL FIRE, TORNADO AND HAILSTORM ASSESSMENT INSURANCE ASSOCIATIONS.

SECTION **1759. Repeal.** Section seventeen hundred fifty-nine of the code as amended and sections seventeen hundred sixty to seventeen hundred sixty-seven inclusive, are hereby repealed. [32 G. A., ch. 80, § 16.]

SEC. **1759-a. Organization—purposes.** That chapter five of title nine of the code be repealed and the following enacted in lieu thereof:

"Any number of persons may, without regard to the provisions of the preceding chapter, enter into contracts with each other for the insurance from loss or damage by fire, tornadoes, lightning, hailstorms, cyclones or windstorms and to insure plate glass against breakage from accident, but such associations of persons shall in no case insure any property not owned by one of their own number, except such school and church property as may be situated within the territory in which they do business and the reinsurance of the risks of similar associations. Associations organizing for the purpose of transacting business under the provisions of this chapter shall incorporate under the provisions of chapter one of title nine of the code.

Risks or hazards above mentioned shall be classified as follows:

1. Fire and lightning.
2. Tornadoes, cyclones and windstorms.
3. Hailstorms.
4. Plate glass."

[32 G. A., ch. 80, § 1; 29 G. A., ch. 74, § 1; 22 G. A., ch. 93; 20 G. A., ch. 11; 17 G. A., ch. 104; 16 G. A., ch. 103; C. '73, § 1160.]

A mutual fire insurance company cannot issue a policy to one not a member nor for a stated and definite amount of insurance nor for a stiplated premium. One

who insures his property in a mutual company in a stated amount for a specific premium does not become a member. *In re Assignment Mutual Guaranty F. Ins. Co.*, 107–143, 77 N. W. 868.

One who has accepted such a policy which by statute the company is not allowed to issue cannot recover therein. *Ibid.*

Members of the company are not individually liable under such a policy. *Ibid.*

An association organized under the provision of § 1160 of the code of '73 could not collect money from a member by way of premium. *Bradford v. Mutual F. Ins. Co.*, 112–495, 84 N. W. 693.

An association collecting premiums from its members, instead of assessments, was not under that section exempt from the operation of ch. 211, acts of 18 G. A., relating to time of bringing action. *Ibid.*

The creation of a guaranty fund held not to deprive the corporation of the character of a mutual company. *Smith v. Sherman*, 113–601, 85 N. W. 747.

The requirements of code § 1741 as to setting out copy of application in connection with the policy are applicable to mutual companies. *Corson v. Iowa Mut. Fire Ins. Assn.*, 115–485, 88 N. W. 1086.

Although in general a money judgment cannot be rendered against an assessment company, yet if the company has issued a policy in which it agrees to pay a fixed sum in case of loss, such action may be maintained. *Byrnes v. American Mut. F. Ins. Co.*, 114–738, 87 N. W. 699.

SEC. **1759-b. County and state associations.** Any association incorporated under the laws of this state for the purpose of furnishing insurance as provided for in this chapter, doing business only within the county in which is situated the town or city named[1] in its articles of incorporation as its principal place of business, or the counties contiguous thereto, shall, for the purposes of this chapter, be deemed a county mutual assessment association; all other associations operating hereunder shall, for the purposes of this chapter, be deemed state mutual assessment associations and the two words "mutual" and "association" shall be incorporated into and become a part of their name. [34 G. A., ch. 18, § 11.] [32 G. A., ch. 80, § 2.]

[1]The word "named" was erroneously omitted from the supplement of 1907. EDITOR.]

The distinction between state mutual and county mutual associations or companies may be the basis of distinction in the matter of taxation. *Iowa Mut. Tornado Ins. Assn. v. Gilbertson*, 129–658, 106 N. W. 153.

The statute does not prohibit the removal of property insured in a farmers' mutual association to another county than that in which it was insured and in which the company had a right to do business, and if it appears that the property destroyed was within the limits of the territory within which the company was authorized to carry risks at the time it was insured, its removal beyond such limits by the consent of the company will not terminate the risk. *Kesler v. Farmers' Mut. F. & L. Ins. Assn.*, 141 N. W. 954.

SEC. **1759-c. Conditions of authorization.** No state mutual assessment association shall issue any policies until at least one hundred twenty-five applications have been received in any class as shown by section one hereof, representing the following amount of insurance: Classes 1, 2 and 3, two hundred fifty thousand dollars; Class 4, one hundred thousand dollars, and no county mutual assessment association shall issue any policies until applications for insurance to the amount of fifty thousand dollars, representing at least fifty applicants, have been received. Neither shall any association issue any policies of insurance until its articles of incorporation and form of policy shall have been submitted to, and approved by, the auditor of state, nor until he has satisfied himself that the association has, in good faith, applications representing the number of applicants and the amount of insurance above required and has issued to the association a certificate authorizing it to transact an insurance business. [32 G. A., ch. 80, § 3.]

SEC. **1759-d. Annual report.** Each association doing business under the provisions of this chapter shall, annually, in the month of January, re-

port to the auditor of state, upon blanks furnished by him the following facts:

1st. The name, place of doing business, date of commencement and objects of the association.

2d. Names and post-office addresses of president, secretary and treasurer.

3d. Amount of risks in force at beginning of year.

4th. Amount of risks written during the year.

5th. Amount of risks expired and canceled during the year.

6th. Amount of risks in force at the end of the year.

7th. The amount of receipts from assessments during the year.

8th. The receipts from other sources.

9th. Amount paid for losses during the year.

10th. Amount paid to agents for services during the year.

11th. Amount paid to officers during the year, specifying amount paid each.

12th. Amount paid to employes during the year.

13th. Amount of other expenses.

14th. Amount of losses adjusted and due.

15th. Amount of losses adjusted and not due.

16th. Amount and number of claims reported but not adjusted.

17th. Number and amount of claims resisted and in litigation.

18th. Cost per thousand during the year.

19th. Average cost per thousand during the past five years. Provided that state mutual assessment insurance associations shall, in addition to the foregoing, report the following facts.

20th. The value of real estate owned by the association.

21st. The amount of cash on hand and deposited in bank to the credit of the association, and in what bank deposited.

22d. The amount of cash in hands of agents and in course of transmission.

23d. The amount of loans secured by first mortgage on real estate, with the rate of interest thereon.

24th. The amount of all other loans and bonds, and how secured, with the rate of interest thereon.

25th. The amount of interest on investments actually due and unpaid.

26th. The amount of all other securities and their value.

27th. The amount which the association is required by law to hold as a reinsurance reserve.

28th. The amount due officers and employes.

29th. The amount due agents.

30th. The amount due banks or other creditors and the security given therefor.

31st. All other claims against the association.

32d. The largest amount insured in any one risk.

33d. The amount reinsured and names of companies and associations carrying such reinsurance, and such other information as the auditor of state may deem necessary for the purpose of ascertaining the true condition of the association. The report herein contemplated shall be made as of December thirty-first of each year, and verified by the oath of the president or vice president and secretary of the association. [32 G. A., ch. 80, § 4; 17 G. A., ch. 104; C. '73, § 1160.]

SEC. **1759-e. Publication.** The report referred to in the preceding section shall be tabulated by the auditor of state and published by him in

the annual report on insurance, one copy of which shall be sent to each association. The county associations, the state associations and those doing an exclusive tornado and an exclusive hailstorm insurance business shall be separately classified. [32 G. A., ch. 80, § 5; 17 G. A., ch. 104.]

SEC. **1759-f. Fees—certificates.** Such associations shall pay the same fees for annual reports and annual certificates of authority as are required to be paid by domestic companies organized and doing business under the preceding chapter, which certificate shall expire March first following the date of its issue. [34 G. A., ch. 18, § 12.] [32 G. A., ch. 80, § 6; 17 G. A., ch. 104; C. '73, § 1160.]

SEC. **1759-g. Inquiries by auditor.** The auditor of state may address inquiries to any association in relation to its doings and condition and any association so addressed shall promptly reply thereto in writing. [32 G. A., ch. 80, § 7.]

SEC. **1759-h. Fees and assessments.** Such associations may collect a policy and survey fees and such assessments, provided for in their articles of incorporation and by-laws, as are required to pay losses and necessary expenses incurred in the conduct of their business. State mutual fire insurance associations shall provide for and maintain a reinsurance reserve as hereinafter designated. No state mutual association shall collect assessments for more than one year in advance where such assessments exceed three mills on each dollar of insurance in force. [32 G. A., ch. 80, § 8; 17 G. A., ch. 104; C. '73, § 1160.]

SEC. **1759-i. Reinsurance reserve—exceptions.** From and after the taking effect of this act, all state mutual fire insurance associations operating under the provisions of this chapter, except such associations as confine their business exclusively to farm and dwelling property, churches and schoolhouses, shall, annually, set aside and maintain as a reinsurance reserve an amount equal to ten per cent. of the receipts from assessments during the year until the total amount thus accumulated shall equal forty per cent., but not to exceed fifty per cent. of the amount of one annual assessment at the basis rate charged for such insurance on all policies in force. The reserve thus accumulated may be used for the payment of losses and expenses and when so used shall be restored and maintained by the collection of assessments as hereinafter provided. [32 G. A., ch. 80, § 9.]

SEC. **1759-j. Maximum liability of members.** Every association contemplated by the preceding section shall provide in its by-laws and specify in its policies the maximum liability of its members to the association. Such liability shall not be less than a sum equal to the basis rate charged by the association for insurance nor greater than a sum equal [to] three times such basis rate. The maximum liability of the member shall be plainly and legibly stated in each policy. Whenever reductions shall be made in the liability of members such reduction shall apply proportionately to all policies in force. [32 G. A., ch. 80, § 10.]

SEC. **1759-k. Assessments when assets are insufficient.** Whenever the assets of any association required to maintain a reinsurance reserve are insufficient for the payment of losses and expenses, it shall make an assessment for the required amount ratably upon its members liable therefor, and whenever by reason of depreciation, loss or otherwise, the net assets of any association required to maintain a reinsurance reserve, after providing for other debts, are less than the required reserve, the deficiency shall be restored by assessment as above provided. [32 G. A., ch. 80, § 11.]

SEC. **1759-1. Assessments when association is insolvent.** Whenever the board of directors or the auditor of state shall ascertain that any association is insolvent, such board, or upon its failure so to do, the auditor of state may direct an assessment ratably upon all members liable therefor in such amount as may be necessary as follows:

1st. It shall be determined what amount each policyholder should pay or receive in case he desires to withdraw from the association.

2d. What further sum each policyholder should pay to reinsure his policy with some other solvent association.

The board of directors shall forthwith cause written notice and demand of payment to be served personally or by mail upon each policyholder liable therefor. The notice of assessment shall show separately the amount required to be paid in case of withdrawal and the amount required to be paid where withdrawal or cancellation is not desired. The amount due under the assessment shall be payable at the home office of the association within thirty days after date of the notice, but the insured may elect whether to pay the amount called for in case of withdrawal is desired or the amount called for where it is desired that the insurance shall be continued and his policy shall be canceled or continued according to such payment. In case of state mutual assessment associations if, within sixty days after the assessment is made, it shall appear that the amount of insurance remaining in force is less than the amounts required by section three hereof the reinsurance reserve of such policies as are in force shall be used to reinsure such policies in some solvent association or at the option of the policyholder contributing the same shall be returned to him and the association shall continue only for the purpose of adjusting its affairs and closing up its business. [32 G. A., ch. 80, § 12.]

SEC. **1759-m. Cancellation of policies.** Any policy of insurance issued by any association operating under the provisions of this chapter may be canceled by the association giving five days' written notice thereof to the insured, or if the insured shall demand in writing or in person, of the association, the cancellation of his policy, the association shall immediately advise him, by letter to address named, the amount, if any, due, as his pro rata share of losses and expenses incurred since date of his policy. Upon surrender of his policy and payment of all sums due, his membership shall cease, provided, that during the months of June, July and August, hail insurance policies may be canceled only at the option of the officers of the association carrying the risk. Upon the expiration or cancellation of any policy of insurance issued under the provisions of this act, all obligations to the association having been paid, the members shall be entitled to and shall be paid by the association a sum equal to at least seventy-five per cent. of the unexpended portion of the amount contributed by him to the reinsurance reserve. [32 G. A., ch. 80, § 13.]

SEC. **1759-n. State associations — bonds of officers.** Any state mutual assessment association contemplated by this chapter, before being authorized to do business in this state, shall require its secretary and treasurer to give bond to the association in such sum as the directors shall deem sufficient, not less, however, than ten thousand dollars for each office, which bond after being approved by the president of the association and by the auditor of state, shall be deposited with the auditor of state as security for the faithful performance of the duties of the secretary and treasurer in handling the funds of the association. Should the auditor of state consider the surety on said bonds, or the amount thereof, insufficient he may require additional security, or an increase in the amount of the

bond. If such additional security or increase be not furnished within thirty days after notice thereof, the auditor of state may revoke the certificate of authority of the association. [32 G. A., ch. 80, § 14.]

SEC. **1759-o. Annual meetings.** The annual meetings of the members of associations transacting business under the provisions of this chapter shall be held at the home office of the association, except as hereinafter provided. Such associations as confine their membership to persons of one occupation, which persons maintain a state organization and hold annual meetings thereof, may for the purpose of electing directors and changing or amending their articles of incorporation and by-laws, hold their annual meetings at the same time and place as the annual meeting of the members of the occupation to which the association confines its membership, provided, that until such time as the articles of incorporation of the association provide for the holding of meetings as above contemplated other than at the home office of the association, twenty days' notice of the time and place of the holding of said meetings shall be given to all members of the association. [32 G. A., ch. 80, § 15.]

SEC. **1760. County and state associations—repealed.** [32 G. A., ch. 80, § 16.]

[See § 1759 and § 1759-a.]

SEC. **1761. When authorized to do business—repealed.** [32 G. A., ch. 80, § 16.]

[See § 1759 and § 1759-a.]

SEC. **1762. Annual report—repealed.** [32 G. A., ch. 80, § 16.]

[See § 1759 and § 1759-a.]

SEC. **1763. Publication—repealed.** [32 G. A., ch. 80, § 16.]

[See § 1759 and § 1759-a.]

SEC. **1764. Fees—certificates—repealed.** [32 G. A., ch. 80, § 16.]

[See § 1759 and § 1759-a.]

SEC. **1765. Fees and assessments—repealed.** [32 G. A., ch. 80, § 16.]

[See § 1759 and § 1759-a.]

The fact that mutual insurance associations are authorized to make assessments to meet expenses indicates that they are associations for pecuniary profit under the incorporation laws. *Iowa Mut. Tornado Ins. Assn. v. Gilbertson*, 129-658, 106 N. W. 153.

SEC. **1766. Inquiries by auditor—examinations—expenses—repealed.** [32 G. A., ch. 80, § 16.]

[See § 1759 and § 1759-a.]

SEC. **1767. State companies—bonds of officers—repealed.** [32 G. A., ch. 80, § 16.]

[See § 1759 and § 1759-a.]

CHAPTER 6.

OF LIFE INSURANCE COMPANIES.

SECTION **1768. On level premium plan.** Every life insurance company upon the level premium or the natural premium plan, created under the laws of this or any other state or country, shall, before issuing policies

in the state, comply with the provisions of this chapter applicable to such companies. Before any such company shall be permitted to incorporate under the laws of this state, it shall present its articles of incorporation to the auditor of state and the attorney-general and have the same by them approved. Such articles shall show the name, location of principal place of business, object, amount of capital, if a stock company, and shall contain such other provisions as may be necessary to a full understanding of the nature of the business to be transacted and the plan upon which the same is to be conducted. All amendments to such articles and amendments hereafter made to the articles of incorporation of companies already organized under the laws of this state shall be approved in like manner. [32 G. A., ch. 81; C. '73, § 1161.]

It is not unlawful for an insurance company to discriminate between policy holders and those who are not policy holders in the loaning of money, nor for it to agree that one who takes insurance shall have a loan thereon. *Key v. National Life Ins. Co.*, 107–446, 78 N. W. 68.

SEC. **1771. Stock or premium notes.** No note shall be accepted as part of the capital of a stock company, nor as a premium note for the purpose of organizing a mutual company, unless accompanied by a certificate of the clerk of the district court or other court of record, of the county in which the person executing it resides, to the effect that the person making it is in his opinion pecuniarily good and responsible therefor in property not exempt from execution. All notes heretofore or hereafter given as a part of the capital stock of a stock company, shall be deposited with the auditor of state, and in the event any stockholder shall dispose of his or her stock in such company, he or she may withdraw the note or notes so given, upon depositing with the auditor of state the note of the purchaser of such stock, accompanied by a certificate as provided for in this section. [29 G. A., ch. 75, § 1.]

SEC. **1782. Discriminations.** No life or casualty, health or accident insurance company or association[1] shall make or permit any distinction or discrimination between persons insured of the same class and equal expectancy of life in the amount or payment of premiums or rates charged for policies of life or endowment insurance, or in the dividends or other benefits payable thereon, or in any other of the terms or conditions of the contract it makes; nor shall any such company or association[1] or agent thereof make any contract of insurance agreement, other than as plainly expressed in the policy issued; nor shall any such company or association[1] or agent pay or allow, directly or indirectly, as an inducement to insurance, any rebate of premium payable on the policy, or any special favor or advantage in the dividends or other benefits to accrue thereon, or any valuable consideration or inducement whatever, not specified in the policy or contract of insurance. [34 G. A., ch. 18, § 13.] [27 G. A., ch. 46, § 1; 23 G. A., ch. 33, § 1.]

[1]"associations," in 27 G. A. session laws. EDITOR.]

The provision of this section as to "any contract of insurance agreement other than as plainly expressed in the policy issued" is to be limited in its application by the title of the act in which it was first enacted, and by the general provisions of the section, and is therefore applicable only to cases of discrimination. *Kelley v. Mutual L. Ins. Co.*, 109 Fed. 56.

The provision as to contracts "plainly expressed in the policy issued" includes in the term "policy" the provision of the application endorsed thereon, in accordance with code § 1819. *Mutual L. Ins. Co. v. Kelly*, 114 Fed. 268.

The amendment of this section made by 27 G. A., ch. 46, held not applicable where the policy had been issued and the death had occurred prior to the taking effect of the amendment. *Beverly v. Northern L. Assn.*, 112–730, 84 N. W. 933.

SEC. **1783-a. Policy forms filed with auditor of state for approval.** It shall be unlawful for any insurance company transacting business within this state, under the provisions of chapter six of title nine of the code, to write or use any form of policy or contract of insurance, on the life of any individual in this state, until a copy of such form of policy or contract has been filed with the auditor of state subject to approval or disapproval by the governor, auditor of state and attorney-general, or by any two of them. Any form of policy or contract which has been disapproved by said officials shall not be written or used in this state. [30 G. A., ch. 59, § 1.]

SEC. **1783-b. Medical examination.** Said officials shall decline to approve any such form of policy or contract of insurance unless the same shall, in all respects, conform to the laws of this state applicable thereto, and unless the issuance of the same is based upon a satisfactory medical examination of the applicant by a physician duly authorized to practice medicine in the state of Iowa, or the state where examined and no policy or contract of insurance shall be issued by any insurance company to any individual in this state until such examination shall have been passed and duly approved by the medical examiner or medical board of such company. [30 G. A., ch. 59, § 2.]

SEC. **1783-c. Penalty.** Any company violating any of the provisions of this act shall, upon conviction thereof, be fined in a sum not less than one hundred nor more than one thousand dollars for each such offense, and the court may also revoke its authority to do business within this state. Should any company decline to file a copy of its form of policies or contracts, as provided in this act, the auditor of state shall suspend its authority to transact business within the state until such form of policies or contracts have been so filed and approved. [30 G. A., ch. 59, § 3.]

SEC. **1783-d. Life insurance companies may write other insurance.** Any life insurance company organized on the stock or mutual plan and authorized by its charter or articles of incorporation so to do, may in addition to such life insurance, insure the health of persons and against personal injuries, disablement or death, resulting from traveling or general accidents by land or water, and insure employers against loss in consequence of accidents or casualties of any kind to employes or other persons, or to property resulting from any act of the employe or any accident or casualty to persons or property, or both, occurring in or connected with the transaction of their business, or from the operation of any machinery connected therewith, but nothing herein contained shall be construed to authorize any life insurance company to insure against loss or injury to person, or property, or both, growing out of explosion or rupture of steam boilers. [31 G. A., ch. 74.]

SEC. **1783-e. Capital stock—minimum amount.** From and after the taking effect of this act, no insurance company shall be incorporated to transact business upon the stock plan, whether life insurance or insurance other than life, with less than one hundred thousand dollars capital, the entire amount of which shall be fully paid up in cash and invested as provided by law. No part of the capital referred to, shall be loaned to any officer or stockholder of the company. [32 G. A., ch. 79, § 1.]

SEC. **1783-f. Companies heretofore organized.** The certificate of authority of any company heretofore organized and transacting business on the stock plan shall not be renewed after January first, nineteen hundred ten, unless said company shall have, at said time, at least one hundred thousand dollars of capital stock; at least fifty thousand dollars of which shall be paid up in cash and invested according to law. The remainder of

said capital may be represented by stock notes payable to the company on demand of its board of directors and said notes shall be deposited with the auditor of state subject to his approval. But no increase of the capital stock of any company shall hereafter be made unless the amount of said increase is paid up in cash. [32 G. A., ch. 79, § 2.]

SEC. **1783-g. May not advertise authorized capital.** No insurance company shall, after the taking effect of this act, be permitted to advertise or publish an authorized capital, or to represent in any manner itself as possessed of any greater capital than that actually paid up and invested as above provided. [32 G. A., ch. 79, § 3.]

SEC. **1783-h. Penalties.** Any person, firm or corporation violating any of the provisions of this act, or failing to comply with any of its provisions, shall be subjected to the penalties provided in section four[1] of chapter fifty-six, acts of the thirtieth general assembly. [32 G. A., ch. 79, § 4.]

[1§ 1821-d herein. EDITOR.]

CHAPTER 7.

OF STIPULATED PREMIUM AND ASSESSMENT LIFE INSURANCE ASSOCIATIONS.

SECTION **1784. Defined.** That the law as it appears in section seventeen hundred eighty-four of the supplement to the code [1902] be and the same is hereby repealed, and the following enacted in lieu thereof:

"Every corporation organized upon the assessment plan, for the purpose of insuring the lives of individuals or furnishing benefits to the widows, heirs, orphans or legatees of deceased members, or insuring the health of persons or furnishing accident indemnity, shall be styled an association, and any corporation doing business under this chapter which provides for the payment of policy claims, accumulation of a reserve or emergency fund, the expense of management and prosecution of the business, by payment of assessments as provided in its contracts, and wherein the liability of the insured to contribute to the payment of policy claims is not limited to a fixed amount, shall be deemed to be engaged in the business of life insurance upon the assessment plan, and shall be subject to the provisions of this chapter, and chapter eight, of title nine of the code." [31 G. A., ch. 75; 28 G. A., ch. 65, § 1; 21 G. A., ch. 65, § 1.]

The statutory provisions with reference to mutual benefit associations, held to be applicable to an association organized under such provisions, although it had not fully complied therewith. *Crocker v. Hogin*, 103–243, 72 N. W. 411.

Life insurance companies, except as otherwise specially provided, are incorporated under the general provision as to the formation of corporations. *Krause v. Modern Woodmen*, 133–199, 110 N. W. 452.

Members of a mutual benefit association are bound to take notice of and be governed by its by-laws. *Fitzgerald v. Metropolitan Acc. Assn.*, 106–457, 76 N. W. 809.

A company operating on the mutual assessment plan is not relieved from the provisions of this chapter by the provisions of code § 1798 exempting from its operation associations organized solely for benevolent purposes. *Connell v. Iowa State Trav. Men's Assn.*, 139–444, 116 N. W. 820.

The association cannot amend its by-laws in such manner as to affect the promise of the society to pay a particular sum to the insured. A member has the right to rely on the terms of his contract. *Fort v. Iowa Legion of Honor*, 146–183, 123 N. W. 224.

The general power to amend the by-laws reserved by the society does not authorize an amendment which impairs the vested rights of the members. *Ibid.*

Where the association so amended its by-laws as to repudiate its existing contracts and to provide for a new rate of assessment on a diminished policy, held that failure to tender the amount due under the original contract did not defeat his right of action to recover damages for breach of contract by such charge. *Ibid.*

The fact that the association has no

funds with which to pay a judgment does not defeat the right to recover damages for repudiation of the contract. *Ibid.*

Where the assured agrees to be bound by amendments to the by-laws or articles subsequently adopted, he must take notice thereof and is as effectually concluded thereby as by those existing at the time of the issuance of his certificate or policy. *Elliott v. Home Mut. Hail Assn.*, 140 N. W. 431.

The statute recognizes the authority of such associations to insure for the benefit of legatees and in the absence of limitation prescribed in the articles or by-laws, it is presumed that persons of any class enumerated in the statute may be beneficiaries. *Brinsmaid v. Iowa State Trav. Men's Assn.*, 152–134, 132 N. W. 34.

SEC. **1784-a. Repeal.** That the law as it appears in sections seventeen hundred eighty-four-a to seventeen hundred eighty-four-o inclusive, supplement to the code [1902] be and the same is hereby repealed. [31 G. A., ch. 76.]

[The above repeals §§ 2 to 16 inclusive of ch. 65, 28 G. A. EDITOR.]

SEC. **1786. Name.**

The provision of code § 1689 as to including the word "mutual" in the name of a mutual company has no application to associations organized under this chapter. *Moore v. Union Frat. Acc. Assn.*, 103–424, 72 N. W. 645.

SEC. **1787. Conditions for commencing business—approval of policy forms.** Before issuing any policy or certificate of membership, if the association at the time has not a membership sufficient to pay the full amount of its certificate or policy on an assessment, it shall cause all applications for insurance to have printed in red ink, in a conspicuous manner along the margin thereof, the words: "It is understood that the amount of insurance to be paid under this application, and certificate or policy issued thereon, shall depend upon the amount collected from an assessment therefor." It must have actual applications upon at least two hundred fifty lives for at least one thousand dollars each; and it shall file with the auditor of state satisfactory proof that the president, secretary and treasurer have each given a good and sufficient bond for five thousand dollars for the faithful discharge of their duties as such officers, sworn copies of which shall be filed with him. It shall also file with him a list, verified by the president and secretary, of the applications, giving the name, age and residence of each applicant, the amount of insurance applied for by each, together with the annual dues and the proposed assessments thereon. Its policy forms shall be approved, as provided by section seventeen hundred eighty-three-a of the supplement to the code, 1907. [34 G. A., ch. 18, § 14.] [21 G. A., ch. 65, § 4.]

Under the bond given by the president of an assessment life insurance company, the sureties are not liable to a receiver of the company for moneys wrongfully paid by him to one member which were collected for the benefit of another who has in turn been satisfied from funds subsequently collected or for money misappropriated after the expiration of the bond. *Sherman v. Harbin*, 124–643, 100 N. W. 622.

Any act of the president of the association contrary to his duty under its articles of incorporation, even though directed or acquiesced in by the board of directors, constitutes a breach of duty involving liability of the surety on his official bond if it results in loss to the association. *Sherman v. Harbin*, 125–174, 100 N. W. 629.

A new bond executed on reëlection for another year is a new and independent undertaking and not a continuance of the bond for the previous year. *Ibid.*

Auditing the books of the company being no part of the duty of the president, he is not liable under his official bond for not discovering errors overlooked by the auditing committee. *Ibid.*

The act of the president in diverting the beneficiary fund to the payment of expenses in resisting claims renders him liable on his bond. *Ibid.*

If the obligation of the association is no more than to levy an assessment on its members and pay the benefit or indemnity stipulated from the proceeds derived therefrom, then the remedy is in equity to compel an assessment and an action at law cannot be maintained. But if the

contract, whether contained in the certificate of membership, the articles of incorporation or by-laws, is for the payment of defined or fixed sums upon the happening of specific contingencies, then the remedy is at law. *Frank v. Interstate Business Men's Acc. Assn.*, 151–684, 132 N. W. 49.

Where the plan of the association requires that assessments be collected quarterly and that the sums provided in the contract be paid on the death of the member out of the proceeds of assessments on hand derived either from annual dues or assessments, then the action is properly at law even though the amount to be paid is subject to the limitation that it cannot exceed the assessment of a certain amount per member in good standing at the time of the injury. *Ibid.*

SEC. 1788. **Assessments.** The articles and by-laws of each such association and its notices of assessment shall state the objects to which the money to be collected is to be devoted, and no part of the proceeds thereof shall be applied to any other purpose than as stated, and the excess, if any, beyond payment of the benefit, shall be set aside and applied only to like purposes, except that all sums collected for expenses and not used for that purpose may be transferred to the benefit, emergency or reserve fund. [30 G. A., ch. 60; 21 G. A., ch. 65, § 6.]

While in the enforcement of a claim for a death loss against a mutual benefit association resort must be had in the first place to an action in mandamus to compel a levy of an assessment, yet, where the corporation fails to make the levy at a time when it would be effectual in furnishing the fund for the payment of the claim, and postpones it until long after, when by reason of decrease in the membership in the association it becomes ineffectual, the association may be held liable in damages. *Christie v. Iowa L. Ins. Co.*, 111–177, 82 N. W. 499.

In such case interest from the time the money should have been collected and paid over under the terms of the contract may be added. *Ibid.*

The beneficiaries being entitled to the amount realized on particular assessments under their certificates, the misappropriation of an assessment made for a loss under one certificate to the payment of a loss under a different certificate does not give rise to an action on the bond of the officer making such appropriation at the suit of the receiver of the company. *Sherman v. Harbin*, 124–643, 100 N. W. 622.

SEC. 1789. **Insurable age—beneficiary—assignment of policy.**

Age: An association is not precluded by the provisions of this section from assuming by consolidation the liability of another association to a member, although at the time of such consolidation the member is over the age when a valid certificate could have been issued. *Cathcart v. Equitable Mut. L. Assn.*, 111–471, 82 N. W. 964.

A company whose articles do not prohibit the insurance of persons over the age specified by code § 1789 cannot by its by-laws render a contract of insurance with a person within the statutory age *ultra vires* and void. *Krause v. Modern Woodmen*, 133–199, 110 N. W. 452.

Change of beneficiary: The provision as to change of beneficiaries relates to the certificate and not to the fund, and the word "assignment" as here used is equivalent to the word "endorsement." A beneficiary who is substituted by the act of the person on whose life the certificate is issued is not an assignee of the certificate. *Shuman v. Supreme Lodge K. of H.*, 110–480, 81 N. W. 717.

Where the right to change the beneficiary is specifically provided for in the certificate, and the manner of doing so is pointed out, the method indicated must be adopted and if that method involves the issuance of a new certificate, the endorsement of a certificate without the observance of the formalities required will not give the endorsee a right to the proceeds as against the beneficiaries designated by the certificate itself. *Shuman v. A. O. U. W.* 110–642, 82 N. W. 331.

Where the benefit was made payable to the wife of the deceased, who was disqualified to collect it on account of having feloniously caused the death of her husband, held that her heirs had no interest in the benefit fund, but that the amount payable was held in trust by the association for the estate of the deceased. *Schmidt v. Northern Life Assn.*, 112–41, 83 N. W. 800.

The beneficiary named in such a certificate has no property right therein, but only an expectancy. If a beneficiary is designated who does not belong to the class of persons enumerated by statute, the insurance becomes payable to those who would have been entitled to it in the absence of any designation. *Ibid.*

Where the parties have agreed upon a mode by which a change of beneficiary may be effected, the change can be made in that mode only, unless by subsequent agreement, assented to by the association, a different mode is substituted. *Modern Woodmen v. Little*, 114–109, 86 N. W. 216.

The beneficiary in a fraternal or mutual benefit association has no vested interest, but is subject to provisions as to changing beneficiaries and when the member has done all in his power to effect the change and entitle him to a new certificate in favor of the proposed beneficiary, equity will carry out his purpose, although the actual issuance and acceptance of the new certificate were prevented by the death of the member. *Wandell v. Mystic Toilers*, 130–639, 105 N. W. 448.

And it seems that if by action of the local officer the member is misled as to the steps necessary to be taken, the association will be estopped to question the sufficiency of the change. *Ibid.*

This section applies to foreign as well as domestic companies. *Belknap v. Johnston*, 114–265, 86 N. W. 267.

Where the certificate is a contract of insurance, made in another state, and change of beneficiary is made and completed in that state, according to its laws, it will be valid. *Ibid.*

The right to change beneficiary existing in such other state at the time the contract was made cannot be affected by subsequent legislation of such state. *Ibid.*

Upon the surrender of a certificate for the purpose of changing beneficiaries the company is not permitted to alter, add to or take from other conditions of the contract in the new certificate and thereby bind the insured without his assent. *Wood v. Brotherhood of Am. Yeomen*, 148–400, 126 N. W. 949.

In the absence of any provision for notice to the company of a change of beneficiary, such change may be made by provision in a will. *Brinsmaid v. Iowa State Trav. Men's Assn.*, 152–134, 132 N. W. 34.

Assignment: Where it was provided that the certificate should not be assignable in payment of or security for any debt, held that the assignment thereof as a security was invalid and the creditor acquired no rights thereunder. *Crocker v. Hogin*, 103–243, 72 N. W. 411.

Rights of beneficiary: Until the beneficiary is changed by law, he has an actual, subsisting interest in the policy which will pass to his administrator in case of his death, and as against such beneficiary, or his administrator, suicide on the part of the insured is not a defense in the absence of a provision to that effect in the policy. But fraud, in procuring a policy with the intent to commit suicide, will vitiate the entire contract and defeat recovery. *Parker v. Des Moines Life Assn.*, 108–117, 78 N. W. 826.

Under an ordinary life policy the beneficiary has a vested right which cannot be impaired without his consent. *Haerther v. Mohr*, 114–636, 87 N. W. 692.

If under the terms of the contract the benefit is payable to some extent and under some conditions to a beneficiary within the description of the statute, the naming of a beneficiary not authorized by statute to receive the benefit under certain conditions does not render the contract invalid and the recovery of the benefit may be had by the beneficiary coming within the statutory provisions. *Oliphant v. American Health & Acc. Assn.*, 147–656, 126 N. W. 806.

The beneficiary named in a certificate of a fraternal beneficiary association has no vested interest during the life of the member; but on the death of such member the person who, under the terms of the contract with the association, is then entitled to receive the benefits provided for in the certificate does acquire a vested interest therein. *Holden v. Modern Brotherhood*, 151–673, 132 N. W. 329.

The effort of a member to change a beneficiary which is not made in accordance with the rules of the association regulating the manner in which such changes may be made, is ineffectual. But to this rule there are some well defined exceptions, as where the society has waived compliance or estopped itself to assert noncompliance; where it is beyond the power of the member to comply literally with the regulations; or if the insured has pursued the course pointed out in the by-laws and has done all in his power to change the beneficiary, but before the new certificate actually issues he dies. *Ibid.*

When a benefit society pays the money into court upon one of its certificates, it waives all mere technical defenses which it might have set up against either claimant and leaves the court free to award the fund upon equitable principles and the court will then determine as to which of the two rival claimants is, in equity, entitled to the fund. *Ibid.*

SEC. 1794. **Foreign companies.** Any association organized under the laws of any other state to carry on the business of insuring the lives of persons, or of furnishing benefits to the widows, orphans, heirs or legatees of deceased members, or of paying accident indemnity, or surrender value of certificates of insurance, upon the stipulated premium plan or assessment plan, may be permitted to do business in the state by complying with the requirements hereinafter made, but not otherwise. It shall file with the auditor of state a copy of its charter or articles of incorporation, duly certified by the proper officers of the state wherein it was organized, to-

gether with a copy of its by-laws, application and policy or certificate of membership. It shall also file with the auditor a statement, signed and verified by its president and secretary, which shall show the name and location of the association, its principal place of business, the names of its president, secretary and other principal officers, the number of certificates or policies in force, the aggregate amount insured thereby, the amount paid to beneficiaries in the event of death or accident, the amount paid on the last death loss and the date thereof, the amount of cash or other assets owned by the association and how invested, and any other information which the auditor may require. The statement, papers and proofs thus filed shall show that the death loss or surrender value of the certificate of insurance or accident indemnity is in the main provided for by assessments upon or contributions by surviving members of such association, and that it is legally organized, honestly managed, and that an ordinary assessment upon its members or other regular contributions to its mortuary fund are sufficient to pay its maximum certificate to the full limit named therein. Upon its complying with the provisions of this section, and of section eighteen hundred and eight, chapter eight, of this title, and the payment of twenty-five dollars, the auditor shall issue to it a certificate of authority to do business in this state, provided the same right is extended by the state in which said association is organized to associations of the same class in this state. When the auditor doubts the solvency of any foreign association, and the failure to pay the full limit named in its certificate or policy shall be such evidence of its insolvency as to require the auditor to investigate it, he shall for this or other good cause, at the expense of such association, cause an examination of its books, papers and business to be made, and if upon such examination he finds that the association is not financially sound, or is not paying its policies or certificates in full, or is conducting its business fraudulently, or if it shall fail to make the statement required by law, he may revoke its authority and prohibit it from doing business until it shall again comply with the provisions of this chapter. If the auditor appoints some one not receiving a regular salary in his office to make this examination, such examiner shall receive five dollars per day for his services in addition to his actual traveling and hotel expenses, to be paid by the association examined, or by the state on the approval of the executive council, if the association fails to pay the same. The provisions of this section shall apply to fraternal beneficiary associations doing exclusively an accident insurance business, and upon compliance with the provisions of this chapter, and the provisions of chapter eight of title nine of the code, so far as the same are applicable, such associations may be authorized to transact business within this state. [32 G. A., ch. 82; 21 G. A., ch. 65, § 13.]

SEC. **1798. Benevolent societies—process.** Nothing in this chapter shall be construed to apply to any association organized solely for benevolent purposes and composed wholly of members of any one occupation, guild, profession or religious denomination, but any such society may, by complying with the provisions hereof, become entitled to all the privileges thereof, in which event it shall be amenable to the provisions of this chapter so far as they are applicable; provided that if organized under the laws of another state or country, they shall file with the auditor of state an agreement in writing authorizing service or notice of process to be made upon the said auditor of state, and when so made shall be as valid and binding as if served upon the association within this state. [34 G. A., ch. 18, § 15.] [21 G. A., ch. 65, § 21.]

A mutual assessment company providing for benefits to its members in case of death or accident is not an association organized solely for benevolent purposes within the provisions of this section. *Connell v. Iowa State Trav. Men's Assn.*, 139–444, 116 N. W. 820.

SEC. **1798-a. Future organization or authorization prohibited—valuation of policies of existing associations.** No life, health or accident insurance company or association, other than fraternal beneficiary associations, which issues contracts, the performance of which is contingent upon the payment of assessments of call made upon its members, shall do business within this state except such companies or associations as are now authorized to do business within this state and which, if a life insurance company or association, shall value their assessment policies or certificates of membership as yearly renewable term policies according to the standard of valuation of life insurance policies prescribed by the laws of this state. [34 G. A., ch. 18, § 16.] [32 G. A., ch. 83, § 1.]

SEC. **1798-b. Reincorporation as legal reserve company—stock company.** Any existing domestic assessment company or association may, with the written consent of the auditor of state, upon a majority vote of its trustees or directors, amend its articles of incorporation and by-laws in such manner as to transform itself into a legal reserve or level premium company, and upon so doing and upon procuring from the auditor of state a certificate of authority, as prescribed by law, to transact business in this state as a legal reserve or level premium company, shall incur the obligations and enjoy the benefits thereof, the same as though originally thus incorporated, and such corporation, under its charter as thus amended, shall be a continuation of such original corporation, and the officers thereof shall serve through their respective terms as provided in the original charter, but their successors shall be elected and serve as in such amended articles provided; but such amendment or reincorporation shall not affect existing suits, rights or contracts. Any assessment company reincorporated to transact life insurance business, shall value its assessment policies or certificates as yearly renewable term policies according to the standard of valuation of life insurance policies prescribed by the laws of this state; provided that accident or health associations may take advantage of all the provisions of this section, in so far as applicable, and may thereupon transform themselves into stock companies. But no such company or association shall reorganize under the provisions of this section unless it shall have accumulated sufficient surplus to constitute a reinsurance reserve equal to the unearned premium on all outstanding policies or certificates, as prescribed by the statutes of this state relating thereto. [34 G. A., ch. 18, § 17.] [32 G. A., ch. 83, § 2.]

CHAPTER 8.

OF PROVISIONS APPLYING TO LIFE INSURANCE COMPANIES AND ASSOCIATIONS.

SECTION **1805. Policy exempt from execution.**

The execution of an ordinary life policy confers immediately a vested right upon and raises an irrevocable trust in favor of the party named as beneficiary, a right which cannot be impaired without the beneficiary's consent. *Haerther v. Mohr*, 114–636, 87 N. W. 692.

The purpose of this section being to provide that the money derived from life or accident insurance shall enure to the benefit of the widow, exempt from her antecedent debts, it follows that she may invest

a part or the whole thereof in property which shall be necessary for the comfort and support of her family without impairing this right of exemption. The exemption is not limited to the money itself. *Cook v. Allee*, 119–226, 93 N. W. 93.

In the absence of any contract or arrangement, the proceeds of life insurance are not exempt in the hands of the heir from the debts of such heir. *O'Melia v. Hoffmeyer*, 119–444, 93 N. W. 497.

Where a bankrupt holds a policy payable to himself, his heirs or legal representatives, the surrender value thereof will be a part of the assets of his estate in bankruptcy under the provisions of the federal bankrupt law. *In re Lange*, 91 Fed. 361; *in re Steele*, 98 Fed. 78.

The provisions of the bankrupt law as to exemption of policies of life insurance are only applicable to cases where there is no exemption by the state law, but so far as such policies are exempt by the state law such exemption is recognized under the general provisions as to exempt property. *Steele v. Buel*, 104 Fed. 968.

The exemption of this section may apply to property purchased with the avails of the insurance. *Booth v. Martin*, 139 N. W. 888.

SEC. **1806. Investment of funds.** That the law which appears as section eighteen hundred and six, supplement to the code [1902], be and the same is hereby repealed and the following enacted in lieu thereof:

"The funds required by law to be deposited with the auditor of state by any company or association contemplated in the two chapters preceding, and the funds or accumulations of any such company or association organized under the laws of this state held in trust for the purpose of fulfilling any contract in its policies or certificates, shall be invested in the following described securities and no other:

1. The bonds of the United States;

2. The bonds of this state or of any other state when such bonds are at or above par;

3. Bonds or other evidences of indebtedness of any county, city, town or school district within the state or any other state, drainage district bonds of this state, improvement certificates issued by any municipal corporation of this state such certificates being a first lien upon real estate within the corporate limits of the municipality issuing the same, where such bonds or other evidences of indebtedness are issued by authority of and according to law and bearing interest, and are approved by the executive council;

4. Bonds and mortgages and other interest-bearing securities being first liens upon real estate within this state or any other state worth at least double the amount loaned thereon and secured thereby exclusive of improvements, or two and one-half times such amount including the improvements thereon, if such improvements are constructed of brick or stone; but no such improvements shall be considered in estimating the value unless the owner shall contract to keep the same insured in some reliable fire insurance company or companies authorized to do business in the state, during the life of the loan, in a sum at least double the excess of the loan above one half the value of the ground exclusive of the improvements, the insurance to be made payable in case of loss to the company or association investing its funds, as its interests may appear at the time of loss; provided that before a company or association may invest any of its funds in such securities as are specified in this subdivision of this section in any state other than the state of Iowa it shall first obtain consent of the executive council so to do; any mortgage lien upon real estate shall not, for the purposes of this section, be held or construed to be other than a first lien by reason of the fact that drainage or other improvement assessments may have been levied against the real estate covered by said mortgage, whether the installments of said assessment be matured or not, provided that in determining the value of said real esate for loan pur-

poses, the amount of the drainage or other assessment tax unpaid, shall be deducted.

5. Loans upon its own policies, where the same have been in force at least two full years, in an amount not exceeding the net terminal reserve. If such loan is made, the company must describe in the note or contract taken, the amount of the loan, the name of the borrower, the number of the policy, and the terms of such note or contract shall make the amount loaned a lien against such policy and such note or contract shall be numbered, dated and signed, giving the post-office address of the insured.

6. Any such real estate in this state as is necessary for its accommodation as a home office and in the erection of any building for such purposes, it may add thereto rooms for rent; provided that before any company or association shall invest any of its funds, in accordance with the provisions of this subdivision it shall first obtain the consent of the executive council; and provided further that not to exceed ten per cent. of the lawful reserve of such company or association shall be so invested. Any company or association so investing its funds may use the value of any such home office as a part of the deposit of legal reserve in which case it shall convey the same to the auditor of state by deed, such property to be held by him in trust for the benefit of the policyholders or members of the company or association; the value thereof to be determined from time to time by the auditor of state.

All such securities shall be deposited with the auditor of state, subject to his approval, and shall remain with him until withdrawn in accordance with law. Any company or association receiving payments or partial payments on any securities deposited with the auditor of state shall notify him of such fact, giving the amount and date of payment, within thirty days after such payment shall have been made. The officers of any company or association which fails to report the receipt of payments or partial payments as above provided, shall be liable to a fine in double the amount collected and not reported within the time and in the manner above specified. It shall be the duty of the company or association and of the officers thereof to withdraw from deposit any loans made in accordance with the provisions of subdivision five of this section within fifteen days after the date of the lapsing or termination of any policy of insurance upon which any such loan is made. Any association making deposit with the auditor of state as herein contemplated, shall at the time of making request for the withdrawal of any securities designate for what purpose the same are desired to be withdrawn. The auditor of state shall have authority to suspend or revoke the certificate of authority of any company or association failing to comply with any of the provisions of this section or for violating the same." [35 G. A., ch. 145, § 1.] [31 G. A., ch. 77; 28 G. A., ch. 66, § 1; 25 G. A., ch. 33; 24 G. A., ch. 30; 21 G. A., ch. 65, § 9; 21 G. A., ch. 169; 17 G. A., ch. 47; C. '73, § 1179.]

SEC. 1811. Defenses to actions on policies—intoxication.

This provision has no application to mutual benefit associations. *Knapp v. Brotherhood of Am. Yeomen*, 128–566, 105 N. W. 63; s. c., 149–137, 126 N. W. 336.

If representations as to the habits of an applicant are known to the soliciting agent to be false the false statements in the application as to such habits cannot be relied upon by the company as a defense. *Biermann v. Guaranty Mut. Life Ins. Co.*, 142–341, 120 N. W. 963.

SEC. 1812. Physician's certificate.

To defeat recovery on account of false statements as to the health of the applicant, the defendant must show, not only that the statements of the applicant were false and fraudulent, but that the examiner was deceived thereby. But the de-

fendant is not estopped by the certificate of the medical examiner from setting up fraud on the part of the applicant in procuring such certificate on which the policy was issued. *Welch v. Union Central L. Ins. Co.*, 108–224, 78 N. W. 853.

The purpose of this statutory provision, estopping the company from setting up misrepresentations as to the health of deceased where a medical examiner has passed on the fitness of the applicant, is to prevent recovery being defeated on any policy where the company has, by its agent, examined and passed upon the fitness of the applicant for insurance, and it is quite immaterial what representations have been made or warranties given. The fraud or deceit referred to in the statute is that of procuring the report or certificate of the physician and not the policy. *Weimer v. Economic L. Assn.*, 108–451, 79 N. W. 123.

Unless the examiner is deceived by answers in the application, or in some other way, the company is not entitled to have the condition of health of the insured at the time of the issuance of the policy investigated. In the absence of fraud or deceit practiced on the medical examiner the company is estopped from questioning the truthfulness of the answers made by the insured in the application. *Stewart v. Equitable Mut. L. Assn.*, 110–528, 81 N. W. 782.

Under this section the company is estopped from inquiring into the correctness of answers in the application in the absence of an allegation that the medical examiner's report was procured through fraud or deceit. The fact that the statements in such application amount to warranties is immaterial. *Nelson v. Nederland L. Ins. Co.*, 110–600, 81 N. W. 807.

The provisions of this section evidently relate to procedure and not to the validity of the contract, and therefore control in an action on a policy issued in another state by a foreign insurance company. *Ibid.*

Where a physician reports in favor of the application, and it is not proven that such report was secured by fraud practiced upon the physician, the defendant is estopped from denying the truthfulness of the applicant's representations. *Brown v. Modern Woodmen*, 115–450, 88 N. W. 965.

The medical examiner or physician referred to in this section is the person who examines the applicant and determines his condition of health and reports whether he is a proper risk. *Peterson v. Des Moines L. Assn.*, 115–668, 87 N. W. 397.

The provisions of this section apply to the person who represents the company in making an examination of applicants as to their physical condition, and not to the action of the medical director of the company in determining whether the risk shall be accepted. *Wood v. Farmers' Life Assn.*, 121–44, 95 N. W. 226.

Proof of the falsity of the representations made in an application for life insurance is not alone sufficient to establish that such representations were fraudulently made. *Ley v. Metropolitan L. Ins. Co.*, 120–203, 94 N. W. 568.

The provisions with reference to the conclusiveness of a health certificate given by a medical examiner have no application to mutual benefit associations. *Smith v. Supreme Lodge*, 123–676, 99 N. W. 553.

In an action on a fraternal benefit certificate evidence of fraud in the application consisting in false answers as to the conditions of the applicant's health is admissible to defeat recovery. *Ibid.*

Unless the agent is purposely misled by the applicant for insurance, the company is estopped from putting in issue whether at the time of the issue or delivery of the certificate he was a fit subject for insurance. *Roe v. National Life Ins. Assn.*, 137–696, 115 N. W. 500.

To constitute such fraud or deceit there must have been an intention to deceive and the examiner must have relied upon the false statements made by the insured or have been misled by concealment of facts which good faith required him to disclose. *Ibid.*

The provisions of this section are not applicable to fraternal benefit societies, orders or associations. *Sargent v. Modern Brotherhood*, 148–600, 127 N. W. 52.

Where a policy of insurance takes effect from the time it is mailed to the applicant, the applicant's condition of health at that time is not open to question or consideration if he has been pronounced by the company's physician a fit subject of insurance. *Unterharnscheidt v. Missouri State L. Ins. Co.*, 138 N. W. 459.

Section applied. *Metzradt v. Modern Brotherhood of America*, 112–522, 84 N. W. 498.

SEC. 1813. Misrepresentation of age.

This provision held applicable to a contract of insurance in the Modern Woodmen, it not appearing that such organization was a fraternal beneficiary society as defined in code § 1822, and therefore specially exempted from the general statutory provisions relating to life insurance. *Krause v. Modern Woodmen*, 133–199, 110 N. W. 452.

SEC. 1819. Copy of application.

Whether the provision that a copy of the application must be attached to or endorsed upon the policy pertains solely to matters of remedy and procedure, and

is therefore applicable in an action in this state upon a policy regardless of the place of contract, *quaere;* but held that the statute of Minnesota under which the policy was executed, though different in terms from the statutory provision in this state, should receive the same construction, and that evidence of fraudulent statements in the application not thus attached or endorsed was inadmissible. *Rauen v. Prudential Ins. Co.*, 129–725, 106 N. W. 198.

The provisions of 18 G. A., ch. 211, as to attaching copy of application to policy (now embodied in code § 1741) held applicable to fraternal societies. *Stork v. Supreme Lodge K. of P.*, 113–724, 84 N. W. 721.

A cross-petition asking cancellation of the policy on the ground of fraud committed by the making of false answers in the application cannot be sustained where a copy of the application has not been attached to or incorporated in the policy. *Biermann v. Guranty Mut. Life Ins. Co.*, 142–341, 120 N. W. 963.

The purpose of this section is to require all representations and warranties to be attached to the policy so that all parts of the contract may be together and the insured may be at all times in possession of the evidence of his contract. *Nutter v. Des Moines L. Ins. Co.*, 156–539, 136 N. W. 891.

Section applied. *Mutual L. Ins. Co. v. Kelly*, 114 Fed. 268.

As applicable to this section, see notes to code § 1741.

SEC. **1820. Limitation of action.** That section eighteen hundred twenty of the code be and the same is hereby repealed and the following enacted in lieu thereof:

"No stipulation or condition in any policy or contract of insurance or beneficiary certificate issued by any company or association mentioned or referred to in this chapter, limiting the time to a period of less than one year after knowledge by the beneficiary within which notice or proofs of death or the occurrence of other contingency insured against must be given, shall be valid. In case of accident or health insurance it shall be valid for any company or association to limit by contract the time when notice or proofs of death, cause of disability or other contingency insured against shall be given; but in no case shall said notice be limited to a period of less than sixty days after knowledge by the beneficiary within which such notice or proofs must be given." [33 G. A., ch. 113, §§ 1, 2.]

The provisions of 18 G. A., ch. 211, § 3, relating to proofs of loss, held applicable to mutual benefit associations as well as fire insurance companies. *Parsons v. A. O. U. W.*, 108–6, 78 N. W. 676.

The time within which an action may be brought for the loss on the policy cannot by stipulation be limited to less than one year from the time the cause of action has accrued. *Kenny v. Bankers' Acc. Ins. Co.*, 136–140, 113 N. W. 566.

A stipulation in the by-laws of a mutual benefit association organized and acting under the provisions of code § 1784 exacting written notice of the death of a member within fifteen days after death is invalid. *Connell v. Iowa State Trav. Men's Assn.*, 139–444, 116 N. W. 820.

SEC. **1820-a. Disbursements—vouchers—affidavit.** No domestic life insurance company shall make any disbursement of one hundred dollars or more unless the same be evidenced by a voucher signed by or on behalf of the person, firm, or corporation receiving the money and correctly describing the consideration for the payment. If the expenditure be for both services and disbursements the voucher shall set forth the services rendered and an itemized statement of the disbursements made. When such voucher cannot be obtained the expenditure shall be evidenced by an affidavit of some officer or agent of said company describing the character and object of the expenditure and stating the reason for not obtaining such voucher. [32 G. A., ch. 84.]

SEC. **1820-b. Misrepresentations prohibited.** No life insurance corporation doing business in this state and no officer, director or agent thereof shall issue, circulate, or use, or cause or permit to be issued, circulated, or used, any estimate, illustration, circular or statement of any sort misrepresenting the terms of any policy issued by it or the benefits or ad-

vantages promised thereby, or the dividends or share of surplus to be received thereon, or shall use any title of any policy or class of policies misrepresenting the true nature thereof. [32 G. A., ch. 85, § 1.]

SEC. **1820-c. Penalty.** Any person violating the provisions of this act, shall be deemed guilty of a misdemeanor and shall be punished accordingly. [32 G. A., ch. 85, § 2.]

SEC. **1820-d. Reports—form—convention edition.** All reports contemplated under sections seventeen hundred fourteen, seventeen hundred seventy-three, seventeen hundred ninety, seventeen hundred ninety-nine and eighteen hundred thirty of the code, and acts amendatory thereof may be upon forms furnished by the auditor of state, and who may, at his option upon authority of the executive council, purchase such forms as are approved by the national convention of insurance commissioners, known as convention edition. [34 G. A., ch. 18, § 18.]

CHAPTER 8-A.

OF EXAMINATION OF INSURANCE COMPANIES.

SECTION **1821-a. Examination authorized—to be made biennially.** The auditor of state may, at any time he may deem it advisable, make an examination of or inquire into the affairs of any insurance company authorized or seeking to be authorized to transact business within this state, provided that such examination shall not be less frequent than once during each biennial period. [30 G. A., ch. 56, § 1.]

SEC. **1821-b. Companies to assist—administer oaths.** When any company is being examined, the officers, employes or agents thereof shall produce for inspection all books, documents, papers or other information concerning the affairs of such company, and shall otherwise assist in such examination so far as they can do. The auditor of state, or his legally authorized representative in charge of the examination, shall have authority to administer oaths and take testimony bearing upon the affairs of any company under examination. [30 G. A., ch. 56, § 2.]

SEC. **1821-c. Examiner — assistants — compensation—expenses—how paid.** For the purpose of carrying into effect the provisions of this act, the auditor of state is hereby authorized to appoint two insurance examiners, one of whom shall be an experienced actuary who shall receive for his services a salary of three thousand dollars per year, the other of whom shall be an experienced and competent fire insurance accountant, who shall receive for his services a salary of two thousand dollars per year, and who, while conducting examinations, shall possess all the powers conferred upon the auditor of state for such purposes. Said examiners shall give bond to the state conditioned upon the faithful performance of their[1] duties, in the sum of five thousand dollars, which bond shall be filed with and approved by the auditor of state. The entire time of the examiners shall be under the control of the auditor of state, and shall be employed as he may direct. The auditor of state may, when in his judgment it is advisable, appoint assistants to aid in making examinations. Such assistants shall receive as compensation for their services not to exceed five dollars per day each. Said examiners and assistants shall receive no other or further compensation than as above provided, except that they and the auditor of state shall receive actual and necessary traveling, hotel and

other expenses while engaged in conducting examinations away from their respective places of residence. Such expenses, together with the compensation of the assistants, shall be paid by the treasurer of state, upon warrants drawn by the auditor of state, bills for the same having first been approved by the executive council. Such bills shall be filed under oath of the party incurring the expense and shall be approved by the person in charge of the examination. The salary of the examiners shall be paid as are the salaries of other employes of the auditor's office. All bills for expenses of any examination, together with the compensation of the assistants, shall be charged to and paid by the companies examined, and upon failure or refusal of any company examined to pay such bill or bills, the same may be recovered in an action brought in the name of the state under the direction of the executive council, and the auditor may also revoke the certificate of authority of such company to transact business within this state. All fees collected under the provisions of this chapter shall be paid to the auditor of state and shall be by him turned into the state treasury as are other fees of his office. [34 G. A., ch. 80, § 1.] [32 G. A., ch. 78; 30 G. A., ch. 56, § 3.]

["his" in 1907 supplement. The amendment by the 34 G. A., ch. 80, § 1, made "examiner" plural; hence this change to the word "their." EDITOR.]

SEC. **1821-d. Revocation of certificate—publication of results of examination.** If upon investigation or examination, it shall appear that any company is insolvent or in an unsound condition, or is doing an illegal or unauthorized business, or that it has refused or neglected for more than thirty days to pay final judgment rendered against it in the courts of this state, the auditor of state may suspend its authority to transact business within this state until it shall have complied in all respects with the laws applicable to such company or has paid such judgment, or he may revoke its certificate of authority to transact business within this state and having revoked the certificate of any company organized under the laws of this state, he shall at once report the same to the attorney-general, who shall apply to the district court or any judge thereof for the appointment of a receiver to close up the affairs of said company; provided that in the case of companies organized on the stock plan under the provisions of chapter four, title nine of the code, the above named officers shall proceed as provided in sections seventeen hundred thirty-one and seventeen hundred thirty-two of the code; and in case of companies organized under the provisions of chapter six, title nine of the code, said officers shall proceed as provided in sections seventeen hundred seventy-seven and seventeen hundred seventy-eight of the code, and no receiver shall be appointed for any company contemplated by this chapter except upon application of the attorney-general, unless five days' notice shall have been served upon the auditor of state and attorney-general, stating the time and place of the hearing of such application, at which time and place said officers shall have the right to appear and be heard as to such application and appointment. The results of any examination shall be published in one or more newspapers of the state or in pamphlet form, when in the opinion of the auditor of state the interests of the public require it. [30 G. A., ch. 56, § 4.]

SEC. **1821-e. Transfer of stock pending examination.** Any transfer of stock of any company, pending an investigation, shall not release the party making the transfer from any liability for losses that may have occurred previous to such transfer. [30 G. A., ch. 56, § 5.]

SEC. **1821-f. Soliciting business after revocation of authority—penalty.** Any officer, manager, agent or representative of any insurance

company contemplated by this act, who, with knowledge that its certificate of authority has been suspended or revoked, or that it is insolvent, or is doing an unlawful or unauthorized business, solicits insurance for said company, or receives applications therefor, or does any other act or thing toward receiving or procuring any new business for said company, shall be deemed guilty of a misdemeanor and shall be subject to the penalties provided in section eighteen hundred fourteen of the code, and the provisions of said section are hereby extended to all companies contemplated by this act. [30 G. A., ch. 56, § 6.]

SEC. **1821-g. Refusing to be examined—penalty.** Should any company decline or refuse to submit to an examination as in this act provided, the auditor of state shall at once revoke its certificate of authority, and if such company is organized under the laws of this state, he shall report his action to the attorney-general, who shall at once apply to the district court or a judge thereof for the appointment of a receiver to wind up the affairs of the company. [30 G. A., ch. 56, § 7.]

SEC. **1821-h. Nonresident companies.** Examination of insurance companies not located within this state shall only be made by order of the executive council, and at such time as it may direct. [30 G. A., ch. 56, § 8.]

SEC. **1821-i. "Company" defined.** The word "company" as used in this act shall mean all companies or associations organized under the provisions of chapters four, five, six, seven or eight of title nine of the code, except county mutuals, and all companies or associations admitted or seeking to be admitted to this state under the provisions of any of the chapters herein referred to. [30 G. A., ch. 56, § 9.]

SEC. **1821-j. Acts in conflict repealed.** All acts or parts of acts in conflict with the provisions of this act are hereby repealed. [30 G. A., ch. 56, § 10.]

CHAPTER 8-B.

OF CONSOLIDATION, REINSURANCE, PROPORTIONATE REPRESENTATION, LICENSING AGENTS AND USE OF PROXIES.

SECTION **1821-k. Agent must be licensed—auditor may revoke.** No person shall directly or indirectly, act within this state as agent or otherwise, in receiving or procuring applications for insurance, or in doing or transacting any kind of insurance business for any company or association, other than county mutuals or fraternal beneficiary associations, until he has procured from the auditor of state a license authorizing him to act for such company or association as agent which license shall terminate at the end of the insurance year for which such company or association is authorized to transact business. The auditor of state may, for good cause, decline to issue such license or may, for like cause, revoke the same. The fee charged for such agent's license shall be, for domestic companies, fifty cents, and for companies located outside the state, two dollars. [30 G. A., ch. 57, § 1.]

SEC. **1821-l. Acting without license—penalty.** Any person acting as agent or otherwise representing any insurance company or association, in violation of the provisions of this act, shall be liable to a fine of twenty-five dollars for each day he shall so act. [30 G. A., ch. 57, § 2.]

SEC. **1821-m. "Company" defined.** The word "company" or "companies" when used in this act shall mean any company or association or-

ganized under the provisions of chapters four, five, six, seven or eight of title nine of the code, except county mutuals. [30 G. A., ch. 58, § 1.]

SEC. **1821-n. Life companies.** No company organized under the laws of this state to do the business of life insurance, either on the stock, mutual, stipulated premium or assessment plan, shall consolidate with any other company or reinsure its risks, or any part thereof, with any other company, or assume or reinsure the whole or any part of the risks of any other company, except as hereinafter provided. Provided that nothing contained in this chapter shall prevent any company as defined in section one of this act from reinsuring a fractional part of any single risk. [30 G. A., ch. 58, § 2.]

Consolidation with another company does not require the unanimous consent of the stockholders. *Beidenkopf v. Des Moines L. Ins. Co.*, 142 N. W. 434.

SEC. **1821-o. Submit plan to auditor of state—statement as to condition.** When any such company shall propose to consolidate or enter into any reinsurance contract with any other company, it shall present its plan to the auditor of state, setting forth the terms of its proposed contract of consolidation or reinsurance, asking for the approval or any modification thereof, which the commission hereinafter provided for may approve. The company must also file a statement of its assets and if a legal reserve company, of the reserve value of its policies or contracts. [30 G. A., ch. 58, § 3.]

SEC. **1821-p. Commission to proceed without notice—may require notice.** The commission shall proceed to hear and determine such petition, without notice. But if the commission shall deem it necessary in order to conserve the interests of the policyholders that notice shall be given, it shall require the company or companies to notify, by mail, all of the members or policyholders of the said company or companies of the pendency of such petition, and the time and place at which the same will be heard, the length of time of such notice to be determined by the commission. [30 G. A., ch. 58, § 4.]

SEC. **1821-q. Commission to hear petition—procedure—submission to membership—approval.** For the purpose of hearing and determining such petition, a commission consisting of the governor, auditor of state and attorney-general is hereby created. In the inability of the governor to act, the secretary of state may act in his stead. The commission may make such examination into the affairs and condition of any company or companies as it may deem proper, and shall have power to summon and compel the attendance and testimony of witnesses, and the production of books and papers before said commission and may administer oaths. When notice shall have been given as above provided, any policyholder or stockholder of said company or companies shall have the right to appear before said commission and be heard with reference to said petition. Said commission, if satisfied that the interests of the policyholders of said company or companies are properly protected and no reasonable objection of said petition exists, may authorize the proposed consolidation or reinsurance or may direct such modification thereof as may seem to it best for the interests of the policyholders; and said commission may make such order and disposition of the assets of any such company thereafter remaining as shall be just and equitable. Such consolidation or reinsurance shall only be approved by the consent of all of the members of said commission, and it shall be the duty of said commission to guard the interests of the policyholders of any such company or companies proposing consolidation or re-

insurance. In case of companies organized on the assessment plan, the commission may require the plan of consolidation or reinsurance to be submitted to the membership of such company or companies to be voted upon. When submitted, it shall be at a meeting called for that purpose, thirty days' notice being given, and a two-thirds vote of all the members present and voting shall be necessary to an approval of any plan of consolidation or reinsurance, and no proxies shall, in any case, be voted. Any plan of consolidation or reinsurance submitted as herein contemplated, must first have been approved by the commission, and the result of said vote must be filed with the auditor of state and be by him determined before any consolidation or reinsurance shall be effected. [30 G. A., ch. 58, § 5.]

SEC. **1821-r. Companies other than life—approval of plan.** When any company or companies not named in section two of this act desire to consolidate or reinsure, it shall only be necessary for such company or companies to submit the plan of consolidation or reinsurance with any other information that may be required, to the auditor of state and the attorney-general and have the same by them approved. [30 G. A., ch. 58, § 6.]

SEC. **1821-s. Consolidation with unauthorized companies prohibited.** No company or companies as defined by section one of this act shall consolidate or reinsure with any other company or companies not authorized to transact business in this state. [30 G. A., ch. 58, § 7.]

SEC. **1821-t. Expenses—how paid.** All expenses and costs incident to proceedings under the provisions of this chapter, shall be paid by the company or companies bringing the petition. [30 G. A., ch. 58, § 8.]

SEC. **1821-u. Penalty.** Any officer, director or stockholder of any company or companies, as defined in this act, violating or consenting to the violation of any of the provisions hereof, shall be punished by a fine of not less than one thousand dollars, or by imprisonment in the county jail for not less than one year, or by both such fine and imprisonment in the discretion of the court. [30 G. A., ch. 58, § 9.]

SEC. **1821-v. Proportionate representation.** From and after the taking effect of this act, the holder or holders, jointly or severally, of not less than one fifth but less than a majority of the shares of the capital stock of corporations organized on the stock plan under the laws of this state for transacting the business of life or fire insurance, shall be entitled to nominate to be elected or appointed, as the case may be, directors or other persons performing the functions of directors by whom, according to the articles of incorporation of such corporations its affairs are to be conducted. In the event such nomination shall be made, there shall be elected or appointed to the extent that the total number to be elected or appointed is divisible, such proportionate number from the persons so nominated as the shares of stock held by persons making such nominations bear to the whole number of shares issued; provided the holder or holders of the minority shares of stock shall only be entitled to one fifth (disregarding fractions) of the total number of directors to be elected for each one fifth of the entire capital stock of such corporation so held by them; and provided further that this act shall not be construed to prevent the holders of a majority of the stock of any such corporation from electing the majority of its directors. Vacancies occurring from time to time shall be filled so as to preserve and secure to such minority and majority stockholders proportionate representation as above provided. [32 G. A., ch. 74, § 1.]

SEC. **1821-w. Articles of incorporation.** All such existing corporations shall by amendment to their articles of incorporation, approved by the auditor of state, provide for the nomination, election or appointment, of

the directors or other persons by whom its affairs are to be conducted, in conformity with the provisions of this act, and the articles of incorporation of all such incorporations hereafter organized shall contain like provisions. [32 G. A., ch. 74, § 2.]

SEC. **1821-x. Voting by proxies—conditions.** Any insurance company or association organized under the laws of this state, may provide in its articles of incorporation, that its members or stockholders may vote by proxies, voluntarily given, upon all matters of business coming before the stated or called meetings of the stockholders or members, including the election of directors. No proxy shall be valid unless signed and executed within two months prior to such meeting or election for which said proxy was given, and such proxy shall be limited to thirty days subsequent to the date of such meeting or election, and may be revoked at any time by the policyholder or stockholder who executed the said proxy. All proxies shall be filed with the company at least one day prior to an election at which they are to be used. [32 G. A., ch. 77, § 1.]

SEC. **1821-y. Solicitation by agents—expenditure of funds.** Soliciting of proxies by an agent of the company either for personal use or for the use of officers of the company or association, or for any other persons, is forbidden. Nor shall any of the funds of a company or association be expended in procuring proxies. [32 G. A., ch. 77, § 2.]

SEC. **1821-z. Penalty.** Any violation of this act shall be deemed a misdemeanor and punishable accordingly. [32 G. A., ch. 77, § 3.]

CHAPTER 9.

OF FRATERNAL BENEFICIARY SOCIETIES, ORDERS OR ASSOCIATIONS.

SECTION **1822. Defined—general provisions.** A fraternal beneficiary association is hereby declared to be a corporation, society or voluntary association, formed or organized and carried on for the sole benefit of its members and their beneficiaries, and not for profit, and having a lodge system, with ritualistic form of work and representative form of government. Such association shall make provision for the payment of benefits in case of death, and may make provision for the payment of benefits in case of sickness, temporary or permanent physical disability, either as a result of disease, accident or old age, provided the period of life at which payment of physical disability benefits on account of old age commences shall not be under seventy years, subject to the compliance by members with its constitution and laws. Provided that beneficiary societies or associations, whose membership is confined to the members of any one religious denomination, shall only be required to have a branch system and a representative form of government. Such beneficiary societies or associations shall be governed by the provisions of chapter nine, title nine, of the code, and shall be exempt from the provisions of the statutes of this state, relating to life insurance companies, to the same extent as fraternal beneficiary associations. But the provisions of this chapter shall not be construed to include fraternal orders which only provide for sick and funeral benefits. [34 G. A., ch. 81, § 1.] [26 G. A., ch. 21, § 1.]

Unless it appears that an association engaged in the business of insurance is within the definition of fraternal beneficiary societies, it will be presumed to be within the general provisions relating to life insurance companies and associations.

Krause v. Modern Woodmen, 133–199, 110 N. W. 452.

The provision of code § 1812, relating to life insurance companies and associations, that the certificate of the examining physician estops the company from defending on the ground that the assured was not in condition of health required by the policy at the time of the issuance of the certificate, in the absence of any evidence that the certificate was acquired by any fraud or deceit of the assured, has no application to beneficiary societies or associations. *Sargent v. Modern Brotherhood*. 148–600, 127 N. W. 52.

Such an association may rely upon misrepresentations in the application as breaches of warranty. But held that under a liberal construction in favor of the assured the answers to questions in the application were not false in such sense as to defeat recovery. *Ibid.*

SEC. **1822-a. Membership confined to one religious denomination —heretofore organized.** Any corporation heretofore organized under the laws of this state, whose membership is confined to the members of any one religious denomination, and whose plan of business permits, may take advantage of this act by amendment to its articles of incorporation, and by complying with the provisions of section eighteen hundred thirty-two of the supplement to the code, 1907; provided, that such corporations as on March fifteenth, nineteen hundred and seven, were and have since continuously been doing business under chapter seven, title nine of the code, may take advantage of this act without raising their mortuary assessment rates or showing that their said rates are such as are required by section eighteen hundred and thirty-nine-j of the supplement to the code, 1907. [34 G. A., ch. 81, § 2.]

SEC. **1824. Insurable age—beneficiary.**

The designation of a beneficiary in a certificate of fraternal insurance is not affected by the fact that such beneficiary has subsequently ceased to bear the relationship to the member required by the articles of the association with reference to the designation of such beneficiary. *White v. Brotherhood of Am. Yeomen*, 124–293, 99 N. W. 1071; *Schmidt v. Hauer*, 139–531, 111 N. W. 966.

Relationship by affinity is not created between the blood relatives on either side of the parties to the marriage relation, and a beneficiary is not a relative of the member within the statutory language as to who may be beneficiaries where their relationship is only by affinity through one who is deceased. *Smith v. Knights of Maccabees*, 127–115, 102 N. W. 830.

Where a beneficiary named is not capable of taking the proceeds under the limitations of the statute as to who may be made beneficiaries, the administrator of the deceased member can recover such proceeds as though no beneficiary had been named. *Ibid.*

In an action against a mutual benefit company by one claiming under a certificate as wife of the insured, the company defending on the ground that insured had a prior wife living and that plaintiff was not, therefore, entitled to the benefit, has the burden of showing that a prior marriage existed, and had not been dissolved. *Parsons v. A. O. U. W.*, 108–6, 78 N. W. 676.

As to changing beneficiary see notes to § 1789.

SEC. **1825. Statutes applicable.**

The statutes relating to life insurance companies are not applicable to mutual benefit associations except as specifically provided, and therefore held that the provisions of code § 1812, making the certificate of a medical examiner conclusive on the company as against all statements in the application, are not applicable to such associations. *Smith v. Supreme Lodge*, 123–676, 99 N. W. 553.

The provisions of the general chapter relating to life insurance are not applicable to mutual benefit associations unless incorporated into the chapter relating to such associations. *Knapp v. Brotherhood*, 128–566, 105 N. W. 63.

SEC. **1826. Copy of application.**

The statute does not require a true likeness or facsimile of the application to be attached to the policy and discrepancies which do not involve any construction in determining that the copies of the application are the same may be disregarded. *Knapp v. Brotherhood of Am. Yeomen*, 139–136, 117 N. W. 298.

The provisions of the statute as to incorporating the application in or attaching a copy of it to the policy cannot be waived by the assured. *Mullen v. Woodmen of the World*, 144–228, 122 N. W. 903.

SEC. **1832. Annual certificate—amount of insurance required.** That the law which appears as section eighteen hundred thirty-two of the supplement to the code [1902] be and the same is hereby repealed and the following enacted in lieu thereof:

"Before any beneficiary society, order or association shall be authorized to commence business within this state, it shall submit to the auditor of state its by-laws or rules by which it is to be governed, and also its articles of incorporation which shall include its plan of business. The auditor of state shall thereupon submit its articles of incorporation to the attorney-general for examination, and if found by him to be in harmony with this title, chapter and with law, he shall so certify upon said articles and return them to the auditor of state. If the auditor of state shall approve the articles and also the by-laws or rules, he shall issue to the society, order or association a permit in writing, authorizing it to transact business within this state for a period of one year from the first day of April of the year of its issue, for which certificate and all proceedings in connection therewith. there shall be paid to the auditor of state a fee of twenty-five dollars, and for each annual renewal thereof a like fee shall be paid; provided, however, that before such certificate shall be issued, the fraternal society, order or association shall have actual bona fide applications upon the lives of at least five hundred persons, residents of this state, for at least one thousand dollars of insurance each, and the auditor of state may require the presentation of such applications, signed by the applicants themselves. No renewal of certificate of authority shall be made to any society, order, or association whose membership, in good standing, or the amount of whose insurance in force shall be reduced below the above requirements. Societies, orders or associations not organized under the laws of this state, in addition to the requirements of the provisions of section eighteen hundred twenty-nine of the code, must also comply with all of the provisions of this chapter, except as to the residence of membership; provided, that no such society, order or association shall be authorized to transact business within this state unless it shall be shown to have actual members, in good standing, of at least one thousand, and at least one million dollars of insurance in force." [30 G. A., ch. 62; 27 G. A., ch. 47, § 1; 26 G. A., ch. 21, § 12.]

SEC. **1833. Agents.**

Mutual benefit associations are prohibited from employing paid agents, and therefore such an organization cannot, after it is formed, ratify the act of a promoter in agreeing that an agent shall have a commission for procuring members for the organization. *First National Bank v. Church Federation*, 129–268, 105 N. W. 578.

Such a contract being expressly forbidden, the association is not estopped by taking advantage of the services of such agent from defending against his claim for compensation. *Ibid.*

The statute does not, however, prohibit others than the association from employing and paying an agent to procure members, and held that the promoter pretending to act as general superintendent of the organization was liable to the agent employed by him in the name of the association for compensation under the contract. *Ibid.*

SEC. **1839-a. "Association" defined.** The term "association" when used in this act shall mean any society, order or association organized or authorized under the provisions of chapter nine of title nine of the code. [30 G. A., ch. 61, § 1.]

SEC. **1839-b. Examination—assistants—compensation.** The auditor of state may, at any time he may deem it advisable, either in person or by his legally appointed representative, make an examination of or inquire into the affairs of any fraternal beneficiary association authorized or seeking to be authorized to transact business within this state, provided the

examination of associations organized under the laws of this state shall not be less frequent than once during each biennial period. To aid in making such examination, the auditor of state may appoint such assistants as may be necessary, each of whom shall receive as compensation for his services not to exceed five dollars per day. [30 G. A., ch. 61, § 2.]

SEC. **1839-c. Officers to assist—examiner may administer oaths.** When an association is being examined, the officers, agents or employes thereof shall produce for inspection all books, papers, documents or other information concerning the affairs of the association and shall otherwise assist in the examination. The auditor of state or examiner shall have authority to administer oaths, and may summon and may examine under oath any officer, employe, representative or agent of any association concerning its affairs or condition. [30 G. A., ch. 61, § 3.]

SEC. **1839-d. Revocation or suspension of authority.** If upon investigation or examination, it shall appear to the satisfaction of the auditor of state that any association is doing an illegal or unauthorized business, or is failing to fulfill its contracts with its members, or is conducting its business fraudulently, or if its membership or the amount of its insurance in force has been reduced below the legal requirement, or should any association decline or refuse to submit to an examination, the auditor of state may suspend or revoke its certificate of authority to transact business within this state, and having revoked the certificate of authority of any association organized under the laws of this state, he shall at once report the same to the attorney-general who shall apply to the district court or any judge thereof for the appointment of a receiver to wind up the affairs of such association. [30 G. A., ch. 61, § 4.]

SEC. **1839-e. Expenses—how paid.** In addition to the compensation of the assistants provided for in section two of this act, the auditor or examiner and assistants shall be entitled to actual and necessary traveling, hotel and other expenses while conducting examinations away from their respective places of residence, the same to be paid by the treasurer of state upon warrants drawn by the auditor of state, bills therefor having been filed under oath and approved by the executive council. Such expense and compensation shall, by the auditor of state, be charged to and collected from the associations examined and should any association neglect or refuse to pay the same, the auditor of state shall at once revoke its certificate of authority to transact business within this state. [30 G. A., ch. 61, § 5.]

SEC. **1839-f. Soliciting new business—penalty.** Any officer, manager, agent or representative of any association who with knowledge that its certificate[1] of authority has been suspended or revoked or that it is doing an illegal, unauthorized or fraudulent business solicits insurance for said association or receives applications therefor, or does any other act or thing toward receiving or procuring any new business for said association, shall be deemed guilty of a misdemeanor and for every such act, on conviction thereof, shall pay a fine of not less than one hundred nor more than ten hundred dollars, or be imprisoned in the county jail not more than one year, or be punished by both such fine and imprisonment. [30 G. A., ch. 61, § 6.]

["certificates" in 30 G. A. session laws. EDITOR.]

SEC. **1839-g. Plan of consolidation or reinsurance—approval.** When any fraternal beneficiary association shall propose to consolidate or enter into any reinsurance contract with any other association or organization, it shall present its proposed plan of consolidation or reinsurance,

together with a statement of the condition of its affairs to the auditor of state for his approval. Should he approve the plan, the same shall be submitted by any association proposing to reinsure its risks or transfer its business, to its local lodges or organizations or to a regular or special meeting of its supreme lodge or governing body to be voted upon, such notice being given as the auditor of state may direct. If, in the judgment of the auditor of state, it is deemed advisable he may also require the plan to be in like manner submitted to the association proposing to accept or reinsure the risks of any other association. In case two or more associations propose to consolidate, the proposed plan of consolidation shall be submitted, as above provided, to all of the associations interested in such consolidation. In any of the above cases, a two-thirds vote of all of the members of each association present and voting shall be necessary to an approval of any plan of consolidation or reinsurance, and in no case shall proxies be voted. On presenting to the auditor of state satisfactory proof that the foregoing provisions have been complied with and that the required number of votes have been cast in favor of the proposed plan, he shall issue to the associations an order to the effect that the plan has been approved, and the same shall be in force and effect from and after the date of such order, and the auditor of state shall direct such distribution of the assets of any such association or associations as shall be just and equitable. [30 G. A., ch. 63, § 1.]

SEC. **1839-h. Expenses—how paid.** All expenses or costs incident to proceedings under the provisions of this act shall be paid by the associations interested. [30 G. A., ch. 63, § 2.]

SEC. **1839-i. Penalty.** Any officer, director or manager of any association violating or consenting to the violation of any of the provisions of this act, shall be punished by a fine of not less than ten hundred dollars, or by imprisonment in the county jail not less than one year, or by both such fine and imprisonment in the discretion of the court. [30 G. A., ch. 63. § 3.]

SEC. **1839-j. Mortuary assessment rates.** No fraternal beneficiary society not admitted to transact business within this state prior to the passage of this act, shall be incorporated or given a permit or certificate of authority to transact business within this state, unless it shall first show that the mortuary assessment rates provided for in whatever plan of business it has adopted, are not lower than is indicated as necessary by the following mortality table:

(See next page.)

NATIONAL FRATERNAL CONGRESS MORTALITY TABLE.

Age	Number Living	Number Dying	Probability of Dying	Age	Number Living	Number Dying	Probability of Dying
20.....	100,000	500	.0050000	60.....	69,801	1,588	.0227504
21.....	99,500	501	.0050352	61.....	68,213	1,681	.0246434
22.....	98,999	502	.0050708	62.....	66,532	1,778	.0267240
23.....	98,497	503	.0051068	63.....	64,754	1,880	.0290330
24.....	97,994	505	.0051535	64.....	62,874	1,985	.0315701
25.....	97,489	507	.0052006	65.....	60,889	2,094	.0343904
26.....	96,982	510	.0052587	66.....	58,795	2,206	.0375202
27.....	96,472	513	.0053176	67.....	56,589	2,308	.0409620
28.....	95,957	517	.0053877	68.....	54,271	2,430	.0447753
29.....	95,442	522	.0054693	69.....	51,841	2,539	.0489767
30.....	94,920	527	.0055520	70.....	49,302	2,645	.0536489
31.....	94,393	533	.0056466	71.....	46,657	2,744	.0588122
32.....	93,860	540	.0057532	72.....	43,913	2,832	.0644912
33.....	93,320	548	.0058723	73.....	41,081	2,909	.0708113
34.....	92,772	557	.0060040	74.....	38,172	2,969	.0777795
35.....	92,215	567	.0061487	75.....	35,203	3,009	.0854957
36.....	91,648	578	.0063067	76.....	32,194	3,026	.0939927
37.....	91,070	591	.0064895	77.....	29,168	3,016	.1031010
38.....	90,479	606	.0066977	78.....	26,152	2,977	.1138345
39.....	89,873	622	.0069209	79.....	23,175	2,905	.1253506
40.....	89,251	640	.0071708	80.....	20,270	2,799	.1380858
41.....	88,611	660	.0074483	81.....	17,471	2,659	.1521951
42.....	87,951	683	.0077657	82.....	14,812	2,485	.1677694
43.....	87,268	708	.0081129	83.....	12,327	2,280	.1849599
44.....	86,568	734	.0084797	84.....	10,047	2,050	.2040410
45.....	85,826	761	.0088668	85.....	7,997	1,800	.2250844
46.....	85,065	790	.0092870	86.....	6,197	1,539	.2483460
47.....	84,275	822	.0097538	87.....	4,658	1,277	.2741520
48.....	83,453	857	.0102693	88.....	3,381	1,023	.3025732
49.....	82,596	894	.0108238	89.....	2,358	788	.3341815
50.....	81,702	935	.0114440	90.....	1,570	579	.3687898
51.....	80,767	981	.0121460	91.....	991	404	.4076690
52.....	79,786	1,029	.0128970	92.....	587	264	.4497445
53.....	78,757	1,083	.0137512	93.....	323	161	.4984520
54.....	77,674	1,140	.0146767	94.....	162	89	.5493827
55.....	76,534	1,202	.0157054	95.....	73	44	.6027397
56.....	75,332	1,270	.0168587	96.....	29	19	.6551724
57.....	74,062	1,342	.0181200	97.....	10	7	.7000000
58.....	72,720	1,418	.0194994	98.....	3	3	1.0000000
59.....	71,302	1,501	.0210513				

Provided, however, that nothing in this act shall be construed to apply to any association organized solely for benevolent purposes and composed wholly of members of any one occupation or guild.

The certificate written by any domestic fraternal beneficiary association operating under the provisions of the foregoing mortality table shall be valued in the same manner as provided in section seventeen hundred seventy-four of the code, except that such valuation shall be based upon the foregoing mortality table and four per cent. interest. [34 G. A., ch. 18, § 19.] [32 G. A., ch. 86.]

SEC. **1839-k. Acquisition of real estate—erection of building—conditions.** Any fraternal beneficiary society, order or association organized under the laws of this state, accumulating money to be held in trust for the purpose of the fulfillment of its certificates or contracts, shall be permitted to invest not to exceed ten per cent. of the aggregate amount of such accumulation in such real estate in this state as is necessary for its accom-

modation as a home office, and in the purchase or erection of any building for such purpose it may add thereto rooms for rent; provided that before any association shall invest any of its funds in accordance with the provisions of this subdivision it shall first obtain the consent of the executive council. Any company or association so investing its funds shall convey the real estate thus acquired to the auditor of state by deed, such property to be held by him in trust for the benefit of the members of such association, the value thereof to be determined from time to time by the auditor of state. Provided, that nothing in this act shall be construed to permit the officials or board of directors of such society, order or association to make such investment without authority specifically granted by the said society, order or association through its grand or supreme lodge or convention. [32 G. A., ch. 87.]

SEC. **1839-1. Investment of funds—securities deposited—auxiliary organizations.** Any fraternal beneficiary society, order or association organized under the laws of this state, accumulating money to be held in trust for the purpose of the fulfillment of its certificates or contracts, shall invest such accumulations in the following securities and no other:

1. Bonds of the United States.

2. Bonds of this or of any other state, when such bonds are at or above par.

3. Bonds or other evidences of indebtedness of any county, city, town or school district within the state or any other state, or drainage bonds of any drainage district in the state of Iowa where such bonds or other evidences of indebtedness are issued by authority of and according to law and bearing interest, and are approved by the executive council.

4. Bonds, mortgages and other interest-bearing securities being first liens upon real estate within this state or any other state, worth at least double the amount loaned thereon and secured thereby exclusive of improvements, or two and one-half times such amount including the improvements thereon, if such improvements are constructed of brick or stone; but no such improvements shall be considered in estimating the value unless the owner shall contract to keep the same insured in some reliable fire insurance company or companies authorized to do business in the state, during the life of the loan, in a sum at least double the excess of the loan above one half the value of the ground exclusive of the improvements, the insurance to be made payable in case of loss to the company or association investing its funds, as its interest may appear at the time of loss. All such securities shall be deposited with the auditor of state subject to his approval, and shall remain with him until withdrawn in accordance with the provisions of this act. Any fraternal beneficiary society, order or association receiving payments, or partial payments on any securities deposited with the auditor of state, shall notify him of such fact giving the amount and date of payment within fifteen days after such payment shall have been made. The officers of any society, order or association which fails to report the receipt of payments or partial payments as above provided shall be liable to a fine in double the amount collected and not reported within the time and in the manner above specified. Any society, order or association required to make a deposit with the auditor of state as herein contemplated, shall at the time of making such deposit, designate by what provisions of its articles of incorporation or laws such fund is accumulated and upon making request for withdrawal of any funds shall designate for what pur-

pose such withdrawal is desired. Any society, order or association, may at any time change its securities on deposit by depositing a like amount in other securities of the same character and the auditor of state shall permit a withdrawal of the same upon satisfactory proof in writing filed with him that they are to be used for the purpose for which they were originally deposited. The auditor of state shall have authority to suspend or revoke the certificate of authority of any society, order or association failing to comply with any of the provisions of this act or for violating the same.

Nothing in this act shall be construed to apply to any association organized solely for benevolent purposes and composed wholly of members of any one occupation, guild, profession or religious denomination; nor shall the provisions of this chapter be construed to apply to auxiliary societies or associations, the membership of which consists of female members of the families of members of any one occupation, guild, profession or religious denomination. [34 G. A., ch. 82, § 1.] [32 G. A., chs. 88–89.]

CHAPTER 10.

OF SAVINGS BANKS.

SECTION **1841. Business.**

A savings bank has authority to receive securities of its depositors for safe keeping. *Sherwood v. Home Savings Bank*, 131–528, 109 N. W. 9.

SEC. **1842. Articles of incorporation.** The articles of incorporation of a savings bank shall be signed and acknowledged by the corporators before some officer authorized to take acknowledgment of deeds, and give the corporate name, the object for which it is formed, the amount of capital, the time of its existence, which shall not exceed fifty years, the number of its directors, the name and post-office address of each person or officer who shall manage its affairs until the first election, and the name of the city, town or village, and the county, in which the principal place of business is to be located. Such articles shall be filed and recorded in the office of the recorder of deeds of the county of the principal place of business, and in the office of the secretary of state. Notice of its incorporation shall be given by publication in some newspaper published in the county wherein the bank is located, once each week, for four consecutive weeks, which notice shall state, in substance, the matters required to be given in the articles of incorporation. [30 G. A., ch. 2, § 5; 15 G. A., ch. 60, § 3.]

[The above section is made applicable to §§ 1889-d to 1889-n by § 1889-m. EDITOR.]

SEC. **1843. Capital.** The paid up capital of any savings bank shall not be less than ten thousand dollars in cities, towns or villages having a population of ten thousand or less, nor less than fifty thousand dollars in cities having a greater population. The corporation may commence business when its first directors or officers named in its recorded articles of incorporation shall have furnished the auditor of state proof, under oath, that the required capital has been paid in and is held in good faith by said bank, and he has satisfied himself of such fact, for which purpose he may make a personal examination, or cause it to be made, at the expense of such bank, and he is also satisfied that the preceding sections of this chapter have been complied with, and has issued a certificate to that effect, naming therein its first board of directors, notice of which certificate shall be given by the publication thereof once each week for four consecutive weeks in some news-

paper printed in the county where its articles are recorded, at the expense of such bank, and proof of such publication by the oath of the publisher or his foreman filed with such auditor. [30 G. A., ch. 2, § 6; 15 G. A., ch. 60, §§ 2, 3.]

[The above section is made applicable to §§ 1889-d to 1889-n by § 1889-m. EDITOR.]

SEC. 1844. Powers.

Under a previous statutory provision that a savings bank should not make a loan of money to any person in excess of a certain per cent. of its capital, held that such provision did not render loans in excess void, the prohibition being intended as a rule for the government of the bank. *Benton County Sav. Bank v. Boddicker*, 105–548, 75 N. W. 632.

A savings bank is not liable for the negligence of a clerk furnished by it to keep account of the sales at a public auction and take notes with good security for such sales. *Willett v. Farmers' Sav. Bank*, 107–69, 77 N. W. 519.

SEC. 1845. Management—officers—meetings.

While the board of directors of a savings bank may elect a cashier to hold office during the pleasure of the board, it may also adopt the plan of electing or appointing the cashier annually, and if it does so, the surety on the cashier's bond is not liable for defalcation after the annual period for which the bond was given. *Ida County Sav. Bank v. Seidensticker*, 128–54, 102 N. W. 821.

The provision that the cashier may be dismissed at the pleasure of the board does not negative his appointment for a fixed term. *Ibid.*

Although the board has appointed a cashier to hold office at pleasure, it may make a new appointment of the same person as cashier for a definite period, which appointment will limit the liability of the sureties on his original bond, although as a matter of fact he continues without interruption to occupy the position under the new arrangement and subsequent arrangements of the same character. *Wapello State Bank v. Colton*, 133–147, 110 N. W. 450.

The existence of a vacancy is not essential to the authority of the governing board to change the terms and conditions of the service of an officer already holding office which the board has authority to fill at pleasure. *Ibid.*

While the directors are chargeable in general with the management of the bank, yet they are not specially authorized by law to make report with reference thereto. *State v. Henderson*, 135–499, 113 N. W. 328.

SEC. 1848. **Deposits.** Any savings bank organized under this chapter may receive on deposit money equal to twenty times the aggregate amount of its paid up capital and surplus, and no greater amount of deposits shall be received without a corresponding increase of the aggregate paid up capital and surplus, which capital and surplus shall be a guaranty fund for the better security of depositors, and invested in safe and available securities. The deposits so received shall be paid to such depositor or his representative, when requested, with such interest and under such regulations as the board of directors shall, from time to time, prescribe, not inconsistent with the provisions of this chapter, which shall be printed and conspicuously exposed in the business office of the bank, in some place accessible and visible to all; and no alteration which may at any time be made in such rules and regulations shall affect the rights of depositors acquired previously thereto in respect to deposits or interest thereon. Savings banks may require sixty days' written notice of the withdrawal of savings deposits, but when there are sufficient funds on hand the officers thereof may, in their discretion, waive this requirement. They may close any account, upon such written notice as may be provided for in the by-laws, directing a depositor to withdraw his deposits, after which it shall cease to draw interest. But nothing in this chapter shall prevent such banks, in their discretion, issuing certificates of deposit payable upon demand. [29 G. A., ch. 167, § 1; 28 G. A., ch. 67, §§ 2, 4; 15 G. A., ch. 60, § 7.]

[The above section is made applicable to §§ 1889-d to 1889-n by § 1889-m. EDITOR.]

SEC. **1850. Investment of funds.** Each savings bank shall invest its funds or capital, all moneys deposited therein and all its gains and profits, only as follows:

1. In bonds or interest-bearing notes or certificates of the United States;

2. In bonds or evidences of debt of this state, bearing interest;

3. In bonds or warrants of any city, town, county, school district, or drainage district of this state, issued pursuant to the authority of law; but not exceeding twenty-five per cent. of the assets of the bank shall consist of such bonds or warrants;

That paragraph four of section eighteen hundred fifty supplement to the code, 1907, be and the same is hereby repealed and the following enacted in lieu thereof, to wit:

"4. In notes or bonds secured by mortgage or deed of trust upon unincumbered real estate located in Iowa or adjoining states worth at least twice the amount loaned thereon; provided however, that no such loan shall be made upon any real estate located outside of Iowa, except real estate situated in any county adjoining the Iowa state line";

5. It may discount, purchase, sell and make loans upon commercial paper, notes, bills of exchange, drafts, or any other personal or public security, but shall not purchase, hold or make loans upon the shares of its capital stock;

6. In all cases of loans upon real estate, all the expenses of searches, examination and certificates of title, or the inspection of property, appraisals of value, and of drawing, perfecting and recording papers, shall be paid by such borrowers; if buildings are included in the valuation of real estate upon which a loan shall be made, they shall be insured by the mortgagor for at least two thirds of their value, in some solvent company, and the loss, if any, under the policy of insurance shall be made payable to the bank or its assigns, as its interests may appear. When the mortgagor neglects to procure the insurance as above provided, the mortgagee may procure the same in the mortgagor's name for its benefit, and the premium so paid therefor shall be added to the mortgage debt. [35 G. A., ch. 149, § 1.] [31 G. A., ch. 78; 15 G. A., ch. 60, § 9.]

The authority to sell, discount, purchase and make loans on commercial paper, notes, etc., authorizes a savings bank to make a contract for the purchase of notes, notwithstanding the inhibition on contracting debt. *Ubbinga v. Farmers' Sav. Bank*, 108–221, 78 N. W. 840.

It is within the power of a savings bank to employ such means and assume such obligations as are ordinarily and customarily resorted to in the banking business and such a bank may incur liabilities in the transfer of paper such as is ordinarily essential and customary under the law merchant. *State v. Corning Sav. Bank*. 139–338, 115 N. W. 937.

SEC. **1850-a. Surplus fund—how invested.** The directors of any savings bank may set apart from its earnings, over and above expenses, any desired sum as a surplus fund, to be maintained as such, separate and apart from earnings usually carried and designated as undivided profits, and which surplus fund shall not be drawn upon for the payment of expenses or dividends, except that it may be made use of as a stock dividend for increasing the capital of the bank. Such surplus shall be invested in the same manner as the capital of the bank, as provided in section eighteen hundred forty-eight of this chapter. The directors may transfer said surplus fund, or any part of the same, back to the undivided profits account, and make use of the same, when so transferred, for the payment of expenses and dividends when the deposits of the bank shall be less than ten

times the capital, or capital and remaining surplus, and not otherwise. [28 G. A., ch. 67, § 1.]

SEC. **1852. Interest—dividends.** No dividend shall be declared or paid to stockholders, save out of the undivided profits on hand after paying or setting apart sums sufficient for the payment of all expenses in operating the bank, and of interest to depositors according to the rate fixed therefor by the board of directors from time to time. The bank shall pay interest to the depositors, when due, upon presentation of deposit book or certificate. [28 G. A., ch. 67, § 3; 15 G. A., ch. 60, § 11.]

SEC. **1855. Repeal.** Section eighteen hundred fifty-five of the code be and the same is hereby repealed. [32 G. A., ch. 90, § 1.]

When a savings bank has become insolvent those who have loaned money to the bank in transactions which are prohibited by the statutory provisions as to the purposes for which the bank is authorized to borrow money are not entitled to participate with depositors and lawful creditors in the distribution of the funds of the bank. *State v. Corning State Sav. Bank*, 136–79, 113 N. W. 500.

Notwithstanding the provisions of this section prohibiting the incurring of indebtedness by savings banks, such a bank may become liable on the transfer of negotiable paper in accordance with the customary business of banking. *State v. Corning Sav. Bank*, 139–338, 115 N. W. 937.

SEC. **1855-a. Indebtedness.** State and savings banks may contract indebtedness or liability for the following purposes only; for necessary expenses in managing and transacting their business, for deposits, and to pay depositors; provided, that in pursuance to an order of the board of directors previously adopted, other liabilities not in excess of amount equal to the capital stock may be incurred. [32 G. A., ch. 90, § 2.]

SEC. **1855-b. Acts in conflict repealed.** All acts or parts of acts in conflict with this act are hereby repealed. [32 G. A., ch. 90, § 3.]

SEC. **1857. Dissolution.** State or savings banks may be dissolved prior to the period fixed in the certificate of incorporation, by the affirmative votes of the stockholders holding three fourths of the capital, at a meeting of stockholders to be called for this purpose in the manner and after publication of notice as required in case of the increase of its capital. In case of dissolution of the bank or proceedings to close the same as authorized in this chapter, no receiver appointed thereunder shall be allowed to sell the assets thereof at forced sale, but he shall collect the same with all diligence, and make distribution of the proceeds from time to time to those entitled thereto. [33 G. A., ch. 114, § 1.] [15 G. A., ch. 60, § 30.]

[The above section is made applicable to §§ 1889-d to 1889-n by § 1889-m. EDITOR.]

CHAPTER 11.

OF STATE BANKS.

SECTION **1864. Capital—certificate.** No state bank shall be organized under the provisions of this chapter with a less amount of paid up capital than fifty thousand dollars, except in cities or towns having a population not exceeding three thousand, where such association may be organized with a paid up capital of not less than twenty-five thousand dollars. But no such association shall have the right to commence business until its officers or its stockholders shall have furnished to the auditor of state a sworn statement of the paid up capital, and, when the auditor of state is

satisfied as to that fact, he shall issue to such association a certificate authorizing it to commence business, and it shall cause said certificate to be published in some newspaper printed in the city or town where the association is located, once each week, for at least four weeks, or, if no newspaper is published in such city or town, then in a newspaper published nearest thereto in the county. [31 G. A., ch. 9, § 6.]

SEC. **1866. Directors.**

Acquiescence by a bank in a course of action by its president who is its managing officer, or any facts constituting a holding out of the president by the bank as having a right to act for it, lay a foundation for authority actual or inferred. *Griffin v. Erskine*, 131–444, 109 N. W. 13.

A remittance to the president of a bank in his name with an abbreviation of his official title is a payment to the bank. *Ibid.*

CHAPTER 12.

OF BANKS.

SECTION **1869. Pay of and loan to officers.** That section eighteen hundred sixty-nine of the supplement to the code, 1907, be and the same is hereby repealed and the following enacted in lieu thereof:

"Officers of savings and state banks may receive for their services a reasonable compensation to be fixed from time to time in the by-laws, or by vote of the board of directors; provided, however, directors as such shall receive only such reasonable compensation as shall be fixed from year to year by the stockholders at their annual meeting and when approved by the auditor of state, and a director of such bank who is paid a salary as an active officer thereof shall not draw any added compensation for attendance upon board meetings. No officer or employe of the bank shall in any manner directly or indirectly use its funds or deposits or any part thereof, except for the regular business transactions of the bank, and no loans shall be made by it to any of them except upon express order of the board of directors, made in the absence of the applicant, duly entered in the records of the board proceedings and only upon the same security as required of others; but the board of directors may by resolution, duly entered in the records of the board proceedings, authorize loans to directors not holding any other office nor being an employe, not exceeding a maximum sum at any one time, which resolution shall be voted upon in the absence of such director. Any such officer, director or employe of the bank violating any of the provisions of this section shall be guilty of embezzlement and shall be imprisoned in the penitentiary not exceeding ten years, or fined in a sum not less than the amount embezzled, or by both fine and imprisonment, but nothing in this act shall prevent or defeat the right to recover upon any note or notes given in violation of this provision." [35 G. A., ch. 150, § 1.] [32 G. A., ch. 91; 31 G. A., ch. 79, § 1; 25 G. A., ch. 30, § 1; 15 G. A., ch. 60, § 17.]

[The above section is made applicable to §§ 1889-d to 1889-n by § 1889-m. EDITOR.]

This provision is intended to prohibit any loan to an officer unless that particular loan has been passed upon by the board of directors as provided. A blanket resolution of the directors will not render valid such subsequent loans. *German Sav. Bank v. Des Moines National Bank*, 122–737, 98 N. W. 606.

But the bank may be bound by the subsequent ratification or approval of such loans and estopped from afterwards questioning the validity of the notes given

therefor by the officers and transferred to a purchaser without notice. *Ibid.*

The statute does not prohibit an officer of the bank from selling negotiable paper unless such sale is resorted to indirectly to obtain a loan. *State v. Corning Sav. Bank*, 139–338, 115 N. W. 937.

SEC. **1870. Limit of liabilities.** The total liabilities to any savings or state bank of any person, corporation, company or firm, for money borrowed, including in the liabilities of a company or firm the liabilities of the several members thereof, shall at no time exceed twenty per cent. of the actually paid up capital of such bank; provided that they may loan not to exceed one half of their capital stock to any person, corporation, company or firm on notes or bonds secured by mortgage or deed of trust upon unencumbered farm land in this state, worth at least twice the amount loaned thereon; but the discount of bona fide bills of exchange drawn against actually existing value, and the discount of commercial or business paper actually owned by the person or persons, corporation, company or firm negotiating the same, shall not be considered money so borrowed. [29 G. A., ch. 76, § 1; 25 G. A., ch. 30, § 2; 15 G. A., ch. 60, § 18.]

[The above section is made applicable to §§ 1889-d to 1889-n by § 1889-m. EDITOR.]

SEC. **1871. Examinations.** The board of directors of each savings and state bank shall, at its annual meeting, appoint from its members an examining committee of not less than two, which shall examine the condition of the bank, at least every quarter, and report the same in writing duly signed to the board, who shall cause said report to be recorded in the directors' minute book of the bank. One of these examinations shall be made during the month of June, and another one during the month of December, in each year, and these two examinations, besides being recorded in the minute book of the bank, shall be reported to the state auditor on blanks to be supplied by him. And in case any bank refuses or neglects to so forward such report, the auditor shall be authorized to have such examination made by one of his regular examiners, and the bank shall be charged with and required to pay the reasonable expense of such examination. Members of such examining committee shall receive for their services a reasonable compensation, to be fixed by the board at its annual meeting, but in no case shall such compensation exceed five dollars per day for each day's actual service to each member. [31 G. A., ch. 80; 25 G. A., ch. 30, § 4.]

[The above section is made applicable to §§ 1889-d to 1889-n by § 1889-m. EDITOR.]

A false statement by an officer to the examining committee of the directors who are required to report to the state auditor is such false statement as may be punished under the provisions of code § 1887. *State v. Henderson*, 135–499, 113 N. W. 328.

SEC. **1872. Quarterly statements.**

What is said in this section relating to deposits and exchange does not indicate that the section applies to corporations like investment companies not engaged in a general banking business. *Williams v. Lewis Investment Co.*, 110–635, 82 N. W. 332.

SEC. **1873. Examination by auditor—publication of statement.** That section eighteen hundred seventy-three of the code, as amended by chapter ninety-two, acts of the thirty-second general assembly, be and the same is hereby repealed and the following enacted in lieu thereof:

"The auditor of the state may, at any time he may see proper, make or cause to be made an examination of any savings or state bank, or he shall call upon it for a report of its condition upon any given day which has passed, as often as five times each year, which report shall contain the

information under the preceding section, and the auditor shall cause it to be published, except as hereinafter provided, in one regular issue in some daily, semiweekly or weekly newspaper in the city or town where such bank is located, or if there be none in such city or town, then, in one regular issue of some daily, semiweekly, triweekly or weekly newspaper printed in said county, and the expense of such publication shall be paid by the bank. The statement published in the newspaper shall not contain the name of the bank or banks in which the bank making the statement, has on deposit, funds subject to be drawn at sight, nor shall said statement show the amount of liabilities due such bank on the part of the directors thereof." [34 G. A., ch. 83, § 1.] [32 G. A., ch. 92; 15 G. A., ch. 60, § 23; C. '73, § 1571.]

[The above section is made applicable to §§ 1889-d to 1889-n by § 1889-m. EDITOR.]

SEC. **1875. Examiners—how appointed—bond—compensation—fees.** That section eighteen hundred seventy-five of the supplement to the code, 1907, be repealed and the following enacted in lieu thereof:

"The auditor of state may appoint not to exceed six bank examiners, to hold office at his pleasure, who shall give bond to the state, conditioned for the faithful discharge of their duties, in the sum of four thousand dollars, which shall be filed with and the sureties thereon approved by said auditor. One of said examiners shall, under the direction of the auditor of state, have charge of the department, examiners and reports. Said examiners shall receive as compensation for their services a salary of eighteen hundred dollars each, per annum. The auditor of state and examiners shall be entitled to actual and necessary expenses incurred in the examination of banks and loan and trust companies, which shall be audited by the executive council and paid by the treasurer of state upon warrants drawn by the auditor of state, but the total amount of such expenses and the salaries of the examiners shall not in any one year exceed the amount of fees collected from such banks and loan and trust companies. Each of such banks and loan and trust companies shall pay to the auditor of state annually before the first of September, the following fees, which shall be by him turned into the state treasury as other fees of his office; those having a paid up capital of twenty-five thousand dollars or under, the sum of fifteen dollars; those having a paid up capital of fifty thousand dollars and over twenty-five thousand dollars, a fee of twenty-five dollars; those having a paid up capital of one hundred thousand dollars and over fifty thousand dollars, a fee of thirty-five dollars; those having a capital of one hundred fifty thousand dollars and over one hundred thousand dollars, a fee of forty dollars; those having a capital exceeding one hundred fifty thousand dollars, a fee of fifty dollars. No bank examiner shall be assigned by the auditor of state to examine a bank or loan and trust company in a county in which he is interested in the business of a bank, or of a loan and trust company." [33 G. A., ch. 115, § 1.] [31 G. A., ch. 81; 30 G. A., ch. 64, § 1; 23 G. A., ch. 50, §§ 1, 2.]

[The above section is made applicable to §§ 1889-d to 1889-n by § 1889-m. EDITOR.]

SEC. **1876. Costs—repealed.** [30 G. A., ch. 64, § 1.]

[The repeal of the above section was shown at § 1875 of the 1907 supplement which has since been repealed as shown at § 1875 herein. EDITOR.]

SEC. **1877. Proceedings against by state—receivers.**

The receiver of an insolvent bank appointed under a proceeding brought by the auditor of state under statutory provisions may have an order on the stock-

holders for the payment of an assessment in such amount as appears to be necessary to meet the liabilities of the bank (under provisions as to double liability of stockholders) and the stockholder is bound to pay the amount of such assessment without waiting for the final distribution of the assets of the bank. In such case the time for collection of such assessment and the amount to be collected can best be left to the sound discretion of the court, the proceeding being one where the estate of the bank is in process of liquidation by direction of the auditor of state. *State ex rel. v. Union Stock Yards State Bank*, 103–549, 70 N. W. 752, 72 N. W. 1076.

SEC. 1878. Assessments.

The proceeds of an assessment on stockholders should be applied ratably to the payment of the general creditors and of the depositors who were not satisfied out of the assets of the bank as to which they are given preference. *State v. Corning State Sav. Bank*, 127–198, 103 N. W. 97.

On the appointment of a receiver for an insolvent bank depositors are preferred creditors and entitled to be paid in full after deducting costs and expenses from the general assets of the bank. And they are also entitled to share ratably with all creditors in the distribution of the proceeds of a statutory assessment of the stockholders. *Ibid.*

SEC. 1882. Liability of shareholders.

The statutory provision rendering stockholders liable to the extent of double the value of their stock for the debts of the bank is not an act authorizing the creation of corporations with banking powers, etc., without submission to the people within the constitutional prohibition. *State ex rel. v. Union Stock Yards State Bank*, 103–549, 70 N. W. 752, 72 N. W. 1076.

Under the provisions of 18 G. A., ch. 208, incorporated into this section, but which as originally passed related to corporations in general, held that the liability provided for in case of buying and selling exchange, etc., applied to the banking business only, and not to an investment business, although the corporation carrying on the business had authority to receive deposits of money. *Williams v. Lewis Investment Co.*, 110–635, 82 N. W. 332.

An assessment in a receivership proceeding is the proper method of enforcing the stockholder's liability, and to render such assessment valid and binding he must be made a party to the proceedings before the assessment. *Elson v. Wright*, 134–634, 112 N. W. 105.

SEC. 1884. Deposits not to be received by insolvent banks.

Insolvency may exist although the resources of the bank may be such that ultimately no loss whatever shall fall upon the depositors. As no penalty is imposed upon the depositor for making a deposit in an insolvent bank, such depositor is not precluded from recovering such deposit. *Toovey v. Ayrhart*, 136–694, 114 N. W. 181.

SEC. 1885. Penalty.

This section contemplates time deposits as well as deposits subject to check and therefore the issuance of a certificate of deposit for money paid in when the bank is insolvent is a criminal act. *State v. Boomer*, 103–106, 72 N. W. 424.

The insolvency of the bank may be proven by the testimony of experts familiar with the banking business. *Ibid.*

To authorize a conviction for receiving deposits for an insolvent bank, actual knowledge of the insolvency of the bank on the part of the officer receiving such deposits must be proven, and it is error to instruct that the defendant will be criminally liable if as a reasonable and prudent man he ought to have known of the insolvency of the bank. *State v. Dunning*, 130–678, 107 N. W. 927.

These provisions are not applicable to an officer of a national bank. *Easton v. Iowa*, 188 U. S. 220. (Reversing *State v. Easton*, 113–516, 85 N. W. 795.)

SEC. 1887. Penalty for false statements.

The statement mentioned in the statute is the basis of the offense alleged and the persons to whom made should be described with such particularity as to individuate the offense charged and enable the defendant to know what is charged. *State v. Henderson*, 135–499, 113 N. W. 328.

SEC. 1889. Statement—doing business—loan and trust companies.

The president and cashier of every savings and state bank shall cause to be kept at all times a full and correct list of the names and residences of the officers, directors, examining committee, and of all the stockholders in the

bank, and the number of shares held by each, in the office where its business is transacted. Said list shall be subject to the inspection of all the stockholders and creditors of the bank during business hours of each day in which business may be legally transacted. A copy of such list, verified by the oath of the president or cashier, shall be transmitted to the auditor of state within ten days after each annual meeting. No corporation shall engage in the banking business, receive deposits, and transact the business generally done by banks, unless it is subject to and organized under the provisions of this title, or of the banking laws of the state heretofore existing, except that loan and trust companies may receive time deposits subject to the same limitations as are now or may hereafter be prescribed for the receiving of deposits by state banks and issue drafts on their depositaries.

All such companies and all corporations now existing or hereafter organized under the provisions of chapter one, title nine of the code whose articles of incorporation authorize the acceptance and execution of trusts, and all corporations in whose name the word "trust" is incorporated and forms a part, shall have a full paid capital of not less than the amount of capital of savings[1] banks, as provided in section eighteen hundred forty-three of chapter ten and shall be subject to examination, regulation and control by the auditor of state, like savings and state banks, and their stockholders shall be liable to the creditors of such companies as provided in section eighteen hundred eighty-two of this chapter for stockholders in savings and state banks. Any corporation violating this section shall forfeit its charter at the suit of the attorney-general, and said corporation, its officers, directors and agents, shall be punished by a fine of not less than five hundred dollars, or imprisonment of not less than two years in the penitentiary, or by both such fine and imprisonment, at the discretion of the court; provided that loan and trust companies organized under the general incorporation laws of the state, which were engaged in the banking business prior to the first day of January, eighteen hundred eighty-six, and have continued therein since said date, may, by the proper additions to their articles of incorporation, become state banks within the provisions of this title, without incorporating the word "state" in the names of such corporations. [30 G. A., ch. 65; 28 G. A., ch. 68, § 1.]

[1"saving" in 30 G. A. session laws. EDITOR.]

[The amendment by 30 G. A. refers to the code section, while the same section appeared in the supplement to the code [1902]. The words stricken, and for which other matter was inserted, appear in line 14 of the code, and line 17 of the said supplement to the code.]

[The above section is made applicable to §§ 1889-d to 1889-n by § 1889-m. EDITOR.]

SEC. **1889-a. Forged or raised checks—notification.** No bank shall be liable to a depositor for the payment by it of a forged or raised check unless within six months after the return to the depositor of the voucher of such payment, such depositor shall notify the bank that the check so paid is forged or raised. [33 G. A., ch. 116, § 1.]

SEC. **1889-b. Deposit in names of two persons—how paid.** When a deposit shall hereafter be made in any bank or trust company in the names of two persons, payable to either, or payable to either or the survivor, such deposit, or any part thereof, or interest or dividend thereon may be paid to either of said persons whether the other be living or not, and the receipt or acquittance of the person so paid shall be a valid and sufficient release and discharge to the bank, banker, or trust company for any payment so made. [34 G. A., ch. 84, § 1.]

SEC. **1889-c. Postal savings funds—securities for.** That all state and savings banks now existing or that may be hereafter organized under and by virtue of the laws of the state of Iowa be and they are hereby authorized and permitted to deposit with the treasurer of the United States such of the securities of the depositing bank as may be required to secure the postal savings funds deposited therein. [35 G. A., ch. 151, § 1.]

CHAPTER 12-A.

OF ADDITIONAL POWERS CONFERRED UPON TRUST COMPANIES, STATE AND SAVINGS BANKS.

SECTION **1889-d. To act in fiduciary capacity—notes, bonds and mortgages—safe deposits.** Trust companies, state and savings banks now existing or which shall be hereafter incorporated under the provisions of title nine of the code, in addition to the powers already granted to such corporations, shall have power, when so authorized by their articles of incorporation:

1. To be appointed assignee or trustee by deed, and guardian, executor or trustee by will, and such appointment, upon qualification as herein required, shall be of like force as in case of appointment of a natural person.

2. To be appointed receiver, assignee, guardian, administrator, or other trustee by any court of record in this state, and it shall be lawful for such court to appoint such corporation as such receiver, assignee, guardian, administrator, or other trustee, in the manner provided by law for the appointment of any natural person to such trust. Provided any such appointment as guardian shall apply to the estate and not the person.

3. To act as fiscal or transfer agents, or registrar for estates, municipalities, companies and corporations.

4. To take, accept and execute any and all such trusts and powers of whatsoever character and description, not in conflict with the laws of the United States or of the state of Iowa, as may be conferred upon or entrusted or committed to them by any person or persons or any body politic, corporation or other authority, by grant, assignment, transfer, devise, bequest or otherwise, or which may be intrusted or committed or transferred to them or vested in them by order of any court of record, and to receive and take and hold any property or estate, real or personal, which may be the subject of any such trust, and to manage and dispose of such property or estate in accordance with the terms of such trust or power.

5. Any court having appointed, and having jurisdiction of any receiver, executor, administrator, guardian, assignee or other trustee, upon the application of such officer or trustee, after such notice to the other parties in interest as the court may direct, and after a hearing upon such application, may order such officer or trustee to deposit any moneys then in his hands, or which may come into his hands thereafter, and until the further order of said court, with any such trust company, state or savings bank, and upon deposit of such money, and its receipt and acceptance by such corporation, the said officer or trustee shall be discharged from further care or responsibility therefor. Such deposit shall be paid out only upon the orders of said court.

6. Whenever, in the judgment of any court having jurisdiction of any estate in process of administration by any assignee, receiver, executor,

administrator, guardian or other trustee, the bond required by law of such officer shall seem burdensome or excessive, upon application of such officer or trustee, and after such notice to the parties in interest as the court shall direct, and after a hearing on such application, the said court may order the said officer or trustee to deposit with any such corporation for safe keeping, such portions or all of the personal assets of said estate as it shall deem proper, and thereupon said court shall, by an order of record, reduce the bond to be given, or theretofore given by such officer or trustee, and the property as deposited shall thereupon be held by the corporation under the orders and directions of said court. When any deposit shall be made by any person in trust for another, and no other or further notice of the existence and terms of a legal and valid trust shall have been given to the corporation in the event of the death of the trustee, the same or any part thereof, together with the dividends or interest thereon, may be paid to the person for whom the said deposit was made, or to his or her legal representatives; provided that the person for whom the deposit was made, if a minor, shall not draw the same during his or her minority without the consent of the legal representatives of said trustee.

7. To issue drafts upon depositories, and to purchase, invest in, and sell promissory notes, bills of exchange, bonds and mortgages and other securities.

8. To exercise the powers conferred on and to carry on the business of a safe deposit company. [35 G. A., ch. 152, § 1.]

SEC. **1889-e. Stock—how voted.** In case any corporation shall hold any of its own shares of stock in any of the trust capacities herein authorized, then such shares shall be voted at stockholders' meetings by any person so authorized by the board of directors of said corporation. [35 G. A., ch. 152, § 2.]

SEC. **1889-f. Separate funds—not liable for debts of corporation.** All property, real or personal, received in trust by any such corporation exercising the powers granted by this act, shall be kept separate from such funds or property which may be in the possession of such corporation, and shall not be liable for the debts or obligations of such corporation. [35 G. A., ch. 152, § 3.]

SEC. **1889-g. Powers and duties same as individuals—compensation—bond.** Every state or savings bank, or trust company, acting as guardian, administrator, executor, trustee, assignee, receiver or custodian shall have the same rights, powers and privileges as individuals so acting, and receive the same compensation as is or may be allowed individuals for exercising similar offices or trusts, so far as the same are fixed by statutes and shall execute a bond for the faithful performance of the trust confided to it in like sum and with like penalties as is required by individuals. [35 G. A., ch. 152, § 4.]

SEC. **1889-h. Retirement or dissolution—successor—how appointed—return of securities.** In case any corporation desires to retire from business under this act, or in case of the dissolution of any such corporation the court having jurisdiction of each of the several trusts and appointments held by such corporation shall, upon application of such corporation or its receiver, after such notice to the other parties in interest as the court may direct, and after a hearing upon such application, appoint another corporation as successor trustee or appointee, and upon the acceptance of such office by the successor trustee and due qualification therefor, and the transfer of the property in such case held, to the successor trustee then the dissolving corporation shall be discharged from any further re-

sponsibility in such trust capacity or appointment. [1]And the auditor of state, upon being furnished with satisfactory evidence of said corporation release and discharge from all of the obligations and trusts assumed by virtue of this act, shall thereupon return to such corporation the securities deposited by it with him. [35 G. A., ch. 152, § 5.]

[1]The last sentence doubtless refers to certain provisions in § 4 of the original bill respecting securities to be deposited with the auditor, which provisions were eliminated by amendment before the bill was passed. EDITOR.]

SEC. **1889-i. Use of words "trust," "state" or "savings" in name.** Any trust company, state or savings bank, which under this act and by its original or amended articles of incorporation shall be authorized to exercise any of the powers herein granted, shall have the word "trust" "state" or "savings" incorporated in the name thereof; and no corporation hereinafter organized without complying with the terms of this act, and no partnership, individual or unincorporated association, shall incorporate or embrace the word "trust" in its name. [35 G. A., ch. 152, § 6.]

SEC. **1889-j. Indebtedness or liability—maximum.** Trust companies, state or savings banks, may contract indebtedness or liability for the following purposes: for necessary expenses in managing and transacting their business, for deposits, and to pay depositors, provided that in pursuance of an order of the board of directors previously adopted, other liabilities not in excess of an amount equal to the capital stock may be incurred. But nothing herein contained shall limit the issuance, by trust companies, of debentures or bonds, the actual payment of which shall be secured by an actual transfer of real estate securities. [35 G. A., ch. 152, § 7.]

SEC. **1889-k. Attorney—appointment of—fee.** The beneficiaries of any trust held by any such corporation, may appoint, by and with the approval of the court having jurisdiction thereof, a practicing attorney in good standing to look after the legal interests of said beneficiaries; and said attorney shall be allowed by the court a reasonable fee for such legal services, to be paid out of said trust estate. [35 G. A., ch. 152, § 8.]

SEC. **1889-l. Dividends—surplus fund.** After providing for all expenses, interest and taxes accrued or due from any corporations exercising the powers herein conferred and deducting all losses and bad debts, the board of directors of said corporation may declare a dividend of so much of the profits of the corporation as they shall judge expedient; all debts past due to any corporation on which interest is past due and unpaid for a period of twelve months, unless the same are well secured and in process of collection, shall be considered bad debts within the meaning of this section; before any such dividend is declared, not less than one tenth of the net profits of the corporation for the preceding half year, or for such period as is covered by the dividend, shall be carried to a fund to be designated the surplus fund, until such surplus fund shall amount to twenty per cent. of its capital stock, and thereafter such surplus fund shall always be equal to at least twenty per cent. of the capital stock of such corporation unless impaired by losses, and whenever the same becomes so impaired it shall be reimbursed in the manner provided for its accumulation. Said surplus shall be invested the same as the original capital. [35 G. A., ch. 152, § 9.]

SEC. **1889-m. Certain provisions applicable—statement of condition.** All of the provisions of section sixteen hundred eighteen-a of the supplement to the code, [1907] relating to the renewal of corporate exist-

ence of state and savings banks, and all of the provisions of code sections numbered eighteen hundred forty, eighteen hundred forty-two, eighteen hundred forty-three, so far as same relate to time and manner of commencing business, eighteen hundred forty-five, eighteen hundred forty-six, eighteen hundred forty-seven, eighteen hundred forty-eight, eighteen hundred forty-nine, eighteen hundred fifty-three, eighteen hundred fifty-four, eighteen hundred fifty-six, eighteen hundred fifty-seven, eighteen hundred fifty-eight and eighteen hundred sixty and all the provisions of chapter twelve of title nine of the code; and all amendments thereto, and not in conflict with this act, shall apply with equal force and effect to all trust companies organized or reorganized under this act, and said sections are hereby amended to include such trust companies. Provided that any corporation exercising any of the powers herein granted, in addition to matters required by section eighteen hundred seventy-two of said chapter twelve of title nine of the code to be given in the statement of conditions, shall give:

A list and brief description of the trusts held by such company, the source of the appointment thereto, and the amount of real and personal estate held by such company by virtue thereof, except that mere mortgage trusts wherein no action has been taken by such company, shall not be included in such statement; said list to be transmitted to the auditor of state within thirty days after the receipt of requisition therefor, but such list shall not be published. [35 G. A., ch. 152, § 10.]

SEC. **1889-n. Acts in conflict repealed.** All acts, or parts of acts, in conflict with this act, are herewith repealed. [35 G. A., ch. 152, § 11.]

CHAPTER 13.

OF BUILDING AND LOAN ASSOCIATIONS.

SECTION 1890. Defined.

The fundamental purpose of these associations is to assist members by small periodical payments to acquire homes. *Home Sav. & Trust Co. v. Fidelity & Dep. Co.*, 115–394, 88 N. W. 821.

Comity between states does not require the courts of this state to enforce a contract or apply a remedy with reference to a foreign building and loan association which contravenes or nullifies the settled policy of this state with reference to such associations. *Field v. Eastern Bldg. & L. Assn.*, 117–185, 90 N. W. 717.

Where the contract issued by a building and loan association was evidently intended to be construed by the stockholder to whom it was issued as providing for full payment of the par value of the stock after the payment of specific sums by way of dues for a fixed time, held that the contract would be so construed as against the association. *Ibid.*

Such a contract is not affected by subsequent amendments to the by-laws, which are made parts of the contract, in the absence of any provision authorizing a change of the terms of the contract by such amendments. *Ibid.*

Such an association, although mutual in name, may in the absence of statutory restrictions bind itself to make payment of the par value of its stock after fixed payment of dues has continued for a specified time. *Ibid.*

Under the articles of plaintiff association, held that a limitation in the number of payments which could be exacted was not a guarantee that such payments would mature the stock, and the member whose stock had then matured was held bound to pay interest and premiums thereafter on his loan. *Le Mars Bldg. & Loan Assn. v. Burgess*, 129–422, 105 N. W. 641.

The retroactive provisions of 26 G. A., ch. 85, and 27 G. A., ch. 48, were not unconstitutional. *Iowa Sav. & Loan Assn. v. Selby*, 111–402, 82 N. W. 968.

SEC. **1893-a. Articles amended—maximum rate—appointment of receiver.** The provisions of this act shall apply to all building and loan

and savings and loan associations hereafter incorporated as well as those now incorporated under the laws of this state or doing business herein, and all such associations shall amend their articles of incorporation so as to conform to the provisions of this act. No such associations shall be authorized or empowered to collect or receive premiums and interest from a borrower at a greater rate than eight per cent. and in case of an amendment to the articles of incorporation so that a lower rate of interest or charge for the use of money loaned to the borrowing member is authorized than the rate of interest charged upon loans, to members who have theretofore borrowed, shall in like manner be reduced to the same rate as that permitted to borrowers after such amendments to the articles of incorporation, so that the interest charged under whatever name, whether charged as premium or interest to all members of the same association, shall be the same, all reductions of the rate of interest or premium charged to new borrowers shall be made and apply equally to those who have theretofore borrowed. In case any such association doing business in the state shall fail to amend its articles of incorporation in conformity herewith prior to July fifteenth, nineteen hundred, its authority to do business in this state shall be revoked by the executive council, and under the direction of the executive council application by the attorney-general shall be made to the proper court for the appointment of a receiver to wind up the affairs of the association, and in such proceedings the amount due from the borrowing member on mortgages shall be ascertained in the manner provided in section seven[1] of this act, and the balance due on such mortgages shall be treated and considered as due within a reasonable time to be fixed by the court after the appointment of a receiver. [28 G. A., ch. 69, § 10.]

[[1]See § 1907-a herein. EDITOR.]

[Acts in conflict with § 10, ch. 69, 28 G. A., are repealed by § 1898-a. EDITOR.]

An association electing to continue in business under the statute can enforce its existing contracts against borrowing members only as authorized by the new statute. Such borrowing members will be presumed to have assented to the modification of their contracts in their favor made by the statutory provisions. *St. John v. Iowa Business Men's B. & L. Assn.*, 136–448, 113 N. W. 863.

The reduction of the rate of interest chargeable against borrowing members to eight per cent. is not only applicable in a foreclosure proceeding to enforce the mortgage given for the previous loan, but may also be relied upon by the member in an action to have his mortgage canceled and released as having been satisfied by the payment of the amount which the association is authorized to collect. *Ibid.*

SEC. 1894-a. **Revocation of certificates.** The executive council shall have the power, and it shall be its duty, to revoke any certificate of authority given to any building and loan or savings and loan association whenever it appears to said council that said association is transacting business illegally, or is unjust and oppressive to its members or the public. [28 G. A., ch. 69, § 11.]

[Acts in conflict with § 11, ch. 69, 28 G. A., are repealed by § 1898-a. EDITOR.]

SEC. 1898. **Nature of business—statement.** All building and loan or savings and loan associations, upon receiving the certificate from the auditor, shall have power, subject to the terms and conditions contained in their articles of incorporation and by-laws, to issue stock to members to be paid for in single, stated, or monthly payments, but not more than ten thousand dollars of stock, computed at par value, of any kind shall be issued to one person; to assess and collect from members such dues, membership fees, fines, premiums, and interest on loans as may in the articles of incorporation and by-laws have been provided, and the same shall not

be held to be usurious; to permit members, other than holders of guarantee stock, to withdraw all or a part of their stock deposits upon such terms and at such times as the articles of incorporation and by-laws may provide; to acquire, hold, encumber and convey such real estate and personal property as may be necessary for the transaction of their business; to make loans to members on such terms, conditions and securities as the articles of incorporation and by-laws provide; said loans to be made only on real estate security, or on the security of their own shares of stock, not to exceed ninety per cent. of the withdrawal value thereof. It shall be the duty of the secretary of every such association doing business in this state to prepare, on or before February fifteenth of each year, a duly verified statement, showing the book value and withdrawal value of a share of each class of stock in said association, for each monthly period up to January first preceding, and file the same with the auditor of state, which shall be preserved in his office. And the said association shall, on or before February fifteenth of each year, mail to each shareholder a written or printed copy of the same. In case of foreclosure, the borrower shall be charged with the full amount of the loan made to him, together with the dues, interest, premium and fines for which he is delinquent, and he shall be credited with the same value of his pledged shares as if he had voluntarily withdrawn the same. In event that judgment is obtained against a borrower from a building and loan association, no greater recovery shall be had than the net amount of principal actually received, with interest thereon at a rate not greater than twelve per centum per annum on the net amount of loan actually received by and paid to borrower, with statutory attorney fees; no evasion of this provision shall be had by means of any dues, membership fees, premiums, fines, forfeitures or other charges, any agreement to the contrary notwithstanding. [The provisions of said section shall apply to and govern all contracts between building and loan and savings and loan associations and their members, made and entered into prior to the taking effect of the code, and every such contract shall in all actions and proceedings be construed and enforced as in said section provided, and with the same force and effect as if made and entered into after the code took effect, anything in the statutes in force when such contracts were made to the contrary notwithstanding.] [28 G. A., ch. 69, § 12; 27 G. A., ch. 48, § 1; 26 G. A., ch. 85, § 9; C. '73, §§ 1185, 1186.]

[The above section was amended by 27 G. A., ch. 48, § 1, by adding thereto the portion enclosed in brackets. By § 12, ch. 69, of 28 G. A., said ch. 48 of 27 G. A. is repealed; and § 16 of ch. 69 of 28 G. A. legalizes all loans affected by the repeal of said ch. 48. The supreme court of Iowa, however, in the case of *Edworthy et al. v. Iowa Savings and Loan Association*, 114 Iowa 220, has held the repealing act unconstitutional so far as it affects contracts legalized by ch. 48 of 27 G. A., hence it is inserted herein, as being still in force as to certain loans.]

Powers: While a building and loan association can only loan money on the security prescribed by statute, yet, as incident to the transaction of its business, it may make a loan on real property on the basis of a valuation fixed with reference to improvements to be made, and accept a bond as security that such improvements will be made in order that the value of the property shall be sufficient to sustain the loan. *Home Sav. & Trust Co. v. Fidelity & Dep. Co.*, 115–394, 88 N. W. 821.

In the absence of express prohibition a building and loan association has the power to borrow money, such power being implied from the general nature of its business. *Bohn v. Boone Bldg. & Loan Assn.*, 135–140, 112 N. W. 199.

Therefore held that in accordance with its usual course of business the president and secretary of such association had authority to execute a note to the holder of matured stock for the amount he was entitled to thereon. *Ibid.*

Where a contract between a building and loan association and a borrowing member is void on the ground that it gives to the member a preference over other members, the association is only entitled to recover the amount actually loaned,

with interest. *Winegardner v. Equitable Loan Co.*, 120–485, 94 N. W. 1110.

A contract between a building and loan association and a borrowing member, by which it is agreed that the stock of the member shall mature and constitute a full satisfaction of the loan after a specified number of payments of dues, premium and interest, regardless of whether the profits of the association have been in fact such as to mature the stock, is invalid. Such a contract involves the appropriation to the benefit of the borrowing member of assets of the association contributed by other members, thus giving the borrowing member a preference to which he is not entitled. *Ibid.*

The legalizing act of 27 G. A., ch. 48, with reference to building and loan associations does not validate a previous contract of such association with borrowing members which gives them a preference over other members in the distribution of the assets of the association. *Ibid.*

Settlement: Where the by-laws contained provisions for withdrawal of members and paying back contributions out of the loan fund, only a percentage of which could be used for such purpose, held that the withdrawal member was not a preferred creditor as to the funds of the association after it had become insolvent, the percentage of the fund applicable to the payment of withdrawals having been exhausted. *Rabbitt v. Wilcoxen*, 103–35, 72 N. W. 306.

Where the association is insolvent and unable to pay each stockholder the book value of his shares, the borrowing shareholder is entitled only to credit for the withdrawal value of his shares, and not for the book value consisting of the amount of installments paid on the stock and the earnings thereof at the last dividend period. If a borrowing member is allowed for all the payments he has made and the earnings thereof, the loss of the association will fall upon the members who have not borrowed, and inequality between the two classes of members will result. An equitable distribution of the assets, if any, in excess of the liabilities, should be effected, and the borrowing member should only be entitled to credit for the actual value of his shares. *Wilcoxen v. Smith*, 107–555, 78 N. W. 217.

There is nothing in the statute authorizing a building and loan association to raise money on certificates in any other way than by issuing shares of stock, and the stockholders constitute its members. *Teller v. Wilcoxen*, 110–565, 81 N. W. 772.

Therefore the holder of a certificate of stock is not a creditor of the association entitled to preference over other members in the winding up of its affairs. *Ibid.*

In the settlement of the affairs of an insolvent building and loan association a borrowing member whose stock has not matured is to be held for the amount of money actually received by him, with interest thereon, less the premium actually paid by him for the loan, and less the interest on the monthly payments of interest made by him. This rule applies to cases where the affairs of the association are not so far settled as to ascertain the value of the stock. When the value of the stock can be determined, the borrower should then be entitled to credit for its value, in addition to the items mentioned. *Hale v. Kline*, 113–523, 85 N. W. 814.

Premiums form a part of the profit fund when paid and go to the increase of value of shares. If the association is insolvent the borrower should be allowed his share of the profit fund, made up in part of the premiums, but no further credit on account of premiums paid. *Briggs v. Iowa Sav. & L. Assn.*, 114–232, 86 N. W. 320.

The fact that interest is exacted monthly instead of at longer intervals will not make the contract usurious. *Ibid.*

The borrower cannot be required to pay more than twelve per cent. per annum, payable monthly, on the loan. *Iowa Cent. Bldg. & L. Assn. v. Vogt*, 115–59, 87 N. W. 726.

Where the association is solvent and seeking foreclosure, a withdrawing shareholder is entitled to have credited on his stock the dues, but not the premiums paid, for the latter go into the profit fund and are to be shared equally by all members. But where the association is insolvent, a borrowing member is entitled to credit on his debt for premiums paid, but not for interest or dues. *Spinney v. Miller*. 114–210, 86 N. W. 317; *Tootle v. Singer*. 118–533, 88 N. W. 446.

In an action by the receiver of a building and loan association after it has become insolvent and ceased to be a going concern, to recover the amount of a loan made to a borrowing member, the member is entitled to have credited upon his loan the interest as paid, and the amount of the premiums paid as of the time of payment, and upon the balance, computing from the time of the appointment of the receiver of the association, the member is chargeable with interest at six per cent., and entitled to credit for the actual value of the shares of stock held by him. *Spinney v. Chapman*, 121–38, 95 N. W. 230.

In determining the net amount of the loan, monthly payments exacted in advance are not to be included. *Oskaloosa Nat. B. L. & I. Assn. v. Bailey*, 129–287, 105 N. W. 417.

When the borrower announces his desire to cease further payment of monthly payments and to take up his mortgage, and negotiations are begun to ascertain the amount paid, the amount of the indebtedness becomes fixed and from that time interest should be allowed on such amount at the ordinary rate. *Ibid.*

The net amount of the loan on which interest may be computed does not include an amount credited by way of advance payment on stock; the association can only recover the amount actually paid to or advanced for the mortgagor. *Butson v. Home Sav. & Trust Co.*, 129–370, 105 N. W. 645.

This rule is not affected by the fact that the company has become insolvent and gone into the hands of a receiver. *Ibid.*

Every payment which goes to advance or accelerate the process of maturing the stock is a payment in some degree or measure on the debt, irrespective of whether by the contract such payment is to be directly applied in discharge thereof. *Ibid.*

A provision fixing a withdrawal value on stock held not to entitle the borrower to credit on foreclosure to the full amount of such withdrawal value. *LeMars Bldg. & L. Assn. v. Burgess*, 129–422, 105 N. W. 641.

A borrower cannot recover back money voluntarily paid to a building and loan association in excess of the amount due on his loan. *Carter v. Iowa State Business Men's B. & L. Assn.*, 135–368, 112 N. W. 828.

The mere establishment of the right to the withdrawal value of stock does not give the stockholder a preference, but if the corporation, although insolvent, before being put into the hands of a receiver, pays a portion of the withdrawal value the transferee of the stock is entitled to dividends on the balance in the same proportion as other stockholders, and the previous payment cannot be accounted as a dividend by the receiver. *McKee v. Home Savings & Trust Co.*, 133–548, 110 N. W. 908.

The fact that the association has undertaken voluntary liquidation and ceased to make new loans does not constitute a breach of contract on its part such as to relieve the borrower from obligation to carry out its terms. *Iowa Bus. Men's B. & L. Assn. v. Fitch*, 142–329, 120 N. W. 694.

A settlement made with the secretary in the usual course of business is binding on the association. *Asbury v. Rowe*, 146–162, 124 N. W. 865.

Premiums, interest, usury: Where the borrower has authorized the secretary of the association to make a certain bid for priority of loan, it will be presumed, in the absence of evidence to the contrary, that the bid was made by the secretary and the money obtained thereby. In such a transaction the contract is not usurious, no interest being charged on the premium bid. *Hawkeye State Sav. & Loan Assn. v. Johnston*, 106–218, 76 N. W. 678.

It is not unconstitutional to authorize building and loan associations to charge by way of interest or premium more than the lawful rate of interest. The profits inure to the benefit of the borrower with other stockholders. *Iowa Sav. & Loan Assn. v. Heidt*, 107–297, 77 N. W. 1050.

In the absence of express statutory provision it is not lawful for the association to exact from the borrower a sum by way of premium which in addition to the interest contracted for renders the amount to be paid for the loan greater than lawful interest. But payment by the borrower of necessary expenses in making the loan in addition to legal interest will not constitute usury. *Ibid.*

The association may deduct from the amount of the loan charges for making abstract, examination of the same and appraisement. If these charges are actually for amounts paid out it is immaterial that they are entered as expenses for making the loan. *Ibid.*

The association may deduct a portion of the dues to cover the expense of management. *Ibid.*

The statute authorizes penalties for the nonpayment of dues and unless exorbitant they will not be unlawful. *Ibid.*

It is not required that the premium be paid in advance. It may be made payable in monthly installments. But the premium provided for must be fixed and paid in good faith to secure the loan, and not as a mere device to evade the law against usury. If the sums nominally paid as premium and interest together exceed the amount loaned, and the monthly payments of premium and interest together exceed the highest rate of interest allowed by law, the loan is usurious. *Wilcoxen v. Smith*, 107–555, 78 N. W. 217.

Under the provisions of § 1185 of the code of '73, authorizing building and loan associations to levy, assess and collect from the members dues, fines, interest and premiums, which shall not be construed to make the loan usurious, held that even though it were necessary to avoid the usury law in such case the association adopt a by-law authorizing the collection of such dues, interest and premiums, the existence of such by-law was sufficiently shown by the instrument evidencing the loan. *Building, Sav. & Loan Assn. v. Froelich*, 110–244, 81 N. W. 449.

The burden is upon the borrower to show that there was in fact no bidding for the right of precedence in making the loan, which would serve as a basis for a premium. *Ibid.*

To take a loan out of the general law as to usury on the ground that it is authorized as a contract with a building and loan association, it must appear that the lender is in fact such an association, and the mere form of the contract of loan will not evidence that fact. *Hyland v. Phoenix Loan Assn.*, 118–401, 92 N. W. 63.

The curative act, removing the objection of usury to loans of building associations is valid as to contracts previously made, if the borrower continues to recog-

nize the contract as valid after the change in the law. *Iowa Sav. & L. Assn. v. Heidt*, 107–297, 77 N. W. 1050; *Iowa Sav. & Loan Assn. v. Curtis*, 107–504, 78 N. W. 208.

Building and loan contracts are exempted from the operation of the general law relating to usury. *Le Mars Bldg. & Loan Assn. v. Burgess*, 129–422, 105 N. W. 641.

Where a loan had been purged of usury by the provisions of 27 G. A., ch. 48, held that the repeal of that act by 28 G. A., ch. 69, did not restore the defense of usury as against such loan. *Edworthy v. Iowa S. & L. Assn.*, 114–220, 86 N. W. 315; *Le Mars Bldg. & Loan Assn. v. Burgess*, 129–422, 105 N. W. 641.

Loans made by a building and loan association to a member, which would otherwise be usurious, but which are legalized by 27 G. A., ch. 48, are valid, not only as to the member, but as to a third party who has become surety of the member for such loan. There is no illegality involved in accepting personal security for a loan to a member. *Le Mars B. & L. Assn. v. McLain*, 120–527, 94 N. W. 1122.

Under this section and the legalizing act of 27 G. A., ch. 48, the computation of interest which is to be made in determining whether the contract with the building and loan association is usurious is to be on the principal sum without rests occasioned by the payment of interest, dues and premiums, and if the total amount of interest and premium paid and delinquent is larger than the principal sum with twelve per cent. interest thereon, then the statutory limit has been exceeded and the borrower is entitled to credit for the excess in addition to the withdrawal value of his stock *Bacon v. Iowa Sav. & Loan Assn.*, 121–449, 96 N. W. 977.

The borrower may be charged with such interest, dues and penalties as are provided for by his contract unless the total amount of the charge exceeds the net loan received by him with twelve per cent. per annum thereon. In such event he is not to be required to pay more than such net amount with twelve per cent. interest. In computing the amount paid by way of interest, dues and premiums, the borrower is not to be allowed interest on such sums paid as on partial payments. *Iowa Dep. & Loan Co. v. Matthews*, 126–743, 102 N. W. 817.

Usurious interest provided for in a building and loan contract made before the enactment of ch. 48, 27 G. A., held to be legalized by that statute. *Co-operative Bank v. Meldrum*, 128–694, 105 N. W. 206.

The provisions in the articles of a building and loan association properly organized, as to payment of dues and fines do not constitute a contract for usury. *Iowa Bus. Men's B. & L. Assn. v. Fitch*, 142–329, 120 N. W. 694.

As to the legalizing act, 27 G. A., ch. 48, see *Guaranty S. & L. Assn. v. Ascherman*, 108–150, 78 N. W. 823.

The act of 27 G. A., ch. 48, legalizing loans previously made by such associations, is applicable to foreign as well as domestic companies. *Tootle v. Singer*, 118–533, 88 N. W. 446; *Spinney v. Chapman*, 121–38, 95 N. W. 230.

SEC. **1898-a. Repeal.** Chapter forty-eight of the acts of the twenty-seventh general assembly, and all acts and parts of acts in conflict with this act, are hereby repealed. [28 G. A., ch. 69, § 12.]

[The above section repeals the portion of the preceding section inclosed in brackets, which is § 1, ch. 48, of the 27 G. A.]

The repeal of the act of 27 G. A., does not render unlawful loans which, though unlawful when made, were rendered valid by such act of 27 G. A. *Edworthy v. Iowa Sav. & Loan Assn.*, 114–220, 86 N. W. 315.

SEC. **1898-b. Loans, contracts and mortgages legalized.** All loans, contracts, and mortgages which are affected by the repeal of said chapter forty-eight, acts of the twenty-seventh general assembly, are hereby legalized so far as to permit recovery to be had thereon for interest at the rate of eight per cent. per annum, but at no greater rate, and nothing contained in such contracts shall be construed to be usurious so as to work a forfeiture of any penalty to the school fund. [28 G. A., ch. 69, § 16.]

[Acts in conflict with § 16, ch. 69, 28 G. A., are repealed by § 1898-a. EDITOR.]

The statutory reduction of the rate of interest to be charged borrowers is applicable to existing loans and the borrower is entitled to have his mortgage canceled when he has paid the amount which the association is authorized to exact. *St. John v. Iowa Bus. Men's B. & L. Assn.*, 136–448, 113 N. W. 863.

SEC. **1898-c. Forbidden stocks—rate of dividend.** That no building and loan or savings and loan associations shall issue guaranty stock,

fully paid stock, or single payment stock, or any stock of any other kind or name which shall receive fixed dividends, or is not subject to all the liabilities of all other classes of stock of said associations, except that it shall be lawful for such associations to issue fully paid stock upon the payment by the holder thereof of the par value of such stock upon which the dividends to be declared shall not exceed the sum named in said certificate of stock, but in no event shall the dividend exceed eight per cent. per annum nor the rate of dividend declared upon the other stock of said association, which said stock shall be subject to be called in and redeemed by the said association by giving the holder thirty days' notice thereof; but such stock shall not be entitled to vote at any stockholders meeting. Any association having heretofore issued stocks forbidden by this section must retire the same on or before January first, nineteen hundred and one, and the same may be retired either by paying the amount due thereon in cash or by the issuing of stock permitted to be issued by the provisions of this section. [28 G. A., ch. 69, § 1.]

[Acts in conflict with § 1, ch. 69, 28 G. A., are repealed by § 1898-a. EDITOR.]

The holder of stock bearing a fixed dividend issued prior to the statute prohibiting the issuance of such stock, upon giving notice of its withdrawal for the purpose of retiring it, in conformity with the statute, is entitled to legal interest on the amount due from the time of such notice. *Kellenberger v. Oskaloosa Nat. B. L. & I. Assn.*, 129–582, 105 N. W. 836.

SEC. **1898-d. Foreclosure of mortgage—costs.** In case of foreclosure of any mortgage given by a shareholder of any such association, the mortgagor shall be charged with the rate of interest agreed upon, not however to exceed eight per cent. per annum, and shall be entitled to be credited, as of any anniversary of said mortgage, with the total amount of all payments made on the stock to the said association during the preceding year, and such payment on the stock shall be treated as a payment upon the mortgage, anything in the articles of incorporation or the by-laws of such association to the contrary notwithstanding. If such association shows affirmatively that losses have occurred during the period of the membership of such shareholder in excess of the amount of any fund accumulated from which to pay such losses, to such an extent that the value of the shares of stock have been impaired, then such associations shall be entitled to have entered as a part of the judgment of foreclosure the equitable contribution of said shareholder toward such losses. If, by the articles of incorporation, the withdrawal value of the stock of such mortgagor is greater than the amount paid thereon, together with eight per cent. interest then such withdrawal value shall be credited on the mortgages of the date to which such value is computed, in lieu of the credits of payment on stock as aforesaid, and judgment and decree shall be rendered for only the balance found due; provided, however, that on any mortgage executed between October first, eighteen hundred ninety-seven, and the date of the taking effect of this act, the rate of interest may be computed at the rate therein named, but in no case at a greater rate than twelve per centum per annum on the net amount of the loan actually received by and paid to the borrower, and no evasion of this provision shall be had by means of any dues, premiums, membership fees, fines, forfeitures, or other charges, any agreement to the contrary notwithstanding. In any suit in which the recovery upon the mortgage shall be for a less amount than the amount demanded in the plaintiff's petition, all costs of suit, including attorney's fees, may in the discretion of the court be taxed to the plaintiff. Provided, further, that in case of foreclosure judgment and decree shall be entered

for as much as would be due the association under the provisions of this act if suit had not been brought. [28 G. A., ch. 69, § 6.]

[Acts in conflict with § 6, ch. 69, 28 G. A., are repealed by § 1898-a. EDITOR.]

The fact that on foreclosure of a mortgage the association claims a larger judgment than it is entitled to does not deprive it of the right to attorneys' fees as contemplated in the statute. *Le Mars Bldg. & Loan Assn. v. Burgess*, 129–422, 105 N. W. 641.

SEC. **1899-a. Loans—premium and interest.** Such associations shall have power to loan money to their members at such rate as may be agreed upon, and may collect premiums and interest thereon, but in no case shall the amount of premium and interest paid exceed eight per cent. per annum, but nothing herein shall be construed as prohibiting the payment of such interest and premium monthly, or at such time as may be provided for in the articles of incorporation. [28 G. A., ch. 69, § 4.]

[Acts in conflict with § 4, ch. 69, 28 G. A., are repealed by § 1898-a. EDITOR.]

SEC. **1900. Voting shares of stock.**

The provision that no person shall vote more than ten per cent. of the outstanding shares of the association is applicable to the action of stockholders in adopting a proposition for voluntary liquidation under code supp. § 1907-a. *McKee v. Home Sav. & Trust Co.*, 122–731, 98 N. W. 609.

A proxy given before the adoption of the provision for voting on voluntary liquidation does not authorize the holder to use such proxy in voting on the question. *Ibid.*

SEC. **1902-a. Expenditures and expenses—compensation of officers and agents.** All expenditures and expenses for management and conducting the affairs of said associations, not including membership fees and charges for closing loans, shall be paid from the receipts of interest, premiums, and other sources of profit. Said associations may thus use for expenses in any one year a sum not in excess of the following percentages on their assets, as shown by the last annual report, to wit: Associations with assets not in excess of one hundred thousand dollars, three per centum per annum; associations with assets in excess of one hundred thousand dollars, but less than three hundred thousand dollars, two and one-half per cent.; associations in excess of three hundred thousand dollars, and less than five hundred thousand dollars, two and a quarter per cent.; and associations with assets in excess of five hundred thousand dollars, two per cent.; but in no event shall the expenses of any association exceed twelve thousand dollars in any one year. No officer, employe, or agent of any association shall receive directly or indirectly any salary or other compensation, except for services actually rendered; and any compensation hereafter paid in violation of this section may be recovered by any shareholder or borrower within three years from the receipt of such illegal compensation from the person accepting the same, or from any officer knowingly consenting to the allowance thereof, in a suit which may be brought in the name of the association, or in the name of such shareholder or borrower. [28 G. A., ch. 69, § 2.]

[Acts in conflict with § 2, ch. 69, 28 G. A., are repealed by § 1898-a. EDITOR.]

After the enactment of 28 G. A., ch. 69, it was not competent for a building and loan association to carry out a contract previously made by which an agent was entitled to a percentage of the gross expense fund received in the business of the association, inasmuch as no such expense fund could be provided by the association. *Wood v. Iowa Bldg. & Loan Assn.*, 126–464, 102 N. W. 410.

SEC. 1903-a. **Fines for delinquency—terms of withdrawal.** Any stockholder in arrears in payments may be fined in a sum not in excess of three cents per share of one hundred dollars each for the first month's delinquency and five cents per share of one hundred dollars each for each succeeding month's delinquency; but said penalty shall only be due and payable from the profits belonging to said delinquent. The terms of withdrawal of a member from such association shall be such that any withdrawing member shall receive a sum not less than he has paid into said association, unless losses have occurred to said association, during the time that said withdrawing member was a member, which exceed the amount of the profits, or any fund created with which to pay such losses, and in that case such withdrawing member shall be charged with his proportionate share of the excess of the losses over the profits, and no more. [28 G. A., ch. 69, § 3.]

[Acts in conflict with § 3, ch. 69, 28 G. A., are repealed by § 1898-a. EDITOR.]

While a profit-earning association may assess fines against delinquents, no such penalty should be imposed when no income is produced on payments that have been made. *Iowa Bus. Men's B. & L. Assn. v. Fitch*, 142–329, 120 N. W. 694.

SEC. 1903-b. **Nonborrowing members—withdrawal of.** The articles of incorporation of any building and loan or building and savings association may, by a three-fourths vote of the board of directors, provide that nonborrowing members shall withdraw their stock at book value in the order of its issue, beginning with the stock first issued, by giving the stockholders thereof thirty days notice. [28 G. A., ch. 69, § 5.]

[Acts in conflict with § 5, ch. 69, 28 G. A., are repealed by § 1898-a. EDITOR.]

SEC. 1906-a. **Detailed statement of salaries published.** The auditor of state shall publish, in his report of building and loan and savings and loan associations, a detailed statement of the salaries and compensation paid, and to whom, giving the names of the officers and agents respectively receiving such salaries. [28 G. A., ch. 69, § 13.]

[Acts in conflict with § 13, ch. 69, 28 G. A., are repealed by § 1898-a. EDITOR.]

SEC. 1907-a. **Voluntary liquidation.** Building and loan or saving and loan associations, by a vote of three fourths of the shareholders of such associations, represented in person or by proxy, may go into voluntary liquidation upon such plan as shall be determined upon by the shareholders at their meeting. In case any such association resolves to go into voluntary liquidation, it shall have power, after crediting the mortgages given by the borrowing member with the full book value of the stock, to sell and assign such mortgage to a similar building and loan association, or to any other parties who will hold the same upon the terms under which such mortgage was given to the association. In that event the said mortgage shall be held to become due, if no other time can be agreed upon between the mortgagor and the association, within three years after the assignment thereof. In case the shareholders are unable to agree upon other plan and terms upon which the said association may wind up its affairs, the following plan shall be adopted. Interest shall be computed on the respective amounts paid in by the several shareholders from the date of such payments until the date that said association resolves to go into liquidation, and amount so found shall be the basis for distribution of the assets of the association. In the case of a borrowing member the amount thus found due him on stock, if there have been no losses so as to impair the capital, shall be credited on his mortgage and the balance of such mortgage shall be paid within one year together with interest at the rate therein

agreed upon not to exceed eight per cent., and upon the payments of the outstanding mortgages and the conversion of the assets into money the same shall be distributed pro rata among the stockholders according to the amount found due each as aforesaid. And any balance due the borrowing member, over and above the amount actually received as a credit on the mortgage, shall be paid to such members. In case, however, of an impairment of the capital by loss, the amount of such loss shall be estimated and apportioned to each member pro rata according to the amount found due such members in the manner aforesaid, and the borrowing members shall be entitled to receive a credit on their mortgages for the balance after the stock is charged with its pro rata share of the loss, and the balance due on such mortgages shall be paid within twelve months, and upon the final distribution any balance due such borrowing member shall be paid to him. But in the final distribution, before the final dividend is made, interest shall be allowed on the amount found due the nonborrowing member not to exceed six per cent. so as to equalize between the borrowing member who has received a credit on his mortgage and the nonborrowing member. Any plan other than that herein specified shall be submitted to the executive council for approval before the same is adopted. [28 G. A., ch. 69, § 7.]

[Acts in conflict with § 7, ch. 69, 28 G. A., are repealed by § 1898-a. EDITOR.]

Where the proceedings for voluntary liquidation are not valid under the statutory provision on that subject a receiver may be appointed without regard to such proceedings. *McKee v. Home Sav. & T. Co.*, 122–731, 98 N. W. 609.

The holder of a proxy given before the adoption of the provision with reference to voluntary liquidation does not have authority to vote under such proxy on that question. *Ibid.*

SEC. **1907-b. Consolidation with other companies.** Any building and loan or savings and loan association organized under the laws of this state shall have authority to consolidate its business and membership with one or more building and loan or savings and loan associations of the same class organized under the laws of this state and to transfer to such association or associations its entire assets subject to its existing liabilities, and upon the consolidation of such associations, if any one or more of said companies shall have heretofore issued guaranty stock, they may provide for the withdrawal and retirement of said guaranty stock, and the same may be withdrawn in accordance with the plan therein adopted. The plan of such consolidation, when approved by the board of directors of each of the associations, shall be reduced to writing and submitted to the executive council, and if they find that the plan is in conformity with the law, and equitable in all respects to the members of both associations, they shall attach thereto their certificate of approval. Such plan shall then be submitted to the members of both associations, either at the regular meetings or at special meetings called for that purpose, and, if approved by a vote of three fourths of the shares of stock of each association, the same shall then be filed in the office of the auditor of state, who shall issue a certificate authorizing the consolidation. At such meetings the members may vote in person or by proxy or by written ballot mailed or otherwise delivered to the secretary at or before the time of meeting. [28 G. A., ch. 69, § 8.]

[Acts in conflict with § 8, ch. 69, 28 G. A., are repealed by § 1898-a. EDITOR.]

SEC. **1907-c. Consolidation when in hands of receiver.** In any case where a receiver has been appointed for any such association, its membership and business may in like manner be consolidated with, and its assets transferred to, another such association of the same class, but in such case

the receiver shall act in place of the board of directors, and the plan must also be approved by the court by which the receiver was appointed. [28 G. A., ch. 69, § 9.]

[Acts in conflict with § 9, ch. 69, 28 G. A., are repealed by § 1898-a. EDITOR.]

SEC. **1908. Foreign companies.**

Prior to any specific provisions as to foreign associations, such an association might do business in the state upon complying with the law relating to foreign corporations generally. *Tootle v. Singer*, 118–533, 88 N. W. 446.

This section implies that foreign corporations are to be put upon an equality with domestic associations of the same character, upon condition only that they comply with the requirements peculiar to them, and held that the act of 27 G. A., ch. 48, legalizing usurious loans by building and loan associations, was applicable to foreign as well as domestic companies. *Ibid.*

Although the contract of a foreign building and loan association may be so made as to require the court, in determining its validity, to look to the law of the place where the association is organized, rather than to that in which the other contracting party resides, yet, when such an association has become insolvent and is no longer a going concern, the rights and liabilities of a member should be determined in accordance with the law of the forum, that being also the place of residence of the member. *Spinney v. Chapman*, 121–38, 95 N. W. 230

SEC. **1908-a. Foreign companies.** No building and loan or savings and loan association, incorporated under the laws of any other state or country, shall be authorized to do business in this state, whose articles of incorporation are not found by the executive council to be in substantial compliance with the laws of this state, and affording equal security and protection to the members thereof. [28 G. A., ch. 69, § 14.]

[Acts in conflict with § 14, ch. 69, 28 G. A., are repealed by § 1898-a. EDITOR.]

SEC. **1914. Annual statement.**

The fiscal year of building and loan associations with reference to the making of dividends corresponds to the calendar year. The profits out of which fines may be taken are those accruing to the member during the year and which have not been appropriated to the members as dividends. *Iowa Bus. Men's B. & L. Assn. v. Fitch*, 142–329, 120 N. W. 694.

SEC. **1915-a. Sale or soliciting sale of stock in unauthorized company—penalty.** It shall be unlawful for any agent, solicitor, or other person to sell stock or solicit persons to subscribe for stock in any such association named in section fourteen hereof, which has not been authorized to do business in this state, and any person convicted of so doing shall be punished by a fine of not less than fifty nor more than two hundred dollars, and shall be committed to the county jail until the fine and costs are paid. [28 G. A., ch. 69, § 15.]

[Acts in conflict with § 15, ch. 69, 28 G. A., are repealed by § 1898-a. EDITOR.]

SEC. **1918. False statements.**

An officer of a building and loan association may be prosecuted for embezzlement under code § 4842 relating to embezzlement in general, although he is guilty of a crime under the statutory provisions relating to such associations. *State v. Ames*, 119–680, 94 N. W. 231.

SEC. **1920-a. Unincorporated building and loan associations—extending provisions of other sections—what included.** All unincorporated organizations, associations, societies, partnerships or individuals conducting and carrying on a business, the purpose of which is to create a fund derived from periodical payments by members of such organizations, associations, societies, or other persons, upon contracts or otherwise, as well as from fines, forfeitures, incidental fees and payment of premiums and interest, which fund is to be loaned or advanced to members of the or-

ganization, association, society or to the persons making such periodical payments, for the purpose of enabling them to acquire the ownership or free possession of real estate, or personal property or to construct buildings, or any or all of such purposes, shall be deemed building and loan associations; and the provisions of chapter thirteen of title nine of the code, and chapter sixty-nine of the acts of the twenty-eighth general assembly of the state of Iowa, shall apply to all such building and loan associations so far as the same can be made applicable to unincorporated organizations, associations, societies, partnerships or individuals. [29 G. A., ch. 77, § 1.]

The statute imposing different conditions on the building and loan business when conducted by an unincorporated association from those imposed upon the business when conducted by a corporation is not unconstitutional. *Brady v. Mattern*, 125–158, 100 N. W. 358.

SEC. **1920-b. Sworn statements—deposit of securities.** Every such unincorporated organization, association, society, partnership or individual, conducting and carrying on the business defined in section one hereof, shall, before transacting any business in this state, submit to the executive council a full and complete sworn statement of the resources and liabilities of such organization, association, society, partnership or individual, and of the proposed plan or method of doing business; and no such unincorporated building and loan association shall be permitted to carry on its business within this state unless it shall first deposit with the auditor of state at least fifty thousand dollars of first mortgages and negotiable notes in the same amount secured thereby upon real estate in the state of Iowa, bearing interest at a rate not less than five per cent. per annum, which said mortgages shall in no case exceed one half the actual value of the real estate upon which they are taken; and the auditor of state shall have power and authority to require that such further amount of such securities shall be deposited with him as in his judgment may thereafter be necessary to protect the members of such building and loan association, or the persons making periodical payments thereto. The notes, mortgages and securities so deposited with the auditor of state shall, with all interest and accumulations thereon, be held in trust by him for the purpose of fulfilling and carrying out all contracts made by such building and loan association with the members thereof, and with the persons making periodical payments thereto. [29 G. A., ch. 77, § 2.]

SEC. **1920-c. Approval—certificate.** If the executive council approves the plan or method of business of any such building and loan association, it shall endorse its approval upon the statement of the resources and liabilities and plan of business presented to it, and such statement shall thereupon be filed in the office of the auditor of state, who shall issue a certificate to such building and loan association to transact business within the state of Iowa, if such association has deposited with him the mortgages and securities required by the provisions of section two hereof. [29 G. A., ch. 77, § 3.]

SEC. **1920-d. Officers to give bonds—approval.** Every officer of such building and loan association who signs or endorses checks or handles any of the funds or securities thereof, shall give such bond or fidelity insurance for the faithful performance of his duty in such sum as the auditor of state may require, and no such officer shall be deemed qualified to enter upon the duties of his office until his bond is approved by, and deposited with, the auditor of state. And any such bond may be increased or additional sureties required by the auditor of state whenever in his judgment it becomes necessary to protect the interest of the association

or its members, or persons making periodical payments of money thereto. [29 G. A., ch. 77, § 4.]

SEC. **1920-e. Examination.** The auditor of state may at any time he may see proper make, or cause to be made, an examination of any such building and loan association, or he may call upon it for a report of its condition upon any given day which has passed, as often as four times each year, which report shall contain the information hereinafter required. [29 G. A., ch. 77, § 5.]

SEC. **1920-f. Expense of examination.** The expense of making such examination shall be paid by the building and loan association, and if made by the auditor in person he shall be paid his necessary expenses only; if made by an examiner designated by the auditor, he shall receive ten dollars a day for the time employed by him and his necessary expenses. [29 G. A., ch. 77, § 6.]

SEC. **1920-g. Annual reports.** On or before the first day of February of each year every such building and loan association shall file with the auditor of state its annual report in writing for the year ending on the thirty-first day of December preceding, giving a complete statement in detail of all of its receipts from all sources, and all disbursements made, during such year, arranged and itemized as may be required by the auditor of state. Such report shall also show the number of members or persons making periodical payments to such association, the number and amount of loans made to such persons, the interest received therefrom, the number and amounts of mortgages, contracts or other securities held by the association, the actual cash value of the real estate securing such mortgages or contracts, the salary paid to each of its officers during the preceding year, the assets and liabilities of the association at the end of the year, and any other matters which in the judgment of the auditor of state may be required to give him full information as to the business transacted by such building and loan association. [29 G. A., ch. 77, § 7.]

SEC. **1920-h. Failure or refusal to furnish reports.** If any such building and loan association shall fail or refuse to furnish to the auditor of state the report required in the preceding section, the officers or persons conducting the business of such building and loan association shall forfeit the sum of twenty-five dollars for each day that such report is withheld, and the auditor of state may maintain an action, jointly or severally, against them in the name of the state to recover such penalty, and the same shall be paid into the state treasury when recovered by him. [29 G. A., ch. 77, § 8.]

SEC. **1920-i. Penalties.** If any officer or agent of any such building and loan association, or any person conducting the business thereof, shall knowingly and wilfully swear falsely to any statement in regard to any matter in this act required to be made under oath, he shall be guilty of perjury and punished accordingly. And if any officer, agent or employe of any such association, or any person transacting the business thereof, shall issue, utter or offer to utter, any warrant, check, order, or promise to pay of such association, or shall sign, transfer, cancel or surrender any note, bond, draft, mortgage, or other evidence of indebtedness belonging to such association, or shall demand, collect or receive any money from any member or other person in the name of such association without being authorized so to do; or if any such officer, agent or employe of such association, or any person transacting the business thereof, shall embezzle, convert to his own use, or shall use or pledge for his own benefit or purpose, any moneys, securities, credits or other property belonging to the associa-

tion, or shall knowingly solicit, transact, or attempt to transact any business for any such association which has not procured and does not hold the certificate of authority from the auditor of state to transact business in this state as provided herein; or shall knowingly make, or cause to be made, any false entries in the books of the association, or shall, with intent to deceive any person making an examination of such association, as herein provided, exhibit to the person making the examination any false entry, paper or statement, he shall be fined in a sum not exceeding ten thousand dollars, or imprisoned in the penitentiary not exceeding ten years, or punished by both such fine and imprisonment. [29 G. A., ch. 77, § 9.]

SEC. **1920-j. Revocation of certificate—receiver.** If any such building and loan association, holding a certificate of authority to transact business within this state issued by the auditor as herein provided, shall violate any of the provisions of this act, or shall fail to deposit with the auditor of state such further amount of mortgages or securities as he may require under section two hereof, the auditor of state shall at once revoke such certificate and notify the executive council of the revocation thereof; and under the direction of the executive council, application shall be made by the attorney-general to the proper court for the appointment of a receiver to wind up the affairs of the association; and in such proceedings the amount due from the borrowing members or persons making periodical payments upon contracts or mortgages given by them, shall be ascertained in the manner provided in section seven of chapter sixty-nine[1] of the acts of the twenty-eighth general assembly; and the amounts owing upon such mortgages or contracts from members of the association or persons making periodical payments thereto, shall be treated and considered as due and payable within a reasonable time, to be fixed by the court after the appointment of a receiver. [29 G. A., ch. 77, § 10.]

[1] 1907-a herein. EDITOR.]

CHAPTER 13-A.

OF THE REGULATION OF CERTAIN PERSONS, FIRMS, COMPANIES, PARTNERSHIPS, ASSOCIATIONS OR CORPORATIONS.

SECTION **1920-k. Terms defined.** The term "association" when used in this act shall mean any person, firm, company, partnership, association or corporation, other than building and loan associations and insurance companies and associations, which issue stocks on the partial payment or installment plan. The term "issue" shall mean issue, sell, place, engage in or otherwise dispose of or handle. The term "stock" shall mean certificates, memberships, shares, bonds, contracts, debentures, stocks, tontine contracts, or other investment securities or agreements of any kind or character issued upon the partial payment or installment plan. [30 G. A., ch. 66, § 1.]

It was the intention of the legislature in the enactment of this statute to wind up all associations engaged in the business of issuing investment securities on the installment plan, provided they do not comply with the provisions of the act within sixty days of its passage. *State v. Syndicate Land Co.*, 142–22, 120 N. W. 327.

SEC. **1920-l. Certificate—how obtained.** No association contemplated by this act shall issue any stock until it shall have procured from the auditor of state a certificate of authority authorizing it to engage in such business. To procure such certificate of authority it shall be necessary for such association to file with the auditor of state a statement, under

oath, showing the name and location of such association, the name and post-office address of its officers, the date of organization, and if incorporated a copy of its articles of incorporation, also, a copy of its by-laws or rules by which it is to be governed, the form of its certificates, stocks or contracts, all printed matter issued by it, together with a detailed statement of its financial condition and such other information concerning its affairs or plan of business as the auditor of state may require. The same shall be, by the auditor of state laid before the executive council for consideration. [30 G. A., ch. 66, § 2.]

SEC. **1920-m. Executive council shall approve.** If the executive council is satisfied that the business is not in violation of law or of public policy, and is safe, reliable and entitled to public confidence, and if it shall approve the form of certificate of stock or contract, it shall direct the auditor of state to issue to such association a certificate of authority authorizing it to transact business within this state until the first day of March next succeeding the date of such authorization. [30 G. A., ch. 66, § 3.]

SEC. **1920-n. Existing companies.** Every such association at present transacting, within this state, the business contemplated by this act, shall be subject to all the provisions hereof, and shall within sixty days from the taking effect of the same, comply with all of its requirements. [30 G. A., ch. 66, § 4.]

SEC. **1920-o. Annual report.** During the month of January of each year, every association transacting the business contemplated by this act, shall file with the auditor of state a statement showing its condition on the thirty-first day of December preceding. Said statement shall be in such form as shall be prescribed by the auditor of state. If it appears from such statement that such association is doing a safe business and is solvent, the auditor of state may renew its certificate of authority authorizing it to transact business within the state until the first day of March of the following year. If at any time it shall appear that such association is doing an unsafe business or is insolvent the auditor of state may revoke its certificate of authority authorizing[1] it to transact business within the state until the first day of March of the following year. If at any time it shall appear that such association is doing an unsafe business or is insolvent the auditor of state may revoke its certificate of authority to transact business and having revoked the certificate of authority of an association organized under the laws of this state, he shall report his action to the attorney-general who shall at once apply to the district court or a judge thereof for the appointment of a receiver to close up the affairs of such association, and an injunction may issue in the same proceeding enjoining and restraining the association from transacting business in this state. [30 G. A., ch. 66, § 5.]

[1]"to authorizing" in 30 G. A. session laws. EDITOR.]

SEC. **1920-p. Bonds or securities—how deposited.** Before any association shall be authorized to transact business contemplated by this chapter, it shall deposit with the auditor of state a bond approved by the executive council, guaranteeing the faithful performance of all contracts entered into by such association or securities of the kind designated in subdivisions one, two, three, four and five of section eighteen hundred and six of the code, as amended by chapter sixty-six, acts of the twenty-eighth general assembly, or such other securities as shall be approved by the executive council in the amount of twenty-five thousand dollars, which amount shall remain in possession of the auditor of state until the end of

the calendar year in which the association shall first be authorized to transact business. At the end of such calendar year, such association shall deposit with the auditor of state securities of the kind above provided in an amount equal to all its liabilities to persons residing within this state and shall keep such deposit at all times equal to such liability; provided that at no time shall such deposit be reduced below twenty-five thousand dollars except at such time as such association shall be by law closing out its business and its liabilities shall have been reduced below twenty-five thousand dollars. [30 G. A., ch. 66, § 6.]

SEC. **1920-q. Unauthorized companies—penalty.** Any member or representative of any association who shall attempt to issue or sell any stock as contemplated by this act or to transact any business whatsoever in the name of or on behalf of such association, not authorized to do business within this state, or which has failed or refused to comply with the provisions of this act, or has violated any of its provisions shall be deemed guilty of a misdemeanor and on conviction thereof shall be punished by imprisonment in the county jail not to exceed one year, or by a fine of not less than one hundred nor more than ten hundred dollars or by both such fine and imprisonment in the discretion of the court. [30 G. A., ch. 66, § 7.]

SEC. **1920-r. Fee for annual certificate.** Such association shall pay to the auditor of state for its certificate of authority to transact business, a fee of twenty-five dollars, and for each annual renewal thereof at the time of filing the annual statement ten dollars, which fee shall be by the auditor of state turned into the state treasury as are other fees of his office. [30 G. A., ch. 66, § 8.]

SEC. **1920-s. Examination.** Every such association doing business within this state, shall be subject to examination in the same manner as is provided for the examination of insurance companies and shall pay the same fees and costs therefor, and shall so far as is consistent with the plan of business, be subject to the same restrictions and regulations. Such examinations shall be full and complete and in making the same the auditor of state or examiner shall have full access to and may demand the production of all books, securities, papers, moneys, etc., of the association under examination, and may administer oaths, summon and compel the attendance and testimony of any persons connected with such association. If upon such examination, it shall appear that such association does not conduct its business in accordance with law, or if it permits forfeiture of payments by persons holding its stock, after three years from the issuance of said stock or provides for the payment of its expenses other than from earnings, or that any profits, advantage or compensation of any form or description is given to any member or investor over any other member or investor of the same class, or if beneficiaries are selected or determined or advantages given one over another by any form of chance, lottery or hazard, or if certificates of stock are by their terms or by any other provision to be redeemed in numerical order or by any arbitrary order or precedence, without reference [to] the amount previously paid thereon by the holder thereof, or that the affairs are in an unsound condition, or if such association refuses such examination to be made, the auditor of state may revoke its certificate of[1] authority to do business in this state, and having revoked the certificate of authority of an association organized under the laws of this state, he shall report the same to the attorney-general, who shall proceed as provided in section five hereof. [30 G. A., ch. 66, § 9.]

["or" in 30 G. A. session laws. EDITOR.]

CHAPTER 13-B.

OF THE REGULATION AND SUPERVISION OF INVESTMENT COMPANIES.

SECTION **1920-t. Sale of stocks and bonds—permit for.** That it shall be unlawful for any investment company or stockbroker or any representative thereof, either directly or indirectly, to sell or cause to be sold, offer for sale, take subscription for or negotiate for the sale in any manner whatsoever in this state, except as hereinafter provided, of any stocks, bonds or other securities of any kind or character, other than those expressly exempted from the provisions hereof, without a permit of the secretary of state as hereinafter provided. But nothing in this act shall be construed to prohibit the sale of bonds of the United States, or of the state of Iowa, or of the municipal, county, school or drainage bonds, or of certificates issued by authority of the laws of the state of Iowa, or to prohibit banks from dealing in the various classes of securities now or hereafter authorized by law or to prohibit the sale of stocks, bonds or other securities at judicial sale or by administrators or executors, or bonds or notes secured by mortgage on real estate, provided that the amount of such lien and of all superior liens upon said real estate shall not exceed three fourths of the actual cash value thereof. [35 G. A., ch. 137, § 1.]

SEC. **1920-t1. Preliminary application—information contained in —verification.** That before any investment company shall secure such permit, it shall be necessary for each and every such investment company to file in the office of secretary of state, together with a filing fee of ten dollars, the following papers, documents, etc., together with such other information and documents as said secretary of state shall deem necessary in each case, to wit:

1. A copy of its constitution and by-laws, or articles of copartnership or association.
2. An itemized statement of its actual financial condition and the amount of its properties and liabilities.
3. A statement showing in full detail the plan upon which it proposes to transact business.
4. A copy of all contracts, bonds or other securities which it proposes to make with or sell to its contributors.
5. Sample copies of all literature or advertising matter used or to be used by such investment company.
6. If it shall be a foreign investment company, it shall file a copy of its charter, which copy shall bear the certificate of the secretary of state, or other state officer having custody of such records, that it is a true, complete and correct copy.

All the above described papers shall be verified by the oath of a duly authorized member of a copartnership or association, if it be a copartnership or association, and by the oath of the president and secretary, if it be incorporated, provided that the secretary of state shall have the power to require such officers to make affidavit to such other reports or information as he may call for. [35 G. A., ch. 137, § 2.]

SEC. **1920-t2. Foreign companies—agreement for acceptance of service.** Every foreign investment company shall, before receiving a certificate as provided in section four hereof, file in the office of the secretary of state an agreement in writing (authenticated by the seal of said foreign investment company and by the signature of a member of a copartnership or company if it be a copartnership or company, or by the signatures

of the president and secretary of the incorporated or unincorporated association, and shall be accompanied by a duly certified copy of the order or resolution of the board of directors, trustees or managers of the corporation, authorizing the said president and secretary to execute the same), that thereafter service of notice of any action or process of any kind against such foreign investment company, growing out of the transaction of any business of said company in this state, may be made on the secretary of state, and when so made, such service of notice or process of any kind shall be valid, binding and effective for all purposes as if served upon the foreign investment company according to the laws of this or any other state, and waiving all claims or right of error by reason of such acknowledgment of service. Such notice or process, with a copy thereof, may be mailed to the secretary of state at Des Moines, Iowa, in a registered letter addressed to him by his official title, and he shall immediately upon its receipt acknowledge service thereof on behalf of the defendant foreign investment company by writing thereon, giving the date thereof, and shall immediately return such notice or process in a registered letter to the clerk of the court in which the suit is pending, addressed to him by his official title, and shall also forthwith mail such copy, with a copy of his acknowledgment of service written thereon, in a registered letter addressed to the person or corporation who shall be named or designated as such foreign investment company in such written instrument. The above provisions for the service of notice or process of any kind are merely additions to the general provisions of law relating to the service of notice or process, and are not to be construed to be exclusive. [35 G. A., ch. 137, § 3.]

SEC. **1920-t3. Secretary of state to determine sufficiency—permit.** It shall be the duty of the secretary of state to examine the statements and documents so filed, and if he shall deem it advisable, he shall require such investment company to furnish him with further and more detailed information regarding the affairs of such investment company, and if he finds that such investment company is solvent; that its articles of incorporation or association, its constitution and by-laws, its proposed plan of business, and proposed contracts contain and provide for a fair, just and equitable plan for the transaction of business, he shall issue to such investment company a statement reciting that such company has complied with the provisions of this act and that such investment company is permitted to do business in this state. In no case shall the secretary of state issue to such investment company or to its stockbrokers or agent thereof a permit to do business in this state unless, in his judgment, said investment company meets the requirements of this act. [35 G. A., ch. 137, § 4.]

SEC. **1920-t4. Amendments to charter, articles, constitution and by-laws—consent of secretary.** That no amendment of the charter, articles of incorporation, constitution or by-laws of any such investment company shall become operative until a copy of the same has been filed with the secretary of state as provided in regard to the original filing of such papers, nor shall it be lawful for any such investment company to transact business on any other plan than that set forth in the statement required to be filed in section two of this act, or to make any contract other than that shown in the copy of the proposed contract required to be filed by the provisions of said section, until a written statement showing in full detail the proposed new plan of transacting business and a copy of the proposed new contract shall have been filed with the secretary of state in like manner as provided in regard to the original plan of business and

proposed contract, and the consent of the secretary of state obtained as to making such proposed new plan of transacting business and proposed new contract. [35 G. A., ch. 137, § 5.]

SEC. **1920-t5. Financial statement—filing fee—delinquency—secretary may cancel permit.** That at the close of business of December thirty-first of each year, and at such other times as the secretary of state may require, every investment company, domestic and foreign, shall file with the secretary of state a statement properly verified by the officers of said company, which statement shall set forth its financial condition and the amount of its assets and liabilities and such other information concerning its financial affairs as the secretary of state may require; said statement being for the information of the secretary of state, and it shall not be open to public inspection, neither shall it be published, or used for private purposes. Each annual statement shall be accompanied by a filing fee of two dollars. Any investment company failing to file said statement for the preceding year by the first day of February of each year, or failing to file any other or special report herein required within thirty days after receipt of request therefor, shall forfeit to the state of Iowa the sum of five dollars per day until said statement is filed, or until its right to do business in this state is canceled; and unless said reports are filed within thirty days from the time they are due the secretary of state may cancel the right of said company to do business in this state. [35 G. A., ch. 137, § 6.]

SEC. **1920-t6. Accounts—how kept—open to inspection.** The general accounts of every such investment company, domestic or foreign, shall be kept in a businesslike and intelligent manner and in sufficient detail that the secretary of state can ascertain at any time its financial condition; and such books of account shall at all times during business hours, except on Sundays and legal holidays, be open to stockholders and investors in said companies and to the secretary of state or his duly authorized representatives. [35 G. A., ch. 137, § 7.]

SEC. **1920-t7. General supervision by secretary—examination—costs of same.** The secretary of state shall have general supervision and control as provided by this act over any and all investment companies, domestic and foreign, doing business in this state and not expressly exempted, and all such investment companies shall be subject to examination by the secretary of state or his duly authorized representative at any time the said secretary of state may deem it necessary. The right, powers and privileges of the secretary of state in connection with such examination shall be the same as is now provided with reference to examination of state banks; and such investment companies shall pay a fee for each of such examinations of not to exceed six dollars for each day or fraction thereof spent by the said secretary of state or his duly authorized representative while absent from the capitol in making such examination, and also the actual traveling and hotel expenses of said examiner, and upon failure or refusal of any such investment company to pay such fees upon the demand of the secretary of state, or his duly authorized representative, the secretary of state may cancel its right to do business in this state until such fee is paid. [35 G. A., ch. 137, § 8.]

SEC. **1920-t8. Cancellation of permit—secretary may act.** Whenever it shall appear to the secretary of state that the assets of any investment company doing business in this state are impaired to the extent that such assets do not equal its liabilities or that it is conducting its business in an unsafe, unfair, inequitable or unauthorized manner, or is jeopardiz-

ing the interest of its stockholders or investors in stocks, bonds or other securities by it offered for sale in this state, or whenever any investment company shall fail or refuse for a period of thirty days to file any papers, statements or documents required by this act without giving reasons therefor satisfactory to the secretary of state, he shall at once cancel the right of said investment company to continue to do business in this state. [35 G. A., ch. 137, § 9.]

SEC. **1920-t9. False statement—penalty.** Any investment company or person who shall knowingly and wilfully subscribe to or cause to be made any false statement or false entry in any book of such investment company, or exhibit any false paper with the intention of deceiving any person authorized to examine the affairs of such investment company, or shall knowingly or wilfully make or publish any false statement of the financial condition of such investment company, or the stocks, bonds or other securities by it offered for sale shall be deemed guilty of a felony; and upon the conviction of any such investment company of such felony it shall be fined not less than one hundred dollars nor more than ten thousand dollars, and the secretary of state may forthwith cancel the right of said investment company to transact business in this state; and upon the conviction of a person of such felony he shall be fined not less than one hundred dollars nor more than ten thousand dollars, and he may be imprisoned for not more than ten years, or by both such fine and imprisonment in the discretion of the court. [35 G. A., ch. 137, § 10.]

SEC. **1920-t10. Failure to comply—penalty.** Any stockbroker, agent or other person, unless expressly exempted from the provisions of this act, who shall sell or attempt to sell the stocks, bonds or other securities of any investment company (domestic or foreign), which has not complied with the provisions of this act, or whose permit has been canceled under the provisions of this act or who shall do or attempt to do business for any such investment company, which has not complied with the provisions of this act, or who shall upon demand refuse to exhibit his duly registered certificate of registration received from the secretary of state, or who shall violate any of the other provisions of this act, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined for each of such offenses not less than one hundred dollars nor more than five thousand dollars or by imprisonment in the county jail of not more than ninety days, or by both such fine and imprisonment in the discretion of the court. [35 G. A., ch. 137, § 11.]

SEC. **1920-t11. Fees—how collected—clerks and deputies—how appointed—qualifications—compensation.** All fees herein provided for shall be collected by the secretary of state and by him turned in to the state treasurer on the first secular day of each month; and the secretary of state shall keep a record of the receipts and expenditures incurred in carrying out the provisions of this act. The secretary of state is hereby authorized to appoint such clerks and deputies as the executive council may deem actually necessary to carry this act into full force and effect; but none of whom shall be related by blood or marriage to such secretary of state. The compensation of such clerks and deputies shall be fixed by the executive council. Before the salary and expenses of any such clerk or deputy shall be paid, a detailed and itemized statement of account shall be prepared by such claimant and duly verified, which verification shall aver that such claim is just, reasonable and wholly unpaid and that the amount therein stated has been expended by such claimant. When said claim has been

approved by the secretary of state and audited and allowed by the executive council, it shall be paid by warrant drawn by the auditor of state upon the state treasurer, and there is hereby appropriated out of any money of the state treasury, and not otherwise appropriated, an amount sufficient to meet said salaries and expenses. [35 G. A., ch. 137, § 12.]

SEC. 1920-t12. **Appeal from decision of secretary—hearing.** Any investment company, domestic or foreign, or any stockbroker, which shall be denied a certificate to transact its business in this state or whose certificate shall be revoked by the secretary of state in pursuance of this act, or any interested citizen of this state, shall have the right to appeal to the executive council of this state from any decision of the secretary of state relating to the provisions of this act, within twenty days from the entry of such decision by serving notice of such appeal upon the secretary of the executive council, and such appeal shall be heard and determined by the executive council under such rules and regulations as they may prescribe. [35 G. A., ch. 137, § 13.]

SEC. 1920-t13. **Agents—certificates of appointment—fee.** Any investment company which has complied with the provisions of this act and received from the secretary of state a certificate authorizing it to offer its securities for sale in this state may appoint one or more stockbrokers or agents to act for it; but no such stockbroker, except under the provisions of the next section, or agent, or any other person, shall directly or indirectly, do any business for said investment company in this state until he shall first register with the secretary of state and file with such officer his written appointment and authority from said investment company to act as its stockbroker or agent and receive from him a certificate showing that such investment company has complied with the provisions of the law and that such person is authorized to act for it. All such certificates shall be subject to revocation by the secretary of state, and unless so revoked shall expire on the first day of July each year. A charge of one dollar shall be made by the secretary of state for each certificate issued to each stockbroker or agent. [35 G. A., ch. 137, § 14.]

SEC. 1920-t14. **Stockbroker—permit—standard securities—lists—reports—investigation of broker and stocks—expense—fee—bond—forfeiture.** The secretary of state may issue to any stockbroker who has been a resident of the state during the last preceding six months an annual permit, which permit shall entitle such stockbroker to handle such stocks, bonds or other securities in the state of Iowa as are known to be standard, or are well known to be safe and legitimate investments, or such as are found by investigation of the secretary of state to be safe and legitimate stocks, bonds or other securities; provided, however, such stockbroker shall file on the first and fifteenth day of each month a detailed list of the stocks, bonds or other securities on hand for sale and also all of those sold by him during the preceding half month and not previously reported; provided further that said secretary of state shall have authority to prohibit the stockbroker from handling any of such issues at any time or to cancel said stockbroker's permit at any time he decides that said broker is not handling such securities as he deems safe and legitimate investments. But the secretary of state shall not issue such annual permit to any stockbroker until he has first satisfied himself by special investigation as to the character and responsibility of such stockbroker and as to the character of the class of stocks, bonds and other securities handled by such stockbroker; and also as to his reputation for handling such stocks, bonds and other securities as the secretary of state shall deem to be safe and legitimate investments.

In the event the secretary of state shall make any investigation provided for under the provisions of this section, the expense incurred thereby shall be borne by the stockbroker so investigated. He shall also pay a fee of fifty dollars to the secretary of state for each of said annual permits, which permits, unless sooner revoked by the secretary of state, shall expire on the first secular day of July of each year. If said permit is issued after the first of January of any year, the fee shall be reduced one half. Before being granted such permit by the secretary of state the stockbroker shall give a bond in the penal sum of five thousand dollars to the state of Iowa, conditioned upon a strict compliance with this act, which bond shall be approved by the executive council and filed with the secretary of state. Said bond shall be forfeited by a violation of the terms or conditions of this act, or by a conviction for such violation, and the attorney-general of this state may institute suit in the name of the state of Iowa in any court of competent jurisdiction for a forfeiture thereof at any time within two years from the time the cause of action accrues; provided that if it appears such violation was not intentional and no fraud was shown only so much of said bond shall be forfeited which shall be equal to the amount of damages sustained. [35 G. A., ch. 137, § 15.]

SEC. **1920-t15. Stocks held by bona fide resident owners—authorization by secretary for sale of same—registration of securities.** Nothing in this act shall be so construed as to prohibit a bona fide owner of any stocks, bonds or other securities, who is at the time a resident of this state, from selling, exchanging or otherwise disposing of the same when not made in the course of continuing or repeated transactions of a similar nature, or when the said securities, including negotiable promissory notes, have been issued or given for goods, wares or merchandise purchased or dealt in by the issuer in the ordinary course of his business, or when sold, exchanged or otherwise disposed of to a bank, trust company, insurance company, building and loan association, or to a stockbroker duly authorized to transact business within this state, provided that the same are sold by said owner in good faith and not for the purpose of evading the provisions of this act; and the secretary of state may authorize in writing any such bona fide owner of any stocks, bonds or other securities to sell in this state any other securities not included in the provisions set forth in the preceding portion of this section; provided, however, that it shall be made to appear to the satisfaction of the secretary of state that such stocks, bonds or other securities are safe and legitimate investments, and that they were acquired and held by the owner in good faith, and not for the purpose of evading the provisions of this act, and that said owner desires in good faith to dispose of said securities; but before such authorization shall issue the owner of such securities shall register, in a book kept for that purpose by the secretary of state, the stocks, bonds and other securities desired to be sold, giving the character of the security, the par value thereof, the date of issue, and any other data concerning the same which the secretary of state may require. A certificate fee of one dollar shall be charged for each such authorization. [35 G. A., ch. 137, § 16.]

SEC. **1920-t16. Statement that secretary does not recommend stocks printed on permit—advertisements.** That each and every certificate or permit granted by the secretary of state under the provisions of this act to any investment company or to any stockbroker, agent or representative thereof or to any other person, shall have printed across its face in bold type the statement: "The secretary of state in no wise recommends the stocks, bonds or other securities offered for sale by this (invest-

ment company, stockbroker, agent, representative or person, as the case may be)"; and any investment company or any stockbroker, agent or representative thereof or any person who shall refer to such certificate or permit in any advertisement or printed matter of any kind shall also print in said advertisement or printed matter, with equal prominence, the statement: "The secretary of state in no wise recommends the stocks, bonds or other securities herein referred to." [35 G. A., ch. 137, § 17.]

SEC. **1920-t17. Terms defined.** In the construction of this act the following definitions shall be followed, unless such construction would be inconsistent with the manifest intent or repugnant to the context of the statute:

1. That the name "investment company" as used in this act shall include every corporation or concern, however constituted, now or hereafter organized, which shall sell or cause to be sold or offered for sale, take subscriptions for, or negotiate for the sale of any stocks, bonds or other securities of any kind or character to any person or persons in the state of Iowa. But nothing in this act shall be construed to make the provisions thereof apply to state, savings, private or national banks, loan and trust companies, local building and loan associations, or to the sale of real estate under bond or contract where the actual transfer of title thereto is contingent upon the future payment or considerations, or corporations not organized for profit.

2. The name "domestic" as used in this act shall apply to those corporations or concerns incorporated or organized under the laws of Iowa or having their principal place of business in the state of Iowa; and the word "foreign" shall apply to those corporations or concerns organized under the laws of another state or having their principal place of business outside of the state of Iowa.

3. The name "stockbroker" as used in this act shall include every person, set of persons, association, company, copartnership or corporation, who shall deal in stocks, bonds or other securities covered by this act, or who shall sell, offer or negotiate for the sale, in the state of Iowa, of any stocks, bonds or other securities covered by this act, or who shall underwrite or purchase such securities and resell them to any person or persons in the state of Iowa at a commission or profit.

4. The name "agent" as used in this act shall include any persons who shall act for any investment company or stockbroker, offering for sale, taking subscriptions for, or negotiating for the sale of, or selling any securities for any investment company or stockbroker, either as an employe on a salary basis or for a commission or who shall execute, issue, sell, offer or negotiate for sale, any contract, bond or other instrument, by the terms of which title to real estate located outside the state of Iowa is to be transferred upon the completion of certain payments or the performance of certain conditions therein specified; provided that if it appears such violation was not intentional and no fraud was shown only so much of said bond shall be forfeited which shall be equal to the amount of damages sustained. [35 G. A., ch. 137, § 18.]

[Subdivision 4 of § 18 of the above act does not appear to have been enrolled as passed by the legislature. It is given here as enrolled. EDITOR.]

SEC. **1920-t18. Acts in conflict repealed.** All acts or parts of acts in so far as they are in conflict with this act are hereby repealed. [35 G. A., ch. 137, § 19.]

TITLE X.

OF INTERNAL IMPROVEMENTS.

CHAPTER 2.

OF LEVEES, DRAINS, DITCHES AND WATERCOURSES.

SECTION 1939. Supervisors to locate.

The power of a board of supervisors to construct ditches and drains under these provisions is not restricted in terms or by necessary inference to territory outside of towns and cities. The presumption must be exercised that the board will have due consideration for the interests of the public within as well as without the limits of such municipal corporation. *Aldrich v. Paine*, 106–461, 76 N. W. 812.

SEC. **1940. Proceedings—bond—survey—notice.** A petition signed by a majority of the persons resident in the county, owning land abutting upon such proposed improvement, shall be first filed in the office of the county auditor, setting forth the necessity for the same, the starting point, route and terminus, together with a bond, with sufficient sureties to be approved by him, conditioned to pay all costs and expenses incurred in case the supervisors refuse to grant the prayer of the petition. The auditor shall thereupon place a copy of the petition in the hands of the county surveyor or a competent engineer, who shall make a survey of the proposed improvement, and return a plat and profile thereof to the auditor; which return shall set forth a full and detailed description thereof, its availability, necessity and probable cost, with a description of each tract of land owned by different persons, through or abutting upon which the improvement is proposed to be located, how it will be affected thereby, and its situation and elevation as compared with that of adjoining lands, with such other facts as he may deem material. The auditor shall immediately thereafter cause notice in writing to be served on the owner of each tract of land, through or abutting upon which the proposed improvement is to be located, who is a resident of the county, of the pendency and prayer of said petition, and the session of the board of supervisors at which the same will be heard, which notice shall be served ten days prior to said session in the same manner that original notices are required to be served. In case any such owner is a nonresident of the county, such notice as to him shall be published, once each week, for two consecutive weeks in some newspaper published in the county, proof thereof being made by affidavits as in case of legal notices published in newspapers, which proof shall be filed with the board. [31 G. A., ch. 9, § 15; 19 G. A., ch. 44, § 2; C. '73, § 1208.]

[§ 1953 is made applicable to proceedings under the above section by § 1946-d. EDITOR.]

Under § 1208 of the code of '73 which used the word "adjacent" in describing the owners who are required to petition for a ditch, held that the term applied to owners of land abutting on the improvement, and not the owners of all the land within the congressional subdivision through which it runs. *Wormley v. Board of Supervisors*, 108–232, 78 N. W. 824.

Under this section only those through

whose land runs or on whose land abuts the improvement participate in initiating the improvement, and the kind of land to be included is not described, the board of supervisors being required to find only that the improvement will be conducive to public health, convenience and welfare; and the district is defined by the commissioners appointed to apportion the cost to the owners of land along or in the vicinity of such improvement and to be benefited thereby, such land being classified for this purpose as "dry," "low," "wet" or "swamp." *Lyon v. Sac County*, 155–367, 136 N. W. 324.

In a proceeding to enjoin the issuance of bonds for the construction of a ditch, the contractor is a necessary party. *Tod v. Crisman*, 123–693, 99 N. W. 686.

The unconstitutionality of the provision for taxing lands in the vicinity of the ditch without notice to the owner thereof, renders the entire provision for assessment for such ditches invalid. *Smith v. Peterson*, 123–672, 99 N. W. 552.

The provisions of these sections do not contemplate notice to a landowner whose land does not abut upon the ditch that he may be assessed therefor, and as he is not afforded an opportunity for a hearing the statute is unconstitutional as to such owner. *Beebe v. Magoun*, 122–94, 97 N. W. 986.

A bond executed by petitioners to pay all costs and expenses incurred in case the supervisors refused to grant the petition, held to be invalid in view of the unconstitutionality of the section providing for such bond. *Carroll County v. Cuthbertson*, 136–458, 114 N. W. 17.

A statute which provides for notice to the property owner at some stage of the proceedings, before the assessment is made, is not open to constitutional objection simply because it does not provide for a new or additional notice of each successive step leading up to the assessment. *Ross v. Board of Supervisors*, 128–427, 104 N. W. 506.

The amendatory statute, 30 G. A., ch. 67, providing for notice in proceedings already instituted, is constitutional. *Ibid.*

No one is entitled to raise the objection of want of notice of the proceedings except the party entitled to notice. *Ibid.*

The landowner is not entitled to notice of the hearing as to the extent of the drainage district and as to whether his land shall be included therein. *Ibid.*

It is not required that the petition contain an accurate description of the lands to be included in the drainage district. The matter of the exact boundary is to be determined upon the engineer's survey and report. *Mackay v. Hancock County*, 137–88, 114 N. W. 552.

An owner who has had notice of the proceeding in which it is sought to have his land included within a drainage district cannot, after the district has been established and the improvement made, question the validity of the proceeding on the ground that his property was not within the scope of the benefits. *Ibid.*

About the only office of the petition, aside from alleging the character of land and the nature of improvement, seems to be to point out the locality in a general way and to indicate those who are to give the security for the preliminary costs and expenses to be paid in event the petition shall be rejected. *Zinser v. Board of Supervisors*, 137–660, 114 N. W. 51.

As to the requirements of the petition under subsequent statutes, see code supp. § 1989-a2. *Prichard v. Board of Supervisors*, 150–565, 129 N. W. 970.

The return of the engineer is the basis of all subsequent proceedings, but he should not include all the lands within the watershed unless affected by the contemplated improvement. *Zinser v. Board of Supervisors*, 137–660, 114 N. W. 51.

In cases of a reassessment and relevy landowners have an opportunity to appear and be heard and at such hearing the board may hear and determine all objections made and may increase, diminish, annul or affirm the apportionment as reported. *Howard v. Emmet County*, 140–527, 118 N. W. 882.

The proceedings for the establishment of a drainage district may be had under the provisions of code supp. §1989-a1, *et seq.*, instead of under these sections. *Hoyt v. Brown*, 153–324, 133 N. W. 905.

SEC. 1941. Location—damages.

Even though the notice is not in the language of the statute, if it is not so defective that it can be said there is no notice, the action of the board in holding it to be sufficient cannot be collaterally assailed. *Oliver v. Monona County*, 117–43, 90 N. W. 510.

No express finding that the ditch is necessary or would conduce to the public health, convenience or welfare is required. A finding by the board that all the requirements of the law have been fully complied with is sufficient, there being no requirement that a finding as to the necessity for the ditch shall be made of record. *Ibid.*

The validity of the establishment of a ditch is not affected by the fact that claims for damages are not made and allowed before such location. The objection is not jurisdictional. *Ibid.*

A landowner who has made claim for damages which has been passed on by the board of supervisors cannot afterwards enjoin the prosecution of the work because the damages allowed are not sufficient. *Ibid.*

SEC. 1942. Claim for damages.

If in the construction of a county drain or ditch through the limits of a city or town injury will result to the streets or an additional burden of expense be cast upon the corporation, there would seem to be no reason why damages might not be claimed by such corporation as well as by the individual owners through whose land the ditch extends. *Aldrich v. Paine*, 106–461, 76 N. W. 812.

The owner of land taken for a drainage ditch is entitled to be paid for the portion so taken without regard to the benefits enjoyed in common with other owners of land in the neighborhood resulting from such ditch. *Gish v. Castner etc. Drainage Dist.*, 137–711, 115 N. W. 474.

SEC. 1944. **Letting work—payment.** The auditor shall cause notice to be given of the time and place of letting, the kind and approximate amount of work to be done on each section, and the time fixed for its completion, by publication, once each week, for four consecutive weeks in some newspaper printed in said county, and shall let it upon each separate section to the lowest bidder therefor, who shall be required to execute a bond, with sufficient sureties, in an amount equal to ten per cent. of the estimated cost of the work so let, or deposit such amount in cash with the auditor, as security for the performance of his contract. The engineer in charge of the construction shall furnish the contractor monthly estimates of the amount of work done on each section, and upon the filing of the same with the auditor, he shall draw a warrant in favor of the contractor for eighty per cent. of the value of the work done, according to the estimate; and when said improvement is completed to the satisfaction of the engineer in charge, and so certified by him to the auditor, he shall draw a warrant in favor of said contractor upon the levee or drainage fund for the balance due, as provided in the following section. If any person to whom any portion of said work has been let shall fail to perform the same as, and in the time, specified in his contract, the cash deposited by him shall be forfeited to, or the penalty named in the bond may be recovered in an action thereon by, the county auditor, for the benefit of the levee or drainage district, on said contract, as liquidated damages, and it shall be relet by the auditor in the manner hereinbefore provided. [31 G. A., ch. 9, § 16; 19 G. A., ch. 44, § 6; 18 G. A., ch. 85, § 8; 16 G. A., ch. 140, § 1; C. '73, § 1212.]

One who claims to be the lowest bidder cannot maintain an action of mandamus to compel the board to award the contract to him. *Vincent v. Ellis*, 116–609, 88 N. W. 836.

The statutory provision as to forfeiture of cash deposit and recovery of a penalty does not deprive the board of supervisors of their right to treat the whole contract as forfeited on default of the contractor to perform, and institute new proceedings for the construction of a different ditch. The board is not bound under such circumstances to allow the county auditor to relet the work under the former proceedings. *Brown v. Board of Supervisors*, 129–533, 105 N. W. 1019.

This statute confers upon the board authority to relet the work and maintain an action for damages against the delinquent contractor on his failure to comply with the terms of the contract. *Webster County v. Nelson*, 154–660, 135 N. W. 390.

If the contract provides for liquidated damages, the board has an election to forfeit the contract on account of the breach of its conditions and relet the work instead of relying upon the recovery of the damages provided for. *Ibid.*

The damages recoverable upon forfeiture of the contract should be assessed upon the basis of the necessary or reasonable cost of taking the work as it existed when the contract was forfeited and carrying it forward to completion. *Ibid.*

Where the bond given by the contractor covers his obligation to carry out such contract and not merely the obligation to pay liquidated damages, the surety is bound by the contractor's liability in the event of forfeiture of the contract and reletting the work. *Ibid.*

Further, see notes to supp. § 1989-a8.

SEC. 1945. Costs and fees—how paid.

As the statute points out a fund from which to pay costs and expenses of preliminary proceedings, the county is under no obligation to pay such costs and expenses save from the fund provided. *Carroll County v. Cuthbertson*, 136–458, 114 N. W. 17.

Since the county is not legally chargeable with the costs incident to the making of the improvements provided for, a bond given to the county in a proceeding under code § 1940, which as it stood when the proceeding was commenced was unconstitutional, was of no effect either as a statutory or a common-law obligation. *Ibid.*

SEC. **1946. Assessment of costs and damages—classification.** When any levee, ditch, drain, or change of direction of any watercourse shall have been located and established, as provided in this chapter, or when it shall be necessary to cause the same to be repaired or reopened, the auditor shall appoint three persons, one of whom shall be a competent civil engineer, and two who shall be resident freeholders of the county, not living within the township or townships where the improvement is or is to be located, and not interested therein or in a like question, nor related to any party whose land is affected thereby, who shall within twenty days after such appointment personally inspect and classify as "dry," "low," "wet," or "swamp" all the land benefited by the location and construction of the improvement, or the repairing or reopening of the same, and shall make an equitable apportionment of the cost, expenses, cost of construction, fees, and damages assessed for the construction of any such improvement, or of repairing or reopening the same, and make report thereof in writing to the board of supervisors and file the same with the county auditor who shall immediately thereafter fix a time for hearing objections thereto before the board of supervisors, and cause to be served upon the owner of each tract of land or lot described in said report as shown by the transfer books in the auditor's office notice in writing of the filing and pendency of said report, the amount of special assessment apportioned to such owner, the day set for hearing the same, and that all objections thereto must be made in writing and filed with the county auditor on or before noon of the day set for such hearing, which notice as to residents of the county shall be served not less than ten days prior to the day set for such hearing in the same manner that original notices are required to be served, and as to nonresidents of the county such notice shall be served by publishing the same once[1] each week for two consecutive weeks, the last publication not less than ten days prior to the day set for hearing, in some newspaper published in the county and by serving the same upon the person or persons in the actual occupancy of the property, not less than ten days prior to the day set for such hearing. When the day set for hearing has arrived the board of supervisors shall proceed to hear and determine all objections made and filed to said report, and may increase, diminish, annul or affirm the apportionment made in said report or any part thereof as may appear to the board to be just and equitable, which apportionment shall be assessed among the owners of the land along or in the vicinity of such improvement and to be benefited thereby, in proportion to the benefit to each of them, and levied upon the lands of the owners so benefited in said proportions, and collected in the same manner as other taxes are levied and collected for county purposes; which fund so collected shall be kept separate from other county funds, and shall be paid out only for purposes properly connected with the improvement, on the order of the county auditor, on claims properly certified by the engineer in charge of the improvement as in this chapter provided, or on the order of the board of supervisors. The engineer shall receive for each day's service, while so engaged, five dollars, and

the other commissioners shall receive each two dollars per day, to be paid out of the funds so collected. In order to prevent or repair a break in any levee in time of high water, any member of the board of supervisors may at once employ the necessary labor to repair the levee or prevent a break thereof, and the necessary and reasonable expense therefor shall be audited by the board of supervisors and paid from the levee fund. [30 G. A., ch. 67, § 1; 29 G. A., ch. 78, § 1; 21 G. A., ch. 139; 19 G. A., ch. 44, § 7; 16 G. A., ch. 140, § 4; C. '73, § 1214.]

["one" in 30 G. A. session laws. EDITOR.]

[The amendment by 30 G. A. ignored § 1946 as it appeared in the code supplement, 1902, but amended § 1946 of the code. § 1946 of the code was amended by 29 G. A. by adding matter to the end of the section, and the amendment by 30 G. A. has been shown as amending the section as it appears in the code supplement, 1902. EDITOR.]

These statutory provisions practically authorize the creation of a drainage district and the assessment of the expenses for the improvement upon all the property coming within the general benefit involved in the promotion of the public health, convenience and welfare. It is not the proximity of the parcels of land in question to the ditch or the benefit to the parcels from the construction thereof which is the basis of the assessment, but all the parcels within the drainage district are to be assessed uniformly with the expense in accordance with their general character. The owner is entitled to notice with reference to whether his land is included within the drainage district and this is sufficient to charge him with notice of the subsequent proceedings. *Oliver v. Monona County*, 117–43, 90 N. W. 510.

The funds derived from a special assessment for the construction of a ditch do not belong to the county. *Yockey v. Woodbury County*, 130–412, 106 N. W. 950.

Under this section, held that the entire assessment on the lands of an owner, some of which abutted upon the ditch, while others were in the vicinity thereof, was invalid for want of the provision for notice to the owner with reference to the proposed assessment on land in the vicinity. *Smith v. Peterson*, 123–672, 99 N. W. 552.

The act of 30 G. A., ch. 67, relating to special assessments for ditches, provides that when the report is made by the commissioners appointed to classify the benefited lands and apportion the expenses notice shall be served personally upon residents and upon nonresidents by publication, and that upon such hearing the board shall determine all objections to the assessment and may affirm or modify the apportionments, and this provision is made applicable to proceedings already instituted. It was competent for the legislature to thus provide for notice in existing proceedings. *Ross v. Board of Supervisors*, 128–427, 104 N. W. 506.

This section has no application to the proceedings provided for by code § 1952. *Smittle v. Haag*, 140–492, 118 N. W. 869.

The unconstitutionality of this section is remedied by the provisions of chs. 57 and 68, 30 G. A. code supp. §§ 1989-a1–1989-a47.) *Ibid.*

The county as such has no interest in the establishment of a ditch constructed for the benefit of a fraction of its territory. *Canal Construction Co. v. Woodbury County*, 146–526, 121 N. W. 556.

SEC. **1946-a. Applicable to proceedings now pending.** That said section nineteen hundred forty-six of the code as amended by section one hereof shall be construed to apply to all proceedings now pending before boards of supervisors for the location and construction of levees, drains, ditches or watercourses under the provisions of chapter two, title ten of the code where the apportionment, assessment or levy of the cost of the improvement has not yet been made, as well as to proceedings instituted hereafter. [30 G. A., ch. 67, § 2.]

SEC. **1946-b. Reassessment and relevy.** Where the assessment and levy on account of any ditch, drain or watercourse has been made by the board of supervisors of any county under the provisions of said section nineteen hundred forty-six of the code without notice or legal notice to the owner of the land affected thereby and the whole or any part thereof remains unpaid, the board of supervisors shall have the authority to recall the assessment or levy thus made without notice and proceed anew as provided in section one hereof to apportion and levy the cost of such improvement among the owners and upon the land benefited thereby, taking

as a basis the original apportionment, and report of the commissioners upon which the board had theretofore acted, and the new assessment and levy made upon notice and hearing in such cases shall be certified by the county auditor to the county treasurer, reëntered upon the tax list and collected as other taxes for county purposes, and all payments made under the prior assessment and levy shall be credited upon the new assessment and levy. [30 G. A., ch. 67, § 3.]

A taxpayer who may be subjected to the payment of a tax by reassessment cannot object to the tax on account of defects which might thus be cured. *Thompson v. Mitchell*, 133–527, 110 N. W. 901.

The reassessment and levy provided for are for the express purpose of compelling the benefited land to pay its just proportion of the cost of improvement. *Howard v. Emmet County*, 140–527, 118 N. W. 882.

SEC. **1946-c. Completion of and payment for work already begun.** When any levee, ditch, drain, watercourse or change of watercourse shall have been heretofore established by any of the boards of supervisors of this state and contract or contracts let therefor, and the improvement wholly or partly constructed or drainage bonds issued on account thereof and the proceedings or tax therefor have been or shall be for any cause found invalid and the board of supervisors has found or shall find that such improvement will be conducive to the public health, convenience or welfare, such board is authorized to provide for the completion of the work and the payment therefor, and for the payment of the work already done and of the drainage bonds issued and to that end shall recall the tax theretofore levied and shall reascertain the cost and expense of such improvement, and after notice and hearing as provided in this act shall assess and levy the same upon the lands benefited thereby, and the said board and the other county officers shall proceed as provided by section three and the other provisions of this act. Such reassessment and relevy of taxes shall be in proportion to and not in excess of benefits, and all taxes theretofore paid upon such improvement shall be credited as provided in section three of this act. [30 G. A., ch. 67, § 4.]

SEC. **1946-d. Drainage bonds.** Section nineteen hundred fifty-three of the code shall be construed to apply to and authorize the issuance of drainage bonds in proceedings heretofore or hereafter instituted under section nineteen hundred forty of the code. [30 G. A., ch. 67, § 5.]

SEC. **1946-e. Future levies.** Such assessment shall fix the proportion for all future levies on account of such improvement or the repair or reopening thereof, and may be levied in one year or apportioned among a series of years, and drainage bonds issued therefor as provided by section nineteen hundred fifty-three of the code, and appeals may be taken as provided by section nineteen hundred forty-seven of the code. [30 G. A., ch. 67, § 6.]

SEC. **1947. Appeals.**

The provision of this section that it shall not be competent to show that the lands assessed were not benefited by the improvements pertains exclusively to the remedy, and is applicable, although the statutory provision in force when the tax was levied authorized the property owner to show that his property was not benefited by the improvements. *Allerton v. Monona County*, 111–560, 82 N. W. 922; *Oliver v. Monona County*, 117–43, 90 N. W. 510.

The landowner, being given opportunity to appear before the board of supervisors and make objection that his land as reported by the commissioner is not in fact benefited by the improvement, is concluded by the finding of the board, and such provision is not unconstitutional. *Ross v. Board of Supervisors*, 128–427, 104 N. W. 506.

On an appeal to the district court from an order of the board of supervisors refusing to order the construction of a ditch on an application therefor there is no right to a jury trial. *In re Bradley*, 108–476, 79 N. W. 280.

The petitioners for the establishment of a public ditch being required to contribute to the expense of establishing it, are entitled to notice of appeal from the award of damages taken by a claimant for such damages. *Henderson v. Calhoun County*, 129–119, 105 N. W. 383.

The board of supervisors has no authority to direct the dismissal of an appeal from its action in fixing the assessment upon lands. The county or board of supervisors, if properly a party to the appeal in any sense is such party only in a nominal or representative capacity and the real parties in interest have the right to control the proceedings. *Temple v. Hamilton County*, 134–706, 112 N. W. 174.

The board is given the authority to pass upon the necessity of the improvement and determine its public character and fix the boundaries of the district, which power is legislative rather than judicial; the court should on appeal be reluctant to interfere with the exercise of discretion on the part of the board. *Ibid.*

On appeal from an assessment of benefits the notice must be served on the first four petitioners. Service on the county auditor only is not sufficient. *Poage v. Grant Twp. etc. Drainage Dist. Co.*, 141–510, 119 N. W. 976.

There is no provision for intervention in the district court by parties who are not residents of the county although they may be affected by the establishment of the proposed district. *Prichard v. Board of Supervisors*, 150–565, 129 N. W. 970.

SEC. **1948. Nuisance—repeal.** That the law as it appears in section nineteen hundred forty-eight of the supplement to the code, 1907, be and the same is hereby repealed. [35 G. A., ch. 154, § 1.]

SEC. **1949. Through two or more counties.**

In a proceeding relating to the establishment of a drainage district in two or more counties involving a matter concerning which the boards of the respective counties are required to act jointly, notice of appeal must be served on the auditor of each county and the court acquires no jurisdiction upon service on only one such auditor. *In re Appeal of Head*, 141–651, 118 N. W. 884.

Failure to record the proceedings in each of the counties does not affect the jurisdiction of the court on appeal in such a case. *Ibid.*

SEC. **1951. Levees, ditches or drains in public highway—highway along levee.** Levees, ditches, drains and embankments may be located and constructed within the limits of public highways, on either or both sides of and along the same, to be so built as not materially to interfere with the public travel thereon, by taxation and assessment under the provisions of this chapter, and, when constructed, shall be under the control of the board of supervisors of the county in which they are situated; and it shall have power to grant a right of way thereon to any railway that will maintain them while used by it, subject to any claim for damages against the company in any condemnation proceedings which shall be instituted, and the damages awarded, paid, or secured to be paid before possession shall be given, but the county shall not be required on account thereof or otherwise to keep up such improvements at its expense. The board of supervisors shall have power to establish public highways along and upon any levee built under the provisions of this chapter, provided that when so used the same shall be worked as other highways and so as to at all times maintain its condition as a levee. [29 G. A., ch. 78, § 3; 20 G. A., ch. 186, § 1.]

SEC. **1952. Petition for drain—proceedings.**

Where a petition is apparently sufficient as to the number of signers the action of the board of supervisors in entertaining jurisdiction of the proceeding cannot be collaterally assailed. *Oliver v. Monona County*, 117–43, 90 N. W. 510.

The essential facts which must be alleged and established before the improvement can be ordered, are, that the body or district of land is subject to overflow, or is too wet for cultivation, and that the public health, convenience or welfare will be promoted by the proposed work. The duty of hearing and determining this question is committed in the first instance to the board of supervisors, and until the truth of both of these propositions has been established to the satisfaction of such board, the order for the location and construction of the improvement cannot rightfully be made. If the supervisors fail to find facts without which the order for the

drain or ditch could not be made, they have no jurisdiction to proceed. *In re Bradley*, 117–472, 91 N. W. 780.

While it is required by code § 1940 that the petitioners in an application for a ditch to be constructed at the public expense shall give a bond to pay all costs and expenses incurred in case the board of supervisors refuse to grant the prayer of the petition, nevertheless, in an appeal in such a proceeding the court may tax the costs against the successful party. *Ibid.*

A property owner who has knowledge of the proceedings and allows the public improvement to proceed without objection cannot afterwards question the validity of the tax on account of irregularity. *Thompson v. Mitchell*, 133–527, 110 N. W. 901.

This section is not dependent on the validity of code § 1946 and is not affected by its unconstitutionality. Constitutional objections to both sections are cured by ch. 68, 30 G. A. (code supp. §§ 1989-a1–1989-a47.) *Smittle v. Haag*, 140–492, 118 N. W. 869.

Under this section the petition must describe the body or district of land by metes and bounds, or otherwise, and allege that it is subject to overflow or too wet for cultivation. *Lyon v. Sac County*, 155–367, 136 N. W. 324.

SEC. **1955. Drains through land of another—application—notice.** Section nineteen hundred fifty-five of the code is hereby repealed and the following substituted therefor:

"Whenever the owner of any land shall desire to construct any levee, open ditch, tile or other underground drain, for agricultural, sanitary or mining purposes or for the purpose of securing more complete drainage or a better outlet, across the lands of others, or across or through the right of way and roadbed of a railroad, and shall be unable to agree with the owner of any such lands, or with any such railroad company, through whose land or property he desires to construct the same, with regard to the location or manner of constructing any such ditch, drain or levee, or with regard to the compensation to be made, or with regard to any other matter properly connected therewith, he may file with the township clerk of the township in which any such land or right of way is situated, an application in writing, setting forth a description of the land or other property through which he is desirous of constructing any such levee, ditch or drain, the starting point, route, terminus, character, size and depth thereof. Upon the filing of any such application, the clerk shall forthwith fix a time and place for hearing thereon before the township trustees of his township, which hearing shall be not more than ninety days nor less than thirty days from the time of the filing of such application and thereupon the township clerk shall cause notice in writing to be served upon the owner of each tract of land across which any such levee, ditch or drain, is proposed to be located, as shown by the transfer books in the office of the county auditor, and also upon the person in actual occupancy of any such lands, of the pendency and prayer of such application, [and] the time and place set for hearing on the same before the township trustees, which notice, as to residents of the county and railroad companies, shall be served not less than ten days before the time set for such hearing, in the manner that original notices are required to be served. In case any such owner is a nonresident of the county, such notice as to him shall be posted in three public places within the township where his land is situated at least fifteen days before the time set for such hearing, one of which places shall be upon the land of which he is the owner. Such notices may be served upon a railroad company by serving the same upon its nearest station agent. If at the hearing it should appear that any person entitled to notice, as provided herein, has not been served with notice as herein provided, the township trustees may postpone such hearing and fix a new time for the same and notice of such new day of hearing may be served on such omitted persons in the manner and for the same length of time provided herein, and by fixing such new day for hearing and by adjournment of the proceedings

to such time, the trustees shall not be held to have lost jurisdiction of the subject matter of such proceeding nor of any persons previously served with notice. Any person or corporation claiming damages as compensation for or on account of the construction of any such improvement, shall file a claim in writing therefor with the township clerk at least two days before the day fixed for hearing on the application and a failure to file such claim at the time specified shall be deemed to be a waiver of the right to claim or recover such damage. The term 'lands' as used in this and the next section shall include right of way and other real estate of a railroad company." [33 G. A., ch. 117, § 1.] [22 G. A., ch. 96, §§ 1, 6; 20 G. A., ch. 188, §§ 1, 6.]

SEC. **1956. Hearing—action of trustees.** Section nineteen hundred fifty-six of the code is hereby repealed and the following substituted therefor:

"At the time set for hearing on any such application, the trustees, if they are satisfied that the provisions of the preceding section have been complied with, shall proceed to hear and determine the sufficiency of the application as to form and substance, which application may be amended both as to form and substance before final action thereon. They shall also determine the merits of the application, all objections thereto and all claims filed for damages that may be occasioned by the location and construction of the proposed drainage improvement, and, if deemed necessary, the trustees may view the premises. The trustees may adjourn the proceedings from day to day, but no adjournment shall be for a longer period than ten days. When the time for final action shall have arrived, the township trustees shall, if they find that the levee, ditch or drain petitioned for will be beneficial for sanitary, agricultural or mining purposes, locate the same and fix the points of entrance and exit on such land or property, the course of the same through each tract of land, the size, character and depth thereof, when and in what manner the same shall be constructed, how kept in repair, what connections may be made therewith, what compensation, if any, shall be made to the owners of such land or property for damages by reason of the construction of any such improvements, and any other question arising in connection therewith. The trustees shall reduce their findings, decision and determination to writing, which shall be filed with the clerk of such township, who shall record it in his book of records, together with the application and all other papers filed in connection therewith, and he shall cause the findings and decision of the trustees to be recorded in the office of the county recorder of the county in which such land is situated, and said decision shall be final unless appealed from as provided in the next section." [33 G. A., ch. 117, § 2.] [22 G. A., ch. 96, §§ 2, 3; 20 G. A., ch. 188, §§ 2, 3.]

SEC. **1959. Costs and damages paid—railroad land.** The applicant shall pay the costs of the trustees and clerk and for the serving of notices for hearing, the fees of witnesses summoned by the trustees on said hearing, and the recording of the finding of said trustees by the county recorder. He shall pay all damages awarded, before entering on the construction of the drain through the land of another. If, after the decision of the trustees locating said drain, the party applying therefor shall pay to the party through whose land said drain is to be constructed the damages awarded to said party, or shall pay the same to the trustees for his use, he may proceed to construct said drain in accordance with the decision of the trustees, and the taking of an appeal shall not affect his right to proceed with the construction of the same. If any such ditch or drain shall be located

through or across the right of way or other land of a railroad company, the trustees shall determine the cost of constructing the same across and through such property and the railroad company shall have the privilege of constructing such improvement through its property in accordance with the specifications made by the trustees and recover the cost thereof as fixed by the trustees. But such railroad company before it may exercise such privilege shall file its election to that effect with the township clerk within five days after the decision of the trustees is filed, and in case such election is filed the applicant shall within ten days thereafter pay to the township clerk for the use of the railroad company, the cost of constructing the drainage improvement through its property, in addition to the amount that may be allowed as damages, and when the railroad company shall have completed the improvement through its property in accordance with such specifications it shall be entitled to demand and receive from the township clerk such cost. If the railroad company shall fail to so construct the improvement for a period of thirty days after filing its election so to do, the applicant may proceed to do so and may have returned to him the cost thereof deposited with the township clerk. [33 G. A., ch. 117, § 3.] [22 G. A., ch. 96, § 9; 20 G. A., ch. 188, § 9.]

DRAINAGE OF COAL LANDS OR LEAD MINES.

SEC. **1968. Compensation.** Any person or corporation who by machinery, such as engines or pumps, or by making drains or adit levels, or in any other way, shall rid any lead or zinc-bearing mineral lands or lead or zinc mines of water, thereby enabling the miners and the owners of mineral interest in said lands to make them productive and available for mining purposes, shall receive one tenth of all the lead and zinc mineral taken from said lands as compensation for said drainage. [31 G. A., ch. 82, § 1; C. '73, § 1229.]

SEC. **1969. Setting apart.** The owners of the mineral interest in said lands, and persons mining upon and taking lead or zinc mineral from said lands, shall jointly and severally set apart and deliver from time to time, when demanded, the said one-tenth part of the mineral taken from said lands to the person or corporation entitled thereto, and the owners of the mineral interest therein shall allow the party entitled to such compensation and his agents at all times to descend into and examine said mines, and to enter any building occupied for mining purposes upon any of said lands, and examine and weigh the mineral taken therefrom. [31 G. A., ch. 82, § 2; C. '73, § 1230.]

SEC. **1971. Notice to smelters.** The person or corporation entitled to said drainage compensation may at any time leave with any smelter of lead or zinc mineral in this state a written notice, stating that said person or corporation claims of the persons named in said notice the amount to which said person or corporation may be entitled, which notice shall have the effect of notices in garnishment, and also authorize the said smelter to retain, for the use of the person entitled thereto, the one-tenth part of the mineral taken from said land and received from the person named in said notice. The payment or delivery of the one-tenth part of the mineral taken from any of said lands by any one of the persons whose duty it is hereby made to pay or deliver the same, shall discharge the parties liable jointly with him, except liability to contribute among themselves. [31 G. A., ch. 82, § 3; C. '73, § 1232.]

SEC. **1972. Right of way.** Any person or corporation engaged as aforesaid in draining such mines and lead or zinc-bearing mineral lands,

when he or they shall find it necessary for the prosecution of their work, shall have the right of way upon, over or under the surface of such mineral lands, and the contiguous and neighboring lands, for the purpose of conveying the water from said mineral lands by troughs, pipes, ditches, water races or tunnels, and the right to construct and use shafts and air holes in and upon the same, doing as little injury as possible in making said improvements. [31 G. A., ch. 82, § 4; C. '73, § 1233.]

UNITED STATES LEVEES.

SEC. **1976. Proceedings.** That section nineteen hundred seventy-six of the code be and the same is hereby repealed and the following enacted in lieu thereof:

"Proceedings as contemplated by the preceding section may be begun by filing with the county auditor a petition asking the board of supervisors to form a levee or a drainage district, for any one or all of the purposes specified in section nineteen hundred seventy-five hereof. Said petition shall be signed by one or more owners of lands lying within the limits of such proposed district; the general limits of said district shall be given therein, and a plat of the proposed district shall be filed with said petition. There shall be filed with said petition a bond, with sureties approved by the county auditor, conditioned for the payment of all costs and expenses incurred, in case the board of supervisors shall refuse to grant the prayer or the petition." [31 G. A., ch. 83, § 1; 26 G. A., ch. 46, § 2.]

SEC. **1977. Commission—appointment of—qualifications—report.** At their next regular session held after the filing of such petition, or at a special session called for the purpose, the board of supervisors shall, if the foregoing provisions have been complied with, appoint a commission of three disinterested freeholders of the county, one of whom shall be, if practicable, a competent civil engineer or surveyor. This commission shall, after being duly sworn, proceed to examine the lands within such proposed district, lay out the work required, and make an estimate of the probable cost of the same. They shall make a full report to the board of supervisors, and may recommend that such district be formed as prayed, or that it be enlarged or diminished, as in their judgment will best subserve the general good and promote the general welfare. [31 G. A., ch. 83, § 2; 26 G. A., ch. 46, § 3.]

SEC. **1979. Hearing.** That section nineteen hundred seventy-nine of the code be repealed and the following enacted in lieu thereof:

"At the time named, or at such other time to which the board of supervisors may adjourn the matter, they shall proceed with the hearing, at which any interested parties may appear, either in person or by counsel, and be heard, and may file written pleadings. The board shall hear and determine the matter, and if they determine against the formation of such district, they shall dismiss the proceedings at the cost of the petitioners. If they shall decide to form such levee or drainage district, they shall proceed to fix the boundaries of the same, and their finding shall be entered upon their records. The finding and the report of the commissioners shall be competent evidence at the hearing above provided for, but shall not be conclusive." [31 G. A., ch. 83, § 3; 26 G. A., ch. 46, § 5.]

SEC. **1981. Work carried on—land condemned.** After entering the order as provided in section nineteen hundred seventy-nine hereof, unless further proceedings are suspended as provided in section nineteen hundred eighty hereof, the board of supervisors shall proceed and adopt such plan or system as in their judgment is proper and best under all the circum-

stances, and cause the work to be done, causing such ditches to be dug, channels opened, embankments erected, fills made, and such other work done as in their judgment will most efficiently promote the general good and the public welfare. They shall have power, in the manner now provided by law, chapter four of title ten of this code, to condemn any land which they deem it necessary to take or use in the prosecution of such work, including any that may be required to aid the United States in completing such levee, the costs and expenses of which shall be paid out of the drainage fund pertaining to such district as hereinafter provided. In the doing of this work the board of supervisors shall have power to employ such help and assistance as they deem necessary, and to fix compensation for the same. All the work to be done which shall involve an estimated expenditure of five hundred dollars or over shall be let by contract, after advertising the same, once each week, for three weeks in some newspaper of general circulation published in the county, to the lowest bidder who shall furnish satisfactory security for the performance of the contract: provided, however, that the board of supervisors may reject all bids, and do the work themselves whenever in their judgment, the work can be so done at a substantial saving. [31 G. A., ch. 9, § 17; 26 G. A., ch. 46, § 7.]

SEC. **1982. Costs assessed.** That section nineteen hundred eighty-two of the code be repealed and the following enacted in lieu thereof:

"If said district is established, the entire costs and expenses incurred under this chapter shall be assessed against and collected from the lands lying within such district, by the levy of a rate upon the assessable value of the land within such district, sufficient to raise the required sum, provided that where the proposed improvement is for drainage only the board may, in their discretion, classify the land within such district and graduate the tax thereon, as provided in chapter sixty-eight of the laws of the thirtieth general assembly. When the board decides to make such classification, they shall proceed in the manner set forth in section twelve of said chapter sixty-eight, and the commissioners shall each be allowed three dollars per day." [31 G. A., ch. 83, § 4; 26 G. A., ch. 46, § 8.]

SEC. **1984. Annual installments.** That section nineteen hundred eighty-four of the code be repealed and the following enacted in lieu thereof:

"If the proposed improvement is the maintenance of a levee, the amount collected in any one year shall not exceed[1] fifty mills on the dollar of the assessment valuation, which said assessment shall be levied at a level rate on the assessable value of the said lands, easements and railroads within the district. If the amount necessary to pay for the improvement, under section nineteen hundred eighty-two hereof, exceed said sum, it shall be levied and collected in annual installments. For all other improvements, the board shall levy a rate sufficient to pay for the same, and may, at their discretion, make the same payable in annual installments of ten or less." [32 G. A., ch. 93, § 1; 31 G. A., ch. 83, § 5; 26 G. A., ch. 46, § 10.]

[1]The amendment by 32 G. A. inserted the words "shall not exceed fifty" in lieu of "two and one-half," thereby using the words "shall not exceed" twice. The repeated words have been dropped. EDITOR.]

SEC. **1985. Bonds.** If the entire amount required under this chapter cannot be collected in one year, the board of supervisors of such county shall have the power to issue drainage bonds for all which cannot thus be provided for in one year, in substantially the manner and form as provided in section nineteen hundred fifty-three, chapter two, title ten of this code, such issue to be determined upon by them before the levy, and an amount

sufficient to pay the interest on such bonds shall be estimated and included in the assessment. If the amount of money required for the improvement under the provisions of this chapter cannot be collected in one year, or if the board of supervisors in their discretion deem it advisable that the taxes shall be paid in installments, or in case it becomes necessary to expend an extraordinary sum for the preservation of the levee in case of an emergency, the board of supervisors of the county shall have the power to issue bonds for all which cannot thus be provided for in one year in [1]substantially the manner and form provided in section twenty-eight of chapter sixty-eight of the laws of the thirtieth general assembly and acts amendatory thereto, and all acts and proceedings in relation thereto shall conform therewith, except that bonds issued in anticipation of taxes for the maintenance of a levee shall not exceed five years' taxes and shall be due in six years from the date of issue. [32 G. A., ch. 93, § 3; 26 G. A., ch. 46, § 11.]

[1]"substantially the manner and form as provided," in 32 G. A. session laws. EDITOR.]

SEC. **1985-a. Claim for repairs.** Whenever a levee or drainage district is organized, the board or boards of supervisors, as the case may be, shall have power and authority to audit and allow claims for money and labor expended in the preservation of said levee prior to and since the organization of the said district, all sums so allowed to be payable from the levee or drainage fund. The said board or boards shall also have full power and authority to make an equitable adjustment of and credit for any taxes paid for repairing the levee where the same has been heretofore levied and collected in any manner by said board or boards of supervisors under any prior proceedings. [32 G. A., ch. 93, § 4.]

SEC. **1986. Cost of maintaining.** The board of supervisors shall have the right and power to keep up and maintain any such levee, ditches, drains, or system of drainage, either in whole or in part, established under the preceding sections of this chapter, as may in their judgment be required, and to levy the expense thereof upon the real estate within such drainage district as herein provided for, and collect and expend the same; provided, however, that no such work which shall impose a tax exceeding fifty mills on the dollar on the assessable value of the lands within the district shall be authorized by them, unless the same is first petitioned for and authorized in substantially the manner required by this chapter for the inauguration of new work. [34 G. A., ch. 85, § 1.] [32 G. A., ch. 93, § 2; 31 G. A., ch. 83, § 6; 26 G. A., ch. 46, § 12.]

SEC. **1988. Apportionment of cost.**

The statute plainly contemplates that after a principal improvement has been made, other improvements subordinate thereto may be established in districts which may include portions of the district created for the principal improvement. *Laurence v. Board of Supervisors*, 151–182, 131 N. W. 8.

SEC. **1989. Through two or more counties.** That section nineteen hundred eighty-nine of the code, 1897, be and the same is hereby repealed and the following enacted in lieu thereof:

"The boards of supervisors of any two or more adjoining counties where a government levee has been constructed, or partly constructed by the government and partly by other means, may carry on the work provided for in this chapter concurrently, provided that they first agree upon a plan or system and a basis of an equitable apportionment of the work to be done and the share of the cost and expense of the same to be borne by each of said counties; or when said levee has been built and separate districts have

been heretofore formed the boards of supervisors may unite said districts into one district, but before said districts can be so united each board of supervisors, acting separately, must by resolution vote in favor of such consolidation and upon said separate votes being favorable the said levee districts shall be consolidated into one district and thereafter the same shall be governed in all respects as now provided, except all action governing the new district shall be by the boards of supervisors acting jointly." [34 G. A., ch. 86, § 1.] [26 G. A., ch. 46, § 15.]

CHAPTER 2-A.

OF LEVEES, DITCHES, DRAINS AND WATERCOURSES.

SECTION **1989-a1. Board of supervisors to establish drainage district.** The board of supervisors of any county shall have jurisdiction, power and authority at any regular, special or adjourned session, to establish a drainage district or districts, and to locate and establish levees, and cause to be constructed as hereinafter provided any levee, ditch, drain or watercourse, or to straighten, widen, deepen or change any natural watercourse, in such county, whenever the same will be of public utility or conducive to the public health, convenience or welfare, and the drainage of surface waters from agricultural lands shall be considered a public benefit and conducive to the public health, convenience, utility and welfare. [30 G. A., ch. 68, § 1.]

By the term "agricultural lands" which is used in the provision for special assessments for public ditches, the legislature meant to designate generally those various and well-known bodies of land lying within the state which, owing to location and surface conditions, habitually collect and retain surface waters to such an extent as to presently unfit them for agricultural purposes. *Sisson v. Board of Supervisors*, 128–442, 104 N. W. 454.

A drainage district is not a corporation and cannot be defendant in an appeal with reference to the allowance of damages. *Clary v. Woodbury County*, 135–488, 113 N. W. 330.

A board of supervisors has no authority to allow damages to land in another county where the district is entirely within the limits of the county in which it is established. *Ibid.*

The drainage of a district is distinctively a local enterprise undertaken solely for the benefit of the particular neighborhood, the expense of which is to be borne by lands within a prescribed area, and the county is not liable for the mistakes or neglect of officers to whom the organization, management and taxation of the district are intrusted. *Canal Const. Co. v. Woodbury County*, 146–526, 121 N. W. 556.

The provisions of this statute and those amendatory thereof are independent of previous statutory amendments on the same subject. *Prichard v. Board of Supervisors*, 150–565, 129 N. W. 970.

The action of the board in determining the propriety of forming a district for the purpose of draining surface water from agricultural lands is largely legislative in character. *Ibid.*

The proceedings to establish a drainage district may be instituted under this section instead of under code § 1940. *Hoyt v. Brown*, 153–324, 133 N. W. 905.

It is evident that the provisions of this section and those following do not relate solely to submerged land or those entirely unfit for use. *Lyon v. Sac County*, 155–367, 136 N. W. 324.

SEC. **1989-a2. Proceedings — bond — survey.** Whenever a petition signed by one or more of the landowners whose lands will be affected by, or assessed for the expenses of, the proposed improvement, shall be filed in the office of the county auditor setting forth that any body or district of land in the county, described by metes and bounds, or otherwise, so as to convey an[1] intelligible description of such lands, is subject to overflow or too wet for cultivation, and that the public benefit or utility, or the public health, convenience or[2] welfare will be promoted by draining, ditching, tiling or leveeing the same, or by changing a natural watercourse, and

setting forth therein the starting point, route and terminus and lateral branches, if necessary, of the proposed improvement, and there is filed therewith a bond, in amount and with sureties to be approved by the county auditor and conditioned for the payment of all costs and expenses incurred in the proceedings in case the supervisors do not grant the prayer of said petition, the board shall at its first session thereafter, regular, special or adjourned, appoint a disinterested and competent engineer, who shall give bond to the county for the use and benefit of the proposed levee or drainage district, if it be established, in amount and with sureties to be approved by the county auditor and conditioned for the faithful and competent performance of his work, and place a copy of the petition in his hands and he shall proceed to examine the lands described in said petition and any other lands which would be benefited by said improvement or necessary in the carrying out of said improvement, and survey and locate such drain or drains, ditch or ditches, improvement or improvements, as may be practicable and feasible to carry out the purposes of the petition and which will be of public benefit or utility or conducive to public health, convenience or welfare. He shall make return of his proceedings to the county auditor, which returns shall set forth the starting point, the route, the terminus or termini of the said ditch or ditches, drain or drains, or other improvements, together with a plat and profile showing the ditches, drains or other improvements, and the course and length of the drain or drains through each tract of land, together with the number of acres appropriated from said tract for construction of said improvement, and the elevation of all lakes, ponds and deep depressions in said district, and the boundary of the proposed district, so as to include therein all lands that will be benefited by the proposed improvements, and the description of each tract of land therein and names of the owners thereof as shown by the transfer books in the auditor's office, together with the probable cost, and such other facts and recommendations as he may deem material. The board of supervisors may at any time recall the appointment of any engineer made under the provisions of this act, if deemed advisable to do so, and select another to act in his place. That the ditches or drains herein provided for shall so far as practicable be surveyed and located along the general course of the natural streams and watercourses or in the general course of natural drainage of the lands of said district, but where it will be more economical or practicable such ditch or drain need not follow the course of such natural streams, watercourses, or course of natural drainage, but may straighten, shorten or change the course of any natural stream, watercourse or general course of drainage. Whenever any such ditch or drain crosses any railroad right of way it shall when practicable be located at the place of the natural waterway across such right of way unless said railroad company shall have provided another place in the construction of the roadbed for the flow of the water; and if located at the place provided by the railroad company, such company shall be estopped from afterwards objecting to such location on the ground that it is not at the place of the natural waterway. [34 G. A., ch. 88, § 1; 34 G. A., ch. 87, § 1; 33 G. A., ch. 118, §§ 1, 2.] [32 G. A., ch. 95, § 1; 32 G. A., ch. 94, § 1; 31 G. A., ch. 85, § 1; 31 G. A., ch. 84, § 1; 30 G. A., ch. 68, § 2.]

[1"any," 2"of" in 30 G. A. session laws. EDITOR.]

Petition: The only purpose of the petition is to bring to the board of supervisors the alleged desirability of the establishment of the drainage ditch and if the location, boundaries and starting point are described with sufficient definiteness to enable the board to determine whether the contemplated improvement is desirable and proper, it is sufficient. *In re Drainage Dist. No. 3*, 146-564, 123 N. W. 1059.

Under this statute, the petition need not be signed by the majority of the landowners residing in the district. *Prichard v. Board of Supervisors*, 150–565, 129 N. W. 970.

A petition is sufficient which describes the body or district of land to be included with sufficient definiteness to enable an engineer to ascertain precisely the land intended. While the board may require a petition to be made more specific, yet if the description does point out the land to be included, the subsequent proceedings thereon will not be without jurisdiction. *Kelley v. Drainage Dist.*, 157– —, 138, N. W. 841.

Further as to the petition, see notes to code § 1940 in this supplement.

Bond: The petitioners are not liable for the expenses of the proceedings preliminary to the action of the board and therefore may properly be sureties on the bond. *In re Drainage Dist. No. 3*, 146–564, 123 N. W. 1059; *In re Hay Drainage Dist. No. 23*, 146–280, 125 N. W. 225.

While the board may be justified in refusing to act if a bond is not filed, yet if the board does in fact act under the petition, any defect in the bond cannot be urged as a ground for questioning the validity of the act subsequently taken. *In re Drainage Dist. No. 3*, 146–564, 123 N. W. 1059.

Engineer's report: Insufficiency of the report of the engineer may be a good ground for setting aside on appeal the action of the board in establishing the drainage district. *In re Nishnabotna River Imp. Dist.*, 145–130, 123 N. W. 769.

The return of the engineer should be made to the auditor and if the board has before it such return substantially as contemplated by the statute the requirements of the statute have sufficiently been complied with to sustain subsequent action *In re Drainage Dist. No. 3*, 146–564, 123 N. W. 1059.

If the report is filed before notice is given the fact that it is subsquently withdrawn from the files will not defeat the jurisdiction of the board in further proceedings. *Ibid.*

It is not necessary that the engineer appointed personally do all the work necessary in making the surveys and plans. He may, to some extent at least, depend upon the reports and actions of others who assist. *Prichard v. Board of Supervisors*, 150–565, 129 N. W. 970.

Where the boundaries of the proposed district are fixed by a description of the land to be embraced therein, it is not necessary that a plat showing the entire boundaries and all the tracts of land included shall accompany such report. *Laurence v. Board of Supervisors*, 151–182, 131 N. W. 8.

Under the present statutory provisions, it is not necessary that the preliminary report of the engineer show the elevations of the different tracts. *Ibid.*

It is not necessary that in a preliminary report as to a general improvement, such as the shortening of a watercourse, the report of the engineer shall show what lateral drains will be necessary to drain the ponds and depressions. *Ibid.*

It is for the board to determine for itself whether the cost of construction and amount of damages awarded make the improvement a greater burden than should be borne by land affected by the improvement, and therefore the report of the engineer as to the size of the ditch required is not controlling on the board as to the fixing of larger dimensions. *Ibid.*

Under the record in a particular case, held that the engineer was not so far interested by reason of his previously expressed views in favor of a particular project, that he was incompetent to serve. *Wallis v. Board of Supervisors*, 152–458, 132 N. W. 850.

The law contemplates that the supervisors shall have the advantage of the best judgment of a competent engineer and this can be given only upon a thorough, actual examination and study of the proposed district in connection with such measurements as may be essential to an exact knowledge of the topography of the territory to be drained. *Lyon v. Sac County*, 155–367, 136 N. W. 324.

The manner in which the engineer discharges his duty, however, if improper, constitutes only an irregularity in the proceedings and not a jurisdictional defect. *Ibid.*

It is not necessary that the engineer make return in his preliminary report of the levels or elevations of each tract or show how it would be affected by the improvement. *Ibid.*

The design of the requirement as to an engineer's report is to render certain the several tracts included in the district and furnish the names of the owners for the purpose of serving notice on them. *Kelley v. Drainage Dist*, 157– —, 138 N. W. 841.

If the report of the engineer is sufficiently definite to enable the landowners to understand the system proposed and the injury which may result to any particular tract and the board of supervisors to intelligently pass on the feasibility of the enterprise, this is all that is required *Munn v. Board of Supervisors*, 141 N. W 711.

By exacting the elevations of all lakes, ponds and deep depressions to be given, it was not intended that levels be taken of all depressions to be drained but only of those depressions of such depth and area necessary to be taken into account in estimating the character and extent of the drainage system to be adopted. *Ibid.*

Action of the board: After the report by the engineer the commissioners subse-

quently appointed under § 1989-a12 are to inspect and classify the lands benefited by the construction of the drainage district, and to justify the inclusion of lands within such district, it should appear that they will derive some benefit, either in drainage directly or in being afforded an outlet for excess of waters to be drained, or in accessibility, or the like. If any land will not be so benefited then it should not be included or assessed. *Zinser v. Board of Supervisors*, 137–660, 114 N. W. 51.

Mere elevation of land above the proposed ditch is not the sole test in determining whether the land included in the district will be benefited. Lands may be included which do not abut on the ditch so that the tile drains on such land may be directly connected with the ditch. *In re Drainage Dist. No. 3*, 146–564, 123 N. W. 1059.

The fact that the particular land has been included in a drainage district, although it might at less expense have been drained by the establishment of a smaller district, will not render erroneous the action of the board in thus including it within the larger district. *Ibid.*

The inclusion of land within a proposed district is not a ground of complaint which may be urged on appeal of owners of such land from the act of the board in establishing such district. The remedy of such owners is to present their complaint, if any, to the assessment on their land when made. *Ibid.*

Even during the pendency of an appeal from the action of the board, it may amend its records so as to show that the essential steps were in fact taken, although not fully made of record. *Ibid.*

The statute authorizes the construction of a drainage ditch which tends to shorten the natural course of a watercourse. *In re County Drains*, 151–47, 130 N. W. 152.

This section, as amended by 33 G. A., ch. 118, § 2, permits the diversion of a natural watercourse for the purpose of a public drain. *Ibid.*

It is not required that the finding of the board as to the necessity of the establishment of the district include also a finding that the district is subject to overflow and too wet for cultivation and that the improvement will be conducive to the public welfare. *Hoyt v. Brown*, 153–324, 133 N. W. 905.

This section has reference to lands of the same character as those described in code § 1952. It is not limited to lands which are submerged or entirely unfit for use. *Lyon v. Sac County*, 155–367, 136 N. W. 324.

The boundary of the district is sufficiently indicated by specifying all the forty-acre tracts of land to be included therein. *Ibid.*

It is not necessarily erroneous to include in the district lands but slightly benefited. The extent of the benefit is to be taken into account in determining the assessment. *Munn v. Board of Supervisors*, 141 N. W. 711.

SEC. **1989-a3. Notice of hearing—approval of plan—fees and mileage for serving notice.** That the law as it appears in section nineteen hundred eighty-nine-a three of the supplement to the code, 1907, be repealed and the following substituted in lieu therefor:

"Upon the filing of the return of the engineer, if the same recommends the establishment of the levee or drainage district, the board of supervisors shall then examine the return of the engineer, and if the plan seems to be expedient and meets with the approval of the board of supervisors, they shall direct the auditor to cause a notice to be given, as hereinafter provided; but if it does not appear to be expedient and is not approved, the board of supervisors are hereby authorized to direct said engineer, or another engineer, selected by them, to report another plan. At any time prior to the establishment of the district, the plan may be amended, and as amended shall be conclusive, unless appealed from as provided in section nineteen hundred eighty-nine-a six of this chapter. When the plan, if any, shall have been finally adopted by the board of supervisors, they shall order the auditor immediately thereafter to cause notice to be given to the owner of each tract of land or lot within the proposed levee or drainage district, as shown by the transfer books of the auditor's office, including railway companies having right of way in the proposed district, and to each lien holder or incumbrancer of any land through which or abutting upon which the proposed improvement extends as shown by the county records, and also to all other persons whom it may concern, including actual occupants of the land in the proposed district (without naming in-

dividuals)., of the pendency and prayer of said petition, the favorable report thereon by the engineer and that such report may be amended before final action, the day set for hearing on said petition and report before the board of supervisors, and that all claims for damages must be filed in the auditor's office not less than five days before the day set for hearing upon the petition, which notice shall be served, except as otherwise hereinafter provided, by publication thereof once each week for two consecutive weeks in some newspaper of general circulation published in the county, the last of which publications shall be not less than twenty days prior to the day set for hearing upon the petition, proof of such service to be made by affidavit of the publisher and filed with the county auditor; provided further, however, that when any resident, nonresident, corporation, railroad company, or other persons owning or having an interest in any land or property affected by the proposed improvement shall have filed with the county auditor of the county wherein such improvement is proposed, an instrument in writing, duly signed, and designating the name and post-office address of his or its agent upon whom service of notice in said matter shall be made, the county auditor shall, at least twenty days prior to the date set for hearing upon said petition, mail a true copy of said notice in a registered letter addressed to the person or agent so designated in said written instrument, as aforesaid. Proof of such service of said notice shall be made by affidavit of said county auditor and filed by him in said matter in his said office on or before the date of the hearing upon the petition, and such service shall be in lieu of all other service of notice to such residents, nonresidents, corporations, railroad companies or other persons. No notice need be served by the auditor upon any of the persons hereinbefore described who shall file with said auditor a statement in writing signed by him entering his appearance at said hearing and waiving any additional notice. If, at the date set for the hearing before the board of supervisors, it should appear that any person entitled to notice, as provided in this section, has not been served with notice for the time, or in the manner, as herein provided, the board may postpone said hearing and set another time for the same, and notice of such day of hearing may be served on such omitted parties in the manner and for the same length of time as provided for in this section; and by fixing such new day for hearing and by adjourning said proceedings to said time, the board of supervisors shall not be held to have lost jurisdiction of the subject matter of said proceeding, nor of any parties so previously served with notice. Personal service upon any of the parties above described in the manner and for the time required for service of original notices shall be sufficient and make publication of notice as to such persons unnecessary." [34 G. A., ch. 87, § 2; 33 G. A., ch. 118, § 3.] [32 G. A., ch. 94, § 2; 31 G. A., ch. 85, § 2; 30 G. A., ch. 68, § 3.]

["rights" in enrolled bill. EDITOR.]

Action of board: A survey and approval of an enginer appointed for that purpose is essential for the authority of the board of supervisors to proceed to the establishment of the district, and upon appeal the court may pass upon the order appealed from, affirming or reversing it, and make such order for the direction of the board as may be proper in giving effect to the court's judgment or decree, but cannot undertake to establish a district varying or differing in a substantial degree from that which was under consideration in the order appealed from. *Hartshorn v. Wright County Dist. Ct.*, 142–72, 120 N. W. 479.

If the report is on file when notice is given a subsequent withdrawal of the report from the files will not defeat the jurisdiction of the board. *In re Drainage Dist. No. 3*, 146–564, 123 N. W. 1059.

The board in the exercise of its original jurisdiction cannot establish a district other than as planned and recom-

mended by a competent engineer. *Shaw v. Nelson*, 150–559, 129 N. W. 827.

While the plan, as reported or approved by the engineer, may be amended, as provided in 33 G. A., ch. 118, § 3, the statute contemplates the establishment of the district according to an amended plan as recommended and not otherwise than as so recommended. *Ibid.*

As between two conflicting plans substantially suitable to accomplish the purpose intended, a court on appeal will sustain the action of the engineer and board in adopting the plan which they found to be preferable. *Schumaker v. Edington*, 152–596, 132 N. W. 966.

It is sufficient as to the boundaries of the district that the report show the tracts of land included. *Munn v. Board of Supervisors*, 141 N. W. 711.

The question whether the cost of the improvement is out of proportion to the benefits rests primarily in the discretion of the board. *Ibid.*

The objection that the benefits to land proposed to be included in a drainage district will be slight is to be taken into account in the assessment of benefits, but it will not constitute a conclusive reason why such land shall not be included. *Wallis v. Board of Supervisors*, 152–458, 132 N. W. 850.

Rights of landowners in an existing improvement may be subordinated to the making of another improvement. *Ibid.*

Notice: The proprietor of a newspaper in which publication of notice is made is not disqualified from making affidavit of publication by being interested in the proceeding. *In re Appeal of Lightner*, 145–95, 123 N. W. 749.

The provisions of § 3, ch. 118, 33 G. A., substituted for this section, authorizing notice by publication, are not unconstitutional even as to actual residents of the county. *Johnson v. Board of Supervisors*. 148–539, 126 N. W. 153.

The fact that no notice is required to be given to mortgagees of land within the proposed drainage district does not render the statute unconstitutional. *Fitchpatrick v. Botheras*, 150–376, 130 N. W. 163.

The fact that notice is given without express direction of the board of supervisors to that effect and before the board has actually examined the return of the engineer, does not render subsequent proceedings thereunder invalid. *In re County Drains*, 151–47, 130 N. W. 152; *Kelley v. Drainage Dist.*, 157– —, 138 N. W. 841.

The voluntary appearance of the property owner by agent in the proceedings cures any irregularity of notice. *Hoyt v. Brown*, 153–324, 133 N. W. 905.

Under this section as amended by 33 G. A., ch. 118, § 3, held that error in giving a middle name in the name of the owner of property specified in such notice was immaterial. *Collins v. Board of Supervisors*, 138 N. W. 1095.

Objections: All objections not made before the board of supervisors are deemed to have been waived. *Lyon v. Sac County*, 155–367, 136 N. W. 324.

Objections to the assessment of the drainage district should be presented to the board and if overruled should be urged on appeal. *Kelley v. Drainage Dist.*, 157– —, 138 N. W. 841.

SEC. **1989-a4. Claims for damages.** Any person claiming damages as compensation for or on account of the construction of such improvement shall file such claim in the office of the county auditor at least five days prior to the day on which the petition has been set for hearing, and on failure to file such claim at the time specified, shall be held to have waived his rights thereto; provided, however, that it shall not be necessary to file claims covering value of land appropriated for right of way for construction of proposed improvements. [34 G. A., ch. 88, § 2.] [30 G. A., ch. 68, § 4.]

The owner of land in another county than that in which the ditch is established cannot make a claim for damages. *Clary v. Woodbury County*, 135–488, 113 N. W. 330.

A drainage ditch constructed in accordance with statutory provisions does not constitute an incumbrance within the ordinary warranty against incumbrances in a subsequent conveyance of such premises, even though no claim for damages has been made or allowed to the grantor. *Stuhr v. Butterfield*, 151–736, 130 N. W. 897.

Under this section as amended by 34 G. A., ch. 88, notice held sufficient as to one property owner, although a middle name was erroneously given, and further held that the notice being sufficient as to such owner, he could not subsequently interpose a claim for damages not presented before the board of supervisors. *Collins v. Board of Supervisors*, 138 N. W. 1095.

SEC. **1989-a5. Location—appraisers.** The board of supervisors at the session set for the hearing on said petition, which session may be regular, special or adjourned, shall thereupon proceed to hear and determine

the sufficiency of the petition in form and substance, which petition may be amended as to form and substance at any time before final action thereon, and, if deemed necessary, the board may view the premises and if they shall find that such levee or drainage districts would not be for the public benefit or utility, nor conducive to the public health, convenience or welfare, they shall dismiss the proceedings; but, if they shall find such improvement conducive to the public health, convenience or welfare or to the public benefit or utility and no claim shall have been filed for damages as provided in section four[1] hereof, they may if deemed advisable locate and establish the same in accordance with the recommendations of the engineer, or they may refuse to establish the same as they may deem best; and at said hearing, the board may order the said engineer or a new engineer appointed by them if deemed advisable, to make further examination and report to said board as to said proposed improvement, and if they determine that further examination and report shall be made, or if any claims have been filed for damages, as provided in section four[1] hereof, then the board of supervisors shall proceed no further than to determine the necessity of the levee or drainage districts and further proceedings shall be continued to an adjourned, regular or special session, the date of which shall be fixed at the time of the adjournment; and the county auditor shall appoint three appraisers to assess such damages, one of whom shall be the engineer theretofore appointed as above provided, or, in case of his absence or inability to act, some other engineer, and two freeholders of the county who shall not be interested in, nor related to any party interested in the proposed improvement. [34 G. A., ch. 88, § 3; 33 G. A., ch. 118, §§ 4, 5.] [31 G. A., ch. 85, § 3; 31 G. A., ch. 84, § 2; 30 G. A., ch. 68, § 5.]

[1See § 1989-a4 herein. EDITOR.]

[The citation, 34 G. A., ch. 88, § 3, appearing above, is an amendment made after that portion of the paragraph which said ch. 88, 34 G. A., sought to amend had been stricken out by § 5, ch. 118, 33 G. A. EDITOR.]

The authority to pass upon the necessity of the improvement, determine its public character and fix the boundaries of the district is legislative rather than judicial in its nature and is intrusted, primarily at least, to the board of supervisors. The court should on appeal be very reluctant to interfere with the action of the board and should set aside its order on the ground that the ditch is not a work of public character or its cost a greater burden than the land benefited should bear only where the evidence is so clear as to render that conclusion unavoidable. *Temple v. Hamilton County*, 134–706, 112 N. W. 174.

A discretion is vested in the supervisors to determine whether the establishment of a drainage district would be for the public benefit or utility or conducive to the public health, convenience or welfare, and if damages are claimed, whether the cost of construction and amount of damages awarded is a greater burden than should be properly borne by the property benefited and if the supervisors determine that it is not advisable to establish the drainage district and make the proposed improvements their action is not subject to review by the courts. *Denny v. Des Moines County*, 143–466, 121 N. W. 1066.

But the functions of the board in determining the sufficiency of the petition is judicial and its action in this respect is subject to review. *Ibid.*

The wisdom and practicability of the proposed drainage scheme cannot constitutionally be left to the determination of a court whose jurisdiction is provided for by the constitution. *Ibid.*

The petition may be amended before the final action of the board and its action may be properly made to conform to the change in plans thus proposed. *In re Hay Drainage Dist. No. 23*, 146–280, 125 N. W. 225.

The including of property within the boundaries of a district has been held to be an exercise of legislative power which the courts cannot review. However this may be, lands which will be to some extent benefited may be included, although the benefit is different from that which will accrue to other lands included. Such difference may be taken into account in determining the amount of the assessment. *Prichard v. Board of Supervisors*, 150–565, 129 N. W. 970.

Where the board on final hearing approves the return of the engineer and orders the establishment of the district, that obviates any objection on the ground that such return was not examined by the board before notice was given. *In re County Drains*, 151–47, 130 N. W. 152.

The necessity of bridges and approaches may be taken into account in estimating the damages to the property through which the ditch is constructed. *Anderson v. Board of Supervisors*, 154–497, 133 N. W. 653.

The value of the land taken for the ditch may properly be considered. *Ibid.*

It is not required that any record be made that the land referred to in the proceeding is subject to overflow or too wet for cultivation. It is sufficient that the board determine that the petition complies with the statutory requirement in form and substance, that the improvement is necessary and will be conducive to the public health, convenience and welfare or to the public benefit or utility and that it is advisable. The establishment of the district necessarily determines that the land is of the character essential to authorize the improvement. *Lyon v. Sac County*, 155–367, 136 N. W. 324.

A slight modification in the drain as recommended by the engineer may be made by the board. *Munn v. Board of Supervisors*, 141 N. W. 711.

SEC. **1989-a6. Assessment of damages — appeal.** The appraisers appointed to assess damages shall proceed to view the premises and determine and fix the amount of damages to which each claimant is entitled, and shall place a valuation upon all acreage taken for right of way as shown by plat of engineer and shall, at least five days before the date fixed by the board to hear and determine the same, file with the county auditor reports in writing showing the amount of damages sustained by each claimant. Should the report not be filed in time or should any good cause for delay exist the board may postpone the time of final action on the subject and, if necessary, the auditor may appoint other appraisers. When the time for final action shall have arrived, and after the filing of the report of the appraisers, said board shall consider the amount of damages awarded in their final determination in regard to establishing such levee or drainage district, and if in their opinion the cost of construction and the amount of damages awarded is not excessive and a greater burden than should be properly borne by the land benefited by the improvement, they shall locate and establish the same, and they shall thereupon appoint said engineer, or if deemed advisable, may appoint a new engineer as a commissioner, who shall make a permanent survey of said ditch as so located, showing the levels and elevations of each forty-acre tract of land and shall file a report of the same with the county auditor together with a plat and profile thereof and shall thereupon proceed to determine the amount of damages sustained by each claimant, and may hear evidence in respect thereto and may increase or diminish the amount awarded in respect thereto, and any party aggrieved may appeal from the finding of the board in establishing or refusing to establish the improvement district or from its finding in the allowance of damages to the district court by filing notice with the county auditor at any time within twenty days after such finding, at the same time filing a bond with the county auditor, approved by him, and conditioned to pay all costs and expenses of the appeal unless the finding of the district court shall be more favorable to the appellant or appellants than the finding of the board, which appeal shall be tried in the district court as an ordinary proceeding, except that when the appeal is from the order of the board in establishing or refusing to establish the levee or drainage district, it shall be tried in equity and the appearance term shall be the trial term; the finding of the court in relation to the establishment of or refusal to establish the levee or drainage district shall be certified by the clerk of the board of supervisors, who shall enter an order in harmony therewith and proceed accordingly. If the appeal is from the amount of damages allowed, the amount ascertained in the district court shall be entered of record, but no judgment shall be rendered

therefor. The amount thus ascertained shall be certified by the clerk of said court to the board of supervisors, who shall thereafter proceed as if such amount had been by it allowed the claimant as damages. If the appeal is from the action of the board in establishing or refusing to establish said drainage district, the court shall enter such order as may be proper in the premises, and the clerk of said court shall certify the same to the board of supervisors, who shall proceed thereafter in said matter in accordance with the order of the court. How the costs shall be distributed among the litigants and against whom the same shall be taxed shall rest in the discretion of the trial court. [34 G. A., ch. 88, § 4; 33 G. A., ch. 118, § 6.] [32 G. A., ch. 94, § 3; 31 G. A., ch. 85, § 4; 30 G. A., ch. 68, § 6.]

Damages awarded: The question of damages is to be finally determined at the time the ditch is located and established and an appeal may be taken within ten days thereafter. *Clary v. Woodbury County*, 135–488, 113 N. W. 330.

A property owner who has failed to file his claim within the time required by statute cannot have equitable relief. *Collins v. Board of Supervisors*, 138 N. W. 1095.

The damages are to be estimated as of the date of the construction of the ditch and not of the date of the establishment of the district. *Gish v. Castner etc. Drainage Dist.*, 136–155, 113 N. W. 757.

Whether the point of time selected for the comparison of values in determining the damages should be that of the establishment of the district or that of the construction of the ditch, is a question not ordinarily material in the practical result to be obtained. *In re Joint Drainage Dist., Ryg v. Board of Supervisors*, 141 N. W. 939.

Engineer's permanent survey: The report of the engineer is not controlling as to the size of the ditch which the board may order. If, in its discretion, it deems a larger and more expensive ditch justified by the benefit to be derived, it may in that respect depart from the engineer's report. *Laurence v. Board of Supervisors*, 151–182, 131 N. W. 8.

It is not necessary in the preliminary report to show levels and elevations of each tract. *Ibid.*

If the data contained in the report in connection with the plat and profile gives the information exacted by statute and such report is accepted by the board as sufficiently specific, the court will not interfere with the action of the board on appeal. A survey made by the engineer is in a sense preliminary and intended for use in ascertaining the feasibility of the improvement. *Munn v. Board of Supervisors*, 141 N. W. 711.

Board's final action: The fact that the appraisers do not follow the statute in making their classifications and assessments does not defeat the jurisdiction of the board. The provisions as to their method of procedure are directory only. *In re Appeal of Lightner*, 145–95, 123 N. W. 749.

Where the record does not show the procedure of the appraisers in this respect the defect may be cured by amendment of the return. *Ibid.*

The determination of the relation of benefits to expenses may be considered by the district court in determining the validity of the action of the board in including certain lands within the proposed district. *In re Drainage Dist. No. 3*, 146–564, 123 N. W. 1059.

Where the record of the proceedings of the board showed a continuous session from day to day, attested at the end of the record of the proceedings for each day with the words "board adjourned," held that such record did not indicate an adjournment *sine die* prior to the session at which the improvement was ordered, it being apparent that these words were used only to indicate an intervening recess of the board. *Hoyt v. Brown*, 153–324, 133 N. W. 905.

Appeal: The county cannot appeal from the action of the district court in setting aside an order of the board of supervisors for the reassessment of the expenses of constructing the ditch. *Yockey v. Woodbury County*, 130–412, 106 N. W. 950.

The contractor who is entitled to be paid out of the funds collected by the assessment may appeal, as he has an interest in such fund. *Ibid.*

This section expressly authorizes an appeal from the refusal of the board of supervisors to establish a drainage district. *Zinser v. Board of Supervisors*, 137–660, 114 N. W. 51.

Notice: Where the proceedings involve a joint action of the boards of two or more counties notice of appeal must be served on the county auditor of each county. *In re Appeal of Head*, 141–651, 118 N. W. 884.

A concession that notice of appeal was served upon the county auditor is sufficient to show that notice was filed with him. *Canal Const. Co. v. Woodbury County*, 146–526, 121 N. W. 556.

Acceptance of service of notice of appeal by the county auditor and the filing of a

notice with him is sufficient. *Shaw v. Nelson*, 150–559, 129 N. W. 827.

Filing a notice of appeal with the county auditor is sufficient without the service of notice upon the petitioners for the drainage improvement. *Henderson v. Board of Supervisors*, 153–283 and 470, 133 N. W. 671.

Bond: If the bond on appeal be defective only, the approval thereof by the auditor cannot be collaterally attacked. *Shaw v. Nelson*, 150–559, 129 N. W. 827.

Court's action: The court on appeal from the action of the board of supervisors in establishing a district in accordance with the recommendations of the engineer has no authority to establish a district substantially different from that recommended in the report and approved by the board. *Hartshorn v. Wright County Dist. Ct.*, 142–72, 120 N. W. 479.

This section does not authorize the introduction of additional testimony in the district court for the purpose of determining whether or not there is some district which should be established although not petitioned for or surveyed. The action of the court should be limited to some district which is under consideration by the board and it could make no order which the board could not have made on the same record. *Ibid.*

A court should on appeal be reluctant to interfere with and set aside a finding on an order of the board establishing the drainage district. *In re Nishnabotna River Imp. Co.*, 145–130, 123 N. W. 769.

If before the final action of the court on appeal the record of the board is so corrected as to show that the essential steps have been taken the proceedings of the board will be sustained. *In re Drainage Dist. No. 3*, 146–564, 123 N. W. 1059.

The court may exercise a reasonable discretion regarding the admission of evidence as to the damages, and held in a particular case that the admission of evidence was not erroneous. *Larson v. Webster County*, 150–344, 130 N. W. 165.

On the trial of the appeal, the district court acts simply as an appellate tribunal. It has no original jurisdiction, and parties not residents of the county cannot intervene, although they may be affected by the establishment of the ditch. *Prichard v. Board of Supervisors*, 150–565, 129 N. W. 970.

The appellants must be confined to the objections presented by them before the board of supervisors. They cannot, in the district court, present new grounds for defeating the proposed improvement. *Ibid.*

Costs: The provision as to payment of all costs and expenses of the appeal does not contemplate the taxation of attorney's fees against the defeated appellant. *In re County Drains*, 151–47, 130 N. W. 152.

SEC. **1989-a7. Damages—by whom paid—division into districts—engineer.** The amount of damages finally determined by the board in favor of any claimant or claimants shall be required to be paid in the first instance by the parties benefited by the said levee or drainage district, or secured to be paid by sufficient bond to be fixed and approved by the county auditor, and after such damages shall have been paid or secured as aforesaid, the board shall divide said improvement into suitable sections, numbering the same consecutively from the source or beginning of the improvement downward towards its outlet and prescribe the time within which the improvement shall be completed and appoint a competent engineer to have charge of the work of construction thereof, who shall be required before entering upon the work to give a bond to the county for the use and benefit of the levee or drainage district to be approved by the auditor in such sum as the board may fix, conditioned for the faithful discharge of his duties. [33 G. A., ch. 118, § 7.] [30 G. A., ch. 68, § 7.]

The provision that the damages are to be secured to be paid upon such terms and conditions as the county auditor may deem just and proper does not render the statute unconstitutional. *Sisson v. Board of Supervisors*, 128–442, 104 N. W. 454.

The damages are to be fixed by the testimony as of the date of the construction of the ditch and not of the date of the establishment of the district, and the evidence may therefore relate to the diminution of value which would result from the construction of the ditch at the date of the trial, the district not yet having been finally established. *Gish v. Castner etc. Drainage Dist.*, 136–155, 113 N. W. 757.

The engineer is not authorized to modify the plans adopted by the board without its approval so as to entitle the contractor to additional compensation. *Monaghan v. Vanatta*, 144–119, 122 N. W. 610.

SEC. **1989-a8. Letting work—notice—bids.** The board shall cause notice to be given by publication, once each week, for two consecutive weeks in some newspaper published in the county wherein such improve-

ment is located and such additional publication elsewhere as they may direct, of the time and place of letting the work of construction of said improvement, and in such notice they shall specify the approximate amount of work to be done in each section and the time fixed for the commencement and completion thereof; and when the estimated cost of said improvement exceeds fifteen thousand dollars the board shall make additional publication for two consecutive weeks in some contracting journal of general circulation, of such notice as they may prescribe, and they shall award contract or contracts for each section of the work to the lowest responsible bidder or bidders therefor, bids to be submitted, received and acted upon separately as to the main drain and each of the laterals, exercising their own discretion as to letting such work as to the main drain as a whole, or as to each lateral as a whole, or by sections as to both main drain and laterals, and reserving the right to reject any and all bids and readvertise the letting of the work. Each person bidding for such work shall deposit in cash or certified check a sum equal to ten per centum of the amount of the bid, not in any event however to exceed ten thousand dollars, said deposit to be returned to him if his bid is not successful, and if successful to be retained as a guarantee only of his good faith in entering on said contract. The successful bidder shall be required to execute a bond with sufficient sureties in favor of the county for the use and benefit of the levee or drainage district in an amount equal to twenty-five per centum of the estimated cost of the work so let, or he may deposit such amount in cash with the auditor as security for the performance of his contract and upon the execution of such bond, or the making of such deposit, the deposit originally made with his bid shall be returned to him. [34 G. A., ch. 89, § 1; 34 G. A., ch. 87, § 3; 33 G. A., ch. 118, § 8.] [31 G. A., ch. 85, § 5; 31 G. A., ch. 9, § 30; 30 G. A., ch. 68, § 8.]

In the absence of any special provision of the contract the contractor constructing a ditch does not assume any liability for the care of the water naturally accumulating by reason of such construction. *Fitzgibbon v. Western Dred. Co.*, 141–328, 117 N. W. 878.

Where notice of letting the contract is given, a defect therein must be pointed out in objections filed with the board; otherwise it will not be considered. *In re Appeal of Lightner*, 145–95, 123 N. W. 749.

The contract may stipulate as to who shall stand the loss or damage to the ditch arising from unforeseen or unavoidable causes before final acceptance. *Littell v. Webster County*, 152–206, 132 N. W. 426.

Where the board notifies the contractor to show cause why his contract should not be declared at an end and the work relet, and after hearing forfeits the contract, it may relet the work without further notice to the contractor. *Webster County v. Nelson*, 154–660, 135 N. W. 390.

After such forfeiture, the county may properly refuse to make further payment under the contract for work done after such forfeiture. *Ibid.*

The board may elect to forfeit the contract and relet the work instead of relying upon the provisions of the contract for liquidated damages. *Ibid.*

SEC. **1989-a9. Monthly estimates — payment.** The engineer in charge of the construction shall furnish the contractor monthly estimates of the amount of work done on each section and upon filing the same with the auditor, he shall draw a warrant in favor of such contractor, or deliver to him improvement certificates, as the case may be, for eighty per centum of the value of the work done according to the estimate, and when said improvement is completed to the satisfaction of the engineer in charge thereof and so certified by him to the board and approved by it, the auditor shall draw a warrant in favor of said contractor upon the levee or drainage fund, or deliver to him improvement certificates, as the case may be, for the balance due. [30 G. A., ch. 68, § 9.]

No authority is conferred on the board of supervisors to pass on the estimates preceding the final report of the engineer. It is only when the work is completed that the board is authorized to approve or disapprove it and if approved to authorize the auditor to issue warrants for the balance due. *Monaghan v. Vanatta*, 144–119, 122 N. W. 610.

The board has the right to assume that the work is being done in accordance with the contract and is not estopped from insisting on final settlement that work for which compensation is claimed was not authorized by the contract. *Ibid.*

The contractors cannot be deprived of their rights through the failure of the engineer to act, nor should they be defeated by his fraud or through his collusion. *Littell v. Webster County*, 152–206, 132 N. W. 426.

Where there is no provision for acceptance mile by mile or otherwise in portions as the work proceeds, intermediate estimates of the engineer are not binding in the final settlement. *Ibid.*

Where fraud and collusion are not made to appear, the contractor cannot maintain an action of mandamus to compel the engineer and board of supervisors to approve the performance of his contract and levy an assessment therefor. *Federal Contracting Co. v. Board of Supervisors*, 153–362, 133 N. W. 765.

In such an action of mandamus, the contractor is not entitled to recover on *quantum meruit*. *Ibid.*

But held that although the refusal of a mandamus by the lower court was proper, the supreme court might in its discretion remand the case for further proceedings in order to enable the appellant, by amending his pleadings and securing trial by appropriate methods, to determine whether he had a right under his contract or upon *quantum meruit*. *Ibid.*

It is only when the engineer has certified that the improvement has been completed to his satisfaction that the board of supervisors is called upon to approve or disapprove, and if it approve, the county auditor is authorized to issue warrants for the final payment of twenty per cent. of the contract. *Barz v. Sawyer*, 141 N. W. 319.

SEC. **1989-a10. Failure to perform work—penalty—completion of work.** If any person to whom any portion of said work shall have been let shall fail to perform the same according to the terms specified in his contract, then the cash deposited by him shall be forfeited to the county, or recovery may be had in an action on the bond by the county, for the benefit of the levee or drainage district, for the damages sustained and the work may be relet by the board in the manner hereinbefore provided; or the board may cause the uncompleted work to be done, paying therefor out of the balance of the contract price not theretofore paid over to the contractor, and if the expenses of so completing the work exceed such balance of the contract price, then the board of supervisors may cause an action to be brought in the name of the county in behalf of said district, or in the name of the board of supervisors and of the said district, for the recovery of the amount of such excess from the contractor and his bondsmen. [35 G. A., ch. 156, § 2; 33 G. A., ch. 118, § 9.] [30 G. A., ch. 68, § 10.]

SEC. **1989-a11. Changes in dimensions—notice—objections—appeal.** That the law as it appears in section nineteen hundred eighty-nine-a eleven of the supplement to the code, 1907, be and the same is hereby repealed and the following enacted in lieu thereof:

If, after the establishment of said district, and before the completion of the drainage improvements therein, it shall become apparent that a levee or drain should be enlarged, deepened or otherwise changed or that a change or alteration in the location should be made for the better service thereof, said board may by resolution authorize such change or changes in the said improvement as the engineer shall recommend; provided that, whenever any change or changes are made either under this section or under any other section of this chapter, all persons whose land shall be taken or whose assessments shall be increased thereby shall first have been given like notices as provided in section nineteen hundred eighty-nine-a three of this chapter, and shall have like opportunity to file claims for damages, as provided for in section nineteen hundred eighty-nine-a four

of this chapter, or file objection to such assessment as provided in section nineteen hundred eighty-nine-a twelve of this chapter, as the case may be, and like opportunity to appeal from the action of the board as provided in section nineteen hundred eighty-nine-a six of this chapter, or section nineteen hundred eighty-nine-a fourteen of this chapter, as the case may be. [34 G. A., ch. 87, § 4; 33 G. A., ch. 118, § 10.] [32 G. A., ch. 94, § 4; 30 G. A., ch. 68, § 11.]

A contractor cannot recover for extra work except as authorized by modification of the contract made in accordance with these provisions. *Monaghan v. Vanatta*, 144–119, 122 N. W. 610.

SEC. **1989-a12. Assessment of costs and damages—apportionment.** When the levee or drainage district or other improvement herein provided for shall have been located and established as provided for in this act, or when it shall be necessary to cause the same to be repaired, enlarged, reopened or cleared from any obstruction therein, unless such repairs, reopening or clearing of obstructions can be paid for as hereinafter provided, the board shall appoint three commissioners, one of whom shall be a competent civil engineer and two of whom shall be resident freeholders of the state not living within the levee or drainage district and not interested therein or in a like question, nor related to any party whose land is affected thereby; and they shall within twenty days after such appointment begin to personally inspect and classify all the lands benefited by the location and construction of such levee or drainage district, or the repairing or reopening of the same, in tracts of forty acres or less according to the legal or recognized subdivisions in a graduated scale of benefits, to be numbered according to the benefit to be received by the proposed improvement; and they shall make an equitable apportionment of the costs, expenses, costs of construction, fees and damages assessed for the construction of any such improvement, or the repairing or reopening of the same, and make report thereof in writing to the board of supervisors. In making the said estimate the lands receiving the greatest benefit shall be marked on a scale of one hundred and those benefited in a less degree shall be marked with such percentage of one hundred as the benefit received bears in proportion thereto. This classification when finally established shall remain as a basis for all future assessments connected with the objects of said levee or drainage district, unless the board, for good cause, shall authorize a revision thereof. In the report of the appraisers so appointed, they shall specify each tract of land by proper description and the ownership thereof as the same appears on the transfer books in the auditor's office, and the auditor shall cause notice to be served upon each person whose name appears as owner and also upon the person or persons in actual occupancy of any such land in the time and manner provided for the establishment of a levee or drainage district, which notice shall state the amount of special assessments apportioned to such owner, upon each tract or lot, the day set for hearing the same before the board of supervisors and that all objections thereto must be made in writing and filed with the county auditor on or before noon of the day set for such hearing. When the day set for hearing shall have arrived, the board of supervisors shall proceed to hear and determine all objections made and filed to said report and may increase, diminish, annul or affirm the apportionment made in said report or in any part thereof as may appear to the board to be just and equitable; but in no case shall it be competent to show that the lands assessed would not be benefited by the improvement, and when such hearing shall have been had the board shall levy such apportionment so

fixed by it upon the lands within such levee or drainage district; and all installments of the tax shall be levied at that time, and shall bear interest at six per cent. per annum from that date; provided that if the owner of any parcel of land, lot or premises against which any such levy shall have been made and certified, shall, within twenty days from the date of such assessment, promise and agree in writing filed in the office of the county auditor that in consideration of his having the right to pay his assessments in installments he will not make any objection of illegality or irregularity as to the assessment of benefits or levy of such taxes upon or against his property, but will pay said assessment, then said taxes levied against said land, lot or premises of such owner shall be payable as follows: one third of the amount of said assessment at the time of filing the above agreement; one third within ten days after the engineer in charge of said drainage improvement shall file a certificate in the office of the county auditor that said improvement is one half completed, and the remaining one third within ten days after the said improvement shall have been accepted by the board of supervisors, and if said installments are not paid as above provided, the failure to pay any installment shall cause the whole sum to become due and payable at once with interest at the rate of one per cent. per month from the date of filing said agreement, and such assessments shall thereupon be collected as other taxes on real estate, which rate may be later reduced to correspond with the rate specified in the certificates or bonds, as the case may be. Provided, however, that no deferred installment of the amount assessed, as between vendor and vendee, mortgagor and mortgagee, shall become a lien upon the property against which it is assessed and levied, until the thirty-first day of December of the year next preceding that in which it is due and payable; [1]and in case the board of supervisors shall increase said apportionment, service of notice thereof shall be made upon the owner of such tract or lot of land as shown by the transfer books in the auditor's office, in the same manner in which original notices are required to be served, where such owner is a resident of the county, and in case such owner is a nonresident of the county such notice as to him shall be served on the actual occupant of the tract or lot of land; provided that in case any railroad company shall be affected by such increased apportionment said notice shall be served upon the station agent of the said railroad company nearest the proposed improvement. If the first assessment made by the board of supervisors for the original cost or for repairs of any improvement as provided in this act is insufficient, the board may make an additional assessment and levy in the same ratio as the first for either purpose. [34 G. A., ch. 87, § 5; 33 G. A., ch. 118, § 11.] [30 G. A., ch. 68, § 12.]

[1]An amendement by 34 G. A. is inserted here which could not be placed as directed by that legislature, because an amendment by 33 G. A. had been inserted where 34 G. A. attempted to insert. EDITOR.]

In general: The statutory provision for notice in proceedings for the assessment of property on account of the benefits derived from the construction of public ditches is not open to the constitutional objection that it authorizes the levying of special assessments upon property in an amount greater than the benefit received, as provision is made therein for the determination of such benefits as a limitation upon the assessment. *Sisson v. Board of Supervisors*, 128–442, 104 N. W. 454.

One who has had proper notice of a proceeding for the assessment of costs and damages is bound to take notice of the subsequent proceedings in that respect contemplated by the statute. The adjournment of the board to a subsequent date for further consideration does not deprive it of jurisdiction. *Gray v. Anderson*, 140–359, 118 N. W. 526.

If the board for any reason never acquired jurisdiction or right to act in the premises and this clearly appears in the record, the court on appeal may, on mo-

tion, at any time during the course of or even before the trial, dismiss the proceedings and cancel the assessment; but before such summary proceedings can be sustained, it must appear that the board was without jurisdiction. *In re Appeal of Lightner*, 145–95, 123 N. W. 749.

The fact that the statute does not provide for notice to mortgagees of the assessment apportioned to a tract of land covered by a mortgage does not render it unconstitutional. *Fitchpatrick v. Botheras*, 150–376, 130 N. W. 163.

By including lands within the district when established, the board necessarily finds that such lands will be benefited by the improvement, and a question as to whether there is any benefit to the land cannot be reconsidered in the levying of the assessment. *Kelley v. Drainage Dist.*, 157– —, 138 N. W. 841.

The landowner cannot complain of the assessment because it is in excess of actual benefit to his land. The improved sanitary conditions and reclamation of highways giving access to the land and other matters of incidental benefit may be considered. *Jackson v. Board of Supervisors*, 140 N. W. 849.

A reasonably fair apportionment of the expense to the land benefited is all that can be expected and prospective benefits may be considered. *Ibid.*

The supreme court will not as a rule on an appeal interfere with the action of the board of supervisors confirmed by the district court as to the assessment of benefits. *Ibid.*

The fact that the assessment is to be made by a board, all the members of which are not elected by the voters whose lands are included within the district, does not render the assessment unconstitutional as resulting in taxation without representation. *Munn v. Board of Supervisors*, 141 N. W. 711.

Classification of land: The statutory provisions as to classification do not apply to railroad property and highways within the district. Railroad lands are to be assessed in accordance with provisions of code § 1989-a18 and highways under the following sections. *In re Johnson Drainage Dist.*, 141–380, 118 N. W. 380.

The statute fixes no time for the report of commissioners and their action within the specified time is not essential to the jurisdiction of the board to act. *In re Farley Drainage Dist.*, 140–339, 118 N. W. 432.

There is no time fixed for the filing of an appraiser's report and a failure to file within twenty days or any other time given for filing does not deprive the board of jurisdiction. *In re Farley Drainage Dist.*, 144–476, 123 N. W. 241.

The law requires equality of assessment so far as the same may be obtained; but it does not undertake to specify how such equality shall be determined. The main purpose of the law is to secure an equitable apportionment of the actual cost of the improvement after considering the location of the several tracts of land, their condition and needs, and the relative benefit that each tract will receive from the improvement as a whole. The commissioners may make any classification in addition to that specifically required by the statute which will aid them in finally accomplishing an equitable apportionment. If they find that such an apportionment requires that certain lands should be taxed for a certain part of the cost of the improvement in addition to a just proportion of the general cost, there is nothing in the law to prevent such action. *Fardal Drainage Dist. v. Board of Supervisors*, 157– —, 138 N. W. 443.

Slight variance from the method prescribed for the classification and assessment of lands, unless prejudice results therefrom, are immaterial. *Kelley v. Drainage Dist.*, 157– —, 138 N. W. 841.

Objections: Where specific objections are made these objections alone will be considered on an appeal. *Chicago M. & St. P. R. Co. v. Monona County*, 144–171, 122 N. W. 820.

The inclusion of property within the boundaries of the district is an exercise of legislative power which the courts cannot review, but the courts may, when their jurisdiction is properly invoked, review the assessment or apportionment of the costs of the improvement. *Ibid.*

A landowner cannot be heard to complain of the method used by the appraisers in apportioning the costs and expenses to the various tracts unless objection on that ground has been interposed at the hearing before the board. *In re Appeal of Jenison*, 145–215, 123 N. W. 979.

The case in the district court and upon appeal to the supreme court must be tried upon the objections filed before the board and these must be reasonably specific. *In re Lightner. Lightner v. Board of Supervisors*, 156–398, 136 N. W. 761, 137 N. W. 462.

But the objectors need not set forth the evidence upon which they intend to rely in order to challenge each and every assessment made. If the real grounds of the objections are fairly apparent, this is sufficient. *Ibid.*

Where the trial court has adopted the assessments recommended by expert engineers, the only real question on appeal is whether or not the trial court erred in adopting such recommendation instead of confirming the assessments made by the board upon the report of its commissioners appointed for that purpose. And on the appeal to the supreme court there is a presumption in favor of the finding of the district court. *Ibid.*

On the entry of a decree in the supreme court reducing some of the assessments appealed from, a new time was fixed within which payment of the new assessments should be made and the case was remanded to the lower court for that purpose. *Ibid.*

Assessment: If the assessment is equitably apportioned and does not exceed the benefits conferred there is no constitutional objection to an assessment as to the amount. *In re Farley Drainage Dist.*, 140–339, 118 N. W. 432.

A large discretion is reposed in the board of supervisors in estimating the amount necessary to be raised by taxation; but where without necessity of increasing the total assessment the board increases the assessments of particular landowners without any corresponding reduction or readjustment as to other owners, such abuse of power will be remedied by appropriate order. *In re Castner Drainage Dist.*, 142–716, 119 N. W. 980.

It is erroneous to assess lands for improvements on the theory that the farther the land is from the outlet of the ditch the greater are the benefits received by it. *Ibid. In re Appeal of Jenison*, 145–215, 123 N. W. 979.

It is impossible to review the action of the board in apportionment of the expense to the various tracts of land included in the district if the record does not show the character of the land. *In re Appeal of Jenison*, 145–215, 123 N. W. 979.

The fact that land included within a drainage district may subsequently be included within another district for the purpose of effecting subsidiary drainage does not render its assessment in the main district invalid. *In re Hay Drainage Dist. No. 23*, 146–280, 125 N. W. 225.

In the absence of a showing that the commissioners or board have acted in bad faith, the presumption is in favor of their action and the property owner complaining of an assessment has the burden of showing that it is erroneous. *Guttormsen v. Drainage Dist.*, 153–126, 133 N. W. 326.

Under the evidence in a particular case, held that the complaining property owner was properly assessed for substantial benefits received. *Schropfer v. Hamilton County*, 147–63, 125 N. W. 992.

In a particular case held that the assessment against the plaintiff was higher in proportion to the benefits than that against other property owners and that the reduction of such assessment on appeal was justified. *Pollock v. Board of Supervisors*, 157– —, 138 N. W. 415.

The cost of construction of the ditch or drain through particular land is not to be regarded as fixing either a maximum or minimum basis for assessment. *Ibid.*

SEC. **1989-a13. Levy and collection of tax—warrants.** In estimating the benefits as to the lands not traversed by said improvement they shall not consider what benefits such lands will receive after some other improvements shall have been constructed, but only the benefits which will be received by reason of the construction of the improvement in question as it affords an outlet for the drainage of such lands, or brings an outlet nearer to said lands or relieves the same from overflow. Said tax shall be levied upon the lands of the owners so benefited in the ratio aforesaid and collected in the same manner as other taxes for county purposes, and the funds so collected shall be kept as a separate fund and shall be paid out only for purposes properly connected with such improvement on the order of the board of supervisors; provided, however, that warrants drawn upon the funds of any drainage district shall be accepted by the county treasurer in payment of drainage assessments levied upon any lands in that district owned by the person to whom the said warrants were issued, and when the amount of the warrant exceeds the amount of the assessment, the treasurer shall cancel the said warrant, and give the holder thereof a certificate for the amount of the overplus, upon the presentation of which certificate to the county auditor he shall file it, and issue a new warrant for the amount of the overplus, and charge the treasurer therewith; and such certificate is transferable by delivery, and will entitle the holder of the new warrant, made payable to his order, and bearing the original number, preceded by the words, "Issued as unpaid balance due on warrant number....." [35 G. A., ch. 153, § 1; 33 G. A., ch. 118, § 12.] [30 G. A., ch. 68, § 13.]

There is no statutory obstacle to the assessment of land for improvement in a subsidiary district after it has already been assessed for the principal improvement. *Laurence v. Board of Supervisors*, 151–182, 131 N. W. 8.

Where a new drain relieves a main drain in the system as previously constructed by furnishing an additional outlet, it is of some benefit to all the lands tributary thereto. *Kelley v. Drainage Dist.*, 157– —, 138 N. W. 841.

SEC. **1989-a14. Appeal—drainage record—counsel—establishment rescinded—new hearing.** An appeal may be taken to the district court from the order of the board fixing the assessment of benefits upon the lands in the same manner and time as herein provided for appeals from the assessment of damages, and such appeal may be taken from the order of the board of supervisors increasing the apportionment within twenty days after the completed service of notice of such increased apportionment in the same manner as herein provided for appeals in assessment for damages, whether objection was made to the report of the commissioner or not. The appeal herein provided for shall be tried in the district court as an action in equity and the appearance term shall be the trial term; and when several appeals are taken and pending in the district court by land owners of the same drainage district whose lands have been assessed by the board, the court may, in its discretion, order the consolidation of such cases, and try the same as one cause of action. When any appeal is taken from any order of the board made in any drainage proceeding coming before it for action, it shall be the duty of the board to employ counsel to represent the interests of the drainage district affected by said appeal on the trial thereof in the appellate courts and the expense thereof shall be paid out of the drainage fund of such district. In all actions or appeals involving or affecting the drainage district, the board of supervisors shall be a proper party for the purpose of representing the drainage district, and all interested parties therein, other than the adversary parties thereto, and the employment of counsel by the board, as authorized by this chapter, shall be for the purpose of protecting all the rights of the drainage district and interested parties therein other than the adversary parties thereto; in all appeals or actions adversary to the district, the appellant or complaining party shall be entitled the plaintiff, and the board of supervisors and drainage district it represents, the defendants, and in all appeals or actions for or in behalf of the district, the board of supervisors and the drainage district it represents may sue as and be entitled the plaintiffs. When an appeal authorized by this chapter is taken, the county auditor shall forthwith make a transcript of the notice of appeal and appeal bond and transmit the same to the clerk of the district court, and the clerk shall docket the same upon payment by the appellant of the docket fee; and on or before the first day of the next succeeding term of the district court, the appellant shall file a petition setting forth the order or decision of the board appealed from and his claims and objections relating thereto; a failure to comply with these requirements shall be deemed a waiver of the appeal and in such case the court shall dismiss the same; it shall not be necessary for the appellee to file answer to the petition unless some affirmative defense is made thereto, but he may do so. The board shall provide a book to be known as the drainage record and the county auditor shall keep a full and complete record therein of all proceedings of the board relating to drainage districts. In any case where the decree is or has been entered setting aside the establishment of a drainage district for errors in the proceedings taken, and such decree becomes final, the board of supervisors shall rescind its order establishing the drainage district, assessing benefits, and levying the tax based thereon, and shall also cancel any contract made for construction work or material, and may refund any or all assessments paid in. The board shall fix a new date for

hearing, giving notice thereof by publication for two weeks and at the time so fixed, enter its order as to the establishment of the proposed district, and thereafter proceed as by law provided. [35 G. A., ch. 156, § 1; 34 G. A., ch. 87, § 6; 33 G. A., ch. 119, § 1; 33 G. A., ch. 118, § 13.] [32 G. A., ch. 95, § 2; 30 G. A., ch. 68, § 14.]

Failure to record the joint action of two or more boards in each county will not affect the jurisdiction of the court on appeal. *In re Appeal of Head*, 141–651, 118 N. W. 884.

If the proceedings are simply erroneous as distinguished from illegal, the property owner's remedy is to file objections before the board, and in the event of an adverse ruling to appeal to the district court as in equity proceedings. On appeal the property owner is confined to objections made by him before the board. *In re Appeal of Lightner*, 145–95, 123 N. W. 749.

Service of notice and filing of bond as provided in code supp. § 1989-a6 are sufficient under this section to effect an appeal to the district court. An appeal from action of the district court to the supreme court may be effected by service of notice in the usual way on counsel representing the district in the district court. *In re Appeal of Jenison*, 145–215, 123 N. W. 979.

On appeal the complaining party must be limited to the objections made before the board of supervisors. *In re Hay Drainage Dist. No. 23*, 146–280, 125 N. W. 225.

The action of the trial court in sustaining the board of supervisors will not be reversed for merely technical objections to the proceedings. *Laurence v. Board of Supervisors*, 151–182, 131 N. W. 8.

The remedy by appeal is exclusive and objections to the assessment are to be prosecuted in that manner and not by an injunction in equity to restrain its enforcement. *Hoyt v. Brown*, 153–324, 133 N. W. 905.

Before the amendment of this section by 34 G. A., ch. 87, § 6, it authorized a review of the action of the board of supervisors in raising an assessment as approved by the commissioners. *Lyon v. Sac County*, 155–367, 136 N. W. 324.

Where the petition in an appeal proceeding such as contemplated by this section had been filed before the statute went into effect, held that a failure to comply with the requirements of the amendment (33 G. A., ch. 118, § 13) relating to the filing of petition should not be regarded as a waiver of such appeal. *Arnold v. Board of Supervisors*, 151–155, 130 N. W. 816.

Under this section as amended by 33 G. A., ch. 118, the provision as to filing a petition relates to the procedure and a failure to comply with such provision does not deprive the court of jurisdiction. The provision as to filing a petition is remedial and should be so construed. If the petition is filed within such time as to enable the court to properly proceed with the trial of the case, a motion to dismiss on the ground that the petition is not filed by the time required by statute should be overruled. *Elwood v. Board of Supervisors*, 156–407, 136 N. W. 709.

A property owner who has voluntarily paid the amount of his assessment even under protest cannot subsequently maintain an appeal from such assessment. *Collins v. Board of Supervisors*, 138 N. W. 1095.

The assessment as made by the board of supervisors and confirmed in the district court on appeal is presumed to be correct and equitable and the burden is upon the property owner appealing to the supreme court to show that it was made on an incorrect basis or was inequitable. It is not enough for him to show that it was in excess of the actual benefits to his land. *Ibid.*

Where a stranger to the record of the board of supervisors served a notice of appeal from the assessment against specific land and asserted therein her ownership of such land, held that she could not, in the district court, have a review of the assessment against other land. *Bradford v. Board of Supervisors*, 140 N. W. 804.

The appeal is triable in the supreme court as an equitable proceeding. *Ibid.*

The findings of fact by the board of supervisors are conclusive and their action can be reviewed by the courts only on questions of law and upon the question of the amount of benefit assessed, which, by the express terms of the statute, is reviewable on appeal. *Chicago, B. & Q. R. Co. v. Board of Supervisors*, (C. C.) 170 Fed. 665.

Under the evidence in a particular case, held that the assessments were not invalid as levied in excess of the benefits conferred or inequitable and unjust. *In re Farley Drainage Dist., Pabbeldt v. Hamilton Co.*, 144–476, 123 N. W. 241.

Attorney's fees are not a part of the taxable costs on the appeal. *In re County Drains*, 151–47, 130 N. W. 152.

SEC. **1989-a15. Obstructions—nuisance—abatement.** That the law as it appears in section nineteen hundred eighty-nine-a fifteen of the supplement to the code, 1907, be and the same is hereby repealed and the following enacted in lieu thereof:

"Any ditch, drain or watercourse, which is now or hereafter may be constructed so as to prevent the surface and overflow water from the adjacent lands from entering the same, is hereby declared as a nuisance and may be abated as such. Any person, firm or corporation diverting, obstructing, impeding or filling up, without legal authority, any ditch, drain or watercourse, or breaking down any levee established, constructed or maintained under any provision of law, shall be deemed guilty of a misdemeanor and punished accordingly." [35 G. A., ch. 154, § 2.] [30 G. A., ch. 68, § 15.]

SEC. **1989-a16. Subsequent proceedings—use of former surveys.** In any proceedings heretofore or hereafter had for the establishment of a ditch, drain, levee or the changing of a natural watercourse, or the establishment of a levee or drainage district where an engineer has been appointed and has made a complete survey, return and plat thereof and for any reason the improvement has been abandoned and the proceedings dismissed and afterwards proceedings are instituted for the establishment of a levee or drainage district, or the changing [of] a natural watercourse, for the benefit or reclamation of the same territory surveyed in said former proceedings, or part thereof, or the same with territory additional thereto, the engineer shall use the return, levels, surveys, plat and profile made in said former proceedings, or so much thereof, as may be applicable; and in case the cost of said returns, levels, surveys, plat and profile made in said former proceedings have been paid for by the former petitioners or their bondsmen, then a reasonable amount shall be allowed said petitioners or bondsmen for the use of the same. [33 G. A., ch. 118, § 14.] [30 G. A., ch. 68, § 16.]

Where proceedings with reference to a public ditch were abandoned at the instance of the contractor on account of doubt as to the constitutionality of the statute under which they were instituted, held that he was not entitled to do the work under new proceedings involving the construction of a ditch of a different character. *Brown v. Board of Supervisors*, 129–533, 105 N. W. 1019.

Where the report of the engineer intelligibly indicates the relation of the new drain with that previously constructed and furnishes the board with the necessary data to enable it to proceed with the performance of its duties, it is sufficient. *Kelley v. Drainage District*, 157– —, 138 N. W. 841.

SEC. **1989-a17. Relevy.** Where proceedings have been had for the establishment of a ditch, drain, levee, change of natural watercourse or the establishment of a drainage district under the law as heretofore existing and such improvement has been established and constructed and taxes levied upon the land benefited thereby, or upon any portion thereof for the cost of such improvement, and where the levy so made cannot for any reason be enforced, the board shall proceed as to all lands benefited by said improvement in the same manner as if the appraisement and apportionment of benefits had never been made; and they shall proceed in the manner hereinbefore provided, using as a basis the entire cost of such improvement, and in taxing up said benefits account shall be taken of the amount of tax, if any, that has been paid by those benefited and credit therefor shall be given accordingly. [30 G. A., ch. 68, § 17.]

Special assessments are charged to the land because of the benefits attached thereto and are to be collected in the same way as ordinary taxes are collected. *Howard v. Emmet County*, 140–527, 118 N. W. 882.

The county is not liable for neglect of its officers to enforce the assessment made in consequence of a relevy. *Canal Const. Co. v. Woodbury County*, 146–526, 121 N. W. 556.

SEC. **1989-a18. Establishment and construction across railroad right of way.** Whenever the board of supervisors shall have established any levee, or drainage district, or change of any natural watercourse and the levee, ditch, drain or watercourse as surveyed and located crosses the right of way of any railroad company, the county auditor shall immediately cause to be served upon such railroad company, in the manner provided for the service of original notices, a notice in writing stating the nature of the improvement to be constructed, the place where it will cross the right of way of such company, and the full requirements for its complete construction across such right of way as shown by the plans, specifications, plat and profile of the engineer appointed by the board, and directing such company to construct such improvement according to said plans and specifications at the place designated, across its right of way, and to build and construct or rebuild and reconstruct the necessary culvert or bridge where any ditch, drain or watercourse crosses its right of way, so as not to obstruct, impede or interfere with the free flow of the water therein, within thirty days from the time of the service of such notice upon it; and upon receiving said notice it shall be the duty of such railroad company to construct the improvement across its right of way according to the plans and specifications furnished in said notice and to build and construct or rebuild and reconstruct the necessary culvert or bridge above mentioned and complete the same within the time specified in said notice; if such railroad company shall fail, neglect or refuse to do so within the time fixed in said notice the auditor shall cause the same to be done under the supervision of the engineer in charge of the improvement and such railroad company shall be liable for the cost thereof to be collected by the county in any court having jurisdiction; and the cost of constructing the improvement across the right of way of such company, not including the cost of building and constructing or rebuilding and reconstructing any necessary culvert or bridge when such improvement is located at the place of the natural waterway or place provided by the railroad company for the flow of the water, shall be considered as an element of such company's damages by the appraisers thereof; and the cost of building and constructing or rebuilding and reconstructing any necessary culvert or bridge when such improvement is located at the place of the natural waterway or place provided by the railroad company for the flow of the water, shall be borne by such railroad company without reimbursement therefor. The commissioners to assess benefits shall fix and determine the benefits to the property of the railroad company within the levee or drainage district and make return thereof with their regular return. Such special assessment shall be a debt due personally from the railroad company, and unless the same is paid by the railroad company as special assessment, it may be collected in the name of the county in any court having jurisdiction. All other proceedings in relation to railroads shall be the same as provided for individual property owners within the drainage district. [33 G. A., ch. 118, § 15.] [32 G. A., ch. 95, § 3; 30 G. A., ch. 68, §§ 18, 19.]

Railroad property is not included within the provisions of code supp. 1989-a12 as to classification or notice. *In re Johnson Drainage Dist.*, 141–380, 118 N. W. 380.

These statutory provisions do not contemplate that where the construction of the improvement necessitates the building of a new railroad bridge the entire cost of construction of such bridge is necessarily recoverable by the company as damages. *Chicago & N. W. R. Co. v. Drainage Dist.*, 142–607, 121 N. W. 193.

The expense of building or rebuilding a culvert or bridge over the ditch as constructed is not an element of damage in

determining the damages which may be assessed in favor of the railroad company in connection with its right of way. Drainage of that character is for the public use, convenience and welfare and the making of the improvement is within the police power of the state. The damages involved to the railroad company in being compelled to rebuild or enlarge its culverts and bridges is merely incidental. *Mason City & Ft. D. R. Co. v. Board of Supervisors*, 144–10, 121 N. W. 39.

The cost of extending the ditch across the right of way and not of constructing or reconstructing culverts or bridges rendered necessary is the element of damage contemplated by the statute. *Ibid.*

While the railroad company cannot have reviewed on appeal the action of the board in including its property within a drainage district, it may have reviewed the assessment or apportionment of the costs with reference to its property. *Chicago, M. & St. P. R. Co. v. Monona County*, 144–171, 122 N. W. 820.

The description of the railroad right of way as a part of said described forty-acre tract is sufficiently definite. *Ibid.*

These statutory provisions imposing their burden on railroad property are not unconstitutional, as the state has the right in the exercise of its police power to impose such expense or burden without the allowance of an equivalent by way of damages. *Chicago, B. & Q. R. Co. v. Board of Supervisors*, (C. C.) 170 Fed. 665.

This section, enacted by way of substitution for previous sections of the statute on the same subject, is not applicable to a drainage ditch established and, in part, constructed before the change in the statute. *Chicago, B. & Q. R. Co. v. Board of Supervisors*, (C. C. A.) 182 Fed. 291.

A railroad company is not entitled to recover the expenses of building a new bridge over a public draining ditch. Its damages on account of the establishment of the ditch will be confined to the value of the easement across its right of way. *Ibid.*

In a particular case held that the assessment of railroad property was not in substantial excess of the benefits derived therefrom in the way of betterment of the roadway and track and not out of proportion of the assessments of other land within the district. *In re Johnson Drainage Dist.*, 141–380, 118 N. W. 380.

SEC. **1989-a19. Construction across highway—interest on assessments.** That section nineteen hundred eighty-nine-a nineteen of the supplement to the code, 1907, be and the same is hereby repealed and the following enacted in lieu thereof:

Whenever such levee, ditch, drain or change of any natural watercourse crosses a public highway, necessitating the removal or the building or rebuilding of any bridge or bridges, the board of supervisors shall remove, build or rebuild such bridge or bridges, paying the costs and expenses thereof from the county bridge fund. Whenever any highway within the levee or drainage district will be beneficially affected by the construction of any improvement or improvements in such district, it shall be the duty of the commissioners appointed to classify and assess benefits to determine and return in their report the amount of benefit to such highway, and notice thereof shall be served upon the clerk of the township in which said highway is located, as provided in the case of an individual property owner. The township trustees or clerk of such township may file objections to such assessment in the time and manner provided in case of landowners, and the trustees shall have the same right of appeal from the finding of the board with reference to the assessment on account of the benefits to such highway. One fourth of such assessment shall be paid by the county from the county road fund, or from the county drainage fund, and three fourths by the township. Such assessment may be paid by the township from its road fund, or out of a fund created for said purpose as provided in section fifteen hundred twenty-eight of the supplement of the code, 1907. The amount finally assessed for benefits to highways shall draw interest at the same rate and from the same time as the assessment against lands. [35 G. A., ch. 157, § 1; 34 G. A., ch. 24, § 5; 33 G. A., ch. 118, § 16.] [30 G. A., ch. 68, § 20.]

[See § 1989-a 38a. EDITOR.]

SEC. **1989-a20. Construction on or along highway.** Whenever a levee or drainage district shall have been established by the board and it shall become necessary or desirable that the levee, ditch, drain or improvement should be located and constructed within the limits of any public highway, on either or both sides and along the same, it shall be so built as not materially to interfere with the public travel thereon; and the board of supervisors shall have power and authority to lay out and establish public highways along and upon any levee or embankment along any ditch or drain built under the provisions of this act, provided that when so established the same shall be worked as other highways and so as not to impair the levee, ditch or drain. [30 G. A., ch. 68, § 21.]

SEC. **1989-a21. Control—repairs—cost.** Whenever any levee or drainage district shall have been established and the improvement constructed as in this act provided, the same shall at all times be under the control and supervision of the board of supervisors and it shall be the duty of the board to keep the same in repair and for that purpose they may cause the same to be enlarged, reopened, deepened, widened, straightened or lengthened for a better outlet, and they may change or enlarge the same or cause all or any part thereof to be converted into a closed drain when considered for the best interests of the public rights affected thereby. The cost of such repairs or change shall be paid by the board from the drainage fund of said levee or drainage district, or by assessing and levying the cost of such change or repair upon the lands in the same proportion that the original expenses and cost of construction were levied and assessed, except where additional right of way is required or additional lands affected thereby, in either of which cases the board shall proceed as hereinbefore provided; provided, however, that if the repair is made necessary by the act or negligence of the owner of any land through which such improvement is constructed or by the act, or the negligence of his agent or employe, or if the same is filled and obstructed by the cattle, hogs or other stock of such owner, employe or agent, then the cost thereof shall be assessed and levied against the lands of such owner alone. [30 G. A., ch. 68, § 22.]

[For control and supervision by trustees of drainage districts see § 1989-a52f. EDITOR.]

Whether such enlargement of the outlet as contemplated by this section be effected by widening and deepening the existing ditch or excavating another parallel with it, or whether this be done by removing the tile and replacing it by that of larger size, or by laying another tile drain parallel with that already laid, can make no difference, for in either event the result is the enlargement of the outlet which is here authorized. *Kelley v. Drainage Dist.*, 157– —, 138 N. W. 841.

SEC. **1989-a22. Outlet for lateral drains—specifications.** The owner of any land, lot or premises that have been assessed for the payment of the cost of the location and construction of any ditch, drain or watercourse as hereinbefore provided, shall have the right to use the ditch, drain or watercourse as an outlet for lateral drains from said land, lot or premises. In making connections with the drainage improvements provided for in this chapter, care must be taken to so protect the drain or drains where such connection is made as to prevent damage thereto by washing out the banks or by permitting soil or silt to be carried into the public improvement, and to this end the board of supervisors may make specifications as to the manner in which all such connections shall be made. [33 G. A., ch. 118, § 17.] [30 G. A., ch. 68, § 23.]

SEC. **1989-a23. Subdrainage districts.** If any person who owns land within the drainage district which has been assessed for benefits and

which is separated from the ditch, drain or watercourse for which it has been assessed, by the land of another or others, shall desire to ditch or drain his said land across the land of such other or others into such ditch, drain or watercourse and shall be unable to agree with such other or others on the terms and conditions on which he may enter upon their lands and construct such drain or ditch, he may proceed in the manner in this section provided, and the ditch or drain which he shall construct or cause to be constructed shall be considered to be conducive to the public health, welfare, convenience and utility to promote which said drainage district was established. He may file his petition with the county auditor asking the board to establish a subdistrict within the limits of the original district for the purpose of securing more complete drainage, describing the lands to be affected thereby by metes and bounds or otherwise so as to convey an intelligible description of such lands; and the bond and all other proceedings shall be the same as herein provided for the establishment, formation and construction of original districts and improvement thereof, including the assessment of damages and the assessment of benefits and when established and constructed, it shall be and become a part of the drainage system of such drainage district and be under the control and supervision of the board of supervisors. [30 G. A., ch. 68, § 24.]

Lands may be assessed for an improvement in a subdistrict although they have previously been assessed for the main improvement. *Laurence v. Board of Supervisors*, 151–182, 131 N. W. 8.

If the original district is created by the joint action of boards of different counties, a subdistrict thereof is under the jurisdiction of such joint board. *Bird v. Board of Supervisors*, 154–692, 135 N. W. 581.

For the purpose of construing the phrase "within the limits of the original district" as used in this section, that phrase must under the provisions of code supp. § 1989-a54 be construed as applicable to the territory annexed to the original district under the provisions of that section. *Ibid.*

It is not necessary to establish a subdistrict within the main district in order to authorize the commissioners to assess particular lands with a share of the expense of a particular portion of the improvement specially beneficial to such land in addition to their proper proportion of the expense of the general improvement. *Fardal Drainage Dist. v. Board of Supervisors*, 157– —, 138 N. W. 443.

SEC. **1989-a24. Enlargement of watercourse or stream.** When two or more districts shall have their outlet or discharge into the same natural watercourse or stream and it shall become necessary to deepen or enlarge said natural watercourse or stream, each district shall be assessed for the cost of such work in the same ratio to such total cost as the discharge of waters of such district bears to the combined discharge of waters of the several districts emptying into said natural watercourse or stream; but no district shall be liable to contribute for any improvement or costs and expenses incurred in improving said natural watercourse or stream above the point of discharge of the waters of such district into the same. [30 G. A., ch. 68, § 25.]

A district once established may be extended, parts of the land therein included in another district, natural streams may be changed, and waters collected in one district of land higher up the stream may be turned into ditches lower down, and the ditch thus used may be deepened or enlarged to meet the necessities of the case. A ditch in another district may be used as an outlet for the water accumulating on lands in the new district. *Prichard v. Board of Supervisors*, 150–565, 129 N. W. 970.

If the owners of lands drained by the ditch into which the waters of the new district are turned are injuriously affected thereby, they have a right to have their ditch deepened, enlarged, widened or changed to meet the new situation, but they cannot present their objections by intervention in an appeal from the proceedings for the establishment of the new district. *Ibid.*

SEC. **1989-a25. New levee or drainage districts.** If any levee, drainage district or improvement heretofore established, either by legal proceedings or by private parties, or which may hereafter be established, shall prove insufficient to protect or drain all of the lands necessarily tributary thereto, the board of supervisors, upon petition therefor as for the establishment of an original levee or drainage district, shall have the power and authority to establish a new levee or drainage district covering and including such old district or improvement, together with any additional lands deemed necessary; and whenever a new district shall be established as contemplated in this section and the new improvement shall extend into or along the former improvement, the commissioners of classification and benefits shall take into consideration the value of such old improvement in the construction of the new improvement and credit the same to the parties owning the old improvement as their interests may appear. [31 G. A., ch. 85, § 6; 30 G. A., ch. 68, § 26.]

Where a new and larger district is created including a district in which a drain is already in existence, the property owner cannot insist that the tile on his land belonging to the older improvement is his personal property and recover damages for its appropriation. *Smittle v. Haag*, 140–492, 118 N. W. 869.

Portions of an adjacent district may be included in a new district if it appears that the land so included will receive benefit from the improvement in the new district. *Prichard v. Board of Supervisors*, 150–565, 129 N. W. 970.

The proceedings under this section are to be the same as for the establishment of an original drainage district. *Ibid.*

The provisions of this section do not exclude the annexation of territory to a district under code supp. § 1989-a54, after the improvement has been completed. *Bird v. Board of Supervisors*, 154–692, 135 N. W. 581.

This section is not limited in its application to the formation of a new district with territory additional to that of the existing district. *Kelley v. Drainage Dist.*, 157– —, 138 N. W. 841.

SEC. **1989-a26. Special assessment—how paid—improvement certificates—waivers.** The special assessment for benefits made by the commissioners appointed for that purpose, as corrected and approved by the board of supervisors, shall be levied at one time by the board against the property so benefited, and when levied and certified shall be payable at the office of the county treasurer. If the owner of any parcel of land, lot or premises against which any such levy shall have been made and certified, which is embraced in any certificate provided for in this section, shall within thirty days from the date of such assessment promise and agree in writing endorsed upon such certificate, or in a separate agreement, that in consideration of having the right to pay his assessment in installments, he will not make any objection of illegality or irregularity as to the assessment of benefits, or levy of such tax upon and against his property, but will pay said assessment with interest thereon at such rate not exceeding six per centum per annum as shall be prescribed by resolution of the board, such tax so levied against the land, lot or premises of such owner shall be payable in ten equal installments, the first of which with interest on the whole assessment shall mature and be payable on the date of such assessment, and the others with interest on the whole amount unpaid annually thereafter at the same time and in the same manner as the March semiannual payment of ordinary taxes; but where no such terms and agreement in writing shall be made by the owner of any land, lot or premises then the whole of said special assessment, so levied upon and against the property of such owner, shall mature at one time and be due and payable with interest from the date of such assessment, and shall be collected at the next succeeding March semiannual payment of ordinary taxes. All of such tax with interest shall become delinquent on the first day

of March next after its maturity and shall bear the same interest with the same penalties as ordinary taxes. And the board may provide by resolution for the issuance of improvement certificates, payable to bearer or to the contractors who have constructed the said improvement or completed part thereof within the meaning of this act in payment or part payment therefor, each of which certificates shall state the amount of one or more assessments or part thereof made against the property designating it and the owners thereof liable to assessments for the cost of same, and said certificate may be negotiated. Such certificates shall transfer to the bearer, contractor or assigns all right and interest in and to the tax in every such assessment or part thereof described therein, and shall authorize such bearer, contractor or assignee to collect and receive every assessment embraced in said certificate, by or through any of the methods provided by law for their collection, as the same mature. Such certificates shall bear interest not to exceed six per centum per annum, payable annually, and shall be paid by the taxpayer to the county treasurer who shall receipt for the same and cause the amount paid to be applied to the payment of the certificate issued therefor. Provided, that any person shall have the right to pay the full amount of the tax so levied against his property, together with interest thereon to date of payment at any time he desires so to do, even before the maturity of any certificates issued therefor. No certificate shall be issued or negotiated for the use of the drainage district for less than par value with accrued interest up to the delivery or transfer thereof. Should the costs of such work exceed the amount of benefits assessed and certificates issued, a new apportionment and levy of tax may be made and other certificates issued in like manner. If the board of supervisors provides for the issuance of improvement certificates by the owners of lands, the township trustees may execute waivers, and there may be issued improvement certificates for such part of the assessment for benefits to highways as is to be paid by the township, such waivers and certificates to conform as nearly as may be to those executed upon the assessments against lands. [35 G. A., ch. 157, § 2.] [30 G. A., ch. 68, § 27.]

[See § 1989-a38a. EDITOR.]

The provision for the privilege of payment in installments upon waiver of objections does not impose a penalty for refusal to waive objections, and it does not constitute a denial of the equal protection of the law. *Sisson v. Board of Supervisors*, 128–442, 104 N. W. 454.

For the purposes of collecting the special assessments referred to in this section they are separated into two classes. One class embraces all assessments where the owners have entered into the prescribed contract for payment in installments and the other class includes all such assessments with reference to which no such contract has been made. As to the first class, it is provided that the tax shall be payable in installments with interest not to exceed six per cent.; while the provision as to taxes becoming delinquent on the first day of March following and bearing "the same interest with the same penalties as ordinary taxes" refers to the second class only,—that is, taxes "where no such terms and agreements in writing shall be made." *Fitchpatrick v. Fowler*, 157–215, 138 N. W. 392.

SEC. 1989-a27. Drainage bonds—benefits to highways included. If the board of supervisors shall determine that the estimated cost of reclamation and improvement of such district of land is greater than should be levied in a single year upon the lands benefited, instead of issuing improvement certificates as provided in the preceding section, it may fix the amount that shall be levied and collected each year and may issue drainage bonds of the county, bearing not more than six per centum annual interest and payable semiannually in the proportions and at the times when

such taxes shall have been collected, and may devote the same at par, with accrued interest, to the payment of the work as it progresses or may sell the same at not less than par, with accrued interest, and devote the proceeds to such payment; and if in the sale of said bonds a premium is received, such premium shall be credited to the drainage fund, and should the cost of such work exceed the estimate, or should the proceeds of the tax when collected be insufficient to pay the principal and interest of bonds sold, a new apportionment of the tax may be made and other bonds issued and sold in like manner, to meet such excess of cost or shortage in the proceeds of tax, but in no case shall the bonds run longer than fifteen years. Any property owner may pay the full amount of the benefit assessed against his property before such bonds are issued and receive a receipt in full therefor. Such payment shall be made to the county treasurer, and it shall be the duty of the county auditor to certify to the treasurer the amount of any such assessment when requested to do so, and the treasurer shall enter the same upon the tax lists in his hands in a separate place provided therefor, and shall furnish the auditor with duplicate receipts given for all assessments so paid in full. The terms and times of payment of the bonds so issued shall be fixed by the board. Said bonds shall be issued for the benefit of the district numbered thereon and each district shall be numbered by the board of supervisors and recorded by the auditor, said record showing specifically the lands embraced in said district and upon which the tax has not been previously paid in full. In no case shall the amount of bonds exceed the benefits assessed. Each bond issued shall show expressly upon its face that it is to be paid only by a tax assessed, levied and collected on the lands within the district so designated and numbered, and for the benefit of which district such bond is issued; nor shall any tax be levied or collected for the payment of said bond or bonds, or the interest thereon, on any property outside the district so numbered, designated and benefited. When the board of supervisors shall provide for the issuance of drainage bonds, it shall determine what part, if any, of the amount assessed for the benefits to highways shall be included in such bond issue, and such part, with interest, shall be paid out of the proper funds in the same yearly proportion and at the same times as the assessments against the lands of private owners. [35 G. A., ch. 157, § 3; 33 G. A., ch. 120, § 1.] [31 G. A., ch. 84, § 3; 30 G. A., ch. 68, § 28.]

[See § 1989-a38a. EDITOR.]

SEC. **1989-a28. Establishment when owners mutually agree.** Owners of land which requires combined drainage may provide for the establishment of a drainage district or location and construction of drains, ditches and watercourses upon their own lands by mutual agreement in writing duly signed, acknowledged and filed with the county auditor; such agreement may include the location, the character of the work to be done, the adjustment of the damages, the classification of the lands to be benefited thereby, the amount of taxes or special assessments to be levied, when the same shall be levied, or so many of these or other provisions as may be agreed upon, and to such extent shall be as valid and binding as though performed in the mode and manner provided for in this act. Upon the filing of the agreement with the county auditor, the board of supervisors shall at the next session thereafter establish such drainage district, and locate the ditch, drain or watercourse provided for in said mutual agreement according to the terms thereof, and shall thereafter have full and complete jurisdiction of the parties and subject matter, and order such

procedure under the provisions of this act as may be required or necessary to carry out the object, purpose and intent of such agreement and to complete and construct the desired improvement and shall retain jurisdiction of the same as fully as in other cases made and provided for in this act. [30 G. A., ch. 68, § 29.]

SEC. **1989-a29. Establishment through two or more counties—voting powers of boards of supervisors equalized.** When the desired levee[1] or drainage district extends into or through two or more counties and embraces land in two or more counties, the petition of one or more owners of land to be affected or benefited by such improvement shall be presented to the county auditor of each county into or through which said levee[2] or drainage district will extend, accompanied by a bond to be filed with the county auditor of each of the said counties at the time of filing such petition, conditioned as provided when the district is wholly within one county, in an amount and with sureties satisfactory to and approved by the board of supervisors. Upon the presentation of such petition and the approval of such bond, the board of supervisors of each of said counties shall appoint a commissioner, and the commissioners of the several counties thus appointed shall meet within thirty days thereafter and appoint a competent engineer, and such commissioners and engineer shall together make a survey of the entire lands embraced in the district, and shall determine what improvement or improvements in the way of levees, drains, ditches or changing of natural watercourses are necessary for the reclamation of the lands described in the said petition; the engineer shall make a plat of all of the lands of said district, showing thereon the proposed improvements, the elevations and levels of said lands, so far as he may deem necessary, and a profile of said levee, drains, ditches or changes in any natural watercourse and shall file a copy in the auditor's office of each of said counties together with a full return of said commissioners and engineer, explaining the situation, describing the lands, the improvements, what effect said improvements will have upon the lands of said district, the course and length of any levee, drain, ditch or change of any natural watercourse through each tract of land, the estimated cost of the same, the dimensions of said improvement together with the names of the owners of all lands included within said district, as shown by the transfer books in the auditor's office, and which in their opinion will be affected or benefited thereby, together with such other facts and recommendations as to them shall seem advisable, and especially whether or not in their judgment such levee or drainage district should be established. Immediately upon the filing of such return, plat and profile, if such recommends the establishment of the levee or drainage district, each county auditor of said counties shall cause the owners of the lands, as shown by the transfer books in the auditor's office, and also the person in actual occupancy of any lots or lands in the district and also each lien holder or incumbrancer, as shown by the county records, of any land through or abutting upon which the proposed improvement extends, to be notified of the time and place where the boards of the several counties will meet in joint session for the consideration of said petition and return. Such notice shall be the same and served in the same time and manner as provided in this act when the levee or drainage district is wholly within one county. When the boards of supervisors are of unequal number, each member of the board of the smallest number of members shall cast a full vote and each member of any larger board shall cast such fractional part of a full vote as may be determined by making the smallest number of the membership of any board the

numerator and the number of the membership of any such larger board entitled to vote, the denominator of such fraction, so as to equalize the voting power of each board. [33 G. A., ch. 118, § 18.] [30 G. A., ch. 68, § 30.]

[1,2"levy" in 30 G. A. session laws. EDITOR.]

Failure to record the proceedings of the joint action of the boards in each of the counties will not defeat the jurisdiction of the court on appeal from such action. *In re Appeal of Head*, 141–651, 118 N. W. 884.

This section as amended by acts of 33 G. A., ch. 118, § 18, clearly authorizes the members of the boards to vote separately at their joint session. *Schumaker v. Edington*, 152–596, 132 N. W. 966.

SEC. **1989-a30. Claims for damages—where filed.** Any person claiming damages as compensation for, or on account of, the construction of such improvement shall file his claim in writing therefor in the office of the county auditor of the county in which his land is situated, at least five days prior to the time at which the petition has been set for hearing, and on failure to file such claims at the time specified shall be held to have waived his right thereto. [30 G. A., ch. 68, § 31.]

SEC. **1989-a31. Hearing—appraisers.** At the time set for hearing such petition the boards of the several counties shall meet at the place designated in said notice and sit jointly in considering the petition and proceed in the same manner as provided in section five[1] of this act, except that if it becomes necessary to appoint appraisers, the boards of supervisors acting jointly shall appoint one appraiser from each county, and if said levee or drainage district extends into or through only two counties then the two appraisers shall choose a third, each of whom shall have like qualifications as provided where the improvement is wholly within one county and they shall then proceed in the same manner and make the same return as provided in section six[2] of this act, except that a copy thereof shall be filed in the auditor's office of each of the several counties. After the filing of the report of such appraisers the further proceedings of the boards[3] of supervisors acting jointly shall be the same as in this act provided where the levee or drainage district is wholly within one county, so far as applicable, except as herein otherwise provided. [30 G. A., ch. 68, § 32.]

[1See § 1989-a5 herein. EDITOR.]
[2See § 1989-a6 herein. EDITOR.]
[3"board" in 30 G. A. session laws. EDITOR.]

SEC. **1989-a32. Assessment of costs and damages—improvement certificates—bonds.** If the boards of supervisors, acting jointly, shall establish the levee or drainage district, they shall appoint a commission, one of whom shall be selected from each county and in addition thereto a competent engineer, each of whom shall have the same qualifications as provided where the district is wholly within one county; and said commission shall within twenty days go upon and view the premises and begin the work of classifying the same as hereinbefore provided where the district is wholly within one county, and in addition thereto shall make an[1] equitable apportionment of the costs, expenses, costs of construction, fees and damages assessed for the construction of such improvement or of the repairing or reopening the same, and make report thereof as provided where the improvement is wholly within one county, except a copy of said report shall be filed with each of the several county auditors. Immediately upon the filing of such report the several county auditors, acting jointly, shall cause notice to be served of the time when and the place where the

boards of supervisors will meet and consider such report, which notice shall be the same and served in the same time and manner and all proceedings thereon shall be the same as provided where the district is wholly within one county, except after the amount to be assessed and levied against the several parcels or tracts of land shall have been apportioned and finally determined, the several boards of supervisors, acting separately, and within their own counties, shall proceed to levy and collect the taxes thus apportioned in the same manner as provided where the district is wholly within one county, and they may issue improvement certificates or may sell bonds for the full amount of the benefits apportioned to such county. [33 G. A., ch. 118, § 19.] [30 G. A., ch. 68, § 33.]

["and" in 30 G. A. session laws. EDITOR.]

SEC. **1989-a33. Letting work.** If the boards of supervisors, acting jointly, shall establish such levee or drainage district, the auditors of the several counties shall immediately thereafter, acting jointly, cause notice to be given of the time and place of the meeting of the boards for letting the contract or contracts for the construction of the improvement. The notices, bond and all other proceedings in relation to letting the contract or contracts shall be the same as in this act provided where the district is wholly within one county, except that the several boards shall act jointly. [30 G. A., ch. 68, § 34.]

In case of a joint drainage district bonds are to be issued by each county severally in proportion to the benefits to such county. *Wood v. Hall*, 138–308, 110 N. W. 270.

The county boards acting jointly or severally have no power to provide that contractors shall purchase bonds covering the preliminary expenses and rights of way. *Ibid.*

But mere irregularities in the contract will not render it void if otherwise enforceable. *Ibid.*

SEC. **1989-a34. Supervising engineer—contractor—how paid.** At the time of establishing the levee or drainage district the boards of supervisors shall appoint a competent engineer to have charge of the construction of the work, and they shall fix his compensation therefor, and he shall before entering upon and taking charge of said work give bond to the counties for the use and benefit of the levee or drainage district, approved by the boards of supervisors in such sum as they may direct, conditioned for the faithful discharge of his duties. The engineer in charge of the work shall furnish the contractor monthly estimates of the amount of work done on each section and the amount due from each county, a duplicate of which shall be filed with the auditor of each of the several counties. Upon the filing of such statement each auditor shall draw a warrant or deliver to him improvement certificates, as the case may be, in favor of the contractor for eighty per centum of the amount due from his respective county. When said improvement is completed to the satisfaction of the engineer in charge and accepted by the boards of supervisors, the engineer shall certify such fact to the several county auditors and each county auditor shall draw a warrant in favor of the contractor, or deliver to him improvement certificates, for the balance due from his respective county. [30 G. A., ch. 68, § 35.]

SEC. **1989-a35. Appeals—notice—bond.** Any person or persons aggrieved shall have the right to appeal in the same time and in the same manner as provided when the district is wholly in one county, except that if the appeal is taken from the action of the boards in establishing the levee or drainage district, such appeal may be taken to the district court of either county in which the district or some part thereof is located. If

said appeal is from the award of damages or assessment of benefits the appeal shall be taken to the district court of the county in which the land affected is located. Notice of appeal and bond shall be given to and filed with the county auditor in the county where the appeal is taken. [33 G. A., ch. 118, § 20.] [30 G. A., ch. 68, § 36.]

As claims for damages are to be filed with the auditor of the county in which the land injured is situated and an appeal from allowance of such damages is to the district court of that county only, a notice of appeal served on the county auditor of such county is sufficient. *Cooper v. Calhoun County*, 152–252, 132 N. W. 40.

Under this section as amended by 33 G. A., ch. 118, § 20, notice of appeal and appeal bond are to be filed with the county auditor in the county where the appeal is taken. *Schumaker v. Edington*, 152–596, 132 N. W. 966.

Under this section as amended by 33 G. A., ch. 118, the district court does not lose jurisdiction on failure of the appellant to file a petition. *Elwood v. Board of Supervisors*, 156–407, 136 N. W. 709.

SEC. **1989-a36. District court to establish—when.** Whenever the establishment of a levee or drainage district, extending into or through two or more counties, is[1] petitioned for as hereinbefore provided and one or more of such boards of supervisors neglect, fail or refuse to take action thereon, the petitioner or petitioners may cause notice in writing to be served upon the chairman of such board or boards, demanding that action be taken upon the prayer of the petition within twenty days from and after the service of such notice; and if such board or boards shall neglect, fail or refuse to take action thereon within the time named, or if such action is taken and the boards of supervisors cannot agree as to the proper determination thereof, the petitioner or petitioners may cause such proceedings to be transferred to the district court of either of the counties into or through which such proposed district, or some part thereof, extends by serving notice upon the auditors of the several counties within ten days after the expiration of the time fixed by the notice, served upon the chairman of the board or boards, or within ten days after the failure of such boards to agree. Upon such notice being given the auditors shall, acting jointly, prepare and certify to the clerk of the district court a full and complete transcript of all proceedings had in such case, on or before the first day of the next succeeding term of said court. The clerk of the district court shall thereupon docket the case and the same shall be tried as in equity and the appearance term shall be the trial term, and the court shall enter judgment and decree dismissing the case or establishing such levee or drainage district and may by proper orders and writs enforce its judgment and decree. [30 G. A., ch. 68, § 37.]

[1]"if" in 30 G. A. session laws. EDITOR.]

SEC. **1989-a37. Special sessions of boards of supervisors.** Whenever the district is located in two or more counties, the boards of supervisors shall have power and authority to adjourn from time to time and meet in special session and in all cases shall have the same jurisdiction, power and authority as provided where the improvement is wholly within one county, and all proceedings shall be the same so far as applicable and not herein otherwise provided. [30 G. A., ch. 68, § 38.]

SEC. **1989-a38. Cities and towns included—benefits assessed—notice—objections—appeal.** The board of supervisors shall have the same power, right and authority to establish a levee or drainage district that includes the whole or any part of any incorporated town or city, including cities acting under special charter, as they have to establish districts as hereinbefore provided, and they shall have the same power, right and au-

thority with respect to the assessment of damages and benefits within such towns or cities as they have in other cases provided for in this act, and like notice to such city or town with respect to the establishment of such district and the apportionment and assessment of damages and benefits shall be given as is required by this act to be given to owners of property damaged or benefited by the establishment or construction of such improvement. Whenever the streets, alleys, public ways or parks of any incorporated town or city, or city acting under special charter, so included within a levee or drainage district, will be beneficially affected by the construction of any improvement or improvements in such district, it shall be the duty of the commissioners appointed to classify and assess benefits to determine and return in their report the amount of benefit to such streets, alleys, public ways and parks, and notice thereof shall be served upon the clerk of such incorporated town or city, or city acting under special charter, and the town or city council, or clerk of such town or city, may file objections to such assessment in the time and manner provided in case of land owners, and the town or city council shall have the same right to appeal from the finding of the board with reference to such an assessment, and such assessment, as finally established, shall draw interest at the same rate and from the same time as the assessments against lands, and the board of supervisors and the town or city council shall have the same power and authority in reference to issuing improvement certificates or drainage bonds and executing waivers on account of such assessment for benefits to streets, alleys, public ways and parks as is herein conferred upon the board of supervisors and township trustees in reference to assessment for benefits to highways. [35 G. A., ch. 157, § 4.] [30 G. A., ch. 68, § 39.]

[See § 1989-a38a. EDITOR.]

SEC. **1989-a38a. Retroactive.** The provisions of this act are hereby made retroactive, and all waivers and improvement certificates heretofore issued by boards of supervisors are hereby legalized, confirmed and made valid. [35 G. A., ch. 157, § 5.]

SEC. **1989-a39. Outlet in another state—right of way.** Whenever a drainage district is established in any county in this state and no practicable or feasible outlet can be obtained except through the lands of an adjoining state, the board of supervisors of such county shall have power and authority to purchase a right of way for such outlet in such adjoining state and pay for the same out of the funds of such district. [30 G. A., ch. 68, § 40.]

While the board of supervisors may acquire an outlet over the land of an adjoining state or may unite with the board in another county for the establishment of a district including lands in both counties, it is not provided that where the district is located entirely in one county the board may acquire an outlet through land in another county. *Clary v. Woodbury County*, 135–488, 113 N. W. 330.

SEC. **1989-a40. Watchmen.** Whenever a levee has been established, or shall hereafter be established, and constructed in any county, the board of supervisors shall be empowered and authorized to employ one or more persons whose duty it shall be to watch such levee and make repairs thereon in case of emergency or cause the same to be made. And such employe shall file with the county auditor an itemized bill for services rendered, and cost and expense incurred in watching or repairing such levee, and the same shall be audited and allowed by the board as other claims and demands and the amount or amounts so allowed shall be paid by the county from the funds belonging to such levee district. If there are no funds on

hand belonging to such district, the same shall be paid in the first instance by the county from the general fund and the board shall proceed to assess and levy a tax upon the lands in such district, which assessment and levy shall be apportioned to each tract of land in the same ratio that the original cost thereof was apportioned, and when collected the auditor shall draw a warrant thereon in favor of the county for the sum or sums so paid from the county funds. [30 G. A., ch. 68, § 41.]

SEC. **1989-a41. Fees and expenses.** Any engineer employed under the provisions of this act shall receive such compensation per diem as shall be fixed and determined by the board of supervisors. Appraisers of damages and commissioners to assess benefits, other than the engineer, shall receive such compensation as the board of supervisors may allow, not to exceed four dollars per day each, and all other fees and costs required under the provisions of this act shall be the same as provided by law for like services in other cases. Such costs and expenses shall be paid by the order of the board of supervisors out of the county treasury from the levee or drainage funds collected for that purpose upon warrants drawn by the county auditor. And the amount of fees for publication of all notices required to be published by the provisions of this act shall be fixed by the board of supervisors not exceeding thirty-three and one-third cents for each ten lines of brevier type, or its equivalent. [35 G. A., ch. 159, § 1.] [31 G. A., ch. 84, § 4; 30 G. A., ch. 68, § 42.]

SEC. **1989-a42. Drainage record—county auditor—additional help.** That section nineteen hundred eighty-nine-a forty-two of the supplement to the code, 1907, is hereby repealed and the following enacted in lieu thereof:

"Whenever a levee or drainage district or districts shall be petitioned for or established in any county, the board of supervisors shall furnish such additional help as shall be just and reasonable, to be paid by the county; and the county auditor shall be the custodian of all papers and records pertaining to the levee or drainage matter in his county and shall keep the book known as the 'drainage record' and shall record therein all of the proceedings of the board of supervisors pertaining to the subject of levees or drainage, as well as the papers required to be filed by the county auditor in such proceedings." [33 G. A., ch. 121, § 1.] [30 G. A., ch. 68, § 43.]

SEC. **1989-a43. Drainage of highways—outlet through private property.** Whenever the township trustees of any township or townships shall desire to drain any highway within or under the jurisdiction of such trustees, and it becomes necessary to cross the lands of a private owner or owners to obtain a proper outlet and the trustees cannot agree with the owner or owners of such land as to how, where and upon what terms such drain may be constructed, such trustees may file in the office of the county auditor a petition describing the highway to be drained and the lands necessary to be crossed to obtain a proper outlet, the starting point, route and terminus of the desired drain, as near as may be, and asking the establishment of such drain. Upon the filing of such petition the county auditor shall appoint a commissioner, who shall be a competent engineer, and place a copy of the petition in his hands and he shall proceed to survey the proposed ditch or drain along the route described in the petition, or other route if found more practicable or feasible, and shall return a plat and profile thereof to the county auditor, and his return shall set forth a full and detailed description thereof, its size, dimensions, whether it will require a covered or open drain, its availability, necessity and probable

cost, with a description of each tract of land or lot owned by different persons through which or abutting upon which the drain is proposed to be located and such other facts and recommendations as he may deem material; and he shall also apportion among the several townships, if more than one, the ratio of the cost of construction and expenses that shall be borne by each township. After the filing of such report the further proceedings shall be the same as provided in title eight, chapter one of the code in relation to the establishment of highways, except that the costs, expenses and damages shall be paid by the township trustees from the road fund of such township or townships, or from the county road fund, or partly from each of said funds, as the board of supervisors may determine. If the board of supervisors shall establish such drain, the same shall be constructed by the board of supervisors in the same manner that other county work is done, and the cost thereof shall be paid from the road fund of such township or townships, or from the county road fund, or partly from each of said funds, as the board of supervisors may direct, or the township trustees having jurisdiction over said highway shall have the right, if they deem advisable, to petition for the establishment of a drainage district including therein said highway, and said petition shall be considered and acted upon and proceedings had thereunder in all respects the same as provided where petition is signed by one or more of the land owners whose lands would be affected by or assessed for the expenses of the proposed improvements. [31 G. A., ch. 84, § 5; 30 G. A., ch. 68, § 44.]

SEC. **1989-a44. Annual inspection.** The board of supervisors of any county in or through which an improvement of the character provided for in this act extends, or shall extend, shall cause a competent engineer to inspect such improvement whenever they may deem it necessary, and at least once in each year, and he shall make report to such board of the condition of the improvement together with such recommendation as he deems necessary. [33 G. A., ch. 118, § 21.] [30 G. A., ch. 68, § 45.]

SEC. **1989-a45. Tax lien upon premises.** The tax provided for in this act, when levied, shall be a lien upon all premises upon which the same is assessed to the same extent and in the same manner as taxes levied for county and state purposes. [30 G. A., ch. 68, § 46.]

The fact that the assessment becomes a lien prior to a lease or mortgage does not render the statute unconstitutional as to mortgagees. *Fitchpatrick v. Botheras*, 150–376, 130 N. W. 163.

SEC. **1989-a46. Defects in proceedings.** The provisions of this act shall be liberally construed to promote the leveeing, ditching, draining and reclamation of wet, overflow or agricultural lands; the collection of the assessments shall not be defeated, where the proper notices have been given, by reason of any defect in the proceedings occurring prior to the order of the board of supervisors locating and establishing the levee, ditch, drain or change of natural watercourse provided for in this act, but such order or orders shall be conclusive and final that all prior proceedings were regular and according to law unless they were appealed from. But if upon appeal the court shall deem it just and proper to release any person or modify his assessment or liability, it shall in no manner affect the rights or liability of any person other than the appellant; and the failure to appeal from the order of the board of supervisors of which complaint is made shall be a waiver of any illegality in the proceedings and the remedies provided for in this act shall exclude all other remedies. [30 G. A., ch. 68, § 47.]

This provision as to liberal construction is to be applied only when it does not result in the repealing of some express provision of the statute. *Clary v. Woodbury County*, 135–488, 113 N. W. 330.

Failure of the county auditor to record the proceedings will not defeat the jurisdiction of the court on appeal. *In re Appeal of Head*, 141–651, 118 N. W. 884.

This section does not expressly or by implication limit the remedies for a review by the supreme court of the judgment which the district may enter upon the trial of an appeal. *Hartshorn v. Wright County Dist. Ct.*, 142–72, 120 N. W. 479.

Where proper notices have been given, the collection of assessments cannot be defeated by reason of any defect in the proceedings occurring prior to the action of the board establishing the ditch. *In re Appeal of Lightner*, 145–95, 123 N. W. 749.

It is competent for the legislature to create a tribunal for hearing objections and provide that all objections not heard before such tribunal shall be considered waived. *Ibid.*

The only persons who may complain in a proceeding for the making of the contemplated improvement are landowners whose lands are within the proposed district. *Prichard v. Board of Supervisors*, 150–565, 129 N. W. 970.

The court is required to solve doubts as to the propriety of the enterprise in favor of the action of the board. *Bird v. Board of Supervisors*, 154–692, 135 N. W. 581.

The effect of this section is to say that the only remedy of an owner of land contained within the district and who is made a party to the hearing of a petition for the establishment of the district is by appeal from the action of the board, and a failure to avail himself of that remedy is a waiver of all other remedies. *Kelley v. Drainage Dist.*, 157– —, 138 N. W. 841.

SEC. **1989-a47. Additional to certain statutes.** The provisions of this act shall be construed as an[1] independent procedure additional to chapter two, title ten of the code and supplement, relating to the location, establishment and construction of levees, drains, ditches and watercourses and shall not be held to repeal any of such provisions. [31 G. A., ch. 84, § 6; 30 G. A., ch. 68, § 48.]

[1"and" in 31 G. A. session laws. EDITOR.]

The provisions of this statute are independent of those previously applicable to such proceedings. *Prichard v. Board of Supervisors*, 150–565, 129 N. W. 970.

SEC. **1989-a48. Preliminary expenses—how paid.** Whenever a petition is filed with the county auditor of any county within the state, as contemplated in chapter sixty-eight, acts of the thirtieth general assembly of Iowa, for the establishment of a drainage district in any county or counties within the state, the board of supervisors of said county (or counties if there be more than one) are hereby authorized to pay all necessary preliminary expenses in connection with said drainage district, out of the general county fund of said county, or if there be more than one county from the general county fund of each of the counties included in said district in such proportion as the work done or expense created in each county bears to the whole amount of work done or expense created, said amounts to be determined by the engineer in charge of the work, and they shall replace the same to the credit of the county fund of said county or counties as their interests may appear as soon as possible after the drainage district is established, or if said district be not established, then said amounts shall be paid from the proceeds of the bond deposited with the county auditor for that purpose, as provided for in chapter sixty-eight, acts of the thirtieth general assembly of Iowa. [31 G. A., ch. 86.]

Prior to the enactment of this provision authorizing preliminary expenses to be paid by the county out of its general funds, held that the county was under no liability with reference to such expenses and that a bond given by petitioners to pay such preliminary expenses in a proceeding under a statute which was unconstitutional could not be enforced by the county as a common-law obligation. *Carroll County v. Cuthbertson*, 136–458, 114 N. W. 17.

SEC. **1989-a49. Pumping stations—petition.** The board of supervisors of any county or counties in the state in which a drainage or levee

district has been or may hereafter be organized as provided in this act may provide as a part of said drainage system for the establishment and maintenance of a pumping station or stations, when and where the same may be necessary to secure a proper outlet for the drainage of the land comprising the said district or any portion thereof, and the cost of construction and maintenance of said pumping station or stations shall be levied upon and collected from the lands in the drainage or levee district, or the lands benefited by such pumping station or stations, in the same manner as provided for in the construction and maintenance of ditches or drains or levees in this act; provided that such pumping station or stations shall not be established or maintained unless a petition therefor shall be presented to the board of supervisors signed by not less than one third of the owners of lands benefited thereby, and the lands benefited by such pumping station or stations shall be determined by the board of supervisors on the report of the engineer, nor shall additional land be taken into any such drainage district after the improvements therein have been substantially completed, unless thirty-three and one-third per cent. of the owners of the land proposed to be taken in shall have petitioned therefor or[1] consented in writing thereto. [34 G. A., ch. 87, § 7.] [32 G. A., ch. 94, § 5.]

[1"of" in enrolled bill. EDITOR.]
[For control and supervision by trustees of drainage districts see § 1989-a52f. EDITOR.]

SEC. **1989-a50. Proceedings under petitions heretofore filed.** Whenever any petition has heretofore been filed and any action thereon has been taken by the board of supervisors that is not final, it shall not be necessary that a new petition shall be filed in order to obtain the benefits of this act, but the board of supervisors are hereby empowered to proceed with the improvement from the point at which legal proceedings thereon were stopped. [32 G. A., ch. 94, § 6.]

SEC. **1989-a51. Statutes applicable.** That the measure of damages for locating, establishing and constructing a levee, ditch, drain or watercourse across the right of way of any railroad company provided for in section three[1] of this act shall be construed to apply to all cases and proceedings now pending involving such question; and the provisions of this act shall also be applicable to chapter two, title ten of the code. [32 G. A., ch. 95, § 4.]

[1See § 1989-a18 herein. EDITOR.]

SEC. **1989-a52. Pumping stations.** The board of supervisors of any county or counties in the state in which a drainage district has been or may hereafter be organized in the manner provided in chapter two of title ten of the code may provide for the establishment and maintenance of a pumping station when and where the same shall be necessary to secure a proper outlet for the lands comprising the district, and the costs of construction and maintenance of such pumping station or plant shall be levied upon and collected from the lands in the drainage district in the same manner as provided for the construction and maintenance of ditches as provided in title ten, chapter two of the code, and code supplement, except the petition referred to shall require the signatures[1] of fifty per cent. of the land owners of such district. [30 G. A., ch. 69.]

[1"signature" in 30 G. A. session laws. EDITOR.]
[For control and supervision by trustees of drainage districts see § 1989-a52f. EDITOR.]

SEC. **1989-a52a. Same—petition for management by trustees.** That in all drainage districts heretofore established or which may be here-

after established under the laws of the state of Iowa, having and operating a pumping station, upon the completion of the construction thereof, any three or more persons who own land within the drainage district which has been assessed for benefits may file in the office of the county auditor a petition signed by a majority of the persons owning land within the drainage district which has been assessed for benefits, asking that said district be placed under the control and management of three trustees, residents of and landowners in said district, to be elected by all the persons owning land in said district that has been assessed for benefits. [35 G. A., ch. 158, § 1.]

SEC. **1989-a52b. Canvass of petition — election ordered — notice.** Upon filing of said petition the board of supervisors shall at their next regular meeting canvass the same and if it shall be determined that the same is signed by a majority of all of the persons owning land in said district that has been assessed for benefits, the board of supervisors shall order an election to be held at some convenient place in the district, at some time not less than thirty nor more than sixty days from the date of the canvass of said petition, for the election of said trustees, and shall name from the residents of the district three judges and two clerks of election and shall cause notice of said election together with the time and place of holding same to be published for two consecutive weeks in the newspaper published in the county in which the district is situated in which the official proceedings of the board of supervisors are published. [35 G. A., ch. 158, § 2.]

SEC. **1989-a52c. Election—canvass of returns.** On the day designated for said election the polls shall open at eight o'clock a. m. and remain open until seven o'clock p. m. and the judges of election shall canvass the vote, and certify the same to the board of supervisors and deposit the ballots cast and the poll books showing the names of the voters with the county auditor. The canvass of the returns shall be on the Monday following said election and the county auditor shall issue a certificate to the trustees of their election. [35 G. A., ch. 158, § 3.]

SEC. **1989-a52d. Term of office.** The trustees shall hold office for a period of two years and until their successors are elected and qualify. [35 G. A., ch. 158, § 4.]

SEC. **1989-a52e. Biennial election.** Elections shall be held biennially in each district upon the first Monday of the month in which the first election was held, for the election of trustees, which shall be called, held and the returns certified in the same manner as the first election. [35 G. A., ch. 158, § 5.]

SEC. **1989-a52f. Powers and duties of trustees—costs and expenses.** The said trustees shall qualify in the same manner as township trustees, and upon their election and qualification they shall have control and supervision of said district in the same manner and with the same powers as are conferred upon the board of supervisors for the control and supervision of drainage districts by sections nineteen hundred eighty-nine-a twenty-one, nineteen hundred eighty-nine-a forty-nine and nineteen hundred eighty-nine-a fifty-two of the supplement to the code, 1907, and all costs and expenses necessary to carry out the powers and duties hereby conferred upon said trustees shall be levied and collected upon the land in said district in the same manner as the same are now levied and collected, upon certificate by the trustees to the board of supervisors, of the amount necessary therefor. [35 G. A., ch. 158, § 6.]

SEC. **1989-a52g. Report—filed with auditor for record.** Such trustees shall, from time to time, and with reasonable promptness furnish the auditor of each county in which any part of said district is situated with a correct record of their acts and proceedings, which statement must be signed by at least two of their number and shall be recorded by the auditor in the drainage record. [35 G. A., ch. 158, § 7.]

SEC. **1989-a53. Owners may drain.** Owners of land may drain the same in the general course of natural drainage, by constructing open or covered drains, discharging the same into any natural watercourse, or into any natural depression, whereby the water will be carried into some natural watercourse, and when such drainage is wholly upon the owner's land he shall not be liable in damages therefor to any person or persons or corporation. Nothing in this act shall, in any manner, be construed to affect the rights or liabilities of proprietors in respect to running waters or streams. [30 G. A., ch. 70.]

The owner may conduct surface water by means of tile drains upon his own land into the natural and usual channel which nature has provided for its discharge upon his neighbor's land without being liable in damages. This was the rule before the adoption of this statute. *Porr v. Simmerson*, 127–551, 103 N. W. 806.

In an injunction case to restrain the establishment by a landowner of a system of tile drainage on his own land at the complaint of an adjoining owner, it must appear that the defendant is about to materially and unduly increase the flow of water to plaintiff's imminent damage. *Wirds v. Vierkandt*, 131–125, 108 N. W. 108.

Where a ditch is by agreement of adjoining owners constructed along a natural watercourse, connecting with an outlet, the upper owner's rights are not limited to the drainage of the particular area from which the ditch of itself conducts surface water, but he may construct lateral tile drains so as to drain lands not otherwise affected. *Neuhring v. Schmidt*, 130–401, 106 N. W. 630.

One may lawfully tile a natural watercourse which passes over his land onto that of another where the effect is not to cast a greater quantity of water or to carry the water in a different manner upon the land of his neighbor. *Hull v. Harker*, 130–190, 106 N. W. 629.

A natural watercourse is not necessarily a channel with banks, but if the surface water uniformly flows in a given course within reasonable limits, the line of its flow is a watercourse. *Ibid.*

The statute as to private drainage and tiling is merely declaratory of the rule at common law, that the owner of land may tile-drain it in the general course of natural drainage, discharging the water collected into one natural watercourse or natural depression by which the water will be carried into some natural watercourse. *Pohlman v. Chicago, M. & St. P. R. Co.*, 131–89, 107 N. W. 1025.

Where by means of tile drains the owner of the higher land discharges on the lower land water from an area which otherwise would not have been drained across the lower land, or at a point where the water of the higher land would not naturally have been discharged, to the material injury of the land, the owner of the higher land is liable in damages. *Sheker v. Machovec*, 139–1, 116 N. W. 1042.

The upper owner has no right to gather the water on his own land which did not previously flow through a natural watercourse over the land of a lower owner and discharge it upon the land of the latter at a different place and in a different manner than before. *Valentine v. Widman*, 156–172, 135 N. W. 599.

This section announces the law as it had been declared by the court and a swale or depression through and over which surface water runs is a watercourse even though it has no well-defined banks. *Parizek v. Hinek*, 144–563, 123 N. W. 180.

The natural watercourse referred to in this section is not necessarily a channel with banks but if the surface waters usually flow in a well-defined channel it is such a watercourse as the statute contemplates. *Cech v. Cedar Rapids*, 147–247, 126 N. W. 166.

The rule announced by the supreme court that, to constitute a natural watercourse, it is not necessary that the flow of water through it should have been sufficient to wear a channel or canal, having definitely well marked sides and banks, will be followed by the federal courts in cases to which the state law is applicable. *Chicago, B. & Q. R. Co. v. Board of Supervisors*, (C. C. A.) 182 Fed. 291.

Even without a statute, the rule is in this state that the landowner cannot rightfully complain of a flow of surface water cast upon him by ordinary tile drains constructed on the land of an adjoining own-

er and discharging on such premises into a natural depression, although by such system of drainage the flow of water is accelerated. *Obe v. Pattat*, 151–723, 130 N. W. 903.

A landowner has the right to conduct the surface water from his land into the courses or depressions extending into his neighbor's land which nature has provided and into which it had previously flowed. *Lyon v. Sac County*, 155–367, 136 N. W. 324.

Where the drainage, not wholly upon the owner's land, is carried into a ditch upon the land of an adjoining owner with the agreement of the latter, there is immunity from liability for damages. The statute has served to relieve the situation from the hampering effect of a too literal reading and application of certain abstract statements of law contained in some of the earlier cases. *Schlader v. Strever*, 157– —, 138 N. W. 1105.

SEC. **1989-a54. Additional lands—procedure for annexation.** That after the original establishment of a drainage district, as in this chapter provided, if the said board is satisfied that additional lands should be included within any drainage district, and that said lands are benefited by the improvement therein, and that said lands should have been included in said original district, then, in such case, the board may order the engineer to make a plat of said lands, with the elevations thereof, and report thereon: and thereupon if said report be in favor of including additional lands, which shall be particularly described in the report, said board shall proceed in such matter as to said proposed annexed territory as in the original establishing of such district, including the fixing and levying of the special tax for benefits, and thereafter the said annexed territory shall be a part of said district, and governed in all respects as lands within the original district; or said annexation may be made and brought under the jurisdiction of the board for all of said purposes upon the petition of the owners of all the lands to be annexed. [33 G. A., ch. 118, § 22.]

This statute is sufficient to authorize the annexation of territory to a district already formed even after the completion of the original enterprise. *Bird v. Board of Supervisors*, 154–692, 135 N. W. 581.

Where the original district has been created by the action of joint boards, territory annexed to the district, although exclusively within the limits of one county, is also under the jurisdiction of such joint boards. *Ibid.*

SEC. **1989-a55. Outlet—acquisition of land for outside limits of county—procedure.** In any case where the necessary outlet of any proposed drainage district is beyond the limits of the county wherein such district is projected, and in the judgment of the board of supervisors expense will be saved such district by avoiding joint proceedings with such adjoining county and by proceeding as hereinafter authorized or whenever after establishment of any district it is found necessary to extend the main ditch beyond the limits of such district as established, in order to secure proper outlet therefor, the board of supervisors shall have power to so extend such outlet and to use the general funds of the district for such purposes; and generally such board of supervisors shall have full power to treat with and to make fair and equitable agreements with any landowner, any other drainage district, ditching organization, corporation or association within this state, whether the same may be acting under this or any other law, touching any work in which such district may be interested, or which may facilitate the flow of the waters from the lands within such district or the flow of waters from the lands lying above said district, through the ditches of such district. Where such drainage district shall find it necessary to acquire real estate for such outlet purposes the board of supervisors may proceed in the county where said real estate is located to condemn the same under the provisions of title ten, chapter four of the code, and the amendments thereto, relating to the taking of private property for works of internal improvement. [33 G. A., ch. 122, § 1.]

SEC. **1989-a56. Pending litigation not affected.** Nothing contained in this act shall be held to affect pending litigation or any proceedings heretofore had under the laws hereby amended. [34 G. A., ch. 87, § 8.]

SEC. **1989-a57. Claims of subcontractors—filing—priority.** Every mechanic, laborer, or other person who as subcontractor, shall perform labor upon or furnish materials for the construction of any drainage ditch provided for in this chapter, shall have a claim against the funds provided for the payment of said ditch and improvements for the value of such services and material not in excess of the amount of the contract price for which no warrants shall have been issued at the time of the filing of said claim. Such claim shall be made by filing with the county auditor an itemized sworn statement of the demand at any time after the performance of the labor or furnishing of the material, but within thirty days from and after the completion of the contract, and such claims shall have priority in the order in which they are filed, provided that the county auditor shall not issue warrants in excess of eighty per cent. of the contract price until thirty days after the completion of the contract. Provided further, that neither the county auditor, nor the county, nor the drainage district shall be liable for any greater sum than the contract price, nor shall they or either of them be liable for the payment of the same before the time provided for in the principal contract. [35 G. A., ch. 155, § 1.]

SEC. **1989-a58. Adjudication—attorney's fee.** Any party in interest may cause an adjudication of the amount, priority and mode and time of payment of such claims by an equitable action in the district court in the proper county. In such action the court may assess a reasonable attorney's fee against the party failing, in favor of said drainage district or county. [35 G. A., ch. 155, § 2.]

SEC. **1989-a59. Release of claim—contractor may file bond for.** The contractor may at any time release such claim by filing with the county auditor of the county in which the drainage ditch is located, a bond for the benefit of such claimant in sufficient penalty and with sureties to be approved by said county auditor, conditioned for the payment of any sum which may be found due such claimant. Such contractor may prevent the filing of such claims by filing in a like manner a bond conditioned for the payment of persons who may be entitled to file such claims. And actions may be brought on any such bond by any claimant within one year after his cause of action accrues, and judgment shall be rendered on said bond for the amount due such claimant. [35 G. A., ch. 155, § 3.]

SEC. **1989-a60. Not retroactive—pending litigation not affected.** This act shall not be deemed retroactive nor affect[1] pending litigation. [35 G. A., ch. 155, § 4.]

["effect" in enrolled bill. EDITOR.]

CHAPTER 3.

OF WATER POWER IMPROVEMENTS.

SECTION **1990. Taking land for.**

A foreign corporation, having complied with the statutory provisions of this state, may exercise the power of condemning land for proper purposes. *Hagerla v. Mississippi River Power Co.*, (D. C.) 202 Fed. 776.

SEC. **1994. Completion of work—legislative control.**

The provisions of this section as to the time within which water-power improvements are to be made relate to conditions subsequent, which are not self-

forfeiting, but constitute grounds only for declaration of forfeiture by the granting power. *Hagerla v. Mississippi River Power Co.*, (D. C.) 202 Fed. 776.

Statutory provisions for condemning land for water-power improvements are constitutional. *Ibid.*

CHAPTER 4.

OF TAKING PRIVATE PROPERTY FOR WORKS OF INTERNAL IMPROVEMENT.

SECTION **1995. By railway—limit of—cemeteries.** Any railway corporation organized in this state, or chartered by or organized under the laws of the United States or any state or territory, may take and hold under the provisions of this chapter so much real estate as may be necessary for the location, construction and convenient use of its railway, providing no part of any territory actually platted, used and devoted to cemetery purposes shall be taken without the consent of the proper officers or owners thereof, and may also take, remove and use for the construction and repair of said railway and its appurtenances, any earth, gravel, stone, timber or other materials on or from the land so taken. The land so taken, otherwise than by the consent of the owners, shall not exceed one hundred feet in width, except for wood and water stations, unless where greater width is necessary for excavation, embankment or depositing waste earth. [34 G. A., ch. 90, § 1.] [17 G. A., ch. 126; C. '73, § 1241; R. § 1314.]

When property has been devoted to public use it cannot be taken and applied to another conflicting public use by the exercise of the power of eminent domain, unless by authority of the legislature expressly given or necessarily implied. But held that land owned by a steamboat company and used for a landing was not so devoted to a public use, the steamboat company having no power to condemn land for public use for such purposes and therefore not being authorized to hold for such purposes exempt from the right of condemnation for purposes authorized by statute. *Diamond Jo Line Steamers v. Davenport.* 114–432, 87 N. W. 399.

Held further that the fact that the steamboat company had only an undivided interest in the property would indicate that it was not held absolutely and as of right to a public use. *Ibid.*

A railroad company undertaking to exercise the privilege of eminent domain is precluded from questioning the constitutionality of the conditions provided by statute for the exercise of such privilege. *Gano v. Minneapolis & St. L. R. Co.*, 114–713, 87 N. W. 714.

A railway company is not bound to acquire a right of way of any particular width, nor to lay its main track in the center of that which is acquired. While ordinarily it is to be presumed to have obtained a right of way of the maximum width, and to have intended to have its track in the center, this is a mere naked presumption, casting the burden of proof on anyone asserting the contrary, but subject to be overcome by evidence rebutting the inference. Hence, exclusive possession exercised by an abutting property owner to within less than fifty feet of the center of the railway track may be shown as against the claim of the railroad company to the full width of the right of way. *Cedar Rapids Canning Co. v. Burlington, C. R. & N. R. Co.*, 120–724, 95 N. W. 195.

A railroad cannot acquire by condemnation a strip to exceed one hundred feet in width. *Minneapolis & St. L. R. Co. v. Chicago, M. & St. P. R. Co.*, 116–681, 88 N. W. 1082.

As the statute does not provide for nor require a preliminary survey or location until the condemnation proceedings are commenced, the company is a trespasser in entering upon land for the purpose of making such preliminary survey, and acquires no rights thereby. *Ibid.*

While the statute contemplates the condemnation only of a right of way one hundred feet in width, yet an additional strip acquired by purchase for use in connection with the right of way constitutes a portion thereof, and the duty of providing a private crossing to the landowner whose property is intersected by the right of way is not changed. *Mattice v. Chicago G. W. R. Co.*, 130–749, 107 N. W. 949.

Where only a small portion of the ground designated on a plat as depot ground has been used for the purpose or is apparently necessary for the future, the company cannot claim that the entire parcel of ground so designated is held ad-

versely for such purposes. *Chicago, M. & St. P. R. Co. v. Hanken*, 140–372, 118 N. W. 527.

The doctrine of acquiescence in a division fence is applicable to a fence acquiesced in by the railroad company and adjoining lot owners as indicating the boundary line between them. *Iowa Cent. R. Co. v. Homan*, 151–404, 131 N. W. 878.

While a railroad built for the sole and only purpose of reaching a particular manufacturing establishment may not be considered to be built for public use, nevertheless a public use exists when it appears that the public has the right to use the road as so built and will in all probability do so at least to some extent. *Dubuque & S. C. R. Co. v. Ft. Dodge, D. M. & S. R. Co.*, 146–666, 125 N. W. 672.

A railroad company, although having only an easement in its right of way, may permit the maintenance of a warehouse on such right of way to facilitate shipments over its road although the occupants of the warehouse may also make shipments over other roads. *Anderson v. Interstate Mfg. Co.*, 152–455, 132 N. W. 812.

Where the condemnation is in the name of a railway company authorized to condemn a right of way for a public purpose, the question whether such right of way was in fact being condemned for a public rather than private purpose held to be a question of fact which might have been raised on appeal and could not be made the basis of a collateral attack. *Davis v. Des Moines & Ft. D. R. Co.*, 155–51, 135 N. W. 356.

When a corporation is organized with authority to construct or operate a railway, it may exercise the power of eminent domain for the purpose of acquiring its necessary right of way. *Lewis v. Omaha & C. B. S. R. Co.*, 157– —, 138 N. W. 1092.

SEC. **1998. Additional depot grounds, yards and other purposes.** Any railway corporation owning or operating or constructing a railway shall have power to condemn lands for necessary additional depot grounds or yards, for additional or new right of way for constructing double track, reducing or straightening curves, changing grades, shortening or relocating portions of the line, for excavations, embankments, or places for depositing waste earth in the same manner as is provided by law for the condemnation of the right of way. Before any proceedings shall be instituted therefor, the company shall apply to the railway commissioners, who shall give notice to the landowner, and examine into the matter and report by certificate to the clerk of the district court in the county in which the land is situated, the amount and description of the additional lands necessary for such purposes, present and prospective, of such company; whereupon the company shall have the power to condemn the lands so certified by the commissioners. [29 G. A., ch. 79, § 1; 28 G. A., ch. 70, § 1; 20 G. A., ch. 190, § 1.]

The right of way which may be taken for railroad purposes is limited to one hundred feet, whether acquired by condemnation or by purchase. Additional right of way for depot grounds can be acquired only by application to the railroad commissioners who shall, after a hearing, certify to the district court the amount and description of additional land necessary for that purpose. *Crandall v. Des Moines N. & W. R. Co.*, 103–684, 72 N. W. 778.

SEC. **1999. Manner of condemnation.**

Measure of damages: In condemnation proceedings the damages are to be assessed once for all, and when once assessed they include all the injuries which may result for all time to come from the construction and operation of the road in a reasonable and proper manner. *Hileman v. Chicago G. W. R. Co.*, 113–591, 85 N. W. 800.

Additional tracks and sidetracks, as they may become necessary, may be constructed without the payment of additional damages for right of way. *Ibid.*

The condemnation of land by virtue of the power of eminent domain is a special proceeding and the legislature has almost unlimited power in fixing the terms and conditions upon which such condemnation may be made. *Richardson v. Centerville*, 137–253, 114 N. W. 1071.

The landowner may recover compensation for depreciation of value of the remainder of his tract due to the proximity of the improvement for which the land was taken. *Ibid.*

Many of the considerations that tend to affect the value of town property are prospective only, but they may nevertheless be taken into account. Therefore, where land was condemned for depot pur-

poses, held that its prospective increased value on account of the location of the depot in that locality might be considered. *Snouffer v. Chicago & N. W. R. Co.*, 105–681, 75 N. W. 501.

Where a lessee seeks compensation he should be allowed the difference between the value of the annual use of the premises before the taking of the right of way and what it was worth afterward. *Werthman v. Mason City & Ft. D. R. Co.*, 128–135, 103 N. W. 135.

The damages to be assessed in condemnation proceedings do not include injuries which may result from the negligence or improper construction of the railroad. *Guinn v. Iowa & St. L. R. Co.*, 125–301, 101 N. W. 94.

In such a proceeding damages resulting from causing water to flow upon the premises of the owner from lands of another owner by the improper construction of ditches are not to be taken into account. *Ibid.*

It is not to be assumed that where the right of way is maintained through the premises of an owner the private way to which he will be entitled will be a grade crossing. It must be assumed that it will be an adequate crossing. *Ibid.*

It is not competent to show in evidence the amount which the company has paid to other owners per acre for rights of way over their land. *Simons v. Mason City & Ft. D. R. Co.*, 128–139, 103 N. W. 129.

Damages are not to be predicated on any particular form of crossing, the requirement of the statute being that the company shall furnish an adequate crossing. *Ibid.*

Nor should the jury be told that they may take into account every element of annoyance and disadvantage resulting from the construction of the railroad which would influence an intending purchaser in making an estimate of the market value of the property. *Ibid.*

In ascertaining the value of a tract of land for the purpose of ascertaining the damage thereto by reason of the taking of a portion for a railroad right of way, evidence as to what another tract somewhat similarly situated was sold for at private sale between the time proceedings were instituted and the date of the trial is not admissible. *Watkins v. Wabash R. Co.*, 137–441, 113 N. W. 924.

While the price at which the land was sold by the owner after the location of the right of way may be a circumstance to be considered as bearing upon the value of the property, it is error to instruct the jury that if the value of the land was not enhanced by the location of the railroad, then the owner was not entitled to recover anything for depreciation. *Ibid.*

The measure of damages in cases of condemnation is the difference between the fair market value of the tract as a whole immediately before and after the taking. The depreciation, if any, in the value of the entire tract should be taken into account. *Ibid.*

In determining the value of the property to be condemned, expert witnesses may testify as to their opinion of its value based upon comparison with other property in the same neighborhood or so nearly similar to the property in question that knowledge of the former and of its value will afford some degree of aid to the jury in estimating the value of the latter. The trial court is vested with discretion to draw the line in each case in determining whether the property referred to may thus be taken into account by way of comparison or illustration. *Youtzy v. Cedar Rapids*, 150–53, 129 N. W. 351.

Where a railroad company has authority under its articles of incorporation to construct and operate not only a street car line or an interurban line but also a general line of railway on which steam cars may be used, the right to use steam as a motive power may be taken into account in assessing the damages to property. *Lewis v. Omaha & C. B. S. R. Co.*, 157– —, 138 N. W. 1092.

The benefits to the property by reason of the improvement cannot be taken into consideration. *Western Newspaper Union v. Des Moines*, 140 N. W. 367.

Interest is to be awarded from the time the railway takes possession of the right of way. *Guinn v. Iowa & St. L. R. Co.*, 131–680, 109 N. W. 209.

The allowance of interest from the time of the construction of the road, antedating the institution of condemnation proceedings, is erroneous. *Clark v. Wabash R. Co.*, 132–11, 109 N. W. 309.

Entire premises: The damages allowed on condemnation of a portion of the owner's premises should include damage to the entire premises resulting from the construction of the improvement which involves the taking of his land. *Haggard v. Independent School Dist.*, 113–486, 85 N. W. 777.

Two tracts connected by a right of way may constitute one farm, damage to the whole of which is to be considered in proceedings to condemn a right of way across one portion. *Westbrook v. Muscatine, N. & S. R. Co.*, 115–106, 88 N. W. 202.

In the assessment of damages it is error to limit the witnesses to a consideration of any special use for the land. The owner is entitled to have his farm valued as a whole and his damages assessed on that basis. *Lough v. Minneapolis & St. L. R. Co.*, 116–31, 89 N. W. 77.

When separate tracts, one only of which is crossed by a right of way, are adapted

to one use and both are especially valuable because of adaptability to that use and are both injuriously affected by the appropriation, they should be treated as constituting one property in assessing the damages. *Hoyt v. Chicago, M. & St. P. R. Co.*, 117–296, 90 N. W. 724.

Whether the owner of separate parcels is entitled to have them treated as one tract is usually a question for the jury. But where the tracts are entirely independent, not contiguous, and there is no evidence that damage to the part actually taken affects the part not touched, the court should direct the jury to consider only that tract over which the right of way is taken. *Ibid.*

The fact that the railroad company in condemnation proceedings described only one of two tracts which are occupied together as a farm does not deprive the owner of the right to have the damages to the entire farm estimated in the proceeding. *Cook v. Boone Suburban Elec. R. Co.*, 122–437, 98 N. W. 293.

Although a tract belonging to one owner may have been platted, it does not follow that there should be a separate assessment as to each subdivision, where there is no physical evidence of the plat and no improvements made with reference thereto. *Gray v. Iowa Cent. R. Co.*, 129–68, 105 N. W. 359.

The damages to the property as a whole are to be estimated rather than to some particular government subdivision from which the right of way has been taken. *Hall v. Wabash R. Co.*, 141–250, 119 N. W. 927.

The fact that testimony is drawn out on cross-examination relating to distinct values of different parcels does not constitute error where the case is submitted only with reference to the value of the property as a whole. *McCaskey v. Ft. Dodge, D. M. & S. R. Co.*, 154–652, 135 N. W. 6.

Trespass by company: Where the railroad company entering without right upon land continues to occupy the same after title has been conveyed to another owner, such occupancy may be treated as a continuing trespass, for which the grantee may recover damages from the time of acquiring title. But the grantee is not entitled to recover for the damages suffered by his grantor. *Clark v. Wabash R. Co.*, 132–11, 109 N. W. 309.

Obstructing watercourse: A railroad company constructing its road across a stream is not liable for negligence in failing to provide for a flood which is not only extraordinary, but unprecedented, and could not reasonably have been foreseen, but it should anticipate and make provision for such floods as may occur in the ordinary course of nature, and will be liable in damages to a property owner whose property is injured by its failing to do so. *Houghtaling v. Chicago G. W. R. Co.*, 117–540, 91 N. W. 811.

It is immaterial that in the construction of an adequate culvert the company acted upon the advice of its engineers who were shown to have been competent and skillful. *Ibid.*

The company is liable for damages resulting from the clogging of a culvert by debris carried down by a stream during a freshet, so far as such damage is the result of a flood not extraordinary and unprecedented, and which could reasonably have been anticipated. *Ibid.*

An exception in a conveyance of a right of way does not cover an additional right granted to the railroad company to discharge surface water upon the land. *Earhart v. Cowles*, 122–194, 97 N. W. 1085.

A railroad company procuring a right of way by condemnation does not have the right to divert the surface water or a stream to the damage of the land owner from whose land the right of way has been taken, and such unlawful obstruction may be enjoined. *Albright v. Cedar Rapids & I. C. R. & L. Co.*, 133–644, 110 N. W. 1052.

Any damage necessarily caused by the proper construction of the railroad is included in the damages paid for the right of way and is not a proper element of proof in an action to recover damages for obstruction of surface waters. *Blunck v. Chicago N. W. R. Co.*, 142–146, 120 N. W. 737.

Where it appeared that the railroad company in the construction of its road had unnecessarily and negligently interfered with a tile drain on the right of way, held that the landowner might recover damages therefor although the construction was by an independent contractor. *Swanson v. Ft. Dodge, D. M. & S. R. Co.*, 153–78, 133 N. W. 351.

Proceedings: The proceedings before the commissioners appointed by law to appraise the land are not a suit at law, but in the nature of an inquest to ascertain its value. No hearing is had and no evidence introduced. The commissioners merely inspect the land, determine upon the amount of damages which will be occasioned by the appropriation and make a written report to the sheriff. To this extent the proceeding is in no respect a suit, but when an appeal from the finding is taken to the district court, the proceeding is adversary and is in the nature of a suit which may be removed to the federal court under the removal acts. *Myers v. Chicago & N. W. R. Co.*, 118–312, 91 N. W. 1076.

While no formal pleadings are required in condemnation proceedings, yet if the defendant undertakes to plead formally and files a written answer, the ordinary rules of pleading should prevail and no

affirmative defense not pleaded can be relied on. *Mason v. Iowa Central R. Co.*, 131–468, 109 N. W. 1.

Where the company is in possession of the right of way sought to be condemned, and the description given in the notice is sufficient to direct the sheriff and jury to the premises, and the award contains a correct description, there can be no objection that the notice of the proceedings was insufficient as to the description of the property to be condemned. *Gray v. Iowa Central R. Co.*, 129–68, 105 N. W. 359.

Abandonment of proceedings: While a company may abandon the condemnation proceedings after the award of damages is made and thereby escape the payment of the award, it cannot simply abandon the award and continue the proceedings, or institute other proceedings for another award as to the same property. *Robertson v. Hartenbower*, 120–410, 94 N. W. 857.

Abandonment of road: When a railroad company enters upon the land of another, builds a roadbed, places ties and rails thereon, these as a general rule, in the absence of abandonment to the owner, belong to the company constructing the same or to its grantees or assignees, and the landowner cannot in condemnation proceedings, although instituted subsequently to the construction of the road, have the value thereof included in his award. *Van Husen v. Omaha B. & T. R. Co.*, 118–366, 92 N. W. 47.

Payment to sheriff: Nothing short of actual payment or its equivalent to the owner of the damages assessed constitutes compensation for property wrested from him under the power of eminent domain. Payment of the damages to the sheriff is not effectual where the sheriff becomes insolvent and the property owner is unable to secure the money paid. *Burns v. Chicago, Ft. M. & D. M. R. Co.*, 110–385, 81 N. W. 794.

The deposit with the sheriff of the amount of the award is intended as security for the landowner where the company takes immediate possession of the land and the landowner has such an interest in the deposit when made that he may hold the officer liable for its safe keeping. *Bannister v. McIntire*, 112–600, 84 N. W. 707.

SEC. 2000. Assessment of damages—notice.

It is not necessary that all the condemnations of the same right of way be before the same jury. *Gray v. Iowa Central R. Co.*, 129–68, 105 N. W. 359.

Where a particular tract included among those as to which damages are to be assessed is overlooked or lost sight of by the sheriff and jury in making up the awards, a subsequent proceeding to assess the damages for such tract is not barred. *Mason v. Iowa Central R. Co.*, 131–468, 109 N. W. 1.

SEC. 2003. Notice—how published. Said notice shall be published in some newspaper in the county, if there is one, if not, then in a newspaper published in the nearest county through which the proposed railway is to be run, once each week, for at least eight successive weeks prior to the day fixed for the appraisement at the instance of the corporation. [31 G. A., ch. 9, § 26; C. '73, § 1248.]

SEC. 2007. Costs.

The provisions of this section allowing attorney's fees in such proceedings is not unconstitutional. *Gano v. Minneapolis & St. L. R. Co.*, 114–713, 87 N. W. 714; *Lough v. Minneapolis & St. L. R. Co.*, 116–31, 89 N. W. 77; *Clark v. Wabash R. Co.*, 132–11, 109 N. W. 309.

The provision as to attorney's fees does not apply unless on the trial the award is at least equal to that allowed by the commissioners. *Wormley v. Mason City & Ft. D. R. Co.*, 120–684, 95 N. W. 203.

In the taxation of attorney's fees, the court in its discretion may receive testimony, but is not bound to do so, and may limit the testimony to proof of the services rendered. *Hall v. Wabash R. Co.*, 133–714, 110 N. W. 1039.

If under the statute attorney's fees are allowed for services rendered on appeal to the supreme court in a condemnation proceeding, such fees are to be taxed in the supreme court as a part of the costs of that court and not as a part of the costs in the district court. *Woodcock v. Wabash R. Co.*, 135–559, 113 N. W. 347.

An attorney's fee is taxable as part of the costs in the proceeding and such fee as well as other costs may be determined by the court. *Richardson v. Centerville*, 137–253, 114 N. W. 1071.

Where on appeal the appellant recovers a verdict for a larger amount than allowed by the commissioners and the appellant elects to take a new trial rather than submit to a reduction by the court, and on such new trial, the party recovers another verdict for an amount in excess of the commissioners' allowance, though not so much as the first verdict, he is entitled to recover the costs of the first trial including an attorney's fee for that trial, as well as the costs including the attorney's fee for the second trial. *McCaskey*

v. Ft. Dodge, D. M. & S. R. Co., 154–652, 135 N. W. 6.

By the provisions of code § 884 the proceedings provided for under this section are to be followed in condemning land by a city. *Mellichar v. Iowa City*, 116–390, 90 N. W. 86.

The provisions of this section as to attorney's fees are not incorporated by reference thereto in code § 2815 relating to condemnation for school purposes. *Jones v. School Board*, 140–179, 118 N. W. 265.

The provisions of this section as to attorney's fees are by reference applicable in the assessment of damages for a viaduct as provided in code supp. § 771. *Globe Machinery & Supply Co. v. Des Moines*, 156–267, 136 N. W. 518.

SEC. 2009. **Appeals—change of venue.** Either party may appeal from such assessment to the district court, within thirty days after the assessment is made, by giving the adverse party, or, if such party is the corporation, its agent or attorney, and the sheriff notice in writing that such appeal has been taken. The sheriff shall thereupon file a certified copy of so much of the appraisement as applies to the part appealed from, and said court shall try the same as in an action by ordinary proceedings. The landowner shall be plaintiff and the corporation defendant. In cases where the property to be taken is for the use of the state either party shall be entitled to a change in the place of trial to the nearest district court outside of the county in which the property is located upon filing a motion for such change of venue. [35 G. A., ch. 160, § 1.] [C. '73, § 1254; R. § 1317.]

The right of appeal furnishes an adequate remedy for any errors or irregularities in the proceeding. *Gray v. Iowa Central R. Co.*, 129–68, 105 N. W. 359.

It is not error to strike from the files an answer of the appellee questioning the jurisdiction of the court over the appellee, where the facts alleged do not show want of jurisdiction. *Simons v. Mason City & Ft. D. R. Co.*, 128–139, 103 N. W. 129.

Where the landowner alone appeals from the award, the company is the defendant in such sense as to be entitled to remove the case to the federal court without regard to which party made the application for the appointment of commissioners. *Kirby v. Chicago & N. W. R. Co.*, 106 Fed. 551.

An appeal by the landowner from the assessment of damages by the commissioners in a condemnation proceeding is in effect an action by the landowner against the corporation for the value of the property taken, and may be removed to the federal court on account of diversity of citizenship of the parties. *Myers v. Chicago & N. W. R. Co.*, 118–312, 91 N. W. 1076.

An appeal from the finding of the sheriff's jury is such an action as may be removed to the federal court, on account of diversity of citizenship, although the landowner is the appellant and as a nonresident asks the removal. *Mason City & Ft. D. R. Co. v. Boynton*, 204 U. S. 570.

Where in a single proceeding the jury passes on the question as to the damage to be allowed to the owner and his tenant separately, either may appeal without joining the other or serving notice upon the other. An award to one would in no manner affect or prejudice the right of the other. *Simons v. Mason City & Ft. D. R. Co.*, 128–139, 103 N. W. 129.

While it may not be proper in examining the jurors on *voir dire* to disclose the amount of the award by the sheriff's jury, there will not be a reversal on that ground where it does not appear that any of the jurors to whom such suggestion was made acted on the final trial of the case. *Ibid.*

Where the company served notice of appeal and afterwards the landowner also served notice and filed a transcript without paying the filing fee and the company thereupon caused the landowner's appeal to be docketed and asked an affirmance for failure of the landowner to prosecute his appeal, held that it was not error for the trial court to consolidate the landowner's appeal with that taken by the company, and subsequent dismissal of its appeal by the company left no question for determination by the court. *McKinnon v. Cedar Rapids & I. C. R. & L. Co.*, 126–426, 102 N. W. 138.

Where land is condemned and taken possession of before the damages are paid, interest should be allowed on the amount of the award. *Lough v. Minneapolis & St. L. R. Co.*, 116–31, 89 N. W. 77.

All questions which might have been presented on appeal from the condemnation proceedings are foreclosed if not thus raised and cannot be made the basis of a collateral attack. *Davis v. Des Moines & Ft. D. R. Co.*, 155–51, 135 N. W. 356.

The landowner, appealing on the ground that he is entitled to larger award, cannot then, for the first time and in the same proceeding, challenge the right of the corporation to condemn land. *Hagerla v. Mississippi River Power Co.*, (D. C.) 202 Fed. 776.

Although under the statute the landowner, appealing from the award of the sheriff's jury, is treated as defendant for determining the right of removal to the federal court, yet if in the state court he files a pleading which is in effect a cross bill asking affirmative relief, the corporation seeking the condemnation may have the case removed if the corporation seeking removal is a citizen of another state and the amount in controversy is sufficient. *Ibid.*

SEC. 2011. Trial—judgment—costs.

Payment to the sheriff does not limit the property owner to his remedy against the sheriff for the recovery of money thus paid. *Burns v. Chicago, Ft. M. & D. M. R. Co.*, 110–385, 81 N. W. 794.

The court should not on appeal render judgment against the corporation for the damages found where the property has not been appropriated. *Haggard v. Independent Sch. Dist.*, 113–486, 85 N. W. 777.

It is improper to enter a judgment on the award of damages by the jury, but error in doing so does not require a reversal. The judgment may be set aside and the case allowed to stand as to award made and attorney's fees allowed. *Richardson v. Centerville*, 137–253, 114 N. W. 1071.

Although the court has no authority on appeal to render a judgment for the damages assessed, it may render a judgment for costs and attorney's fees and from such judgment an appeal will lie. *Klopp v. Chicago, M. & St. P. R. Co.*, 142–474, 119 N. W. 373.

Under this section as amended, the corporation would be liable for damages and attorney's fees on the abandonment of a proceeding for condemnation of property. *Ford v. Board of Park Commissioners*, 148–1, 126 N. W. 1030.

Ownership of the property condemned is not transferred unless the damages are finally ascertained and actually paid, and on appeal no personal judgment can be rendered against the railroad company except for the costs, including a reasonable fee for the owner's attorney. *Mason City & Ft. D. R. Co. v. Boynton*, (C. C. A.) 158 Fed. 599.

SEC. 2015. Nonuser of right of way.

Where the right of the company to land taken for right of way is lost by nonuser the land does not revert to the original owner from whom it was taken, but to the present owner of the tracts of land from which it was taken. *Smith v. Hall*, 103–95, 72 N. W. 427.

Where a right of way is acquired by a fee simple deed and subsequently the separated tracts of the parcel of land through which the right of way is thus conveyed by description are conveyed, excluding the right of way, such subsequent conveyance does not cover any right of reversion of the right of way. *Watkins v. Iowa Central R. Co.*, 123–390, 98 N. W. 910.

Where the owner of land conveys a right of way passing through his premises and afterwards conveys the two parcels expressly excluding the right of way by description from the conveyance, the grantees of the respective parcels are not entitled to damages on the taking of such right of way by another railroad, after abandonment by nonuser for eight years. *Spencer v. Wabash R. Co.*, 132–129, 109 N. W. 453.

In a conveyance of land, a portion of which has been taken for railroad right of way, the portion thus taken may be excepted from the grant so that upon abandonment of the right of way the title thereto does not revert to the grantee of the balance of the tract, but to the original grantor. *Hall v. Wabash R. Co.*, 133–714, 110 N. W. 1039.

It is to be questioned whether this section is meant to apply to a grant of the use of a public highway, but at any rate it does not apply to restrict a railroad company from using a right of way acquired over a public highway alongside a right of way acquired over private property whenever it shall see fit to avail itself of such right. *Morgan v. Des Moines U. R. Co.*, 113–561, 85 N. W. 902.

By agreement a landowner may be entitled to enforce a forfeiture of the railroad right of way in case of abandonment although the length of time of nonuser contemplated by the statute has not expired. *Gill v. Chicago & N. W. R. Co.*, 117–278, 90 N. W. 606.

Use of the right of way over the owner's land which is merely colorable and not for ordinary railroad purposes will not prevent such forfeiture. *Ibid.*

It is not necessary to constitute such abandonment that the entire line of which the right of way in question forms a part shall have been abandoned. *Ibid.*

SEC. 2016. Condemning abandoned right of way.

After the lapse of eight years or nonuser, the right of way ceases to exist as such and is to be again acquired by exercise of the power of eminent domain in the same manner as right of ways are obtained in the first instance. And in such case the provision that parties who have previously received compensation which

has not been refunded shall not be permitted to recover the second time, has no application. *Remey v. Iowa Central R. Co.*, 116–133, 89 N. W. 218; *Gray v. Iowa Central R. Co.*, 129–68, 105 N. W. 359.

As to the question involved in the case of *Remey v. Iowa Central R. Co.*, 116–133, the judges of the court on a subsequent consideration in another case were equally divided in opinion. *Clark v. Wabash R. Co.*, 132–11, 109 N. W. 309.

SEC. 2017. **Raising or lowering highways for crossings—railroad commission shall adjust disagreements.** That section two thousand and seventeen of the code is hereby repealed and the following is enacted in lieu thereof:

"Any such corporation may raise or lower any turnpike, plank road, or other road, for the purpose of having its railroad cross over or under the same, and, in such cases, such corporation shall put such road, as soon as may be, in as good repair and condition as before such alteration. When a new railroad crosses an established highway, or when it is desired to locate a new highway across an established railroad, or when it is desired by any citizen of or the board of supervisors of any county or by any railroad company operating a railroad in this state, for the safety of the public using such highway, to change, alter, relocate, or vacate an established highway, where same crosses a railroad, and the railroad company and the board of supervisors of the county in which such highway crossing is located cannot agree in respect thereto, the board of railroad commissioners of this state, upon application of either the board of supervisors or of twenty-five freeholders of said county, or the railroad company interested, are authorized and empowered, after hearing upon reasonable notice, to determine the necessity for such crossings, location thereof, whether the same shall be at grade or otherwise, the manner in which the same shall be constructed, maintained, or changed, division of expense thereof, and generally to make such orders in respect thereto as are equitable and just, including the right to require condemnation proceedings to be instituted by the board of supervisors as may be necessary to carry out such order; providing, however, that any portion of such expense that is borne by any city, town, county, state, or other public body, shall forever be considered as held in trust by said railroad company receiving same, and no part of the same shall be considered a part of the value of the properties of said railroad company upon which it is entitled to receive a return." [35 G. A., ch. 162, § 1.] [19 G. A., ch. 122; 15 G. A., ch. 47; C. '73, § 1262; R. § 1321.]

A railroad company may cross streets in the occupation of a right of way acquired over private property without the consent of abutting property owners, if in crossing such streets its track is not laid in front of the property of such abutting owners. *Morgan v. Des Moines U. R. Co.*, 113–561, 85 N. W. 902.

Land devoted to the use of a railroad is devoted to public use and a common highway may be used by a railroad company without further compensation to adjoining owners. *Burlington Gas Light Co. v. Burlington, C. R. & N. R. Co.*, 165 U. S. 370.

Under the evidence in a particular case, held that the railroad took its grant of right of way subject to existing easements in favor of the public. *Chicago, R. I. & P. R. Co. v. Council Bluffs*, 109–425, 80 N. W. 564.

And held that, having recognized and adopted a dedication of highways to the public by the original proprietor, a mere nonuse by the public of such highways would not defeat the same. *Ibid.*

SEC. 2020. **Crossing railways, canals and watercourses.**

Where the right of one road to cross another has been acquired under existing statutes, the legislature cannot, by a subsequent statute, impose as a condition to the continued use of such crossing the burden of paying the entire cost of putting in and operating an interlocking system. *Manhattan Trust Co. v. Sioux City & N. R. Co.*, 81 Fed. 50.

But by code § 2063 a railway proposing to cross one already constructed must bear the expense of interlocking. *Minneapolis*

& St. L. R. Co. v. Cedar Rapids, G. & N. W. R. Co., 114–502, 87 N. W. 410.

The statute only requires that the crossings shall be reasonably necessary. An absolute necessity need not exist. The only limitation is that the crossing shall be made as not unnecessarily to interfere with the senior road. *Dubuque & S. C. R. Co. v. Ft. Dodge, D. M. & S. R. Co.*, 146–666, 125 N. W. 672.

The statute does not require a subway crossing under ordinary conditions, and with reasonably good service a grade crossing protected by an interlocking switch is not objectionable as an undue interference with the operation of the road to be crossed. The relative expense of such a crossing and a subway crossing may properly be considered in determining whether the former is reasonable. *Ibid.*

SEC. 2021. Bridges—damages. The expense of building or rebuilding a culvert or bridge over a ditch excavated in the bed of a natural watercourse passing through a right of way is not a proper element of damages in determining the damages allowed to a railroad company in connection with the making of the improvement, under code supp. § 1989-a18. *Mason City & Ft. D. R. Co. v. Board of Supervisors*, 144–10, 121 N. W. 39.

SEC. 2022. Private crossings. That section two thousand and twenty-two of the supplement to the code, 1907, be and the same is hereby repealed and the following enacted in lieu thereof:

"When any person owns land on both sides of any railway, or when the railway runs parallel with the public highway, thereby severing the farm from the public highway, the corporation owning the same shall, when requested to do so, make and keep in good repair a sufficient causeway or other adequate means of crossing the same and one cattle guard on each side thereof connected by cross fences to the right of way fence on each side of the right of way at such reasonable place as may be designated by the owner. If such person desires more than one crossing or desires an overhead or underground crossing over or under said railway, he shall serve or cause to be served a notice in writing upon such railway company setting forth his demand, with a plat of the land showing the place and manner of the desired crossing or crossings. If such railway company, within thirty days after having been served with such notice, has failed and refused to construct such crossing or crossings, such person may apply to the board of railroad commissioners of this state which shall have full authority to determine all questions growing out of such demand, and upon hearing, after due notice, make such order as it may deem just and equitable." [35 G. A., ch. 163, § 1.] [32 G. A., ch. 96; C. '73, § 1268; R. § 1329.]

The fact that an under passageway is contracted in width after it has been occupied and used for a long period does not entitle the property owner to damages if such passageway is left of sufficient width to fulfill the objects for which it was originally provided. *Olver v. Burlington, C. R. & N. R. Co.*, 111–221, 82 N. W. 609.

A landowner cannot acquire a right to a crossing by adverse possession so as to preclude change thereof by the company. *Schrimper v. Chicago, M. & St. P. R. Co.*, 115–35, 82 N. W. 916, 87 N. W. 731.

An undercrossing, constructed in pursuance of the statute and not by contract with the owner, may be changed by the company to a grade crossing when no peculiar damage results to the owner by the change and the expense of maintaining the undercrossing would be unreasonable. *Ibid.*

In condemnation proceedings it is proper for the jury to take into account the fact that an adequate crossing over the track is required by statute to be constructed, and that if only an underground crossing would be adequate, such a crossing will be given. *Lough v. Minneapolis & St. L. R. Co.*, 116–31, 89 N. W. 77.

The duty of determining the kind of crossings is imposed on the company with the limitation that they be adequate, and in determining the damages in a condemnation proceeding it is not to be assumed that the crossing will be a grade crossing. *Guinn v. Iowa & St. L. R. Co.*, 125–301, 101 N. W. 94.

Mandamus will lie: To compel railroad companies to construct suitable crossings for one owning land on both sides of the railroad track without the prior submission of the matter to the board of railroad commissioners. *Swinney v. Chi-*

cago, R. I. & P. R. Co., 123–219, 98 N. W. 635.

The statute clearly contemplates such a crossing as shall connect the several parts of the owner's land without requiring him to go into the public highway, and consent to the construction of a way by which he may reach the public highway is not a waiver of his right to a private crossing. *Herrstrom v. Newton & N. W. R. Co.*, 129–507, 105 N. W. 436.

Where a grade crossing is impracticable, the fact that an overhead crossing would involve considerable expense will not constitute a sufficient reason for not requiring the company to construct such overhead crossing. *Ibid.*

The railroad company is not excused from providing a private crossing by the fact that the landowner may pass from one tract of his land to another separated by the railway by means of an adjoining public highway. The statute evidently contemplates more convenient access than is usually afforded by a public highway, even though one side of the land may abut thereon. *Mattice v. Chicago G. W. R. Co.*, 130–749, 107 N. W. 949.

The fact that the railway has acquired a strip of land for its use adjoining its right of way of full width does not excuse it from furnishing a private crossing. *Ibid.*

The railroad company is required to build and maintain cattle guards within a reasonable time after having been properly requested. The request must be of some officer or agent of the company acting within the scope of his duties, such duties including the management or control of the putting in of cattle guards, or of ordering them to be put in. *McGill v. Minneapolis & St. L. R. Co.*, 113–358, 85 N. W. 620.

Where a private crossing was constructed over three adjacent parallel lines of railroad which was protected by gates at each end of the passageway, held that failure of one of the companies to maintain an inside gate between its own right of way and that of another company would not render it liable for an injury to an animal coming upon its right of way. *Fowbel v. Wabash R. Co.*, 125–215, 100 N. W. 1121.

The obstruction of a private crossing is prohibited by the provisions of code § 5078, relating to obstructions of either public or private ways, and a tenant in possession may recover damages to his use of the premises by reason of such obstruction. *Morrison v. Chicago & N. W. R. Co.*, 117–587, 91 N. W. 793.

While the railroad company cannot be permitted to arbitrarily change a private crossing agreed upon between the parties, yet if it is found to be inadequate on the one hand or on the other hand unduly to interfere with the safe operation of the road, it may by proper notice require that a change be made. But it must take the initiative in making such change and cannot disregard the rights of the owner merely upon the ground that the crossing as agreed upon renders the operation of its trains unsafe. *Hartshorn v. Chicago G. W. R. Co.*, 137–324, 113 N. W. 840.

Although it may be against public policy to contract for the maintenance of an open crossing, the landowner may have the right to recover for stock killed at such crossing under the stipulations of a contract that the company will pay therefor. *Livingston v. Chicago & N. W. R. Co.*, 142–404, 120 N. W. 1040.

In proceedings to condemn additional land for right of way it is proper to show the inconvenience that will be suffered by the landowner by reason of being deprived of a crossing which he has previously enjoyed. *Klopp v. Chicago M. & St. P. R. Co.*, 142–474, 119 N. W. 373.

It is not required in the absence of request of property owner that cattle guards and wing fences be erected at a private crossing. *Rutherford v. Iowa Central R. Co.*, 142–744, 121 N. W. 703.

The company is not required to use the same care towards persons using private crossings as to those using public crossings,—that is, it is not required to keep a lookout for such persons. *Ibid.*

Where it was contended that there was an agreement for an under crossing at a particular place, held that there had been a written agreement for such crossing between the landowner and the railroad company constructing the road and that the purchaser of the railroad was charged with knowledge of such agreement. *Longshore v. Chicago G. W. R. Co.*, 147–463, 124 N. W. 795.

Where the company having constructed a stone culvert over a stream crossing its right of way permitted the owner of the land abutting on each side of the right of way to use such culvert as an under crossing for cattle, held that such crossing was not a private crossing such as the company was bound to keep in repair and the use was permissive only. *Hastings v. Chicago, R. I. & P. R. Co.*, 148–390, 126 N. W. 786.

SEC. 2024-a. **Institutions of United States—state to condemn land for.** Whenever in the opinion of the governor of the state, the public interest requires the laying or construction of any drain, sewer or aqueduct, and the acquisition of an easement therefor, upon or across private property, or the taking of any real estate for the making or construction of

any drain, sewer or aqueduct, or for rifle ranges, exercise, drill or parade grounds, yards, walls, buildings or other improvements or conveniences for the use or benefit of any fort, arsenal, military post or other institution of the United States, upon or across private property, the same proceedings may be had in the name of the state as are provided for the taking of private property for works of internal improvement by chapter four, title ten, of the code, and the proceedings shall be conducted by the county attorney of the county in which the land is situated, whenever directed by the governor, or he may appoint some other person for that purpose. [29 G. A., ch. 83, § 1.]

SEC. **2024-b. Same—damages certified—how paid—conveyance of title.** When the amount of the damages is finally determined, the sheriff or clerk, as the case may be, shall certify the amount thereof to the governor who shall, by an order endorsed thereon, direct the payment of the same, including all costs and expenses incurred, and the auditor of state shall issue a warrant on the treasury for the amount, which shall be paid out of such money as may have been deposited in the treasury by the United States, or by any person or persons for and on its behalf, and when paid to the sheriff or person entitled thereto, the governor and auditor of state are hereby authorized and instructed to convey the easement or real estate so taken and all of the rights of the state so acquired therein, to the United States, by good and sufficient deed of conveyance executed for, on behalf of and in the name of the state of Iowa, and thereupon the United States, through its proper officer or agent, may enter upon the premises and construct the desired work. [29 G. A., ch. 83, § 2.]

SEC. **2024-c. United States may purchase or condemn.** That where the United States of America has undertaken or may hereafter undertake to improve any river, stream, or watercourse, forming a part of the boundary line of this state, or within this state, or to utilize any river, stream, or watercourse, for any purpose, deemed advisable, the said United States may purchase, or condemn land and private property, in accordance with the provisions of chapter four, title ten of the code, for taking private property. [29 G. A., ch. 80, § 1.]

SEC. **2024-d. Additional grounds for state purposes—jury selected by chief justice.** Whenever, in the opinion of the executive council of the state, public interest requires the taking of real estate as a site for any state building, or as additional grounds for any existing state building, or for any other state purpose, the state may take and hold, under its right of eminent domain, so much real estate as is necessary for the purpose for which the same is taken; and proceedings may be instituted in the name of the state of Iowa for the condemnation of such real estate under the provisions of chapter four of title ten of the code, except that the members of the sheriff's jury shall be selected by the chief justice of the supreme court of the state of Iowa upon receipt of notice from the sheriff of the county in which the real estate is situated that the application mentioned in code section nineteen hundred ninety-nine has been made to such sheriff, and not more than one member of such jury shall be residents of the same county, and the names and places of residence of each juror so selected by the said chief justice shall be returned by him and filed with said sheriff, and the proceedings shall be conducted by some person appointed by the governor of the state. [35 G. A., ch. 161, § 1.] [30 G. A., ch. 71, § 1.]

SEC. 2024-e. **Damages—how paid.** When the amount of damages is determined, the sheriff or clerk, as the case may be, shall certify the amount thereof to the executive council which shall, by an order endorsed upon the certificate, direct the payment of the same, and the auditor of state shall, upon receipt of such order, issue a warrant on the treasury for the amount, which warrant shall be paid out of any money appropriated by the general assembly for that purpose, or out of any money received from the sale of other property, the proceeds of which may have been authorized by law to be used for the purpose of the purchase of real estate for state use; and when the amount of such damages is paid to the sheriff, the clerk, or the person entitled thereto, the state, through its proper officer or agent, may enter upon the possession of the real estate taken, and use and occupy the same for state purposes. [30 G. A., ch. 71, § 2.]

SEC. 2024-f. **Courthouses—jails—procedure.** Whenever the interest of any county requires real estate for the erection of courthouses or jails by a county, such county may take and hold such real estate for the purpose for which same is taken, by condemnation proceedings. Such proceeding shall be instituted pursuant to a resolution of the board of supervisors of a county, and shall be instituted and prosecuted in the name of the county seeking such condemnation by the county attorney for such county under the provisions of chapter four of title ten of the code. [30 G. A., ch. 72, § 1.]

SEC. 2024-g. **Same—damages—how paid.** In cases where such condemnation is sought by a county, the sheriff or clerk, as the case may be, shall, when the amount of the damages is determined, certify the amount thereof to the board of supervisors and such board may direct payment thereof by resolution, and the county auditor shall thereupon issue his warrant therefor upon the proper fund of such county. In any case when the amount of the damages is paid to the sheriff or clerk, or the person entitled thereto, and the time for appeal has expired or final judgment entered upon appeal, the county may enter into possession of the real estate taken, through its proper officers or agents, and use and occupy the same for the purpose taken. [30 G. A., ch. 72, § 2.]

SEC. 2024-h. **Same—appeals.** No county condemning or seeking to condemn land under the provisions of this act, shall be entitled to the possession of the lands condemned or sought to be condemned until the time for appeal to the district or supreme court from such condemnation has expired, or final judgment rendered on appeal, and in all appeals from the award of the sheriff's jury in such proceedings, the court shall have jurisdiction to pass upon the public necessity for the condemnation of such real estate, and shall determine the same without the intervention of a jury, and may make such order with reference thereto as it may deem proper within its discretion, and may modify, enlarge or diminish the area of grounds sought to be condemned, but all questions as to amount of damages shall be determined by ordinary proceedings as in other cases of condemnation. [30 G. A., ch. 72, § 3.]

SEC. 2024-i. **Gravel and material for road improvement—counties.** That section two thousand and twenty-four-i of the supplement to the code, 1907, be and the same is hereby repealed, and the following substitute enacted in lieu thereof:

"The board of supervisors of any county is hereby authorized and empowered within the limits of such county and without the limits of any city or town, to procure, purchase or condemn, enter upon and take any lands, not to exceed five acres in any one place, for the purpose of obtain-

ing gravel or other suitable material with which to improve the roads and highways of such county including a sufficient roadway to such land by the most reasonable route, and to pay for the same out of the county road funds, and it shall be the duty of the board of supervisors of each county, where such material can be found within the county as herein provided, to procure, purchase or condemn such tracts so that no part of the county shall be more than six miles distant from land where such material can be obtained for highway purposes; provided, however, that the board of supervisors shall not be required to purchase such land, but may procure the road material at any place within or without the county when the combined cost of obtaining and hauling the same is not greater than the cost would be by condemnation proceedings under this act. [35 G. A., ch. 164, § 1.] [30 G. A., ch. 73, § 1.]

[See §2024-i1 to § 2024-i3. EDITOR.]

SEC. **2024-i1. Same—township trustees may use.** "The township trustees of any township in such county shall have the right to enter upon, take and use any such land, gravel or other suitable material for the purpose of improving the highways and roads within their respective townships. [35 G. A., ch. 164, § 2.]

SEC. **2024-i2. Same—road improvement organizations—misuse—penalty.** "Road improvement companies, corporations, voluntary associations, commercial clubs, road improvement districts, and individual citizens shall have the right to enter upon said land and haul and use said material for public road improvement. Any person, company, corporation or club using said material for any other purpose than public road improvement, shall be guilty of a misdemeanor, and upon conviction, fined not less than one hundred dollars, nor more than five hundred dollars, or imprisonment in the county jail not more than thirty days, or both. [35 G. A., ch. 164, § 3.]

SEC. **2024-i3. Same—nonfeasance—removal.** "In case the board of supervisors of any county shall fail, neglect or refuse to perform the duty imposed upon them by this act, the members thereof shall be subject to removal from office for failure to perform their duty as provided by chapter seventy-eight of the acts of the thirty-third general assembly as amended." [35 G. A., ch. 164, § 4.]

SEC. **2024-j. Same—cities and towns.** Cities and towns including cities under special charter are hereby authorized and empowered within or without their limits to procure, purchase or condemn, enter upon and take any lands for the purpose of obtaining gravel, stone or other suitable material with which to improve the streets and alleys of such city or town, including a suitable roadway thereto by the most reasonable route, and pay for the same from the general fund, grading fund, or from the highway or poll taxes of such city or town, or partly from each of said funds. [30 G. A., ch. 73, § 2.]

SEC. **2024-k. Same—condemnation proceedings by cities and towns.** Proceedings for condemnation of land as contemplated in this act shall be in accordance with the provisions relating to taking private property for works of internal improvements. [30 G. A., ch. 73, § 3.]

SEC. **2024-l. Same—reversion of lands.** When lands that have been condemned and taken under this act, and not used for the purpose herein specified for the period of five consecutive years, such lands shall then revert to the owner or owners of the tract from which it was taken. [30 G. A., ch. 73, § 4.]

SEC. 2026. **Interurban or street railway over highways.** That section two thousand and twenty-six of the supplement to the code, [1902] and chapter eighty-seven of the acts of the thirty-first general assembly be and the same are hereby repealed, and the following enacted in lieu thereof:

"Any interurban or street railway may for the purpose of constructing or extending its line locate, build and operate its road by any power other than steam, over and along any portion of the public road, beyond the limits of any city or town, which is one hundred feet or more wide. It shall as soon as practicable put the road in as good repair as it was before its use for such railway. Boards of supervisors are authorized to accept for road purposes conveyances of land adjoining any such road or part thereof sufficient to increase the same to the width of one hundred feet; but in any county in which such company desires to operate its line of railway over a road not less than sixty feet in width, for a distance not over two miles, beyond the limits of a city or town, the board of supervisors may grant the right to it to operate its line over said road, not exceeding two miles, under such rules and regulations as said board may prescribe, and may also from time to time make such further reasonable regulations as may be necessary. Where an interurban railway desires to operate its lines along or upon a public highway beyond the limits of any city or town, and in the opinion of the board of supervisors of the county in which such highway is located, it is impracticable or inexpedient to increase the width thereof to one hundred feet, such board of supervisors may permit such interurban railway company to construct and operate its railway along and upon such highway, under such restrictions and regulations as the board may deem advisable; but no such railway shall construct or operate its line along or upon such highway until a written statement of consent of two thirds of the residents owning property abutting upon such highway shall have been obtained and filed with the auditor of the county in which the highway is located; but no such written consent signed by any abutting landowner shall be construed to waive any claim for damages he may have on account of the location and construction of such railway upon and along the highway in front of the premises unless expressly so stated therein, and no such written consent shall have the effect to deprive any other abutting landowner of his right to recover damages therefor. And in all cases the location, construction and operation of such interurban railway shall be subject to the provisions of section two thousand and twenty-seven of the code. [32 G. A., ch. 97; 31 G. A., ch. 87; 29 G. A., ch. 81, § 5; 18 G. A., ch. 32, § 1.]

The provisions of the act from which this section is derived related entirely to street railways and a street railway which is thus extended beyond the city limits along the public highway to a neighboring city or town does not become subject to taxation under the provisions relating to taxation of railroads. *Cedar Rapids & M. C. R. Co. v. Cedar Rapids*, 106–476, 76 N. W. 728.

Under the provisions of code § 1334, which now control the taxation of interurban railways, an electric railway constructed and operated along the highway outside of the city limits is to be taxed as an interurban railway, being now so defined by code supp. § 2033-a. *Cedar Rapids & M. C. R. Co. v. Cummins*, 125–430, 101 N. W. 176.

The distinctive or peculiar privilege given to an interurban railway is the right under certain conditions to occupy and use the public roads as a right of way and it is doubtless due to this fact that such railways are required to use some motive power other than steam. *Lewis v. Omaha & C. B. S. R. Co.*, 157– —, 138 N. W. 1092.

SEC. 2028. **Ways to lands which have none.** Any person, corporation or copartnership owning or leasing any land not having a public or

private way thereto, may have a public way to any railway station, street or highway established over the land of another, not exceeding forty feet in width, to be located on a division, subdivision or "forty" line or immediately adjacent thereto; but if a railway is to be constructed thereon, as provided in section two thousand and thirty-one, the same may be located wherever necessary and practicable, but not exceeding one hundred feet in width, and not interfering with buildings, orchards, gardens or cemeteries; and when the same shall be constructed it shall, when passing through inclosed land, be fenced on both sides by the person or corporation causing it to be established. [33 G. A., ch. 123, § 1.] · [29 G. A., ch. 82, § 1; 25 G. A., ch. 18; 15 G. A., ch. 34, § 1.]

One whose property is not reached by a public highway may have an outlet to the highway established at his expense. *Perry v. Board of Supervisors*, 133–281, 110 N. W. 591.

One who petitions for the establishment of a public way cannot be defeated by a showing that proceedings to establish a public highway along the same line have been defeated, where it does not appear that the party asking the establishment of the way was a party to the proceeding for establishing the highway. *Kirkhart v. Roberts*, 123–137, 98 N. W. 562.

The provisions relating to the establishment of right of ways to mines are to be construed together and it is only on a public way such as is authorized to be located under this section, that a railway may be established under § 2031. *Morrison v. Thistle Coal Co.*, 119–705, 94 N. W. 507.

The right of way for a railway thus established is a public way, even though it is not maintained so as to be available for use by the traveler otherwise than by use of railway cars. *Ibid.*

The requirement of this section, before its amendment by 29 G. A., ch. 82, that such right of way, not exceeding forty feet in width, may be located on a division line or immediately adjacent thereto, did not render it improper where, by reason of making a reasonably convenient curve, it was necessary to construct a portion of the track more than forty feet from a division line. *Ibid.*

Unless a party has a way either public or private which is unobstructed and unquestioned, he may institute proceedings for condemnation of a highway through his premises. *Carter v. Barkley*, 137–510, 115 N. W. 21.

The statute seems to contemplate that a public way may be condemned on the application of one who does not have any public or private right of way to his land. The fact that he may be entitled to a way by necessity which is uncertain and worthless does not deprive him of the right to have a way condemned. *Miller v. Kramer*, 148–460, 126 N. W. 931.

Prior to the amendment of this section eliminating the requirement that the right of way be on a division line or immediately adjacent thereto, held that the fact that the condemnation would result in severing a small portion of the land of an owner from the balance of his tract was not sufficient ground for refusing the condemnation. Such damage could be taken into account in determining the allowance of damage to be made to such owner. *Ibid.*

In an action to enjoin the establishment of a way over land under this section, held that owners of land over which the defendant might have a right of way were neither necessary nor proper parties. *Miller v. Kramer*, 154–523, 134 N. W. 538.

SEC. 2032. Rights of riparian owners.

It has been the legislative policy of the state to allow the fee owners of adjacent shore lands along a navigable river to build piers, cribs and other convenient erections to be used in connection with navigation and commerce. But the riparian proprietor only owns to high-water mark. *Hagerla v. Mississippi River Power Co.*, (D. C.) 202 Fed. 776.

CHAPTER 4-A.

OF INTERURBAN RAILWAYS.

SECTION 2033-a. **Definition.** Any railway operated upon the streets of a city or town by electric or other power than steam, which extends beyond the corporate limits of such city or town to another city, town or

village, or any railway operated by electric or other power than steam, extending from one city, town or village to another city, town or village, shall be known as an interurban railway, and shall be a work of internal improvement. [29 G. A., ch. 81, § 1.]

The provision that the portion of an interurban railway system within the corporate limits of a city shall be subject to municipality regulation does not destroy its character as a part of the system for the purposes of taxation. *Cedar Rapids & M. C. R. Co. v. Cummins*, 125–430, 101 N. W. 176.

An interurban railway is a railway operated by other power than steam and extending beyond the corporate limits of a city or town to another city or town. *Lewis v. Omaha & C. B. S. R. Co.*, 157– —, 138 N. W. 1092.

SEC. 2033-b. **What statutes apply.** The words railway, railway company, railway corporation, railroad, railroad company, and railroad corporation, as used in the code and acts of the general assembly, now in force or hereafter enacted, are hereby declared to apply to and include all interurban railways, and all companies or corporations constructing, owning or operating such interurban street railways, and all provisions of the code and acts of the general assembly, now in force or hereafter enacted, affecting railways, railway companies, railway corporations, railroads, railroad companies and railroad corporations, are hereby declared to affect and apply in full force and effect to all interurban railways, and to all interurban railway companies or railway corporations constructing, owning or operating such interurban railways. [29 G. A., ch. 81, § 2.]

The provisions of this section render code § 2072, requiring the ringing of a bell and the blowing of a whistle on approaching a highway crossing, applicable to interurban railways. *Swisher v. Interurban R. Co.*, 151–384, 130 N. W. 404.

SEC. 2033-c. **When deemed a street railway.** Any interurban railway shall within the corporate limits of any city or town, or of any city acting under a special charter, upon such streets as it shall use for transporting passengers, mail, baggage, and such parcels, packages, and freight as it may carry in its passenger or combination baggage cars only, be deemed a street railway, and be subject to the laws governing street railways. [29 G. A., ch. 81, § 3.]

An interurban line which includes a city street car system may be taxed by the executive council as a unit. *Waterloo & C. F. R. T. Co. v. Board of Supervisors*, 131–237, 108 N. W. 316; *Cedar Rapids & M. C. R. Co. v. Cummins*, 125–430, 101 N. W. 176.

An interurban railway, so far as it is operated within the limits of a city, does not come within the terms of code § 2071, declaring that a railway company is liable to an employe for injuries resulting from the negligence of a coemploye. *McLeod v. Chicago & N. W. R. Co.*, 125–270, 101 N. W. 77.

This statutory provision was evidently intended to regulate crossings outside of cities and not to interfere with the authority of cities within their limits. *Council Bluffs v. Illinois Central R. Co.*, 157– —, 138 N. W. 891.

SEC. 2033-d. **Powers of cities and towns.** Cities and towns and cities acting under special charters shall have power to authorize or forbid the construction of such railways upon, or over, or along the streets, alleys and public grounds within their limits and to prescribe the conditions and regulations under which said railways shall be constructed and operated within said limits. But the right to operate as a street railway under section three of this act shall not be granted for a period exceeding twenty-five years. Nothing herein shall impair the obligation of contracts of such city or town heretofore made. This act shall not in any manner affect sections seven hundred seventy-five and seven hundred seventy-six of the code, which shall be applicable to interurban railways. [29 G. A., ch. 81, § 4.]

SEC. 2033-e. **Grade crossings — duties of employes — penalty.** Wherever the tracks of an interurban railway cross the tracks of any steam railway at grade the steam railway shall have the right of way and not be compelled to stop its trains and the interurban railway company operating said line shall cause its cars to come to a full stop not nearer than ten feet nor further than fifty feet from such crossing, and before proceeding to cross said steam railway tracks shall cause some person in its employ first to cross said track ahead of said car or cars and ascertain if the way is clear and free from danger for the passage of said interurban cars, and said interurban cars shall not proceed to cross until signalled to do so by such person employed as aforesaid, or said way is clear for such passage over said tracks. Every person in charge of any interurban car or cars, who wilfully fails to comply with the provisions hereof and fails to bring the car or cars which he has in charge to [a] stop, or causes the same to cross said steam railway tracks before the way is clear or he is signaled to do so, shall be subject to a fine of not less than one hundred dollars nor more than two hundred dollars or imprisonment in the county jail not to exceed twelve months in the discretion of the court. No steam railway shall obstruct the free passage of the cars of an intersecting interurban railway at such crossing. [29 G. A., ch. 81, § 6.]

SEC. 2033-f. **Automobile railway—statutes applicable.** Any system of railway operating cars within the state of Iowa over or upon any track other than steel or iron shall be known as an automobile railway, and shall be a work of internal improvement. The words "railway," "railway company," "railway corporation," "railroad," "railroad company" or "railroad corporation," as used in the code and acts of the general assembly now in force or hereafter enacted, are hereby declared to apply to, and include, automobile railways, and all companies or corporations owning or operating such automobile railways, and all provisions of the code and acts of the general assembly now in force or hereafter enacted affecting railways, railway companies, railway corporations, railroads, railroad companies or railroad corporations, are hereby declared to affect and apply in full force and effect to all automobile railways and to all automobile railway companies owning or operating such automobile railways. [32 G. A., ch. 98.]

CHAPTER 5.

OF THE CONSTRUCTION AND OPERATION OF RAILWAYS.

SECTION 2036. **May join or consolidate.**

A lease of railroad property for a long period of time is not void under the statutory provision against the creation of perpetuities. *Sioux City Terminal R. & W. Co. v. Trust Co.*, 82 Fed. 124; *First Nat. Bank v. Sioux City Terminal R. & W. Co.*, 69 Fed. 441.

SEC. 2038-a. **Powers in other states.** That any railroad corporation organized under and by virtue of the laws of this state and owning and operating a railroad therein shall be authorized and empowered to exercise in any other state or territory of the United States in which it may control or operate a connecting line or lines of railway the powers and privileges conferred upon it by its articles of incorporation and all powers, privileges and franchises conferred upon railroad corporations under and

by virtue of the laws of Iowa or of such other state or territory, for the purposes set forth in section two hereof. [29 G. A., ch. 84, § 1.]

SEC. 2038-b. **May purchase, lease, control or operate extension in other states.** That any railroad corporation so organized under the laws of Iowa and owning and operating a railroad therein may lease, purchase, or otherwise acquire and own, control or operate any connecting extension of its said railroad not parallel or competing therewith, in any other state or territory of the United States, and to that end may purchase and control the stock, bonds or securities of any such extension if not contrary to the laws of such other state or territory. [29 G. A., ch. 84, § 2.]

SEC. 2039. **Duties and liabilities of lessees.**

A special assessment on railway property for improvement of abutting streets cannot be collected directly from the lessee where the lessee has not undertaken to pay such assessment. *Chicago, R. I. & P. R. Co. v. Ottumwa*, 112–300, 83 N. W. 1074.

A construction company operating engines and cars over a temporary track in the construction of a railroad is engaged in the operation of a railroad within the provisions of code § 2071, providing that every corporation operating a railway shall be liable to its employes for all damages sustained in consequence of the negligence of coemployes. *Mace v. Boedker*, 127–721, 104 N. W. 475.

It being the primary duty of the owner of a railroad to construct and maintain bridges over ditches provided for the passage of surface water, the lessee of the road is liable in damages for a negligent obstruction of water by such bridge causing damage to property. *De Lashmutt v Chicago, B. & Q. R. Co.*, 148–556, 126 N W. 359.

SEC. 2041. **Bonds—mortgages.**

By statute the company has express authority to mortgage after-acquired property, and by that statutory provision, when the power to mortgage exists, the right to incumber after-acquired property is necessarily included. *Beach v. Wakefield*, 107–567, 76 N. W. 688, 78 N. W. 197.

SEC. 2042. **After-acquired property.**

The statute expressly authorizes any corporation organized under the state law for the purpose of constructing and operating a railway, to mortgage its franchise and all its property, whether acquired before or after the execution of the mortgage. *Sioux City Terminal R. & W. Co. v. Trust Co.*, 82 Fed. 124.

SEC. 2043. **Execution of mortgages.**

A railroad company is in many respects purely a private corporation, and it may bind itself by an *ultra vires* mortgage, which is not against public policy, by accepting and retaining the benefits thereof. *Beach v. Wakefield*, 107–567, 76 N. W. 688, 78 N. W. 197.

SEC. 2049. **Bonds secured by mortgage.**

The provisions of this section are not inconsistent with those of code § 1611 as to the limitation of the indebtedness of a railroad corporation. *Barnes v. Eastern Iowa R. Co.*, 155–721, 134 N. W. 90, 136 N. W. 1053.

SEC. 2051. **Conditional sale or lease of equipment or rolling stock.** In any contract for the sale of railroad or street railway equipment or rolling stock or power house, electric or other equipment of street or interurban railways or of electric light and power companies or of steam heating companies, such equipment including engines, boilers, generators, switch boards, transformers, motors and other machinery and appliances, it may be agreed that the title thereto, although possession thereof be delivered immediately or at any time or times subsequently, shall not vest in the purchaser until the purchase price shall be fully paid, or that the seller shall have and retain a lien thereon for the unpaid purchase money. In any contract for the leasing or hiring of such property, it may be stipulated for a conditional sale thereof at the termination of such contract, and

that the rentals or amounts to be received under such contract may, as paid, be applied and treated as purchase money, and that the title to the property shall not vest in the lessee or bailee until the purchase price shall have been paid in full, and until the terms of the contract shall have been fully performed, notwithstanding delivery to and possession by such lessee or bailee; but no such contract shall be valid as against any subsequent judgment creditor, or subsequent bona fide purchaser for value without notice, unless

1. The same shall be evidenced by an instrument executed by the parties and acknowledged by the vendee, or lessee, or bailee, as the case may be, in the same manner as deeds are acknowledged or proved;

2. Such instrument shall be filed for record in the office of the secretary of state;

3. Each locomotive engine, stationary engine, boiler, switch board, transformer, motor, other piece of machinery or appliance or car sold, leased or hired as aforesaid shall have the name of the vendor, lessor or bailor plainly marked on each side thereof, followed by the word "owner," "lessor" or "bailor," as the case may be. [32 G. A., ch. 99; 25 G. A., ch. 28, § 1.]

SEC. 2052. **Recording.** The contracts herein authorized shall be recorded by the secretary of state in a book of records to be kept for that purpose, and, on payment in full of the purchase money and the performance of the terms and conditions stipulated in any such contract, a declaration in writing to that effect may be made by the vendor, lessor or bailor, or his or its assignee, which declaration may be made on the margin of the record of the contract, duly attested, or it may be made by a separate instrument, to be acknowledged by the vendor, lessor or bailor, or his or its assignee, and recorded as aforesaid. For such services the secretary of state shall be entitled to a fee of ten cents per hundred words for recording each of the contracts and each of said declarations but in no case shall the fee be less than one dollar and a fee of one dollar for noting such declaration on the margin of the record. [31 G. A., ch. 88; 25 G. A., ch. 28, § 2.]

SEC. 2054. **Cattle guards—crossings—signs.**

The statute absolutely requires railroad companies to construct specified crossings wherever their road crosses public streets or highways and makes them absolutely liable for failure to do so. The provision for notice when there has been such failure and for the construction thereof by the municipal or other authorities is for the protection and accommodation of the public only and does not affect or lessen the duties or liability of the delinquent company. *See v. Wabash R. Co.*, 123–443, 99 N. W. 106.

An approach to a crossing situated on the company's right of way is a part of the crossing which the company is bound to construct. *Ibid.*

The duty to erect a crossing necessarily implies a duty to maintain it. *Ibid.*

In an action for personal injuries resulting from a defect in such crossing or approach the burden of proof is on the defendant to show contributory negligence upon the part of the plaintiff. *Ibid.*

The company may be held liable for not taking precautions at highway crossings for the protection of those in the rightful use of the highway. *Oliver v. Iowa Central R. Co.*, 122–217, 97 N. W. 1072.

But a person *sui juris* voluntarily and unnecessarily placing himself in a position of known danger cannot recover from the railroad company for injuries received, although the company has been negligent in not taking steps to protect him from danger. *Ibid.*

In the absence of some controlling reason to the contrary, highways are to be improved so that the travel shall pass along the middle line of the land appropriated therefor and a railroad company cannot complain of the assumption that it constructed its crossing at the place thus fixed by legal presumption. The statute requires cattle guards and fences to be placed along the line of the highway. *Craig v. Wabash R. Co.*, 121–471, 96 N. W. 965.

In an action to recover damages resulting to an employe by reason of a defective cattle guard, a plea of contributory negligence may be quite different from an allegation in the petition that plaintiff was free from contributory negligence. *Ford v. Chicago, R. I. & P. R. Co.*, 106–85, 75 N. W. 650.

Where an animal had gone upon the right of way over a defective cattle guard and had afterwards escaped across such guard to the highway and was there killed, held that it did not necessarily appear that it was not killed by reason of the defective cattle guard and the company might be liable. *Riley v. Chicago, M. & St. P. R. Co.*, 104–235, 73 N. W. 488.

. The company is required to make proper cattle guards and it is only on its neglect or refusal to do so that the provisions of this section apply. The burden of showing such neglect or refusal is on the party asking damages on account thereof. *O'Mara v. Newton & N. W. R. Co.*, 140–190, 118 N. W. 377.

The fact that portions of lots abutting upon a street improvement are covered by railroad tracks does not prevent the company owning such lots from being liable for its proportion of the entire improvement. *Des Moines U. R. Co. v. Des Moines*, 140–218, 118 N. W. 293.

The requirement of cattle guards and wing fences is not applicable to private crossings under code § 2022. *Rutherford v. Iowa Central R. Co.*, 142–744, 121 N. W. 703.

SEC. 2055. Failure to fence—liability for stock killed—speed at depots.

Failure to provide fences and cattle guards: The fact that the railroad company allows a portion of its right of way to remain open for use of the public as a highway does not relieve it from liability for stock killed on such portion of its right of way where it does not appear that the dedication of such portion of the right of way to the public has been accepted by it. *Sarver v. Chicago, B. & Q. R. Co.*, 104–59, 73 N. W. 498.

The fact that fencing would involve a cattle guard at the place where a spur track leaves the main track does not constitute an excuse for not maintaining a fence at such place. *Kingsbury v. Chicago, M. & St. P. R. Co.*, 104–63, 73 N. W. 477.

The issue under a general denial in an action to recover for injuries to stock on a right of way raises simply the question whether the company has the right to fence its right of way at the point involved, and not the question whether it has a legal excuse for not so doing. *Ibid.*

There is no liability for a failure to fence unless the injury is caused thereby. *Norman v. Chicago & N. W. R. Co.*, 110–283, 81 N. W. 597.

Upon proof of the failure of the railroad company to fence its track at the point where an animal comes upon the right of way from adjoining premises and is killed a prima-facie case is made out for the recovery of damages for the killing of the animal, and to escape such liability the company attempting to relieve itself from the duty of maintaining a fence on account of an arrangement with the adjoining property owner by which such fence is to be maintained by him, has the burden of proof. The voluntary construction of some kind of a fence by the adjoining landowner will not excuse the company from erecting such fence as is required by law. *Craig v. Wabash R. Co.*, 121–471, 96 N. W. 965.

It is the track, and not the right of way, which is required to be fenced, and where the track was laid on a bridge and the right of way under the bridge was left unfenced, and cattle passed through from an adjoining field under the bridge onto the highway, and were killed at the highway crossing, held that the railroad company was not liable by reason of the want of a fence. *Cagwin v. Chicago & N. W. R. Co.*, 113–175, 84 N. W. 1032.

A railroad company is not responsible for stock killed by reason of the want of fences along its right of way through the platted portion of a city where its track is intersected with streets and alleys. *Gibson v. Iowa Central R. Co.*, 136–415, 113 N. W. 927.

Whether or not the place where stock is killed is a place where the company has a right to fence is a question of law for the court, if the facts are undisputed. *Ibid.*

Defective fence or cattle guard: The finding in a particular case that stock got on the right of way through a defective gate held sufficiently supported by evidence indicating that the gate was liable to come open by reason of the action of the wind. *Huss v. Chicago G. W. R. Co.*, 113–343, 85 N. W. 627.

Failure to repair upon notice or within a reasonable time is a failure to fence within the statutory provision. *Daily v. Chicago, M. & St. P. R. Co.*, 121–254, 96 N. W. 778.

Although a proper fence is maintained at the boundary of the right of way, yet if there is another fence nearer the track, leaving a lane between the two fences to which stock have access from the highway or adjoining premises, the fence next to the track is a railway fence within the meaning of code § 2055, making a railway company liable for the killing of stock which have gone upon the track by reason of defects in such fence. *Ibid.*

Animals coming into this open way from adjoining premises are running at large within the meaning of the statute, and the company is liable for damages if such animals get upon the track by reason of defect in the fence adjoining the track and are killed. *Ibid.*

The company being charged with the duty of maintaining proper and sufficient gates at private crossings is bound to use ordinary care and prudence in the construction of such gates, but is not charged with an absolute liability for the results of defects therein. It will not be liable for the results of the defective condition arising from use or decay unless it has actual notice of the defects or in the exercise of reasonable care should have had notice and a sufficient time has elapsed within which to make repairs. Notice may be inferred from lapse of time and the question of notice and the reasonable time for repair or reconstruction are for the jury. *Wirstlin v. Chicago, M. & St. P. R. Co.*, 124–170, 99 N. W. 697.

The owner of stock can recover for injury thereto on the right of way only upon proof of want of repair in the fence, where that is complained of, and that the condition was known to the defendant or had existed for such length of time that knowledge should be imputed to it. *Klay v. Chicago, M. & St. P. R. Co.*, 126–671, 102 N. W. 526.

Under a notice claiming damages on account of the killing of an animal going upon the track because of a defective fence, plaintiff may recover on proof that the accident occurred by reason of a defective cattle guard. *Boyer v. Chicago, R. I. & P. R. Co.*, 123–248, 98 N. W. 764.

To relieve the company from liability for the killing of an animal coming upon the right of way across a cattle guard, it must appear that the guard was reasonably sufficient for the purpose intended. *Campbell v. Iowa Central R. Co.*, 124–248, 99 N. W. 1061.

Where a cattle guard is defective by reason of being filled up with sand and gravel so that animals may readily pass over the same from the highway to the portion of the right of way which is fenced, the company is liable for killing such animals on the fenced portion of the right of way after they have passed thereon from the highway. *Pothast v. Chicago G. W. R. Co.*, 110–458, 81 N. W. 693.

Where an animal gets upon a right of way over a cattle guard which is defective by reason of being filled up with snow, an action for the death of the animal falls within the provisions of this section. *Paul v. Chicago, M. & St. P. R. Co.*, 120–224, 94 N. W. 498.

Evidence in a particular case held sufficient to sustain a verdict against a railroad company for killing of stock by reason of a defective fence. *Kling v. Chicago, M. & St. P. R. Co.*, 115–133, 88 N. W. 355.

Where abutting owners have at their own expense changed an open crossing to a closed crossing by fences, they cannot recover for stock killed on the track which has passed through the gate in such fence, negligently left open by a trespasser. *Weaver v. Chicago & N. W. R. Co.*, 146–149, 124 N. W. 1088.

Where the fence, as originally constructed, was sufficient, the duty of the railroad company is to use ordinary and reasonable care to maintain the same and keep it in repair and the burden is on the plaintiff to show negligence in that respect. *Latta v. Illinois Central R. Co.*, 151–244, 130 N. W. 1059.

Negligence: Where the track is enclosed for a long distance each way from the place of accident and train men have no reason to expect that stock will be on the right of way at such place, there is no duty owed to the owner of the stock until their presence is discovered, and then the company owes only the duty of using ordinary care to avoid injury to such stock. *Mears v. Chicago & N. W. R. Co.*, 103–203, 72 N. W. 509.

Where a gate at a crossing is such as is commonly in use and is in good order and the railroad company is not negligent in keeping it closed, it will not be liable for stock killed on the right of way going thereon through such gate, unless it is negligent in the operation of its trains with reference to such stock. *Ibid.*

The liability of the railroad company for stock coming upon the right of way on account of a failure to fence does not depend on the negligence of the employes operating the train. *Mikesell v. Wabash R. Co.*, 134–736, 112 N. W. 201.

If an animal comes upon the right of way through a defective fence and becoming frightened by the operation of a hand car from which it attempts to escape is injured at a cattle guard, the company is liable. *Ibid.*

In an action based on negligent killing of cattle at a crossing, it is sufficient to allege the failure to give the warning signals and to stop the train after the cattle were or should have been discovered in the exercise of reasonable care. It is not necessary to state the causes of the failure of duty and charge the same as independent matters of negligence. *Barnard v. Chicago, M. & St. P. R. Co.*, 133–185, 110 N. W. 439.

Under a claim to recover damages for stock killed within city limits where the company has no right to fence, it is incumbent on the plaintiff to show not only the killing of his stock by a passing train but that this killing was due to the negligence of the defendant's employes; and it is not enough to show circumstances consistent with such negligence but the

circumstances must negative every other reasonable hypothesis. *Gibson v. Iowa Central R. Co.*, 136–415, 113 N. W. 927.

Negligence of owner: The mere fact that the owner knows that a gate separating his premises from the right of way is broken down will not as a matter of law preclude his recovery for killing of his animals which go upon the right of way through such gate. Contributory negligence alone will not defeat the owner's recovery. *Enix v. Iowa Central R. Co.*, 114–508, 87 N. W. 417.

Contributory negligence of the owner of the stock does not defeat recovery if the animals are killed through the negligence of the company. *Barnard v. Chicago, M. & St. P. R. Co.*, 133–185, 110 N. W. 439.

Evidence—burden of proof: In an action for killing a horse which had passed through a right of way gate upon the track, held that the evidence was sufficient to justify the submission to the jury of the question as to how the gate became open. *Titus v. Chicago, M. & St. P. R. Co.*, 128–194, 103 N. W. 343.

If it appears that a right of way gate has been opened by stock so that an animal gets upon the right of way and is injured, it is then for the jury to determine whether the gate was sufficient in its construction and fastening. *Ibid.*

Proof of changes in such gate made by the railway company after the accident is inadmissible. *Ibid.*

If the fence through which stock go upon the right of way is not such as is required by the statute, the company is liable in double damages for the injury. *Ibid.*

In an action for the killing of an animal coming on the right of way through a gate, evidence is admissible tending to show the general construction of the gate, manner of use, the material of which it was constructed and the kind of fastening used, in order that the jury may determine whether or not the company was negligent in its construction. But the company is not to be charged with any other negligence in that respect than that related in the petition. *Wirstlin v. Chicago, M. & St. P. R. Co.*, 124–170, 99 N. W. 697.

In an action to recover damages for killing of stock, which it is claimed came upon the enclosed portion of the right of way over a cattle guard from a highway crossing, it is competent to show that the cattle guard was out of order and ineffective. *Black v. Minneapolis & St. L. R. Co.*, 122–32, 96 N. W. 984.

It appearing that an animal had gone upon the track through a defective fence and there was killed, throws upon the company the burden of proving freedom from negligence. *Daily v. Chicago, M. & St. P. R. Co.*, 121–254, 96 N. W. 778.

Where the question was as to whether a gate in the right of way fence was sufficient, it was held error to permit a witness to testify that he did not think such gate was sufficient. *Collins v. Chicago, M. & St. P. R. Co.*, 122–231, 97 N. W. 1103.

The provisions of this section as to burden of proof were not designed to dispense with all proof by the owner except as to injury or destruction of his property. Before a prima-facie case is made out the plaintiff must show an original want or subsequent insufficiency of the fence or cattle guard at a place where the cattle come onto the right of way. Then the burden is on the company to show that the defect was without its knowledge in the exercise of reasonable care,—that is, that after the construction of such a fence or cattle guard a defective condition has arisen and that this defect has not continued for such a time that in the exercise of reasonable care this defect should have been discovered. *O'Mara v. Newton & N. W. R. Co.*, 140–190, 118 N. W. 377.

Under the evidence in a particular case, held that the jury was justified in finding that the animal killed was struck upon the right of way and not upon the highway. *Klay v. Chicago, M. & St. P. R. Co.*, 126–671, 102 N. W. 526.

Speed at depot grounds: Liability for injury to stock on account of operating trains on the depot grounds at a greater rate of speed than eight miles per hour where no fence is built, is limited to stock running at large and is not applicable to stock driven by and under the control of the owner or his servant. *Strever v. Chicago & N. W. R. Co.*, 106–137, 76 N. W. 513.

Measure of damages: One who has stock killed on the right of way as the result of a defective cattle guard over which the animals have come upon the right of way, may recover the value of the animals, and is not limited to the average value of such stock in general. Therefore, where the action was for the killing of a brood mare it was held competent to show the number of her foals as tending to show a special value for breeding qualities. *Campbell v. Iowa Cent. R. Co.*, 124–248, 99 N. W. 1061.

In proving the value of a mare killed on the right of way evidence is competent to show that she was with foal. *Boyer v. Chicago, R. I. & P. R. Co.*, 123–248, 98 N. W. 764.

Notice: The misnaming of the defendant in a notice with reference to the killing of stock by designating it as a "railway" instead of a "railroad" company is immaterial, actual notice having been served on the defendant. *Black v. Minneapolis & St. L. R. Co.*, 122–32, 96 N. W. 984.

It is not essential that the jurat to the affidavit shall state that it was sworn to in the presence of or before the notary who verifies the fact by his certificate.

That fact is presumed from the official statement that the affidavit was sworn to, which statement is made over the notary's official seal and is signed by him as a notary public. *Ibid.*

The statute does not require the notice to deal in details nor is it essential that the notice state that the loss occurred in the county, as a loss occurring elsewhere would not be the subject of an action of which notice could be served on an agent within the county where the suit is brought. *Latta v. Illinois Cent. R. Co.*, 151–244, 130 N. W. 1059.

In such an action, it is incumbent upon plaintiff to prove notice to the defendant, actual or constructive, that the fence was out of repair. *Ibid.*

Double damages: Where the notice and affidavit were sufficient to put the railroad company upon inquiry, which, if diligently pursued, would have led to a discovery of the facts concerning plaintiff's claim, held that that was sufficient, although there was a discrepancy between them. *Brammer v. Wabash R. Co.*, 112–375, 83 N. W. 1048.

The liability for double damages is provided for only if the stock is running at large when killed, and not if at that time it is in the charge of or under the control of the owner. *Morris v. Chicago, G. W. R. Co.*, 133–28, 110 N. W. 154.

The company having failed to pay in accordance with a notice and affidavit of loss and it appearing that the action is properly maintainable for double damages, the court may give judgment for twice the value of the animal as found by the jury; or if the jury renders a verdict, which upon inquiry the court finds to have been for the value of the animal only, the jury may be allowed to correct their verdict accordingly. *Campbell v. Iowa Cent. R. Co.*, 124–248, 99 N. W. 1061.

A concession by counsel for plaintiff during the progress of the trial that there is no right to recover double damages is not binding on the court in rendering judgment, the facts necessary to entitle the plaintiff to recover double damages having been established. *Black v. Minneapolis & St. L. R. Co.*, 122–32, 96 N. W. 984.

It is only the wilful act of the owner which will defeat his recovery for animals passing through a defective gate or fence and killed on the right of way by the operation of trains. *Claus v. Chicago, G. W. R. Co.*, 136–7, 111 N. W. 15.

[The last reference in the notes to this section in the original code is erroneous. It should be *Schurr v. Omaha & St. L. R. Co.*, 98–418, 67 N. W. 280.]

SEC. 2056. Damages by fire.

Ordinary care: The statute does not make a railroad company absolutely liable for fires set out by it. Ordinary and reasonable care on the part of the company is all that is required. But ordinary care demands the use of the best known and most appropriate appliances for preventing the escape of fire. *German Ins. Co. v. Chicago & N. W. R. Co.*, 128–386, 104 N. W. 361.

Where the company has offered testimony tending to show the condition of the engine at the time when a fire is set out, it is not improper for the court to instruct as to the duty of the company in providing proper appliances. *Helverson v. Chicago, R. I. & P. R. Co.*, 139–423, 116 N. W. 699.

Presumption—burden of proof: The fact that fire is set out by sparks from an engine creates a presumption of negligence on the part of the railroad company which may be overcome by proof that it was not guilty of negligence. *Swanson v. Keokuk & W. R. Co.*, 116–304, 89 N. W. 1088; *Krejci v. Chicago & N. W. R. Co.*, 117–344, 90 N. W. 708.

The provision of this section throwing the burden of proof on the company to escape liability from loss due to fires is not applicable to fires set out by section men on the right of way. *Connors v. Chicago & N. W. R. Co.*, 111–384, 82 N. W. 953.

Aside from the provisions of this section, the escape of sparks from a locomotive is not in itself proof of negligence in its operation, and where an employe claimed to be injured by reason of sparks and cinders striking him in the eye, held that proof of the accident was not in itself evidence of negligence on the part of the company. *Duree v. Chicago, M. & St. P. R. Co.*, 118–640, 92 N. W. 890.

Before the enactment of the fire statute it had uniformly been held in this state that negligence of the company would not be presumed from proof of the setting out of fire alone. But it was also held that the setting out of two or more fires by the same engine would constitute some evidence of negligence. And where the evidence indicated that the fires might have been set out by reason of the negligent use of slack coal in the engine, held that there was enough evidence on the subject of negligence to take the case to the jury. *Glanz v. Chicago, M. & St. P. R. Co.*, 119–611, 93 N. W. 575.

The fact of a fire caused by the operation of a railroad company having been shown, a presumption of negligence on the part of the company follows without further proof. *Kennedy v. Iowa State Ins. Co.*, 119–29, 91 N. W. 831.

But the company may contract for exemptions from liability for its negligence in causing fires to property permitted by it to be located upon its right of way. *Ibid.*

The presumption arising from proof of the fire is to be given the effect of substantive evidence of negligence. It does not have merely the effect of changing the burden of proof. *Stewart v. Iowa Cent. R. Co.*, 136–182, 113 N. W. 764.

On proof of damage sustained from a fire set out by a locomotive engine the burden is on the company to exonerate itself from the charge of negligence. But nothing more is required than that the defendant shall show freedom from negligence in the respects charged in the petition. The plaintiff cannot base his claim on one kind of negligence and recover on another. *Volquardsen v. Iowa Telephone Co.*, 148–77, 126 N. W. 928.

This statutory provision creates a presumption of negligence where a fire is caused in the operation of a railroad. If there is evidence tending to rebut this presumption, the question is for the jury. *Iowa Cent. R. Co. v. Hampton Elec. L. & P. Co.*, (C. C. A.) 204 Fed. 961.

Measure of damages: Where one's meadow has been destroyed he is entitled to recover its value, which may be ascertained by finding what it would cost to reproduce or restore it. The rule is different as to the destruction of trees. *Bradley v. Iowa Central R. Co.*, 111–562, 82 N. W. 996.

Where land has been appropriated to a particular purpose as by converting it into an orchard or a meadow or planting it to a crop which is already growing, the loss occasioned by a fire destroying the meadow or orchard or crop is to be determined with reference to such existing condition. *Black v. Minneapolis & St. L. R. Co.*, 122–32, 96 N. W. 984.

When trees, shrubs or meadow are destroyed the measure of damages is at least the difference in value between the land as it was before the injury and its value afterward and the loss of rental value on account of the loss. *Krejci v. Chicago & N. W. R. Co.*, 117–344, 90 N. W. 708.

The rule of damages for the destruction of a hedge is the difference in value of the entire farm of plaintiff before and after its destruction, and the value of the hedge may be taken into account in determining the amount of the injury. *Swanson v. Keokuk & W. R. Co.*, 116–304, 89 N. W. 1088; *Thompson v. Keokuk & W. R. Co.*, 116–215, 89 N. W. 975.

In such case plaintiff is entitled to recover the value of the grass destroyed, as well as the expense of restoring the meadow. *Ibid.*

Evidence: In case of the destruction of a meadow, the value of the meadow burned may be determined by comparison with the condition of the remainder of the meadow at the time of the trial. *Ibid.*

In an action to recover damages for injury to a meadow by fire, evidence as to the effect of fire on another meadow under substantially similar circumstances is admissible. Proximity of the two meadows is not important, the competency of the evidence depending on similarity of the conditions. *Castner v. Chicago, B. & Q. R. Co.*, 126–581, 102 N. W. 499.

In an action to recover damages for loss of property by fire set out by a railroad engine, evidence of witnesses that they had seen engines of the defendant throw sparks a distance from the track as far as the place where the fire in question started, is competent as bearing on the question whether the fire could have been occasioned by sparks from an engine. *Black v. Minneapolis & St. L. R. Co.*, 122–32, 96 N. W. 984.

On the question whether the fire was set by sparks from defendant's locomotive, witnesses may testify that within a few minutes after the passing of a locomotive the fire was discovered. *Ibid.*

When grass land and meadow land is destroyed, the rule of damage is the cost of restoring it to its former condition and its rental value as such until restored. *Pascal v. Chicago, R. I. & P. R. Co.*, 141 N. W. 920.

Liability for personal injuries from fire: Where it appeared that the wife of the owner of farm buildings had been injured by being burned while attempting to protect the premises against fire, and had been made ill by overexertion in so doing, held that the railroad company being chargeable with negligence in setting out such fire, was liable, regardless of statutory provisions. *Glanz v. Chicago, M. & St. P. R. Co.*, 119–611, 93 N. W. 575.

The provisions of this section as to liability for damages resulting from fires set out apply only to injuries to property, and not to injuries to the person. *Duree v. Chicago, M. & St. P. R. Co.*, 118–640, 92 N. W. 890.

SEC. 2057. **Fences required.** That section two thousand and fifty-seven of the code be and the same is hereby repealed, and the following enacted in lieu thereof:

"All railway corporations owning or operating a line of railway within the state shall construct, maintain, and keep in repair a suitable fence of posts and barb wire, or woven wire, or both combined, or posts and boards, or any other fence which the fence viewers shall determine to be equivalent thereto, on each side of the track thereof, so connected with cattle guards at all public road crossings as to prevent cattle, horses, sheep, swine, and

other live stock from getting on the railroad tracks. Such tracks shall be fenced within six months after the completion of the same or any part thereof. Such fence, when of barb wire, shall be of five wires; when of barb wire and woven wire, it shall consist of three barb wires above and woven wire not less than twenty-four inches wide at the bottom, or it may consist entirely of woven wire, in which event the woven wire shall be not less than fifty inches wide; all of the above to be securely fastened to posts not more than twenty feet apart, the top of such fences to be not less than fifty-four inches high; or such fences may consist of five boards, securely nailed to posts set not more than eight feet apart, and to be not less than fifty-four inches high; provided, however, that, where such fences are constructed entirely of barb wire, in addition to the above, on the written request of any person owning land abutting such right of way who has constructed, and is maintaining around his said land, or any part thereof, a hog-tight fence on all sides thereof except along such right of way, such railroad corporations shall reinforce such right of way fence with such additional barb or woven wire as is necessary to make it hog-tight. Fences repaired or rebuilt shall conform to the foregoing provisions. Nothing in this or the following sections shall be construed to compel a railway company operating a third-class line to fence its roads through the land of any farmer or other person who by written agreement with such company waives the fencing thereof." [32 G. A., ch. 100; 22 G. A., ch. 30, § 1.]

The purpose of specifying what shall be a sufficient fence is to fix absolutely the liability of the company for injury to animals going upon the right of way through a fence, unless it complies with the requirements of statute. *Titus v. Chicago, M. & St. P. R. Co.*, 128–194, 103 N. W. 343.

The railroad company erecting and maintaining gates at private crossings must construct them with an efficiency corresponding to the requirements as to a fence. *Claus v. Chicago G. W. R. Co.*, 136–7, 111 N. W. 15.

If, the railroad company having constructed a proper gate, the owner leaves it open and his animals enter on the right of way, the company is not liable; but if the gate is not such as is required his act in leaving it open will not relieve the company from liability for animals passing through such open gate upon the right of way and being injured by the operation of trains. *Ibid.*

SEC. 2063. Proposed crossing.

Where a railroad about to be constructed is to cross one already constructed, the former must bear the expense of interlocking. *Minneapolis & St. L. R. Co. v. Cedar Rapids, G. & N. W. R. Co.*, 114–502, 87 N. W. 410.

The right to use a crossing already established cannot be made to depend upon payment of the entire cost of an interlocking system. *Manhattan Trust Co. v. Sioux City & N. R. Co.*, 81 Fed. 50.

Where one railroad company is bound to pay the expense of an interlocking system, the other company is bound to contribute to the expense of the maintenance thereof. *Minneapolis & St. L. R. Co. v. Gowrie & N. W. R. Co.*, 123–543, 99 N. W. 181.

SEC. 2064. Apportionment of costs.

The provisions of this section as to apportionment relate only to the costs of the proceedings, and not to the expense of the interlocking device. *Minneapolis & St. L. R. Co. v. Cedar Rapids, G. & N. W. R. Co.*, 114–502, 87 N. W. 410.

SEC. 2066. Sale or lease of railroad property—joint arrangement.

A railway may contract with connecting lines to carry beyond its line, subject only to the qualification that under such agreement arbitrary rates cannot be fixed which are discriminatory in their nature. *Bras v. McConnell*, 114–401, 87 N. W. 290.

The fact that the railroad company is authorized to lease its road does not relieve it from liability for damages during use by the lessee due to the surface water resulting from an insufficient bridge over a ditch. In such case there may be joint liability of both the owner and the lessee. *De Lashmutt v. Chicago, B. & Q. R. Co.*, 148–556, 126 N. W. 359.

SEC. 2071. **Liability for negligence or wrongs of employes—personal injury—contributory negligence.** Every corporation operating a railway shall be liable for all damages sustained by any person, including employes of such corporation, in consequence of the neglect of the agents, or by any mismanagement of the engineers or other employes thereof, and in consequence of the wilful wrongs, whether of commission or omission, of such agents, engineers or other employes, when such wrongs are in any manner connected with the use and operation of any railway on or about which they shall be employed, and no contract which restricts such liability shall be legal or binding. Nor shall any contract of insurance, relief, benefit, or indemnity in case of injury or death, entered into prior to the injury, between the person so injured and such corporation, or any other person or association acting for such corporation, nor shall the acceptance of any such insurance, relief, benefit, or indemnity by the person injured, his widow, heirs, or legal representatives after the injury, from such corporation, person, or association, constitute any bar or defense to any cause of action brought under the provisions of this section, but nothing contained herein shall be construed to prevent or invalidate any settlement for damages between the parties subsequent to injuries received. That in all actions hereafter brought against any such corporation to recover damages for the personal injury or death of any employe under or by virtue of any of the provisions of this section, the fact that the employe may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employe; provided, that no such employe who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier or corporation of any statute enacted for the safety of employes contributed to the injury or death of such employe; nor shall it be any defense to such action that the employe who was injured or killed assumed the risks of his employment. [33 G. A., ch. 124, § 1.] [27 G. A., ch. 49, § 1; C. '73, § 1307.]

In general: The company is not liable to an employe for an injury done by a coemploye when it would not have been liable to a third person injured by a like act. *Kincade v. Chicago, M. & St. P. R. Co.*, 107–682, 78 N. W. 698.

This section makes no pretense of fixing the degree of negligence which will entitle an injured person to recover. It does not render the company liable to a trespasser for injuries received, unless due to wilful wrong or gross negligence. *Earl v. Chicago, R. I. & P. Co.*, 109–14, 79 N. W. 381.

This provision applies only to companies operating commercial railroads and not to street railway companies. *McLeod v. Chicago & N. W. R. Co.*, 125–270, 101 N. W. 77.

This statutory provision does not render the company liable to the surviving husband or wife for such negligence causing the instant death of the other. *Major v. Burlington, C. R. & N. R. Co.*, 115–309, 88 N W. 815; *Seney v. Chicago, M. & St. P. R. Co.*, 125–290, 101 N. W. 76.

Negligence: The provisions of this section do not alter the character of the relation between the railroad company and a person injured, nor the rules of evidence appropriate to such relation upon an issue as to negligence. In such an action the fact of the happening of the accident through which an employe is injured is not evidence of negligence on the part of the defendant, or its employes to sustain the burden of proof resting on the plaintiff. *Chicago & N. W. R. Co. v. O'Brien*, 132 Fed. 593.

Operation of the railroad: One employed in the construction of a bridge is engaged in the operation of the road in such sense as that the company will be liable for injuries to him caused by negligence of the foreman in allowing a train to go upon the incomplete bridge, the foreman having been provided with a flag for the purpose of enabling him to control the operation of trains over such bridge. *Keatley v. Illinois Cent. R. Co.*, 103–282, 72 N. W. 545.

The peculiarity of the railroad business which distinguishes it from any other is the movement of vehicles or machinery of great weight on the track by steam or other power, and the dangers incident to such movement are those the statute was intended to guard against. If, then, the

injury is received by an employe whose work exposes him to the hazards of moving trains, cars, engines or machinery on the track, and is caused by the negligence of a coemploye in the actual movement thereof, or in any manner directly connected therewith, the statute applies and recovery may be had. Beyond this the statute affords no protection. *Akeson v. Chicago, B. & Q. R. Co.*, 106-54, 75 N. W. 676.

Therefore, held that an employe in a railroad coal house, who was injured by the negligence of a coemploye in shoving back a plank over which coal had been carried to fill a tender of a live locomotive, was so engaged in the operation of the railroad as to be entitled to recovery for negligence of the coemploye. *Ibid.*

An employe engaged in an occupation in connection with the business of the road, having nothing to do with the movement of trains, yet involving the performance of duties which bring him into a situation where he is exposed to the perils and hazards arising from such operation or movement, is within the provisions of this section. *Williams v. Iowa Central R. Co.*, 121-270, 96 N. W. 774.

In determining whether an employe is engaged in such employment as to bring him within these provisions, the test is, does the duty of the employe, no matter what his designation, require him to perform services which expose him to the hazards peculiar to the business of operating a railway? And held that a car repairer injured by a moving engine when actually employed at his work in the railroad yards was within the statutory provision. *Hughes v. Iowa Cent. R. Co.*, 128-207, 103 N. W. 339.

An employe operating a hand car is engaged in the operation of the road. *Larson v. Illinois Cent. R. Co.*, 91-81, 58 N. W. 1076.

The provisions of this section are intended for the benefit of those railroad employes, no matter in what department of service, whose employment for the time being exposes them to the danger and hazards peculiar to the operation of railroads. Therefore held that such provisions were applicable in an action to recover for injuries received by one employe engaged with other employes in removing a push car from the railroad track. *Cahill v. Illinois Cent. R. Co.*, 148-241, 125 N. W. 331.

The statute contemplates such injuries only as are caused by the negligent acts of employes engaged in the movement of the engines, cars and machinery on the track, or directly connected therewith. Therefore, held that the handling of a derrick in coaling an engine was not within the contemplation of the statute. *Reddington v. Chicago, M. & St. P. R. Co.*, 108-96, 78 N. W. 800.

A railroad is only operated, within the meaning of the law, by moving trains, cars, engines or machinery on the track. *Connors v. Chicago & N. W. R. Co.*, 111-384, 82 N. W. 953.

This section has reference to the physical use and operation of the railway and does not cover an injury resulting in the movement of a dead engine along a track in a shop where it has been placed for repair. *Slaats v. Chicago, M. & St. P. R. Co.*, 149-735, 129 N. W. 63.

A railroad is operated under this section when in use for the transportation of freight or passengers. By that term is meant the movement of engines, cars and machinery on the tracks. *Ibid.*

This section held applicable to injuries sustained by a car cleaner working in a standing car on a side track, which was run into by an engine by reason of the negligence of a hostler in charge of such engine. *Jensen v. Omaha & St. L. R. Co.*, 115-404, 88 N. W. 952.

One who is engaged in repairing or working upon a standing car and suffers injury by reason of a moving engine or car being negligently brought into collision therewith, is within the protection of the statute. *Russell v. Chicago, R. I. & P. R. Co.*, 141 N. W. 1077.

Where an employe was assisting in transferring railroad rails from one car to another by means of power furnished by the operation of a locomotive engine, held that he was so engaged in the hazardous business of operating railways as to be entitled to recover for injuries received through the negligence of a coemploye. *Stebbins v. Crooked Creek R. & C. Co.*, 116-513, 90 N. W. 355.

The operation of an engine and cars over a temporary track in the construction of a railroad is the operating of a railway within the statutory provisions, rendering every corporation operating a railway liable to its employes for damages sustained in consequence of the negligence of other employes. *Mace v. Boedker*, 127-721, 104 N. W. 475.

The ordinary work of a section hand which is wholly disconnected from the operation and control of cars or trains operated on the track is not an employment connected with the use and operation of the road within the statutory provision. *Dunn v. Chicago, R. I. & P. R. Co.*, 130-580, 107 N. W. 616.

Assumption of risk: The provisions of this section do not affect the rule as to assumption of risk. *Chicago, G. W. R. Co. v. Crotty*, 141 Fed. 913.

One engaging in the hazardous business of operating trains on a railroad does not assume the risk of the negligence of the train dispatcher. *Phinney v. Illinois Cent. R. Co.*, 122-488, 98 N. W. 358.

Under this section as amended by 33 G. A., ch. 124, a person injured in conse-

quence of the neglect of any agent or employe of a railroad company in matters connected with the operation of the railroad is within the limits of the statutory provision without respect to the question whether the duty neglected is or is not magisterial in character. *Melody v. Des Moines U. R. Co.*, 141 N. W. 438.

The maintenance of safe switch yards and bridges is a matter connected with the use and operation of the railway. *Ibid.*

These statutory provisions are not, however, limited merely to the abolition of the fellow-servant rule in the cases to which it is applicable. *Ibid.*

Contractual limitation of liability: The so-called Temple amendment (added to this section by 27 G. A., ch. 49, and constituting the last sentence of this section as printed above) prohibiting any defense on account of a contract between a railroad company and its employes in the nature of a contract for insurance or relief in case of accident, made prior to the injury, is constitutional. Such a contract constitutes a limitation of liability such as is prohibited by the statute. *McGuire v. Chicago, B. & Q. R. Co.*, 131–340, 108 N. W. 902.

An agreement entered into at the time of the employment between the company and an employe that if he sustains any personal injury for which he makes a claim against the company for damages he will give notice thereof in writing within thirty days is a limitation on the company's liability, and therefore invalid. *Mumford v. Chicago, R. I. & P. Co.*, 128–685, 104 N. W. 1135.

Participation in the benefit of a relief fund will not, under the provisions of this section, defeat recovery of damage for personal injury received by plaintiff in defendant's employment, the injuries complained of having been received in this state, although the contract of employment was made in another state where such limitation of liability was not invalid. *Hamilton v. Chicago, B. & Q. R. Co.*, 145–431, 124 N. W. 363.

The provision of this section as amended, relating to the acceptance of benefits from a relief fund, is not unconstitutional. (On appeal affirming *McGuire v. C. B. & Q. R. Co.*, 131–340, 108 N. W. 902.) *Chicago, B. & Q. R. Co. v. McGuire*, 219 U. S. 549, 31 Sup. Ct. R. 259.

SEC. 2072. Signals at road crossings.

In general: A railroad company cannot be excused for failure to comply with the provisions of this section on the ground that compliance would amount to an interference with interstate commerce. *Willfong v. Omaha & St. L. R. Co.*, 116–548, 90 N. W. 358.

The statutory requirement that the whistle be blown on approaching a highway crossing does not apply to the street crossings within the city limits in the absence of some ordinance or resolution on the part of the city; but the requirement that the bell shall be rung is applicable to street crossings, and if they are less than sixty rods apart, the bell should be rung continuously from the time the duty begins until all such crossings are passed. *Golinvaux v. Burlington, C. R. & N. R. Co.*, 125–652, 101 N. W. 465.

Where there is no ordinance requiring the blowing of the whistle within city or town limits it may be omitted. *Pratt v. Chicago, R. I. & P. R. Co.*, 107–287, 77 N. W. 1064.

This section is applicable to a crossing within the limits of a village which is not an incorporated town or city. *Bruggeman v. Illinois Cent. R. Co.*, 147–187, 123 N. W. 1007.

The signals required of the railroad company on approaching a highway crossing are not only intended for the benefit of those who are on or about to cross the track, but also for the benefit of those who may be near the track in such position as to be placed in peril. *Mitchell v. Union Terminal R. Co.*, 122–237, 97 N. W. 1112.

Failure to ring the bell at a crossing renders the company liable not only for an injury occurring at such crossing but for injuries to persons near the track who would have been warned by such signal of approaching danger and enabled to avoid it. *Warn v. Chicago, G. W. R. Co.*, 149–450, 126 N. W. 1104.

Evidence of failure to give signals at other crossings cannot be considered in determining the liability of the company for failure to give signals at the crossing where the accident occurred. *Heise v. Chicago, G. W. R. Co.*, 141–88, 119 N. W. 371.

Negligence: The requirements of state statutes and city ordinances are not the sole standards for determining whether due care has been observed by the railroad company to guard against accidents at a crossing. *Kowalski v. Chicago, G. W. R. Co.*, 84 Fed. 586.

Failure to give signals as required by law will be presumed, in the absence of a showing to the contrary, to have been the proximate cause of injury at a highway crossing. *Kuehl v. Chicago, M. & St. P. R. Co.*, 126–638, 102 N. W. 512.

Even though there is no duty to keep a flagman at a crossing, the fact of the failure to do so may be taken into consideration on the question of alleged negligence in running the train at a high and dangerous rate of speed at such crossings. *Golinvaux v. Burlington, C. R. & N. R. Co.*, 125–652, 101 N. W. 465.

The railroad company does not necessarily discharge its whole legal duty with reference to the safety of persons about to cross a track at a public crossing, or as to the safety of the property under their control, by sounding the whistle and ringing the bell. If by reason of a curve in the track, high banks or other obstructions there is peculiar danger to such persons or their property, the common law obligation to exercise care may require the taking of further precautions. *Kinyon v. Chicago & N. W. R. Co.*, 118–349, 92 N. W. 40.

The mere fact of great speed will not in itself constitute negligence, but if, by reason of natural or artificial obstructions, or a curve in the track, the crossing is of peculiar or extraordinary danger, the operation of the railway must be conducted with reference to that fact. *Ibid.*

It is not error to instruct that failure to give statutory signals at a crossing constitutes negligence as to a person injured at such crossing and if the crossing is more than usually dangerous because of obstructions then reasonable and adequate warning, in view of the dangers to be reasonably apprehended at the crossing, should be given of the approach of the train. *Bruggeman v. Illinois Cent. R. Co.*, 154–596, 134 N. W. 1079.

Evidence that the railroad company has failed to have a post set near its track at the point where the whistle should be sounded for a railroad crossing may be considered in connection with other circumstances in determining whether due care has been exercised by the company. *Gray v. Chicago, R. I. & P. R. Co.*, 139 N. W. 934.

The giving of the statutory signals does not necessarily satisfy all the requirements of reasonable care on the part of the company as to persons on the highway near a railroad crossing. *Ibid.*

Where, owing to peculiar circumstances, other warning than that required by the statute at a highway crossing is necessary, it may constitute negligence to fail to give warning signals on approach of the train at a greater distance from the crossing than required by statute. *Wilson v. Chicago, M. & St. P. R. Co.*, 142 N. W. 54.

Testimony tending to show that the plaintiff was looking out and listening for signals because he knew his horses were afraid of the cars and that if signals had been given he could have stopped his team in a safer place and been able to control them, tends to show that injury due to the frightening of the horses when the train reached the crossing without the giving of signals was the proximate result of the failure to give such signals. *Morgan v. Iowa Cent. R. Co.*, 151–211, 130 N. W. 1058.

Contributory negligence: The mere fact that the person approaching the crossing may have heard the train at the distance from the crossing at which the signal should have been given will not of itself justify the court in saying as a matter of law that there was no negligence on the part of the company, or that there was contributory negligence on plaintiff's part in connection with the accident happening at such crossing. *Kinyon v. Chicago & N. W. R. Co.*, 118–349, 92 N. W. 40.

One about to cross a railroad track at a highway crossing has the right to place some degree of reliance upon the presumption that the trainmen will do their duty and sound the usual signal of warning in approaching the crossing. The question of contributory negligence in such cases is for the jury. *Mitchell v. Union Terminal R. Co.*, 122–237, 97 N. W. 1112.

It will not necessarily constitute contributory negligence that a person at a highway crossing seeing danger of a collision with his team imminent, attempts to so control the team as to prevent injury. *Ibid.*

It is usually a question for the jury whether one whose animals are injured at a highway crossing by a train was guilty of contributory negligence with reference thereto. *Kuehl v. Chicago, M. & St. P. R. Co.*, 126–638, 102 N. W. 512.

Before there can be a recovery on account of negligence of the railway company in failing to give statutory signals, or for running at an exceedingly high rate of speed at a highway crossing, it must be shown that the person suffering injury from such negligence did not contribute to the injury by negligence on his own part, and he cannot in all cases rely upon the railway company to give the signals required by statute. A person possessing the ordinary powers of seeing and hearing cannot, without negligence on his part, knowingly approach a railway crossing and fail to discover an approaching train which he can readily see or hear within sufficient length of time to enable him, with reasonable effort, to avoid danger. *Crawford v. Chicago, G. W. R. Co.*, 109–433, 80 N. W. 519.

While the absence of statutory signals does not relieve one who attempts to cross a railroad track from the duty of vigilantly using all his senses to ascertain if there is danger in crossing, such fact is properly to be considered by the jury with all the other facts in determining whether or not such person exercised reasonable care and caution for his own safety. *Dusold v. Chicago, G. W. R. Co.*, 142 N. W. 213.

The failure of the servants of the company to give the statutory signals is no excuse for the failure of travelers on the highway to look and listen before crossing the track. *Chicago, M. & St. P. R. Co. v. Bennett*, (C. C. A.) 181 Fed. 799.

Injuries to stock: The statutory sig-

nals are intended for the protection, as far as possible, of animals as well as men, and a failure to give such signals when approaching a crossing makes the company absolutely liable for injuries to stock on the crossing, provided it appears that if such signals had been given they would have prevented the animals going on the track or frightened them away from the crossing. *Graybill v. Chicago, M. & St. P. R. Co.*, 112–738, 84 N. W. 946; *McGill v. Minneapolis & St. L. R. Co.*, 113–358, 85 N. W. 620.

It is for the jury to determine whether the signals were given as required, and if not, whether the failure to give them was the cause of the injury to the animals. *Ibid.*

The engineer or motorman, if he sees, or in the exercise of reasonable care should see, a horse on a railroad crossing, is negligent in not giving signals, for such signals would be calculated even in the case of a dumb animal to cause it to get off the track and thus avoid the danger of injury. *Swisher v. Interurban R. Co.*, 151–384, 130 N. W. 404.

Private crossings: The statute does not require the sounding of the engine whistle on approaching a private crossing. The term "any road crossing" as used, designates a highway crossing. *Nichols v. Chicago, M. & St. P. R. Co.*, 125–236, 100 N. W. 1115.

There is no common law duty to give signals on approaching private crossings. The omission to give such signal might constitute negligence as by reason of peculiar or extraordinary circumstances where ordinary prudence would require an alarm or signal to be given by an approaching train. *Ibid.*

The provisions as to signals have no reference to private crossings. *Weaver v. Chicago & N. W. R. Co.*, 146–149, 124 N. W. 1088.

While the company is not bound to give signals at private crossings, those who operate its trains must be presumed to know of the existence of the crossings and of their ordinary use. *Ressler v. Wabash R. Co.*, 152–449, 132 N. W. 827.

Evidence: Testimony of witnesses that they did not hear the crossing whistles sounded does not even create a conflict with positive evidence that the signals were given at the whistling posts. *Payne v. Chicago & N. W. R. Co.*, 108–188, 78 N. W. 813.

If the person injured at the crossing would not have heard the signals if given, then the omission to give them will not render the company liable. *Ibid.*

Positive evidence that the signal at a railroad crossing is not given is not to be discredited because in conflict with evidence of other witnesses that such signals were given. *Kinyon v. Chicago & N. W. R. Co.*, 118–349, 92 N. W. 40.

Testimony of witnesses in a situation to hear and likely to have heard a crossing signal, if one had been given, that they did not hear any such signal, is not to be ignored and treated as of no weight because opposed to the testimony of witnesses who say that the signal was actually given, or that they heard such signal. The testimony of the witnesses who were in a situation to hear and likely to hear a signal, if given, is not to be treated as merely negative evidence. *Selensky v. Chicago, G. W. R. Co.*, 120–113, 94 N. W. 272.

Evidence of persons in a situation to hear and whose attention was not diverted that they did not hear a signal which other witnesses testified to having heard, is not merely negative evidence. *Mackerall v. Omaha & St. L. R. Co.*, 111–547, 82 N. W. 975.

As between witnesses who are in an equally advantageous position as to hearing sounds and signals, those who testify that they did not hear are entitled to the same credit as those who testify that they did hear, and the former should not be discredited by an instruction that, as compared with other witnesses, their testimony is negative. *Stanley v. Cedar Rapids & M. C. R. Co.*, 119–526, 93 N. W. 489.

Testimony of witnesses who are at the time looking out and listening for signals, that no signals were given, is affirmative testimony and entitled to as much weight as that of witnesses who in the same position testify that they heard such signals. *Morgan v. Iowa Cent. R. Co.*, 151–211, 130 N. W. 1058.

The testimony of a witness who was in fact listening for signals under circumstances rendering it his duty to do so, that he did not hear a signal given, is of equal credibility of that of a witness testifying that he did hear such signal. *Lockridge v. Minneapolis & St. L. R. Co.*, 140 N. W. 834.

Interurban railways: Whether this section is applicable to electric interurban roads, *quaere*. *Rogers v. Interurban R. Co.*, 150–270, 129 N. W. 946.

In any event, to render such a company liable for failure to give signals, it must appear that such failure was the proximate cause of the injury alleged to have resulted. *Ibid.*

By the provisions of code supp. § 2033-b, this section is made applicable to interurban railways, the term "locomotive engine" being applicable to an electric motor car which should be provided with such a whistle as is in common use on electric motor cars, and a gong with which such signal may be given as is required to be given by a bell in the case of steam locomotive engines. *Swisher v. Interurban R. Co.*, 151–384, 130 N. W. 404.

SEC. 2073. Stopping at railway crossings.

This section is as to the forfeiture provided penal in character. The offense denounced is the omission of the engineer to stop the train as required, and the liability of the company is for the commission of the offense on the part of the engineer. There is no liability on the part of the company unless the engineer has been at fault, and the company may have the advantage of any excuse that would be available to the engineer. The burden of proof is not sustained by evidence of the fact alone that the train was not stopped at the crossing. *State v. Chicago, M. & St. P. R. Co.*, 122–22, 96 N. W. 904.

This section is not unconstitutional as imposing a penalty on a railway company for an offense of its employe. The requirement is only that the company secure obedience by its employes to the requirements of the statute. *Ibid.*

Where the company whose track is crossed by the track of another company does not demand the installation of an interlocking system as authorized by code § 2063, it must comply with statutory requirement for the stopping of its trains approaching such crossings. If it does insist on the installation of an interlocking system by the other company, it must thereafter bear its share of the expense of maintaining such interlocking system. *Minneapolis & St. L. R. Co. v. Gowrie & N. W. R. Co.*, 123–543, 99 N. W. 181.

This section is not applicable to a crossing of the line of an electric railway under the provisions of code supp. § 2033-a. *Grace v. Minneapolis & St. L. R. Co.*, 153–418, 133 N. W. 672.

SEC. 2074. Contract or rule limiting liability.

A contract between an express company and its servant, exempting the express company from liability for injuries to the servant, and authorizing it to contract for like exemption from liability with a railroad company, and the corresponding contract between the express company and the railroad company exempting the latter from liability for injuries to servants of the express company, are invalid. *O'Brien v. Chicago & N. W. R. Co.*, 116 Fed. 502.

As a railroad company may absolutely refuse to check as baggage of a passenger that which is merchandise, it may, notwithstanding the provisions of this section, make any regulations in regard to the waiver of such condition which it sees fit to adopt. *Weber Co. v. Chicago, St. P. M. & O. R. Co.*, 113–188, 84 N. W. 1042.

Limitations of liability in a bill of lading are void. *McMillan v. American Express Co.*, 123–236, 98 N. W. 629.

A railroad company contracting for the carriage of goods beyond the end of its line may, in the contract with reference to such carriage, limit its liability, notwithstanding the provisions of this section. *Hartley v. St. Louis, K. & N. W. R. Co.*, 115–612, 89 N. W. 88.

It may be stipulated that stock is to be in charge of the shipper or his agent while in transit, free transportation being furnished to such person, and that the shipper assumes the duty of loading and unloading, attending to, feeding and watering such stock at his own expense and risk. In case damage results from lack of care in these respects on the part of the shipper or his agent the company will not be liable unless the loss is due to the failure of the company to discharge duties not assumed and undertaken by the shipper. *Grieve v. Illinois Cent. R. Co.*, 104–659, 74 N. W. 192.

The burden is on the shipper in the first instance to show in such case that injury to stock from want of care did not result from his own negligence and if occasioned by failure to do what he has undertaken, then that such failure resulted from the omission on the part of the company to perform some duty devolving upon it. *Ibid.*

A contract between a railroad company and the shipper of stock by which the latter is to have the entire charge and care of the stock and the company is not to be liable for damages for failing to feed and water, is not void under the statute as a contract limiting liability. *Burgher v. Chicago, R. I. & P. R. Co.*, 105–335, 75 N. W. 192.

A contract for the transportation of live stock, exempting the carrier from liability for loss or damage received from heat, suffocation, crowding, maiming, etc., is invalid. *Powers v. Chicago, R. I. & P. R. Co.*, 130–615, 105 N. W. 345.

A limitation of liability for a horse to one hundred dollars, named in the contract as "the release value of the horse," held invalid under the provisions of this section. *Lucas v. Burlington, C. R. & N. R. Co.*, 112–594, 84 N. W. 673.

The case of *Solan v. Chicago, M. & St. P. R. Co.*, 95–260, 63 N. W. 692, is affirmed on appeal to U. S. supreme court. *Chicago, M. & St. P. R. Co. v. Solan*, 169 U. S. 133.

The case of *Griswold v. Illinois Cent. R. Co.*, 90–265, 57 N. W. 843, followed in a case involving a similar state of facts. *Hartford F. Ins. Co. v. Chicago, M. & St. P. R. Co.*, 175 U. S. 91.

This section is not applicable to a contract exempting a railroad company from liability to one permitted to erect a building on its right of way, for loss thereof by fire. *Ibid.*

A railroad company cannot by contract limit its liability for injury to stock resulting from unreasonable and negligent delay during shipment. *Siemonsma v. Chicago, M. & St. P. R. Co.*, 137–607, 115 N. W. 230.

A contract seeking to relieve the carrier from liability for stock being transported when the owner or agent does not accompany it is of no validity. *Wisecarver v. Chicago, R. I. & P. R. Co.*, 141–121, 119 N. W. 532.

A limitation to an agreed valuation as the basis for fixing the rate of charge is invalid. *Winn v. American Express Co.*, 149–259, 128 N. W. 663.

An agreement for fixing a rate for transportation on the basis of a fixed valuation is not valid to defeat recovery of the real value of the property lost, and the shipper may recover the actual loss less the difference between the freight collected and what would have been charged had the true valuation been given. *Betts v. Chicago, B. & Q. R. Co.*, 150–252, 129 N. W. 962.

A contract in which the shipper in consideration of a reduced rate agrees that his shipment is of a stated value and that in the event of loss his recovery shall not exceed such stipulated valuation violates the provisions of this section. *Blair v. Wells Fargo & Co.*, 155–190, 135 N. W. 615.

The provisions of this section are applicable to shipments under interstate commerce. *Cramer v. Chicago, R. I. & P. R. Co.*, 153–103, 133 N. W. 387.

In an action for loss of goods through negligence, a contract limiting liability to an arbitrary agreed valuation is not valid as a defense. *Ibid.*

A contract under interstate commerce between a carrier and a shipper of stallions that the carrier shall not be liable for more than one hundred dollars each for loss of any of them, if such contract is fairly made, is not so unreasonable in its terms that a court should refuse to enforce it. *Lefebure v. American Express Co.*, 139 N. W. 1117.

SEC. **2074-a. Action against joint carriers.** That chapter seventy-four of the laws of the thirtieth general assembly be and the same is hereby repealed and there is hereby enacted as a substitute therefor the following:

That in all cases where a railway company bills property to a point beyond the terminus of its own railway and provides by contract that it shall not be liable for the destruction of or damage to such property beyond the terminus of its own railway and the said property is damaged or destroyed between the place of shipment and place of destination to which it was billed, the initial carrier and the connecting carrier or carriers if more than one, over whose line or lines of railway the property shall have been carried between the place of shipment and said place of destination, may be joined as defendants in one action, brought in any county from or into which shipment shall be made, or suit may be brought in any county through which shipment shall be made and service of original notice may be made on any of said carriers in any county of the state, where the carrier to be served has a station agent, by serving such notice on such station agent. [32 G. A., ch. 101; 31 G. A., ch. 89, § 1; 30 G. A., ch. 74, §§ 1, 2.]

A carrier may ordinarily limit its responsibility for the transportation of property to the terminus of its own line. *McManus v. Chicago, G. W. R. Co.*, 138–150, 115 N. W. 919.

SEC. **2074-b. Liability of joint carriers.** On proof being made by the owner of the property shipped, that the same has been destroyed or damaged in transit between the said place of shipment and the place of destination, the liability of a common carrier shall attach to all the defendants and judgment shall be entered accordingly against them all unless one or more of the defendants shall prove that it was not or they were not liable, in which case judgment shall go only against the remaining defendant or defendants. [31 G. A., ch. 89, § 2.]

SEC. **2074-c. Freight claims — damages — excessive charge—time limit for adjustment.** That every claim for loss of or damage to property while in the possession of any common carrier, or for delay in delivering freight or baggage or express, or for a charge in excess of the legal

and regular charge for the service rendered shall be adjusted and paid within forty days in case of shipments wholly within this state, and within ninety days in case of shipments from without the state after the filing of such claim with the agent or agent's carrier at the point of destination of each shipment, provided that no such claim shall be filed until after the arrival of the shipment or of some part thereof at the point of destination or until after the lapse of a reasonable time for the arrival thereof; and provided further that if such claim is not filed within sixty days from the time it accrues, the penalty provided in this act shall not apply. [35 G. A., ch. 179, § 1.]

SEC. 2074-d. **Failure to adjust—penalty.** Failure to adjust and pay such claim, within the period herein prescribed shall subject the common carrier, so failing, to the penalty of a sum which in amount shall be equal to the amount of the claim originally filed; provided, however, that it shall in no case be less than twenty-five dollars or more than one hundred dollars for each and every failure, to be recovered by the party aggrieved, in any court of competent jurisdiction; provided further that said claim shall be filed in proper form, including such information possessed by the claimant, as will aid in establishing his claim. The penalty shall not apply unless the claimant shall recover the full amount claimed by him, nor when the claim exceeds five hundred dollars. [35 G. A., ch. 179, § 2.]

SEC. 2074-e. **No division of claims.** The claimant shall not be permitted under this act to divide his claims arising from loss, damage or injury to one shipment or consignment of goods but only one claim within the meaning of this act shall be filed for one shipment. [35 G. A., ch. 179, § 3.]

SEC. 2075. **Lien of judgment.**

A pending right of action against a railroad, which is not reduced to judgment before the sale of the property under mortgage foreclosure, is not preserved by this section. *Winter v. Iowa Cent. R. Co.*, 111–342, 82 N. W. 760.

Section 1309 of code of '73 had no application to street railways. *Fidelity Loan & Trust Co. v. Douglas*, 104–532, 73 N. W. 1039.

SEC. 2076. **Classification of railroads.** That section two thousand and seventy-six of the code is hereby repealed and the following enacted in lieu thereof:

"All railroads of the state shall be classified in accordance with the gross amount of their several annual earnings within the state, per mile, for the preceding year, as follows: Class A shall include those whose gross annual earnings per mile shall be four thousand dollars or more; class B shall include those whose gross annual earnings per mile shall be three thousand dollars or any sum in excess thereof less than four thousand dollars; class C shall include those whose gross annual earnings per mile shall be less than three thousand dollars. In determining the classification of any railroad, the entire railroad property owned or operated by any company shall be considered as a single railroad, and the aggregate gross earnings of the entire railroad within the state shall be divided by the entire mileage owned or operated within the state, to ascertain the gross earnings per mile of such railroad." [32 G. A., ch. 102, § 1; 15 G. A., ch. 68, § 1; C. '73, § 1305.]

SEC. 2077. **Passenger rates—expositions and fairs—railroad commission.** That section two thousand and seventy-seven of the code is hereby repealed and the following enacted in lieu thereof:

All railroad corporations according to their classifications as herein prescribed shall be limited to compensation per mile for the transportation of any person with ordinary baggage not exceeding one hundred and fifty pounds in weight as follows: Class A, two cents; class B, two and one-half cents; class C, three cents; and for children twelve years of age or under, one half the rate above prescribed; provided, however, that every railroad corporation shall be entitled to charge a fare of not to exceed ten cents for the transportation of each passenger with ordinary baggage for any distance not exceeding five miles. A charge of ten cents may be added to the fare of any passenger when the same is paid upon the cars, if a ticket might have been procured within a reasonable time before the departure of the train, except in those cases where a minimum of ten cents is charged for a distance of less than five miles as above provided. All railroad corporations, according to their classification, as herein prescribed, shall be limited to compensation per mile for the transportation of any person, with ordinary baggage not exceeding one hundred fifty pounds in weight, who shall purchase a round trip ticket from any point within this state to any town or city within said state at which an annual fair or exposition is being held, said ticket being good for return trip of said purchaser to point of origin during said fair or exposition, and at least one day after the conclusion of the same, as follows: Class A, one and one-half cents; class B, two cents; class C, two and one-half cents, and for children twelve years of age or under, one half of the rate above prescribed, all of the aforesaid rates to apply to each mile traveled; provided, however, that said maximum rates of charge shall only apply on transportation to such points at which an annual fair or exposition has been held during one or more preceding years, and where the attendance during the immediately preceding year for any week or part thereof was not less than seventy-five thousand bona fide paid admissions; and it is further provided that upon application being made by any interested party, the state board of railroad commissioners shall, after full hearing, determine whether or not any given fair or exposition comes within the provisions of this statute, and in case such commission shall find that any given fair or exposition comes within said provisions, then, and in that case, the said commission shall prescribe the time and place at which the carriers shall perform the services for the rates of charge, as hereinbefore stated; and said commission shall by order designate what reasonable notice shall be given by said railway companies to the public of the rates aforesaid; and the said orders of the board of railroad commissioners shall be enforced in the same manner as is provided by law for the enforcement of other orders of the said commission. [35 G. A., ch. 165, § 1.] [32 G. A., ch. 102, § 2; 15 G. A., ch. 68, § 2.]

Plaintiff suing for wrongful ejection from a train for the refusal to pay ten cents additional on account of not having a ticket has the burden of alleging facts to show that he could not have procured a ticket within a reasonable time before the departure of the train upon which he took passage. *Bowsher v. Chicago, B. & Q. R. Co.*, 113–16, 84 N. W. 958.

SEC. **2077-a. Station telephones—bulletins posted.** That section two thousand and seventy-seven-a of the supplement to the code, 1907, is hereby repealed and the following enacted in lieu thereof:

It shall be the duty of all railway companies on all lines of railway operated by them to install a telephone in each passenger or freight depot in any city or town where a telephone exchange is maintained for public service, said telephone to be connected with and for the use of the patrons

of said exchange; and it shall be the further duty of all railway companies on all lines operated by them to keep posted in the waiting room of each passenger station, a bulletin plainly showing the time of arrival and departure at such station of all trains carrying passengers, and at all stations where a telegraph or telephone operator is maintained, such bulletin shall indicate whether said trains are late or on time, and if late, the approximate number of minutes late. If the train is less than ten minutes late, the same shall be considered on time for the purpose of this act. [35 G. A., ch. 166, § 1; 33 G. A., ch. 125, § 1.] [29 G. A., ch. 87, § 1.]

SEC. 2077-a1. **Violation—penalty.** Any agent, telephone or telegraph operator of such railroad corporation who shall violate the provisions of this act shall be deemed guilty of a misdemeanor and upon conviction shall be punished by a fine of not less than five dollars nor more than fifty dollars. [35 G. A., ch. 166, § 2.]

SEC. 2078. **Classification by executive council.** The law as it appears in code section two thousand and seventy-eight is hereby repealed and the following enacted in lieu thereof:

"The executive council shall at its regular meeting on the second Monday in July in each year classify the different railways, as provided by section two thousand and seventy-six of the code, from information as to gross earnings obtained from the annual reports of railways made to the executive council for assessment and taxation, if it shall be satisfied of the correctness of same, or from information obtained by said executive council from any other source, and, when there shall be any change in classification, shall issue a certificate to any corporation or corporations affected by such change, certifying the class to which they are respectively assigned; any change of rates by any corporation pursuant to any change of classification shall take effect and be in force from and after the date of such certificate." [30 G. A., ch. 75; 15 G. A., ch. 68, § 7.]

[As to annual statement for purposes of taxation, see § 1334.]

AUTOMATIC COUPLERS AND BRAKES.

SEC. 2079. **On new or repaired cars.**

It is not negligence *per se* not to equip engines and tenders with the latest coupling device, in the absence of any statutory provision as to automatic couplers on engines and tenders. *Bryce v. Burlington, C. R. & N. R. Co.*, 119–274, 93 N. W. 275.

The test to be applied in determining the sufficiency of the automatic coupler as complying with the statutory requirement is whether the person operating the coupler is required to go between the ends of the cars; and this test applies to the act of coupling as well as to that of uncoupling. The use of a coupler not complying with these conditions constitutes actionable negligence. *Chicago, M. & St P. R. Co. v. Voelker*, 129 Fed. 522.

The statutory provision being for the protection of the lives and limbs of persons, is to be so construed as to prevent the mischief and advance the remedy so far as the words fairly permit. *Ibid.*

SEC. 2080. **On all cars.** After January first, eighteen hundred ninety-eight, no corporation, company or person, operating a railroad, or any transportation company using or leasing cars, shall have upon any railroad in this state any car that is not equipped with such safety automatic coupler; provided that the board of railroad commissioners shall have power upon a showing which it shall deem reasonable, to extend the time within which any such corporations shall be required to comply with the provisions of this section, but no such extension shall be made beyond January first, nineteen hundred. [27 G. A., ch. 50, § 1; 24 G. A., ch. 23, § 2; 23 G. A., ch. 18, § 2.]

SEC. 2082. Power brake on cars.

This section does not require that all cars in a train shall be equipped with automatic couplers and power brakes, but only that there be a sufficient number so equipped to enable the engineer to control the train, etc. *Carter v. Sioux City Service Co.*, 141 N. W. 26.

SEC. **2083-a. Exemption from liability.** That no corporation, company or person shall be liable to any prosecution in any court of this state for any fines or penalties incurred under the provisions of section two thousand and eighty-three of the code in so far as the same relates to the operation of cars not equipped with safety automatic couplers only, as provided by section two thousand and eighty of the code, from the first day of January, eighteen hundred ninety-eight, up to and including the time of taking effect of this act; and every such corporation, company, or person shall be, and is hereby, released from all criminal prosecution, penalties, fines, and forfeitures for failure to have cars equipped with such safety automatic couplers during such period. [27 G. A., ch. 51, § 1.]

SEC. **2083-b. Pending litigation.** This act shall in no manner affect pending litigation. [27 G. A., ch. 51, § 2.]

EQUIPMENT OF LOCOMOTIVES.

SEC. **2083-c. Switching service—headlights—footboards—grab rails.** That it shall be unlawful for any railway or terminal transfer company, or any corporation operating locomotives in switching or yard service, to operate, or permit the same to be operated, unless said locomotives are equipped with headlight on both front and rear of engine, when operated between sunset and sunrise, and all such engines shall be equipped with a footboard of substantially uniform height, width, and length, securely fastened and firmly braced to the pilot beam in front of engine, and a similar footboard on rear of tank or tender of engines, upon which employes may stand or ride when their duties require them so to do, and that a substantial grab rail or rod be securely fastened upon said pilot beam at each end and in the center, at a convenient height for employes to reach and hold on to with their hands, said rod to extend across the full length of the said pilot beam, and also across the rear end beam of said tank or tender; provided that the provisions of this statute shall not apply to switching or yard service at stations or places where regular switch engines are not employed exclusively as switch engines, or during a period of not exceeding twelve hours, when a switch engine is being cleaned or washed out, and also switching by work trains; and provided further that where regular switch engines are disabled by accident, or in need of repairs, or there is an unusual or unexpected amount of work, switching, under such conditions, with ordinary engines, for a period of not to exceed forty-eight hours, shall not be considered a violation of this statute. [33 G. A., ch. 126, § 1.]

SEC. **2083-d. Same—violation—penalty.** Any person, railway company, terminal transfer or other corporation or company who violates any of the provisions of section one of this act shall be deemed guilty of a misdemeanor and upon conviction shall be punished by a fine of not less than fifty dollars or more than five hundred dollars for any such violation, and each day that every such engine is operated shall constitute a separate and distinct violation of this act. [33 G. A., ch. 126, § 2.]

SEC. **2083-e. Frost glass in cab windows—repair.** Every person, partnership, company or corporation owning or operating a railway in the state of Iowa, between November first and April first of each year, shall

equip the cab of all locomotive engines in use, with frost glass, of not less than eight inches in width and eighteen inches in length on either side of the cab of said engine in front of the seat of the engineer and fireman; provided that where a frost glass is broken or becomes out of repair, a period of not to exceed seventy-two hours is allowed to repair or replace the same. [35 G. A., ch. 167, § 1.]

SEC. **2083-f. Same—violation—penalty.** Any violation of this act shall be punished by a fine of not less than fifty dollars nor more than one hundred dollars for each day any locomotive engine is operated in violation thereof. [35 G. A., ch. 167, § 2.]

SEC. **2083-g. Power of headlights—time of compliance.** It shall be the duty of every person, firm or corporation owning or operating any line of railway within the state of Iowa, except lines under twenty miles in length operated wholly within this state, to equip all locomotives, power vehicles, power cars, or other equipment used as the equivalent of or in place of a locomotive, when used in the transportation of passengers or freight, with a headlight of sufficient candle power, measured with a reflector, to throw a light in clear weather that will enable the operator of same to plainly discern an object the size of a man lying prone on the track at a distance of eleven hundred feet from the headlight, and thereafter to maintain and use such headlights upon every such locomotive, vehicle, car or other equipment. It shall be the duty of all such common carriers to so provide and equip ten per cent. of the whole number of locomotives used by such carriers with such headlight within ninety days after the taking effect of this act, and an additional ten per cent. of such locomotives to be so equipped each and every thirty days thereafter until all such engines and locomotives, and other equipment used as equivalent thereof shall be equipped with such headlight. This act shall not be construed to apply to power cars used by street railways and operated wholly within the corporate limits of any city or town, nor to engines or other equipment used exclusively for switching purposes, nor to engines or other equipment running after sunrise and before sunset. [35 G. A., ch. 172, § 1; 35 G. A., ch. 171, § 1.]

SEC. **2083-h. Same—violation—penalty.** Any person, firm or corporation owning such line of railway or the equipment operated thereon, who shall cause or permit any locomotive, power vehicle, power car, or other equipment used as the equivalent thereof, to be operated without being equipped with the headlight required by the provisions of section one hereof, shall be deemed guilty of a misdemeanor and, upon conviction, shall be punished by a fine of not less than one hundred dollars nor more than five hundred dollars for each offense. Provided, however, that no punishment shall be imposed for the operation of any such locomotive or the equivalent thereof without such headlight, when such locomotive was properly equipped with such headlight at the commencement of the trip, providing it is shown that such headlight was in good and sufficient working condition when the trip was begun and became disabled during the trip. G. A., ch. 171, § 2.]

CABOOSE CARS.

SEC. **2083-i. Applicable to all railways except interurban.** That the provisions of this act shall apply to any corporation or to any person or persons while engaged as common carriers in the transportation by railroads of passengers or property within this state except interurban to which the regulative power of this state extends. [34 G. A., ch. 93, § 1.]

SEC. 2083-j. **Minimum length — construction — equipment.** That from and after the first day of January, nineteen hundred twelve, it shall be unlawful, except as otherwise provided in this act, for any such common carrier by railroad to use on its lines any caboose car or other car used for like purposes, unless such caboose or other car shall be at least twenty-four feet in length, exclusive of the platform, and equipped with two four-wheel trucks, and shall be provided with a door in each end thereof and an outside platform across each end of said car; each platform shall not be less than eighteen inches in width and shall be equipped with proper guard rails, and with grab irons and hand brakes, and steps for the safety of persons getting on and off said car; said steps shall be equipped with a suitable rod, board, or other guard at each end and at the back thereof, properly designed to prevent slipping from said step. Said caboose shall be provided with cupola, and necessary closets and windows. And be it further enacted that each caboose car be equipped with an emergency air valve, and air gauge which shall be placed on inside of said car; provided that the provisions hereof shall not apply to work trains, transfer service or emergencies not exceeding thirty-six hours. [34 G. A., ch. 93, § 2.]

SEC. 2083-k. **Cars now in use—when equipped.** Whenever any such caboose car[1] or other car[2] now in use by such common carriers as provided by section one herein, shall, after this act goes into effect, be brought into any shop for general repairs, it shall be unlawful to again put the same into service of such common carriers within this state, unless it be equipped as provided in section two of this act. [34 G. A., ch. 93, § 3.]

[1],"cars" in enrolled bill. EDITOR.]

SEC. 2083-l. **Extension of time—authority railroad commission.** That the state railroad commission is hereby authorized to give to any common carrier aforesaid, upon full hearing, and for good cause shown, a reasonable extension of time in which to comply with the provisions of this act; provided that in no case shall such extension in the aggregate exceed a period of one year from the time herein limited for compliance with this act. [34 G. A., ch. 93, § 4.]

SEC. 2083-m. **Penalty.** Any common carrier as provided in section one of this act violating any of the provisions of this act shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined not less than one hundred dollars nor more than five hundred dollars for each offense. [34 G. A., ch. 93, § 5.]

TAXES IN AID OF RAILROADS.

SEC. 2084. **May be voted.** Taxes not exceeding five per cent. on the assessed value of any township, town or city may be voted to aid any railway company, trolley or electric railway which is or may become incorporated under the laws of the state, to aid in the construction of a projected railroad or any trolley or electric railway within the state, as hereinafter provided. [29 G. A., ch. 85, § 1; 25 G. A., ch. 27; 24 G. A., ch. 18; 20 G. A., ch. 159, § 2.]

SEC. 2085. **Petition—notice—submission—certificate—levy—collection—certain cities.** When a petition is presented to the trustees of any township or the council of any town or city, signed by a majority of the resident freehold taxpayers of such township, town or city, asking that the question of aiding any railroad company incorporated under the laws of the state in the construction of a projected railroad within it be submitted to the voters thereof, it shall be the duty of the trustees or council, as the

case may be, immediately to give notice of a special election, by publication in some newspaper printed in said township, town or city, if any there be, and, if not, then in some newspaper published in the county, and also by posting copies of said notice in five public places in such township, town or city at least ten days before such election, which shall state the time and place of holding the same, the name of the company, and the line of the road proposed to be aided, the rate per cent. of the tax to be levied, whether one half thereof shall be collected the first year and one half the following year, or whether the whole is to be collected in one year, the amount of work required to be done and when and where the same shall be done, to what point said railroad shall be fully completed, and any other conditions which shall be performed before such tax or any part thereof shall become due; and in no case shall such tax become due until such railroad is fully completed according to the conditions in said notice. The trustees or council, as the case may be, shall cause to be prepared the form of the proposition to be submitted. The proposition shall be printed and placed upon the ballots and the election shall be conducted in the same manner as provided with respect to like or similar propositions in the chapter on elections; and if a majority of the votes polled be for the adoption of the proposition, then the clerk of the township, city or town, or the clerk of election, shall forthwith certify to the county auditor the result thereof, the rate per cent. of tax voted, the year or years during which the same is to be collected, the name of the company to which voted, and the time, terms and conditions upon which the same, when collected, is to be paid under the conditions and stipulations in said notice, together with an exact copy of the notice under which the election was held, which the county auditor shall at once cause to be recorded in the office of the recorder of deeds; the expense thereof, and of publishing the notice, and all the expenses of the election, shall be paid by the railway company to which it is proposed to vote the tax. When such certificate has been made and recorded, the board of supervisors of the county shall, at the time of levying the ordinary tax next following, levy such taxes as are voted under the provisions hereof, as shown by said certificate, and cause the same to be placed on the tax lists of the proper township, town or city, indicating in their order thereupon when and in what proportion the same are to be collected, and upon what conditions the same are to be paid to the railway company, a certified copy of which order shall accompany the tax lists. The taxes shall be collected at the same time or times specified in the order, and in the same manner, and subject to the same laws after they are collectible, as other taxes, or as may be stated in the petition and notices for the election, except as otherwise provided. Provided, that in cities acting under special charter, and cities having a population of twenty-five thousand or over, it shall only be necessary that the petition for the submission of the question of aiding any railroad company, as herein provided, shall be signed by two thousand or more resident freeholders thereof. [35 G. A., ch. 168, § 1.] [20 G. A., ch. 159, § 3.]

[The above section is made applicable to trolley or electric railways by § 2091-a. EDITOR.]

A condition in the proposition for voting a tax that the railroad shall be operated in connection and solely with a certain other specified railroad system for a specified time and in active competition with other specified roads does not render the taxes invalid. *Bras v. McConnell*, 114-401, 87 N. W. 290.

Printing of surplusage on the ballot will not necessarily render the election invalid. *Ibid.*

In a particular case held that the form of ballot was sufficient and was not calculated to mislead the voter in expressing his views. *Ibid.*

Under a notice of the voting of an aid tax containing a stipulation that the road should be built to a particular place and that the depot should be within one hundred rods of a certain street of that place, held that the stipulations were substantially complied with and that the company was entitled to the tax. *Whitney v. Chicago, A. & N. R. Co.*, 133–508, 110 N. W. 912.

SEC. 2086. **Notice—conditions—limit of tax.** The stipulations and conditions in the notices prescribed in this chapter must conform to those set forth in the petition asking for the election; and the aggregate amount of tax voted in any city, town or township shall not exceed five per cent. of the assessed value of the property therein, respectively. The right to vote taxes within the limits herein provided shall exist after the expiration of ten years from the exercise to the limit of the right herein granted. Nothing herein shall authorize a tax of five per centum within such period named to steam railroads and also five per centum within such period to interurban railways. [29 G. A., ch. 86, § 1; 25 G. A., ch. 27; 24 G. A., ch. 18; 20 G. A., ch. 159, § 4.]

[The above section is made applicable to trolley or electric railways by § 2091-a. EDITOR.]

SEC. 2087. **Money paid out—certificates.**

[Although the above section appears in both of the prior supplements it is not shown here as the code section remains unchanged. However, see § 2091-a which amplifies § 2087 and makes it applicable to trolley or electric railways. See also § 2091-d which makes § 2087 applicable to §§ 2091-b and 2091-c. EDITOR.]

The company is not entitled to receive the taxes voted, nor is the treasurer authorized to pay them to it, until the township trustees have made and filed with the treasurer the required certificate. *Chicago, A. & N. R. Co. v. Whitney*, 152–520, 132 N. W. 840.

SEC. 2088. **Certificates of taxes exchangeable for stock or bonds—interurban railroads excepted.** The county treasurer when required shall, in addition to a tax receipt, issue to each taxpayer, on the payment of any taxes voted under the provisions of this chapter, a certificate showing the amount of tax paid, the name of the railway company entitled thereto, and when the same was paid; and he may charge twenty-five cents for each certificate issued. Said certificates shall be assignable, and, when presented by any person holding the legal title thereto to the president, managing director, treasurer or secretary of the railroad company receiving the taxes paid, as shown by such certificates, in sums of one hundred dollars or more of taxes, it shall issue or cause to be issued to said person the amount of stock of the company desiring the benefit from said taxes, to the amount of said certificate or certificates, and if the taxes paid as shown by said certificate or certificates amount in the aggregate to more or less than any certain number of shares of stock, then the holder thereof shall be entitled to receive the full number of shares of stock covered by said certificates, and may make up in money the balance of any share when the certificates held by him are not equal to one full share of such stock, which stock for such purpose shall be estimated at par. When it shall be proposed in the petition and notice calling an election to issue first mortgage bonds not exceeding the sum of eight thousand dollars per mile for a railroad of three-feet gauge, and not exceeding the sum of eighteen thousand five hundred dollars per mile for the ordinary four-feet eight and one-half inch gauge in lieu of stock, it shall be lawful to issue bonds of the denomination of one hundred dollars in the same manner as is provided for the issue of stock, and in such case the petition and notice shall state the amount of bonds per mile to be issued, the rate of interest, and

the time of payment of the interest and principal thereof. Provided, that the provisions of this section shall not be applicable to taxes that are voted and paid in aid of the construction of railroads that are interurban in character. [34 G. A., ch. 91, § 1.] [23 G. A., ch. 19, § 1; 20 G. A., ch. 159, § 6.]

Where there is no prohibition of the issuance of bonds the stockholder cannot complain that the bonds of the company have been issued prior to the delivery to him of the stock to which he has become entitled. *Whitney v. Chicago, A & N. R. Co.*, 133–508, 110 N. W. 912.

SEC. 2089. Liability of directors.

[Although the above section appears in both of the prior supplements it is not shown here as the code section remains unchanged. However, see § 2091-a which amplifies § 2089 and makes it applicable to trolley or electric railways. EDITOR.]

SEC. 2090. Forfeiture of tax.

[Although the above section appears in both of the prior supplements it is not shown here as the code section remains unchanged. However, see § 2091-a which amplifies § 2090 and makes it applicable to trolley or electric railways. See also § 2091-d which makes § 2090 applicable to §§ 2091-b and 2091-c. EDITOR.]

SEC. 2091. Taxes paid in labor or supplies.

[Although the above section appears in both of the prior supplements it is not shown here as the code section remains unchanged. However, see § 2091-a which amplifies § 2091 and makes it applicable to trolley or electric railways. See also § 2091-d which makes § 2091 applicable to §§ 2091-b and 2091-c. EDITOR.]

The lien here provided for in favor of laborers is not a mechanic's lien, nor is it a common law lien. Neither possession nor filing of a statement or claim is essential. *Kent v. Muscatine, N. & S. R. Co.*, 115–383, 88 N. W. 935.

Such a lien is assignable. *Ibid.*

SEC. 2091-a. Statutes applicable. All of the provisions of sections two thousand and eighty-four, two thousand and eighty-five, two thousand and eighty-six, two thousand and eighty-seven, two thousand and eighty-nine, two thousand and ninety, and two thousand and ninety-one of the code are hereby made applicable to trolley or electric railways. And wherever the word "railroad" appears in any of said sections the same shall be held to include trolley or electric railroad; and wherever the words "railroad company" or "railway company" appear in said sections the same shall be held to include trolley railway company, and electric railway company. Provided, that no stock shall be issued by any such company except upon payment therefor of the full par value thereof in cash or its equivalent. [34 G. A., ch. 92, § 1.] [29 G. A., ch. 85, § 2.]

SEC. 2091-b. Electric railroads — construction — electrification of steam railroads. Taxes not exceeding five per cent. on the assessed value of the real property of any district or territory contiguous to any projected trolley or electric railroad, or to any steam railroad which it is proposed to electrify, may be levied to aid in the construction of such projected trolley or electric railroad, or in the electrification of such steam railroad, within the state, as hereinafter provided. [35 G. A., ch. 169, § 1.]

SEC. 2091-c. Petition — notice—election—certification—expense—levy—collection. When it is proposed to construct any trolley or electric railroad, or to electrify any steam railroad, and a petition definitely describing any district or territory contiguous to and within five miles of the line of such railroad or proposed railroad, signed by a majority of the resident freehold taxpayers of such district or territory, asking that the question of aiding in the construction or electrification of such railroad or proposed

railroad within such district or territory be submitted to the voters thereof, is presented to the board of supervisors of the county in which such district or territory is situated, it shall be the duty of such board of supervisors immediately to give notice of a special election by publication in some newspaper published in such district or territory, if any there be, and if not, then in some newspaper published in the county, and also by posting copies of said notices in five public places in such district or territory at least ten days before such election, which shall state the time and place of holding the same; the name of the company and the line of the road proposed to be added; the rate per cent. of the tax to be levied; whether one half thereof shall be collected the first year and one half the following year; or whether the whole is to be collected in one year; the amount of work required to be done, and when and where the same shall be done; to what point said railroad shall be fully completed; and any other conditions which shall be performed before such tax or any part thereof shall become due; and in no case shall such tax become due until such railroad is fully completed according to the conditions of said notice. The board of supervisors shall cause to be prepared the form of the proposition to be submitted, and the proposition shall be printed and placed upon the ballots; and the board of supervisors shall appoint the judges and clerks of election, and the election shall be conducted in the same manner as provided with respect to like or similar propositions in the chapter on elections; and the judges of election shall canvass the vote and make return to the county auditor; and if a majority of the votes polled be for the adoption of the proposition, then the county auditor shall forthwith certify to the result thereof, rate per cent. of the tax voted, the year or years during which the same is to be collected, the name of the company to which voted, and the time, terms and conditions upon which the same when collected is to be paid under the conditions and stipulations in said notice, together with an exact copy of the notice under which the election was held, which the county auditor shall at once cause to be recorded in the office of the recorder of deeds. The expense thereof and of publishing the notice and all the expenses of the election shall be paid by the railway company to which it is proposed to vote the tax. When such certificate has been made and recorded the board of supervisors of the county shall at the time of levying the ordinary tax next following, levy such taxes as are voted under the provisions hereof as shown by said certificate, and cause the same to be placed on the tax lists of the proper township, town or city, indicating in their order thereupon when and in what proportion the same are to be collected, and upon what conditions the same are to be paid to the railway company, a certified copy of which shall accompany the tax list. The taxes shall be collected at the time or times specified in the order and in the same manner and subject to the same laws after they are collectible as other taxes, or as may be stated in the petition and notice for the election, except as otherwise provided; provided, however, that such tax shall only be levied upon the real property within such district or territory. The stipulations and conditions in the notice prescribed in this section must conform to those set forth in the petition asking for the election, and the aggregate amount of taxes voted in any such district or territory shall not exceed five per cent. of the assessed value of the real property therein. [35 G. A., ch. 169, § 2.]

SEC. **2091-d. Statutes applicable.** The provisions of section two thousand and eighty-seven, two thousand and ninety and two thousand and ninety-one of the supplement to the code, 1907, are hereby made applicable

to all taxes levied under the provisions of this act. [35 G. A., ch. 169, § 3.]

[§§ 2087, 2090 and 2091 of the 1907 supplement were exactly the same as in the code. EDITOR.]

SEC. 2091-e. **Ownership—approval of railroad commission.** No tax shall be levied to aid in the electrification of any steam railway for the benefit of any person, firm or individual, who is not the owner in fee simple of said steam railway, unless with or prior to the presentation of the petition to the board of supervisors asking for said election, the agreement between the person, firm, or corporation proposing to electrify said steam railway, and the owner of said steam railway for its electrification and use, has been presented to the board of railway commissioners, and its duration, terms and conditions found suitable by said board, and said approval made a matter of record in the proceedings of said board of railway commissioners, and certified to such board of supervisors. [35 G. A., ch. 169, § 4.]

SEC. 2091-f. **Limitation of tax.** The real property upon which such tax shall have been levied shall not be subjected to taxes in aid of railroads, including such tax, to exceed five per centum of the assessed value of said real property, for a period of ten years after said levy. [35 G. A., ch. 169, § 5.]

RELOCATION OF LINE.

SEC. 2093. **Notice.** A public notice to all whom it may concern of the time of filing such petition, the object thereof, and the term of court at which the application will be made for authority to make the change, and requiring all persons desiring the repayment of money or return of property, as in this chapter provided, to appear and present their claims therefor, must be published in a newspaper printed in each county in which the change is to be made, once each week, for a period of ten successive weeks before the term of court at which the application is to be heard. The court may order any additional notice or publication that it may think proper. [31 G. A., ch. 9, § 7; 16 G. A., ch. 118, § 2.]

UNION RAILWAY DEPOTS.

SEC. 2100. **Powers.**

The corporation provided for in this section is not a railroad company. But a railroad company may, irrespective of this section, construct a union depot, and in so doing it does not lose any of the powers possessed by it under the general law. *Morgan v. Des Moines U. R. Co.*, 113-561, 85 N. W. 902.

A railroad company may purchase and own such right of way as it sees fit and use it in connection with the operation of a union depot without securing the consent of the railroad commissioners. *Ibid.*

HOURS OF SERVICE OF EMPLOYES.

SEC. 2110-a. **Hours of service limited—exceptions.** It shall be unlawful for any railway company within the state of Iowa, or any of its officers or agents to require or permit any employe engaged in or connected with the movement of any rolling stock, engine or train, to remain on duty more than sixteen consecutive hours, or to require or permit any such employe who has been on duty sixteen consecutive hours to perform any further service without having at least ten hours for rest, or to require or permit any such employe to be on duty at any time to exceed sixteen hours in any consecutive twenty-four hours; provided, however, that this section

shall not apply to work performed in the protection of life or property in cases of accident, wreck, or other unavoidable casualty, or prevent train crews from taking a passenger train, or freight train loaded exclusively with live stock or perishable freight, to the next nearest division point upon such railroad; and provided further that it shall not apply to that time necessary for the trainmen to reach a resting place when an accident, wreck, washout, snow blockade or other unavoidable cause has delayed their train; and provided further that this section shall not apply to employes of sleeping car companies. [32 G. A., ch. 103, § 1.]

SEC. 2110-b. **Penalty—investigation—prosecutions.** Any superintendent, train master, train dispatcher, yardmaster or other official of any railroad in the state of Iowa, violating any of the provisions of this act, shall be deemed guilty of a misdemeanor, and upon conviction shall be punished by a fine of not less than one hundred dollars and not more than five hundred dollars for each offense. It shall be the duty of the board of railroad commissioners to receive written statements of violations of this act and when so requested to hold the same without disclosure of the name of the person making such statement, and to investigate each and every complaint filed alleging such violation. The board in making such investigation shall have the power to administer oaths, interrogate witnesses, take testimony, and require the production of books and papers, and must file a report of such investigation in writing with a full statement of its finding to the governor. In all cases of violation of this act, the board of railroad commissioners, through the attorney-general, must at once begin the prosecution of all parties against whom evidence of violation is found; but this act shall not be construed to prevent any other person from beginning prosecution for violation hereof. [32 G. A., ch. 103, § 2.]

INTERURBAN TERMINALS.

SEC. 2110-c. **Street railways to furnish terminal facilities—compensation—determination by railroad commission.** That all persons, firms or corporations now or hereafter owning or operating electric street railways in any city (including cities organized under special charter) or town of this state, are hereby authorized and required to permit the use for interurban business only but not for local street railway business, of such of their terminals, tracks, poles and wires as are located in the streets, alleys and public places of said cities and towns, and such portions of their tracks, poles and wires as may cross property owned by said street railway companies in such cities and towns, by the passenger and combination baggage cars of interurban railway companies, for the transportation of passengers, mail, express and baggage; and said street railways shall furnish to said interurban railways, electric power for the operation of their cars and the transaction of their said business in said cities and towns, as to said tracks so furnished; but said street railways shall not be required to furnish electric power except during such hours as their street railway cars may be in operation; nor shall they be required to furnish such power where they have not power houses and machinery sufficient therefor; and they shall have the preference in the use of their own tracks and power so that their own cars shall not be delayed in transit; nor shall they be required to furnish car houses or car barns or access thereto. Said interurban railways shall pay a reasonable compensation for the privileges and power that may be furnished them as above mentioned under this act. If an agreement for the use of the facilities so furnished

and the compensation for the same cannot be made between the interested parties the question as to the amount of such compensation and the conditions under which said facilities shall be furnished, used and operated, shall be heard and determined by the board of railroad commissioners of the state of Iowa, on petition to the said board by either party to the controversy, ten days' notice in writing of such petition being served upon the opposite party; and any order entered by said board of railroad commissioners, or court upon appeal, shall be subject to modification or review from time to time, upon notice being given as herein provided. [32 G. A., ch. 104, § 1.]

SEC. 2110-d. **Appeal — commissioner — report — hearing — bond.** Each party to the proceeding shall have the right to appeal to the district court of the county where the street railway in question is located from any order made by the board of railroad commissioners under this act, which appeal shall be taken within twenty days from the date of the order appealed from, and shall be perfected by serving a notice of appeal upon the other parties to such proceeding and filing the same with the secretary of the board of railroad commissioners, and by filing within twenty days from the date of such order, a petition in the said district court, stating the facts and asking the court to determine the matter in controversy. The board of railroad commissioners shall, when such notice of appeal is filed with its secretary, forthwith certify to said district court a transcript of the papers and proceedings before said board, and its order thereon. The court, or a judge thereof, if the petition is filed in vacation, shall thereupon appoint a commissioner to examine into the necessity of such proceeding, and report the facts and his recommendation in such time as the court or judge may direct, and as soon as possible thereafter the court or judge shall appoint a time and place for the hearing of such petition. The proceedings shall be in equity and subject to all the rules of equity practice, except that the court shall require the issues to be made up at the first term after the petition is filed and give the proceeding precedence over other civil business and try the same thereat if possible. The action shall be triable *de novo* upon said appeal, except that the question of compensation for the tracks, poles, wires, terminals and power to be furnished shall first be tried to a jury in the same manner and with the same effect as jury trials in ordinary proceedings, and the jury shall assess, separately, compensation for power to be furnished, on such basis as the court shall direct. No such appeal shall suspend the order appealed from if the interurban railway company on whose behalf said order is made shall file such bond for the payment of damages and costs as the district court to which such appeal is taken, or a judge thereof, may order and require. In all cases payment of the compensation awarded shall be made or secured to be made as the board of railroad commissioners or court may order and require before the interurban company desiring the use of the same shall be entitled thereto. [32 G. A., ch. 104, § 2.]

SEC. 2110-e. **Power furnished outside of city or town.** Street railroad companies desiring so to do shall be authorized to furnish to interurban railway companies, power for the operation of the cars of interurban railway companies outside of cities and towns, but no street railroad company shall be required to furnish such power. [32 G. A., ch. 104, § 3.]

SEC. 2110-f. **Applicable to interurban railways operating street railways.** This shall not apply to those portions of the terminals, tracks, poles and wires of interurban railway companies which are located in the streets, alleys and public places of cities and towns and which are used by

such companies for the transaction of a local street railway business; and where an interurban railway company has heretofore built tracks in a city or town used for street railway purposes it may acquire the use of such tracks, poles and wires as may be necessary to complete a terminal loop for the cars operated on such tracks and for the use of its interurban cars only, under the provisions of this act. [32 G. A., ch. 104, § 4.]

SEC. **2110-g. Acts in conflict repealed.** All acts and parts of acts in conflict herewith are hereby repealed. [32 G. A., ch. 104, § 5.]

SEC. **2110-h. Not applicable to pending litigation.** The provisions of this act shall not affect any pending litigation. [32 G. A., ch. 104, § 6.]

WEEDS ON RIGHT OF WAY.

SEC. **2110-i. Destruction of weeds—written notice.** It shall be the duty of every corporation owning or operating a railroad in this state on written notice from the owner, lessee or occupant of any land abutting upon its right of way to cut and burn, or otherwise destroy once each year during the month of July, all cockleburs, burdock weeds, quack grass and thistles on its right of way adjacent to said land. [32 G. A., ch. 105, § 1.]

SEC. **2110-j. Penalty.** Any failure to comply with the provisions of this act shall be deemed as a misdemeanor and shall be punished accordingly. [32 G. A., ch. 105, § 2.]

SEC. **2110-k. Enforcement.** It shall be the duty of the county attorneys in the respective counties to enforce the provisions of this act. [32 G. A., ch. 105, § 3.]

ELEVATORS AND OTHER BUILDINGS ON RAILROAD LANDS.

SEC. **2110-l. Disagreements adjusted by railroad commission.** That whenever a disagreement arises between the owner of an elevator or grain warehouse, coal shed, ice house, buying station, flour mill, or any other building used for receiving, storing or manufacturing any article of commerce transported or to be transported, situated on a railroad right of way, or on land owned or controlled by a railroad company, and such railroad company, as to the terms and conditions on which the same is to be continued thereon, or removed therefrom, or whenever application is made by any person, firm or corporation for the right to a site for such elevator or grain warehouse, coal shed, ice house, buying station, flour mill, or any other building used for receiving, storing or manufacturing any article of commerce transported or to be transported, and such railway company and said applicant cannot agree as to whether said elevator or grain warehouse shall be so placed on said right of way or on property owned or controlled by the railroad company, or as to the character of the buildings to be erected and placed thereon, or the place where the same is to be so erected and maintained, or as to the terms and conditions under which the same may be so placed or operated, then, and in every such event on written application to the board of railroad commissioners by such railroad company, person, firm or corporation the said board of railroad commissioners shall have authority, and it is hereby made their duty, as speedily as possible after the filing of such application, to hear and determine such controversy, and make such order in reference thereto as shall be just and right between the parties under all the facts in the case, which order shall be enforced as other orders of said commission. [35 G. A., ch. 178, § 1.]

SEC. **2110-m. Destruction of buildings—liability of railroad for negligence.** In the event that any elevator, warehouse, coal shed, ice

house, buying station, flour mill or any other building used for receiving, storing or manufacturing any article of commerce transported or to be transported, situated on the right of way or other land of a railroad company shall be injured or destroyed by the negligence of any railroad company, or the servants or agents of any railroad company in the conduct of the business of such company, the railroad company so causing such injury or destruction shall be liable therefor to the same extent as if such elevator, warehouse, coal shed, ice house, buying station, flour mill or any other building used for receiving, storing or manufacturing any article of commerce transported or to be transported was not situated on the right of way or other land of such railroad company, any provision in any lease or contract to the contrary notwithstanding. [35 G. A., ch. 178, § 2.]

CHAPTER 6.

OF THE BOARD OF RAILROAD COMMISSIONERS.

SECTION 2112. Supervision.

The power of supervision given by this section is broad enough to sustain an order of the railroad commissioners requiring a railroad to receive goods for shipment in the cars of the shipper or of another road in which such goods have been received by the shipper. *State v. Chicago, M. & St. P. R. Co.*, 152–317, 130 N. W. 802.

SEC. 2113. Powers and duties. That section twenty-one hundred thirteen of the code be and the same is hereby repealed and the following enacted in lieu thereof:

"It shall from time to time carefully examine into and inspect the condition of each railroad, its equipment, and the manner of its conduct and management with regard to the public safety and convenience in the state; make semiannual examination of its bridges, and report the condition thereof to the company to which they belong; and if found by it unsafe it shall immediately notify the railroad company whose duty it is to put the same in repair, which shall be done by it within ten days after receiving such notice. If any corporation fails to perform this duty the board may forbid and prevent it from running trains over the same while unsafe. And should any railroad or transportation company in this state fail to provide proper shelter for its patrons at stations where two or more tracks are operated, or fail or refuse to connect by proper switches or tracks with the tracks or lines of other railroad or transportation companies, the board may require such railroad or transportation company to provide the same in such manner and upon such conditions as it may determine. When, in the judgment of the board, any railway corporation fails in any respect to comply with the terms of its charter or articles of incorporation or the laws of the state; or when in its judgment any repairs are necessary upon its road; or any addition to its rolling stock, or addition to or change in its stations or station houses, or the equipment thereof for the health and convenience of the public, or change in its rates of fare for transporting freight or passengers, or change in the mode of operating its road or conducting its business, is reasonable and expedient in order to promote the security, convenience, and accommodation of the public, the board may make an order prescribing such improvements and changes and shall serve a notice upon such corporation, in the manner provided for the service of an original notice in a civil action, which notice shall be signed

by its secretary, of the improvements and changes which it finds to be proper; and a report of such proceedings shall be included in its annual report to the governor as provided in the next section; but nothing in this section shall be so construed as relieving any railroad company from its present responsibility or liability for damage to person or property." [35 G. A., ch. 173, § 1; 33 G. A., ch. 127, § 1.] [32 G. A., ch. 106; 17 G. A., ch. 77, § 3.]

The board may require a railroad company, in order to promote the convenience and accommodation of the public, to receive goods tendered to it for transportation in cars belonging to a private person or to another road without being compelled to unload the goods from the cars in which they have been received by the shipper and reload them in the cars furnished by the railroad to which such shipment is tendered. *State v. Chicago, M. & St. P. R. Co.*, 152–317, 130 N. W. 802.

The board of railroad commissioners has general supervision of railroads and must investigate all alleged neglect or violation of the law, and the orders of the board will be enforced by the courts. An action to enjoin the board from enforcing its orders as to rates is not an action against the state. *Poor v. Iowa Cent. R. Co.*, (C. C.) 155 Fed. 226.

SEC. 2116. **Duty of railroad to transport freight—passenger service.** Every railway corporation shall upon reasonable notice, and within a reasonable time, furnish suitable cars to any and all persons who may apply therefor, for the transportation of any and all kinds of freight, and receive and transport such freight with all reasonable dispatch, and provide and keep suitable facilities for the receiving and handling thereof at any depot on the line of its road; and shall also receive and transport in like manner the empty or loaded cars furnished by any connecting road, to be delivered at any station or stations on the line of its road, to be loaded or discharged or reloaded and returned to the road so connecting; and for compensation it shall not demand or receive any greater sum than is accepted by it from any other connecting railroad for a similar service. In any suit or action in court brought against a railroad corporation for the purpose of enforcing rights arising under the provisions of this section, the burden of proving that the provisions of this section have been complied with by such railroad corporation, shall be upon such railroad corporation. That every railway corporation owning or operating lines of railroads of more than twenty-five miles in length within the limits of the state of Iowa shall maintain a service of not less than two passenger trains each way every twenty-four hours, over the entire length of each division of such line or lines, when so ordered by the board of railroad commissioners. It is hereby further provided that passenger service of less than the number of trains provided herein shall be presumed to be unreasonable within the contemplation of section twenty-one hundred thirteen of the supplement to the code, 1907. [35 G. A., ch. 176, § 1; 33 G. A., ch. 128, § 1.] [32 G. A., ch. 107; 17 G. A., ch. 77, § 10.]

Where a railroad company accepts live stock for shipment its duty is to transport the same with all reasonable dispatch. *Siemonsma v. Chicago, M. & St. P. R. Co.*, 137–607, 115 N. W. 230.

Whether this section authorizes the board of railroad commissioners to require a railroad to receive and transport merchandise tendered to it for transportation in cars belonging to the shipper or to another road, the general purport of other sections of the statute is to sustain such an order. *State v. Chicago, M. & St. P. R. Co.*, 152–317, 130 N. W. 802.

SEC. 2118. **Cumulative.**

The powers given the railroad commissioners to enforce performance by railroads of the duties imposed upon them by the statute as to private crossings and the like matters, do not exclude other remedies. *Swinney v. Chicago, R. I. & P. R. Co.*, 123–219, 98 N. W. 635.

SEC. 2119. **Orders of commissioners enforced—appeals—penalties.** The district courts of this state shall have jurisdiction to enforce, by proper decrees, injunctions and orders, the rulings, orders and regulations affecting public rights, made or to be made by the board, such as are now, or may hereafter be, authorized to be made by them for the future direction and observance of railroads in this state. The proceedings therefor shall be by equitable action in the name of the state of Iowa, and shall be instituted by the attorney-general, whenever advised by the board that any railway corporation, or person operating a line of road in this state, is violating and refusing to comply with any rule, order or regulation made by the board, and applicable to such railroad or person. It shall be the duty of the court in which any such cause shall be pending to require the issue to be made up at the first term of the court to which such cause is brought, which shall be the trial term, and to give the same precedence over other civil business. If the court shall find that such rule, regulation or order is reasonable and just, and that in refusing compliance therewith said railway company is failing and omitting the performance of any public duty or obligation, the court shall decree a mandatory and perpetual injunction, compelling obedience to and compliance with such rule, order or regulation by said railroad company, or other person, its officers, agents, servants and employes, and may grant such other relief as may be deemed just and proper. All violations of such decree shall render the company, persons, officers, agents, servants and employes who are in any manner instrumental in such violation, guilty of contempt of court, and the court may punish such contempt by a fine not exceeding one thousand dollars for each offense, and may imprison the person guilty of contempt until he shall sufficiently purge himself therefrom. And such decree shall continue and remain in effect and be enforced until the rule, order or regulation shall be modified or vacated by the board.

That all rules, orders and regulations affecting public rights, made or to be made by the board of railway commissioners, such as are now or may hereafter be authorized to be made by them for the future direction and observance of railroads in this state, shall be in full force and effect from and after the date fixed by the board for the taking effect of such rules, order and regulations. If any railroad fails, neglects or refuses to comply with any rule, order or regulation made by the board within the time specified, it shall pay a penalty of fifty dollars for each and every day it fails, neglects or refuses to obey any rule, order or regulation so made, to be recovered in any court having jurisdiction.

Any railroad aggrieved at any rule, order or regulation made by the board may institute proceedings in any court of proper jurisdiction to have the rule, order or regulation complained of vacated, if found by the court, after due trial, not to be reasonable, equitable or just, and if upon an appeal from any rule, order or regulation of the board the complaining railroad is successful in having such rule, order or regulation vacated, the aforesaid penalty shall be set aside, if unsuccessful, there shall be taxed as a part of the costs a reasonable attorney's fee for the attorney appearing in behalf of the state.

The time for the taking effect of any rule, order, or regulation affecting public rights, made by the board of railroad commissioners as provided herein, may, in its discretion, be extended, and said extension of time may be granted for the purpose of testing the legality thereof, upon application by any such aggrieved railroad, showing reasonable grounds therefor, and that said application is made in good faith and not for the purpose of delay.

When any railroad shall fail upon appeal to secure a vacation of the order from which it has appealed, it may apply to the court in which said appeal is finally adjudicated for an order remitting the penalty which has accrued during the pendency of the appeal and upon a satisfactory showing that the order appealed from was unreasonable or unjust, or that the power of the board to make the same was doubtful and that said appeal has been prosecuted in good faith and not for the purposes of delay, such court may remit the penalty that has accrued during the pendency of the appeal. [33 G. A., ch. 129, §§ 1, 2, 3.] [20 G. A., ch. 133, § 1.]

The authority given to the railroad commissioners to enforce the duties imposed by law on railroad companies does not exclude the remedy by mandamus to compel a railroad company to construct a private crossing where the lands of one owner are separated by the railroad right of way and track. *Swinney v. Chicago, R. I. & P. R. Co.*, 123–219, 98 N. W. 635.

SEC. 2120-a. **Interstate freight rates—investigation.** It is hereby made the duty of the board of railroad commissioners to exercise constant diligence in informing themselves of the rates, charges, rules, and practices of common carriers engaged in the transportation of freight from points in this state to points beyond its limits, and from points in other states to points in this state, also in territory wholly outside this state; and whenever it shall come to the knowledge of the board of railroad commissioners either from their own investigation or by complaint made to them in any manner whatsoever that the rates charged by any common carrier on interstate business are unjust or unreasonable, or that such rates, rules or practices discriminate unjustly against the citizens, industries or interests of this state, or place any of the citizens, industries or interests of this state at an unreasonable disadvantage as compared with those of other states, or are levied or laid in violation of the act to regulate commerce, or in conflict with the rulings, orders or regulations of the interstate commerce commission, it shall be the duty of the board of railroad commissioners to immediately call the attention of the officials of railroads operating in this state to the fact and to urge upon them the propriety of changing such rate or rates, rules or practices. [32 G. A., ch. 108, § 1.]

SEC. 2120-b. **Appeal to interstate commerce commission—prosecutions.** Whenever such rates, rules or practices are not changed or adjusted so as to remove or remedy such discrimination within a reasonable time, it shall be the duty of the board of railroad commissioners, whenever it can legally be done, to present the facts involved in such discrimination to the interstate commerce commission and appeal to it for relief and thereafter, if deemed necessary, by said board of railroad commissioners, they shall prosecute any charge or charges growing out of any such discrimination at the expense of the state, before said interstate commerce commission. [32 G. A., ch. 108, § 2.]

SEC. 2120-c. **Attorney-general to assist.** In all work devolving upon the railroad commission they shall receive, upon application, the services of the attorney-general of this state, and he shall also represent them, whenever called upon to do so, before the interstate commerce commission. [32 G. A., ch. 108, § 3.]

SEC. 2120-d. **Wires over railroad tracks.** The railroad commissioners of this state shall have general supervision over any and all wires for transmitting electric current or any other wire whatsoever crossing under or over any track of a railroad in this state. [32 G. A., ch. 109, § 1.]

SEC. 2120-e. **Regulations.** Within thirty days from the taking effect of this act said railroad commissioners shall make regulations pre-

scribing the manner in which such wires shall cross such railroad tracks in this state. [32 G. A., ch. 109, § 2.]

SEC. 2120-f. **Wires must be strung in manner prescribed.** It shall hereafter be unlawful for any corporation or person to place or string any such wire for transmitting electric current or any wire whatsoever across any track of a railroad in this state except in such manner as may be prescribed by the railroad commissioners as provided by this act. [32 G. A., ch. 109, § 3.]

SEC. 2120-g. **Examination of wires already strung.** The board of railroad commissioners shall, as soon as possible after the taking effect of this act, either by personal examination or otherwise, obtain information where the tracks or railroads are crossed by wires strung over said tracks, contrary to or not in compliance with the rules prescribed by the railroad commissioners as contemplated by this act, and shall order such change or changes to be made by the persons or corporations owning or operating such wires as it may deem necessary to make the same comply with said rules and within such reasonable time as it may prescribe. [32 G. A., ch. 109, § 4.]

SEC. 2120-h. **Minimum height.** In case such wires cross over said track, in no case shall said board of railroad commissioners prescribe a less height than twenty-two feet above the top of the rails of any railroad track for any wire. [32 G. A., ch. 109, § 5.]

SEC. 2120-i. **Wires across railroad right of way at highways.** The board of railroad commissioners are hereby authorized to provide for and regulate the crossing of wires over and across railroad right of ways at highways and other places within the state. [32 G. A., ch. 109, § 6.]

SEC. 2120-j. **Penalty—enforcement.** Any person or corporation who string or maintain any wire across any railroad track in this state at a different height or in a different manner from that prescribed by the said board of railroad commissioners shall forfeit and pay to the state of Iowa the sum of one hundred dollars for each separate period of ten days during which such wire is so maintained, said forfeiture to be recovered in a civil action brought in any court of competent jurisdiction in the name of the state of Iowa, by the attorney-general, or by the county attorney of the county in which such wire is situated, at the request of the said board of railroad commissioners, and it is hereby made the duty of the said attorney-general and county attorney to bring such action forthwith upon being so requested. [32 G. A., ch. 109, § 7.]

SEC. 2120-k. **Accidents—investigation of—report.** That upon the occurrence of any serious accident upon any railroad within this state, which shall result in personal injury, or loss of life, the corporation operating the road upon which the accident occurred shall give immediate notice thereof to the board of railroad commissioners whose duty it shall be, if they deem it necessary, to investigate the same, and promptly report to the governor the extent of the personal injuries, or loss of life, and whether the same was the result of mismanagement or neglect of the corporation on whose line the injury or loss of life occurred. Provided, that such report shall not be evidence or referred to in any case in any court. [32 G. A., ch. 110.]

SEC. 2120-l. **Uniform gauge—inspection—order.** That the railroad commissioners of Iowa are charged with the duty, within one year from the passage of this act, to inspect and examine all railroad lines or branches that are of a gauge less than four feet eight and one-half inches in width of track, and if, considering the interest of the public and the railroad

traffic tributary to that line or branch road, and the physical or natural difficulties to be encountered and the expense that would be involved or incurred in changing the track to a gauge of four feet eight and one-half inches in width, and making it practical to operate the said line or branch road on that gauge, it appears to be reasonable and just to require the railway company which is the owner to do so, then said commissioners shall enter an order fixing a reasonable time within which said railroad track is to be changed to a gauge of four feet eight and one-half inches in width. [35 G. A., ch. 170, § 1.]

SEC. 2120-m. **Same.** It shall be the duty of the railroad commissioners, within one year after the passage of this act, to examine all the railroads in this state, now in existence, that are less than four feet eight and one-half inches gauge, and if they find that it is feasible or in their judgment necessary and reasonable to change the gauge of any such railroad to four feet eight and one-half inches, they shall make their order in writing, fixing such reasonable time within which such gauge shall be changed to that width. In making such order, said commissioners shall take into consideration the amount and probable life of the rolling stock of such narrow gauged road, and all other facts bearing on the reasonableness of the time to be allowed to make such change of gauge. [35 G. A., ch. 170, § 2.]

SEC. 2120-n. **Electric current transmission lines—franchise—hearing.** Upon petition to the railroad commission of the state of Iowa, said railroad commission may grant to any individual or corporation organized under the laws of Iowa, or corporation authorized to transact business in Iowa under the general incorporation laws of the state, engaged in the manufacture, sale, or distribution for sale of electric current for light, power, or heating purposes, the right within the state, except in cities and towns, to erect, use and maintain poles, wires, guy wires, towers, fixtures and other necessary construction for the purpose of conducting electricity for lighting, power and heating purposes over, along and across any public lands, highways or streams or the lands of any person or persons, and to acquire the necessary interests in real estate therefor. The said petition shall set forth the manner, methods and specifications for the construction of said line, together with a general description of the public lands, highways, streams or private lands over which it is desired that said transmission line be constructed, together with a map showing the starting point, route and terminus of said proposed line. Upon the filing of said petition, the commission shall cause publication in the official newspapers of each county into or through which said proposed line extends, of a notice addressed to the citizens of said county, which notice shall contain a statement as to the purpose of the petition, a description of the lands to be traversed by the transmission line, and the date and place fixed by the commission for hearing upon said petition.

The date fixed shall be not less than ten days after the last publication of said notice hereinbefore provided for, and at any time before final submission to the commission, objections in writing to the proposed line, either as to its establishment or location, may be filed with the commission and shall be given due consideration. The expense of said publication shall be paid by the applicant as a condition precedent to said hearing. The commission may personally examine the proposed route and upon said hearing may grant the application either as a whole or in part, or upon such conditions as to terms and location as to the commission may seem right and just. The privilege granted by the commission shall be and con-

stitute a franchise to operate and maintain the proposed transmission line, but all rights granted by said franchise shall be subject to the provisions of this act and also to such regulations as the legislature may, from time to time, prescribe, either by direct legislative enactment or by and through the railroad commission, under the laws of Iowa now or hereafter in force. [35 G. A., ch. 174, § 1.]

SEC. 2120-o. **Additional rights—how granted.** Any person or corporation organized under the laws of this state, or corporation authorized to transact business in Iowa under the general incorporation laws of the state, owning or operating a transmission line for the conducting of electricity, or who or which has obtained a right so to do, and desires to acquire additional rights for the purposes contemplated herein, may petition the railroad commission, as hereinbefore provided, for the original granting of such right, and the same proceedings shall be taken as hereinbefore provided; provided, however, that before the commission shall act upon such petition, the person or corporation filing same shall, with said petition, file its consent that the provisions of this act and of all acts or laws relating to public utilities or to the regulation, supervision, or control thereof which are now in force or which may be hereafter enacted shall apply to its existing line or lines with the same force and effect as though said line or lines had been constructed under the permit provided for in section one hereof. [35 G. A., ch. 174, § 2.]

SEC. 2120-p. **Obtaining franchise deemed acceptance of provisions and regulations.** Any transmission line proceeding under this act and obtaining the franchise herein provided shall be conclusively held to an acceptance of the provisions of this act and of all acts or laws relating to public utilities or to the regulation, supervision, or control thereof which are now in force or which may be hereafter enacted, and to have consented to such reasonable regulation as the commission may, from time to time, prescribe. [35 G. A., ch. 174, § 3.]

SEC. 2120-q. **Eminent domain—extent—procedure.** Any person or corporation having secured the franchise provided for in the preceding sections shall thereupon be vested with the right of eminent domain to such extent as may be necessary and as prescribed and approved by the commission, not exceeding twenty-five feet in width to carry out the purposes of said franchise, and in the event agreement with the private owner of lands as to damages caused by the construction of said transmission line cannot be made, the same proceedings shall be taken as provided for taking private property for works of internal improvement in chapter four of title ten of the code and amendments thereto. [35 G. A., ch. 174, § 4.]

SEC. 2120-r. **Supervision of construction—requirements—danger signals.** The railroad commission shall have power of supervision over the construction of said transmission line and over its future operation and maintenance, and said transmission line shall be constructed near and parallel to the right of way of the railways of the state or along the division lines of the lands, according to the government survey thereof, wherever the same is practicable and reasonable, and so as not to interfere with the use by the public of the highways or streams of the state, nor unnecessarily interfere with the use of any lands by the occupant thereof, and shall be built of strong and proper wires attached to strong and sufficient supports properly insulated at all proper points of attachment; all wires, poles and other devices which by ordinary wear or other causes are no longer safe shall be removed and replaced by new wires, poles or other devices, as the case may be, and all abandoned wires, poles or other devices

shall be at once removed. Where wires carrying current are carried across, either above or below wires used for other service, the said transmission line shall be constructed in such manner as to eliminate, so far as practicable, damages to persons or property by reason of said crossing; there shall also be installed sufficient devices to automatically shut off electric current through said transmission line whenever connection is made whereby current is transmitted from the wires of said transmission line to the ground, and there shall also be provided a safe and modern improved device for the protection of said line against lightning. No transmission line shall be constructed, except by agreement, within one hundred feet of any dwelling house or other building, except where said line crosses or passes along a public highway or is located alongside or parallel with the right of way of any railway company. At any crossing of any highway by said transmission line, the poles or towers next to the highway shall be labeled with the following words: "Danger.....volts Electricity." The stroke of said letters and numbers shall be at least four inches in length and not less than five eighths of an inch in width, and the color of the letters and numbers shall be in contrast with the color of the background. The said labels shall show the maximum number of volts of electricity transmitted over said line, and said label shall face toward the highway. Where said poles or towers are extended along said highway and within the limits thereof or immediately adjacent thereto, the sign hereinbefore described shall be placed at least every quarter of a mile. The commission shall have full power and authority to add such further and additional rules and regulations as regards location, construction, operation and maintenance of said transmission line as may be reasonable. [35 G. A., ch. 174, § 5.]

SEC. 2120-s. **Injury to person or property—burden of proof.** In case of injury to any person or property by any transmission line operating under this act, negligence will be presumed on the part of the person or corporation operating said line in causing said injury, but this presumption may be rebutted by proof, but no change in the rule of the burden of proof shall exist in favor of employes of the person or corporation operating said transmission line who are charged with or engaged in the construction, reconstruction, repair or maintenance thereof. [35 G. A., ch. 174, § 6.]

SEC. 2120-t. **Access to lines—damages to lands and crops.** Individuals or corporations operating transmission lines constructed under the provisions of this act, or operating by acceptance under the provisions of this act, shall have reasonable access to said transmission line for the purpose of constructing, reconstructing, enlarging, repairing or locating the poles, wires or construction and other devices used in or upon said transmission line, but shall pay to the owner of such lands and of crops thereon all damages to said lands or crops caused by entering, using and occupying said lands for said purposes. Said damages shall be payable annually at the end of each season, and shall be payable in the county where caused, but nothing herein contained shall be construed to prevent the execution of an agreement between said operating company and the owner of said land or crops with reference to the use thereof. [35 G. A., ch. 174, § 7.]

SEC. 2121. **Salaries.** The board shall keep an office in the capitol at the seat of government, and each commissioner shall receive a salary of twenty-two hundred dollars a year. The secretary of the board shall receive a salary of eighteen hundred dollars a year. [32 G. A., ch. 2, § 7; 17 G. A., ch. 77, § 6.]

CHAPTER 6-A.

OF THE COMMERCE COUNSEL.

SECTION 2121-h. **Appointment—term—removal—vacancy.** That there is hereby created and established the office of commerce counsel, which shall be filled by an attorney of the state of Iowa, who shall be appointed by the board of railroad commissioners, subject to the approval of two thirds of the members of the senate in executive session. During the session of the thirty-fourth general assembly, and every four years thereafter, an attorney shall be appointed as said commerce counsel, whose term of office shall be for a period of four years commencing on the first day of July in the year appointed, or until his successor is appointed and qualified. The board of railroad commissioners may, by and with the consent of the senate, during a session of the general assembly, remove said counsel for malfeasance or nonfeasance in office, or for any cause that renders him ineligible for appointment, or incapable or unfit to discharge the duties of his office; and his removal, when so made, shall be final. A vacancy in said office occurring while the general assembly is in session, shall be filled for the unexpired term, by an appointment made by the board of railroad commissioners, with the approval of two thirds of the members of the senate in executive session. If the general assembly is not in session, then the said vacancy shall be filled by an appointment made by the board of railroad commissioners, which appointment shall expire thirty days from the time the next general assembly convenes. [34 G. A., ch. 94, § 1.]

SEC. 2121-i. **Eligibility.** No person in the employ, or owning any bonds, stock or property in, or who has, in any way or manner, pecuniary interest in any corporation, or business subject to the jurisdiction of the state board of railroad commissioners or interstate commerce commission, shall be eligible to said office; and the entering into the employ of, or acquiring of any stock or other interest in, any such corporation or business by said attorney, after his election or appointment, shall disqualify him from holding said office or performing the duties thereof. Said commerce counsel shall not engage in any other business, vocation or employment, than herein specified, nor shall he be a member of any political committee, or contribute to any political campaign fund, or take any part in political campaigns or be a candidate for any political office, during his term as commerce counsel. [34 G. A., ch. 94, § 2.]

SEC. 2121-j. **Office — assistants — compensation — expenses.** Said commerce counsel shall have his office in the quarters assigned to the board of railroad commissioners and he shall have free access to all the files, documents, reports and papers in said offices. He shall have the power and authority to appoint and remove, subject to the approval of the board of railroad commissioners, assistants, stenographers and rate clerks to assist him in the performance of his duties, the salaries and expenses of said employes to be paid out of the funds at the disposal of the board of railroad commissioners and subject to the order of said board. The annual salary of the said commerce counsel shall be five thousand dollars. Compensation of all assistants, stenographers and rate clerks shall be fixed by the board of railroad commissioners. The commerce counsel and other necessary agents and experts shall have reimbursed to them all the actual and necessary traveling, and all other expenses and disbursements incurred or made by him in the discharge of his official duties, such expenditures to be approved by the board of railroad commissioners, and paid

out of such funds as shall be appropriated for said purpose by the general assembly. [34 G. A., ch. 94, § 3.]

SEC. **2121-k. Appropriation.** There is hereby appropriated from any funds in the state treasury, not otherwise appropriated, sufficient amount thereof to pay the salary of said commerce counsel. [34 G. A., ch. 94, § 4.]

SEC. **2121-l. Duties.** The commerce counsel shall be the legal adviser of the railroad commissioners, and it shall be his duty to diligently investigate the reasonableness of the rates charged or to be charged for services rendered or to be rendered by the railroad companies, express companies, or of other individuals, parties, or corporations, subject to the jurisdiction of said board of railroad[1] commissioners, and it shall also be his duty to diligently investigate the reasonableness of the rates, charges, rules and practices of common carriers on interstate transportation, whenever directed by the board of railroad commissioners or whenever in his judgment any of said rates, charges, rules, or practices are undue, unjust, unreasonable, unlawful, unduly prejudicial or unduly discriminatory against any of the citizens or industries of the state of Iowa. It shall be his duty, if they pertain to intrastate business, to institute proceedings relative to such matters before said board of railroad commissioners and to prosecute same to final determination before said board or to any court to which same may be taken. If they concern interstate transportation, it shall be his duty whenever in his judgment such action is necessary or whenever directed by the railroad commission to institute proceedings before the interstate commerce commission and prosecute the same to final determination before said commission or in any court to which same may be taken. It shall also be his duty to act as attorney for and represent the board of railroad commissioners in all of the courts of this state or of the United States in which the validity of any order of said board is an issue. It shall be the duty of said commerce counsel also in all cases before the railroad commissioners in which any person or persons have filed complaint against any person, firm or corporation over which the state board of railroad commissioners has jurisdiction to appear for and in behalf of such person or persons so filing such complaint. It shall also be his duty to institute and prosecute in any of the courts any and all suits necessary to the proper enforcement of any rule or order of said railroad commissioners or to make defense therein whenever said rule or order may be called in question, provided that the duty here enjoined upon the commerce counsel shall not be construed to in any wise limit or abridge the authority or jurisdiction of the attorney-general. [35 G. A., ch. 177, § 1; 34 G. A., ch. 94, § 5.]

[1]"railway" in enrolled bill. EDITOR.]

CHAPTER 7.

OF THE REGULATION OF CARRIERS BY RAILWAY.

SECTION 2124. Unjust discrimination.

The provision of 22 G. A., ch. 28, in relation to unjust discriminations and the punishment therefor, held applicable to cases wherein railway companies voluntarily fixed joint rates, irrespective of provisions of 23 G. A., ch. 17 (code §§ 2152–2157), relating to the fixing of schedules of joint rates by the railroad commissioners. *Blair v. Sioux City & P. R. Co.*, 109–369, 80 N. W. 673.

A rate on shipment of hogs from different points in the state to a central point for grading and distribution and shipment to different destinations outside of the state, held to constitute an interstate rate and not discriminatory although less than the rate for shipment from such different points to the central point. *Central Trust Co. v. Chicago, R. I. & P. R. Co.*, 156–104, 135 N. W. 721.

An action for discrimination under this and the following sections is *ex delicto*, in which the party suing can recover only for damages actually accruing to him. *Ibid.*

If the plaintiff is the assignee of goods purchased by him and delivered at his place of business the question whether he suffers damage by a discriminatory rate is one of fact. *Ibid.*

SEC. 2125. **Undue preference — switching charges — switching service defined.** It shall be unlawful for any common carrier subject to the provisions of this chapter to make or give any preference or advantage to any particular person, company, firm, corporation or locality, or any particular description of traffic, in any respect whatsoever, or subject any particular person, company, firm, corporation or locality, or any particular description of traffic, to any prejudice or disadvantage in any respect whatsoever; but this shall not be construed to prevent any common carrier from giving preference as to time of shipment of live stock, uncured meats, or other perishable property. All common carriers subject to the provisions of this chapter shall, according to their respective powers, afford all reasonable, proper and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding and switching of cars, and for the receiving, forwarding and delivering of passengers and property to and from their several lines, and to and from other lines and places connected therewith; and shall not discriminate in their accommodations, rates and charges between such connecting lines. Any common carrier may be required to switch and transfer cars for another, for the purpose of being loaded or unloaded, upon such terms and conditions as may be prescribed by the board of railroad commissioners. The switching service of common carriers is hereby defined to be the shifting of loaded or empty cars from one main line or siding to another main line or siding at an industry, or at a group of industries, or at a station, village or city and within its industrial vicinity, as may be defined by the board of railroad commissioners, by means of switches and connecting tracks. [34 G. A., ch. 95, § 1.] [22 G. A., ch. 28, § 4; 15 G. A., ch. 18; C. '73, §§ 1292–6.]

SEC. 2128-a. **Passenger tickets—redemption—time limit.** It shall be the duty of every railroad company, corporation, person or persons acting as common carriers of passengers in the state of Iowa, to provide for the redemption, at the place of purchase and at the general passenger agent's office of said carrier, of the whole or any integral part of any passenger ticket or tickets that such carrier may have sold, as the purchaser or owner has not used for passage or received transportation for which such ticket should have been surrendered; and said carrier shall there redeem the same at a rate which shall equal the difference between the price paid for the whole ticket and the cost of a ticket between the points for which said ticket has been actually used, and no carrier shall limit the time in which redemption shall be made to less than ten days from date of sale at the place of purchase and six months from date of sale at general passenger agent's office. [28 G. A., ch. 71, § 1.]

The requirement of the statute is that provision shall be made for the redemption of tickets which means that the person or persons in charge of the ticket window and authorized to sell tickets shall be prepared to make redemption when called upon to do so. The statute is not satisfied by the mere appointment of one person who may or may not have his station at the window where the ticket busi-

ness is transacted, as the one through whom redemption must be made. *Rohrig v. Chicago, R. I. & P. R. Co.*, 130–380, 106 N. W. 935.

Unless the company adopts some regulation limiting the time for redemption of tickets, provided for by 28 G. A., ch. 71, demand therefor may be made at any time within the period of the general statute of limitations. *Jolley v. Chicago, M. & St. P. R. Co.*, 119–491, 93 N. W. 555.

The company is afforded time in which to investigate, but must at its peril discharge the statutory obligation if found to exist, within the period fixed, and the holder of a ticket is not bound to apply a second time within ten days to have his ticket redeemed. *Ibid.*

Formal tender of the tickets is not essential, provided the agent has notice that the ticket holder presents them for redemption, and refuses at the time to accept them for that purpose. *Ibid.*

The remedy provided by the statute is for those purchasing tickets of passage in good faith and for actual use. One who purchases them for the purpose of subsequently presenting them for redemption and collecting the penalty in case the redemption is refused, is not entitled to relief. *Ibid.*

SEC. **2128-b. Notice posted as to limitation and transferability.** No railroad company, corporation, person or persons doing business in the state of Iowa, as common carrier of passengers, whose rate of fare is regulated by statute of this state, shall sell or issue to any person, at the maximum rate allowed by law, any ticket or tickets bearing any condition of limitation as to the time of use, or as to transferability, without first providing for the redemption of said ticket, as directed by the preceding section hereof, and also having notice of such provision and privilege of redemption conspicuously posted at each place where sales of tickets are made by such common carriers in this state. A failure to provide for the redemption of such ticket or to give notice as above provided shall make all conditions and limitations as to time of use or transferability of no force or effect. [28 G. A., ch. 71, § 2.]

If a passenger in order to secure transportation on a particular train is required by the agent to purchase a ticket to a more distant point than his destination and afterwards, not having used it, presents it for redemption, his right to have it redeemed under the statute cannot be successfully questioned unless he is shown to have acted in bad faith. *Cook v. Chicago, R. I. & P. R. Co.*, 136–497, 113 N. W. 1079.

SEC. **2128-c. Penalty.** Any railroad company, corporation, person or persons, who as common carriers shall sell or issue tickets as set forth in the preceding sections, and shall refuse or neglect to redeem the same, as by said sections provided, within ten days of date of demand, shall forfeit and pay to the owner of such ticket the purchase price of said ticket, and the further sum of one hundred dollars. [28 G. A., ch. 71, § 3.]

SEC. **2128-d. Mileage books.** Nothing in this act shall prohibit the sale of mileage books or tickets, at less than the maximum rates allowed by law, bearing reasonable conditions of limitation, as to the right of use for passage. [28 G. A., ch. 71, § 4.]

SEC. **2130. Penalty in treble damages.**

The penalty of treble damages authorized in case recovery is had for unlawful discrimination in rates should not be increased by allowing interest on the damages thus awarded. *Blair v. Sioux City & P. R. Co.*, 109–369, 80 N. W. 673.

While it is the duty of the carrier to provide proper facilities for the interchange of traffic between such carrier and a connecting carrier, or for the forwarding of goods over other lines, the carrier will not be liable in treble damages unless it appears that its failure was the result of undue preferences or unlawful combinations. The statutory provision is penal in character and is to be strictly construed. *Clark v. American Express Co.*, 130–254, 106 N. W. 642.

The right of action against a carrier on the ground of discrimination is barred within two years unless fraudulently concealed. *Central Trust Co. v. Chicago, R. I. & P. R. Co.*, 156–104, 135 N. W. 721.

SEC. **2145. Discrimination—punishment—schedule of switching charges.** If any such railway corporation shall charge, collect or receive

for the transportation of any passenger or freight of any description upon its railroad, for any distance within the state, a greater amount of toll or compensation than is at the same time charged, collected or received for the transportation in the same direction of any passenger or like quantity of freight of the same class, over a greater distance of the same railway; or if it shall charge, collect or receive at any point upon its road a higher rate of toll or compensation for receiving, handling or delivering freight of the same class and quantity than it shall at the same time charge, collect or receive at any other point upon the same railway; or if it shall charge, collect or receive for the transportation of any passenger or freight of any description over its railway a greater amount as toll or compensation than shall at the same time be charged, collected or received by it for the transportation of any passenger or like quantity of freight of the same class being transported in the same direction over any portion of the same railway of equal distance; or if it shall charge, collect or receive from any person a higher or greater amount of toll or compensation than it shall at the same time charge, collect or receive from any other person for receiving, handling or delivering freight of the same class and like quantity at the same point upon its railway; or if it shall charge, collect or receive from any person for the transportation of any freight upon its railway a higher or greater rate of toll or compensation than it shall at the same time charge, collect or receive from any other person or persons for the transportation of the like quantity of freight of the same class being transported from the same point in the same direction over equal distances of the same railway; or if it shall charge, collect or receive from any person for the use and transportation of any railway car or cars upon its railroad for any distance, a greater amount of toll or compensation than is at the same time charged, collected or received from any other person for the use and transportation of any railway car of the same class or number, for a like purpose, being transported in the same direction over a greater distance of the same railway; or if it shall charge, collect or receive from any person for the use and transportation of any railway car or cars upon its railway a higher or greater compensation in the aggregate than it shall, at the same time, charge, collect or receive from any other person for the use and transportation of any railway car or cars of the same class for a like purpose, being transported from the same original point in the same direction, over an equal distance of the same railway; all such discriminating rates, charges, collections or receipts, whether made directly or by means of any rebate, drawback, or other shift or evasion, shall be received as prima-facie evidence of the unjust discriminations prohibited by this chapter; and it shall not be a sufficient excuse or justification thereof on the part of said railway corporation that the station or point at which it shall charge, collect or receive less compensation in the aggregate for the transportation of such passenger or freight, or for the use and transportation of such railway car the greater distance than for the shorter distance, is a station or point at which there exists competition with another railway or other transportation line. This section shall not be construed so as to exclude other evidence tending to show any unjust discrimination in freight or passenger rates. The provisions of this section shall apply to any railway, the branches thereof, and any road or roads which any railway corporation has the right, license or permission to use, operate or control, wholly or in part, within this state; but shall not be so construed as to prevent railway corporations from issuing commutation, excursion or thousand-mile tickets, if the same are

issued alike to all applying therefor. Provided, however, that nothing in this section shall be so construed as to prevent railroad companies or the board of railroad commissioners from establishing schedules of reasonable charges applicable to switching services only, and which shall be independent of any schedule of charges which may be provided for the regular line haul freight service of common carriers. [34 G. A., ch. 95, § 2.] [22 G. A., ch. 28, § 24.]

When joint rates are established between all the points on two or more lines of road, if within the state, extortion and discrimination are prohibited. *Blair v. Sioux City & P. R. Co.*, 109–369, 80 N. W. 673.

SEC. 2152. Joint rates.

When two or more companies enter into an agreement for joint rates, which agreement covers all stations upon the line in any given state, they virtually create a new and independent line, and become subject to the law preventing unjust discrimination and unreasonable exaction. *Blair v. Sioux City & P. R. Co.*, 109–369, 80 N. W. 673.

The corresponding section of 23 G. A., ch. 17, held not unconstitutional. *Ibid.*

SEC. 2153. **Connecting lines.** That section twenty-one hundred fifty-three of the code be and the same is hereby repealed and the following enacted in lieu thereof:

"Every owner or consignor of freight to be transported by railway from any point within this state to any other point within this state shall have the right to require that the same shall be transported over two or more connecting lines of railway, to be transferred at the connecting point or points without change of car or cars if in carload lots, and with or without change of car or cars if in less than carload lots, whenever the distance from the place of shipment to destination, both being within this state, is less over two or more connecting lines of railway than it is over a single line of railway, or where the initial line does not reach the place of destination; and it shall be the duty, upon the request of any such owner or consignor of freight, made to the initial company, of such railway companies whose lines so connect, to transport the freight without change of car or cars if the shipment be in a carload lot or lots, and with change of car or cars if it be in less than carload lots, from the place of shipment to destination, whenever the distance from the place of shipment to destination, both being within this state, is less than the distance over a single line, or when the initial line does not reach the point of destination, for a reasonable joint through rate. This section shall apply to interurban railways and their connection with ordinary steam railways." [32 G. A., ch. 111, § 1; 23 G. A., ch. 17, § 2.]

In this statutory provision, the legislature evidently recognized the long continued custom of railroads of receiving the cars of other roads for the transportation of freight over their own roads without breaking bulk, and the board of railroad commissioners may require a railroad to receive freight for shipment from its road in cars of a private person or of another road. *State v. Chicago, M. & St. P. R. Co.*, 152–317, 130 N. W. 802.

SEC. 2155. **Schedules of joint rates.** Section twenty-one hundred fifty-five of the code be and the same is hereby repealed and the following enacted in lieu thereof:

"The board of railroad commissioners shall, within ten days after this act takes effect, notify in writing every railway company owning or operating a railway within this state that it will, upon a day named in such notice, which day shall not be more than thirty days after giving said notice, take up for investigation the subject of establishing joint through

rates, as herein provided, between the railway lines in this state. It shall also give a similar notice, directed 'To whom it may concern,' and so publish the same that it will have general circulation throughout the state. All corporations, partnerships and persons interested in the subject may present themselves at the hearing and be heard, under such rules and regulations as the board may prescribe. At the end of the investigation, which shall be carried on with all due diligence, the said board of railroad commissioners shall make and publish a schedule of joint through railway rates for such traffic and on such routes as in its judgment the fair and reasonable conduct of business requires shall be done by carriage over two or more lines of railway, and will promote the interests of the people of this state. In the making thereof, and in changing, revising or adding to the same, the board shall be governed as nearly as may be by the preceding sections of this chapter, and shall take into consideration, among other things, the rates established for shipments within this state for like distances over single lines, the rates charged by the railway companies operating such connecting lines for joint interstate shipments, and the increased cost, if any, of a joint through shipment as compared with a shipment over a single line for like distances. In establishing such rates for shipments in less than carload lots, in cases where at the connecting point or points in the line of shipment the connecting railways have not and are not required to have a common station or stopping place for loading or unloading freight, the board shall make such lawful regulations as in its judgment will be fair and just respecting the transportation of such freight from the usual unloading place of one railway to the usual loading place of the other. The joint through rates thus established shall be promulgated by mailing a printed copy thereof to each railway company affected thereby, and shall go into effect within ten days after they are so promulgated; and from and after that time an official printed schedule thereof shall be prima-facie evidence, in all the courts of this state, that the rates therein fixed are just and reasonable for the joint transportation of such freight between the points and over the lines described therein. The said board shall deliver a printed copy of said schedule to any person making application therefor. The share of any railway company of any joint through rate shall not be construed to fix the charge that it may make for transportation for a similar distance over any part of its line for any single rate shipment or the share of any other joint rate. The board, upon such reasonable notice as it may prescribe, may, upon its own motion or upon the application of any person, firm or corporation interested therein, revise, change or add to any joint through rates fixed or promulgated hereunder; and any such revised, changed or added joint rates shall have the same force and effect as the rate or rates originally established. The said board is empowered to authorize, upon proper hearing, any railway company whose line connects the point of shipment with the point of destination but requires a longer haul than the joint haul over which a joint rate has been established, to charge the joint rate without affecting the charge upon any other part of its line, except that the charge for a like kind of property must not be greater for a shorter than for a longer distance over its railroad, all of the shorter haul being included within the longer. This section shall apply to interurban railways and their connection with ordinary steam railways." [32 G. A., ch. 111, § 2; 24 G. A., ch. 25; 23 G. A., ch. 17, § 3.]

SEC. 2157-a. **Transportation of live stock — conditions — return transportation.** On and after May first, nineteen hundred and four,

common carriers of live stock, in carload lots, upon receiving, in this state, for shipment one or more carloads of horses or mules or two or more carloads of other live stock, shall upon demand of the owner of such animals offered for shipment, issue to such owner, or the actual agent or employe of such owner, without other consideration transportation from the place of receiving such shipment to the place of destination, and return, such transportation to be limited to one person for each shipment, as is above set out. When a single shipment aggregates six cars or more, such owner shall be entitled, on demand, as is above provided, to transportation for one additional person, such additional person to be an actual agent or employe of such owner, and such common carrier shall in like manner and under similar conditions issue transportation for one person to destination of shipment only to the shipper of one carload of cattle, hogs or sheep. The return transportation herein provided for is to be delivered, upon demand, at the office of the carrier at the place of destination, upon proper identification of the person so entitled to same, and shall be good for transportation if presented within forty-eight hours from the time of the delivery of such shipment at place of destination. [30 G. A., ch. 76, § 1.]

SEC. **2157-b. Penalty.** Any common carrier violating the above provisions shall forfeit and pay to the owner of any shipment, as is above provided, three times the amount of the regular fare expended by such owner for himself, or his agent, in going from point of shipment to point of destination, and return, of a shipment of stock as herein provided. [30 G. A., ch. 76, § 2.]

SEC. **2157-c. Misuse of transportation—trespasser.** Any person other than the owner, his agent or employe, as is described in section one hereof, attempting to use, or using, the transportation therein provided for, shall be considered a trespasser upon the trains or premises of such common carrier. [30 G. A., ch. 76, § 3.]

SEC. **2157-d. Water-closets in cabooses.** That the cabooses or cars attached to such stock trains, and in which the holders of such transportation are required to ride when accompanying such live stock to market, shall be provided with suitable water-closets for the use of such persons while in transit, provided that the provisions of this section shall not go into effect until January first, nineteen hundred and five, and that all such railroads shall be allowed until said time to comply with the requirements of this section. [30 G. A., ch. 76, § 4.]

SEC. **2157-e. Penalty.** Any railroad in this state engaged in the transportation of live stock, and failing or refusing to comply with the requirements of the foregoing section, shall be deemed guilty of a misdemeanor, and upon conviction thereof, shall be fined not less than one hundred dollars for each day's negligence or refusal to comply therewith; and all moneys so collected as fines shall be paid into the public school funds of the state. [30 G. A., ch. 76, § 5.]

SEC. **2157-f. Free passes—issuance or acceptance—what prohibited.** No common carrier of passengers shall, directly or indirectly, issue, furnish or give any free ticket, free pass or free transportation for the carriage or passage of any person within this state except as permitted in the second section hereof. Nor shall any common carrier, in the sale of tickets for transportation at reduced rates, discriminate between persons purchasing the same, except the persons described in the second section of this act. Nor shall any person accept or use any free ticket, free pass or free transportation except the persons described in said section.

The words "free ticket," "free pass," "free transportation" as used in this act shall include any ticket, pass, contract, permit or transportation issued, furnished or given to any person, by any common carrier of passengers, for carriage or passage, for any other consideration than money paid in the usual way at the rate, fare or charge open to all who desire to purchase. [32 G. A., ch. 112, § 1.]

An annual pass issued to a local attorney of the company in full compensation for prospective services of an occasional and casual character, held to be a free pass within the prohibition of this statute. *Schulz v. Parker*, 139 N. W. 173.

No interference with the jurisdiction of congress to regulate interstate commerce is necessarily involved in the statute. *Ibid.*

The statute is not unconstitutional on account of any defect in the title. *Ibid.*

SEC. 2157-g. **Persons entitled to such transportation.** The persons to whom free tickets, free passes, free transportation and discriminating reduced rates may be issued, furnished, or given are the following, to wit: (a) the officers, agents, employes, attorneys, physicians, and surgeons, of such common carriers of passengers whose chief and principal occupation is to render service to common carriers of passengers; (b) to the families of the persons included in subdivision "a" hereof; (c) the general officers of any such common carrier; (d) employes on sleeping cars, express cars, and linemen of telegraph and telephone companies, railway mail service employes, post-office inspectors, customs inspectors and immigration inspectors, newsboys on trains, baggage agents; (e) persons injured in wrecks and physicians and nurses attending such persons; (f) passengers traveling with the object of providing relief in cases of railroad accident, general epidemic, pestilence, or other calamitous visitation; (g) necessary caretakers of live stock, vegetables and fruit, including return transportation to forwarding station; (h) the officers, agents or regularly accredited representatives of labor organizations, composed wholly of employes of railway companies; (i) inmates of homes for the reform or rescue of the vicious or unfortunate, including those about to enter and those returning home after discharge, and boards of managers, including officers, and superintendents of such homes; (j) superannuated and pensioned employes and members of their families and widows of employes who die while in the service of such common carriers; (k) employes crippled and disabled in the service of a common carrier of passengers; (l) policemen, mail carriers and firemen of any city wearing the insignia of their office within the limits of such city; (m) ministers of religion, traveling secretaries of Railroad Young Men's Christian Associations, inmates of hospitals and charitable and eleemosynary institutions, and persons exclusively engaged in charitable and eleemosynary work; (n) indigent, destitute and homeless persons, while being transported by charitable societies or hospitals, and necessary agents, employes in such transportation; (o) school children to and from public or parochial schools; (p) the state fish and game warden, and his car and necessary assistants therewith, when engaged in the performance of official duties.

In any prosecution under this act if it is claimed that a free ticket, free pass or other transportation was wrongfully issued or given to physicians or surgeons, attorneys, agents, [or] employes, it shall be incumbent upon the defendant to prove the character of the service rendered, or to be rendered. The provisions of this act shall not be construed to prohibit the interchange of passes for the persons to whom free tickets, free passes, or free transportation may be furnished or given under the provisions of this section. Nothing in this act shall operate to repeal the provisions of section

twenty-one hundred fifty of the code so far as said section refers to the members of the national guard, nor shall it operate to repeal section twenty-one hundred fifty-one of the code. Nothing in this act shall be construed to invalidate any existing contract between a street railway company and a city where a condition of a franchise grant requires the furnishing of transportation to policemen, firemen, and city officers, while in the performance of official duties. [34 G. A., ch. 96, § 1; 33 G. A., ch. 130, § 1.] [32 G. A., ch. 112, § 2.]

This statute is not unconstitutional as interfering with freedom of contract between the employer and employe. *Schulz v. Parker*, 139 N. W. 173.

SEC. **2157-h. Testimony—immunity from prosecution.** No person, within the purview of this act shall be privileged from testifying in relation to anything herein prohibited, but no person having so testified shall be liable to any prosecution or punishment for any offense concerning which he was required to give his testimony. [32 G. A., ch. 112, § 3.]

SEC. **2157-i. Penalty.** Any common carrier, its officer, agent or representative, violating any of the provisions of this act shall be fined in a sum not less than one hundred dollars and not more than ten hundred dollars for each offense, or in the discretion of the court shall be imprisoned in the county jail for not less than thirty and not more than ninety days; and any person other than the persons excepted in the second section of this act, who accepts or uses any free ticket, free pass or free transportation for carriage or passage within this state shall be subject to a like penalty. [32 G. A., ch. 112, § 4.]

SEC. **2157-j. Names of free pass beneficiaries reported.** Every common carrier of passengers within the provisions of this act shall on or before the first day of February of each year, file with the executive council of the state of Iowa, a sworn statement showing the names of all persons within this state to whom, during the preceding calendar year, it issued, furnished or gave a free ticket, free pass, free transportation or a discriminating reduced rate, except wage earners of common carriers in their ordinary employment and families of such wage earners, and disclosing such further information as will enable the council to determine whether the person to whom it was issued, was within the exception of this act. [32 G. A., ch. 112, § 5.]

SEC. **2157-k. Repeal.** When this act takes effect, it shall repeal chapter ninety, laws of the thirty-first general assembly, and all acts and parts of acts inconsistent with this act. [32 G. A., ch. 112, § 6.]

SEC. **2157-l. Weighing of coal in car lots—scales—weight certificates.** That every person, firm or corporation engaged in operating any railroad within the state of Iowa shall equip the line of its track and thereafter maintain thereon in good order, track scales of sufficient capacity to weigh all carloads of coal that may be transported over the said railroad, and shall weigh the same at the request of any owner, consignor or consignee of such commodities, and furnish written certificates of such weights to such owner, consignor or consignee as hereinafter provided. Such track scales shall be so installed and maintained at all division stations along the line of such railroads within the state of Iowa, and at such other stations as the board of railroad commissioners shall from time to time direct. [32 G. A., ch. 113, § 2.]

SEC. **2157-m. At point where shipment originates.** That every person, firm or corporation engaged in operating any railroad within the state of Iowa, over which coal, in carload lots shall be transported for hire,

shall weigh such coal at point where such shipment originates unless covered by weight agreement between consignor and railway company, provided such point is equipped with track scales. If not so equipped, it shall be weighed at first practicable point en route where track scales are provided. Said person, firm or corporation shall furnish to said shipper a bill of lading showing date and place weighed, also the gross, tare and net weight for each carload of coal so weighed. The tare weight shall be determined by using actual weight of empty car at loading station, provided track scales are maintained at such point. [32 G. A., ch. 113, § 3.]

SEC. 2157-n. **At destination upon request—fee.** Such coal shall be weighed at destination upon request of consignee when there are track scales at such point. If not equipped with track scales at such point, then at nearest practicable point en route where such scales are maintained and certificate of weight showing actual gross, tare and net weights, shall be furnished to consignee and settlement of freight charges based on these weights. A reasonable charge of not more than one dollar per car, may be made for such weighing on request. [32 G. A., ch. 113, § 4.]

SEC. 2157-o. **How weighed.** Cars when weighed on track scales shall be uncoupled, clear and unhampered at both ends, carefully weighed by competent weighmen and certificates issued upon request of consignees, showing gross, tare and net weights. [32 G. A., ch. 113, § 5.]

SEC. 2157-p. **Prima-facie evidence.** Certificates mentioned in this act shall be prima-facie evidence of the facts therein recited in any action arising between consignors and consignees and common carriers. [32 G. A., ch. 113, § 6.]

SEC. 2157-q. **Penalty.** Any common carrier operating in this state violating any of the provisions of this act by neglecting or refusing to weigh cars or to furnish certificates of weights as herein provided shall be guilty of a misdemeanor and shall be, upon conviction thereof, fined in the sum of not more than one hundred twenty-five dollars for each and every violation. [32 G. A., ch. 113, § 7.]

SEC. 2157-r. **Reconsignment without charge.** Upon request of the consignee it shall be the duty of any common carrier of freight to reconsign, rebill and reship from any place of destination within the state to any other place within the state any property in carload lots, whether accompanied by any person or not, brought to said place of destination over its own or other line and treat the same in all respects as an original shipment between such places, provided the charges to first place of destination are paid or secured to the satisfaction of such company. [32 G. A., ch. 114.]

SEC. 2157-s. **Movement of cars of live stock—burden of proof.** That it is hereby made the duty of all common carriers of freight within this state to move cars of live stock at the highest practicable speed consistent with reasonable safety, and the reasonable movement of its general traffic. The burden of proof that cars of live stock are so moved shall be upon the carrier, and proof that such cars were moved according to schedule or time table shall not be prima-facie evidence that they were moved at the highest practicable speed consistent with reasonable safety. [35 G. A., ch. 180, § 1.] [32 G. A., ch. 115, § 1.]

SEC. 2157-t. **Railroad commissioners to prescribe speed.** In order to enforce the duty prescribed in section one, the board of railroad commissioners shall immediately and from time to time investigate the practice of the common carriers with respect to the movement of live stock; and if it ascertains at any time that the common carriers or any of them are

not moving cars of live stock with the proper speed, then upon notice to any such common carrier or carriers, the said board shall prescribe the speed at which and the conditions under which cars of live stock shall be moved within this state by any such carrier or carriers. The order shall specify the time at which it shall go into effect, which shall be as soon as, in the judgment of the board, the carrier or carriers affected can, with reasonable diligence, readjust its or their time-tables. The power to prescribe speed and determine conditions for the movement of cars of live stock within this state is hereby expressly conferred upon the said board of railroad commissioners. [32 G. A., ch. 115, § 2.]

SEC. 2157-u. **Enforcement.** Any order, ruling or regulation made by the board under this act shall be enforceable as provided in section twenty-one hundred nineteen of the code. [32 G. A., ch. 115, § 3.]

CHAPTER 8.

OF TELEGRAPH AND TELEPHONE LINES.

SECTION 2158. Right of way.

Under § 1324, code of '73, as amended by 19 G. A., ch. 104, providing that any person or company may construct a telephone line along the public highways of the state, held that the term "public highways" as used included city streets, and that a telephone company might occupy such streets without the city's consent. *Chamberlain v. Iowa Telephone Co.*, 119–619, 93 N. W. 596.

Where grant is made to a telephone company to use the streets of a city without limitation as to territory it has the right under such grant to extend its service to meet the demands of the public. *State v. Nebraska Tel. Co.*, 127–194, 103 N. W. 120.

A mutual voluntary association for the construction and maintenance of a telephone line for the exclusive benefit of the members of such association is not bound to extend its membership nor furnish connecting lines for others. *Dumont v. Peet*, 152–524, 132 N. W. 955.

The general provisions of this section are limited and controlled by those found in code §§ 775 and 776 as to the granting of franchises to construct and operate telegraph or telephone lines in the streets of a city. *Farmers' Telephone Co. v. Washta*, 157– —, 133 N. W. 361.

SEC. 2161. Liability for refusing to transmit messages.

Telegraph companies are to a limited sense and yet in a strict sense common carriers of intelligence and news and are bound to afford equal facilities to all in like situations. *Huffman v. Marcy Mut. Tel. Co.*, 143–590, 121 N. W. 1033.

In the absence of special ruling, a patron of a mutual telephone company should not be cut off from the use of the line for any impropriety of its use until after warning and failure to desist. *Ibid.*

SEC. 2163. Liable for mistakes.

A telegraph company being engaged in a public employment may be liable in tort for breach of its obligations arising under a contract. *Cowan v. Western Union Tel. Co.*, 122–379, 98 N. W. 281.

Whether a telegraph company has used reasonable diligence as to the delivery of a message confided to it is to be determined upon the consideration of all the facts of the case, including improper or defective address, and is for the jury. *Hurlburt v. Western Union Tel. Co.*, 123-295, 98 N. W. 794.

Negligence being shown, damages for mental pain and anguish resulting from failure to deliver may be recovered. *Ibid.*

The statutory provision as to the liability of a telegraph company does not create a right of action in the addressee of a death message to recover damages for negligent delay in the delivery where none existed before, and therefore held that such provision was ineffective to sustain a recovery of damages for mental anguish by the addressee unaccompanied by any physical injury. *Rowan v. Western Union Tel. Co.*, 149 Fed. 550.

Negligent delay in delivering a telegram

containing an inquiry as to the price of land, but no proposition to buy which, if accepted, would have constituted a contract of sale, will not authorize recovery of damages for the delay based on loss of the sale. *Bennett v. Western Union Tel. Co.*, 129–607, 106 N. W. 13.

In an action against a telegraph company for damages resulting from negligent delay in transmitting a proposition for the exchange of real estate, held that as the proposition was made by mail and did not contemplate a response by telegram, it was for the jury to say whether the unreasonable delay in the acceptance of the contract through a telegraphic response was the cause of the loss of the benefits of the bargain. *Lucas v. Western Union Tel. Co.*, 131–669, 109 N. W. 191.

One who acts in response to a telegram apparently addressed to a person of a different name, cannot recover damages against the telegraph company for injuries resulting to him by reason of the fact that the telegram was not intended for him, although the telegram has been delivered to him by the company. *Bowyer v. Western Union Tel. Co.*, 130–324, 106 N. W. 748.

Damages resulting from failure to receive a telegram erroneously transmitted as to the name of the addressee may be recovered in an action against the company. *Hise v. Western Union Tel. Co.*, 137–329, 113 N. W. 819.

A telegraph company is liable for negligence in transmitting a forged telegram upon which there is reason to believe another will rely to his injury and from the transmission of which such injury results. *Wells v. Western Union Tel. Co.*, 144–605, 123 N. W. 371.

It is sufficient to render the company liable that the result likely to follow from reliance upon the genuineness of the telegram may be gathered in a general way from the fact of sending it. *Ibid.*

Therefore held that the telegraph company was liable for negligence in transmitting as genuine a forged telegram from one bank to another stating that the former would honor a draft by a specified person for a certain amount and that the holder of such draft might recover against the company although he was not the person to whom the telegram was addressed. *Ibid.*

If a telegraph company receives a forged message under circumstances which excite, or reasonably ought to excite, suspicion of its true character and forwards it without warning to the addressee who relies upon it to his injury, a liability to the person thus injured is incurred. *Citizens' Nat. Bank v. Western Union Tel. Co.*, 139 N. W. 552.

Error in the transmission of the message being shown, the burden is upon the defendant company to prove that the mistake was not due to its negligence. *Younker v. Western Union Tel. Co.*, 146–499, 125 N. W. 577.

An addressee may sue and recover damages but he must show that he suffered some damage. If the damage was suffered by the sender alone the addressee has no cause of action. *Ibid.*

Where a telegram is sent to an agent and by erroneous transmission the agent so acts as to cause a loss to the sender the agent has no right of action against the company unless he is in some way liable to his principal or suffers a loss as agent. *Ibid.*

In a proper case damages may be awarded for mental anguish resulting from the negligence of the defendant in the transmission or delivery of a message whenever such mental anguish is the natural and proximate result of such negligence. *Maley v. Western Union Tel. Co.*, 151–228, 130 N. W. 1086.

Relation by affinity does not give rise to a presumption of mental suffering in the case of failure to deliver a death message. *Foreman v. Western Union Tel. Co.*, 141–32, 116 N. W. 724.

It is not necessary however that the relationship of the parties be brought home to the company in order to sustain recovery for mental suffering in a proper case. *Ibid.*

In an action to recover damages for negligent delay in delivering a death message resulting in mental suffering to the addressee in consequence of his being unable to attend the funeral of a relative, the burden is upon the plaintiff to plead and prove either a close relationship with the deceased or such other facts showing such close and affectionate relations as to give rise to the mental suffering upon which the claim for damages is predicated. *Seddon v. Western Union Tel. Co.*, 146–743, 126 N. W. 969.

It is not essential to the recovery of such damages that the relationship relied upon shall appear in the message. *Ibid.*

The burden on the plaintiff to show negligence is satisfied by proving an unreasonable delay; the burden is then on the defendant to show the absence of negligence. *Ibid.*

The duty owed by a telegraph company is public, though growing out of contract, and the measure of damages for failure to discharge its duty is governed by the law of the forum. *Markley v. Western Union Tel. Co.*, 151–612, 132 N. W. 37.

If a message is sent as soon as given to the receiving agent of the company, no recovery can be had for delay in transmission resulting from an erroneous address. *Ibid.*

Where an agent for the sale of property, having a purchaser ready, willing and able to buy, is defeated in realizing his expected profit from such sale by the negligent delay of telegraphic service in the deliv-

ery of a message, he is entitled to recover the profits thus lost. *McNeil v. Postal Tel. Cable Co.*, 154–241, 134 N. W. 611.

Where the telegraph company installs a telephone in its office as a means of communication with those desiring to send messages to it for transportation, it is liable for the negligence of its agent in erroneously recording for transmission a message thus received by telephone. *Markley v. Western Union Tel. Co.*, 141 N. W. 443.

A telephone company may be liable under this section for damages in not furnishing the proper connection called for within a reasonable time. *Volquardsen v. Iowa Telephone Co.*, 148–77, 126 N. W. 928.

While an allegation of unreasonable delay might be sufficient to throw on defendant the burden of showing that the delay was not due to negligence, yet where the particular negligence relied on is alleged it must be proven and plaintiff cannot complain of failure of defendant to prove freedom from negligence in other respects. *Ibid.*

The liability of the telephone company being defined by statute, the damages must be the proximate result of the unreasonable delay proven. *Ibid.*

SEC. 2164. Negligence presumed—notice of claim.

The burden is upon the company to prove that mistake or delay in the transmission or delivery of a message is not due to its own negligence. *Cowan v. Western Union Tel. Co.*, 122–379, 98 N. W. 281.

It is error to admit in evidence a notice in writing of a claim for damages, where there is no allegation in the pleadings as to such notice. *Heald v. Western Union Tel. Co.*, 129–326, 105 N. W. 588.

Failure to allege notice is a good ground for motion in arrest of judgment in an action on a claim as to which notice is required. *Ibid.*

The objection that notice of a claim against a telegraph company for damages due to negligence was not given within sixty days, as required by statute, may be raised for the first time in a motion in arrest of judgment. *Free v. Western Union Tel. Co.*, 135–69, 110 N. W. 143.

Negligence will be presumed on proof of unreasonable delay in the delivery of a message and the burden is on the defendant to show that the delay was not due to negligence. *Potter v. Western Union Tel. Co.*, 138–406, 116 N. W. 130.

In estimating the time for notice of claim the date of the alleged negligence of the company and not the date of delivering the telegram to the company is to be considered. *Markley v. Western Union Tel. Co.*, 144–105, 122 N. W. 136.

The statutory provisions as to the time for filing claims cannot be waived by a stipulation made at the time that the telegram is delivered. *Ibid.*

The provision of this section as to notice does not apply to a case where there is neither erroneous transmission nor unreasonable delay, but it is sought to hold the company liable for negligence in transmitting a forged telegram and thereby misleading a party entitled to rely upon the information which the telegram purports to convey. *Wells v. Western Union Tel. Co.*, 144–605, 123 N. W. 371.

Where a telegram was sent by a principal to an agent and by reason of error in transmission the agent so acted as to cause damage to the principal, held that notice given by the agent of a claim on his individual behalf would not support an action by the principal. *Younker v. Western Union Tel. Co.*, 146–499, 125 N. W. 577.

The institution of suit and service upon the company within the sixty days is a sufficient compliance with the requirement as to notice. *Seddon v. Western Union Tel. Co.*, 146–743, 126 N. W. 969.

It is immaterial that in the petition the allegation is that the company failed to deliver the telegram, whereas from the testimony it appears that the delivery was negligently delayed. *Ibid.*

It seems that service of notice would not be premature if made after the completion of the tort complained of, although at the time of the service of such notice the cause of action has not fully accrued. *Salinger v. Western Union Tel. Co.*, 147–484, 126 N. W. 362.

Where in consequence of negligence in the transmission of a message an agent was imprisoned, held that notice of complaint on the part of his principal sending the message was not sufficient notice of a claim on the part of the agent to recover his damages resulting from such imprisonment. *Brockelsby v. Western Union Tel. Co.*, 148–273, 126 N. W. 1105.

This provision for notice is not applicable in an action for the failure to deliver a telegram. *Larsen v. Postal Tel. Cable Co.*, 150–748, 130 N. W. 813.

CHAPTER 9.

OF EXPRESS COMPANIES.

SECTION **2165. Repeal.** That sections twenty-one hundred sixty-five and twenty-one hundred sixty-six of the code be and the same are hereby repealed. [32 G. A., ch. 116, § 1.]

The provisions of code § 2074 prohibiting contracts limiting the liability of a carrier are applicable to express companies. *McMillan v. American Express Co.*, 123–236, 98 N. W. 629.

SEC. **2165-a. Subject to regulations.** All express companies operating and doing business in this state are declared to be common carriers, and it shall be the duty of every such express company or common carrier to transport all property, parcels, money, merchandise, packages, and other things of value which may be offered to them for transportation, at a reasonable charge or rate therefor; and all laws so far as applicable, now in force or hereafter enacted, regulating the transportation of property by railroad companies, shall apply with equal force and effect to express companies. [32 G. A., ch. 116, § 2.]

SEC. **2165-b. Supervision by railroad commissioners—schedule of joint rates.** The railroad commissioners of this state shall have general supervision of all express companies operating and doing business in this state; and shall inquire into any unjust discrimination, neglect or violation of the laws of this state governing common carriers, by any express company doing business therein, or by the officers, agents or employes thereof; and they shall have power and it shall be their duty, to fix and establish reasonable, fair and just rates of charges including a schedule of maximum joint rates for each kind or class of property, money, parcels, merchandise, packages, and other things to be charged for and received by each express company or carriers by express, separately or conjointly, on all such property, money, parcels, merchandise, packages and other things which by the contract of carriage are to be transported separately or conjointly by such express companies, or carriers by express, doing business over the line of any railroad or other carrier between points wholly within the state of Iowa, which rates or charges shall be made to apply to all such express companies or express carriers, and may be changed or modified by said commissioners from time to time in such manner as may become necessary. [32 G. A., ch. 116, § 3.]

SEC. **2165-c. Schedule of rates for each company—prima-facie evidence.** Within six months from the taking effect of this act it shall be the duty of said railroad commissioners, and they are hereby directed, to prepare and make for each express company doing business in this state a schedule of reasonable maximum charges of rates for transporting property, money, parcels, merchandise, packages, and other things carried by such express company or companies between points wholly within the state of Iowa; and in all actions brought against such common carriers wherein there are involved the charges thereof for the transportation of any property, or any unjust discrimination in relation thereto, the schedules or reasonable maximum rates of charges so made by the railroad commissioners shall be taken as prima-facie evidence in all courts that the rates fixed therein are reasonable and just maximum rates of charges for which said schedules have been prepared. [32 G. A., ch. 116, § 4.]

SEC. **2165-d. Printed schedules posted and displayed.** It shall be the duty of every such company or common carrier engaged in transport-

ing property, money, parcels, merchandise, packages and other things, to print in clear and legible type the schedules of rates for transportation of such property, money, parcels, merchandise, packages, and other things, so made by such railroad commissioners, and shall post in each of its offices or places of business where patrons visit for the purpose of making and receiving shipments, and keep displayed in each office or place of business within convenient access, and for the inspection and use of the public during customary business hours such printed schedule of rates of charges and any amendments thereto, and shall also post and display in similar manner any special rules and regulations which may be promulgated by them or said railroad commissioners for the information of their patrons. [32 G. A., ch. 116, § 5.]

SEC. **2165-e. Excessive charges—penalty.** It shall be unlawful for any express company or common carrier to charge, demand, collect or receive a greater compensation for such transportation of property, or for any service in connection therewith between the points named in such schedules than the rates and charges which are specified in the schedules made by said railroad commissioners and in effect at the time. Any such express company or common carrier, any officer, representative, or agent or any express company, or carrier, who knowingly violates the provisions of this act shall forfeit to the state of Iowa the sum of five hundred dollars for each offense, to be recovered as by law provided. [32 G. A., ch. 116, § 6.]

SEC. **2165-f. Refusal to transport—liable for damages—penalty.** Each and every express company or carrier by express, as herein defined, doing business within the state of Iowa, shall at all convenient times during the hours of business accept and receive for prompt transportation and shipment destined to points on their own line, or to points on the lines of other express companies operating within the state, or for points beyond said state, all property, parcels, money, merchandise, packages and other things of value which may be offered to them, or either of them, for transportation by the public, and any express company or other common carrier refusing to transport goods as above provided taking the same in the order presented, shall be liable to the party injured for damages sustained by reason of its refusal, and in addition thereto shall be liable to a penalty of not less than five nor more than five hundred dollars, to be recovered in each case by the owner of the goods in any court having jurisdiction in the county where the wrong is done, or where the common carrier resides or has an agent, and each case of refusal shall be construed as a separate offense under this act. [32 G. A., ch. 116, § 7.]

SEC. **2166. Supervision by railroad commissioners—schedule of rates—repealed.** [32 G. A., ch. 116, § 1.]

[See § 2165.]

TITLE XI.

OF THE MILITIA.

CHAPTER 1.

OF THE MILITIA.

SECTION 2167. **Who constitute—exemptions—repealed.** [33 G. A., ch. 131, § 1.]

[See § 2215-f. EDITOR.]

SEC. 2168. **Iowa national guard—repealed.** [33 G. A., ch. 131, § 1.] [29 G. A., ch. 88, § 1.]

[See § 2215-f. EDITOR.]

SEC. 2168-a. **Iowa national guard—repealed.** [33 G. A., ch. 131, § 1.]

[See § 2215-f. EDITOR.]

SEC. 2169. **Governor to call out—repealed.** [33 G. A., ch. 131, § 1.] [29 G. A., ch. 88, § 2.]

[See § 2215-f. EDITOR.]

SEC. 2169-a. **Governor to call out—repealed.** [33 G. A., ch. 131, § 1.] [31 G. A., ch. 91, § 1; 30 G. A., ch. 77, § 1.]

[See § 2215-f. EDITOR.]

SEC. 2170. **When—repealed.** [33 G. A., ch. 131, § 1.]

[See § 2215-f. EDITOR.]

SEC. 2171. **Sheriff may call—repealed.** [33 G. A., ch. 131, § 1.]

[See § 2215-f. EDITOR.]

SEC. 2172. **Command—repealed.** [33 G. A., ch. 131, § 1.]

[See § 2215-f. EDITOR.]

SEC. 2173. **Brigades—enlistments—repealed.** [33 G. A., ch. 131, § 1.] [29 G. A., ch. 88, § 3; 28 G. A., ch. 72, § 1.]

[See § 2215-f. EDITOR.]

SEC. 2173-a. **Enlistments—repealed.** [33 G. A., ch. 131, § 1.] [31 G. A., ch. 91, § 2; 30 G. A., ch. 77, § 2.]

[See § 2215-f. EDITOR.]

SEC. 2174. **Staff of commander-in-chief—repealed.** [33 G. A., ch. 131, § 1.] [31 G. A., ch. 91, § 3; 29 G. A., ch. 88, § 4.]

[See § 2215-f. EDITOR.]

SEC. 2175. **Adjutant general—duties—repealed.** [33 G. A., ch. 131, § 1.] [31 G. A., ch. 91, § 4; 30 G. A., ch. 77, § 3; 29 G. A., ch. 88, § 5.]

[See § 2215-f. EDITOR.]

SEC. 2176. **Generals—election and staff of—repealed.** [33 G. A., ch. 131, § 1.] [28 G. A., ch. 72, § 2.]

[See § 2215-f. EDITOR.]

SEC. 2176-a. **Adjutant general—compensation—repealed.** [33 G. A., ch. 131, § 1.] [31 G. A., ch. 91, § 5; 30 G. A., ch. 77, § 4.]

[See § 2215-f. EDITOR.]

SEC. 2177. **Regiments—officers of—repealed.** [33 G. A., ch. 131, § 1.]

[See § 2215-f. EDITOR.]

SEC. 2178. **Regimental staff—band—repealed.** [33 G. A., ch. 131, § 1.] [31 G. A., ch. 91, § 6; 30 G. A., ch. 77, § 5; 28 G. A., ch. 72, § 9.]

[See § 2215-f. EDITOR.]

SEC. 2179. **Company—officers of—repealed.** [33 G. A., ch. 131, § 1.] [29 G. A., ch. 88, § 6; 28 G. A., ch. 72, § 3.]

[See § 2215-f. EDITOR.]

SEC. 2179-a. **Company and troop officers—repealed.** [33 G. A., ch. 131, § 1.] [30 G. A., ch. 77, § 6; 30 G. A., ch. 77, § 6.]

[See § 2215-f. EDITOR.]

SEC. 2180. **Elections of officers—repealed.** [33 G. A., ch. 131, § 1.] [28 G. A., ch. 72, § 4.]

[See § 2215-f. EDITOR.]

SEC. 2181. **Medical and staff departments—repealed.** [33 G. A., ch. 131, § 1.] [29 G. A., ch. 88, § 7; 28 G. A., ch. 72, § 5.]

[See § 2215-f. EDITOR.]

SEC. 2181-a. **Medical and staff departments—repealed.** [33 G. A., ch. 131, § 1.] [31 G. A., ch. 91, § 8; 30 G. A., ch. 77, § 7.]

[See § 2215-f. EDITOR.]

SEC. 2182. **Rules—repealed.** [33 G. A., ch. 131, § 1.]

[See § 2215-f. EDITOR.]

SEC. 2183. **Term of service — resignation — discharge — repealed.** [33 G. A., ch. 131, § 1.] [30 G. A., ch. 77, § 8.]

[See § 2215-f. EDITOR.]

SEC. 2184. **Parades—encampments—repealed.** [33 G. A., ch. 131, § 1.] [31 G. A., ch. 91, § 7; 30 G. A., ch. 77, § 9.]

[See § 2215-f. EDITOR.]

SEC. 2185. **Transportation—repealed.** [33 G. A., ch. 131, § 1.]

[See § 2215-f. EDITOR.]

SEC. 2186. **Discipline—repealed.** [33 G. A., ch. 131, § 1.]

[See § 2215-f. EDITOR.]

SEC. 2187. **Field duty—repealed.** [33 G. A., ch. 131, § 1.]

[See § 2215-f. EDITOR.]

SEC. 2188. **Penalties—repealed.** [33 G. A., ch. 131, § 1.] [30 G. A., ch. 77, § 10.]

[See § 2215-f. EDITOR.]

SEC. 2189. **Special duty—drill—repealed.** [33 G. A., ch. 131, § 1.] [31 G. A., ch. 91, § 8.]

[See § 2215-f. EDITOR.]

SEC. 2190. **Arms, equipment and ammunition—repealed.** [33 G. A., ch. 131, § 1.] [31 G. A., ch. 91, § 9.]

[See § 2215-f. EDITOR.]

SEC. 2191. **Inspection—schools of instruction—repealed.** [33 G. A., ch. 131, § 1.] [31 G. A., ch. 91, § 10.]

[See § 2215-f. EDITOR.]

SEC. 2192. **Embezzlement of state property—repealed.** [33 G. A., ch. 131, § 1.] [31 G. A., ch. 91, § 11.]

[See § 2215-f. EDITOR.]

SEC. 2193. **Uniforms—repealed.** [33 G. A., ch. 131, § 1.]

[See § 2215-f. EDITOR.]

SEC. 2194. **Penalty for failure to return arms—repealed.** [33 G. A., ch. 131, § 1.]

[See § 2215-f. EDITOR.]

SEC. 2195. **Fines for absence or misconduct—suit for—repealed.** [33 G. A., ch. 131, § 1.]

[See § 2215-f. EDITOR.]

SEC. 2196. **General courts-martial—repealed.** [33 G. A., ch. 131, § 1.]

[See § 2215-f. EDITOR.]

SEC. 2197. **Inferior courts-martial—repealed.** [33 G. A., ch. 131, § 1.]

[See § 2215-f. EDITOR.]

SEC. 2198. **Sentence—repealed.** [33 G. A., ch. 131, § 1.]

[See § 2215-f. EDITOR.]

SEC. 2199. **Military board—repealed.** [33 G. A., ch. 131, § 1.] [29 G. A., ch. 88, § 8.]

[See § 2215-f. EDITOR.]

SEC. 2200. **Military organizations—repealed.** [33 G. A., ch. 131, § 1.]

[See § 2215-f. EDITOR.]

SEC. 2201. **Payment for uniforms—repealed.** [33 G. A., ch. 131, § 1.] [31 G. A., ch. 91, § 12.]

[See § 2215-f. EDITOR.]

SEC. 2202. **To belong to state—repealed.** [33 G. A., ch. 131, § 1.]

[See § 2215-f. EDITOR.]

SEC. 2203. **Allowance for headquarters—repealed.** [33 G. A., ch. 131, § 1.] [32 G. A., ch. 117, § 1; 31 G. A., ch. 91, § 14; 28 G. A., ch. 72, § 6.]

[See § 2215-f. EDITOR.]

SEC. 2204. **Allowance for company and band—repealed.** [33 G.A., ch. 131, § 1.] [31 G. A., ch. 91, § 15; 29 G. A., ch. 89, § 1.]

[See § 2215-f. EDITOR.]

SEC. 2204-a. **Allowance for rifle ranges—repealed.** [33 G. A., ch. 131, § 1.] [31 G. A., ch. 91, § 13.]

[See § 2215-f. EDITOR.]

SEC. 2205. **Regulations—repealed.** [33 G. A., ch. 131, § 1.]

[See § 2215-f. EDITOR.]

SEC. 2206. **Companies may be disbanded—repealed.** [33 G. A., ch. 131, § 1.]

[See § 2215-f. EDITOR.]

SEC. 2207. **Words construed—repealed.** [33 G. A., ch. 131, § 1.]

[See § 2215-f. EDITOR.]

SEC. 2208. **Loan of arms to schools and colleges—repealed.** [33 G. A., ch. 131, § 1.]

[See § 2215-f. EDITOR.]

SEC. 2209. **Exemptions and privileges—repealed.** [33 G. A., ch. 131, § 1.]

[See § 2215-f. EDITOR.]

SEC. 2210. **Penalty for injuring or disposing of arms—repealed.** [33 G. A., ch. 131, § 1.]

[See § 2215-f. EDITOR.]

SEC. 2211. **Compensation of adjutant general and assistants—repealed.** [33 G. A., ch. 131, § 1.] [31 G. A., ch. 91, § 16; 28 G. A., ch. 72, § 7.]

[See § 2215-f. EDITOR.]

SEC. 2212. **Compensation of officers and men—repealed.** [33 G.A., ch. 131, § 1.] [31 G. A., ch. 91, § 17; 30 G. A., ch. 77, § 11; 28 G. A., ch. 72, § 8.]

[See § 2215-f. EDITOR.]

SEC. 2213. **Compensation during encampments—repealed.** [33 G. A., ch. 131, § 1.] [32 G. A., ch. 117, § 2; 30 G. A., ch. 77, § 12; 28 G. A., ch. 73, § 1.]

[See § 2215-f. EDITOR.]

SEC. 2213-a. **Warrants—how drawn—repealed.** [33 G. A., ch. 131, § 1.] [28 G. A., ch. 73, § 2.]

[See § 2215-f. EDITOR.]

SEC. 2214. **Appropriation—repealed.** [33 G. A., ch. 131, § 1.] [32 G. A., ch. 117, § 3; 31 G. A., ch. 91, § 18; 30 G. A., ch. 77, § 13; 29 G. A., ch. 89, § 2.]

[See § 2215-f. EDITOR.]

SEC. 2214-a. **Stoppage of compensation—repealed.** [33 G. A., ch. 131, § 1.] [32 G. A., ch. 177, § 4.]

[See § 2215-f. EDITOR.]

SEC. 2215. **Time of taking effect—repealed.** [33 G. A., ch. 131, § 1.]

[See § 2215-f. EDITOR.]

CHAPTER 1-A.

OF THE NAVAL MILITIA.

SECTION 2215-a. **Naval militia—repealed.** [33 G. A., ch. 131, § 1.] [29 G. A., ch. 90, § 1.]

[See § 2215-f. EDITOR.]

SEC. 2215-b. **Officers—repealed.** [33 G. A., ch. 131, § 1.] [29 G. A., ch. 90, § 2.]

[See § 2215-f. EDITOR.]

SEC. 2215-c. **Organization—discipline and exercise—repealed.** [33 G. A., ch. 131, § 1.] [29 G. A., ch. 90, § 3.]

[See § 2215-f. EDITOR.]

SEC. 2215-d. **Uniform—repealed.** [33 G. A., ch. 131, § 1.] [29 G. A., ch. 90, § 4.]

[See § 2215-f. EDITOR.]

SEC. 2215-e. **Election and appointment of officers—repealed.** [33 G. A., ch. 131, § 1.] [29 G. A., ch. 90, § 5.]

[See § 2215-f. EDITOR.]

TITLE XI-A.

OF THE MILITARY CODE OF IOWA.

CHAPTER 1.

OF THE MILITARY CODE OF IOWA.

SECTION 2215-f. **Military code of Iowa.** That title eleven of the code of Iowa and the law as it appears in title eleven of the supplement to the code, 1907, is hereby repealed and the following enacted in lieu thereof to be officially designated and known as, "The Military Code of Iowa." [33 G. A., ch. 131, § 1.]

SEC. 2215-f1. **Military force—who constitutes—enumeration—exemption.** The military force of the state of Iowa shall consist of every able-bodied male citizen, and every able-bodied male of foreign birth, who has declared his intention to become a citizen, who is between the ages of eighteen and forty-five years, not exempt from such service under the laws of the United States, except honorably discharged soldiers, sailors and marines of the United States, who shall be exempt from military service in this state at their option. The assessors shall return to the auditor with the annual assessment a complete enumeration of such persons, which may be revised and corrected by the board of supervisors at its June session in each even-numbered year, or at such other time as the governor may direct, and the auditor shall certify to the adjutant general a true copy of such corrected list, and in each odd-numbered year he shall certify the number of names on the list. But no person having conscientious scruples against bearing arms shall be compelled to do military duty in time of peace. [33 G. A., ch. 131, § 2.]

SEC. 2215-f2. **Iowa national guard—how recruited—soldier and company defined.** The organized militia shall be designated as the "Iowa national guard," hereinafter referred to as "the guard," and it shall be recruited by volunteer enlistments, from persons of the state eligible to military duty. In this act the word "soldier" shall include musicians and all persons in the guard or in the militia when called into service, except commissioned officers; and the word "company" shall include battery, troop, band, signal corps and hospital corps except as herein otherwise provided. [33 G. A., ch. 131, § 3.]

SEC. 2215-f3. **War department regulations—governor to prescribe optional regulations.** The organization, armament, equipment and discipline of the guard, except as hereinafter specifically provided, shall be the same as that which is now or may be hereafter prescribed under the provisions of the act of congress approved January twenty-first, nineteen hundred and three, as amended May twenty-seventh, nineteen hundred and eight, relating to the militia or any subsequent amendments thereto or substitutes therefor; and as to those requirements which are mandatory therein as may be prescribed by the regulations of the war department

published in pursuance therewith, and so far as the governor may prescribe as to those things which are optional therein; and any change hereafter made shall become effective as to the guard when an order or regulation to that effect shall have been promulgated by the governor. [33 G. A., ch. 131, § 4.]

SEC. **2215-f4. Organization.** The guard shall consist of at least four regiments of infantry, with such necessary complement of machine gun companies as may at any time be prescribed, one medical department consisting of a medical corps, and a hospital corps, and, at the discretion of the governor, two signal companies, one regiment of cavalry, four batteries, and such other staff corps or departments as may be prescribed by the governor; and to further conform to the national militia laws, the governor shall, from time to time, prescribe in regulations and orders the organization of the guard in such manner as to make the said organization conform to the requirements for the organized militia under the laws of the United States. [33 G. A., ch. 131, § 5.]

SEC. **2215-f5. Other organizations prohibited without permission of governor.** It shall be unlawful for any body of men, other than the guard of this state and the troops of the United States, to associate themselves together as a military company or organization within the limits of this state without the written permission of the governor, which he may at any time revoke; but this provision shall not prevent civic, social or benevolent organizations from wearing uniforms and swords not in conflict with the other provisions of this act. [33 G. A., ch. 131, § 6.]

SEC. **2215-f6. Regulations and orders—publication of.** The governor is authorized to make and publish regulations and orders for the government and discipline and uniforming of the guard not in conflict with existing laws. [33 G. A., ch. 131, § 7.]

SEC. **2215-f7. Subject to military code—other regulations.** The guard shall be subject to the military code of Iowa and all regulations and orders made and published in pursuance therewith, and in all matters not specifically covered thereby it shall be subject to the regulations of the war department governing the organized militia, the articles of war, the army regulations, and such regulations and orders as may be made and published in pursuance therewith. [33 G. A., ch. 131, § 8.]

SEC. **2215-f8. Incorporation of companies.** Companies may incorporate under chapter two, title nine of the code of Iowa. The articles of incorporation may provide for the methods of administration of civil business, and may provide for such officers as may be deemed necessary. The articles of incorporation shall be approved by the regimental commander and the adjutant general, and such approval endorsed thereon, before the same are recorded. They must provide among other things, that the name of the corporation shall be identical with the military designation of the organization, and that the officers of the company shall be officers of the corporation. [33 G. A., ch. 131, § 9.]

SEC. **2215-f9. Rules and by-laws—subject to approval—capacity to sue.** Each company may make rules and by-laws for its own government, not in conflict with existing laws and regulations and orders, subject to the approval of the regimental commander. Any person who is by such rules and by-laws made the custodian of any funds, whether originally derived from federal, state or other sources, shall have legal capacity to sue for the collection thereof or an accounting therefor. [33 G. A., ch. 131, § 10.]

SEC. 2215-f10. **Officers — terms — resignations—elections.** Every general, field and line officer of the guard shall be elected for a term of eight years, and each officer shall be held to service for the full term commissioned, unless he shall sooner resign and his resignation be accepted, or he be discharged or dismissed by sentence of court-martial; provided, that the term of any officer commissioned and serving at the time of the passage of this act shall not be extended by its enactment. It is hereby made the duty of any officer removing from the state, and of any company officer upon permanently removing his place of residence from the station of such company, to resign his commission, and upon failure to do so, his commission shall be revoked by the governor. All company officers shall be elected by a majority vote of the enlisted men of the organization for which said officer is to be elected and commissioned, and all field officers of a regiment shall be elected by the majority vote of the line officers of such regiment; and all general officers shall be elected by the majority vote of all the line officers of the organizations composing the brigade or division, for the command of which such general officer is to be elected. Only those officers or enlisted men who belong to their respective organizations at the time when the order for any election is issued shall be eligible to vote at such elections; and all voting shall be in person, by ballot and by signing duplicate tally sheets, and under such further regulations as may be promulgated by the governor. [33 G. A., ch. 131, § 11.]

SEC. 2215-f11. **Examining board—appointment—duties.** An examining board of three or more competent officers, appointed by the governor, shall convene at such times and places as he shall direct, whose duty it shall be to examine into the capacity, qualifications, propriety of conduct and efficiency of commissioned officers of the rank of lieutenant, captain or major or any person who shall have been elected or appointed as lieutenant, captain or major, who shall be ordered before it, provided, that any person elected or appointed to an office superior to the rank of major must pass or have passed the examination provided for major, and, upon the report of said board, if adverse to such officer and approved by the governor, the commission of such officer shall be vacated, or the commission withheld. No officer shall be eligible to sit on such board whose rank or promotion would in any way be affected by the proceedings, and two members at least shall be of equal or superior rank to the officer examined. If any officer shall refuse to report himself before said board when directed, the governor shall, upon report of such refusal by such board, vacate his commission. [33 G. A., ch. 131, § 12.]

SEC. 2215-f12. **Bonds of officers—action upon.** All officers to whom shall be issued, or who shall be accountable for arms, equipment, uniforms and any other state or United States property for military uses, or who shall have the control, custody or disbursement of funds as provided for in this act, shall, before the delivery to them of such arms, equipment, uniforms and other state or United States property, and the receipt of such funds, be required to execute and deliver to the adjutant general a bond therefor, with sureties to be approved by the governor and payable to the state, in such amount as may be fixed by the governor, conditioned according to law, for the proper care, use and return in good order, wear, use and unavoidable loss and damage excepted, of all such state and United States property, and the proper care and faithful disbursement and accounting of all funds coming into the hands of such officer; upon the violation of any of the conditions of such bond, action thereon shall be brought by the adjutant general upon behalf of the state of Iowa, and any recovery

thereon shall be credited to the guard funds of the state. It shall be the duty of the attorney-general of the state to prosecute all actions upon such bonds. [33 G. A., ch. 131, § 13.]

SEC. **2215-f13. Enlistments—term—oath.** All enlistments shall be for three years, except that enlistments made within ninety days from date of discharge from the guard or the United States army, by reason of expiration of term, shall be considered continuous service in the guard, and such reënlistments may be for one, two or three years, as the soldier may elect. Each person enlisting must sign the enlistment paper prescribed by the adjutant general and take the following oath or affirmation which shall be administered by the enlisting officer, to wit: "You do solemnly swear (or affirm) that you will bear true allegiance to, and that you will support the constitution of the United States and that of the state of Iowa, and will, as a member of the national guard, serve the United States and the state of Iowa faithfully through your term of service, unless sooner discharged, and that you will obey the orders of the commander-in-chief and such officers as may be placed over you, and the laws and regulations governing the military forces." [33 G. A., ch. 131, § 14.]

SEC. **2215-f14. Staff of governor—how appointed—rank of members.** The staff of the governor shall consist of an adjutant general, who shall be chief of staff, an assistant adjutant general, both of whom shall have served honorably in the regular or volunteer service of the United States, or for not less than one year in the guard, and twelve aides. The adjutant general and assistant adjutant general shall be appointed and commissioned by the governor, and shall hold office until their successors are appointed and commissioned. The assistant adjutant general shall be appointed upon the recommendation of the adjutant general. The aides may, at the discretion of the governor, be appointed and commissioned by him or detailed for such service from the active membership of the guard, or their duties may be performed by United States army officers regularly or specially detailed by the war department for service with the guard. The adjutant general shall have the rank of brigadier general and the assistant adjutant general that of colonel. The aides shall have the rank of lieutenant colonel except that any person so appointed, who has held a higher rank for a period of one year or more in the guard, may be appointed with the rank of the highest grade so held by him, and those detailed from the active membership of the guard shall retain their rank in the guard and shall not be relieved from their regular duties by reason of such detail. United States army officers, regularly or specially detailed for service with the guard or stationed in the state, may be assigned positions on the staff with their rank in the United States service or such higher rank, not above that of lieutenant colonel, as the governor may designate. [33 G. A., ch. 131, § 15.]

SEC. **2215-f15. Adjutant general — duties — report — assistant.** The adjutant general shall issue and transmit all orders of the governor, and shall keep a record of appointments, of all officers commissioned by the governor, of all the general and special orders and regulations, and of such matters as pertain to the organization of the military force and his duties. He shall reside at the capital and hold his office at the pleasure of the governor. He shall have charge of the state arsenal and grounds and all other property of the state kept or used for military purposes, and receive and issue all quartermaster and ordnance stores and camp equipage upon the order of the governor. The adjutant general shall furnish, at the expense of the state, such blanks and forms as shall be approved by the

governor. He shall, in each year preceding a regular session of the general assembly, make out a detailed report of the transactions of his office, the expenses thereof and such other matters as shall be required by the governor for the period since the last preceding report, and the governor may, at any time, require a similar report. The assistant adjutant general shall be on duty with the adjutant general, and shall perform such duties under his direction as may be prescribed, and in the absence of the adjutant general shall perform the duties of that officer as acting adjutant general. [33 G. A., ch. 131, § 16.]

SEC. **2215-f16. Salaries—increase in time of active service.** The adjutant general shall receive an annual salary of twenty-two hundred dollars in time of peace, and the assistant adjutant general shall receive an annual salary of fifteen hundred dollars, and there shall be appointed a record clerk in the adjutant general's office who shall have charge of the war records under direction of the adjutant general, who shall receive a salary of twelve hundred dollars per annum, and such assistance shall be employed in the adjutant general's and quartermaster's departments as shall, in the opinion of the governor, be actually necessary, and any person so employed shall receive for the time actually and necessarily on duty such compensation as the governor may prescribe. When requisition shall be made on the governor of Iowa by the president of the United States for troops, and during the time the Iowa troops are in the service of the United States under call of the president, the salary of the adjutant general shall be increased so that he shall receive in full compensation for his services, pay and allowances equal to that of brigadier general of the United States army. [33 G. A., ch. 131, § 17.]

SEC. **2215-f17. Division, brigade and regimental staffs—noncommissioned officers—staff departments.** The division staff shall be appointed and commissioned by the governor, upon the recommendation of the division commander. The brigade staff shall be appointed and commissioned by the governor, upon the recommendation of the brigade commander. The regimental staff shall be appointed and commissioned by the governor, upon recommendation of the regimental commander. The commissions of such division, brigade and regimental staff officers shall expire when the officer nominating them, or his successor, shall make new nominations for their respective offices, and when such persons shall have been appointed and commissioned. The commander of each regiment shall appoint by warrant from the enlisted men of his regiment, the noncommissioned staff, and upon recommendation of the company commanders he shall appoint the noncommissioned officers of each company and issue warrants to the persons thus appointed. When staff corps or departments are authorized by the governor as contemplated in section five of this act, the governor shall appoint and commission the chief of the staff corps or department, and shall appoint and commission such officers for such staff corps or department as may be authorized by orders and regulations, upon the recommendation of the chief of the staff corps or department. [33 G. A., ch. 131, § 18.]

SEC. **2215-f18. Call by president—term of service—other troops—draft.** That whenever the United States is invaded or in danger of invasion from any foreign nation, or of rebellion against the authority of the government of the United States, or the president is unable, with the regular forces at his command, to execute the laws of the union, it shall be lawful for the president to call forth such number of the national guard of Iowa as he may deem necessary to assist in repelling such invasion,

suppressing such rebellion or to assist in enabling him to execute such laws, and to issue his orders for that purpose, through the governor, to such officers of the national guard of Iowa, as he may think proper; and the president may specify, in his call, the period for which such service is required, and the guard so called forth shall continue to serve during the term so specified, either within or without the territory of the United States, unless sooner relieved by order of the president, provided that no commissioned officer or enlisted man of the guard shall be held to service beyond the term of his existing commission or enlistment. And whenever the president shall require, in any of the designated instances, more troops than can be supplied by the guard of the state, the governor shall, in his discretion, organize forthwith such other national guard forces as he may deem necessary, or order into the service of the United States so many of the unorganized militia of the state as is required, designating the same by draft if a sufficient number do not volunteer, and shall commission officers therefor. [33 G. A., ch. 131, § 19.]

SEC. **2215-f19. Governor may order out troops.** The governor shall have the power, in cases of insurrection, invasion or breaches of the peace, or imminent danger thereof, to order into the service of the state such of its military forces as he may think proper, under the command of the senior officer thereof. [33 G. A., ch. 131, § 20.]

SEC. **2215-f20. Sheriff may call out—repeal.** That section twenty-one, chapter one hundred thirty-one, acts of the thirty-third general assembly be and the same is hereby repealed. [35 G. A., ch. 181, § 1; 33 G. A., ch. 131, § 21.]

SEC. **2215-f21. Encampment—target practice—school of instruction—transportation.** The guard may parade for encampment or drill annually, by division, brigade, regiment, battalion or company, as ordered by the governor, and the members thereof or assignments of details therefrom, at the discretion of the governor, may be called out or detailed for target practice, school of instruction or other practice or instruction. In lieu of the encampments provided herein, the governor may, in his discretion, order part or all of the guard to participate in field maneuvers or other exercises for instruction in conjunction with troops of the United States army. Transportation shall be furnished for all military purposes. [33 G. A., ch. 131, § 22.]

SEC. **2215-f22. Inspections—school of instruction—disbanding.** The governor shall require such inspections of the different organizations of the guard, and such schools of instruction for officers and enlisted men, as he may deem proper and necessary. The inspections shall be made by United States army officers, either on regular or special detail with the guard or in the state, where such officers are available for that purpose, and if made by other officers, the governor shall fix their compensation therefor in the orders for such inspections. The governor shall disband any company of the guard when it shall fall below a proper standard of efficiency, and he may order special inspections with a view of determining such efficiency. Schools of instruction may be ordered when sufficient funds are available beyond other requirements of this act. [33 G. A., ch. 131, § 23.]

SEC. **2215-f23. Compensation and allowance while on duty—stoppage of pay.** The military force, when in active service of the state upon the call of the governor, and the guard when paraded for drill, encampment, target practice, school of instruction, or other duty under orders of the governor, shall be paid the following compensation for time actually on

duty; each commissioned officer shall receive for such service the pay of his rank in the United States army, without allowances, increase or additions on account of length of service, and without subsistence or other allowances other than transportation and quarters, except as herein otherwise provided. Enlisted men shall be furnished transportation, subsistence and quarters, and in addition thereto shall receive the following per diem: chief musician, three dollars; principal musician, drum major, first class sergeant, regimental sergeant major, commissary sergeant, quartermaster sergeant, color sergeant, first sergeant, two dollars; battalion sergeant major, company quartermaster sergeant, sergeant and cook, one dollar and seventy-five cents; corporal, farrier, saddler, blacksmith, one dollar and fifty cents; private, one dollar and twenty-five cents. Enlisted men who have served continuously for three years and not more than five years, shall receive an added amount of fifteen per cent. of the above per diem, and those who have served continuously five years or more, an added amount of twenty-five per cent. of the above per diem. When in actual service of the state, pursuant to the order of the governor, the compensation of the military force shall be paid out of any funds in the state treasury, not otherwise appropriated, upon warrants drawn by the auditor of state. The claims for such services shall be audited and allowed by the governor. Should any part of the compensation above provided be paid by the United States, there shall be paid from the state treasury only that part thereof not paid by the United States. When on duty on rifle practice, range competition, or schools of instruction, officers shall receive such compensation or allowances as the governor shall designate in orders with reference thereto. Compensation, subject to payment by the state of Iowa, to the officers and enlisted men of the guard for military service, shall be subject to stoppage of payment for loss or damage to public property issued them for military uses. [35 G. A., ch. 181, § 2; 33 G. A., ch. 131, § 24.]

SEC. **2215-f24. Annual allowance for office expense.** There shall be allowed annually to each division, or brigade commander the sum of one hundred dollars and to each regimental commander the sum of three hundred dollars, which shall be paid in full in lieu of office rent, clerk hire, and for postage, stationery, issuing orders, making official records and all other papers or clerical work of such headquarters; and there shall be allowed annually to each company commander the sum of one hundred dollars, to each inspector of small arms practice, to the chief surgeon, to each major surgeon, and to each chief musician of bands, the sum of fifty dollars, for postage, stationery, issuing orders, making official returns, copying official records, and all other paper work required by regulations, which sum shall be payment in full for such services. All payments shall be made semiannually and in the amounts as herein provided. [33 G. A., ch. 131, § 25.]

SEC. **2215-f25. Armory rent—how apportioned.** There shall be allowed annually to each company for armory rent, lights, fuel and janitor service and like necessary expenses, not to exceed the sum of ten hundred dollars; to each band not to exceed the sum of five hundred dollars; and to each detachment of the hospital corps not to exceed the sum of three hundred dollars, or so much thereof as may be necessary, to be paid in such amounts, either in part or in whole, and under such regulations as a board of officers appointed by the governor shall prescribe, and approved by him. [35 G. A., ch. 182, § 1; 33 G. A., ch. 131, § 26.]

SEC. **2215-f26. Rifle ranges—allowances.** The governor may designate the location of four regimental rifle ranges, and the expenditure of the sum of two thousand dollars, or so much thereof as may be necessary, is

hereby allowed for the acquisition and construction thereof, such sums to be expended under the direction of such officer or board of officers as the governor may direct; and the sum of two hundred dollars, or so much thereof as may be necessary, shall be allowed annually for expenditure in like manner for the rental and maintenance of each of said ranges; and the sum of one hundred dollars annually for each company, or so much thereof as may be necessary, shall be allowed upon such conditions as the governor may prescribe for the procurement, construction and maintenance of company rifle ranges; these payments to be made when sufficient funds are available beyond other requirements of this act. [33 G. A., ch. 131, § 27.]

SEC. **2215-f27. Miscellaneous expenses for drill.** There shall be allowed annually to each company for miscellaneous military uses not otherwise provided for by the state, not to exceed the sum of five hundred dollars, the same to be paid semiannually; companies showing full attendance and actual drill of those present of two hours each week shall be entitled to the full sum of five hundred dollars, and companies showing lesser attendance at drill shall be paid proportionately, provided that when a company's attendance at drill falls below fifty per cent. it shall be deemed inefficient and forfeit its right to any allowance under this section; and for like purpose and under like requirements, to each regimental band the sum of two hundred fifty dollars, and to each detachment of the hospital corps under like requirements the sum of one hundred twenty-five dollars; the same to be paid under such regulations as the governor shall prescribe. [33 G. A., ch. 131, § 28.]

SEC. **2215-f28. Accounting to adjutant general.** No further payments shall be made under any provision of this act to the accountable officer of any organization, who does not fully and satisfactorily account to the adjutant general for all moneys theretofore paid to him under any provision of this act. [33 G. A., ch. 131, § 29.]

SEC. **2215-f29. Trespass—sale of intoxicating liquors—penalty.** Any person who shall trespass upon the encampment grounds or the camp grounds of the military force of the state in active service or of the guard called out for encampment, drill, target practice or other duty, or interrupt, molest or interfere with any member of the guard in the discharge of his duty, or sell any malt or spirituous or other intoxicating liquor within one mile of such encampment, camp or station, except a person engaged in the business prior to the establishment of such encampment, camp or station under permit issued by lawful authority, shall be guilty of a misdemeanor and punishable therefor, and the commanding officer of such force may order the arrest of such person and cause him to be delivered to a peace officer or magistrate as soon as practicable. [33 G. A., ch. 131, § 30.]

SEC. **2215-f30. False certificate or return—misuse of funds—penalty.** Any officer or soldier of the guard knowingly making any false certificate of muster or false return of state property or funds in his hands, or wilfully neglecting or refusing to apply all money drawn from the state treasury for the purpose named in the requisition therefor, shall be punished by imprisonment in the penitentiary not exceeding five years, or by fine in the amount of money not so applied, or both such fine and imprisonment, and all costs of prosecution. [33 G. A., ch. 131, § 31.]

SEC. **2215-f31. Military stores property of state—failure to account for—penalty.** All arms, uniforms, equipments and other military property furnished or issued by the state, or for which an allowance has been made, shall belong to the state, and shall be used for military purposes only, and each officer and soldier, upon receiving a discharge, or

otherwise leaving the military service of the state, or upon demand of his commanding officer, shall forthwith surrender such state military property in his possession to said commanding officer. Every member of the guard who shall wilfully neglect to return to the armory of the company, or place in charge of the commanding officer of the company to which he belongs, any arms, uniforms, equipments or other military property, or portion thereof, belonging to the state within six days after being notified by said commanding officer to do so, shall be fined not more than fifty dollars or imprisoned not more than thirty days. [33 G. A., ch. 131, § 32.]

SEC. **2215-f32. Destruction or injury of military property—penalty.** Every person who shall wilfully or wantonly injure or destroy any article of uniform, arms, equipment or other military property furnished or issued by the state, and refuse to make good such injury or loss, or who shall sell, dispose of, secrete or remove the same with intent to sell or dispose of it, shall be punished by a fine not less than one hundred dollars, nor more than five hundred dollars, or be imprisoned in the county jail for not more than four months or by both such fine and imprisonment. [33 G. A., ch. 131, § 33.]

SEC. **2215-f33. Exemptions.** Every officer and soldier of the guard shall be exempt from jury duty, and labor on the road on account of poll tax during his term of service, and, except in cases of treason, felony or breach of the peace, be privileged from arrest during his attendance at drill, parades, encampments, active service, election of officers, and in going to and returning from the same. The uniform, arms and equipments of every member of the guard shall be exempt from attachment, execution or sale for debt or taxes. Every member of the guard who has served the full term of his commission or enlistment, shall, upon application, be entitled to an honorable discharge, exempting him from military duty, except in time of war or public danger. [33 G. A., ch. 131, § 34.]

SEC. **2215-f34. Service badges.** The adjutant general, from the available funds at his disposal, shall procure and issue to the officers and men of the guard entitled thereto, service badges according to the design and pattern thereof as may be determined upon by the adjutant general and kept on file at the office of the adjutant general. [33 G. A., ch. 131, § 35.]

SEC. **2215-f35. Uniform—by whom worn—when—penalty.** Every person who at any time wears a uniform of the United States army, navy, marine corps or the guard, or any part of such uniform or a uniform, or a part of a uniform similar thereto, within the bounds of the state of Iowa, is guilty of a misdemeanor, and if found guilty of such offense, he shall be punished by a fine of not less than fifty dollars and not more than one hundred dollars, or by imprisonment in the county jail not exceeding thirty days, or by both such fine and imprisonment; provided, that nothing in this act shall be construed as prohibiting officers or enlisted men of the guard of the state of Iowa, or any other state, or of the United States army, navy, marine corps or revenue service, or forest service, or cadets at any university, college or school, from wearing such uniform or parts of uniform, while on military duty or duty connected therewith; and provided further that nothing in this act shall be construed as prohibiting inmates of any veterans' or soldiers' home, or any member of any war veterans' or sons of veterans' association from wearing their uniform; and provided further that nothing in this act shall be construed as prohibiting persons of the theatrical profession from wearing such uniforms in any playhouse or theatre while actually engaged in following their profession; and provided

further that nothing in this act shall be construed as prohibiting the uniformed ranks of civic societies parading or traveling in a body or being in encampments, or going to or from their place of meeting or when assembled in a lodge room in their adopted uniform. [33 G. A., ch. 131, § 36.]

SEC. **2215-f36. Absence without leave—unsoldierly conduct—fines —evidence.** Every soldier absent from any tour of active service, parade, drill, encampment or inspection without leave or sufficient excuse, shall be fined two dollars for each day of absence; and for any unsoldierly conduct during any such service he may be fined not more than ten dollars. Such fines shall be collected by civil action in the name of the state for the use of the company to which the soldier fined belongs; but in no case shall the state pay the costs of such action. Any company may impose such other fines upon its members as it may think proper in its by-laws, which may be enforced in the manner above provided. The findings of the court-martial provided in section thirty-nine of this act for the trial of soldiers charged with such offenses shall be conclusive evidence on the question of whether or not the soldier was absent without sufficient excuse or whether he was guilty of unsoldierly conduct or whether he was guilty of an infraction of the by-laws of the company. Upon the trial of the civil action above provided for, no evidence shall be competent on the part of the defendant except that he may show in defense that the court-martial that determined his guilt did not comply with the provisions of the law or was for any reason without jurisdiction to determine the question of his guilt. [33 G. A., ch. 131, § 37.]

SEC. **2215-f37. General courts-martial.** Any member of the guard charged with an offense as defined in this act or in the articles of war or general regulations governing the organized militia and the army of the United States or any regulations promulgated by the governor under authority of this act, may be tried by a general court-martial ordered and appointed by the governor. The organization of the court and the forms of procedure shall, as far as practicable, be those prescribed in the articles of war and regulations for the army and organized militia, except that it shall not be necessary for the continuance or conclusion of the proceedings of any court-martial to have the minutes of its proceedings, which may be taken in shorthand, transcribed into longhand before the completion of such proceedings, but such transcript shall be filed within a reasonable time after the conclusion of the proceedings of such court. The punishment fixed by the sentence shall not be other than dismissal or dishonorable discharge from the service, or reduction to the ranks of a noncommissioned officer, and suspension from duty and forfeiture of compensation or confinement for a period named in the sentence or reprimand, according to the gravity of the offense; except when the offense shall have been committed while in the active service of the state, when the punishment may be as prescribed in the articles of war, and a trial under this section shall be a trial within the provisions of section twelve of article one of the constitution of Iowa. Witnesses duly served with subpoena, signed by the judge advocate, shall appear and testify as if duly served with subpoena to appear and testify in the district court, and shall receive the same fees and mileage therefor, to be taxed as costs, which, with other necessary expenses of the judge advocate and the court, shall be taxed and certified by the president of the court-martial, and paid by the state treasurer upon the auditor's warrant issued therefor to the judge advocate, who shall pay the expenses of the trial. [33 G. A., ch. 131, § 38.]

SEC. 2215-f38. **Inferior courts-martial.** Inferior courts-martial are hereby authorized, and the constitution, composition, jurisdiction and proceedings thereof shall be assimilated to courts of the same nature in the army of the United States, but no stoppage of pay or confinement shall exceed that provided for in similar courts by the United States army regulations. A home station court-martial[1] is hereby authorized for the trial of offenses referred to in section thirty-seven hereof. The governor shall provide regulations governing the same and the procedure connected therewith, provided that such regulations must prescribe at least five days' notice of the time of hearing of the charge, and shall provide that the hearing before such court-martial shall be public. [33 G. A., ch. 131, § 39.]

[1]"courts-martial" in enrolled bill. EDITOR.]

SEC. 2215-f39. **Approval or disapproval of courts-martial proceedings—mitigation—record.** The proceedings of all general courts-martial shall be submitted to the governor, who shall approve or disapprove the same, or he may mitigate or remit any punishment imposed by the sentence of said court. The proceedings of inferior courts-martial shall be approved or disapproved by the commanding officer, who may in like manner mitigate or remit the punishment fixed in the sentence. In all cases the record of the proceedings of the court-martial, with the order of the governor or commanding officer accompanied therewith, shall be preserved as a permanent record in the office of the adjutant general. [33 G. A., ch. 131, § 40.]

SEC. 2215-f40. **Tax exemptions—use of public utilities.** It shall be lawful for the boards of supervisors of the several counties and for the city councils of the several cities and towns of the state to exempt from taxation all personal and real property held and used for armory or military purposes; and it shall be lawful for any county or city or town which owns public utilities to grant to any organization of the guard which is stationed in such place, the free use of such public utilities. [33 G. A., ch. 131, § 41.]

SEC. 2215-f41. **Building and camp ground improvements.** The governor is authorized to expend from the funds appropriated for the support and maintenance of the guard such amounts as may be necessary in the erection of buildings and other improvements on the permanent camp grounds and rifle ranges purchased by the state for the use of the guard, or purchased by the United States for the uses of the guard of this state, when in his judgment such buildings and improvements will be for the permanent good of the guard. [33 G. A., ch. 131, § 42.]

SEC. 2215-f42. **Appropriation.** There is appropriated out of any moneys in the treasury not otherwise appropriated, the sum of one hundred fifty thousand dollars per annum or so much thereof as may be necessary, for the support of the guard under the provisions of this act not applying to active service, which shall be drawn by a warrant, drawn by the auditor of state on the state treasurer, upon the certificate of the adjutant general approved by the governor, showing for what purpose each draft is to be or has been used, and no indebtedness shall be created in excess of such annual appropriation. [35 G. A., ch. 182, § 2; 33 G. A., ch. 131, § 43.]

SEC. 2215-f43. **Present commissions, enlistments, contracts and organizations.** The term of service and the rank of all officers and grades of all enlisted men in the guard at the time of the taking effect of this act shall not be affected thereby, unless especially mentioned herein, but each of said officers and enlisted men shall be held to service for the full period of the commission or enlistment under which he is then serving; neither

shall the provisions of this act be construed to affect the continuity of the various organizations of the guard, nor of any contracts made by it, or by any of its organizations; provided, however, that upon the issuance of regulations and orders by the governor for the reorganization of the guard as herein contemplated or provided for, the governor may, if necessary in order to conform to such plan of reorganization, change the rank of any such officers or the grade of any such enlisted men. [33 G. A., ch. 131, § 44.]

TITLE XII.

OF THE POLICE OF THE STATE.

CHAPTER 1.

OF THE SETTLEMENT AND SUPPORT OF THE POOR.

SECTION 2216. Who liable to maintain.

The obligation to support children being under these sections primarily upon their father and mother, and secondarily upon their grandfather, in the absence or inability of nearer relatives, held that the grandfather was not bound for their support, although the evidence showed that their father had abandoned his wife and had no property subject to execution, where there was no showing that he was absent or unable to provide for his children. *Johnson County v. Stratton*, 111–421, 82 N. W. 955.

Liability of a grandparent for support of children can be predicated only on proof that the parent is unable, because of physical or mental disability, to earn a living by labor. The inability of such parent to earn sufficient support for himself and children, not due to physical or mental disability, is no ground for throwing the liability for their support upon the grandparent. *Monroe County v. Abegglen*, 129–53, 105 N. W. 350.

SEC. 2217. Same.

The grandparent is not liable for the support of his grandchildren where it appears that the parents are capable of furnishing such support. *Monroe County v. Abegglen*, 129–53, 105 N. W. 350.

The fact that the father of such children has secured a divorce from their mother, the daughter of the grandparent who is sought to be charged with such support, and has subsequently remarried and become encumbered with another family, is no reason why the support of his children should be thrown upon the grandparent. *Ibid.*

SEC. 2219. Notice—hearing—order—appeal.

It is not necessary that liability for the support of a relative be determined under this section before the support is furnished for which relatives are subsequently to be held liable. *Hamilton County v. Hollis*, 141–477, 119 N. W. 978.

SEC. 2222. Recovery by county.

The county may recover sums expended for relief and support at the poor farm or elsewhere; and the amount expended in case of support at the poor farm is determined by proof of the reasonable value of maintaining each inmate. *Hamilton County v. Hollis*, 141–477, 119 N. W. 978.

SEC. 2224. Settlement—how acquired.

The wife's legal settlement is that of her husband only where the family relation in fact exists and her dependence upon him is acknowledged and acquiesced in by him. After the wife has been abandoned by her husband his change of residence does not affect the place of her settlement. *Washington County v. Polk County*, 137–333, 113 N. W. 833.

SEC. 2225. Foreign paupers.

One county furnishing relief to a resident of another state cannot recover therefor from another county in which such poor person has received an injury on account of which relief should have been furnished by the latter county. *Cerro Gordo County v. Boone County*, 152–692, 133 N. W. 132.

Neither the county nor its officers are liable to a transient for failure to furnish the relief authorized by this section to be furnished. *Wood v. Boone County*, 153–92, 133 N. W. 377.

SEC. 2228. Contest as to settlement.

The liability of a county for support furnished by another county is purely statutory. *Cerro Gordo County v. Boone County*, 152–692, 133 N. W. 132.

The fact that officers of one county fail to furnish relief which should be furnished to a transient does not render the county liable to another county which furnishes such relief. *Ibid.*

SEC. 2230. **Relief by trustees—overseer of the poor.** The township trustees of each township, subject to general rules that may be adopted by the board of supervisors, shall provide for the relief of such poor persons in their respective townships as should not, in their judgment, be sent to the county home. But where a city is embraced, in whole or in part, within the limits of any township, the board of supervisors may appoint an overseer of the poor, who shall have within said city, or part thereof, all the powers and duties conferred by this chapter on the township trustees. The relief may be either in the form of food, rent or clothing, fuel and lights, medical attendance, or in money, and shall not exceed two dollars per week for each person for whom relief is thus furnished, exclusive of medical attendance. They may require any able-bodied person to labor faithfully on the streets or highways at the rate of five cents per hour in payment for and as a condition of granting relief; said labor shall be performed under the direction of the officers having charge of working streets and highways. When medical services are rendered by order of the trustees or overseers of the poor, no more shall be charged or paid therefor than is usually charged for like services in the neighborhood where such services are rendered. No supervisor, trustee or overseer shall be directly or indirectly interested in any supplies furnished the poor. [33 G. A., ch. 29, § 3.] [18 G. A., ch. 133; C. '73, § 1361.]

It is money expended in furnishing support or relief which may be recovered; but if the support is furnished at the poor farm, the reasonable value of maintaining an inmate is the measure of the money expended. *Hamilton County v. Hollis*, 141–477, 119 N. W. 978.

Where it appeared that on notice of the clerk to the trustees two of the trustees appeared and it was agreed as to what action should be taken, held that there was a sufficient meeting of the trustees to support such action. *Brock v. Jones County*, 145–397, 124 N. W. 209.

The township trustees, in passing upon a claim for medical services rendered to a poor person, act in a quasi judicial capacity and a claim once presented and rejected cannot be allowed by a subsequent board although the trustees rejecting such claim may, no doubt, within a reasonable time, reconsider their action. *Case v. Davis County*, 150–552, 129 N. W. 804.

An allegation that the township trustees, without knowledge of the merits of a claim previously rejected by their predecessors at the time the services were performed, allowed and certified the same, held sufficient to charge fraud in such allowance. *Ibid.*

SEC. 2231. **Soldiers or families.** No person who has served in the army or navy of the United States, or their widows or families, requiring public relief shall be sent to the county home when they can and prefer to be relieved to the extent above provided, and other persons and families may, at the discretion of the board, also be so relieved. [33 G. A., ch. 29, § 1.] [17 G. A., ch. 37; 16 G. A., ch. 26; C. '73, § 1362.]

The relief contemplated in this section is that furnished under code § 2230 which limits the trustees to the expenditure of two dollars per week. It does not have reference to the application of the soldiers' relief tax provided for in code § 431. *Hamilton County v. Hollis*, 141–477, 119 N. W. 978.

SEC. 2232. County expense.

The county, being charged with the duty of relieving and looking after the interests of the poor, is to that extent a charitable institution; and a gift made specifically as an aid to this feature of its work is to all intents and purposes a charitable gift within the exception of the collateral inheritance tax. *In re Estate of Spangler*, 148–333, 127 N. W. 625.

SEC. 2233. **Township trustees—duty.** The trustees in each township, in counties where there is no county home have the oversight and care of all poor persons in their township, and shall see that they receive proper care until provided for by the board of supervisors. [33 G. A., ch. 29, § 1.] [C. '73, § 1364; R. § 1387; C. '51, § 819.]

SEC. 2234. **Application for relief—action of supervisors.** The poor must make application for relief to the trustees of the township where they may be, and, if the trustees are satisfied that the applicant is in such a state of want as requires relief at the public expense, they may afford such relief, subject to the approval of the board of supervisors, as the necessities of the person require, and shall report the case forthwith to the board of supervisors, who may continue or deny relief, as they find cause. The board of supervisors may examine into all claims, including claims for medical attendance, allowed by the township trustees for the support of the poor, and, if they find the amount allowed by said trustees to be unreasonable, exorbitant or for any goods or services other than for the necessaries of life, they may reject or diminish the claim as in their judgment would be right and just, and this act shall apply to all counties in the state, whether there are county homes established in the same or not. This act shall apply to acts of overseers of poor in cities as well as to township trustees. [33 G. A., ch. 29, § 2.] [22 G. A., ch. 101; C. '73, § 1365; R. § 1388; C. '51, § 820.]

If the board of supervisors has in fact employed a competent and efficient physician to care for the poor, the township trustees are not authorized to employ another simply because they believe the county physician is inattentive, neglectful or incompetent. *Lacy v. Kossuth County*, 106–16, 75 N. W. 689.

A certificate from the township trustees attached to the account of a physician presented to the board of supervisors is properly admissible in evidence. *Ibid.*

Where a physician is employed by the board of health to attend upon a person infected with contagious disease he is entitled to compensation from the county if the infected person is a poor person, notwithstanding the employment by the county of another physician to attend generally upon the poor. *Ibid.*

Where it appeared that the board of supervisors had employed a physician but the case in question was not one which would come within his care under his contract of employment, held that the claim of another physician for services rendered in such case was properly allowed. *Taylor v. Woodbury County*, 106–502, 76 N. W. 824.

It is not necessary that application be made for relief by the poor person in order to entitle the county to recover from relatives for support furnished. *Hamilton County v. Hollis*, 141–477, 119 N. W. 978.

The necessity for and extent of the relief to be furnished is largely, if not wholly, a matter of discretion, and neither the county nor its officers are liable for damages in failing to furnish such relief even though, under the circumstances, it might be proper to do so. *Wood v. Boone County*, 153–92, 133 N. W. 377.

SEC. 2235. **Payment of claims.**

The physician may claim for services performed by another physician under his direction. *Taylor v. Woodbury County*, 106–502, 76 N. W. 824.

Even though the services for which claim is made were originally rendered without proper legal sanction, yet the giving of the certificate contemplated in this section cures any such defect in the claim. *Ibid.*

Payment or allowance by the board of a claim which is defectively certified cannot be said to be illegal or unauthorized in such sense as that it should be set aside in an action to recover for the medical services authorized. *Brock v. Jones County*, 145–397, 124 N. W. 209.

SEC. 2238. **Contracts for support.**

A contract or an arrangement between the board of supervisors and a medical society for the furnishing of medical services to the poor is not invalid; and a member of the society cannot recover for services rendered on an arrangement subsequently made between him and the township board of trustees. *Brock v. Jones County*, 145–397, 124 N. W. 209.

SEC. 2241. **County home established.** The board of supervisors of each county may order the establishment of a county home in such county whenever it is deemed advisable, and also the purchase of such land as may be deemed necessary for the use of the same, and may make the requisite contracts and carry such order into effect, provided the cost of said county home and land, if in excess of five thousand dollars, shall be first estimated by said board and approved by a vote of the people. [33 G. A., ch. 29, § 1.] [C. '73, § 1372; R. § 1396; C. '51, § 828.]

SEC. 2242. **Contracts—government.** The board of supervisors, or any committee appointed by it for that purpose, may make all contracts and purchases requisite for the county home and may prescribe rules or regulations for the management and government of the same, and for the sobriety, morality and industry of its occupants. [33 G. A., ch. 29, § 1.] [C. '73, § 1373; R. § 1401; C. '51, § 833.]

SEC. 2243. **Steward appointed.** The board may appoint a steward of the county home, who shall be governed in all respects by the rules and regulations of the board and its committees, and may be removed by the board at pleasure, and who shall receive such compensation, perform such duties, and give such security for his faithful performance as the board may direct. [33 G. A., ch. 29, § 1.] [C. '73, § 1374; R. § 1402; C. '51, § 834.]

SEC. 2244. **Admission to county home—labor.** The steward shall receive into the county home any person producing an order as hereafter provided, and enter in a book to be kept for that purpose the name and age, and the date of the reception of such person; he may require of persons so admitted such reasonable and moderate labor as may be suited to their ages and bodily strength, the proceeds of which, together with the receipts of the poor farm, shall be appropriated to the use of the county home in such manner as the board may determine. No person shall be admitted to the county home except upon the written order of a township trustee or member of the board of supervisors, and relief is to be furnished in the county home only, when the person is able to be taken there, unless in the cases hereinbefore otherwise provided. [33 G. A., ch. 29, § 1.] [C. '73, §§ 1375–7; R. §§ 1403–5; C. '51, §§ 835–7.]

Although persons admitted to the poorhouse may be required to perform such labor as may be suited to their age and strength, the proceeds of which are to be appropriated to the use of the poorhouse, nevertheless the board of supervisors may make a contract with reference to the labor of an insane inmate by which his services are to be accepted in full payment for his board and lodging, and his estate relieved from liability therefor. *Marshall County v. Lippincott*, 137–102, 111 N. W. 801.

SEC. 2245. **Discharge.** When any inmate of the county home becomes able to support himself, the board must order his discharge. [33 G. A., ch. 29, § 1.] [C. '73, § 1379; R. § 1408; C. '51, § 840.]

SEC. 2246. **Visitation of county home.** The board shall cause the county home to be visited at least once a month by one of its body, who shall carefully examine the condition of the inmates and the manner in which they are fed and clothed and otherwise provided for and treated, ascertain what labor they are required to perform, inspect the books and accounts of the steward, and look into all matters pertaining to the county home and its inmates, and report to the board. [33 G. A., ch. 29, § 1.] [C. '73, § 1380; R. § 1410; C. '51, § 842.]

SEC. 2247. **Expenses—tax.** The expense of supporting the poor shall be paid out of the county treasury in the same manner as other disbursements for county purposes; and in case the ordinary revenue of the

county proves insufficient for the support of the poor, the board may levy a poor tax, not exceeding two mills on the dollar, to be entered on the tax list and collected as the ordinary county tax. [33 G. A., ch. 132, § 1.] [21 G. A., ch. 10; 17 G. A., ch. 166; C. '73, § 1381; R. § 1412; C. '51, § 844.]

SEC. **2248. Letting out.** The board is invested with authority to let out the support of the poor, with the use and occupancy of the county home and farm, for a period not exceeding three years. [33 G. A., ch. 29, § 1.] [C. '73, § 1382; R. § 1415; C. '51, § 847.]

SEC. **2249. Education of children.** Poor children, when cared for at the county home, shall attend the district school for the district in which such home[1] is situated, and a ratable proportion of the cost of the school, based upon the attendance of such poor children to the total number of days' attendance thereat, shall be paid by the county into the treasury of such school district, and charged as part of the expense of supporting the county home. [33 G. A., ch. 29, § 1.] [17 G. A., ch. 166; C. '73, § 1381; R. § 1412; C. '51, § 844.]

[1"house" in code changed here to comply with the manifest intent. EDITOR.]

SEC. **2250. Illegitimates.**

The putative father of an illegitimate child being chargeable for its support, the child may recover civil damages for injuries resulting from sale of intoxicating liquors to the father. *Goulding v. Phillips*, 124-496, 100 N. W. 516.

SEC. **2252. "Poor person" defined.**

The provisions as to the support of poor persons are to be construed as contemplating only those who having no property are unable because of physical or mental disability to earn a living by labor. *Monroe County v. Abegglen*, 129-53, 105 N. W. 350.

A person to come within the class mentioned must be without property which can aid in his support or out of which funds may be realized for his maintenance. *Hamilton County v. Hollis*, 141-477, 119 N. W. 978.

CHAPTER 2.

OF THE CARE OF THE INSANE.

[For general supervision by board of control and abolishment of boards of trustees see §§ 2727-a8 and 2727-a9 herein. EDITOR.]

SECTION **2253. Hospitals—trustees—repealed.** [29 G. A., ch. 91, § 1.]

[See § 2253-a.]

SEC. **2253-a. State hospitals—names.** That section twenty-two hundred fifty-three of the code be and the same is hereby repealed and the following enacted in lieu thereof:

The hospital for the insane at Mount Pleasant shall be known by the name of "Mount Pleasant State Hospital"; the one at Independence, "Independence State Hospital"; the one at Clarinda, "Clarinda State Hospital"; and the one at Cherokee, "Cherokee State Hospital." [29 G. A., ch. 91, § 1; 25 G. A., ch. 80; 22 G. A., ch. 75, §§ 1, 2; C. '73, § 1383.]

SEC. **2266. Finding of commissioners—warrant—confinement.**

The board of insane commissioners is not required to make a finding upon the question of legal residence of a person found to be insane. *Brown v. Lambe*, 119-404, 93 N. W. 486.

A finding of insanity and an order for commitment are not admissible as proof of the fact of insanity where it appears that there was no commitment in fact and that on further investigation the commissioners found that the person under investigation was not insane and ordered his discharge. *State v. Neubauer*, 145-337, 124 N. W. 312.

Discharge from the hospital after commitment is evidence of change in mental capacity but is not conclusive. *Mileham v. Montagne*, 148-476, 125 N. W. 664.

SEC. 2267. **Appeal from finding.** Any person found to be insane in proceedings herein authorized may appeal from such finding to the district court by giving the clerk thereof, within ten days after such finding has been made, notice in writing that an appeal is taken, which may be signed by the party, his agent, guardian or attorney, and, when thus appealed, it shall stand for trial anew. Upon appeal it shall be the duty of the county attorney to prosecute the action on behalf of the informant without additional compensation. [29 G. A., ch. 92, § 1; 18 G. A., ch. 152, §§ 1, 2.]

SEC. 2270. **Settlement in another county.** If the commissioners find that the person committed to the hospital has or probably has a legal settlement in some other county, they shall, after the time allowed for an appeal, or, in case an appeal is taken, after the same is finally disposed of, immediately notify the auditor of such county of such finding and commitment, and the auditor so notified shall thereupon inquire and ascertain if possible whether the person in question has a legal settlement in that county, and shall immediately notify the superintendent of the hospital and the commissioners of the county from which such person was committed of the result of such inquiry. If the legal settlement of a person committed cannot for a time be ascertained, and is afterwards found, the notices required shall then be given. If in either of the above cases the auditor of the county in which it is alleged that the patient has a legal settlement shall find adversely to the decision of the commissioners of the county from which the patient was committed, and said commissioners are unwilling to accept his findings, they shall, through the auditor of their county, forthwith apply to the district court through proper legal proceedings for a determination of the case. Any county whose officials shall fail either in cases now in dispute or disputes which may hereafter arise to apply to the district court as herein provided, within six months from the date of the receipt of notice from the auditor of the county in which it is claimed the patient has a legal settlement shall be liable for the maintenance of said patient. If, upon hearing, the court shall find that the patient has no legal settlement in either of the counties in dispute, the board of control shall at once be notified by the auditor of the county from which the patient was committed, in accordance with the provisions of section one, chapter ninety-two, acts of the thirty-first general assembly,[1] and the proceedings thereafter with reference to said patient shall be as provided in said section. The residence of any person found insane who is an inmate of any state institution shall be that existing at the time of admission therein. [32 G. A., ch. 118; 24 G. A., ch. 24, § 2; C. '73, § 1402.]

[1] § 2727-a28a herein. EDITOR.]

SEC. 2271. **Custody outside hospital.** If any person found to be insane and a fit subject for custody and treatment in the hospital cannot at once be admitted therein, or, in case of appeal from the finding of the commissioners, if such person cannot with safety be allowed to go at liberty, the commissioners shall require that such person shall be suitably provided for otherwise until such admission can be had, or until the occasion therefor no longer exists. Such patients may be cared for as private patients whose relations or friends will obligate themselves to take care of and provide for them without public charge. In such case, the commissioners shall in writing appoint some suitable person special custodian, who shall have authority to, and shall in all suitable ways, restrain, protect and care for such patient in such manner as to best secure his safety and comfort, and to best protect the persons and property of others. In the case of public patients, the commissioners shall require that they be in like manner

restrained and protected and cared for by the board of supervisors at the expense of the county, and they may, accordingly, issue their warrant to such board, who shall forthwith comply with the same. If there is no county home for the reception of such patients, or if no more suitable place can be found, they may be confined in the jail of the county in charge of the sheriff; but no female may be confined in such county home or jail unless at all times under the personal care of a suitable female attendant, who shall hold a key of the apartment in which said person is confined. [33 G. A., ch. 29, § 1.] [22 G. A., ch. 68, § 2; C. '73, § 1403.]

SEC. 2279. **Insane prisoners—inquiry—confinement.**

The commissioners of insanity have no authority to inquire as to the sanity of a prisoner under arrest on indictment, and the provisions of this section are in this respect invalid. The court should proceed under the provisions of code § 5540. *Stone v. Conrad*, 105–21, 74 N. W. 910.

SEC. 2283. **At expense of state.** Patients in a hospital having no legal settlement in the state, or whose legal settlement cannot be ascertained, shall be supported at the expense of the state. The trustees of any asylum may authorize the superintendent to remove any patient who has no legal settlement within the state, the cost of such removal to be paid directly from the state treasury, upon a sworn statement of the superintendent and the approval of the trustees appended to each voucher. [31 G. A., ch. 92, § 3; 21 G. A., ch. 47; C. '73, § 1419.]

SEC. 2287. **Escape—expenses of capture and return.** That section twenty-two hundred eighty-seven of the code and chapter seventy-nine of the acts of the thirtieth general assembly amendatory thereof are hereby repealed and in lieu thereof is enacted the following:

"If any patient shall escape from a state hospital for the insane the superintendent shall cause immediate search to be made for him and if he cannot be found, shall cause notice of such escape to be given forthwith to the clerk of the district court of the county where he belongs and if found to be in that county the clerk shall at once notify the superintendent of the place where the patient can be found, and when so notified or when otherwise informed of the place in which the patient may be taken the superintendent shall send an employe of the hospital or other person for him and cause him to be returned to the hospital unless for good reasons a different course be deemed advisable by the superintendent, and is approved by the board of control. In case of apparent necessity the patient may be taken into custody and restrained by the local authorities until he is taken by the representative of the hospital. All actual and necessary expenses incurred in the capture, restraint and return to the hospital of the patient shall be paid on itemized vouchers, sworn to by the claimants and approved by the superintendent and the board of control of state institutions, from any money in the state treasury not otherwise appropriated." [31 G. A., ch. 93; 30 G. A., ch. 79; C. '73, § 1423.]

SEC. 2288. **Discharge when cured.**

Discharge of one committed for insanity is only prima-facie evidence of recovery. *Mileham v. Montagne*, 148–476, 125 N. W. 664.

SEC. 2291. **Compensation for keeping—repealed.** [27 G. A., ch. 54, § 1.]

[See § 2291-a.]

SEC. 2291-a. **Repeal.** That section twenty-two hundred ninety-one of the code be and the same is hereby repealed. [27 G. A., ch. 54, § 1.]

SEC. 2291-b. **Amount allowed for care of patients.** That the law as it appears in section twenty-two hundred ninety-one-b, chapter two, title

twelve, supplement to the code, 1907, be and the same is hereby repealed and in lieu thereof is enacted the following:

The board of control of state institutions of Iowa may from time to time fix the monthly sum for the board and care of each patient in the state hospitals for the insane, which sum for the hospitals at Mount Pleasant and Clarinda shall not exceed fourteen dollars, and for the hospitals at Independence and Cherokee shall not exceed fifteen dollars. Said sum shall be placed to the credit of the hospital entitled thereto upon the certificate of the board of control of state institutions, based upon reports of the superintendent, and paid from the state treasury as provided by the law as it appears in section twenty-seven hundred twenty-seven-a one and subsequent sections to and including section twenty-seven hundred twenty-seven-a fifty-one, chapter two, title twelve, supplement to the code, 1907, and acts amendatory thereof, and the certificate of the board shall be competent evidence of the amount due for the time therein stated. [34 G. A., ch. 97, § 1.] [29 G. A., ch. 157, § 1; 28 G. A., ch. 140, § 3; 27 G. A., ch. 54, § 1; 17 G. A., ch. 84; C. '73, § 1427.]

SEC. **2291-c. Cherokee state hospital—support for.** Section two of chapter one hundred forty of the acts of the twenty-eighth general assembly is hereby repealed and in lieu thereof is enacted the following:

That in order to maintain the hospital for the insane at Cherokee and provide for the patients therein during the first month of its occupancy, the superintendent is authorized to estimate before the opening of the hospital for the support of five hundred fifty patients for such first month, and the sum of eighty-two hundred fifty dollars is hereby appropriated for that purpose. [29 G. A., ch. 157, § 2; 28 G. A., ch. 140, § 2.]

SEC. **2291-d. Appropriation for transferring patients.** The sum of six thousand dollars, or so much thereof as shall be necessary, is hereby appropriated out of any money in the state treasury not otherwise appropriated to pay the expenses of transferring patients in hospitals for the insane to other hospitals, made advisable by the opening of the hospital at Cherokee. The money required for the purpose stated shall be drawn by and on the estimate of the superintendents of the several hospitals, approved by the board of control of state institutions, and may be so drawn before the expenses are incurred or vouchers therefor are filed. Any unexpended balance of money so drawn shall be returned to the state treasury. An itemized statement of the money so drawn and of the expenses so incurred and paid and of the balance, if any, returned to the state treasury shall be made by the board of control and filed in the office of the auditor of state. [29 G. A., ch. 157, § 3.]

SEC. **2292. Charged to the counties—how certified and paid—tax levied.** Section twenty-two hundred ninety-two of the code, relating to the expense of the insane, is hereby repealed and the following enacted in lieu thereof:

"The superintendents of the hospital for the insane and hospital for inebriates shall certify to the auditor of state on the first days of January, April, July and October, the amount not previously certified by him due the state from the several counties having patients chargeable thereto, and the auditor of state shall thereupon charge the same to the county so owing and the board of supervisors shall at the time of levying other taxes estimate the amount necessary to meet this expense the coming year including cost of commitment and transportation of patients and shall levy a tax therefor. Taxes thus levied and collected cannot be used for any other purpose or transferred to any other fund. Should any county fail

to levy a tax sufficient to meet this expense the deficiency shall be paid from the general county fund. Should any county fail to pay these bills within sixty days from the date of certificate from the superintendent, the auditor of state shall charge the delinquent county the penalty of one per cent. per month on and after sixty days from date of certificate until paid. The superintendent shall, at the time of mailing certificate to the auditor of state, send a duplicate copy to the auditor of each county having a patient chargeable thereto, and the county auditor, upon receipt of such certificate, shall thereupon pass the same to the credit of the state in his ledger of state accounts, and at once issue a notice to his county treasurer, authorizing him to transfer the amount from the insane or county fund, to the general state revenue, which notice shall be filed by the treasurer as his authority for making such transfer, and shall include the amount so transferred in his next remittance of state taxes to the treasurer of state, designating the fund to which it belongs." [31 G. A., ch. 94; 17 G. A., ch. 183, §§ 1-3; 16 G. A., ch. 28; C. '73, § 1428.]

SEC. **2297. Estates of patients liable.**

The wife does not become liable to the county for the support of her husband as a patient in the insane hospital. *Blackhawk County v. Scott*, 111–190, 82 N. W. 492.

The state has no common law right of recovery against the estate of one who has received the benefits of treatment as an insane person in the hospitals of the state, and there is no statutory provision creating a liability which may be enforced by the state against the patient or his property. *State v. Colligan*, 128–536, 104 N. W. 905.

The estate of an insane person cannot be taxed with the costs of the hearing on the question of insanity and commitment under such hearing. *In re Estate of Westlake*, 125–314, 101 N. W. 88.

In defense to an action to recover from the estate of an insane person the expense of maintaining him by the county, it may be shown that under an agreement with the board of supervisors he rendered services on the poor farm for an agreed compensation in full payment for his board and lodging. *Marshall County v. Lippincott*, 137–102, 111 N. W. 801.

A father is liable to the county for the care and support of his minor son at the hospital for the insane. The statutory provision does not impose a tax nor is it open to objection that it authorizes the taking of private property without just compensation. *Guthrie County v. Conrad*, 133–171, 110 N. W. 454.

The question of the insanity of the person for whose support recovery is sought against his parent may be litigated in the action. *Ibid.*

The fact that the insane person is placed in the hospital without the consent of those liable for his support will not relieve them from the statutory liability. *Ibid.*

The county may recover judgment against an insane person for any sum paid by the county for his support, such insane person being defended by guardian. A judgment thus recovered may be enforced by execution sale of the property of the insane person. *Gressly v. Hamilton County*, 136–722, 114 N. W. 191.

No provision is made for jury trial on a claim of the county against the estate of an insane person for his care and support. *In re Guardianship of Buck*, 140–355, 118 N. W. 530.

A husband is liable under this section for the amount advanced by the county to support his insane wife at the hospital. *Wapello County v. Eikelberg*, 140–736, 117 N. W. 978.

This section does not authorize recovery by the state but only by the county which is legally bound in law for the support of an insane person, and the board of supervisors of the county may relieve the estate of an insane person from the payment of the expense of the keeping of such person in the insane hospital. *State v. Cole*, 155–654, 136 N. W. 887.

Where it appears that the county has expended nothing in the maintenance of a patient in the insane hospital it cannot recover the expense of such maintenance from the estate of such insane person who is a nonresident of the county. *Ibid.*

The estates of insane patients are not released from liability because they are supported at public charge and payments made by the county on that account may be collected. Such collection is to be enforced by judgment and execution as any other claims against the estate of the insane person. *Clay County v. Meyers*, 140 N. W. 889.

SEC. **2297-a. Nonresident patients—liability of estates and persons.** That the estates of all patients who are provided for and treated in state hospitals for the insane in this state but who are nonresidents of

this state, and all persons legally bound for the support of such patients shall be liable to the state for the reasonable value of the care, maintenance and treatment of such patients while in such hospitals, and the certificate of the superintendent of the state hospital in which any nonresident is or has been a patient, showing the amounts drawn from the state treasury or due therefrom as provided by law on account of any nonresident patient, shall be presumptive evidence of the reasonable value of the care, maintenance and treatment furnished such patient. [34 G. A., ch. 98, § 1.]

This statute is not applicable to claims for support of an insane person presented prior to the date of its taking effect. *State v. Cole*, 155–654, 136 N. W. 887.

SEC. **2308. County insane fund.** The board of supervisors, when levying taxes for general purposes, shall include therein a tax of one and one-half mill or less, as may be necessary, for the purpose of raising a fund for the support of such insane persons as are cared for and supported by the county in the insane ward of the county home, or elsewhere outside of any state hospital for the insane, which shall be known as the county insane fund, and shall be used for no other purpose than the support of such insane persons. [33 G. A., ch. 29, § 3.] [27 G. A., ch. 55, § 1.]

SEC. **2308-a. Nonresidents of county—costs and expenses—how paid.** That section twenty-three hundred and eight-a of the supplement to the code, 1907, be and the same is hereby repealed and the following enacted in lieu thereof:

"That in all cases where the commissioners of insanity of a county find to be insane a person who does not have a legal settlement within that county, the necessary and legal costs and expenses of the arrest, care, investigation and commitment of such person, including quarterly support in a state hospital during the investigation, or time required to determine the residence of such person, also court costs in suit to determine the legal settlement of such patient, together with costs of appeal, if an appeal be taken, and the person is found to be insane on appeal, shall in the first instance be paid by the county in which such person is so found to be insane. If, upon investigation, such person is found to have a legal settlement in another county of this state, such necessary and legal costs and expenses shall be audited and paid by the supervisors of that county in the manner provided for the payment of other claims. If such person be found to have no legal settlement within this state such necessary and legal costs and expenses shall be paid out of any money in the state treasury not otherwise appropriated, on vouchers executed by the auditor of the county which has paid them, and approved by the board of control of state institutions. Such vouchers shall contain an itemized statement of the costs and expenses and payment shall be made to the treasurer of the county." [35 G. A., ch. 183, § 1.] [30 G. A., ch. 78.]

CHAPTER 2-A.

OF THE DETENTION AND TREATMENT OF DIPSOMANIACS, INEBRIATES AND THOSE ADDICTED TO THE EXCESSIVE USE OF NARCOTICS.

[For jurisdiction of superior courts see § 260. EDITOR.]

SECTION **2310-a1. Board of control to provide department.** That the board of control is hereby directed to provide for the detention and treatment of dipsomaniacs, inebriates and persons addicted to the exces-

sive use of morphine or other narcotics, in one or more of the hospitals for the insane at the discretion of said board. Said department thus provided for to be designated as a hospital for inebriates. [29 G. A., ch. 93, § 1.]

SEC. **2310-a2. Examination—commitment.** That all dipsomaniacs, inebriates and persons addicted to the excessive use of morphine or other narcotics, who shall be citizens of the state of Iowa and residents of the county from which they might be committed to the hospital for inebriates, may be brought before the district court or judge of the county where they reside for examination and commitment to said hospital for inebriates. Their examination, trial and commitment shall be governed by the same statutes as now apply to and govern the examination and commitment of incorrigibles to the state industrial school. If it shall be determined by said district court or judge, that such person is addicted to dipsomania, inebriety or to the excessive use of narcotics, he or she shall be committed to such hospital for inebriates, as may be established by the board of control as above provided for. The term of detention and treatment shall be, for the first commitment not less than one, nor more than three years; and for the second commitment not less than two nor more than five years. The governor shall parole a patient on conditions named in the following section. [29 G. A., ch. 93, § 2.]

SEC. **2310-a3. Parole—conditions—report—form.** If after thirty days of such treatment and detention a patient shall appear to be cured, and if the physician in charge and the superintendent of said institution shall so recommend, the governor shall parole said patient; provided that said patient shall pledge himself or herself to refrain from the use of all intoxicating liquors as a beverage, or other narcotics, during the remaining part of his or her term of commitment, and shall avoid the frequenting of places and the association of people tending to lead them back to their old habits of inebriety, and shall send the following report on the first day of every month during term of parole to the governor, which report must be inquired into and approved as correct by the clerk of the district court of the county wherein the patient resides, and said patient shall furnish the clerk of the district court with satisfactory evidence of his sobriety and good habits:

Report of.....to superintendent of hospital for inebriates at.....Iowa.

I, ... being on parole from the hospital for inebriates at .....Iowa, do hereby certify that I have up to this date, being the first day of.....19...., refrained from the use of all intoxicating liquors as a beverage, and all narcotics of any kind whatsoever, except it be a moderate use of tobacco.

.....
.....

I have carefully inquired into the record of.....as named above and do hereby certify that I believe the statements contained in his above report are true.

.....

Clerk district court of Iowa in and for.....county, Iowa.

Dated this.....day of....., 19.....

And if at any time the patient on parole, for any reason fails to make the above report, the sheriff of the county wherein such patient resides shall, without further writ or warrant, return said patient at once to the hospital from which he or she has been paroled, on receiving notice of

such failure from the clerk of the district court of the county wherein the patient resides, or any three reputable citizens thereof, and the patient so returned shall be detained and treated during the full term of his commitment. [29 G. A., ch. 93, § 3.]

SEC. **2310-a4. What statutes apply.** That all statutes of the state providing for the trial, commitment, detention and treatment of incorrigibles sent to industrial schools shall be applicable to trial, detention and treatment of all patients committed under the provisions of this act, except in so far as they may be modified by the provisions of this act. [29 G. A., ch. 93, § 4.]

SEC. **2310-a5. Expenses—how paid.** That the expense of trial, commitment and treatment of such persons so committed under the provisions of this act shall be borne and paid in the same manner and out of the same fund as the expenses of insane patients are borne and paid, and the estates of such patients shall be liable therefor to the same extent as in the case of insane persons. [29 G. A., ch. 93, § 5.]

SEC. **2310-a6. State hospital for inebriates.** The industrial home for the adult blind at Knoxville shall hereafter be called the state hospital for inebriates, and shall be used for the detention, care, and treatment of all male dipsomaniacs, inebriates, and persons addicted to the excessive use of morphine, cocaine, or other narcotic drugs. [30 G. A., ch. 80, § 1.]

SEC. **2310-a7. Officers and employes.** The officers and employes of said hospital shall consist of a superintendent, who shall be a reputable physician, and such other officers and employes as the board of control of state institutions shall deem necessary for the proper operation of said institution. Said superintendent shall be appointed by the board of control of state institutions for the term of four years and shall receive such salary as said board may fix, not exceeding two thousand dollars per annum. [30 G. A., ch. 80, § 2.]

SEC. **2310-a8. Control.** The board of control of state institutions shall have the same power and control over said hospital as is now given it with reference to the several institutions mentioned in chapter one hundred eighteen of the acts of the twenty-seventh general assembly and all amendments thereto, and said act and amendments shall apply to and govern said hospital in every respect in so far as they are not in conflict with the provisions of this act. [30 G. A., ch. 80, § 3.]

SEC. **2310-a9. Notice of opening of hospital.** When said hospital buildings are erected, refitted, equipped, furnished, and ready for occupancy, said board of control shall mail written notice to every judge of the district court and to every clerk of the district court in the state, notifying them that said hospital is open for the reception of patients. [30 G. A., ch. 80, § 4.]

SEC. **2310-a10. Male patients.** Said hospital shall receive all male patients regularly committed to it who are dipsomaniacs, inebriates, or who are addicted to the excessive use of morphine, cocaine, or other narcotic drugs. Provided, however, that whenever in the opinion of the board of control of state institutions it shall be necessary to restrict the number of admission for lack of room, said board may notify by mail each district judge and each clerk of the district court in the state of the fact, and that patients will not be admitted except on application approved by the superintendent, and after such notice is given it shall not be lawful for the clerk of any court to issue a warrant for the commitment of any patient to said hospital unless such clerk has been notified by the superin-

tendent in writing that the patient can be received, and until such notice from the superintendent is received the order of commitment shall be suspended. The superintendent shall in such cases grant applications for admission in the order in which they are received. When the board of control is of the opinion that the necessity for such restriction has ceased to exist it may discontinue it and give notice thereof as was required to establish it, and when such notice is given the restriction shall cease. [31 G. A., ch. 95; 30 G. A., ch. 80, § 5.]

SEC. **2310-a11. Application for commitment.** Applications for commitment to said hospital shall be made to the judge of the district court of the district which embraces the county in which the person whom it is proposed to commit resides, and said application may be made in person by any dipsomaniac, inebriate, or user to excess of morphine, cocaine, or other narcotic drug, or it may be made against any such person by his wife, or other relative, or by his guardian or by any other person, such person having first obtained the consent of the district judge for so doing. [30 G. A., ch. 80, § 6.]

The statute authorizes the filing of an information by one in no manner related to the inebriate, provided such person obtains an order from the district judge. *State v. Brooks*, 146–295, 125 N. W. 168.

SEC. **2310-a12. Examination—commitment.** On presentation of the application provided for in section six hereof, unless made in person by an inebriate, dipsomaniac, or user to excess of narcotic drugs, the judge shall issue an order, which may be served by any peace officer, directing him to bring the accused person before him for examination, and on his appearance, unless he demands a formal trial, the judge shall hear any evidence which may be adduced touching the accusation. The accused may be represented by counsel and the judge may, if he deems it necessary, require the county attorney of the county where the hearing is had to attend and assist in such hearing. In case said application be voluntarily or involuntarily made and the said judge shall determine that the accused is a proper person to be committed to said hospital, he shall make an order committing him thereto; otherwise he shall be discharged. The term of detention and treatment shall be until the patient is cured and not exceeding three years. Provided that before a person shall be committed to a state hospital for inebriates satisfactory evidence shall be submitted to the trial court or judge showing that the person committed is not of bad repute or of bad character apart from his or her habit for which the commitment is made and that there is reasonable ground for believing that the person if committed will be cured of such habit; and provided further, that the board of control of state institutions may discharge any person committed to a state hospital under the provisions of this act on the recommendation of the superintendent when satisfied that such person will not receive substantial benefit from further hospital treatment. [32 G. A., ch. 119; 30 G. A., ch. 80, § 7.]

Where the defendant does not demand a jury trial he is in no position to complain that he was deprived of any constitutional right. *State v. Brooks*, 146–295, 125 N. W. 168.

SEC. **2310-a13. Formal trial.** If the accused shall not voluntarily apply for commitment and shall prior to the beginning of the hearing before the judge, demand a formal trial, the judge shall continue the hearing to the next term of the district court, or if the court shall be in session the

case shall be transferred to it, and in either case the cause shall be docketed and tried as a civil case, and all papers used before the judge shall be filed with the clerk of the court; pending such hearing the judge may make such order in relation to the custody, restraint or control of the accused as he shall deem necessary. [30 G. A., ch. 80, § 8.]

SEC. **2310-a14. Warrant of commitment.** If on a formal trial the accusation is proven the judge of the court shall impose sentence of detention, as provided in section seven hereof, and the clerk of the court shall issue a warrant of commitment in accordance therewith to said hospital. If the truth of the charge is not established he shall be discharged. [30 G. A., ch. 80, § 9.]

SEC. **2310-a15. Costs and expenses.** All costs and expenses incurred in the arrest of the accused and other costs incurred in any hearing before the judge, and all costs and expenses of trial, and the costs and expenses incurred in taking the accused to the hospital, shall be taxed up on the proceeding or trial as the case may be and be made a matter of record in the proper books of the office of the clerk of the district court of the county where the accused resided and shall be paid by the county and may, if he be committed, be recovered by it of the accused. [30 G. A., ch. 80, § 10.]

SEC. **2310-a16. Per capita allowance.** The board of control of state institutions shall fix the per capita monthly allowance which may be charged by said hospital for the care, treatment, and maintenance of each patient therein, which shall not exceed the sum of twenty dollars per capita per month, which shall be certified by the superintendent to[1] said board and paid out as provided in chapter one hundred eighteen of the acts of the twenty-seventh general assembly applicable to state hospitals for the insane. Provided, however, that so much of the monthly sum as exceeds fifteen dollars shall be paid by the state from any money in the state treasury not otherwise appropriated and shall not be charged to any county or person. Provided that until the average number of patients in said hospital shall exceed two hundred per month, it shall be credited by the auditor of state and the treasurer of state with not to exceed the sum of four thousand dollars per month, which may be drawn as above provided. [30 G. A., ch. 80, § 11.]

[1]"of" in 30 G. A. session laws. EDITOR.]

SEC. **2310-a17. Rules and regulations—blanks.** The superintendent of said hospital, subject to the approval of the board of control, shall prepare rules and regulations for the government of said hospital and its inmates, and said board of control shall cause to be prepared a blank form of warrant or order of commitment which shall contain such printed questions as may tend to bring out the previous history, condition and treatment of the accused, which blanks shall be furnished to the district judges and to the clerks of the district court. The judge when he investigates the charge and the clerk of the court when the case is tried, shall, so far as they are able, fill out said blanks. [30 G. A., ch. 80, § 12.]

SEC. **2310-a18. Patients to labor—treatment.** Patients received at said hospital shall be required to labor if in the opinion of the superintendent it is for their physical and mental welfare, and the method of treatment shall be that which is deemed best to eliminate the effects of the alcohol or narcotic drug and to build up the system physically and mentally and which will tend to strengthen the moral character of the patient and enable him to resist the temptation to drink or use narcotic drugs. [30 G. A., ch. 80, § 13.]

SEC. **2310-a19. Conditions of parole—violation.** That the law as it appears in section twenty-three hundred ten-a nineteen of the supplement to the code, 1907, is hereby repealed and in lieu thereof is enacted the following:

"Any patient whom the superintendent believes to be cured, or so much improved as to make his release on trial advisable, may be paroled, conditioned on said patient's signing a written pledge agreeing to refrain from the use of all intoxicating liquors as a beverage, and from the use of morphine and cocaine or other narcotic drugs during the term of his commitment, and shall avoid frequenting places and the association of people tending to lead him[1] back to his old habits of inebriety. And said paroled patient must make written reports to the superintendent of said hospital at the beginning of each month on blanks to be furnished the clerks of the district and superior courts for that purpose, to the effect that he has not during the month past in any respect violated any of the terms and conditions of his parole, which reports must be investigated and approved by the clerk or judge of the court which committed him, or if he shall have removed from the county from which he was committed then by the clerk of the district court of the county in which he actually resides at the time the report is made, who may demand from said paroled patient satisfactory evidence as to the truth of the statement. If at any time a patient on parole shall fail to make said report, or shall fail in any respect to fulfill all of the conditions upon which said parole was granted, he may, without any further proceeding whatever and on the written order of the superintendent of said hospital, be taken and returned to the hospital, there to be detained and treated as provided herein. Said patient so violating his parole may be returned by any peace officer, or by any officer or person whom the superintendent of the hospital may direct so to do, and in every such case all of the expenses of such taking and return of such patient shall be paid out of any money in the state treasury not otherwise appropriated on voucher executed and approved as in other cases, unless otherwise paid. Provided, however, that the superintendent may parole patients into the care of reliable and responsible persons whom he may select, and in such cases the patient shall sign the written pledge, and monthly reports shall be made as in other cases, and it shall be lawful for the superintendent to take from the person into whose care such a patient is paroled an obligation in writing which shall specify the undertaking of the obligor and require him to pay all expenses which shall be incurred on account of the paroling of the patient and in returning him for a violation of his parole, and all the provisions of this act for returning a patient for a violation of his parole shall apply to patients paroled into the care of other persons. If the superintendent be satisfied in any case that it will impose an unnecessary hardship upon a paroled patient to secure the approval of the clerk of the district court to the monthly report he may waive such approval when the report is approved by some other public officer, to be designated by him. [35 G. A., ch. 185, § 1; 33 G. A., ch. 133, § 1.] [30 G. A., ch. 80, § 14.]

[1]"them" in enrolled bill. EDITOR.]

SEC. **2310-a19a. Applicable to females.** "The provisions of this act shall apply to female patients who have been or shall be committed to a state hospital for the insane under the law as it appears in chapter two-A, title twelve of the supplement to the code, 1907." [35 G. A., ch. 185, § 2.]

SEC. 2310-a20. **Leaving hospital without authority—penalty.** Any patient in said hospital who shall without due authority leave the hospital, including its grounds and any other place to which he may be permitted to go, shall be guilty of a misdemeanor and shall upon conviction be punishable by imprisonment in the county jail not less than thirty nor more than ninety days, and the district court of the county in which the institution is situated, as well as the district court of any county in which the patient may be found, shall have jurisdiction in such cases. The board of supervisors of the county in which such prosecution is had shall certify to the board of control of state institutions an itemized statement of the costs of prosecution and maintenance incurred by the county wherein such prosecution is had, which certificate shall be indorsed by the trial judge stating that the amount, as shown by said certificate is correct. On receipt of such certificate, the said board of control shall order a warrant issued in favor of the treasurer of the county wherein such prosecution is had, for the amount of the costs and expenses so incurred, which shall be payable out of the support or contingent fund of said hospital for inebriates. [31 G. A., ch. 96; 30 G. A., ch. 80, § 15.]

SEC. 2310-a21. **Refusal to work—enforcement of rules by officers and employes.** Any patient in said hospital who shall be required to work as hereinbefore provided, and who shall refuse so to do, or who shall violate any of the rules and regulations of the hospital, shall be subject to punishment therefor and shall not be paroled. For the purpose of enforcing any of the laws, rules or regulations established for the government of said hospital or the patients therein, the superintendent thereof and all assistants and employes of the institution while employed as such are hereby clothed with the powers of peace officers so far as the management and government of such hospital and the patients therein is concerned: and such superintendent, assistants and employes, or any one thereof, shall have power to protect the property of such institution, to suppress riots, disturbances, and breaches of the peace, and to enforce all laws, rules or regulations established for the regulation and government of the hospital and the patients therein, and may upon view or information without warrant arrest any person violating any of such laws, rules or regulations and may hold any such offender to be dealt with as provided by law or the rules and regulations established for the government of such institution.

This act shall not be construed to authorize any additional employes in such institutions or any increase of compensation to any employes on account thereof. [34 G. A., ch. 99, § 1.] [30 G. A., ch. 80, § 16.]

SEC. 2310-a22. **Commitment of females.** Females who are dipsomaniacs, inebriates, or addicted to the excessive use of morphine, cocaine, or other narcotic drugs, may be committed to a state hospital for the insane to be designated by the board of control, for treatment, and all the provisions of this act, so far as applicable and except as modified by this section, shall apply in such cases and also to the cases of such females as may remain in the hospital for inebriates connected with any state hospital. [30 G. A., ch. 80, § 17.]

[For parole and conditions thereof see § 2310-a19a. EDITOR.]

SEC. 2310-a23. **Transfer of patients—appropriation.** When the hospital for inebriates is open for the reception of patients the board of control shall cause to be transferred to it all male persons then in the in-

ebriate hospitals connected with the insane hospitals of the state, and for the purpose of covering the expense of said transfer there is hereby appropriated the sum of four thousand dollars, or so much thereof as may be necessary, out of any funds in the state treasury not otherwise disposed of. [30 G. A., ch. 80, § 18.]

SEC. **2310-a24. Penalties.** Any person who shall furnish any patient of said hospital for inebriates, or any patient who has been or may hereafter be committed to any insane hospital as an inebriate, dipsomaniac, or as one addicted to the excessive use of narcotics, any intoxicating liquor or narcotic drug, except on the written prescription of the superintendent, shall be guilty of a felony, and on conviction thereof shall be punished by imprisonment in the state penitentiary for not less than six months nor more than one year, or by a fine, not less than five hundred dollars nor more than ten hundred dollars, at the discretion of the court. Any person who shall knowingly furnish any intoxicating liquor or narcotic drug to one who has been discharged from either of said institutions as cured, except upon the written prescription of a reputable practicing physician, shall be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not less than three hundred dollars and not more than ten hundred dollars and stand committed to the county jail until such fine is paid. [30 G. A., ch. 80, § 19.]

SEC. **2310-a25. Per capita support for first month.** For the purpose of the maintenance of said hospital for inebriates during the first month of its operation the superintendent thereof may estimate in advance of said opening and on the basis of a population of three hundred inmates at twenty dollars per capita per month for the necessary supplies to operate the hospital for the first month, and the aggregate of said per capita shall be credited to said institution by the auditor of state and treasurer of state and may be drawn against as provided in chapter one hundred eighteen of the acts of the twenty-seventh general assembly. [30 G. A., ch. 80, § 20.]

SEC. **2310-a26. Additional land and buildings—appropriation.** To carry out the purposes of this act and provide for the purchase of the necessary land, and to erect proper additional buildings and outbuildings, and to refit the present buildings, and to equip and furnish the same, and to purchase all necessary animals, tools, implements, and other needed articles, there is hereby appropriated the sum of one hundred twenty-five thousand dollars, or so much thereof as may be necessary, out of any funds available therefor, and on the passage and publication of this act the board of control shall proceed to purchase land, and erect, refit, equip and furnish said buildings as are herein provided for. [30 G. A., ch. 80, § 21.]

SEC. **2310-a27. Acts in conflict repealed.** Section thirty-two hundred twenty-one of the code and all acts and parts of acts in conflict with this act are hereby repealed; provided, however, that nothing in this act shall in any way interfere with the execution of any commitment heretofore made under chapter ninety-three of the acts of the twenty-ninth general assembly; and provided, further, that commitments may continue to be made under such act up to the time the hospitals for inebriates provided for herein shall be formally declared ready for the reception of patients. [30 G. A., ch. 80, § 22.]

SEC. **2310-a28. Insane patients—expenses.** Whenever any person committed to and received in the hospital for inebriates shall become insane, it shall be the duty of the superintendent to file, or cause to be filed,

with the commissioners of insanity of Marion county, Iowa, an information charging the said patient with insanity and the said insane commission shall proceed to inquire into the sanity of said patient as provided in title twelve, chapter two of the code. In the event that said person shall be judged insane, he shall be transferred to the hospital for the insane, where he shall be detained until such time as that he shall be discharged by the superintendent of the insane hospital, when he shall be returned to the hospital for inebriates, where he shall remain under the terms of the original commitment. All the expense incident to the commitment of said patient to the state hospital for the insane, including the expense of the hearing before the commissioners of insanity of Marion county, and the expense of returning said patient to the hospital for inebriates shall be paid out of any money in the state treasury not otherwise appropriated on vouchers executed and approved as in other cases. [33 G. A., ch. 133, § 2.] [30 G. A., ch. 80, § 23.]

[The direction for placing the amendment made by 33 G. A. is somewhat obscure. The above seems to carry out the intent. EDITOR.]

SEC. **2310-a29. Parole when confinement is injurious to health.** Whenever the physical condition of any patient shall become such that, in the judgment of the superintendent, further confinement will prove injurious to the health of said patient, the state board of control may parole him, under proper conditions and restrictions, for such period of time as it may deem advisable. [30 G. A., ch. 80, § 24.]

SEC. **2310-a30. Escape—expenses of recapture.** The law as it appears in section twenty-three hundred ten-a thirty, supplement to the code, 1907, be and the same is hereby repealed and the following enacted in lieu thereof:

"In case of the escape of any patient from the hospital all necessary expenses incurred in the recapture and recommitment of such patient shall be paid out of any funds in the state treasury not otherwise appropriated on vouchers executed and approved as in other cases." [33 G. A., ch. 133, § 3.] [30 G. A., ch. 80, § 25.]

SEC. **2310-a30a. Claims—how paid.** The board of control of state institutions is hereby authorized to permit the superintendent to pay any claims to which the three foregoing sections refer, from the contingent fund provided for by the law as it appears in section twenty-seven hundred twenty-seven-a forty-four, supplement to the code, 1907, and the institution support fund shall be credited at the beginning of each month with the amount, if any, paid during the preceding month from such contingent fund, as shown by the certificate of the superintendent approved by said board of control. [33 G. A., ch. 133, § 4.]

[§ 4 of ch. 133, 33 G. A., authorized the superintendent to pay any claims to which the "three foregoing sections," viz.: §§ 1, 2, and 3 of the act, refer, which sections amend respectively §§ 2310-a19, 2310-a28 and 2310-a30. EDITOR.]

SEC. **2310-a31. Subject to prosecution for public offenses.** Whenever any person shall have been committed to the state hospital for inebriates under the provisions of this act, he shall still be subject to prosecution for any public offense committed against the penal statutes of the state and he shall, at all times, be subject to arrest notwithstanding such commitment. Such person shall, when discharged, be returned to said hospital at the expense of the county in which said prosecution was pending and concluded. [30 G. A., ch. 80, § 26.]

SEC. **2310-a32. Traveling expenses of paroled or discharged patients.** That when an inebriate person is paroled or discharged from the state hospital for inebriates at Knoxville or from any state hospital in which female inebriates are kept and is unable to furnish or obtain money for the necessary traveling expenses from the hospital to the place of commitment, the superintendent of the hospital with the approval of the board of control of state institutions may furnish said patient with transportation to the place where he or she was committed or to any other point he or she may select which is not more distant from the hospital than the place of commitment. [31 G. A., ch. 97.]

SEC. **2310-a33. Custodial department.** That there is hereby created in the state hospital for inebriates at Knoxville, Iowa, a department to be known as the custodial department. [35 G. A., ch. 184, § 1.]

SEC. **2310-a34. Persons confined.** Said department shall be for the confinement of all male persons hereinafter committed to said hospital who have been discharged under the provisions of section twenty-three hundred ten-a twelve, supplement to the code, 1907; all male persons committed to said hospital who are found by the court making the order of commitment to be habitual inebriates or drug habituates; and any person committed to the hospital who, in the judgment of the board of control of state institutions acting upon the recommendation of the superintendent, is believed to be a menace to the maintenance of the discipline of the hospital; and providing that patients of any department of the hospital who leave the institution or grounds thereof without due authority shall be subject to transfer to said custodial department upon order of the superintendent of the hospital. [35 G. A., ch. 184, § 2.]

SEC. **2310-a35. Release—transfer.** No person confined in the custodial department shall be released therefrom until he shall have remained a full term of three years, but may be transferred to any other department of said hospital after two years confinement, if, in the judgment of the board of control of state institutions acting upon the recommendation of the superintendent, such transfer would not be detrimental to the well-being of other patients or to the discipline of the hospital, and such transferred patients may be paroled as provided by law, provided nothing herein contained shall prevent the discharge of patients as is provided by section twenty-three hundred ten-a twenty-nine, supplement to the code, 1907. [35 G. A., ch. 184, § 3.]

SEC. **2310-a36. Segregation.** All habitual inebriates as defined in this act shall be kept and provided for in buildings or apartments separate from all other patients of the hospital and shall not be allowed to mingle or associate with them unless it be necessary in the performance of their duties. [35 G. A., ch. 184, § 4.]

SEC. **2310-a37. Labor—credit for.** All able-bodied patients of the hospital may be employed at labor on the farm, garden, grounds, in or on buildings, shops and other places owned or leased by the state and connected with said hospital when work can be provided, and each patient may be credited with the sum of seventy cents for each full day's labor satisfactorily performed. Fifty cents of said sum shall be deducted for his maintenance and the balance, twenty cents, the superintendent shall pay monthly to those dependent upon him for support, if there be any; otherwise it shall be paid to said patient upon his legal release. All such payments shall be made from the general support fund of the hospital in the same manner as other obligations. Providing, however, that no patient shall be entitled to remuneration under this act until he is in the hospital

ninety consecutive days, and then only during such time as he conforms to the rules and regulations of the hospital. [35 G. A., ch. 184, § 5.]

SEC. **2310-a38. Acts in conflict repealed.** All acts and parts of acts inconsistent herewith are repealed. [35 G. A., ch. 184, § 6.]

CHAPTER 3.

OF DOMESTIC ANIMALS.

SECTION 2311. Meaning of terms.

The owner of property within the terms of this section may be one having less than an absolute or unqualified title. *Getchell & Martin Lumber & Mfg. Co v. Peterson*, 124–599, 100 N. W. 550.

SEC. 2312. Male animals running at large.

The owner of a bull, turning him loose on his own field with knowledge or notice that the partition fence separating his field from a field of an adjoining owner is insufficient to restrain him, cannot complain that the animal is taken up by the adjoining owner as running at large. *Conway v. Jordan*, 110–462, 81 N. W. 703.

Tender of the damages cannot be made until the constable has taken possession of the animal and estimated the damages done. *Ibid.*

One who has been damaged by a bull which has escaped from the custody of its owner is not limited to a proceeding by distraint; but having distrained the animal to prevent further damage, he may surrender him to the owner and recover such damages as he has suffered, in an action at law. *Burleigh v. Hines*, 124–199, 99 N. W. 723.

This statutory provision is applicable without regard to the sufficiency of partition fences through which the animal escapes from custody of the owner onto the land of another owner and there causes damage by getting with calf the blooded cows of such adjoining owner. *Ibid.*

The damage to be recovered in such case is the depreciation in value resulting at once on the serving by the bull of the cows thus gotten with calf and a subsequent disposal by the owner of the cows, of one or more of them, will not relieve the owner of the bull from liability for the damage to the cows thus disposed of. *Ibid.*

SEC. 2313. Distraint damage feasant—recovery.

Where an animal passes from the premises of the owner to the premises of an adjoining owner through a defective fence, the latter may distrain him for damage done. *Conway v. Jordan*, 110–462, 81 N. W. 703.

By distraining a bull which the owner improperly allows to get beyond his control, such distraint being only for the purpose of preventing further damage, the person who thus distrains does not waive the right to sue for damages and elect to rely upon proceedings under the distraint. He may surrender the animal to the owner and afterwards recover in an action such damages as he has suffered. *Burleigh v. Hines*, 124–199, 99 N. W. 723.

Where adjoining properties are not separated by partition fences and there has been no attempt to comply with the statutes for the construction thereof, the owner of one property will not be liable for injury to the crops of another occasioned by animals trespassing from his own pasture, in the absence of any knowledge that the adjoining property has been planted. *Lint v. Malone*, 140 N. W. 372.

SEC. 2314. What animals not permitted to run at large.

The damages for which animals are distrained must be assessed by the township trustees on notice given as required in code § 2317. *Holaman v. Marsh*, 116–483, 90 N. W. 82.

Animals which have escaped from the owner's close and are under the control of no one are running at large within the statutory provision with reference to trespasses by such animals. *Foster v. Bussey*, 132–640, 109 N. W. 1105.

One who is in rightful possession of land may distrain and hold for damages animals prohibited from running at large, trespassing upon his land. *Miracle Pressed Stone Co. v. Roth*, 144–656, 123 N. W. 346.

SEC. 2316. Apportionment of damages.

Where separate trespasses are committed by the stock of different owners, the damages from each trespass are to be considered as distinct and separate, and there is no occasion to apportion the aggregate damages from such trespasses against the different owners in proportion to the number of animals belonging to each engaged in the trespass. *Foster v. Bussey*, 132–640, 109 N. W. 1105.

SEC. 2317. Assessment of damages—sale.

The damages for which animals running at large may be distrained under code § 2314, must be assessed by the township trustees on notice given to them by the person making distraint. *Holaman v. Marsh*, 116–483, 90 N. W. 82.

One who distrains trespassing animals is entitled to compensation for their keeping although by reason of defective township organization there are no trustees competent to assess the damages. *Robinson v. Halley*, 124–443, 100 N. W. 328.

SEC. 2318. Assessment made—appeal.

The fact that there were no trustees of the township wherein stock was distrained to appraise the damage, does not affect the rights of recovery thereof. The owner of the trespassing stock which is distrained by an adjoining landowner should bear the burden of the keeping of the animals, rather than an innocent party. *Robinson v. Halley*, 124–443, 100 N. W. 328.

SEC. 2339. Diseased animals killed.

So far as this section authorizes the destruction by an officer of animals disabled and unfit for further use on account of disease not contagious or infectious in character, and without notice to the owner, it is unconstitutional and the officer destroying such animal may be liable in damages to the owner therefor. *Waud v. Crawford*, 141 N. W. 1041.

SEC. 2340. Dogs killed. It shall be lawful for any person to kill any dog caught in the act of worrying, maiming or killing any sheep or lamb, or other domestic animal, or any dog attacking or attempting to bite any person, and the owner shall be liable to the party injured for all damages done, except when the party is doing an unlawful act. The provisions of this section shall not apply to any damage done by a dog affected with hydrophobia. [30 G. A., ch. 81; 25 G. A., ch. 84; C. '73, § 1485.]

Prior to the amendment of this section the owner of a dog was only liable for the portion of damage done by his dog acting in concert with others in inflicting an injury by killing stock. *Anderson v. Halverson*, 126–125, 101 N. W. 781.

The fact that a dog is harbored on the premises, title to which is in the wife, will not render the wife liable for injuries committed by such dog, the husband being presumed to be the head of the family and responsible for such injury. *Burch v. Lowary*, 131–719, 109 N. W. 282.

In an action under this section for injury inflicted by a dog, the only defense available to the dog's master is the doing of an unlawful act at the time of the attack by the person injured. *Van Bergen v. Eulberg*, 111–139, 82 N. W. 483.

The unlawful act of the person injured that will defeat liability of the owner of the dog must be one that directly contributes to the injury sustained. *Beckler v. Merringer*, 131–614, 109 N. W. 185.

Mere negligence of the party injured is not sufficient to defeat his recovery for the injury, and the burden is not on the plaintiff to show freedom from contributory negligence, but it is on the defendant to show that the plaintiff was guilty of some unlawful act. *Ibid.*

Permitting an animal to run at large in the public highway is not such unlawful act as will defeat the action of the owner of such animal against the owner of a dog causing injury to it. *Ibid.*

Where a horse is frightened in the highway by a dog, and as a consequence, after running some distance is injured by coming into collision with a barbed wire fence, the owner of the dog is liable for the injuries which are the proximate result, although there is an intervening cause contributing to the injury, if it is not the efficient cause thereof. *Ibid.*

Plaintiff having left his horse and buggy in defendant's livery stable went to the buggy at a seasonable hour and in a proper manner to get some article therefrom and was bitten by defendant's dog. Held that plaintiff not being a trespasser was entitled to recover, whether defendant's employes knew of his presence at the place or not. *Shultz v. Griffith*, 103–150, 72 N. W. 445.

Negligence by the injured party, whether of omission or commission, does not exempt the owner of a dog from liability for

injuries committed by such dog unless the negligence amounts to an unlawful act. *Ibid.*

Persons who have possession of and harbor dogs are liable therefor as owners under the statutory provision making owners liable for injuries committed by dogs except when the party injured is doing unlawful acts. *Ibid.*

While this section was evidently intended to do away with the necessity of proving *scienter*, still the plaintiff is not precluded from proving those facts which would have been necessary to a right of action at common law. *Sanders v. O'Callaghan*, 111–574, 82 N. W. 969.

At common law a person was not entitled to keep a vicious dog on his premises for the purpose of keeping off trespassers, provided they came there in the daytime and on some innocent mission. *Ibid.*

In an action for damages on account of injuries received from a vicious dog, plaintiff must show freedom from contributory negligence. *Ibid.*

By the amendment of this section it was intended that the owner of a dog should be liable for damages done by it only when worrying, maiming or killing a domestic animal or when attacking a person. *Miles v. Schrunk*, 139–563, 117 N. W. 971.

The statute creates an absolute liability of the owner of a dog for damages done by it, regardless of knowledge or negligence; but the damages contemplated are compensatory only. *Puls v. Powelson*, 142–604, 121 N. W. 1.

The person to whom the dog legally belongs is the person designated as owner; and proof of knowledge of the mischievous propensities is dispensed with only in case of an action against the owner. To render one who merely harbors a dog liable, previous knowledge of the bad character is required. *Alexander v. Crosby*, 143–50, 119 N. W. 717.

The word "owner" as used in this section has reference to the person to whom the dog belongs, and if the wife of the defendant has bought and paid for it out of her own separate money, the defendant is not liable. *Alexander v. Crosby*, 150–239, 129 N. W. 959.

One may not lawfully kill the dog of another except he be caught in the act of worrying, maiming or killing sheep, lambs or domestic animals or attempting to bite some person. *Ellis v. Oliphant*, 141 N. W. 415.

Where a dog is wrongfully killed, evidence of persons who knew his character, traits and habits is admissible as to his actual value. *Ibid.*

Although plaintiff, in an action to recover for injuries resulting from the attack of a dog, apparently predicates his action upon the violation of a city ordinance, yet if he alleges facts giving rise to a remedy under this section, he may recover without regard to the ordinance. *Forsythe v. Kluckhohn*, 142 N. W. 225.

SEC. 2341. **Repeal.** Section twenty-three hundred forty-one and section twenty-three hundred forty-two of the code are hereby repealed. That chapter ninety-eight of the acts of the thirty-first general assembly be and the same is hereby repealed. [32 G. A., ch. 120, § 1; 31 G. A., ch. 98, § 1.]

SEC. 2341-a. **Registration of pedigree—fee—repealed.** [34 G. A., ch. 100, § 9.] [32 G. A., ch. 120, § 2.]

[See § 2341-r. EDITOR.]

SEC. 2341-b. **Posting certificate of registration—repealed.** [34 G. A., ch. 100, § 9.] [32 G. A., ch. 120, § 3.]

[See § 2341-r. EDITOR.]

SEC. 2341-c. **Grade stallion—repealed.** [34 G. A., ch. 100, § 9.] [32 G. A., ch. 120, § 4.]

[See § 2341-r. EDITOR.]

SEC. 2341-d. **Transfer of certificate—fee—repealed.** [34 G. A., ch. 100, § 9; 33 G. A., ch. 134, § 1.] [32 G. A., ch. 120, § 5.]

[See § 2341-r. EDITOR.]

SEC. 2341-e. **Publishing false pedigrees—penalty—repealed.** [34 G. A., ch. 100, § 9.] [32 G. A., ch. 120, § 6.]

[See § 2341-r. EDITOR.]

SEC. 2341-f. **Stallions—jacks—registration of pedigrees.** No person, firm, company or corporation shall offer for public service, sale, exchange or transfer in this state as registered any stallion or jack over two

years old unless and until he shall have caused the name, age, color and pedigree of the animal to be enrolled by the secretary of the state board of agriculture and shall have procured from him a certificate of such enrollment. The secretary of the state board of agriculture shall recognize as registered only such animals as have been recorded in some stud book recognized by the department of agriculture of the state of Iowa, and the certificate of pedigree shall accompany the application for enrollment. The state of Iowa shall be paid the sum of one dollar for each annual certificate of soundness issued by the secretary of the state board of agriculture according to the methods hereinafter provided. [34 G. A., ch. 100, § 1.]

SEC. **2341-g. Examination by veterinarian—certificate renewal—false report.** The owner or keeper of each and every stallion or jack over two years old kept for public service, sale, exchange or transfer shall cause said stallion or jack to be examined by a duly qualified veterinarian who shall be a graduate of a recognized college and registered as a graduate veterinarian by the Iowa board of veterinary examiners, or veterinarian licensed by said board, who shall make affidavit that such animal is free from hereditary, infectious, contagious or transmissible disease or unsoundness, and shall file the same with the secretary of the state board of agriculture. Any veterinarian who knowingly or wilfully makes a false report upon the disease or freedom from disease, or soundness or unsoundness of the animal brought to him for examination shall be punished by the revocation of his veterinarian certificate. The owner or keeper of each and every stallion or jack over two years old kept for public service or for sale, exchange or transfer shall between the dates of January first and April first of each year after their first registration make application for the renewal of the certificate in the form and manner as above described. [35 G. A., ch. 188, § 1; 34 G. A., ch. 100, § 2.]

SEC. **2341-h. Disqualification.** The presence of any one of the following named diseases shall disqualify a stallion or jack for public service and no certificate shall be issued by the secretary of the state board of agriculture: glanders, farcy, maladie du coit, coital exanthema, urethral gleet, mange, melanosis, blindness, cataract, bone spavin, ringbone and periodic opthalmia[1] (moon blindness). Stallions or jacks possessing any of the following named unsoundnesses may receive a certificate but each certificate and every advertisement shall state in large type or writing that the stallion or jack is unsound and shall specify the unsoundness or unsoundnesses which said stallion or jack has: amaurosis, laryngeal hemiplegia (roaring or whistling), pulmonary emphysema (heaves, broken wind), bog spavin, sidebone, navicular disease, curb, with curby formation of hock, chorea (St. Vitus's dance), crampiness, shivering, stringhalt. In cases where stallions or jacks possess any of the above named unsoundnesses in a very aggravated or serious form, the department of agriculture may upon investigation disqualify such stallion or jack from public service, if they consider him so unsound as to be unfit for breeding purposes. [35 G. A., ch. 188, § 2; 34 G. A., ch. 100, § 3.]

[1]"opthalinia" in enrolled bill. EDITOR.]

SEC. **2341-i. Posting certificate—grade stallion.** Any owner or keeper of a registered stallion or jack over two years old offered for public service or for sale, exchange or transfer who represents or holds such animal as registered, shall keep a copy of the state registration and certificate of soundness upon the door or stall of the stable where such animal is usually kept, and where such animals are advertised each and every ad-

vertisement shall contain a copy of such certificates or the substance thereof. Where certificates of registration have heretofore been issued by the state board of agriculture an additional certificate of registration shall not be required, but application for certificate of soundness shall be made as hereinbefore provided. Any owner or keeper of a stallion or jack over two years old other than registered offered for public service or for sale, exchange or transfer must secure certificates of soundness from the secretary of the state board of agriculture and advertise said stallion or jack by having and posting handbills or posters not less than five by seven inches in size, and said bills or posters must have printed thereon, immediately preceding or above the name of the stallion the words "grade stallion" (or jack) in type not smaller than one inch in height, said bills or posters to be posted in a conspicuous manner at all places where the said stallion or jack is kept for public service, sale, exchange or transfer, together with a copy of the certificate of soundness issued by the secretary of the state board of agriculture, and where such animals are advertised each and every advertisement shall contain a copy of the said certificate or the substance thereof and the words "grade stallion" (or jack). [34 G. A., ch. 100, § 4.]

SEC. **2341-j. Examination upon complaint — consultation — expenses.** When complaint is made to the state board of agriculture that a stallion or jack is diseased and on investigation it is by the department deemed necessary, an examination shall be made by the state veterinarian or his duly authorized deputy; the owner of such stallion or jack shall select some recognized graduate or licensed veterinarian to act with the state veterinarian and the said veterinarian shall, on receipt of a notice, act jointly with the state veterinarian, and these two shall appoint a third graduate or licensed veterinarian to act with them and their decision shall be final. In case all three or any two of the experts declare the stallion or jack is eligible to receive or retain a license, then the expense of the consultation shall be paid by the state board of agriculture out of funds collected for registration fees, or if three or any two of the experts declare the stallion or jack not to be eligible in accordance with the provisions of this act, the expense incurred shall be paid by the person owning the animal and it may be collected in the same manner as in any case of appeal in civil action. [35 G. A., ch. 188, § 4; 34 G. A., ch. 100, § 5.]

SEC. **2341-k. Transfer of certificate—fee.** If the owner of any registered animal shall sell, exchange or transfer the same, he shall file certificate, accompanying the same with a fee of fifty cents, with the secretary of the state board of agriculture, who shall, upon receipt of the original state certificate, properly transferred, and the required fee, issue a new certificate to the then new owner of the animal, and all fees provided by this act shall go into the treasury of the department of agriculture. [34 G. A., ch. 100, § 6.]

SEC. **2341-l. Imported stallions or jacks—certificates—temporary permits.** Every person, firm, company or corporation importing from foreign countries any stallion or jack into the state of Iowa for use or public service, sale, exchange or transfer shall secure certificates of freedom from diseases and unsoundness from a duly qualified or licensed veterinarian in this state, certifying that said animal is free from any or all diseases and unsoundnesses enumerated in section three[1] of chapter one hundred of the acts of the thirty-fourth general assembly as herein amended. Said certificate must be filed with the secretary of the state board of agriculture, who shall issue a certified copy of said certificate of soundness without

charge to said importer which shall serve as a temporary permit to offer said stallion for public service, sale, exchange or transfer until such time as original certificate of pedigree can be produced and state certificate of enrollment and soundness issued. Said temporary permit shall be invalid after ninety days from date of issue. [35 G. A., ch. 188, § 3; 34 G. A., ch. 100, § 7.]

[1See § 2341-h herein. EDITOR.]

SEC. **2341-m. Admission from other states—certificates.** No stallion or jack shall be brought into the state of Iowa from any other state unless accompanied by a certificate of soundness issued by a duly qualified veterinarian who must be approved by the state veterinarian of the state in which the animal is purchased, such examination to cover all diseases and unsoundnesses specified in section three[1] of chapter one hundred of the acts of the thirty-fourth general assembly as herein amended. Said certificate must be filed with the secretary of the state board of agriculture, who shall issue a permit admitting said stallion or jack into the state. [35 G. A., ch. 188, § 5.]

[1See § 2341-h herein. EDITOR.]

SEC. **2341-n. Certificate for transportation—penalty.** On and after July fourth, nineteen hundred thirteen, no railroad company, transportation company or common carrier shall transport into the state of Iowa except for exhibition or racing purposes, any stallion or jack unless accompanied by a state veterinarian's certificate as provided in section four of this act. Violation of this provision shall be punished as provided in section eight[1] of chapter one hundred of the acts of the thirty-fourth general assembly. [35 G. A., ch. 188, § 6.]

[1§ 2341-q herein. EDITOR.]

SEC. **2341-o. Permanent certificate of soundness—fee.** Any stallion or jack six years old or over and having successfully passed veterinary examinations for soundness for two consecutive years shall be entitled to a permanent state certificate of soundness. The last examination must have been made within the year in which said certificate was granted, provided, however, that said permanent certificate must be returned each year to the secretary of the state board of agriculture with a fee of one dollar for renewal and must be accompanied by a certificate signed by a duly qualified or licensed veterinarian that said animal is free from contagious, infectious or communicable diseases. [35 G. A., ch. 188, § 7.]

SEC. **2341-p. Blindness—examination—certificate.** The owner of any blind stallion or jack may upon application have the same examined at the expense of the owner of said animal by a board of three examiners, one to be the state veterinarian or his duly authorized deputy, one to be selected by the owner of the animal, who shall be a graduate or licensed veterinarian, and these two shall appoint a third graduate or licensed veterinarian who shall act with them, and if upon examination and proof furnished, all three or any two members of said board declare that such blindness was caused by accident or disease not transmissible, then upon affidavit of said board the secretary of the state board of agriculture shall be authorized to issue a state certificate. [35 G. A., ch. 188, § 8.]

SEC. **2341-q. False pedigrees of stock—penalty for publishing.** Any person who shall fraudulently represent any animal, horse, cattle, sheep or swine to be registered, or any person who shall post or publish or

cause to be posted or published any false pedigree or certificate of soundness, or shall use any stallion or jack over two years old for public service, or sell, exchange or transfer any stallion or jack over two years old, representing such animal to be registered, without first having such animal registered, and obtaining the certificate of soundness from the state board of agriculture, as hereinbefore provided, or who shall violate any of the provisions of this act, shall be guilty of a misdemeanor, and be punished by a fine of not more than one hundred dollars, or imprisoned in the county jail not exceeding thirty days or [1]by both fine and imprisonment. [34 G. A., ch. 100, § 8.]

[1]"both by" in enrolled bill. EDITOR.]

SEC. **2341-r. When effective—repeal—pending litigation.** This act shall take effect and be in force from and after the first day of January, nineteen hundred twelve, and sections twenty-three hundred forty-one-a, twenty-three hundred forty-one-b, twenty-three hundred forty-one-c, twenty-three hundred forty-one-d and twenty-three hundred forty-one-e of the supplement to the code, 1907, are hereby repealed on and after the first day of January, nineteen hundred twelve. Nothing in this act shall be construed so as to affect litigation arising prior to the first day of January, nineteen hundred twelve. [34 G. A., ch. 100, § 9.]

SEC. **2341-s. Lien on progeny of stallion.** The owner or keeper of a stallion kept for public services who has complied with sections twenty-three hundred forty-one-a, twenty-three hundred forty-one-b, twenty-three hundred forty-one-c and twenty-three hundred forty-one-d of the supplement to the code, 1907, shall have a prior lien upon the progeny of such stallion to secure the amount due such owner or keeper for the service of such stallion, resulting in said progeny, provided that where such owner or keeper misrepresents such stallion by false pedigree no lien shall be obtained. [33 G. A., ch. 135, § 1.]

[§§ 2341-a to 2341-d, inclusive, of the supplement to the code, 1907, were repealed by § 9 of ch. 100, 34 G. A., shown at § 2341-r of this supplement. EDITOR.]

SEC. **2341-t. Limitation of lien.** The lien herein provided for shall remain in force for a period of six months from the birth of said progeny and shall not be enforced thereafter. [33 G. A., ch. 135, § 2.]

SEC. **2341-u. Enforcement—procedure.** The owner or keeper of such stallion may enforce the lien herein provided by placing in the hands of any constable an affidavit containing a description of the stallion and a description of the dam and the time and terms of service, and said constable shall thereupon take possession of said progeny and sell the same for nonpayment of service fee by giving the owner of said progeny ten days' written notice, which notice shall contain a copy of the affidavit and a full description of the progeny to be sold, the time and hour when, and the place at which the sale will take place, and posting for the same length of time in three public places in the township of such owner's residence a copy of such notice. If payment of the service fee and the costs are not made before the date thus fixed, the constable may sell at public auction to the highest bidder such progeny and the owner or keeper of the stallion may be a bidder at such sale. The constable shall apply the proceeds, first, in the payment of the costs, second, in the payment of the service fee. Any surplus arising from sale shall be returned to the owner of the progeny. [33 G. A., ch. 135, § 3.]

SEC. **2341-v. Right of contest—injunction.** The right of the owner or keeper to foreclose, as well as the amount claimed to be due, may be

contested by anyone interested in so doing, and the proceeding may be transferred to the district court, for which purpose an injunction may issue, if necessary. [33 G. A., ch. 135, § 4.]

SEC. **2342. Publishing false pedigrees—repealed.** [31 G. A., ch. 98, § 1.]

[See § 2341.]

SEC. **2348. Bounties.** A bounty of twenty dollars shall be allowed on the skin of an adult wolf, four dollars on that of a cub wolf, and one dollar on that of a lynx or wild cat, to be paid out of the treasury of the county in which the animal was taken, upon the certified statement of the facts, together with such other evidence as the board of supervisors may demand showing the claimant to be entitled thereto. The person claiming the bounty shall produce such statement, together with the whole skin of the animal, to the auditor of the county wherein such wolf, lynx or wild cat was taken and killed, and he shall destroy or deface the same so as to prevent their use to obtain for the second time the bounty herein provided. Any person who shall demand a bounty on any of the above mentioned animals killed or taken in another state or county, or on a domesticated animal, shall be fined not more than one hundred nor less than fifty dollars. [35 G. A., ch. 189, § 1.] [24 G. A., ch. 37; C. '73, §§ 1487, 1488; R. §§ 2193–5.]

While the board may require other evidence than the verified statement of the claimant that the animals had been destroyed, it is not intended to invest the board with the discretion to pay or not if the essential facts are established to its satisfaction, and on the refusal of the board to pay in a proper case action may be maintained against the county. *Bourrett v. Palo Alto County*, 104–350, 73 N. W. 838.

SEC. **2348-a. Pocket gophers—bounty.** There shall be paid from the general fund of the county a bounty of ten cents for each pocket gopher caught and killed within the county, provided that the person entitled to such bounty shall make, as hereinafter provided, proof of destruction of such animal within thirty days after the same was destroyed. [34 G. A., ch. 101, § 1.] [32 G. A., ch. 121, § 1.]

SEC. **2348-b. Proof required.** The person catching and killing any such animal shall remove and present to the officers before whom he makes his proof, both front feet and claws of each animal for which he claims the bounty, and the person claiming the bounty shall furnish written proof, under oath, that each animal for which he claims the bounty was caught and killed within the county against which he presents the claim for bounty; and the board of supervisors may require in addition to the above any other and further proof which it deems necessary and reasonable to show that each animal for which the bounty is claimed was caught and killed within the county against which the claim is presented. [32 G. A., ch. 121, § 2.]

SEC. **2348-c. To whom presented.** The claws and other proofs required may be presented to the county auditor; and the board of supervisors of each county may appoint registrars or other officers in other parts of the county to whom claws of the animal caught and other proofs of the killing may be presented. [32 G. A., ch. 121, § 3.]

SEC. **2348-d. Rattlesnakes.** That whenever in the judgment of the board of supervisors of any county in this state, the public health and welfare of the citizens of its county demands, there shall be paid from the general fund of the county a bounty of fifty cents for each rattlesnake caught and killed within the county; provided that the person entitled to

such bounty shall make, as hereinafter provided, proof of the capture and killing of said snake within thirty days after the same was killed. [33 G. A., ch. 137, § 1.]

SEC. **2348-e. Proof required.** That the person catching and killing any rattlesnake shall cut off and present to the county auditor or other officer before whom he makes proof, at least two inches of the tail of the rattlesnake with the rattles still attached thereto, and shall make written affidavit that each and every rattlesnake for which he claims bounty was caught and killed within the county where he is claiming bounty. [33 G. A., ch. 137, § 2.]

SEC. **2348-f. To whom presented.** That the tail with rattles attached, described in section two hereof, with the proofs required, may be presented to the county auditor or to other officers in the county designated by the board of supervisors, who shall see that the rattles are detached and the piece of tail destroyed. The rattles may be returned to the claimant. [33 G. A., ch. 137, § 3.]

SEC. **2348-g. Ground hogs.** The board of supervisors of any county may allow a bounty of twenty-five cents for each ground hog killed within the county to be paid out of the general county fund to the person killing the same, on the terms and conditions hereinafter provided. [33 G. A., ch. 136, § 1.]

SEC. **2348-h. Proof required.** The person catching and killing any such animal shall remove and present to the officers, before whom he makes his proof, the head or scalp of each animal for which he claims the bounty, and the person claiming the bounty shall furnish written proof, under oath, that each animal for which he claims the bounty was caught and killed within the county against which he presents the claim for bounty, and the board of supervisors may require in addition to the above any other and further proof which it deems necessary and reasonable to show that each animal for which the bounty is claimed was caught and killed within the county against which the claim is presented. [33 G. A., ch. 136, § 2.]

SEC. **2348-i. To whom presented.** The scalp and other proofs required may be presented to the county auditor; and the board of supervisors of each county may appoint registrars or other officers in other parts of the county to whom scalps of the animal caught and other proofs of the killing may be presented. [33 G. A., ch. 136, § 3.]

SEC. **2348-j. Crows.** The board of supervisors of any county may allow a bounty not to exceed ten cents for each crow killed within the county, to be paid out of the general county fund, to the person killing the same, on the terms and conditions hereinafter provided. [35 G. A., ch. 190, § 1.]

SEC. **2348-k. Proof required.** The person killing any such crow within the county, shall remove and present to the county auditor the head and feet of each crow for which he claims the bounty and shall also furnish written proof, under oath, that each crow for which he claims the bounty was caught and killed within the county, and not more than thirty days previous to the time when such proof of claim is filed. [35 G. A., ch. 190, § 2.]

SEC. **2348-l. Destroyed by auditor.** The head and feet of each crow, upon which said bounty shall have been paid, shall be destroyed by the auditor of the county wherein such crow was taken and killed, as soon as proof has been accepted, by him. [35 G. A., ch. 190, § 3.]

CHAPTER 4.

OF FENCES.

SECTION 2355. Partition fences.

The rights and duties of adjacent owners of land with respect to partition fences is purely statutory, and as the statute prior to the enactment of the present code recognized a hedge fence as a proper form of partition fence and did not specify the height nor required trimming, the owner maintaining such partition fence was not liable to adjoining owners for damage due to the height and untrimmed condition of such hedge. *Kinney v. Kinney*, 104–703, 74 N. W. 688.

One of the adjoining owners cannot by injunction compel the other owner to take out and destroy a division hedge on the ground that it has become a nuisance, such a hedge being considered common property of the two owners. *Harndon v. Stultz*, 124–440, 100 N. W. 329.

The rule as to partition fences has no reference to the boundary which is the thread of a nonnavigable stream and on which it is impracticable to erect any fence. In such case the bed of the stream must necessarily be regarded as unenclosed land, and the duty to fence devolves on neither one of the adjoining owners. *Foster v. Bussey*, 132–640, 109 N. W. 1105.

The sufficiency of a partition fence is of no consequence in determining the liability for damage committed by a bull which the owner does not restrain as required by code § 2312. *Burleigh v. Hines*, 124–199, 99 N. W. 723.

One property owner who has not compelled an adjoining owner to join in the erection of a partition fence cannot recover damages from such adjoining owner because of defendant's animals coming across such partition line onto plaintiff's land. *Miracle Pressed Stone Co. v. Roth*, 144–656, 123 N. W. 346.

SEC. 2356. Powers of fence viewers.

Fence viewers have no power to decide as to a disputed line, either by measurements of their own or by accepting a disputed survey of another. *Boyd v. Shoop*, 107–10, 77 N. W. 482.

But two modes of dividing partition fences are recognized by statute, one by written agreement and the other by order of fence viewers. If neither of these methods has been followed, the mere fact that a portion of the partition fence has been erected for the owner of the premises by a tenant does not give rise to liability to the adjoining owner for injuries caused by stock escaping through such defective fence. In the absence of division either of the adjoining owners has the right to build such portions of fence as he may see fit and the duty of maintaining every portion of it rests on both alike. *DeMers v. Rohan*, 126–488, 102 N. W. 413.

In an appeal from fence viewers relating to the apportionment of a partition fence, held not error to admit testimony as to who built the different portions of the fence, it appearing that the case was submitted to the jury on the theory that it was immaterial by whom the different portions of the fence were built. *Smith v. Ellyson*, 137–391, 115 N. W. 40.

SEC. 2358. Default—damages and fees collected as taxes. If the erecting, rebuilding or repairing of such fence be not completed within thirty days from and after the time fixed therefor in such order, the adjoining owner may do or complete the same, and the value thereof may be fixed by the fence viewers, and unless the sum so fixed, together with all fees of the fence viewers caused by such default, as taxed by them, is paid to the landowner so erecting, rebuilding, trimming or cutting back or repairing such fence, within ten days after the same is so ascertained; or when ordered to pay for an existing fence, and the value thereof is fixed by the fence viewers, and said sum, together with the fees of the fence viewers, as taxed by them, remains unpaid by the party in default for ten days, the fence viewers shall certify to the county auditor the full amount due from the party or parties in default, including all fees and costs taxed, together with a description of the real estate owned by the party or parties in default along or upon which the said fence exists, and the county auditor shall enter the same upon the tax list and the amount shall be collected as other taxes and when so collected same shall be paid to the party or parties entitled thereto. [35 G. A., ch. 191, § 1.] [C. '73, §§ 1491, 1493, 1496; R. §§ 1528, 1530, 1533; C. '51, §§ 897, 899, 902.]

Where no claim is made before the trustees that a partition fence is not upon the true line, that question cannot afterwards be raised as against the order of the trustees making partition of the fence. *Rainsberger v. Leverton*, 155–92, 135 N. W. 56.

SEC. 2359. **Service of notice on nonresidents.** The notice by the fence viewers provided for in this chapter may be served upon any owner nonresident of the county where his land is situated, by publication thereof, once each week, for two consecutive weeks in a newspaper printed in the county in which the land is situated, proof of which shall be made as in case of an original notice and filed with the fence viewers, and a copy delivered to the occupant of said land, or to any agent of the owner in charge of the same. [31 G. A., ch. 9, § 1.]

SEC. 2360. **Orders—notice.**

The action of the fence viewers is not illegal because their findings are put in writing in another township, provided they are duly recorded by the clerk in the proper township. *Miles v. Tomlinson*, 110–322, 81 N. W. 587.

SEC. 2361. **Division recorded.**

In providing for a written agreement as to partitioning the fence and specifying the circumstances under which such agreement will be binding, the intention to exclude any other form of partition by mutual act is manifest. *De Mers v. Rohan*, 126–488, 102 N. W. 413.

SEC. 2367. **Lawful fence defined—sheep and swine-tight fences.** Section twenty-three hundred sixty-seven of the code of Iowa is hereby repealed and the following substituted in lieu thereof:

"A lawful fence shall consist of three rails of good substantial material, or three boards not less than six inches wide and three quarters of an inch thick, such rails or boards to be fastened in or to good substantial posts, not more than ten feet apart where rails are used, and not more than eight feet apart where boards are used, or wire either wholly or in part, substantially built and kept in good repair; or any other kind of fence, which, in the opinion of the fence viewers, shall be equivalent thereto, the lowest or bottom rail, wire or board not more than twenty nor less than sixteen inches from the ground, the top rail, wire or board, to be between forty-eight and fifty-four inches in height, and the center rail, wire or board not less than twelve nor more than eighteen inches above the bottom rail, wire or board; or it shall consist of three wires, barbed with not less than thirty-six iron barbs of two points each, or twenty-six iron barbs of four points each, on each rod of wire, or of four wires, two thus barbed and two smooth, the wires to be firmly fastened to posts not more than two rods apart, with not less than two stays between posts, or with posts not more than one rod apart, without such stays, the top wire to be not more than fifty-four nor less than forty-eight inches in height. Provided, however, that all partition fences may be made tight by the party desiring it, and, when his portion is so completed, and securely fastened to good substantial posts, set firmly in the ground, not more than twenty feet apart, the adjoining property owner shall construct his portion of the adjoining fence, in a like tight manner, same to be securely fastened to good substantial posts, set firmly in the ground not more than twenty feet apart. All tight partition fences shall consist of not less than twenty-four inches of substantial woven wire on the bottom, with three strands of barb wire with not less than thirty-six barbs of two points to the rod on top, the top wire to be not less than forty-eight inches, nor more than fifty-four inches high, or not less than eighteen inch substantial woven wire on the bottom with four strands of barb wire of not less than thirty-six barbs of two points to

the rod, the top wire to be not less than forty-eight inches nor more than fifty-four inches high, or good substantial woven wire not less than forty-eight inches nor more than fifty-four inches high. In case adjoining owners or occupants of land shall use the same for pasturing sheep or swine, each shall keep his share of the partition fence in such condition as shall restrain such sheep or swine. Upon the application of either owner, after notice given as prescribed in this chapter, the fence viewers shall determine all controversies arising under this section, including the partition fences made sheep and swine tight." [33 G. A., ch. 138, § 1.] [18 G. A., ch. 47; 17 G. A., ch. 124; 16 G. A., ch. 101; C. '73, § 1507; R. § 1545.]

One whose close is surrounded by a lawful fence is entitled to damages against the owner of the animals which have escaped from his premises and being at large have broken through such lawful fence. *DeMers v. Rohan*, 126–488, 102 N. W. 413.

It is apparent that in repealing the former statute and enacting this substitute, the legislature had two purposes in view: first, to define a tight fence; and second, instead of requiring a person desiring it to make tight the entire partition fence at his own expense, with the privilege of removing the added material, to provide that all partition fences may be made tight by the party desiring it, and when his portion is so completed, the adjoining property owner shall construct his portion of the partition in like tight manner. *Mitchell v. Graver*, 139 N. W. 460.

SEC. 2368. Where stock restrained.

The respective duties of adjoining owners with respect to fences is the same where stock is prohibited to run at large as where there is no restraint. *Miracle Pressed Stone Co. v. Roth*, 144–656, 123 N. W. 346.

SEC. 2369. Appeal.

The correctness of the findings of the fence viewers is to be determined on appeal, and not on certiorari. *Miles v. Tomlinson*, 110–322, 81 N. W. 587.

An appeal from the order or decision of the fence viewers is effected by the filing of a bond as in the case of an appeal from a judgment of a justice of the peace. *Hahn v. Lumpa Estate*, 131–722, 109 N. W. 310.

It is error to tax all the costs to the appellant on an appeal from the decision of fence viewers apportioning a division fence when the appellant has secured a material modification of the finding of the fence viewers. *Smith v. Ellyson*, 137–391, 115 N. W. 40.

CHAPTER 5.

OF LOST GOODS.

SECTION 2372. **Advertisement—title vests—sale.** In all cases where the appraisement of any such property shall not exceed the sum of twenty dollars, the taker-up shall advertise the same on the door of the courthouse, and in three other of the most public places in the county, within five days after the appraisement, and if no person shall appear to claim and prove such property within six months of the time of taking up, it shall vest in the taker-up; but if the value thereof shall exceed the sum of twenty dollars, the county auditor, within five days from the time of the reception of the justice's certificate at his office, shall cause an advertisement to be posted on the door of the courthouse, and at three other of the most public places in the county, and also a notice to be published once each week, for three weeks successively in some public newspaper printed in this state; and if such property be not claimed or proved within ninety days after the advertisement of the same, as aforesaid, the taker-up shall deliver the same to the sheriff of the county wherein it was taken up, who

shall thereupon proceed to sell it at public auction to the highest bidder for ready money, having first given ten days' notice of the time and place of sale; and the proceeds of all such sales, after deducting the costs and other necessary expenses, shall be paid into the county treasury. [31 G. A., ch. 9, § 18; C. '73, § 1513; R. § 1507.]

SEC. **2374. Disposition of property unclaimed.** In all cases where such lost goods, money, bank notes or other things shall not exceed the sum of ten dollars in value, the finder shall forthwith advertise the same on the door of the courthouse and in three other of the most public places in the county where the same was found; and if no person shall appear to claim and prove such money, goods, bank notes or other things within twelve months from the time of such advertisement, the right to such property, when the same shall consist in goods, money or bank notes, shall be vested in the finder; but if the value thereof shall exceed the sum of ten dollars, the county auditor, within five days from the receipt of the justice's certificate, shall cause to be posted upon the courthouse door, and in three of the most public places in the county, a notice thereof, which shall also be published, once each week, for three weeks successively in some public newspaper printed at the county seat; and if the said goods, money, bank notes or other things be not reclaimed within six months after the finding, the finder, if the same shall consist in money or bank notes, shall deliver the same to the county treasurer, after deducting the necessary expenses hereinafter provided for; if in bills, notes of hand, patents, deeds, mortgages, or other instruments of value, the same shall be delivered to the county auditor to be preserved in his office for the benefit of the owner when an applicant shall prove his title thereto; if in goods or merchandise, the same shall be delivered to the sheriff of the county, who shall thereupon proceed to sell the same at public auction to the highest bidder for ready money, having first given ten days' notice of the time and place of such sale; and the proceeds of such sale, after deducting the costs and other expenses, shall be paid into the county treasury. [31 G. A., ch. 9, § 19; C. '73, §§ 1510, 1515; R. § 1509.]

CHAPTER 6.

OF INTOXICATING LIQUORS.

SECTION **2382. Manufacture, sale or keeping for sale prohibited.** No one, by himself, clerk, servant, employe or agent, shall, for himself or any person else, directly or indirectly, or upon any pretense, or by any device, manufacture, sell, exchange, barter, dispense, give in consideration of the purchase of any property or of any services or in evasion of the statute, or keep for sale, any intoxicating liquor, which term shall be construed to mean alcohol, ale, wine, beer, spirituous, vinous and malt liquor, and all intoxicating liquor whatever, except as provided in this chapter, or solicit, take, or accept any order for the purchase, sale, shipment, or delivery of any such liquor, or aid in the delivery and distribution of any intoxicating liquor so ordered or shipped, or own, keep, or be in any way concerned, engaged or employed in owning or keeping any intoxicating liquor with intent to violate any provision of this chapter, or authorize or permit the same to be done; and any clerk, servant, employe or agent engaged or aiding in any violation of this chapter shall be charged and con-

victed as principal. Provided that nothing herein shall prohibit traveling salesmen soliciting orders for the purchase, sale, and shipment of intoxicating liquors, from persons legally authorized to sell or dispense the same. [28 G. A., ch. 74, §§ 1, 2; 23 G. A., ch. 35, § 2; 22 G. A., ch. 71, § 1; 20 G. A., ch. 8, § 1; 20 G. A., ch. 143, §§ 10, 11; 17 G. A., ch. 119, § 4; C. '73, §§ 1523, 1540–2, 1554–5; R. §§ 1559, 1562, 1581, 1587; C. '51, §§ 929–31.]

Selling, keeping, giving, or dispensing: Proof that a liquor used as a beverage contains alcohol is sufficient to establish its character as intoxicating liquor, however much the alcohol may be diluted or however weak its intoxicating effect as a beverage may be. *State v. Colvin*, 127–632, 103 N. W. 968.

Proof of the sale of beer is prima-facie evidence of the sale of an intoxicating liquor and the burden is on the person charged with such sale to show, if he can, that the liquor so sold was not intoxicating. *State v. Spiers*, 103–711, 73 N. W. 343.

The fact that the seller is not aware of the intoxicating character of the liquor sold is no defense. *Peters v. District Court*, 114–207, 86 N. W. 300.

Violation by an agent of the conditions of the mulct law will render the principal liable to the penalties of the prohibitory law. *Hawks v. Fellows*, 108–133, 78 N. W. 812.

Sale of alcohol without a permit is unlawful even though it is to be used for scientific purposes. *In re Application of Henery*, 124–358, 100 N. W. 43.

The statute provides against every possible scheme that may be devised for the purpose of evading the provisions of the law prohibiting the unlawful sale of intoxicating liquors, and an acquittal in a prosecution for unlawfully selling or keeping for sale is a bar to a subsequent proceeding for the seizure and destruction of the same liquors as kept for unlawful sale. *State v. Cobb*, 123–626, 99 N. W. 299.

The gift of liquor which is prohibited by the statute is a gift resorted to for the purpose of avoiding the law by a subterfuge or by an indirect dealing intended to conceal unlawful sales, and held that the giving of a drink of liquor from samples by a traveling salesman of a foreign dealer for the purpose of testing the quality of the liquor was not within the prohibition of the statute. *State v. Bernstein*, 129–520, 105 N. W. 1015.

The crime of unlawfully selling or accepting an order for the purchase, sale or delivery of intoxicating liquors is not committed by one who makes a purchase of liquor from one authorized to sell, having the intent to give and afterwards giving such liquor to a minor who has solicited such person to make a purchase thereof for him. *State v. Smith*, 135–523, 113 N. W. 336.

The distribution of intoxicating liquors among the members of a club constitutes a sale. *State v. Johns*, 140–125, 118 N. W. 295.

It is not necessary that the sale or dispensing or distribution of intoxicating liquors among the members of an organization be within a building or "place." Such dispensing or distribution in a canvas inclosure in the public street is illegal. *Shideler v. Tribe of the Sioux*, 139 N. W. 897.

The provisions of the mulct law operate as a modification of the prohibitory law relating to the sale of intoxicating liquors. *Campbell v. Jackman*, 140–475, 118 N. W. 755.

The statute prohibits the sale of any liquor which is in fact intoxicating and certain described liquors whether intoxicating or not. A liquor manufactured from malted grain is a malt liquor, and its sale therefore prohibited, irrespective of whether it is an intoxicating beverage or not. *Sawyer v. Botti*, 147–453, 124 N. W. 787; *State v. Stickle*, 151–303, 131 N. W. 5.

The business of dealing in intoxicants being peculiarly within the control of the state, it is not unconstitutional to prohibit sales by women under circumstances that would render lawful similar sales made by men. *In re Application of Carragher*, 149–225, 128 N. W. 352.

Where liquor is delivered on a telephone order at the place of business of the buyer and the purchase price is there collected, a sale is made at such place and not at the place of business of the seller where the telephone order is received. *Cheadle v. Roberts*, 150–639, 130 N. W. 368.

The unlawful intent to keep may be presumed from unlawful sales although it may appear that the person making such unlawful sales has a pharmacy permit or has complied with the conditions of the mulct law. *Bowers v. Maas*, 154–640, 135 N. W. 25.

The use of the word "dispense" in the alternative with "manufacture, sell, exchange, barter" plainly indicates that it is not intended to describe an act which is included in selling, but, on the contrary, that the word is used to describe an independent and distinct method of being concerned in the disposal of such liquors. *Sawyer v. Frank*, 152–341, 131 N. W. 761, 132 N. W. 861.

Where it appeared that the defendant, in conducting a restaurant and as a part of his business, through his regular employes, dispensed liquor to his patrons whenever desired by them, to be drunk on

the premises in connection with their meals, held that although the liquor was procured by his employes under his sanction with money furnished by the patrons, he was guilty of dispensing liquor illegally, under the provisions of this section. *Ibid.* To the same effect see *Reusch v. Withrow*, 137 N. W. 495.

Insurance: Where an insured building is described as used for saloon purposes, the fact that the occupant does not conduct his saloon in strict compliance with the law does not vitiate the policy. *Petty v. Mutual Fire Ins. Co.*, 111-358, 82 N. W. 767.

Agents soliciting orders: The provisions of 28 G. A., ch. 74, amending this section so as to make criminal the soliciting of orders in the state for sales of liquors outside the state to be shipped into the state, held unconstitutional as an interference with interstate commerce. *State v. Hanaphy*, 117-15, 90 N. W. 601.

The amendment of this section by 28 G. A., ch. 74, is not unconstitutional. (Overruling *State v. Hanaphy*, 117-15 and *State v. Bernstein*, 129-520.) *McCollum v. McConaughy*, 141-172, 119 N. W. 539.

Notwithstanding the final decision that this section is constitutional, one who, acting on a prior decision of the court that it was unconstitutional, had violated its provisions held not subject to the punishment prescribed for such act. *State v. O'Neil*, 147-513, 126 N. W. 454.

Original packages: Where a dealer in cigarettes brought into the state packages thereof which were opened by him and contents consisting of small packages containing ten each were exposed for sale and sold, held that such small packages were not original packages within the meaning of the law as to interstate commerce, and that the seller was punishable under the anti-cigarette law. (Code §§ 5006, 5007.) The court considers the case of *State v. Coonan*, 82-400, relating to sales of intoxicating liquors in original packages, and overrules it in so far as it is inconsistent with this case. *McGregor v. Cone*, 104-465, 73 N. W. 1041; but see *State v. McGregor*, 76 Fed. 956.

SEC. **2383. Penalty—second offense.** That section twenty-three hundred eighty-three of the code of Iowa be and the same is hereby repealed, and the following enacted in lieu thereof:

"Whoever is found guilty of violating any of the provisions of the preceding section, for the first offense shall pay a fine of not less than fifty dollars nor more than two hundred dollars and cost of prosecution, and stand committed to the county jail until such fine and costs are paid; for the second and each subsequent offense he shall pay, upon conviction thereof, a fine of not less than three hundred dollars nor more than five hundred dollars and costs of prosecution, or be imprisoned in the county jail not to exceed one year." [34 G. A., ch. 102, § 1.] [20 G. A., ch. 143, §§ 1, 10, 11; C. '73, §§ 1525, 1540, 1542; R. §§ 1561-2.]

SEC. **2383-a. Qualification to sell—elector.** No one except a qualified elector of the town, city or township in which the business is conducted and carried on shall engage in the sale of intoxicating liquors at retail. [33 G. A., ch. 143, § 1.]

This statutory provision is applicable not only to those acting in compliance with the mulct law, but also to those acting under pharmacists' permits. *In re Application of Carragher*, 149-225, 128 N. W. 352.

SEC. **2383-b. Persons interested in distilling or brewing.** No person, firm, association or corporation and no officer, member, stockholder, agent or employe of any such firm, association or corporation engaged in the manufacture, brewing, distilling or refining of intoxicating liquors shall be interested or engaged, either directly or indirectly, in the retail sale of intoxicating liquors, or own, operate or lease any building, erection or place to be used for the sale or keeping for sale of intoxicating liquors at retail, or own or lease or be interested in, either directly or indirectly, any fixtures, furniture, or apparatus to be used in the retail sale of intoxicating liquors, or furnish the license bond required by law or pay for such bond or guarantee the bond of such person engaging in the sale of intoxicating liquors contrary to the conditions above prohibited shall be punished as in section three provided. [33 G. A., ch. 143, § 2.]

SEC. **2383-c. Violation—penalty.** Any person, firm, association or corporation, or any agent or officer of such firm, association or corporation, violating any of the provisions of this act, shall be deemed guilty of a misdemeanor, and shall be liable to all of the penalties, both civil and criminal, provided in chapter six, title twelve of the code, the supplement to the code, 1907, and amendments thereto. [33 G. A., ch. 143, § 3.]

SEC. **2383-d. Acts in conflict repealed.** All acts and parts of acts, in so far as they are in conflict with this act, are hereby repealed. [33 G. A., ch. 143, § 4.]

SEC. **2383-e. When effective.** This act shall take effect and be in force on and after the first day of March, nineteen hundred ten. [33 G. A., ch. 143, § 5.]

SEC. **2384. Nuisance—penalty—abatement—attorney's fee.**

While it is not necessary, in order to warrant an injunction, that actual sales must be shown up to the date of the action to enjoin, yet there must be some evidence of the existence of the nuisance at that time. If no nuisance exists when the action is brought, plaintiff is not entitled to a decree. *Sharp v. Arnold*, 108–203, 78 N. W. 819.

It is the use of the place in which the inhibited acts are done, rather than the doing of the acts, which constitutes the offense of nuisance here described. Therefore, held that where blank bills of lading for intoxicating liquors were sent to a banker and persons desirous of purchasing liquors were in the habit of paying the banker for such bills of lading, thereby procuring the liquors from the freight depot, held that such banker was properly convicted for maintaining a nuisance. The use of the building or place for the prohibited purpose renders it a nuisance, although the party charged owns neither the liquors nor the place. *State v. Snyder*, 108–205, 78 N. W. 807.

The sale of alcohol even though for scientific purposes without a permit is unlawful and constitutes a nuisance. *In re Application of Henery*, 124–358, 100 N. W. 43.

In an action for abatement of liquor nuisance and for injunction, evidence of illegal sales after the commencement of the action is competent, the charge being of a continuing offense. *Hall v. Coffin*, 108–466, 79 N. W. 274.

Either the selling in violation of law or the keeping with intent to sell renders the place where the liquors are sold or kept for sale a nuisance. *State v. Thompson*, 130–227, 106 N. W. 515.

The discovery of liquor on the premises is presumptive evidence of keeping for illegal sale, but in itself such keeping has no tendency to prove the act of selling. *Ibid.*

The finding of intoxicating liquors in the possession of one not legally authorized to sell is presumptive evidence that such liquors are kept for illegal sale. *State v. Stevens*, 119–675, 94 N. W. 241.

The fact that liquor found in the possession of defendant is shown to have been in fact owned by another does not prevent such possession from being evidence of keeping for unlawful purposes. *Ibid.*

Where the mulct law is in force and the seller has complied with its conditions, proof of the mere sale of liquor is not sufficient to sustain a conviction under this section. *State v. Miller*, 114–396, 87 N. W. 281.

It is not necessary in an indictment for maintaining a place for the illegal sale of intoxicating liquor to negative defendant's right to sell under the mulct law, nor to specify in what respect the mulct law has been violated by defendant. It is for the defendant in the first instance to introduce evidence of compliance with the conditions of the mulct law, if he relies upon the provisions of that law as a justification or excuse for selling. *State v. Donahue*, 120–154, 94 N. W. 503.

Where an indictment describes a nuisance as kept in a particular building, situated in a certain town, it is necessary to prove the keeping in the place as charged. *State v. Schuler*, 109–111, 80 N. W. 213.

An indictment for keeping a nuisance, alleging that defendant used a certain building as a drug store "with the intent to sell there intoxicating liquors, to wit, (describing them), and then and there did sell the same," held sufficient where the words "then and there" were construed as designating the drug store as the place of the unlawful sale. *State v. Pinckney*, 111–34, 82 N. W. 450.

The sale of liquors by one purporting to act under the mulct law constitutes a nuisance upon the violation of the statutory provision relating to sale upon election day. *Hammond v. King*, 137–548, 114 N. W. 1062.

There may be a violation of this section although the same act constitutes a violation of code § 2404, relating to club rooms. *State v. Johns*, 140–125, 118 N. W. 295.

One to whom liquors are consigned with his knowledge and delivered will be presumed to be the owner. *Ibid.*

A restaurant keeper who "dispenses" intoxicating liquors in his place of business, within the prohibition of code § 2382, is guilty of maintaining a nuisance. *Sawyer v. Frank*, 152–341, 131 N. W. 761, 132 N. W. 861.

One sale of intoxicating liquors by a pharmacist without a permit is enough to establish the unlawful selling and keeping for sale of intoxicating liquors. *State v. Benson*, 154–313, 134 N. W. 851.

The intent or motive with which intoxicating liquors are thus kept and sold is immaterial. *Ibid.*

Evidence of the reputation of the place is not admissible in a criminal prosecution for maintaining a nuisance. *Ibid.*

Under the evidence in a particular case, held that the keeping of liquor with the intent of unlawful sale was sufficiently made out to sustain a conviction for contempt in violation of an injunction. *Russell v. Anderson*, 141–533, 120 N. W. 89.

On the death of a defendant charged with maintaining a liquor nuisance, he being the sole defendant, the proceeding is necessarily abated. *Babbitt v. Corrigan*, 157– —, 138 N. W. 466.

SEC. 2385. Permits.

If the liquor sold by the permit holder is so compounded with other substances as to lose its distinctive character as an intoxicant, and to be no longer desirable for use as a stimulating beverage, and is in fact a medicine, then the permit holder is not guilty of violating the law in making a sale without a written request. *State v. Gregory*, 110–624, 82 N. W. 335.

The written requests on which sales are made are admissible in evidence in a prosecution against the seller, and if such requests are defective, the seller is liable. The permit holder should refuse to make a sale on a written request unless he has reason to believe the statements made therein are true, and in no case should he make such sale unless he knows the person applying therefor is not a minor, intoxicated or in the habit of using intoxicating liquors as a beverage. When proper requests have been made the question of the seller's good faith in making the sale is for the jury. *Ibid.*

The keeping for sale by druggists of tonics or other preparations containing a small percentage of alcohol is not a violation of a druggist's permit if it appears that such preparations are not capable of being used as beverages. *In re Application of Henery*, 124–358, 100 N. W. 43.

In stating the purpose for which liquor is required in the request provided for by code § 2394, the purchaser must state a purpose or use authorized by this section. *State v. Swallum*, 111–37, 82 N. W. 439.

A statement in an application for liquor that it is desired for "medical purposes" is sufficient; but it is not sufficient to say that it is desired for "mechanical purposes." In the latter case, the specific mechanical purpose should be specified. *Smith v. Foster*, 153–664, 134 N. W. 93.

SEC. **2386. Pharmacists — manufacturers of proprietary medicines.** If any such registered pharmacist or manufacturer of proprietary medicines shall sell, barter, give, exchange, dispose of or use intoxicating liquors in any manner or for any purpose other than authorized in the preceding section, he shall be liable to all the penalties and proceedings provided for in this chapter, and upon proof of such violation by a registered pharmacist, the clerk of the district or superior court shall transmit to the commissioners of pharmacy a certified copy of the record thereof within ten days after its entry, and upon receipt of such certified copy said commissioner may strike his name from the list of registered pharmacists and cancel his certificate. The commissioners of pharmacy are empowered to make such further rules and regulations, not inconsistent with law, with respect to the purchase, keeping and use of intoxicating liquors by registered pharmacists and manufacturers of proprietary medicines, as they shall think proper to prevent abuses of the privilege, and shall revoke the certificate of registration of any pharmacist for repeated violation of this chapter. Said commissioners are authorized to draw from the state treasury an amount not exceeding fifty per cent. of the clear proceeds of all fees collected and paid into the treasury of any county on account of violations of the provisions of this chapter or the chapter regulating the practice of pharmacy, prosecuted by the commissioners, the amounts so drawn to be used solely in prosecutions instituted by them for failure to comply with the provisions of such chapters. The court or

clerk thereof, before whom any prosecution is instituted or prosecuted by the commissioners of pharmacy, shall certify to the auditor of state all such cases, and the amount of fees imposed and collected therein. The expenses thus incurred by the commission shall be audited by the executive council, and the amount thereof shall be drawn from time to time upon the warrants of the state auditor. [27 G. A., ch. 56, § 1; 23 G. A., ch. 35, §§ 13, 17; 22 G. A., ch. 71, § 18.]

SEC. **2387. Application for permit.**

A decree entered by consent will bar one who has been enjoined from the selling of intoxicating liquors from receiving a permit under the provisions of the statute. *In re Application of Thoma*, 117–275, 90 N. W. 581.

A judgment finding defendant guilty of violating his liquor permit whether entered by confession or in settlement of criminal or civil proceedings for such violation, renders him ineligible to receive another permit within two years. *In re Application of Wilhelm*, 124–380, 100 N. W. 44.

A sale of alcohol without a permit, although to be used only for scientific purposes, is unlawful and a sufficient ground for refusing the issuance of a permit on application within six months after such unlawful sale. *In re Application of Henery*, 124–358, 100 N. W. 43.

A drug store in which soda water and ice cream are sold is not a restaurant within the language of the statute prohibiting the issuance of permits for the sale of intoxicating liquors to the keepers of restaurants. *Ibid.*

Where the applicant has voluntarily surrendered his permit in consequence of an action for its revocation being brought, his application for a new permit should be denied unless he alleges and proves that he has not knowingly been engaged in the unlawful sale of liquor within two years next before making the application. *In re Application of Smith*, 126–128, 101 N. W. 875.

A particular description of the place in the petition for a permit and in the notice of the application therefor is absolutely necessary to give the court jurisdiction to hear the application and grant the permit. *Muncey v. Collins*, 132–50, 106 N. W. 262.

The fact that the applicant for a permit has, during the previous six months, violated the Sunday law in making sales of articles not included within the business of a pharmacist is not a ground for refusing a permit. *In re Application of Maulsby*, 136–66, 113 N. W. 548.

A decree enjoining the defendant from illegal sale of intoxicating liquor does not prevent the granting of a permit to such person to sell or keep for sale after the lapse of two years. *Denmead v. Parker*, 145–581, 124 N. W. 780.

SEC. **2388. Notice.** Notice of an application for a permit must be published, once each week, for three consecutive weeks in a newspaper regularly published and printed in the English language, and of general circulation in the township, town or city where the applicant proposes to conduct the business, or, if none be regularly published therein, then in one of the papers selected by the board of supervisors for the publication of its proceedings, the last publication of which shall be not less than ten nor more than twenty days before the first day of the term at which the hearing is to be had. This notice shall state the name of the applicant, with the firm name, if any, under which he is doing business, the purpose of the application, the particular location of the place where the proposed business is to be carried on, and that the required petition is or will be on file in the clerk's office of the court (naming it) at least ten days before the first day of the term (naming it) when the application will be made. A copy of such notice shall be served upon the county attorney in the same manner and for the same length of time as is required of original notices in said courts. [30 G. A., ch. 2, § 7; 23 G. A., ch. 35, § 3; 22 G. A., ch. 71, § 2.]

SEC. **2389. Hearing—remonstrances.**

Permits are not granted as a matter of course, and the requirement of the statutory provisions as to particularity of description in the petition and notice as to the place where the privilege is to be exercised is for the purpose of advising the court and public and those who may desire to resist the application as to the exact location where the business is to be conducted. Such description is therefore es-

sential. *Muncey v. Collins*, 132–50, 106 N. W. 262.

In an action to restrain the defendant from selling intoxicating liquors under a permit not sufficiently describing the place where sales were authorized to be made, the defendant is not entitled to have the decree of the court giving him a permit to sell amended so as to make the permit sufficient. *Ibid.*

The statute is not mandatory with reference to the term of court at which the application for a permit to sell intoxicating liquors shall be passed upon. While it is provided that on the filing of a remonstrance the court shall fix a day in the term for the trial, and all applications shall be tried at the first term after completed service has been made of the required notice, if the business of the court shall allow, nevertheless the court may, in the exercise of its discretion, postpone the hearing to the next term, like other business. *Cox v. Burnham*, 120–43, 94 N. W. 265.

Any citizen of the county wherein the application is made may file a remonstrance or objection to granting the permit, and when a remonstrance is thus filed a trial is to be had and the issue is to be determined by the court. *In re Application of Smith*, 126–128, 101 N. W. 875.

A remonstrant becomes in effect a party to the proceeding and may appeal from a decision granting the permit. *Ibid.*

The question whether the public necessities or conveniences require the granting of a permit is addressed to the discretion and judgment of the trial court. *In re Application of Henery*, 124–358, 100 N. W. 43.

The reasonable convenience and necessities of the people are to be determined by the trial court under the evidence in the exercise of a sound discretion and judgment. *In re Application of Moore*, 140–560, 118 N. W. 879.

The action of the court can be properly interfered with on appeal only when there is a manifest abuse of discretion. *Ibid.*

SEC. 2390. **Bond—to be recorded.** No permit shall issue until the applicant shall execute to the state a bond in the penal sum of one thousand dollars, with good and sufficient sureties to be approved by the clerk of the court, conditioned that he will well and truly observe and obey the laws of the state now or hereafter in force in relation to the sale of intoxicating liquors, that he will pay all fines, penalties, damages and costs that may be assessed or recovered against him for a violation of such laws during the time for which the permit is granted, and the principal and sureties in said bond shall be liable thereon, jointly and severally, for all civil damages and costs that may be recovered against the principal in any action brought by a wife, child, parent, guardian, employer or other person under the provisions of this chapter. The bond, after being approved and recorded by the clerk, shall be deposited with the county auditor, and suit may be brought thereon at any time by the county attorney, or by any person for whose benefit the same is given. The clear proceeds of all other money which may be collected for breaches of the bond shall go to the school fund of the county. If at any time the sureties on the bond shall file with the court or clerk a written request for release, or become insolvent, or be deemed insufficient by the court granting the permit, or its clerk, such court or clerk shall require a new bond to be executed within a reasonable time to be fixed. If the permit holder fails or neglects to furnish a new bond within the time so fixed, the permit shall from that date become null and void. [28 G. A., ch. 75, § 1; 23 G. A., ch. 35, § 5; 22 G. A., ch. 71, § 4.]

Sales made elsewhere than in the place specified in the permit, while the permit holder continues in business in such place, will undoubtedly constitute a breach of his bond. But where the permit holder has ceased to conduct business in the authorized locality and is making sales in another building not covered by the permit, although corresponding in general to the description of the permit, the surety will not be liable. *Carter v. Nicol*, 116–519, 90 N. W. 352.

SEC. 2392. **Permit issued.** Upon taking said oath and filing said bond, the clerk of the court granting the same shall issue a permit to the applicant, authorizing him to keep and sell intoxicating liquors as in this chapter provided. The permit so issued shall specify the building, give

the street and number or location in which intoxicating liquors may be sold by virtue of the same, and the length of time the same shall be in force, unless sooner revoked. Provided that upon the expiration of the lease or destruction of the building where such business is conducted, or for other good and sufficient cause shown, consent in writing of the bondsmen having been obtained therefor, or a new bond given, the district court of the county which granted said permit, or a judge of said court, may change the place specified in said permit to some other place in the same city, town, or township upon motion therefor. A copy of said motion, and notice of the time when and the place where the same will be heard, shall be given to the county attorney of the county where said place is situated, at least five days before said hearing. [27 G. A., ch. 57, § 1; 23 G. A., ch. 35, §§ 5, 16; 22 G. A., ch. 71, § 7.]

A liquor license or privilege is not a property right which cannot be revoked without due process of law. *McConkie v. Remley*, 119–512, 93 N. W. 505.

The permit is a trust reposed in the holder, granted after being shown worthy, and may be revoked. An order granting a permit confers no property right and amounts to no more than a mere privilege to sell under certain conditions. *McCoy v. Clark*, 104–491, 73 N. W. 1050.

Where the permit holder keeps for sale or sells contrary to law he may be enjoined for maintaining a nuisance. *Ibid.*

Where a permit holder takes orders at various places and delivers liquor in pursuance of such orders and receives payment on delivery, the sales are to be deemed made at such places, and not at the place for which the permit is had. *Carter v. Bartel*, 110–211, 81 N. W. 462.

Where the permit and bond describe the premises intended to be covered, they do not apply to sales in a different building, although it may be covered by the same description to which the place of business had been removed. *Carter v. Nicol*, 116–519, 90 N. W. 352.

Where the order granting a permit provided that it should be in force for a specified time, held that the fact that the permit issued by the clerk in pursuance of such order stated that the right to sell was to continue until revocation of the permit or so long as the applicant's registration as a pharmacist was in effect, was no protection to the applicant in selling liquor after the time limited in the order granting the permit. *State v. Brown*, 135–40, 109 N. W. 1011.

A pharmacist doing business under a liquor permit is a retailer of liquors, and therefore, the provisions of 33 G. A., ch. 143, § 1, prohibiting any person except a qualified elector from engaging in the sale of intoxicating liquors at retail render it illegal for a woman, although a qualified pharmacist, to sell under a permit. *In re Application of Carragher*, 149–225, 128 N. W. 352.

SEC. **2393. Record—costs.** The clerk of the court granting the permit shall preserve as a part of the record and files in his office all petitions and other papers except bonds pertaining to the granting or revocation of permits, and keep suitable books in which bonds and permits shall be recorded. The books shall be furnished by the county like other public records. Whether said permit be granted or refused, the applicant shall pay the costs incurred in the case, and, when granted, he shall make payment before any permit issue, except the court may tax the cost of any witnesses summoned by private persons resisting said application, and the fees for serving such subpoenas, to such persons, when it is shown that such witnesses were summoned maliciously, or without probable cause to believe their evidence material. The fees in such cases shall be as provided in actions at law in the district court. [28 G. A., ch. 75, § 2; 23 G. A., ch. 35, § 9; 22 G. A., ch. 71, § 10.]

SEC. **2394. Requests to purchase—blanks—permit holder to fill in.** Before selling or delivering any intoxicating liquors to any person, a request must be signed by the applicant, in his true name, truly dated, stating the applicant is not a minor, his residence, for whom and whose use the liquor is required, and his true name and residence, and, where numbered, by street and number if in a city, the amount and kind required, the actual

purpose for which the request is made, and for what use desired, and that neither the applicant nor the person for whose use requested habitually uses intoxicating liquors as a beverage, and attested by the permit holder who receives and fills the request. The blanks for such request shall, with proper stubs, in all cases, be printed in book form and shall be furnished to the permit holder by the county auditor of the county in which such permit is in force, and shall contain, in addition to the matter provided for in said section, the facsimile signature of the county auditor; and both the stub and the request shall be numbered consecutively. Such blank requests with stubs, shall be furnished the permit holder applying therefor upon payment by him to the county auditor of the actual cost of printing the same. Such blank requests and the corresponding stubs shall be filled out by the person making the sale in ink, and in the presence of the applicant for such liquors and prior to the applicant's signature thereof. The line between the request and its corresponding stub shall be perforated. The permit holder shall be required to preserve the stubs in book form and shall keep them at all times subject to the inspection of the commissioners of pharmacy, the county attorney, any grand juror, sheriff or justice of the peace in the county in which such permit is in force. The blank form of request and stub shall be as follows:

No.....

(Official Form E–Series B.)

CERTIFIED REQUEST OF PURCHASERS.

No....., Iowa. .....19....

To..... Reg. Phar. No.....

I hereby make request for the purchase of the following intoxicating liquors:

AMOUNT.	KIND.
.....	.....
.....	.....

.....19...

Purchaser.....

Address.....

Purchase.....

For whom.....

Address.....

Certifier.....

Address.....

My true name is..... I am not a minor, and reside in.....township (or town of.....) at No..... in the County of ....., State of..... The actual purpose for which this request is made is to obtain the said liquor for.....and the same is desired for .....use, and neither myself nor the said .....habitually use intoxicating liquors as a beverage.

If the applicant is unknown to the permit holder the blank below shall also be filled out and signed by a witness.

Signature of Purchaser.....

I, ... hereby certify that I am acquainted with....., the applicant for the purchase of the foregoing described liquors, and that said..... is not a minor and is not in the habit of using intoxicating liquors, as a beverage, and is worthy of credit as to the truthfulness of the statements in the foregoing request, and my residence is....., No....., Street.....

(Signature of Certifier)

.....

Attested by.....

Registered Pharmacist No. .....

The request shall be refused unless the permit holder has reason to believe the statement to be true, and in no case granted unless the permit holder filling it personally knows the person applying is not a minor, intoxicated, nor in the habit of using intoxicating liquors as a beverage; or, if the applicant is not so personally known, before filling the order or delivering the liquor, he shall require identification, and the statement in writing of a reliable and trustworthy person, of good character and habits,

known personally to him, that the applicant is not a minor, nor in the habit of using intoxicating liquors as a beverage, and is worthy of credit as to the truthfulness of the statements in the application; and this statement so made shall be signed by the witness in his own name, stating his residence correctly. [34 G. A., ch. 103, § 1; 33 G. A., ch. 139, § 1.] [23 G. A., ch. 35, § 10; 22 G. A., ch. 71, § 12.]

The seller must believe the statements in the application to be true; he must know the applicant, or have him identified; and he must know or obtain proof that such applicant is not in the habit of using intoxicating liquors as a beverage. The law is violated by sale to persons in the habit of using liquor as a beverage, although the seller is ignorant of such habit. The seller sells at his peril. *Harlan v. Richmond*, 108–161, 78 N. W. 809.

If the applicant makes the purchase for another he must give the street and number of the user, and in such case is only required to state his own residence generally, but if he is to use the liquor himself he must describe his residence with the same particularity required when he purchases for another, that is, if his residence is in a numbered city he must give his own street and number. The purchaser must not be allowed to avoid these requirements of the law, even though by oversight, forgetfulness or mistake. *State v. Swallum*, 111–37, 82 N. W. 439.

The purchaser must specify in his request the exact purpose and use for which the liquor is required, which must be a use which is lawful under code § 2385. *Ibid.*

Sales on written request, not containing the statements required by statute, are unlawful. *State v. Harris*, 122–78, 97 N. W. 1093.

Where a sale would be illegal but for the identification required by statute, it cannot be transformed into a legal sale by proof that upon some former occasion a sale had been made to such purchaser which was legal because preceded by a proper identification and statement. *State v. Mulhern*, 130–46, 106 N. W. 267.

The question of good faith in making sales under a permit only arises when proper requests have been made. Prohibition is the rule, and permission to sell is the exception, and he who claims the right to sell must bring himself within the exception. *State v. Gregory*, 110–624, 82 N. W. 335.

The requirement of the statute as to requests that they shall state the purpose for which the request is made and the use for which the liquor is desired must be complied with, and the pharmacist who violates an injunction by sales on insufficient written request subjects himself to punishment for contempt without regard to his intent. *Barber v. Brennan*, 140–678, 119 N. W. 142.

A sale by a permit holder to a minor is unlawful. *Sharp v. Davis*, 142–19, 120 N. W. 323.

A request for alcohol for "chemical" purposes is not in compliance with the statutory requirement. There should be a statement of the specified chemical use for which the liquor is desired. *Stromert v. Johnson*, 144–682, 123 N. W. 336.

The request to purchase for "medical purposes" is sufficient but it is not sufficient to say that the liquor desired is for "mechanical use." The latter designation is not specific enough under code § 2385. *Smith v. Foster*, 153–664, 134 N. W. 93.

Under this section prior to its amendment by 34 G. A., ch. 103, held that the specification in the application as to the amount and kind of liquor was a part of the request which the applicant should fill out by himself and that it was unlawful for the pharmacist to fill out such portion of the application. *Ibid.*

When a purchaser of liquor lives in a town or village the statement in the request that he resides in the county is not sufficiently specific. *Long v. Joder*, 139–471, 116 N. W. 1063.

The signing of the written request specified by statute is a condition precedent to the right to sell. To sell without the written request is a violation of the law. Such a sale constitutes a violation of an injunction subjecting the seller to punishment for contempt. *Batcher v. Nichols*, 141 N. W. 420.

SEC. 2397. Returns by permit holder.

Where there was a violation of the law as to sale of intoxicating liquors, which consisted in a failure of a permit holder to make proper returns of sales, and an injunction was sought to restrain the permit holder from selling, held that, as it appeared that the permit holder had gone out of business and was not intending to make further sales, the injunction was properly denied. *Redley v. Greiner*, 117–679, 91 N. W. 1033.

The requests for liquor which are required to be preserved and returned by the permit holder may be introduced in evidence as against him. *State v. Mulhern*, 130–46, 106 N. W. 267.

Returns of sales made by the permit holder to the county auditor cannot be considered unless introduced in evidence and made a part of the record in the case. *State v. Hatlestad*, 132–188, 109 N. W. 613.

SEC. 2399. Illegal sales by permit holder—evidence.

Although sales by a permit holder are only made on signed applications for such liquor to be used for medicine, yet if the seller has knowledge that the purchaser is a minor, or is in the habit of using liquor as a beverage, the sale is unlawful. *State v. Skillicorn*, 104–97, 73 N. W. 503.

The seller of intoxicating liquors is bound to know at his peril whether a person to whom he sells is within the prohibited class. Where a large number of sales appear to have been regularly made to the same person, and the character and habits of sobriety of persons to whom such sales were made were shown to be such as to bring them within the prohibited class, held that a presumption of illegal sales would arise. *Hall v. Coffin*, 108–466, 79 N. W. 274.

The good faith of the seller is immaterial in determining whether the requirements of the law as to sale of intoxicating liquors have been complied with. *Peak v. Bidinger*, 133–127, 110 N. W. 292.

It is no defense to a permit holder in an action against him to recover damages on account of unlawful sales, that he had no knowledge that the person to whom the sales were made was in the habit of becoming intoxicated. *Bistline v. Ney*, 134–172, 111 N. W. 422.

A pharmacist renders the place in which his business is carried on a nuisance by violation of the law as to sales under his permit, and in an action to enjoin his place of business as a nuisance, will not be permitted to say that although the statutory regulations have been violated, he has acted in good faith. *Rizer v. Tapper*, 133–628, 110 N. W. 1038.

The permit holder cannot escape liability for unlawful sales in his place of business by others without his authority. *Stromert v. Johnson*, 144–682, 123 N. W. 336.

A registered pharmacist has a right to sell drugs and medicines, even though they contain intoxicating liquor or alcohol, provided they are so compounded that they cannot be used as a beverage; but the question as to whether a proprietary medicine is in fact capable of being used and is used as a beverage is to be determined on the evidence. *McNiel v. Horan*, 153–630, 133 N. W. 1070.

Proof of illegal sales by a druggist under a permit is sufficient to establish the character of the place in which such sales are made as a nuisance. *Smith v. Foster*, 153–664, 134 N. W. 93.

When unlawful sales are shown, the unlawful intent with which the liquor is kept is no less to be presumed because it appears that the person making such sales holds a pharmacy permit. *Bowers v. Maas*. 154–640, 135 N. W. 25.

SEC. **2400. Revocation of permit.** Permits shall be deemed trusts reposed in the recipients, and may be revoked upon sufficient showing by order of a court or judge. Complaint may be presented at any time to the district or superior court, or a judge thereof, which shall be in writing and signed and sworn to by three citizens of the county in which the permit was granted. A copy of the complaint shall, with a notice in writing of the time and place of hearing, be served on the accused five days before the hearing, and if the complaint is sufficient, and the accused appear and deny the same, the court or judge shall proceed without delay, unless continued for cause, to hear and determine the controversy. If continued or appealed at the instance of the permit holder, his permit may, in the discretion of the court, be suspended during the controversy. The complainant and accused may be heard in person or by counsel, or both, and proofs may be offered by the parties; and if it shall appear upon such hearing that the accused has in any way abused the trust, or that liquors are sold by the accused or his employes in violation of law, or dispensed unlawfully, or he has in any proceeding, civil or criminal, within the last two years, been adjudged guilty of violating any of the provisions of this chapter, the court or judge shall revoke and set aside the permit; the papers and order in such case shall be immediately returned to and filed by the clerk of the court, and, if heard by a judge, the order shall be entered of record as if made in court; and if in this or any other proceeding, civil or criminal, it shall be adjudged by the court or judge that any registered pharmacist, proprietor or clerk has been guilty of violating any provision of this chapter, such adjudication may be by the commissioners of pharmacy regarded as sufficient, if repeated, to work a forfeiture of his certificate of registration. It shall be the duty

of the clerk to forward to the commissioners of pharmacy transcripts of such judgments or orders without charge therefor, and as soon as practicable after final judgment or order has been made and entered. [27 G. A., ch. 58, § 1; 23 G. A., ch. 35, § 7; 22 G. A., ch. 71, § 8.]

SEC. **2401. How business conducted — partner — clerks — physicians.** A permit holder may employ not more than two registered pharmacists as clerks to sell intoxicating liquors in conformity to the permit and the law; but in such cases the acts of clerks in conducting the business shall be considered the acts of the permit holder, who shall be liable therefor as if he had personally done them, and in making returns, the verification of such requests as may have been received, attested and filled by the clerk must be made by such clerk, and the clerk who transacted any of the business under the permit must join in the general oath required of the employer, so far as relates to his own connection therewith. If for any cause a registered pharmacist who holds a permit shall cease to hold a valid and subsisting certificate of registration or renewal thereof, his permit shall be forfeited and be null and void. Nothing contained in this chapter shall be construed to prevent licensed physicians from in good faith dispensing liquors as medicines to patients actually sick and under their treatment. In case a permit holder shall die, his personal or legal representative may continue the business, subject to the provisions thereof, through the agency of any reputable registered pharmacist, upon the approval of the court granting such permit, or the clerk thereof, and the giving of a bond as hereinbefore provided. A partner who is a registered pharmacist, not holding a permit, shall have the same rights and be subject to the same restrictions as clerks; and for whose acts the permit holder shall be held responsible the same in all respects as for his clerks. [28 G. A., ch. 76, § 1; 23 G. A., ch. 35, §§ 2, 15; 22 G. A., ch. 71, § 16.]

Illegal sales of liquor made by a clerk may render the principal liable for nuisance. *State v. O'Malley*, 132–696, 109 N. W. 491.

The fact of settling a civil suit for injuries resulting from liquor furnished to a patient by a physician cannot be shown in a prosecution for illegal sale of such liquor. *State v. Campbell*, 129–154, 105 N. W. 395.

SEC. **2401-a. Wholesale druggists may sell for certain purposes — request blanks.** Any corporation doing a general wholesale drug business within the state and having a registered pharmacist who holds a permit to sell intoxicating liquors, and is financially interested in and actually engaged in the conduct of said business, may sell and dispense intoxicating liquors, not including malt liquors, for the purpose of compounding medicines, tinctures, and extracts, none of which can be used as a beverage, to any registered pharmacist conducting a general drug business within the state, or to any firm or corporation having a registered pharmacist financially interested therein and doing a general drug business within the state, and to physicians duly licensed under the laws of the state; and for resale, to registered pharmacists holding a permit to sell intoxicating liquors. Such sales of intoxicating liquors shall be made only upon the written request of the registered pharmacist or physician desiring to purchase the same, said request to be signed by the applicant for the purchase and countersigned by the permit holder of the corporation making the sale with his name and the date the goods are delivered for transportation, and shall be in the following form:

....., Iowa, ... 19...

To ....., Reg. Phar. No. .....:

I hereby make request for the purchase of the following intoxicating liquors:

Amount.	Kind.
.....	.....
.....	.....

Reg. Phar. No. .... Day of .... 19....

My true name is ....., I am (1) a pharmacist registered under the laws of the state of Iowa; my registry number is ....., I am conducting a general drug business in ....., Iowa; (2) a physician duly licensed under the laws of the state of Iowa, and have my office at ....., Iowa, where I am engaged in the practice of medicine.

The actual purpose for which this request is made is for .... I do not habitually use intoxicating liquors as a beverage.

.....
Signature of Purchaser.

[34 G. A., ch. 104, § 1.]

SEC. **2401-b. Requests may be forwarded.** Requests for intoxicating liquors made under the provisions of the foregoing section need not be filled out and signed in the presence of the permit holder countersigning the same for the wholesale drug corporation, but may be done by the applicant at his place of business and forwarded to the corporation of whom the request is made. Said requests shall be preserved and returns made to the county auditor in accordance with the provisions of section twenty-three hundred ninety-seven of the code, but said requests need not be consecutively numbered. [34 G. A., ch. 104, § 2.]

SEC. **2401-c. Shipments—bill of lading.** Intoxicating liquors shipped under the provisions of this act may be inclosed in the same box, package, or carton containing other drugs or merchandise. In all cases of such shipments of intoxicating liquors the bill of lading shall set out that intoxicating liquors are in the shipment, with the kind and amount of the same, and one copy of the bill of lading shall be signed for the wholesale drug corporation by the permit holder provided for in section one of this act, or any officer of such drug corporation. [34 G. A., ch. 104, § 3.]

SEC. **2401-d. Common carriers shall require filing of copy of permit.** All railway, transportation and express companies, and other common carriers shall receive intoxicating liquors from corporations conducting a wholesale drug business and ship to registered pharmacists and physicians. Before receiving such shipments, the common carrier shall require the corporation to file with it a copy of the permit of the permit holder connected with the wholesale drug corporation making the shipment, said copy to be certified by the clerk of the district court; the affidavit of any officer of the corporation that said corporation is actually and in good faith engaged in the wholesale sale of drugs in this state, and that the permit holder is a stockholder in the drug corporation; and with each shipment of intoxicating liquors a bill of lading made out and signed as provided for in section three of this act. The foregoing provisions having been complied with, the common carrier shall be relieved from all liabilities otherwise imposed by law for the transportation of intoxicating liquors. [34 G. A., ch. 104, § 4.]

SEC. **2401-e. Violation—penalty.** A failure to comply with all or any of the provisions of this act shall render the person who so fails to comply liable to all the penalties otherwise imposed by law for the sale and transportation of intoxicating liquors within the state. [34 G. A., ch. 104, § 5.]

SEC. **2401-f. "Corporation" construed.** The term corporation, as used in this act shall be construed to include corporations, firms and persons engaged in the general wholesale drug business within this state. [34 G. A., ch. 104, § 6.]

SEC. **2402. Intoxication punished.**

To justify an arrest without a warrant on a charge of being intoxicated, it must be found that the person arrested was in fact in a state of intoxication. *Snyder v. Thompson*, 134–725, 112 N. W. 239.

SEC. **2403. Sale or gift to minor or intoxicated person.** The law as it appears in section twenty-four hundred and three of the code, and section twenty-four hundred and three of the supplement to the code [1902], is hereby repealed, and the following enacted in lieu thereof:

"No person by himself, agent or otherwise, shall in any manner procure for, or sell or give any intoxicating liquors to any minor for any purpose, except upon written order of his parent, guardian, or family physician, or give to or in any manner procure for or sell the same to any intoxicated person, or to one in the habit of becoming intoxicated." [32 G. A., ch. 122, § 1; 28 G. A., ch. 77, § 1; 20 G. A., ch. 143, § 9; C. '73, § 1539.]

The statute absolutely prohibits the sale of liquor to a minor for any purpose whatever, and the seller is bound at his peril to know whether the person to whom he sells is within the prohibited class. *Fielding v. La Grange*, 104–530, 73 N. W. 1038.

Proof that the purchaser was in fact under the age of majority makes out a prima-facie case of sale to a minor, although there is no evidence that he had not attained his majority by marriage as provided in code § 3188. *State v. Mulhern*, 130–46, 106 N. W. 267.

The penalty herein provided for is not covered by the bond required under code § 2448, par. 3, of one who carries on the business of selling under the mulct law, nor that provided for in code § 2422, as to bonds required of permit holders. *Headington v. Smith*, 113–107, 84 N. W. 982.

Liability for illegal sale to minors and intoxicated persons cannot be enforced against the surety on a bond purporting to be executed in pursuance of the provisions of the mulct law, when it appears that the mulct law was not in force in the locality where the business was carried on. *Gorman v. Williams*, 117–560, 91 N. W. 819.

A partner and the partnership are liable for damages for the illegal and unauthorized sale of intoxicating liquors by which a wife is deprived of support which her husband should give her. *Mathre v. Story City Drug Co.*, 130–111, 106 N. W. 368.

Where liquor is sold to an intoxicated person and his death is caused by drinking the same, the administrator of the estate cannot recover damages for his death against the person selling the liquor in violation of this section. *Bissell v. Starzinger*, 112–266, 83 N. W. 1065.

The action to recover the penalty provided for sales to minors or habitual drunkards may be brought in the county of defendant's residence, irrespective of the place of sale. *Carrier v. Bernstein*, 104–572, 73 N. W. 1076.

Such an action cannot be joined with an action by a wife to recover damages for sales of liquor to her husband. *Ibid.*

The provisions of the mulct law do not relieve one who sells under its provisions from liability for sales to minors or habitual drunkards. *Ibid.*

The civil penalty provided for selling liquor to a minor does not apply to the act of a person who lawfully purchases liquor with intent to give and who does give such liquor when purchased to a minor, nor does such act constitute a crime. *State v. Smith*, 135–523, 113 N. W. 336.

This section does not qualify the provisions of code § 2394 with reference to sales under permits. The written order of the parent is a bar to the penalty provided in this section, but does not remove the statutory injunction that every permit holder must know that the applicant whose request he honors is not a minor. *Sharp v. Davis*, 142–19, 120 N. W. 323.

Evidence in a particular case held sufficient to sustain a conviction for procuring for and giving intoxicating liquors to a person in the habit of becoming intoxicated. *State v. Beede*, 151–701, 130 N. W. 714.

SEC. **2403-a. Penalty.** Any person violating any of the provisions of section one hereof shall be guilty of a misdemeanor, and upon conviction thereof be fined in a sum not less than twenty-five dollars, nor more than two hundred dollars, and costs of prosecution, and shall stand committed to the county jail until such fine and costs are paid. [32 G. A., ch. 122, § 2.]

SEC. **2404. Club room.**

One who keeps or uses a particular place in violation of the provisions of this section may be found guilty of a nuisance under the provisions of §§ 2382 and 2384. *State v. Johns*, 140–125, 118 N. W. 295.

Although a place walled in by canvas in a street in which liquors are dispensed or given away by an incorporated association organized for legitimate purposes may not be a club room, it is a "place" within the meaning of this section. *Shideler v. Tribe of the Sioux*, 139 N. W. 897.

A violation of this section is punishable under code §§ 2382, 2384 and 2405. *Ibid.*

SEC. **2405. Action to abate nuisance—injunction—contempt.**

Temporary injunction: A temporary injunction may be granted against a person holding a permit to sell intoxicating liquors for keeping for sale or selling the same in his pharmacy contrary to law. *McCoy v. Clark*, 104–491, 73 N. W. 1050.

The granting of a temporary writ as a matter of course follows the continuance of an application for the temporary writ, but not a general continuance of the action. *Powers v. Winters*, 106–751, 77 N. W. 509.

Where a case is made for an injunction it is error to refuse a preliminary writ. One who has been engaged in the traffic of intoxicating liquors in violation of law cannot avoid an injunction by simply making a profession of change of heart. *Donnelly v. Smith*, 128–257, 103 N. W. 776.

It is error to refuse a temporary injunction on the application of a citizen where it appears that the defendant operating under the mulct law is maintaining a place for the sale of liquor otherwise than in strict compliance with the provisions of the mulct law. *State v. Roney*, 133–416, 110 N. W. 604.

The notice of an application for a temporary injunction in vacation must show the name of the judge to whom the application will be made and the specific place at which the application will be made. The original notice of the beginning of the action in which a temporary and also a permanent injunction will be asked is not sufficient. *Beck v. Vaughn*, 134–331, 111 N. W. 994.

If the notice is not given as required, the preliminary injunction will be void for want of jurisdiction, and its enforcement may be enjoined. *Ibid.*

The fact that the injunctional method is not applicable to all classes of criminal offenses does not constitute such discrimination between classes as to render it unconstitutional as applied under the intoxicating liquor law. *Brown v. Powers*, 146–729, 125 N. W. 833.

This section is not unconstitutional as denying to the defendant the right to present his evidence in resistance to the application for temporary writ by deposition. *Tuttle v. Pockert*, 147–41, 125 N. W. 841.

Depositions taken for use on an application for a temporary injunction may also be used on a final hearing. *Tinning v. Mumm*, 146–263, 125 N. W. 203.

Evidence in a particular case held sufficient to make out *prima facie* the maintenance of a liquor nuisance. *Ibid.*

Where the application for a temporary injunction is under oath and sufficient notice thereof is given, the court may enter a decree without evidence, on defendant's default. *Sowles v. Martens*, 142 N. W. 442.

Permanent injunction: A decree of injunction should not be entered for the closing of a building and making the costs and attorney's fees in the action a lien thereon where it appears that the illegal sales in the building have been without the knowledge or consent of the owner and for a very short time. *Merryfield v. Swift*, 103–167, 72 N. W. 444.

An injunction cannot be granted against a person to restrain him from selling liquor independent of the place where it is sold. *State v. Frahm*, 109–101, 80 N. W. 209.

On failure to establish the maintenance of a nuisance at any given place, the trial court may well deny an injunction. *Barr v. Neel*, 151–458, 131 N. W. 650.

Where a permanent injunction has already been granted against the members of a firm, another decree for an injunction against them as individuals should not be granted. *Carter v. Bartel*, 110–211, 81 N. W. 462.

An injunction may properly be granted against the premises on which the nuisance is maintained and the owner thereof. *Ibid.*

The good faith of the person instituting the proceedings cannot be inquired into, nor the authority of the attorney purporting to represent him, where he has appeared as a witness and accepted responsibility for the action. *Rizer v. Tapper*, 133–628, 110 N. W. 1038.

By violating the provision of the statute as to the sale of liquors on election day, one who is acting under the mulct law becomes subject to an injunction with

reference to any subsequent sales of liquors. *Hammond v. King*, 137–548, 114 N. W. 1062.

Where it appears in a proceeding for injunction that defendant is selling liquor in violation of law, the court should enjoin the defendant absolutely from the further prosecution of the business in any manner or form. *Hemmer v. Bonson*, 139–210, 117 N. W. 257.

Where it appears that sales in violation of law have been made by a pharmacist holding a permit and that he still continues in the business, an injunction should be granted on proof of violation of the statute prior to the bringing of suit. *Long v. Joder*, 139–471, 116 N. W. 1063.

A pharmacist who violates an injunction by sale of liquor on written requests which are insufficient subjects himself to punishment for contempt without regard to the intent for which the sales were made. *Barber v. Brennan*, 140–678, 119 N. W. 142.

Where it is found that a pharmacist has been selling liquors on requests which are not in compliance with the requirements of the statute, he should be enjoined and the costs of the proceedings should be taxed against him without regard to whether the violation of the law was merely technical or without criminal intent. *Smith v. Foster*, 153–664, 134 N. W. 93.

In a suit for an injunction to abate a liquor nuisance, held that the evidence was sufficient to show that the defendant acting under the mulct law and his co-defendant were partners and to sustain the granting of a perpetual injunction. *Woodring v. Romberg*, 155–105, 135 N. W. 566.

An injunction may properly be granted against an incorporated association organized for legitimate purposes which maintains from time to time a canvas inclosure in a street in which liquors purchased by it are dispensed to its members. *Shideler v. Tribe of the Sioux*, 139 N. W. 897.

The courts have no authority to restrain the sale of intoxicating liquors made in entire conformity to the provisions of the mulct law. *Campbell v. Jackman*, 140–475, 118 N. W. 755.

A charge of maintaining a liquor nuisance made in a petition for an injunction does not afford ground for an action of libel. *Hess v. McKee*, 150–409, 130 N. W. 375.

Abandonment of business: Where it appears that defendant has in good faith abandoned the business before the trial and sold his interest in the premises on which the crime is charged to have been carried on, no injunction should be granted. *Patterson v. Nicol*, 115–283, 88 N. W. 323.

Where an injunction was sought to restrain a permit holder from making further sales on the ground that he had violated the provisions of the law with reference to sales by such person, and it appeared that the defendant had gone out of business and had no intention of making further sales, held that the injunction was properly refused. *Redley v. Greiner*, 117–679, 91 N. W. 1033.

A showing that on the eve of the trial the defendant has abandoned the business is not sufficient to warrant the court in refusing to grant an injunction, and in such case the court may properly tax costs and attorney's fees to such defendant. *Drummond v. Richland City Drug Co.*, 133–266, 110 N. W. 471.

Primarily a suit under this section has for its object the termination of the unlawful use of the particular premises, and the resulting consequence of restraining one found guilty from establishing a nuisance elsewhere is only incidental. Therefore, if the action is abated under the provisions of code § 2410 by the giving of bond no judgment can be rendered which will have effect as to a nuisance subsequently established on the premises. *Morris v. Lowry*, 113–544, 85 N. W. 788; *Morris v. Connolly*, 113–545, 85 N. W. 789.

Where it appears that the defendant is still engaged in the business and that the owner has taken no steps to abate the nuisance, the latter cannot complain of the granting of an injunction. *McCracken v. Miller*, 129–623, 106 N. W. 4

Where the trial court is satisfied that defendant has abandoned for all time the illegal sale of liquors it should deny a permanent injunction. *Sawyer v. Termohlen*, 144–247, 122 N. W. 924.

The fact that the defendant after the institution of injunction proceedings in which the ground of complaint that a certain form of drink which he was selling was a malt liquor abandoned the sale of such liquor, but contested the injunction on the ground that such sale was not prohibited by law, the court properly entered a final decree and taxed attorney's fees against him on the finding that the sale of such liquor was in fact within the statutory prohibition. *Sawyer v. Botti*, 147–453, 124 N. W. 787.

Where it appears that a defendant has in good faith gone out of the business without intention to again engage in it, an injunction may properly be denied; but if, though defendant has ceased business and professes reformation, the brief time elapsing between the reformation and the trial or other circumstances indicate a doubt as to defendant's good faith, an injunction may properly be granted. *Tuttle v. Bunting*, 147–153, 125 N. W. 844.

An injunction may be denied where it appears that the defendant has in good faith abandoned the unlawful sales; but if after the commencement of the injunction action, defendant has continued to sell without complying with the law, costs of the action should be taxed against him

including statutory attorney's fees. *Offil v. Westbrook*, 151–446, 131 N. W. 649.

Where it appeared that the defendant, selling in his restaurant a beverage which came within the statutory definition of intoxicating liquor, abandoned such sale as soon as his right to sell it was challenged, held that the court might properly refuse to grant an injunction. *Barr v. Neel*, 151–458, 131 N. W. 650

An abandonment of the business immediately before the trial of the case is not sufficient to require the denial of a decree of injunction. *Bowers v. Maas*, 154–640, 135 N. W. 25.

Where one who has been unlawfully selling intoxicating liquors desists from the business of making such sales only on the institution of the injunction proceedings, the cost of the proceedings and attorney fees should be taxed to him even though the court may deem it unnecessary to award an injunction. *Fisher v. Skoglund*, 155–440, 136 N. W. 231.

Where there has been but a technical violation of the law and it appears that the defendant has in good faith quit the business with the intention not to reëngage therein, the supreme court will not on appeal interfere with the discretion of the trial court in denying an injunction. *State v. Harrison*, 140 N. W. 223.

Pleading and procedure: The general allegation that defendant has established and is keeping, using and maintaining a certain building described as a place for the sale of intoxicating liquors in violation of law, and as a place for keeping intoxicating liquors with intent to sell the same in violation of law, is sufficient in an action to enjoin the nuisance. But if it appears that the defendant is entitled to keep and sell intoxicating liquors by virtue of a permit, then the petition should further recite facts which render the keeping and sale of liquor by such person unlawful. *Abrams v. Sandholm*, 119–583, 93 N. W. 563.

In an action to enjoin the maintenance of a liquor nuisance the defendant has the burden of proving that sales shown to have been made were lawful. *Sharp v. Davis*, 142–19, 120 N. W. 323.

Where plaintiff in an action for an injunction specifies the violation of law relied upon and the defendant, joining issue, is found not guilty of such violation, plaintiff cannot on appeal insist that in other respects sales by the defendant were unlawful. *Reusch v. Withrow*, 154–56, 134 N. W. 431.

The plaintiff is not required to plead the evidential facts as to the keeping and the intent, and the existence of such intent may be established by proof of unlawful sales or use and unlawful acts or omissions not specifically alleged. *Bowers v. Maas*, 154–640, 135 N. W. 25.

The plea of the bar afforded by the mulct law is an affirmative defense, the burden of establishing which is cast upon the defendant who seeks its protection. The plaintiff is not required to anticipate and negative in advance such possible defenses. *Ibid.*

A petition alleging only that the defendant maintains a place and keeps therein intoxicating liquors with intent to sell the same in violation of the law is not subject to a motion for more specific statement. *Fisher v. Stoevenor*, 155–548, 136 N. W. 673.

Where the petition charges defendants with the maintenance of a liquor nuisance they are not entitled, on an affidavit showing that they are operating under the mulct law, to have the particulars of their violation of the law specifically alleged. *Knauss v. Gruenwald*, 156–331, 136 N. W. 690.

An action to enjoin a liquor nuisance is abated on the death of the sole defendant pending an appeal by the plaintiff from the action of the lower court in refusing the injunction. *Babbitt v. Corrigan*, 157– —, 138 N. W. 466.

Parties: An injunction restraining defendant from illegally selling liquors in a certain building is not void by reason of the recital therein that defendant was not the owner of the premises during the time of the previous sales and that subsequently the premises have been sold and possession thereof given to another, it appearing that such change of possession did not take place until after the temporary writ had been issued and served. *Ohlrogg v. District Court*, 126–247, 99 N. W. 178.

It is proper to so frame the decree as that it shall perpetually enjoin only the unlawful keeping of intoxicating liquors for sale. *Denmead v. Parker*, 145–581, 124 N. W. 780.

The fact that owners of premises alleged to have been used unlawfully have not been made parties furnishes no obstacle to decrees against those who are parties. But it is error to tax the costs and attorney's fees against any interest in the property of one who is not a party. *Ibid.*

The provisions relating to the abatement of liquor nuisances do not contemplate a proceeding *in rem*. The action is *in personam* and the property is to be subjected to the lien of a judgment for costs in such proceedings only on proof of facts under issues properly raised in an action to which the owner of the property is a party. *State v. Kelly*, 151–264, 130 N. W. 1088.

To sustain an injunction against the maintenance of the building as a nuisance and an order for its abatement, the owner is a necessary party. *Fisher v. Sliph*, 154–121, 134 N. W. 632.

Effect of decree: One who is enjoined from the unlawful sale of intoxicating liquor may, without violating such injunction, make sales in compliance with the provisions of the mulct law. *Landt v. Remley*, 113–555, 85 N. W. 783.

A prior injunction will not bar a second action to enjoin for the same nuisance where it appears that the prior injunction was secured through the fraud of the defendant. *Cameron v. Tucker*, 104–211, 73 N. W. 601.

A prior injunction against the owner of premises will not bar a second action for an injunction against such owner and sureties on his bond given under the provisions as to the mulct tax. *Ibid.*

An invalid decree in another action cannot be relied upon as a defense in an injunction proceeding. *Hemmer v. Dunlavey*, 143–265, 121 N. W. 1024.

The injunction contemplated by this section prohibits the illegal sale of liquors. But prior to the enactment of 33 G. A., ch. 142, § 3, the granting of an injunction did not affect the right of one enjoined to sell under the mulct law after a new compliance with all the requirements by him to be performed, a new general statement of consent not being necessary. *Rink v. Bollinger*, 145–501, 123 N. W. 183.

SEC. 2406. **How brought and tried—evidence—attorney's fee—investigation by county attorney—report.** Actions to enjoin nuisances may be brought in the name of the state by the county attorney, who shall prosecute the same to judgment, or any citizen of the proper county may institute and maintain such a proceeding in his name. The action when brought shall be triable at the first term of court after due and timely service of notice of the commencement thereof has been given; and in such action evidence of the general reputation of the place described in the petition shall be admissible for the purpose of proving the existence of such nuisance. If the plaintiff is successful in the action, an attorney's fee of twenty-five dollars shall be taxed as costs in his favor.

Such action, when brought by a citizen, shall not be dismissed upon the motion of either the plaintiff or defendant until the county attorney shall have been notified in writing of the filing of such motion, and until such county attorney shall have made a personal investigation of the place of business sought to be enjoined, and of all matters set forth in said motion for dismissal, and shall have filed, in writing, a report of his findings in said cause, and his recommendation in reference to the disposition of the same. If any such action shall remain upon the docket for two terms of court, without trial, it shall be the duty of the judge of such court to order the plaintiff and his attorney or attorneys of record, to appear in open court for examination as to the reasons why such cause has not been brought on for trial; and it shall be the duty of the county attorney to conduct such examination, if the judge shall so order. Whenever the court shall have reason to believe that any action commenced under this section has not been brought or prosecuted in good faith said court shall direct the grand jury to investigate all the facts and circumstances connected with the bringing and prosecution of the same. [30 G. A., ch. 82; 21 G. A., ch. 66, § 1.]

Attorney's fee: This section fixes the amount of the attorney's fee which is to be allowed in such cases under the general provisions of code § 2429. *Carter v. Bartel*, 110–211, 81 N. W. 462.

An additional attorney's fee may be taxed against the defendant on an appeal to the supreme court in which he is unsuccessful. *Drummond v. Richland City Drug Co.*, 133–266, 110 N. W. 471.

The limitation of this section as to the amount of the fee does not apply to the allowance of an attorney fee under code § 2429 providing for the allowance of such fee in proceedings to punish for contempt. *Lingelbach v. Hobson*, 130–488, 107 N. W. 168.

One who consents to the prosecution of an injunction suit in his name and testifies that he is the plaintiff in such proceeding cannot deny the authority of the attorney by whom the proceeding is prosecuted, and attorney fees may be taxed in favor of such attorney. *Plank v. Hertha*, 132–213, 109 N. W. 732.

Suit by citizen: If the suit for an injunction is instituted by a citizen, he is free to employ any attorney he may choose,

and he may prosecute a proceeding for contempt in violating the injunction when secured without the interposition of the county attorney. *Brennan v. Roberts*, 125–615, 101 N. W. 460.

Where the action is brought in the name of the state, it must be brought by the county attorney. The defendant is not bound to respond in such an action brought by an attorney other than the county attorney. *Beck v. Vaughn*, 134–331, 111 N. W. 994.

The judge may issue a temporary writ of injunction in vacation on the petition of the state or citizens of the county under this section, as well as on the petition of a citizen of the county under code § 2405. *Young v. Preston*, 131–292, 108 N. W. 463.

If in a proceeding for an injunction brought by a citizen an unauthorized decree is permitted to be entered to the prejudice of the public, any other citizen may institute action by certiorari to annul such decree. *Hemmer v. Bonson*, 139–210, 117 N. W. 257.

A citizen of the county is authorized to institute and maintain an action of this kind without regard to his interest. *Reusch v. Loserth*, 139 N. W. 454.

Evidence: The mere fact of the possession of liquor is evidence of keeping for illegal sale where it does not appear that the defendant is entitled to sell by virtue of a permit or some other lawful authority. *Abrams v. Sandholm*, 119–583, 93 N. W. 563.

Evidence of the reputation of the place is not admissible in a criminal prosecution for maintaining a nuisance. *State v. Benson*, 154–313, 134 N. W. 851.

As the action is triable at the first term after due and timely service of notice thereof has been given, the defendant is not entitled to present his evidence in the form of depositions as a matter of right. *Tuttle v. Pockert*, 147–41, 125 N. W. 841.

Dismissal: While under this section as amended a dismissal without notice to the county attorney and his recommendation made on personal investigation is erroneous, such dismissal is not without jurisdiction and cannot be collaterally attacked. *Sawyer v. Kelly*, 148–644, 127 N. W. 977.

To render such dismissal invalid it must appear that it was procured by fraud or collusion to which the defendant relying on such dismissal was a party. *Ibid.*

SEC. 2407. Violation of injunction.

Contempt proceedings: It is no defense that accused has acted in good faith upon the advice of counsel in regard to selling liquor in violation of the injunction. *State v. Stevenson*, 104–50, 73 N. W. 360.

It is immaterial that the judge calls the defendant to answer for contempt by notice or citation rather than by warrant of arrest, if the defendant actually appears and submits himself to the jurisdiction of the court for the purposes of the case. *State v. Thompson*, 130–227, 106 N. W. 515.

A decree enjoining a party to the suit from selling liquor is self-executing and its violation is a contempt, though no formal writ of injunction has issued and been served on such defendant. *Bartel v. Hobson*, 107–644, 78 N. W. 689.

Where the defendant who is enjoined is represented in the case by attorney when the decree is rendered, he is chargeable with notice of the decree. *Hawks v. Fellows*, 108–133, 78 N. W. 812.

Violation by an agent of an injunction will subject the principal to punishment for contempt. *Ibid.*

Whether the provisions of code § 5337 as to withdrawal of a plea of guilty in a criminal prosecution are applicable to proceedings to punish for violation of a liquor injunction or not, it is too late to withdraw such plea after the judgment of the court has been pronounced, although it is not yet entered of record. *Beatty v. Roberts*, 125–619, 101 N. W. 462.

This section requires the setting out of the alleged facts constituting the violation of the injunction, but an information reciting the issuance of an injunction, the knowledge thereof and the selling and keeping for sale of liquor in violation of its terms, is sufficient. It was not intended to require the setting out of the evidence upon which the proceeding must finally be determined. *McGlasson v. Scott*, 112–289, 83 N. W. 974.

A judgment in an injunction proceeding should be proved either by the record itself or by an authenticated copy thereof. *Ibid.*

The specific provision that there shall be a trial on the issue raised by the denial of the defendant in a proceeding to punish for a contempt in violating an injunction against the sale of intoxicating liquors is in harmony with the general law. See code § 4465. *Drady v. District Court*, 126–345, 102 N. W. 115.

A proceeding to punish for contempt in the violation of an injunction to abate a liquor nuisance may be prosecuted without the aid of the county attorney. *Brennan v. Roberts*, 125–615, 101 N. W. 460.

An information charging the violation of an injunction need not allege specifically the acts constituting the violation of law relied upon. *Pumphrey v. Anderson*, 141–140, 119 N. W. 528.

To establish the violation of an injunction by the owner of the property who is not in possession, knowledge either express or implied must be shown. *Sawyer v. Mould*, 144–185, 122 N. W. 813.

One who participates in an unlawful sale of liquor which is in his sole possession and receives the purchase price therefor is guilty of violating an injunction prohibiting him from selling intoxicating liquor or keeping the same for the purpose of selling. *Goodrich v. Wheeler*, 145–289, 123 N. W. 950.

Where the contempt proceeding is against persons named individually and as a partnership and fines are imposed on the individuals there should not be an additional fine on the partnership as such. *Brown v. Powers*, 146–729, 125 N. W. 833.

Where the injunction forbids everyone from maintaining a nuisance on the premises described, it is binding on any person who continues a nuisance on such premises. *Dermedy v. Jackson*, 147–620, 125 N. W. 228.

The information for violation of an injunction may be filed by another than the complainant in the proceeding in which the injunction was granted. *Ibid.*

The statute does not provide how the contempt proceedings shall be entitled. An information entitled in the name of the state against the person complained of as violating the injunction is sufficient. *Ibid.*

Where the description of the property in the information is the same in that of the decree of injunction the identity of the premises is presumed regardless of a discrepancy in the name of the owner. *Ibid.*

After forfeiting the protection of the mulct law by violating an injunction, the saloon keeper cannot avoid a second charge of contempt on the theory that he has made a change in the method of conducting his business, but he must qualify anew to become entitled to the benefits of the law. *Sawyer v. Gaynor*, 148–115, 126 N. W. 773.

Under the evidence in a particular case, held that the lower court was in error in dismissing a contempt proceeding in which it was charged that in violation of an injunction the defendant had made sales of liquors to minors. *Sawyer v. Hutchinson*, 148–449, 126 N. W. 798.

An information or affidavit charging violation of an injunction upon information and belief is sufficient. *Koch v. District Court*, 150–151, 129 N. W. 740.

The violation of an injunction in a nuisance case does not constitute a crime. The proceeding for such contempt is not criminal. *Judge v. Powers*, 156–251, 136 N. W. 315.

An injunction as to the use of premises for the sale of intoxicating liquors is not binding on persons not parties to the proceedings and who have no knowledge thereof. An employe is not bound by an injunction against his employer of which he has no notice. *Harris v. Hutchison*, 140 N. W. 830.

In a contempt proceeding for violating an injunction the court will take judicial notice of its own order granting such injunction. *Bunting v. Powers*, 144–65, 120 N. W. 679.

The office of a precept or warrant is to bring the defendant into court and give him an opportunity to be heard in defense. Having been heard in the proceedings he cannot question the court's jurisdiction because of irregularity in the issuance of the precept. *Haaren v. Mould*, 144–296, 122 N. W. 921.

Failure to attach to the information a duly authenticated copy of the decree alleged to be violated is not a valid objection to the court's jurisdiction. *Ibid.*

The court may take judicial notice of the decree for violation of which the proceeding is instituted. *Ibid.*

The decree of injunction which the defendant is charged with having violated is sufficiently before the court without being formally introduced in evidence. *Sawyer v. Oliver*, 144–382, 122 N. W. 950.

Review by certiorari: If the judge, imposing a fine for violation of an injunction, acts without jurisdiction, the person upon whom a fine is sought to be imposed is not bound to appeal, but may enjoin its enforcement. *McConkie v. Landt*, 126–317, 101 N. W. 1121.

Where it appeared that one charged with contempt in violating an injunction had not complied with the conditions of the mulct law, held that an order discharging him in a proceeding for contempt was improper, and on certiorari it was annulled. *Jones v. Byington*, 128–397, 104 N. W. 473.

The statute leaves no discretion with the trial judge as to punishment when it is clear that there has been a violation of injunction in the sale of liquor. His refusal to make an order of punishment for contempt may be reviewed by certiorari. *Barber v. Brennan*, 140–678, 119 N. W. 142.

An order of discharge in a contempt proceeding which is set aside in a proceeding by certiorari does not constitute a final adjudication barring a subsequent finding for contempt although the defendant was not formally a party to the proceeding by certiorari. *Brown v. Powers*, 146–729, 125 N. W. 833.

Where on a hearing for contempt the defendant was discharged but on annulment in certiorari proceedings of such ruling he was again put on trial and convicted, held that the rule of twice in jeopardy had no application. *Gibson v. Hutchinson*, 148–139, 126 N. W. 790.

While the supreme court on certiorari determines whether, under the evidence introduced, the lower court erred in refusing to punish for contempt, the decision of the lower court is entitled to weight where the evidence is in conflict. *Sawyer v. Hutchinson*, 149–93, 127 N. W. 1089.

A stay of contempt proceedings on application for certiorari does not suspend the injunction nor prevent another proceeding for contempt for a subsequent violation thereof. *Silvers v. Vermilion*, 151–163, 130 N. W. 913.

SEC. 2408. Abatement.

The existence of a nuisance being established, a decree as provided in this section must be given, unless action has been abated by the owner giving bond and paying costs before order of abatement, as provided in code § 2410. Such abatement should have the effect of closing the building referred to against all uses, unless sooner released by proceedings under that section. *McCoy v. Clark*, 109–464, 80 N. W. 538.

The order of abatement should be for the closing of the building for all purposes and the effect of such order can only be obviated by the giving of a bond under the provisions of § 2410. *Lewis v. Brennan*, 141–585, 120 N. W. 332.

Where it is found that a pharmacist has been selling liquor under a permit without full compliance with the requirements of the statute, the place of sale should be ordered to be abated as a nuisance irrespective of the knowledge of the owner of the premises; but the owner may, by complying with code § 2410, have such order canceled so far as it relates to his property. *Smith v. Foster*, 153–664, 134 N. W. 93.

SEC. 2410. Abatement by owner. If the owner appears and pays all costs of the proceeding, and files a bond with sureties to be approved by the clerk in the full value of the property, to be ascertained by the court, or, in vacation, by the clerk, auditor and treasurer of the county, conditioned that he will immediately abate said nuisance and prevent the same from being established or kept therein within a period of one year thereafter, the court, or, in vacation, the judge, may, if satisfied of his good faith, order the premises closed under the order of abatement to be delivered to said owner, and said order of abatement canceled so far as the same may relate to said property; and if the proceeding be an action in equity, and said bond be given and costs therein paid before judgment and order of abatement, the action shall be thereby abated as to said building only. The release of the property under the provisions of this section shall not release it from any judgment, lien, penalty or liability to which it may be subject by law. [29 G. A., ch. 94, § 1; 21 G. A., ch. 66, § 7.]

The giving of a bond abates the action, and not simply the nuisance, and therefore in such a case no judgment can be rendered. *Morris v. Lowry*, 113–544, 85 N. W. 788; *Morris v. Connolly*, 113–545, 85 N. W. 789.

It is only on the giving of a bond that the building is to be allowed to be used for other purposes. *Lewis v. Brennan*, 141–585, 120 N. W. 332.

SEC. 2412. Prepayment of fees not required — costs taxed to plaintiff.

One who procures a temporary injunction without complying with the statutory provisions with reference thereto so that the proceeding is void, is liable for costs in an action instituted against him, and others, to enjoin the enforcement of the decree. *Beck v. Vaughn*, 134–331, 111 N. W. 994.

Where no ground is shown for the granting of an injunction, the costs may properly be taxed to the county. *Barr v. Neel*, 151–458, 131 N. W. 650.

The costs should not be taxed to the plaintiff where it does not appear that the action was brought maliciously or without probable cause. *Reusch v. Loserth*, 139 N. W. 454.

SEC. 2413. Search warrant—seizure.

While the information should state the name of the owner or keeper of the intoxicating liquor so that in case of seizure notice thereof may be given to him, yet the determination as to who owned or kept it is important only when the owner or keeper resists unsuccessfully a judgment of forfeiture and it becomes necessary to tax costs. Where the claimant of the liquor states that he was the keeper thereof, there is no occasion for the jury to determine that fact, and he is liable for costs as fixed by the finding that the liquor was kept for illegal purposes. *State v. Intoxicating Liquors*, 109–145, 80 N. W. 230.

Evidence that the intoxicating liquors belonged to defendant and were kept by him in a restaurant or grocery store in the same building as that in which he resided, is sufficient evidence to warrant the condemnation and destruction of such liquor. *State v. Johnson*, 157– —, 138 N. W. 458.

The guilt of the person charged with unlawfully owning or keeping intoxicating liquors is essential to a judgment for its condemnation and destruction. *Babbitt v. Corrigan*, 157– —, 138 N. W. 466.

SEC. 2415. Notice—trial—judgment—appeal.

In a proceeding to forfeit liquor charged to be kept for illegal purposes, the presumption arising under code § 2427 that the keeping by a person not authorized to sell and on premises not used exclusively for a private dwelling, throws the burden upon a claimant of the liquor to show not only that he did not keep the liquor for illegal sale, but also that it was not kept by anyone for that purpose. *State v. Intoxicating Liquors*, 109–145, 80 N. W. 230.

Acquittal in a prosecution for the unlawful sale or keeping for sale of intoxicating liquors is a bar to a subsequent proceeding for the seizure and destruction of the liquors so kept. *State v. Cobb*, 123–626, 99 N. W. 299.

As the procedure for condemnation of liquor seized under a search warrant relates only to the property so seized, an adjudication in such a procedure that the liquor was not unlawfully kept is not conclusive in a subsequent prosecution for maintaining a nuisance. *State v. Dougherty*, 147–570, 126 N. W. 696.

SEC. 2418. Civil action for damages by wife, parent, child, etc.

In an action for damages for the sale of intoxicating liquors the person injured is not required to establish all the elements of an injury actionable at common law. And held that the wife of one who committed suicide while intoxicated by reason of unlawful sales of liquor to him by a permit holder might recover damages without showing that her husband would not have committed suicide had the defendant not sold him the liquor. It is sufficient in such case to show that the act was committed while the husband was in fact intoxicated with liquor unlawfully sold to him by defendant. *Bistline v. Ney*, 134–172, 111 N. W. 422.

The measure of damages in an action for loss to a wife by reason of causing the intoxication of her husband is dependent on what the husband had in fact done for the support of the wife prior to the wrongful acts of defendant in selling him intoxicating liquors. *Bellison v. Apland*, 115–599, 89 N. W. 22.

It is error to instruct the jury that the defendant in such a case is liable for all damages sustained by plaintiff on account of the intoxication of her husband where it appears that the husband procured intoxicating liquors elsewhere, which he drank, and which contributed to his besotted condition during the time complained of. *Ibid.*

Evidence of former suits of the same character by the wife against other defendants is admissible on the question of plaintiff's good faith in bringing the action. *Ibid.*

An action by a wife for damages for the sale of intoxicating liquor to her husband cannot be joined with an action to recover a penalty for sale to minors or intoxicated persons. *Carrier v. Bernstein*, 104–572, 73 N. W. 1076.

In an action to recover damages for permanent injuries received by the husband by reason of the intoxication complained of, he may be permitted as a witness to exhibit to the jury his physical condition. *Faivre v. Mandercheid*, 117–724, 90 N. W. 76.

A joint action may be maintained against different persons who contributed to the intoxicated condition causing injury to the husband, although the defendants were conducting separate places of business and did not act in concert. *Ibid.*

A wife, suing for injuries sustained by reason of the sale of intoxicating liquors by defendant to her husband, is not limited to the recovery of damages resulting from habitual intoxication, but may recover for damages resulting from specific intoxications, so far as defendant may have contributed thereto. *League v. Ehmke*, 120–464, 94 N. W. 938.

The fact that by reason of habitual intoxication the husband was not furnishing support to his wife prior to the time of the sales to her husband by the defendant, will not defeat the liability of the defendant for continuance of such condition by reason of sales made by him. *Ibid.*

A seller who by his acts contributes to a condition of habitual intoxication, cannot escape liability for specific injuries due to a particular fit of intoxication, not caused by liquor sold by him. *Ibid.*

Although the language of code § 2418 differs slightly from that of § 1557 of the code of '73, nevertheless, one who is entitled to sell liquors by reason of the mulct law, but who sells without compliance with the conditions of the law, is liable in civil damages to a wife who is injured by reason of such sales to her husband. *Ibid.*

In an action to recover damages for the death of a person caused by the sale

of intoxicating liquors to him, life tables showing his expectancy of life are admissible in evidence. *Knott v. Peterson*, 125–404, 101 N. W. 173.

The fact that the husband, for whose death, due to the defendant's wrongful act in selling him intoxicating liquors, the wife seeks recovery, has on account of the habits of intoxication failed to support his wife prior to his death is not to be taken into account in measuring the amount of her recovery. *Ibid.*

In an action for damages resulting from the sale of intoxicating liquors to plaintiff's husband, held that testimony tending to show that the husband was addicted to the use of intoxicating liquors six or seven years prior to the time involved in the action was incompetent as a part of plaintiff's case. *Mathre v. Devendorf*, 130–107, 106 N. W. 366.

It is not competent for the defendant to show by way of defense that the plaintiff has instituted a suit against another for damages for sales of liquors to her husband within the same period of time covered by the petition in the case on trial. *Ibid.*

The wife is entitled to recover in such cases for only such damages as she has suffered by reason of defendant's act. *Ibid.*

The jury should not be permitted to give double damages by means of allowance for impaired ability to secure or hold remunerative employment in addition to damages to plaintiff's support or means of support. *Ibid.*

It is competent to show that the intoxication of the plaintiff's husband prevented him from securing or holding a permanent position of employment. *Mathre v. Story City Drug Co.*, 130–111, 106 N. W. 368.

Ordinarily a firm or a partner will not be liable for the wilful or negligent tort of a partner acting beyond the scope of his authority; but an exception to this rule exists where the damage claimed is for unlawful sale of intoxicating liquors. *Ibid.*

In an action by a child for damages on account of sale of liquor to a parent, evidence of the number of children, even though immaterial, will not be prejudicial. *Shull v. Arie*, 113–170, 84 N. W. 1031.

Under this section both principal and agent are liable, but the principal is liable for an authorized sale made by the agent. *Ibid.*

Damages may be recovered in behalf of an illegitimate child who has been recognized by the parent. *Goulding v. Phillips*, 124–496, 100 N. W. 516.

The bondsmen of one who purports to sell in compliance with the conditions of the mulct law, but has not filed the requisite consent of adjoining property owners, are liable for damages provided for under this section. *Breeding v. Jordan*, 115–566, 88 N. W. 1090.

In an action by a child to recover damages for causing the death of the parent, life tables are admissible in evidence. *Peterson v. Brackey*, 143–75, 119 N. W. 967.

The awarding of such damages is discretionary with the jury only as to amount if the wrong is established. *Ibid.*

To sustain a recovery under this section it is enough that the injury was by an intoxicated person, regardless of whether it would have been committed by him if sober. It is not necessary to prove that the injury was in consequence of intoxication. *Lee v. Hederman*, 157– —, 138 N. W. 893.

The value of an infant's means of support lost by the death of his father necessarily depends largely on the habits of that father, whether economical, industrious and sober or the reverse. The fact as to the deceased parent's excessive use of intoxicants may be material in determining the loss in means of support by the infant through his father's death. *Ibid.*

The action may be brought against two or more persons who have contributed to the intoxication, causing the damage complained of, and if each has given a separate bond under the mulct law, the joint action may be maintained against the surety on such bonds. *Kaus v. American Surety Co.*, (D. C.) 199 Fed. 972.

SEC. 2419. Transportation to one not holding permit.

The crime described in this section may be charged in the language of the statute. *State v. Reilly*, 108–735, 78 N. W. 680.

An individual engaged in illegal traffic in intoxicating liquors, if not a carrier, falls within the designation of "other persons" under the language of this section. *Ibid.*

Notwithstanding the so-called Wilson law, the statutory provisions as to transportation of liquors into the state have no application to carriers transporting such liquors into the state from another state. *Rhodes v. Iowa*, 170 U. S. 412.

Although by arrangement between the seller of intoxicating liquors in one state and the buyer thereof in another, the goods may be shipped C. O. D. by the seller to the buyer, without subjecting them to the provisions of the law of the state to which they are shipped, with reference to the sale of intoxicating liquors (*American Express Co. v. Iowa*, 196 U. S. 133, 25 Sup. Ct. Rep. 182, overruling 118 Iowa, 447), yet the legal effect of such transaction as to the time when title to the liquor passes from the seller to the buyer may be controlled by evidence as to the intention of the parties. *Hamilton v.*

Schlitz Brewing Co., 129–172, 105 N. W. 438.

The transportation and delivery of a C. O. D. package of liquor by an express company does not render the company liable for damages resulting from the sale thereof. *Chambers v. Adams Express Co.*, 128–154, 103 N. W. 152.

An express company receiving liquors from a consignor outside of the state, to be transported to a consignee in the state and delivered to him on payment of the purchase price and charges of transportation, the shipment having been made in pursuance of an order of the consignee, accepted by the consignor, acts as the agent of the consignee in the transportation of liquors and as the agent of the consignor in the collection of the charges, and cannot be deemed the seller nor an agent of the seller of the liquors, in violation of federal or state law. *United States v. Adams Exp. Co.*, 119 Fed. 240.

One who, as agent for the consignee, receives liquors from the carrier for delivery to such consignee is not engaged in interstate commerce. *State v. Wignall*, 150–650, 128 N. W. 935.

The statute applies only to railway and express companies, common carriers and persons engaged in the carrying business and not to private individuals acting without consideration and for the purpose of conferring a favor, even though acting as an agent of the consignee. *Ibid.*

SEC. 2422. Lien of judgments—liability of sureties—costs—evidence.

Where the real owner of property has an opportunity to make defense in the action he is bound by the judgment declaring a lien on such property. *State v. Mateer*, 105–66, 74 N. W. 912.

Where defendant has been convicted of maintaining a liquor nuisance, the governor may remit the fine, but cannot remit the costs nor suspend their execution. *Ibid.*

The bond here provided for does not cover the penalty authorized by code § 2403 in case of sales to minors. *Heading-ton v. Smith*, 113–107, 84 N. W. 982.

Authority to sell under the provisions of the mulct law is not the same as that given to a permit holder. *Ibid.*

Action against the surety on a liquor seller's bond for civil damages caused by sale of liquor may be maintained without making the principal a party. *Knott v. Peterson*, 125–404, 101 N. W. 173.

The premises on which a liquor nuisance is maintained are liable to a judgment for a fine imposed for the illegal keeping of liquors, although constituting the homestead of the seller. *Jasper County v. Sparham*, 125–464, 101 N. W. 134.

One who takes the property by conveyance prior to the enforcement of the fine takes it subject to the judgment. *Ibid.*

The indictment for a liquor nuisance need not specifically describe the premises on which the judgment will become a lien, but the property may be identified by evidence when it is sought to enforce the lien against it. *Ibid.*

While the judgment for costs and attorney's fees becomes a lien on the premises providing the unlawful use was with the knowledge of the owner or his agent, the property cannot be subjected to the payment of such judgment without notice to the owner and affording him an opportunity to be heard. *Denmead v. Parker*, 145–581, 124 N. W. 780.

The premises which have been used for the illegal sale of intoxicating liquors by the occupants who were not the owners thereof, are subject to the lien of a judgment rendered against such occupants only when it is shown that they have been used for such illegal purposes with the knowledge or consent of the owner or his agent. A suit for injunction against the premises in such case is not a proceeding *in rem* so as to render the judgment a lien upon the premises as against the interest of an owner who is not made a party to the proceedings. *State v. Kelly*, 151–264, 130 N. W. 1088.

This section relates only to the lien of the judgment for costs and not to the order of abatement directed to be entered under code § 2408. *Smith v. Foster*, 153–664, 134 N. W. 93.

SEC. 2423. Payments—contracts—negotiable paper.

In general: An action under this section to recover back payments made for intoxicating liquors is an action for the enforcement of a statutory penalty, and cannot therefore be removed to the federal courts. *Hamilton v. Joseph Schlitz Brg. Co.*, 100 Fed. 675.

The person named in this section as "receiver" and who is made liable for a return of the money, is evidently the person to whom it belonged when paid by the purchaser. It is not participation in making the sale nor the handling of the money that renders one liable for its return, but only the receipt of such money by him as his own. *Foley v. Leisy Brg. Co.*, 116–176, 89 N. W. 230.

A contract for the sale of property, a part consideration of which is an indebtedness for intoxicating liquors, is wholly void, and the person who has contracted to convey may have his title quieted as

against the person with whom the illegal contract of conveyance was made. *Lindt v. Uihlein*, 109–591, 79 N. W. 73.

One who claims title to real property in consideration of the illegal sale of intoxicating liquors cannot, after his title is adjudged to be void on that ground, assert the rights of an occupying claimant. *Lindt v. Uihlein*, 116–48, 89 N. W. 214.

Money loaned to a partnership engaged in the business of unlawful sale of liquors may be recovered, it not appearing that the loan was made to enable the partnership to violate the law. *Grey v. Callan*, 133–500, 110 N. W. 909.

A mere suspicion on the part of an owner of property leased that intoxicating liquor may be sold on the premises by the tenant does not defeat the right of the lessor to recover on a bond given by the tenant to save the lessor harmless from any liability of the premises under the intoxicating liquor laws. *Harbison v. Shirley*, 139–605, 117 N. W. 963.

The owner of a brewery permitting the retail sale of liquor on any portion of the premises forfeits the right to recover on contracts of sale made in the prosecution of his business. *Orke v. McManus*, 142–654, 121 N. W. 177.

Notes which are in fact given either in whole or in part for and on account of intoxicating liquors sold in violation of law are invalid. *Arie v. Dixon*, 144–573, 123 N. W. 173.

An action to recover payments made for liquor sold in violation of statute is not a penal action, but civil and remedial, and may be maintained in a federal court. *United Breweries Co. v. Colby*, (C. C.) 170 Fed. 1008.

Sales in another state: Where a salesman has only authority to take orders subject to approval, and no part of the price is paid, nor any part of the goods delivered when the orders are taken which are to be filled in another state, the contract is not in violation of the laws of this state. *Sachs v. Garner*, 111–424, 82 N. W. 1007.

Money paid for liquor sold and shipped at a point outside of the state on orders there received and approved cannot be recovered under this section. *Brown v. Wieland*, 116–711, 89 N. W. 17.

As to payments for liquors unlawfully sold in this state, the obligation to repay exists from the time the payment is made, and only demand is necessary to maintain an action on the claim, and therefore such a claim may be introduced by way of counter claim, under the provisions of code § 3570, although at the time the original action is brought no demand has yet been made. *Ibid.*

An order given for liquor subject to approval in another state becomes binding upon such approval and the shipment of the liquor in response thereto and the payment of the purchase price may be enforced. *Bowlin Liquor Co. v. Brandenburg*, 130–220, 106 N. W. 497.

Where the sale of intoxicating liquors actually takes place in another state, no recovery may be had for payments made therefor. *Hamilton v. Schlitz Brewing Co.*, 129–172, 105 N. W. 438.

Prohibition being the rule, the burden is upon one seeking to recover payment for intoxicating liquors sold to show that the sales, if made in this state, were lawful. But if it appears that the sale was made in another state it will not be presumed to have been unlawful. *Westheimer v. Habinck*, 131–643, 109 N. W. 189.

If sold in another state and shipped to this state for delivery to the purchaser, the liquors while in the hands of the carrier and still subject to the control and direction of the seller do not become subject to the police regulations of the state. *Ibid.*

When the buyer accepts liquors shipped to him on his order, given to the seller in another state, his liability is on the contract of sale thus made in the state where the seller resides, even though in the meantime he has countermanded the order. His acceptance is to be deemed a waiver of the countermand, rather than as giving rise to an action on implied contract. *Gross v. Feehan*, 110–163, 81 N. W. 235.

A contract between a principal in another state and an agent in this state to sell intoxicating liquor in original packages prior to the passage of the act of congress subjecting the traffic in intoxicating liquors brought into the state to the regulations of the state, was not unlawful. *Green v. Schoenhofen Brg. Co.*, 103–252, 72 N. W. 655.

SEC. 2424. Requisites of indictment or information—testimony of purchaser.

Under the special statutory provisions as to prosecutions for liquor nuisances, it is not necessary in the indictment to allege that the liquors kept by the defendant were sold or kept in violation of law. *State v. Brown*, 135–40, 109 N. W. 1011.

SEC. 2425. Several counts—second conviction.

A prosecution under this section is within the jurisdiction of a justice of the peace, although the aggregate of the fines imposed may be in excess of one hundred

dollars, but this is because more than one offense may be charged in the information, the penalty for each offense being within the constitutional limitation. *State v. Babcock*, 112-250, 83 N. W. 908.

SEC. 2427. Evidence of illegal selling or keeping—license.

The presumption which arises from the finding of liquor on the premises of defendant is that the liquor is kept by some one for illegal sale, and in a prosecution for forfeiture of such liquor the burden is on defendant claiming to be the owner of the liquor to show not only that he did not keep the liquor for illegal sale, but that it was not kept by anyone for that purpose. *State v. Intoxicating Liquors*, 109-145, 80 N. W. 230.

The possession of a federal license to sell liquor is presumptive evidence of the selling and keeping for sale. *McCracken v. Miller*, 129-623, 106 N. W. 4.

The discovery of liquor on the premises is presumptive evidence of keeping for illegal sale, but does not tend to prove the act of selling in violation of law. *State v. Thompson*, 130-227, 106 N. W. 515.

Proof of the possession of intoxicating liquor in a public eating house is a substantial fact declared by the statute to constitute a nuisance, and it is not essential in a prosecution for such nuisance to show that intoxicating liquors have actually been found in such place by an officer under a search warrant. *State v. Wilson*, 152-529, 132 N. W. 820.

The finding of liquors in a restaurant or grocery store kept in the same building as that of defendant's residence, with evidence that such liquor is the property of the defendant, is sufficient to show the keeping of such liquor for illegal sale. *State v. Johnson*, 157- —, 138 N. W. 458.

SEC. **2427-a. Certified list of federal license holders—county attorney shall secure.** That the several county attorneys of this state are hereby authorized and directed to secure from the federal internal revenue collectors for Iowa, on or before the fifteenth day of January, April, July and October of each year, a certified copy of the names of all persons who have paid to the federal government special taxes imposed upon the business of selling intoxicating liquors within their respective counties, except such persons within their counties as are engaged in the sale of intoxicating liquors under the mulct law and registered pharmacists who hold valid permits to keep and sell intoxicating liquors for medicinal purposes, and to pay to the internal revenue collector the fee prescribed by the statutes of the United States. Said county attorney shall file with the county auditor of his county a certified statement of the amount paid to such internal revenue collector, and the board of supervisors shall audit and allow the same at their next regular or special meeting. [34 G. A., ch. 105, § 1.]

SEC. **2427-b. Filed with auditor—record.** Upon receipt by the county attorney of certified copies of the names of all persons in his county who have paid the federal government the special tax imposed on the business of selling intoxicating liquors as aforesaid, the county attorney shall, after examination of said list, file the same with the auditor of his county, who shall record the same in a book kept therefor, which shall be open to public inspection. [34 G. A., ch. 105, § 2.]

SEC. **2427-c. Prima-facie evidence.** The certified copy furnished by the internal revenue collector of the name of any person who has paid to the federal government the special tax imposed upon the business of selling intoxicating liquors shall be prima-facie evidence that said person is engaged in the sale of, or keeping with intent to sell, intoxicating liquors in violation of law, unless said person by way of defense shows that he has complied with all the terms and conditions of the mulct law, or that he is a registered pharmacist, actually engaged in business as such and said certified copy shall be competent evidence in any court within this state. [34 G. A., ch. 105, § 3.]

SEC. **2428. Duty of peace officers—direction by county attorney—report—compensation—expenses.** Peace officers shall see that all provisions of this chapter are faithfully executed within their respective

jurisdictions, and when informed, or they have reason to believe, that the law has been violated, and that proof thereof can be had, they shall file an information to that effect against the offending party before a magistrate, who shall thereupon proceed according to law. Upon trials of such causes, the county attorney shall appear for the state, unless some other attorney, selected by the peace officer who filed the information, shall have previously appeared. Any peace officer failing to comply with the provisions of this section shall pay a fine of not less than ten nor more than fifty dollars, and a conviction shall work a forfeiture of his office. Every peace officer shall give evidence, when called upon, of any facts within his knowledge tending to prove a violation of the provisions of this chapter, but his evidence shall in no case be used against him in any criminal prosecution. The attorney selected by a peace officer in accordance with the provisions of this section shall receive, for prosecuting such charge before a justice of the peace, five dollars, to be taxed as costs in the case. Any peace officer shall, whenever directed in writing so to do by the county attorney, make special investigation of any alleged or supposed infraction of the law within his county, and report in writing with reference thereto within a reasonable time to such county attorney. When such investigation is made, the peace officer shall file with the county auditor a detailed, sworn statement of the services rendered and of his actual itemized expenses incurred in connection therewith, accompanied by the written order of the county attorney. If the officer be one who is receiving a definite and fixed salary, the board of supervisors shall audit and allow only so much of such expense account as it shall find reasonable and necessary. If the officer be one not receiving a fixed and definite salary, the board of supervisors shall allow such additional sum for services as it may deem reasonable and just, which allowance shall be final. [35 G. A., ch. 192, § 1.] [20 G. A., ch. 143, § 13; 17 G. A., ch. 91; C. '73, §§ 1551, 3829; R. §§ 1578, 4168; C. '51, § 2561.]

This section applies equally to county attorneys and other officers named. *Tennant v. Kuhlemeier*, 142–241, 120 N. W. 689.

SEC. 2429. Attorney's fees.

The provisions of this section as to the amount of the attorney's fees are limited by those of code § 2406 and the cases provided for in that section. *Carter v. Bartel*, 110–211, 81 N. W. 462.

Under this section the limitation of § 2406 as to the amount of the fee to be allowed in an action to enjoin a nuisance is not applicable. *Lingelbach v. Hobson*, 130–488, 107 N. W. 168.

The statute authorizes the taxation of attorney's fees as a part of the costs and also allows ten per cent. for collecting the penalty imposed. *Brennan v. Roberts*, 125–615, 101 N. W. 460.

The ten per cent. of the fine, in addition to the attorney's fee which is to be allowed to the attorney prosecuting the case, cannot be recovered either as costs or otherwise until the fine has been collected. *McConkie v. Landt*, 126–317, 101 N. W. 1121.

The statute contemplates the allowance of reasonable attorney's fees in favor of the attorney by whom the injunction proceeding is actually prosecuted without objection on the part of the person who ostensibly appears as prosecutor. *Plank v. Hertha*, 132–213, 109 N. W. 732.

An attorney's fee may be taxed in the supreme court as costs in favor of the attorney who appears in the certiorari proceeding to sustain an order for punishment for contempt, if it be found that the order was properly made. *Cheadle v. Roberts*, 150–639, 130 N. W. 368.

The attorney in a prosecution for contempt is entitled to a percentage of the fine paid for collection, but the board of supervisors has no authority to contract with a private person for collecting such fines on a percentage. *Gunn v. Mahaska County*, 155–527, 136 N. W. 929.

SEC. 2431. Evasions.

Statutes designed to regulate the sale of intoxicating liquors are to be construed and interpreted by the rules having application to statutes generally, save as modi-

fied by the provisions of this section, that it shall be the duty of courts and jurors to construe the general chapter relating to the subject of intoxicating liquors so as to prevent evasion. *Cox v. Burnham*, 120–43, 94 N. W. 265.

MULCT TAX.

SEC. 2432. Payment of—lien.

[For additional provisions respecting annual mulct tax see §§ 2461-c and 2461-d. EDITOR.]

The mulct tax is not payable by a registered pharmacist who has a permit for the sale of intoxicating liquors, although he sells in violation of his permit. *In re Assignment of Shonkwiler*, 104–67, 73 N. W. 479.

Where at the time the mulct tax law went into effect certain premises were already leased under terms by which the lessor could terminate the lease in the case of illegal sale of liquor on the premises, and the lessor had knowledge of illegal sales and did not take steps to terminate the lease, held that the premises were subject to the tax. *In re Smith*, 104–199, 73 N. W. 605.

No notice to the lot owner of the assessment and levy of the mulct tax is necessary. It is a tax to be assessed and levied by virtue of a general law upon certain persons and property coming within the provisions of the act. The statute contemplates that the person liable to the tax shall appear and pay the same without notice. *Ibid.*

The mulct tax is to be assessed against every person, other than registered pharmacists holding permits, who is engaged in selling or in keeping with intent to sell intoxicating liquors, and upon the real property, and the owner, thereof, in or upon which such liquors are sold or kept with intent to sell. The tax is to be assessed regardless of the fact that no petition of consent has been secured or permission to sell granted. The petition and permission are important only in determining whether prosecution under the prohibitory law is barred; they have no relation to the taxing provision. *Ibid.*

The mulct tax may properly be levied against the owner of the premises who, by the use of ordinary care and diligence, might have known of the unlawful sales of liquor thereon. *David v. Hardin County*, 104–204, 73 N. W. 576.

Under provisions of prior statutes requiring a levy of the mulct tax annually by the board of supervisors, held that where sales were continued for more than six months of the year there could not be any abatement of the full amount of the annual tax. *Hubbell v. Polk County*, 106–618, 76 N. W. 854.

The provisions of the prior statute as to time of making the levy held directory only and that a levy in December instead of in September was valid. *Ibid.*

Although the tax is payable in quarterly installments, the liability therefor attaches at the beginning of each annual period. *Kane v. Grady*, 123–260, 98 N. W. 771.

It is the property used in connection with the business, and this alone, which is liable for the tax. If a man has divided his property in good faith, so that a part is not used in connection with the business, such part is not liable for the tax, whether it be a part of the same platted lot or a distinct and separate portion of the same block of buildings. It does not follow that because, for the purpose of a general assessment, property has been treated as one tract, the entire tract is subject to mulct tax. *Lucas County v. Leonard*, 107–593, 78 N. W. 203.

On the other hand, the mulct tax is not limited in its application to the ground only upon which the building used for the purpose stands. The law intends to subject to the tax not only the building and the ground upon which it stands, but also all land appurtenant and used in connection therewith. *Ibid.*

Where property was sold at tax sale for the mulct tax at the instance of the bondsman who was liable for the payment of the tax, and the sale was subsequently set aside as invalid, held that such bondsman could not recover from the county the amount paid by him at the sale under the provisions of code § 1446. *Guedert v. Emmet County*, 116–40, 89 N. W. 85.

This so-called tax is merely a charge or license exacted for the privilege of carrying on the business of selling intoxicating liquors, and is therefore not a tax within the meaning of the federal bankrupt law requiring trustees in bankruptcy to pay all taxes legally due and owing by the bankrupt in advance of the payment of dividends to creditors. *In re Ott*, 95 Fed. 274.

The tax imposed by the mulct liquor law is a charge or license exacted for the privilege of carrying on the business of vending liquors. It confers no right on the person engaged in the business, but imposes an impediment to the transaction of such business. *Hodge v. Muscatine County*, 121–482, 96 N. W. 968.

An action to recover a mulct tax may be maintained against the person conducting the business and the sureties on his bond. *Carroll County v. Ley*, 127–230, 103 N. W. 101.

But the mulct tax is not a personal obli-

gation against the owner of property which can be enforced in an action at law. *Ibid.*

The provisions of the original mulct law, so far as they were reënacted in the code, have been in full force and effect ever since their original enactment and the bond given with reference to observance of the original law was effectual under the provisions of the code. *O'Brien County v. Mahon*, 126–539, 102 N. W. 446.

The provisions with reference to the bond to be given by a seller under the mulct law contemplate the particular location of the place of sale, and it is for damages occasioned by the sale of intoxicating liquors there, and not elsewhere, that the bondsmen are liable. *O'Banion v. DeGarmo*, 121–139, 96 N. W. 739.

While the assessor may list only for the current quarter, the authority of citizens to act under code supp. § 2435 is not so limited. *National Loan & Inv. Co. v. Board of Supervisors*, 138–11, 115 N. W. 480.

There is no provision as to the term for which the bond is required to be given and it may therefore be continuing and not subject to revocation during any year with reference to which it has taken effect. But if prior to the beginning of any year for which the seller desires to pay the mulct tax the bond is revoked by the sureties, notice of such revocation being given to the officer appointed to see that such bond is approved, the sureties do not continue bound for such ensuing year. *Fidelity & Deposit Co. v. Jenness*, 138–725, 116 N. W. 709.

From this section and other provisions of the mulct law it appears that a corporation may engage in the business of selling intoxicating liquors under the statutory regulations. (But now see 33 G. A., ch. 143, supp. §§ 2383-a–2383-e.) *State v. Delahoyde*, 147–327, 126 N. W. 330.

The mulct law provides for a tax which is a lien as against a trustee in bankruptcy. *In re Lange Co.*, (D. C.) 159 Fed. 586.

A contract of insurance on intoxicating liquors, kept in a bonded warehouse, is valid. *Mechanics' Ins. Co. v. Hoover Distilling Co.*, (C. C. A.) 182 Fed. 590.

This section was not intended to apply to and does not affect suits and proceedings in the federal courts. *Ibid.*

SEC. **2433. Return by assessor.** In the months of December, March, June, and September of each year, and before the twentieth day of each of said months, the assessor of each township, town or city, or assessment district thereof, shall return to the county auditor a list of persons who are, or since the last quarterly return have been, engaged in carrying on within said township, town, city or assessment district the business of selling or keeping for sale intoxicating liquors, or maintaining any place where such liquors are sold or kept for sale, and also a description of the real property wherein or whereon such business is carried on or such place is maintained, with the name of the occupant or tenant and owner or agent. At least five days before the assessor makes the return above contemplated to the county auditor he shall give to the person found in possession of each place which he intends to list, or is required to list, and to the tenant occupant and owner of such place a notice in writing that he intends to return such list to the county auditor charging the property itself and the owner of the property therein described and the person who owns or conducts the business with the mulct tax. But if any one of the persons to whom the assessor is herein required to give notice does not reside within the assessor's assessment district it shall be sufficient for the assessor to mail, at least five days before he make such return to the auditor, a copy of such notice to such person at his last known post-office address; and if there is anyone whose post-office address cannot be ascertained by the assessor it shall be sufficient as to such person for the assesor to post a copy of such notice in some conspicuous place on the front of the property about to be listed as liable to the tax. Service of notice on any agent having general charge of the property or on any agent renting or collecting rent on the property so used or having authority to rent or collect rent on such property, or on any member of the owner's family over fourteen years of age shall be equivalent to notice to the owner of such property. The assessor shall give notice in each case in such one of the ways above provided as the circumstances of the case require, and he shall show in his

return to the auditor that he has given notice and the manner of the service. The return signed by the assessor shall in all cases be admissible in evidence without further proof, and such return shall have the same force and effect as the oath of the assessor. The burden of proof shall in all cases be upon the party claiming that notice was not given. The county auditor shall furnish to the several assessors of his county, printed blanks upon which to give the notice contemplated in this amendment. Any assessor wilfully failing to comply with the provisions of this section shall pay a fine of fifty dollars and costs for each offense. [29 G. A., ch. 95, § 1; 25 G. A., ch. 62, § 2.]

The mulct tax is not a property tax in such sense as that the treasurer has authority under code § 1374 to assess it as an omitted tax on property subject to assessment. *In re Appeal of Des Moines Union R. Co.*, 137–730, 115 N. W. 740.

SEC. 2435. **Statement by citizens.** Should the assessor for any reason fail to perform his duty, any three citizens of the county can, by verified statement on information and belief, addressed to the county auditor, procure the listing of names and places as above provided, with the same force and effect as if done by the assessor. At least five days before listing the property or names with the county auditor as contemplated in code section twenty-four hundred thirty-five such citizens shall give notice in writing of their intention so to do to the same parties and in the same manner as required of the assessor in section one[1] of this amendment, and proof of the service of notice shall be made by the affidavit of one or more of the citizens making the return, which affidavit shall be returned to and filed with the auditor with the list of names and property sought to be charged; and the return and affidavit of the citizens so filed with the county auditor shall be admissible in evidence in the same way and with the same force and effect as the return of the assessor. [29 G. A., ch. 95, § 2; 25 G. A., ch. 62, § 3.]

[1]See § 2433 herein. EDITOR.]

The proceeding by citizens is not limited by the provisions applicable to the assessor as to the time for returning the tax. *National Loan & Inv. Co. v. Board of Supervisors*, 138–11, 115 N. W. 480.

SEC. 2436. **Quarterly installments—lien—penalty.**

Under previous statutory provisions levy of the tax by the board of supervisors was essential. *Smithberg v. Archer*, 108–215, 78 N. W. 847.

Where one sells liquor after the beginning of a period for which taxes are to be paid he becomes liable for the entire amount of the tax, and evidence of subsequent abandonment of the business before the expiration of the period is immaterial. *State v. Miller*, 114–396, 87 N. W. 281.

A surety on the bond who pays the tax is not subrogated to the county's rights under this section. *Knoll v. Marshall County*, 114–647, 87 N. W. 657.

The liquor seller is liable for the full tax for the quarter in which he commences business and the liability of his surety is the same. *O'Brien County v. Mahon*, 126–539, 102 N. W. 446.

SEC. 2437. **List certified to treasurer—mulct tax account.** On the last day of December, of March, of June, and of September in each year, the county auditor shall certify to the county treasurer a complete list of the names of persons returned to him by the assessors, or entered on the sworn statements made to him by citizens as aforesaid, together with a description in each case of the real property wherein or whereon the business is carried on or the place maintained, and the name of the occupant or tenant, and the owner or agent of such property, and the county auditor shall keep in his office in books to be provided for that purpose an account

to be known as the mulct tax account, in which memoranda of all moneys which may come into his hands and those of the county treasurer, from the mulct tax, shall be entered; and the county treasurer shall keep a like account and record of all mulct tax coming into his hands. Settlement of such accounts shall be made with the board of supervisors at the January and June sessions of the board, which settlement shall be published with the proceedings of the board. [30 G. A., ch. 83, § 1; 25 G. A., ch. 62, § 10.]

The mulct tax is made a lien only on the real property wherein or whereon the business is conducted. *O'Banion v. DeGarmo*, 121–139, 96 N. W. 739.

The notice by citizens of the county of an application to the auditor to have places listed as subject to mulct tax which have been omitted by the assessor, must be a notice in writing, proof of the service of which is to be made by the affidavit of one of the citizens making the application, and proof of service of such notice by a constable is insufficient. *National Loan & Inv. Co. v. Board of Supervisors*, 134–527, 111 N. W. 1009.

SEC. 2438. **Entry of tax—payments made to county treasurer.** The county treasurer shall thereupon enter upon a book known as the mulct tax book a quarterly installment of the mulct tax, as due and payable by the person carrying on such business or keeping such place, and as a lien and charge upon and against the real property wherein or whereon such business is carried on or such place maintained, all payments of mulct tax shall be made to the county treasurer upon a certificate from the county auditor showing the amount due. [30 G. A., ch. 83, § 2; 25 G. A., ch. 62, § 10.]

SEC. 2439. **When delinquent—sales for—redemption—title in the county.** After the expiration of one month from the date when such tax becomes due and payable, if not paid, it shall be delinquent and collectible by the treasurer in the same method as that in which other delinquent taxes are collectible, and all the provisions as to the collection of other delinquent taxes shall apply. Tax sales for such delinquent taxes shall also be made on the first Monday in June of each year, in the same manner and to the same effect as on the first Monday in December, and all the provisions of law as to tax sales in December shall apply to such sales in June. When real estate offered at tax sale under this section shall be passed for want of bid covering amount of tax due thereon, it shall be advertised and sold by the treasurer at next semiannual tax sale. The treasurer shall appoint, prior to such sale, three appraisers who shall appraise the value of any and all property to be offered at such sale, taking into account any superior, valid lien thereon, and file a separate appraisement for each parcel; and the cost thereof shall be added to the penalty. If at the sale an amount less than the tax and penalty and less than the appraisement is offered, the property shall be sold to the county; at the appraised value, if it is less than the tax and penalty; or at the tax and penalty, if they are less than the appraised value. The provisions of sections fourteen hundred thirty-six, fourteen hundred thirty-seven, and fourteen hundred thirty-eight of the code shall apply to the redemption; but the supervisors may allow redemption for any amount deemed advantageous to the county; and in default thereof after notice to redeem as provided by section fourteen hundred forty-one of the code, the treasurer shall execute a deed to the county, without fee, and such deed shall have, so far as applicable, all the effect as provided by section fourteen hundred forty-four of the code as to vesting in the county all the right, title, interest and estate of the former owner in and to the land conveyed. On redemption or on final sale of the property the proceeds shall be applied as provided

by section twenty-four hundred forty-five of the code. While thus acquiring title the county, to protect its interest, may bid in the property at ordinary tax sale and acquire title under the same terms and conditions as other tax sale purchasers. [31 G. A.., ch. 99; 25 G. A., ch. 62, §§ 12, 13.]

A suit in equity cannot be maintained against the owner of the land on which the nuisance is situated to enforce the payment of the tax. *Crawford County v. Laub*, 110–355, 81 N. W. 590.

The provisions as to assessment and collection of the mulct tax are specific and complete. Such a tax cannot be assessed by the treasurer under the provisions of code § 1374 relating to property omitted from assessment. *In re Appeal of Des Moines Union R. Co.*, 137–730, 115 N. W. 740.

SEC. 2441. Application for remission.

The board of supervisors in considering an application for remission of the mulct tax has no power to determine the question of priority as against a mortgage on the premises, nor can the district court on appeal from the action of the board of supervisors consider such question. *David v. Hardin County*, 104–204, 73 N. W. 576.

The word "year" as used in 25 G. A., ch. 62, with reference to the mulct tax, has reference to a calendar year, and therefore where the tax was not payable in advance because the case was not one where consent to the sale could be given, and the property was not shown to be subject to assessment until near the end of the calendar year, held that the board of supervisors at its January meeting could only levy such tax on the premises for the remainder of the preceding calendar year. *Ibid.*

But where the place had been used for more than six months of the calendar year for sale of liquor and the board at its September meeting levied a tax of six hundred dollars against the property, held that under the statute the owner was not entitled to a remission of any portion of the tax on the ground that the premises had thus been used for less than one year. *Engelthaler v. Linn County*, 104–293, 73 N. W. 578.

Notice of the proceedings against the property need not be given to the property owner, nor is the fact that the owner did not know of the sale of liquor on his premises controlling, and code §§ 2433 *et seq.* are not unconstitutional in this respect. *Newton v. McKay*, 130–596, 102 N. W. 827.

The mulct tax is imposed upon all except permit holders who carry on the business of selling or keeping for sale intoxicating liquors. Payment of the tax does not in itself constitute a bar to proceedings for the unlawful sale of liquors. It is not therefore a license. The legislature may impose a tax without legalizing the business taxed. *Ibid.*

The statutory provisions as to the assessment and collection of the mulct tax do not involve notice of the assessment or levy of the tax. Notwithstanding the omission of any provision for such notice, the statute is not unconstitutional. *Hodge v. Muscatine County*, 121–482, 96 N. W. 968.

Such statute confers no right but imposes an impediment to the transaction of the business. It is a tax on that business levied to meet the burdens imposed on the general public by what is thought to be the result of the conduct of such business. *Ibid.*

As the property owner may apply to the board of supervisors for remission of the tax, notice to the property owner of the imposition of such tax by the board is not essential to its validity. *Hodge v. Muscatine County*, 196 U. S. 276.

SEC. 2445. **Tax divided and apportioned.** That the law as it appears in section twenty-four hundred forty-five of the code be and the same is hereby repealed and there is enacted in lieu thereof the following:

"The revenue derived from the tax provided for in this chapter shall be paid into the county treasury, one half to go into the general county fund, and the remainder to be paid over to the municipality in which the business taxed is conducted. If such business is conducted outside the limits of a city or town then the tax now in hands of county treasurers, or that shall hereafter be collected from such business, shall be apportioned as follows: One half to the general county fund and the other one half to the clerk of the township in which such business is conducted. The clerk of the township shall apportion the amount so received by him equally among the road supervisors of the territory of the township outside of the city or town, to be by said road supervisors expended for the improvement of the roads

of the districts. In counties where a tax on the traffic in intoxicating liquors is paid into and belongs to the county treasury, the board of supervisors may transfer the same or any part thereof to the county road fund and expend the same upon the roads of the county; and that portion of such revenue derived from such business conducted inside the limits of a city, including cities under special charter, or town, the board may expend all or any part thereof upon the permanent improvement of streets within such city or town abutting upon agricultural or horticultural lands not subject to taxation for general municipal purposes." [33 G. A., ch. 140, § 1.] [26 G. A., ch. 25; 25 G. A., ch. 62, § 14.]

The county treasurer is not entitled to a collection fee under code § 490 for the portion of the regular mulct tax which is to be paid to the city, but may collect such fee as to any additional mulct tax imposed by the city and collected by him. *Waverly v. Bremer County*, 126–98, 101 N. W. 874.

The full amount of the tax is recoverable by the county, one half the amount recovered being for the use of the city or town in which the business is conducted. *O'Brien County v. Mahon*, 126–539, 102 N. W. 446.

The county has no control over the portion of the mulct tax collected by the treasurer which goes to the municipality and is not liable for the action of the treasurer in deducting from such tax a collection fee. *City of Sioux City v. Woodbury County*, 144–326, 122 N. W. 940.

Anyone found engaged in the business of selling liquor is subject to the tax whether he be legally engaged therein or not. Therefore it is not to be inferred from this section that there is any authority to carry on such business outside of the city or town. *Beck v. Woodruff*, 148–193, 126 N. W. 1107.

SEC. 2446. Duty of county attorney.

This section relates to the collection of the mulct tax and not to the apportionment of the penalties of the prohibitory law. *Tennant v. Kuhlemeier*, 142–241, 120 N. W. 689.

SEC. 2447. Effect of payment.

The business of selling intoxicating liquor in compliance with the provisions of the mulct law is lawful, and a note given by one partner in such business to another for the purchase of the interest of the latter in such business is valid. *Phillips v. Gifford*, 104–458, 73 N. W. 1033.

A condition in such note that it shall be void "if the payer is obliged to abandon his present business on account of a change of the liquor law by the next legislature," held to be a valid condition. *Ibid.*

A person operating under the mulct law is engaged in a lawful occupation. *State v. Miller*, 114–396, 87 N. W. 281; *Iowa City v. McInnerny*, 114–586, 87 N. W. 498.

The statute confers no right but imposes an impediment to the transaction of the business. It is a tax on that business levied to meet the burdens imposed on the general public by what is thought to be the result of the conduct of such business. *Hodge v. Muscatine County*, 121–482, 96 N. W. 968.

The mulct tax is imposed upon all except permit holders who carry on the business of selling or keeping for sale intoxicating liquors. Payment of the tax does not in itself constitute a bar to proceedings for the unlawful sale of liquors. It is not therefore a license. The legislature may impose a tax without legalizing the business taxed. *Newton v. McKay*, 130–596, 102 N. W. 827.

The provisions of the mulct law do not relieve the parties selling in accordance therewith from liability to a wife for damages by reason of sales to her husband nor from the penalty provided for sales to minors or habitual drunkards. *Carrier v. Bernstein*, 104–572, 73 N. W. 1076.

Violation of the provisions of the mulct law by an agent subjects the seller to the penalties of the prohibitory law as to the sale of liquor. *Hawks v. Fellows*, 108–133, 78 N. W. 812.

Notwithstanding a mistake of law on the part of one carrying on a business under the supposed protection of the mulct law, he renders himself liable to the penalties of the prohibitory law if he violate the conditions under which he is authorized to conduct the business. *State v. Gifford*, 111–648, 82 N. W. 1034.

One who sells in compliance with the mulct law does not violate a previous injunction restraining him from making further unlawful sales, but if he attempts to act under the mulct law without complying with its provisions he violates such injunction. *Landt v. Remley*, 113–555, 85 N. W. 783.

Prohibition is still the rule in this state, and freedom from the penalties imposed by the liquor law for the sale of intoxi-

cants the exception, and he who would bring himself within the exception must prove compliance with all the conditions imposed to secure immunity. *Schuneman v. Sherman*, 118–230, 91 N. W. 1064.

The payment of the mulct tax does not legalize the business if the statutory prohibition of selling on election day is violated. *Hammond v. King*, 137–548, 114 N. W. 1062.

The statutory prohibition against construing the terms of the mulct law into a license or legalization of the business is by express enactment so far waived as to exempt the dealer who fully complies with the law from any penalties for violation of the prohibitory law. In its general effect, the statute as a whole provides a species of local option whereby the selling or keeping for sale of intoxicating liquors, though generally prohibited, is allowed in counties and other municipalities where the specific restraints and specifications shall have been properly observed. *Campbell v. Jackman*, 140–475, 118 N. W. 755.

This section expressly provides that the payment of a tax does not protect the wrongdoer except as provided in the section creating the bar. *Beck v. Woodruff*, 148–193, 126 N. W. 1107.

The mulct law is not unconstitutional in giving to the inhabitants of cities and towns privileges which are denied to those living outside thereof. *Ibid.*

SEC. **2448. When a bar—conditions.** In any city, including cities acting under special charters, of five thousand or more inhabitants, no proceedings shall be maintained against any person who has paid the last preceding quarterly assessment of mulct tax, nor against any premises as a nuisance on account of the selling or keeping for sale therein or thereon, by such person, of such liquors, provided the following conditions are complied with; and in any city of over twenty-five hundred and less than five thousand inhabitants, when a written statement of consent that intoxicating liquors may be sold in such city, signed by eighty per cent. of the voters residing in such city, voting therein at the last preceding election, as shown by the poll list of said election, shall have been filed with the county auditor, and shall by the board of supervisors at a regular meeting, or at a special meeting called for that purpose, have been held sufficient, and its findings entered of record, which statement when thus found sufficient, shall be effectual for the purpose herein contemplated until revoked, said city shall come within the provisions of this section:

1. *Statement of consent—action of supervisors.* A written statement of general consent that intoxicating liquors may be sold in such city, signed by a majority of the voters residing in such city, voting therein at the last preceding election, as shown by the poll list of said election, shall have been filed with the county auditor and shall, by the board of supervisors, at a regular meeting, have been held sufficient, and its finding entered of record, which statement when thus found sufficient, shall be effectual for the purpose herein contemplated, until revoked, as hereinafter provided.

2. *Resolution of council—consent of property owners—officers barred—limits—colleges and universities.* The person appearing to pay the tax shall file with the county auditor a certified copy of a resolution regularly adopted by the city council, consenting to such sales by him, and a written statement of consent from all the resident freeholders owning property within fifty feet of the building where said business is carried on. But in no case shall said business be conducted by any person holding any township, town, city or county office, or within three hundred feet of any church building, schoolhouse, or cemetery, nor within one-half mile of the place where any agricultural fair is being held, nor within a distance of five miles from any normal school, college or university situated within the limits of any city or town and under the control of the state board of education. Provided however, that the provisions of this specific amendment and of section twenty-four hundred sixty-one of the code shall not exclude any brewery where consent is obtained as provided in section twenty-four

hundred fifty-six to section twenty-four hundred sixty, inclusive, of the code.

2-a. *Application of act.* This act[1] shall apply only to saloons within said distance from any normal school, college or university under the control of the state board of education, operated under petitions of consent circulated and declared sufficient after the passage hereof.

[1Refers to the last part of par. 2 beginning with "nor within a distance of five miles from any normal school" * * *. EDITOR.]

3. *Bond.* He shall file with the county auditor, to be approved by the clerk of the district court, a bond to the county, in the sum of three thousand dollars, conditioned upon the faithful observance of all the provisions of this chapter relating to the mulct tax, and for the payment of all damages that may result from the sale of intoxicating liquors upon the premises occupied by the obligor. Said bond shall be signed by himself as principal, and by two sureties who shall qualify each in double the amount of the bond, and neither of whom shall be surety on any other like bond, provided that any surety company, authorized to do business in this state, under the laws thereof may become sole surety on any and all bonds required under this section.

4. *Place of sale.* Said selling or keeping for sale of intoxicating liquors shall be carried on in a single room having but one entrance or exit, and that opening upon a public business street. The bar where liquors are furnished shall be in plain view of the street, unobstructed by screens, blinds, painted windows or any other device. There shall be no chairs, benches, nor any other furniture in front of the bar, and only such behind the bar as is necessary for the attendants. A list of names of all persons employed about the place shall be filed with the county auditor, and no persons shall be permitted behind the bar except those whose names are so listed.

5. *Conduct.* The place shall be conducted in a quiet, orderly manner.

6. *Gaming and amusements.* There shall be no gambling or gaming with cards, dice, billiards or any other device, nor any music, dancing or other form of amusement or entertainment, either in the room where said business is carried on or in any adjoining room or building controlled by the person, partnership or corporation carrying on said business.

7. *Obscene pictures.* There shall be no obscene or impure decorations, inscriptions, placards or any such thing in the place.

8. *Females.* No female shall be employed in the place.

9. *Opening and closing.* The place shall not be open nor any sales be made earlier than seven a. m. nor later than nine p. m. on any day. It shall not be open at all, nor shall any sales be made, on the first day of the week, commonly called Sunday, nor on any election day or legal holiday, nor on the evening of such days.

10. *Minors, drunkards, intoxicated persons.* No minor, drunkard or intoxicated person shall be allowed in the room, and no sales of intoxicating liquors shall be made to any minor, drunkard or intoxicated person, or knowingly to any person who has taken any of the so-called "cures for drunkenness."

11. *Written notice not to sell.* No sale of intoxicating liquors shall be made to any person whose wife, husband, parent, child, brother, sister, guardian, ward over fourteen years of age, or employer, shall by written notice forbid such sales.

12. *Payment of tax.* If the name of a person desiring to carry on the business of selling or keeping for sale intoxicating liquors, or maintaining

a place where such liquors are sold or kept for sale, has not been entered by the auditor on the list of such persons as hereinbefore provided for, or if the property wherein or whereon such business is to be conducted has not likewise been entered by the auditor on such list, then the name of such person and the description of such property shall be entered upon such list by the treasurer, and a quarterly installment of tax shall be paid as though the name of such person and the description of such property had been duly entered upon such list at the last preceding quarterly assessment for such purpose. [35 G. A., ch. 194, § 1; 35 G. A., ch. 193, §§ 1, 2.] [31 G. A., ch. 100; 29 G. A., ch. 96, § 1; 25 G. A., ch. 62, § 17; 18 G. A., ch. 82; 18 G. A., ch. 147; 17 G. A., ch. 119, § 2; C. '73, § 1114.]

[The amendment by 31 G. A. ignored code supplement, 1902, where same appeared. The change has been made to the code supplement, 1902.]

Conditions—burden of proof: As against a charge of violating an injunction in selling intoxicating liquors, the defendant claiming to act in compliance with the mulct law has the burden of showing performance of all the conditions which are in their nature conditions precedent, but it is for the complaining party to show violations of the law involving matters of conduct only, as that sales are made to minors or on Sunday, etc. *Jones v. Byington*, 128–397, 104 N. W. 473.

The seller who relies on compliance with the mulct law as a defense against liability for civil damages in an action by the wife for sale of liquor to her husband, has the burden of alleging and proving full and complete compliance with the conditions imposed by the mulct law. *League v. Ehmke*, 120–464, 94 N. W. 938.

In an indictment for maintaining a place for the illegal sale of intoxicating liquors, it is not necessary to negative the right of defendant to sell under the mulct law. If defendant claims that his act was lawful because in compliance with the provisions of the mulct law, he must prove not only that he has complied with the provisions as to securing the consent of the proper authorities, but also that he has conducted his place in accordance with the provisions of this and other paragraphs relating to the method of conducting such business. *State v. Donahue*, 120–154, 94 N. W. 503.

The fact that one acting under the mulct law is advised by the county attorney or city attorney or chief of police that a sale on the day of a school election is not illegal, does not relieve him from the effect of a violation of statute. *Hammond v. King*, 137–548, 114 N. W. 1062.

Where a party charged with a violation of the prohibitory law wishes to excuse himself by reason of provisions of the mulct law he must bring himself within such provisions by way of defense and the burden is on him to prove compliance with such law. *Pumphrey v. Anderson*, 141–140, 119 N. W. 528.

One who is enjoined under code § 2405 from illegal sale of intoxicating liquors may, by compliance with these provisions, become entitled to carry on business under the mulct law without securing a new general statement of consent (but by § 3, ch. 142, acts 33 G. A., one who is enjoined cannot sell liquor within five years). *Rink v. Bollinger*, 145–501, 123 N. W. 183.

Having once forfeited the protection of the mulct law and been enjoined, the saloon keeper cannot relieve himself from the bar of the statute by mere change of purpose or method in the sale of his goods. If he would reënter the same business he must qualify anew as if he had never enjoyed the privilege before. *Sawyer v. Gaynor*, 148–115, 126 N. W. 773.

The payment of the mulct tax operates as a bar only when the conditions of this section have been complied with and when the business is carried on in the place authorized. *Beck v. Woodruff*, 148–193, 126 N. W. 1107.

When one engaged in selling liquor has been enjoined from such sale, he forfeits the protection of the mulct law and cannot claim its protection for future sales without requalifying by the filing of a new bond. *Reusch v. Withrow*, 154–56, 134 N. W. 431.

Par. 1. **Statement of consent:** Under 25 G. A., ch. 62, the authority to determine whether the petition of consent was sufficient was not vested in the city council, and its action in granting permission to sell was not conclusive. *State v. Pressman*, 103–449, 72 N. W. 660.

In determining the sufficiency of the signatures to the petition the poll books and registration lists are the best evidence of who cast ballots at the last election. *Ibid.*

One who acts under the mulct law, in relying on the sufficiency of a petition of consent, does so at his peril, and if the statement of consent is insufficient he may be punished for illegal selling. *Bartel v. Hobson*, 107–644, 78 N. W. 689.

A statement of consent filed before the present code went into effect is not effectual under its provisions to suspend the penalties of the prohibitory law. The privilege to sell acquired under such a

statement of consent does not constitute a right which is protected as against the repeal of prior statutes resulting from the adoption of the code. *West v. Bishop*, 110–410, 81 N. W. 696.

The board of supervisors is made a special tribunal for the determination of the sufficiency of the statement of consent, not only as to the county at large, but also as to each and every subdivision thereof, and its findings can only be questioned on appeal. Parol evidence is inadmissible, in the absence of a finding by the board as to the sufficiency of the statement of consent, to show the requisite number of signers for any town within the county. *Schuneman v. Sherman*, 118–230, 91 N. W. 1064.

One who sells liquor does so at his peril, and cannot rely on parol evidence that the statement of consent, not approved by the board of supervisors, was in fact sufficient as applied to the locality in which he sells. *Ibid.*

One who voluntarily pays a mulct tax without ascertaining whether the required general statement of consent has been filed cannot recover back the tax paid on the theory that it was paid under a mistake of fact, if it appears that the statement of consent was not sufficient. *Ahlers v. Estherville*, 130–272, 104 N. W. 453.

A statement of consent filed prior to the taking effect of the code not being effective after the time when the code took effect, held that taxes paid in reliance on such statement were paid under mistake of law and could not be recovered. *Ibid.*

It is not contemplated that a general statement of consent be secured with reference to any particular seller or that a new statement is required for one who, having been enjoined for violation of the law, has attempted to comply anew with those provisions. *Rink v. Bollinger*, 145–501, 123 N. W. 183.

Population: The official register of the state is, by code § 177, made conclusive evidence as to the number of inhabitants in the city. *In re Sale of Intoxicating Liquors*, 108–368, 79 N. W. 260.

As the sufficiency of a statement of consent may depend upon the population of the city, those resisting the application for consent have an interest in the proceedings of public officers with reference to taking the census. *Semones v. Needles*, 137–177, 114 N. W. 904.

As to cities over twenty-five hundred and less than five thousand in population, a petition signed by eighty per cent. of the voters of such city is sufficient. In such a city the consent may be secured by getting the signature of eighty per cent. of the voters in the city or the majority of the voters in the city and the majority of the voters in the township and sixty-five per cent. of the voters of the county. *Theobald v. Flinn*, 139 N. W. 449.

Poll books: The poll list is made the only and exclusive evidence as to who voted in the particular localities. *Porter v. Butterfield*, 116–725, 89 N. W. 199; *Wilson v. Bohstedt*, 135–451, 110 N. W. 898.

The names on the statement of consent must appear on the poll books of the last preceding general election. Where the signature is by mark it should be witnessed and unless so witnessed should not be counted. *Scott v. Naacke*, 144–164, 122 N. W. 824.

The statement must show the date of signature of each signer. *Ibid.*

The poll books referred to in this section are those filed with the county auditor and not those filed with the several township, city or town clerks. *In re Consent to Sell Intoxicating Liquors, De Board v. Williams*, 155–149, 134 N. W. 620.

The poll books by which the sufficiency of the signatures to the petition of general consent are to be determined are those filed with the county auditor and not those retained by the local officers. *Jackman v. Board of Supervisors*, 156–620, 137 N. W. 906.

If at the time the petition of general consent is signed and filed and at the time the board enters upon its canvass thereof, no poll book for a particular precinct of the city has been filed with the county auditor, the names of signers for such precinct must be excluded. *Ibid.*

The right to be heard upon a petition of consent is not the right of a voter, as such, but of those voters only who voted at the preceding election and whose names are to be found upon a poll book duly filed with the auditor. *Ibid.*

Although the poll lists afford the sole criterion for ascertaining the names of persons voting at the last preceding election, the use by a voter whose name appears on the poll list of his name as appearing on such list for signature to the petition of consent does not vitiate his signature to such petition although it is incorrectly spelled on such list. *Taft v. Snouffer*, 157– —, 137 N. W. 922.

These provisions as to qualifications of signers of the petition of consent are applicable under code § 2451 relating to petitions for revocation. *Mills v. Hallgren*, 146–215, 124 N. W. 1077.

Par. 2. Resolution of council: Where the application is for permission to a firm to sell intoxicating liquors under the mulct law, the authority given by the council to such firm is not available to one member of the firm to whom the business is transferred. *State v. Zermuehlen*, 110–1, 81 N. W. 154.

After violating the provisions of the statute by the sale of liquors on an election day, one who is acting under the mulct law is precluded from reliance upon

the resolution of the city council and the written statement of consent of adjoining freeholders. *Hammond v. King*, 137–548, 114 N. W. 1062.

To constitute a resolution of consent by a city or town council there must have been formal action of the council and a record of such action, for the statute requires a certificate of the record. *Sawyer v. Collins*, 148–712, 127 N. W. 1015.

The requirement of a certified copy of a resolution by the town council is complied with where it appears by certification of the town records that the town council granted a liquor license for certain prescribed premises, a copy of which, attested by the town recorder, was filed with the auditor. *Sawyer v. Lorenzen*, 149–87, 127 N. W. 1091.

Consent of property owners: The filing of a statement of consent by adjoining property owners is a condition precedent to the right to sell under the mulct law, and sales made before such statement of consent is filed are unlawful. *Landt v. Remley*, 113–555, 85 N. W. 783.

Where property within fifty feet of the building where the business is carried on is owned by a partnership, the consent of each partner is essential. *Close v. O'Brien*, 135–305, 112 N. W. 800.

The purchaser of property from an owner who has consented to the maintenance of a saloon within fifty feet of his property does not take the property subject to the consent previously given by his grantor, and a new statement of consent by such purchaser must be filed by the saloon keeper at the beginning of the next tax year. *Conway v. District Court*, 132–510, 109 N. W. 1074.

The consent of an adjoining property owner cannot be withdrawn during the year for which the annual tax is payable although it is paid in quarterly installments, but such withdrawal may be effectual as to the next annual payment. *Kane v. Grady*, 123–260, 98 N. W. 771.

If the room in which sales of liquor are made is less than fifty feet from the premises of a property owner who does not consent, the occupant cannot by constructing a board partition which is fifty feet from such premises leaving an unoccupied space between such partition and the wall of the room render the consent of such property owner unnecessary. *McColl v. Rally*, 127–633, 103 N. W. 972.

An agreement to pay a property owner a sum of money in consideration of his giving consent that a saloon may be established within fifty feet of his property, is against public policy and void. *Greer v. Severson*, 119–84, 93 N. W. 72.

The consent of neighboring property owners required by the statute is not intended to be the subject of barter and sale. *Ibid.*

The fact that a person operating under the mulct law elects to pay his tax in quarterly installments does not make it obligatory upon him to see that the consent of resident owners of property within fifty feet is renewed or refiled at the opening of each successive quarter. Having once complied with the law in this respect, his duty is discharged until such consent has in some manner been withdrawn or until the expiration of the tax year for which the consent was given. *Sawyer v. Hutchinson*, 149–39, 127 N. W. 1090.

It is only resident freeholders owning property within the fifty-foot limit whose consent is required to the establishment of a mulct saloon and a corporation organized and doing business in another county is not such resident freeholder although it may be the owner of such property. *Ibid.*

It is not necessary that the saloon proprietor owning also other property within the fifty-foot limit shall put on file his own consent to the operation of a saloon on his premises. *Sawyer v. Lorenzen*, 149–87, 127 N. W. 1091.

A resident property owner may maintain an action by certiorari to have determined the validity of a decree refusing to abate a liquor nuisance within the prescribed distance from his premises. *Hemmer v. Bonson*, 139–210, 117 N. W. 257.

Proximity to agricultural fair: In determining whether the place where intoxicating liquor is being sold is within one-half mile of the place where an agricultural fair is being held, the distance must be measured in a straight line and not by the nearest traveled route along the streets and sidewalks. *Woodring v. Nolan*, 135 N. W. 567.

Par. 3. Bond: The bond here provided for does not cover the payment of assessments required by city ordinance, under code § 2455. *Ottumwa v. Hodge*, 112–430, 84 N. W. 533.

Nor does the bond cover the penalty specified by code § 2403 for sales to minors. *Headington v. Smith*, 113–107, 84 N. W. 982.

The sureties on the bond are liable for sales which are unlawful under code § 2418, although the seller, purporting to act under the provisions of the mulct law, has failed to file the requisite consent of adjoining property owners. *Breeding v. Jordan*, 115–566, 88 N. W. 1090.

Where the bondsman bought in at tax sale the property of his principal, the sale being at his instigation and for taxes for which he was liable, held that he could not recover the amount paid from the county upon the setting aside of the sale as invalid. *Guedert v. Emmet County*, 116–40, 89 N. W. 85.

Where a bond was given in supposed compliance with the mulct law, but it appeared that at the time the provisions of the mulct law were not in force in the city

where the business was carried on, held that no liability under such bond for illegal sales to minors and intoxicated persons, under the provisions of code § 2403, could be enforced against the surety on such bond. *Gorman v. Williams*, 117–560, 91 N. W. 819.

The surety on the bond who pays the amount of the tax is not subrogated to any lien of the county against the property for the payment of such tax. *Knoll v. Marshall County*, 114–647, 87 N. W. 657.

While the surety on the bond may recover from the principal the amount which he is required to pay, he is not subrogated to the remedy of the county against the principal and the county may proceed at its election to enforce the bond or punish the principal for illegal selling. *O'Brien County v. Mahon*, 126–539, 102 N. W. 446.

A bond given to enable a dealer to do business under the mulct law is effectual as a common law obligation although it does not strictly conform to the statutory requirement. *Ibid.*

The county may elect to collect the mulct tax by action on the bond or to prosecute the principal for illegal sales made by him after failure to pay the tax, and the tax is due and payable whether the principal complies with the law or not. By resorting to one remedy the county does not necessarily waive the other. *Ibid.*

It is not necessary in the bond to describe the premises on which the business is to be conducted. *Ibid.*

Interest may be recovered in an action on the bond on account of the delinquency of the principal in paying the tax. *Ibid.*

The surety on the bond of a liquor seller, in general selling in accordance with the provisions of the mulct law, but in a particular instance to a drunkard, held liable under a judgment rendered against his principal in a civil action to recover damages in favor of one who was injured by such sale. *Knott v. Peterson*, 125–404, 101 N. W. 173.

Recovery on a bond given by one who sells liquor under the mulct law must be confined to sales made on the premises described in the bond. *O'Banion v. DeGarmo*, 121–139, 96 N. W. 739.

The provisions of code supp. §§ 1177-a–1177-d relating to cancellation of bonds on notice by sureties have no application to bonds given under the provisions of the mulct law. *Fidelity & Deposit Co. v. Jenness*, 138–725, 116 N. W. 709.

A joint action may be maintained on the bonds of separate sellers who have contributed to the intoxication of a person to the injury of one entitled to recovery therefor, under the provisions of code § 2418. *Kaus v. American Surety Co.*, (D. C.) 199 Fed. 972.

Par. 4. Place of sale: The keeping of a place for the sale of intoxicating liquors, as authorized by the mulct law, does not warrant the peddling of such liquors in other parts of the city, either at wholesale or at retail. *Cameron v. Fellows*, 109–534, 80 N. W. 567.

One room—single entrance: Compliance with the mulct law will not authorize the maintenance of a cold storage warehouse wherein intoxicating liquors are kept for sale and the filling of orders from such warehouse by delivery to purchasers at different places about the city. *Carter v. Miller Brewing Co.*, 111–457, 82 N. W. 930.

The statutory provision as to one entrance is violated where, in addition to the front door, the room has a door leading into another room or shed where liquor is stored. *State v. Bussamus*, 108–11, 78 N. W. 700.

Where there was a door connecting the place where liquor was sold with a cellar which was used as a storeroom for such liquor, which cellar had an outside entrance, the room in which the sales were made having also an outside entrance, held that the use of the room and the cellar together constituted a violation of the provisions of this section. *Powers v. Klatt*, 111–357, 82 N. W. 752.

It is a violation of the law to have a smaller room partitioned from the main room to be used for a storeroom, or to so use a cellar connected with the main room having also an entrance from the street. *Garrett v. Bishop*, 113–23, 84 N. W. 923.

The maintenance of a cold storage warehouse separate and removed from the saloon in which the business of selling liquor under the mulct law is prosecuted by the defendant is a violation of the requirement that the business shall be carried on in a single room having but one entrance or exit. *Bell v. Hamm*, 127–343, 101 N. W. 475.

It is a violation of the law to carry on the business in two rooms, one a bar room proper, the other a basement room underneath in which liquors are kept, the two being connected by a flight of stairs, with egress from the basement room to other rooms in the building and through them into a side street. *Jones v. Byington*, 128–397, 104 N. W. 473.

It is not a violation of the provision requiring the business to be carried on in a single room having but one entrance or exit, and that opening upon a public street, that there is within the room used as a place for selling liquor an ice box or cooling room, in which beer and other liquor intended for sale are kept, if such cooling room is not a room which could be resorted to for the purpose of concealment while buying or drinking intoxicating liquor. *State v. Donahue*, 120–154, 94 N. W. 503.

There is no exception in the statute to the requirement that the room in which

the liquors are sold shall have but one entrance or exit, and an additional doorway may not be maintained, even for the convenience of the proprietor or his employes. *State v. Gifford*, 111–648, 82 N. W. 1034.

One who conducts the business of selling intoxicating liquors under the mulct law in a place having a back door which may be used for purposes of entrance and exit, aside from the principal entrance, should be enjoined. *State v. Roney*, 133–416, 110 N. W. 604.

Under the evidence in a particular case, held that a place from which the sale of intoxicating liquors was made was not a single room having but one entrance or exit, and that opening upon a business street. *Bartel v. Hobson*, 107–644, 78 N. W. 689.

A liquor dealer having paid but one tax under the mulct law has no right to keep for sale, and sell, intoxicating liquors from two wholly separate and independent rooms in the same building. *Thomas v. Arie*, 122–538, 98 N. W. 380.

Where the saloon keeper uses one room in which to sell liquor and another in which to store it for the purpose of sale, he violates the provision as to transacting his business in a single room with only one exit or entrance. *Sawyer v. Oliver*, 144–382, 122 N. W. 950.

As to conducting the business exclusively in one room, there is no distinction between wholesale and retail dealers. *Manderscheid Sons Co. v. Oliver*, 146–168, 124 N. W. 897.

It is unlawful to conduct a mulct saloon in two rooms although one of them is used exclusively for the purpose of storage of the stock while sales are made exclusively from the other room. *Johannsen v. Hutchinson*, 151–608, 132 N. W. 20.

But the fact that while removing the place of business from one room to another, sales are made in the latter while barrels of liquor are still in the former, practically in transit, does not constitute a violation of the law. *Ibid.*

A trap door to the cellar which is usually kept nailed down does not constitute a violation of the statute. *Ibid.*

It is the existence of an entrance or exit other than that allowed by statute which is condemned and not its use for any particular purpose. *Reusch v. Loserth*, 139 N. W. 454.

It is not in violation of the statute to maintain a so-called refrigerator room inside the walls of the room in which liquor is sold in which beer may be properly and conveniently kept. A hole through the outside wall into such refrigerator room for putting ice into it is not a separate entrance. *Tuttle v. Carraher*, 139 N. W. 453.

The entrance and exit must be upon a public business street. The fact that it is upon a public street is not sufficient if the street is not devoted to business. The placing of the saloon on a residence street does not make it a business street. *Sowles v. Martens*, 142 N. W. 442.

Bar in plain view: The location of a saloon in the basement of a building with the bar so situated that it is not in the plain view of pedestrians using the street or sidewalk in the ordinary manner is not in compliance with the statute. *McColl v. Rally*, 127–633, 103 N. W. 972.

A basement saloon so constructed that the only entrance is through a long hall after descending from the street does not have an opening upon a public street in the sense required by the statute. *Ibid.*

Where there were curtains in the window and a sign painted thereon, and flower jars, none of which obstructed the full view of the interior of the premises from the sidewalk in front, held that there was no violation of the mulct law as to the condition of the premises. *Lingelbach v. Hobson*, 130–488, 107 N. W. 168.

On the question whether the bar is in plain view from the public street the finding of the trial judge, who has an opportunity to see and hear the witnesses, will be given weight on appeal. *Sowles v. Martens*, 142 N. W. 442.

Chairs: Evidence that a chair is kept in the room for the use of customers is sufficient to show a violation of the statute. *Reusch v. Loserth*, 139 N. W. 454.

List of employes: It is impossible to file a list of names of employes when there are no employes. The saloon keeper is not in such case required to file a statement showing that he has no employes. *Jones v. Mould*, 138–683, 116 N. W. 733.

The requirement as to filing a list of employes relates not only to regular barkeepers but to any persons employed about the place for any purpose. *Pumphrey v. Anderson*, 141–201, 119 N. W. 617.

The act of the keeper of a mulct saloon in having about the place employes whose names were not listed as provided by the statute constitutes a violation of an injunction restraining such saloon keeper from unlawfully conducting his business. *Ibid.*

Where the business is conducted by a corporation the officers of the corporation actively carrying on the business of selling must be listed as employes. *Manderscheid Sons Co. v. Oliver*, 146–168, 124 N. W. 897.

One who is employed in one particular instance only in transporting liquor to a mulct saloon for lawful sale is not such an employe as is by the statute required to be listed with the county auditor. *Johannsen v. Hutchinson*, 151–608, 132 N. W. 20.

It is not necessary to list as employes the names of persons who as common carriers pursuing an independent employment, having no connection with the busi-

ness, haul beer to the saloon and place it in the refrigerator room. *Tuttle v. Carraher*, 139 N. W. 453.

Par. 9. Opening and closing: The act of keeping a saloon open on election day is punishable by reason of this provision, and the city council cannot provide for the punishment of the same act, either under code § 2455 or under the general powers given by code § 680. *Iowa City v. McInnerny*, 114–586, 87 N. W. 498.

The provision that sale shall not be made on legal holidays forbids the sale on the fourth of July or on any other of the days specified in code § 3053 as holidays with relation to the protesting and dishonor of negotiable instruments. *Brennan v. Roberts*, 125–615, 101 N. W. 460.

Keeping the place open for any length of time after ten o'clock and for any purpose, even though it be the cleaning of the place or the counting of the money after door is closed and customers are excluded, will constitute a violation of the law. *Lingelbach v. Hobson*, 130–488, 107 N. W. 168.

The bar of the statute is removed by the illegal sale of liquor on election day and the violator becomes liable to the penalty of the intoxicating liquor law for sales subsequently made. *Hammond v. King*, 137–548, 114 N. W. 1062.

The day of a school election is an election day within the prohibition of the statute as to the sale of liquor under the mulct law. *Ibid.*

Par. 10. Minors, etc.: It is a violation of the provision that no minor shall be allowed in the room if the proprietor allows his own minor son to be in the room and behind the bar. *Jones v. Byington*, 128–397, 104 N. W. 473.

Under the evidence in a particular case, held that the employment in a saloon as porter of a person who sometimes became intoxicated was not a violation of the statute, it not appearing that he was allowed in the saloon when in an intoxicated condition. *Tuttle v. Carraher*, 139 N. W. 453.

A sale to a minor is such violation of the statute as to remove all the protection afforded by the mulct law, although the seller is ignorant of the fact of the infancy of the buyer. *Sowles v. Martens*, 142 N. W. 442.

Par. 12. Payment of tax: The county treasurer is without authority to assess a mulct tax save at the request of the party carrying on the business as directed by the provisions of this section as amended. *In re Appeal of Des Moines Union R. Co.*, 137–730, 115 N. W. 740.

SEC. 2449. Cities under five thousand and towns.

Where the petition of consent was presented after the taking effect of the code, held that it was immaterial that some of the signatures to the petition had been affixed thereto before the code took effect. *Cameron v. Fellows*, 109–534, 80 N. W. 567.

In determining whether the percentage of signers is sufficient the statement of consent is to be compared with the poll books of the general election preceding the time when the petition is filed. *Ibid.*

But one general petition of consent for the county may be canvassed by the board of supervisors, and in acting on that petition the board may determine with reference to particular towns whether the number of signers to the general petition who reside in that town and in the township in which it is located, constitutes the required proportion of voters in such town and township. But the board has no authority to canvass a subsequent petition with reference to a particular town not found on the canvass of the general petition to be one in which sales of liquor may be made. *Meyer v. Hobson*, 116–349, 90 N. W. 85.

To authorize the sale of liquors in a town there should be a finding by the board of supervisors in connection with their canvass of the statement of consent, that there is the requisite number of signers in such town, and in making such determination the board may hear evidence. Therefore in an action in which the right to sell liquors in such town is involved the finding of the board of supervisors on the sufficiency of the number of signers in the town is the only evidence which may be considered. If there is no finding as to the town by the board, then there is no right to sell. *Hill v. Gleisner*, 112–397, 84 N. W. 511.

The board of supervisors canvassing a statement of consent for the sale of intoxicating liquors in the county and making no specific finding that the majority of voters in a certain town in the county had signed the petition cannot long after correct its records so as to make the finding sufficient to legalize the selling of liquor in such town. *Brickley v. Westphal*, 134–266, 111 N. W. 829.

The numerical basis upon which the percentage computation must be made under this section is the full number of legal voters who vote at the last preceding general election as shown by the poll lists regardless of deaths or removals, and the qualification with reference to residence within the county and outside of the corporate limits of cities, etc., is applicable to the eligibility of the proposed signers *Gjerset v. Drexel*, 155–559, 136 N. W. 538.

In cities and towns of less than five thousand, the petition of consent must contain the signatures of sixty-five per cent. of the voters of the county and outside of the corporate limits of cities having a

population of five thousand or over, also a majority of the voters of the city or town and a majority of the voters of the township, except as otherwise provided. But it is provided in the preceding section that as to cities over twenty-five hundred and less than five thousand in population, the petition signed by eighty per cent. of such voters is sufficient. *Theobald v. Flinn*, 139 N. W. 449.

This statute does not, by implication even, permit the business to be carried on outside of cities and towns. *Beck v. Woodruff*, 148–193, 126 N. W. 1107.

SEC. 2450. **Sufficiency of statement—finding—appeal.** All statements of general consent, filed with the county auditor as provided in the two preceding sections, shall be publicly canvassed by the board of supervisors, at a regular meeting, at least ten clear days' notice of such intended canvass having been previously published by the county auditor in the official newspapers of the county, and its finding as to the result in the city having over five thousand inhabitants, or the county, as the case may be, and the various towns and townships therein, shall be entered of record. And such finding shall be effectual for the purpose herein contemplated until revoked as herein provided. If the board shall find the statement sufficient, any citizen of the county may, within thirty days thereafter, upon filing a sufficient bond for the costs, file with the clerk of the district court a general denial as to the statement of general consent, or any part thereof, whereupon the county attorney shall cause notice thereof to be served upon the person or persons filing said statement of consent with the county auditor, and said party shall within ten days file with said clerk a bond conditioned to pay the costs of the hearing in the district court, in a sum to be fixed by the clerk of said court. If such bond be filed, then the auditor shall certify the statement of consent and all papers and records to the district court, where the matter shall be tried *de novo*, the county attorney appearing for the state, but if no bond be filed, then the order of the board of supervisors finding the statement of general consent sufficient shall be considered and treated as set aside and null and void. The costs in all cases of appeal shall be taxed against the losing party. Should the board of supervisors find the statement of general consent insufficient, any party aggrieved may appeal therefrom to the district court by filing, within thirty days thereafter, with the clerk of said court a sufficient bond for the costs. Upon the filing and approval of said bond, the auditor shall certify the statement of consent and all papers and records to the district court, where the matter shall be tried *de novo*. All costs shall be taxed against the appellant, whether the finding of the board is sustained or reversed, and in such actions the county attorney shall appear and defend the finding of the board. Only one statement of general consent from any county, city or town, or city or town acting under special charter, therein entitled to file the same, shall be canvassed by the board of supervisors in any one year. When said petition of general consent is found sufficient by the board of supervisors or the city council, as the case may be, it shall, unless revoked under section twenty-four hundred fifty-one of the code, be in force and effect for the period of five years only; and all petitions and statements of general consent in force and effect previous to the first day of July, nineteen hundred and six shall, unless revoked under section twenty-four hundred fifty-one of the code, be and become null and void on and after five years from July first, nineteen hundred and six. [31 G. A., ch. 101.]

Where the record of the findings of the board as to the number of signers shows the number of voters and the number of signers in each of the election precincts, it is sufficient, although the aggregate for each township is not footed up. *Cameron v. Fellows*, 109–534, 80 N. W. 567.

The statute requires the county attorney

to appear against the statement in all proceedings before the district court upon appeal. *Green v. Smith*, 111–183, 82 N. W. 448.

The proceeding here contemplated is a special proceeding, and there is no right to a trial by jury in the district court. *Ibid.*

No right vests until the statement of consent has been adjudged sufficient, and one who has signed the general statement may, before action is taken thereon, withdraw his consent and by proper written notice and request to the board annul his former act in affixing his signature. *Ibid.*

The sufficiency of the statement of consent may be passed upon by the board of supervisors at an adjourned meeting provided for at a regular meeting of the board. *Butterfield v. Treichler*, 113–328, 85 N. W. 19.

Notice of the hearing should be given ten clear days before the hearing and it is not necessary that notice be given ten days before the first day of the regular session of the board. *Ibid.*

The poll lists do not show in what towns the voters resided, and therefore in determining the result of the statement of consent with reference to the number of voters signing, resident in the various towns and townships in the county, the board of supervisors and the court on appeal can receive testimonv. *Porter v. Butterfield*, 116–725, 89 N. W. 199.

The appeal is to be tried by the court without a jury, and it is error to submit the questions of fact to the jury in such a case. *Ibid.*

The costs on appeal are to be taxed against the losing party. *Ibid.*

The "general denial as to the statement of general consent" contemplated by the statute as the basis of an appeal from the action of the board in approving the statement of consent is not a technical pleading, but a general exception or objection. *Stokesbury v. Korte*, 129–434, 105 N. W. 702.

Service of notice by the county attorney of such general denial upon the person or persons filing the statement of consent is not jurisdictional. *Ibid.*

Such notice may be served upon the person who files the statement with the auditor, although in doing so he acts as attorney or agent for others. *Ibid.*

The appeal is not made dependent upon the action or consent of the county attorney, and the objecting citizen or citizens may be represented on the appeal by other counsel than the county attorney, who is required to appear only as the representative of the public. *Ibid.*

A pleading by the objector in the district court describing himself as a citizen of the county is a sufficient allegation that he is such citizen. *Ibid.*

Where legal proceedings to test the validity of the action of the board of supervisors in approving a statement of consent have been commenced within the period during which the poll books are directed to be preserved, they may be subsequently properly introduced in evidence, although the time for their destruction in the ordinary course has passed. *Reed v. Jugenheimer*, 118–610, 92 N. W. 859.

Such a proceeding is to be tried before the district court *de novo*, and the burden is upon the petitioners to show that the statement of consent is sufficient. *Ibid.*

The statement of consent is a public record and the fact that it is temporarily out of the keeping of its legal custodian will not, in the absence of proof of alteration, prevent its admission in evidence on the trial of an appeal from the action of the board of supervisors. *Wilson v. Bohstedt*, 135–451, 110 N. W. 898.

In a proceeding for review, notice to the person or persons filing the statement of consent is all that is required. No notice to persons who have acted or may intend to act in reliance on such petition of consent is provided for. *Fitzgibbon v. Macy*, 118–440, 92 N. W. 78.

Nor is it contemplated that notice be given to all the persons signing the statement of consent, but only to those presenting it to the auditor and causing it to be filed. *Ibid.*

It is not required that such notice be filed with the county auditor, but it should, with proper proof of service, be filed with the clerk of the district court. *Ibid.*

The provision requiring the persons filing a general statement of consent to give bond within ten days after service of notice of review by the district court, is mandatory, and on failure to file such bond within the time specified, the order of the board of supervisors finding the statement of general consent sufficient is to be treated as null and void. *Ibid.*

The provision of code § 2450 that only one statement of general consent shall be canvassed by the board of supervisors in any one year does not relate to the filing of more than one petition, but to the final consideration thereof by the board, and if the first statement filed is insufficient, and before the board has finally acted upon it by making the canvass necessary to determine its sufficiency, another statement, which is sufficient, is filed and properly brought up for consideration, the board may approve it. *In re Canvass of Statement of Consent, etc.*, 120–680, 95 N. W. 194.

The trial provided for in court as to the sufficiency of the statement of consent canvassed by the board of supervisors is by special proceedings, without a jury, but not in equity, and the applicants are not entitled to a continuance in order to take testimony by deposition. *Dye v. Augur*, 138–538, 110 N. W. 323.

The general denial which must be filed by those opposing the statement of gen-

eral consent within thirty days may be amended after that time so as to show the persons contesting to be citizens of the county. *Ibid.*

Where a general allegation of citizenship is made in the denial and not controverted except by a general denial thereof, no issue is raised requiring the introduction of proof. *Ibid.*

The board obtains jurisdiction to canvass the statement only by notice given to the public of a hearing at which any citizen may appear and contest the sufficiency of the consent. Therefore the board of supervisors has no authority at a subsequent meeting to nullify the effect of the record which has already been made on such a hearing. *Brickley v. Westphal*, 134–266, 111 N. W. 829.

Any fact or action relied upon as estopping or barring the appeal should be taken advantage of either by plea in bar or abatement. *Moon v. Hartsuck*, 137–236, 114 N. W. 1043.

Other names cannot be added to the statement after it has been filed with the auditor and notice for hearing, although withdrawals may be allowed after that time. *Scott v. Naacke*, 144–164, 122 N. W. 824.

The provision that only one statement of general consent shall be canvassed "in any one year" relates to a calendar year and not to a period of twelve months. *Sawyer v. Steinman*, 148–610, 126 N. W. 1123.

There is no provision of the statute which in terms requires a statement of facts as to the findings of the canvass board in regard to each town and township to be made of record. The finding of the board should be sufficiently definite so that it can be ascertained therefrom whether a saloon may be lawfully operated in the city or town in question. *Ibid.*

The bond required by any citizen filing a general denial as to the statement of consent should contain a penalty before its sufficiency is to be determined by the clerk of the district court who should approve it. *Lemon v. Drexel*, 152–144, 132 N. W. 184.

Withdrawals may be made after the auditor makes a preliminary canvass and causes notices to be published. *Ibid.*

The intent of this section is to confer judicial or quasi judicial powers upon the board of supervisors in determining the sufficiency of the statement of consent, and the action of the board in finding the statement sufficient is not suspended by an appeal. *Hammond v. Waldron*, 153–434, 133 N. W. 661.

Until the amendment of this section by 31 G. A., ch. 101, a sufficient petition of consent continued in force indefinitely until revoked by a proceeding in the nature of a counter petition. *Conly v. Dilley*, 153–677, 133 N. W. 730.

The consents given to individuals by city councils must cease and become of no effect with the termination of the general consent upon which they are dependent for their validity. *Ibid.*

While withdrawals of the signers of the petition of consent may be considered by the board before the petition has been acted upon, the effect of such withdrawals cannot be defeated by a further withdrawal of withdrawal of signatures,—that is, by requesting the board not to consider the withdrawal of the signers' names already presented to the board. A signature to the petition thus once withdrawn cannot be reinstated by such request. *In re Consent to Sell Intoxicating Liquors, De Board v. Williams*, 155–149, 134 N. W. 620.

A citizen and taxpayer of the county appearing in the district court on appeal to sustain the action of the board of supervisors in holding the statement of consent presented to them to have been insufficient, may appeal to the supreme court from the action of the district court reversing the action of the board of supervisors. *Ibid.*

Publication of notice of the intended canvass in all the newspapers of the county, though none of them have been regularly designated for that year as an official newspaper, held sufficient. *Ibid.*

The spirit and real intent of this statutory provision is to permit a citizen to defend the action of the board in an appeal taken from the action of the board in holding the petition for consent to be insufficient. *Anderson v. Board of Supervisors*, 156–153, 135 N. W. 570.

Withdrawals filed after the canvass of the statement has been commenced are not effective to change the number of original withdrawals. *Ibid.*

Where the notice was published in the newspapers selected for a previous year as the official newspapers of the county and still recognized as such, held that it was sufficient. *Jackman v. Board of Supervisors*, 156–620, 137 N. W. 906.

One who attempts to comply with the mulct law is justified in relying upon the finding of the board of supervisors that the statement of consent is sufficient after it has been entered of record; and such a finding is effectual for the purpose of avoiding the penalty of the prohibitory law until revoked on appeal or otherwise. *State v. Harrison*, 140 N. W. 223.

SEC. 2451. **Forfeiture or revocation.** Whenever any of the conditions of the third preceding section shall be violated, or whenever the council of the city or town or city acting under special charter shall by a majority vote direct it, or whenever there shall be filed with the county auditor

a verified petition, signed by a majority of the voters of the said city, town, or city acting under special charter, or county, as the case may be, as shown by the last general election, requesting it, then the bar to proceedings as provided in the second and third preceding sections shall cease to operate, and the persons engaged in the sale of intoxicating liquors shall be liable to all of the penalties provided in this chapter. [28 G. A., ch. 78, § 1; 25 G. A., ch. 62, § 19.]

This section does not provide for any action by the board of supervisors with reference to a petition to remove the bar to the enforcement of the prohibitory liquor law which has been declared by the board in determining the sufficiency of the general petition of consent in the county. *Meyer v. Hobson*, 116–349, 90 N. W. 85.

The board of supervisors is neither permitted nor required to pass upon the sufficiency of the petition for revocation. The filing thereof *ipso facto* removes the bar. *McConkie v. Remley*, 119–512, 93 N. W. 505.

There is no provision for the revocation of the consent of an adjoining property owner. No revocation of consent will be effectual during the annual period for which consent has been given but it may be effectual as to the succeeding annual period. *Kane v. Grady*, 123–260, 98 N. W. 771.

The sureties on the bond may be liable for unlawful sales, although the seller, purporting to act under the mulct law, has not filed the required consent of the adjoining property owners. *Breeding v. Jordan*, 115–566, 88 N. W. 1090.

There is no provision for revocation in a town on petition of the electors of the township in which the town is situated after the bar of the statute has once been established. A petition by a majority of the electors in the town who voted at the last general election is sufficient. *Tuttle v. Poechert*, 143–446, 121 N. W. 1057.

A petition for revocation can be signed only by electors actually voting at the last general election. *Mills v. Hallgren*, 146–215, 124 N. W. 1077.

One who has violated the provisions of the mulct law and been enjoined therefor cannot reëngage in the business without new compliance with all the conditions of code § 2448 required to be performed as precedent to carrying on the business under that section; but a new general statement of consent is not essential. *Rink v. Bollinger*, 145–501, 123 N. W. 183.

SEC. 2452. False signatures—time of signing.

The provision of this section that every general statement of consent shall be accompanied by the affidavit of some reputable person, showing that said person personally witnessed the signing of each name appearing thereon, and making any false statement contained in said affidavit punishable as perjury, does not impose upon the board the duty of determining the sufficiency and truthfulness of such affidavits where it is admitted that the statement of consent is signed by the genuine signatures of a sufficient number of persons qualified to sign it. *In re Canvass of Statement of Consent, etc.*, 120–680, 95 N. W. 194.

The requirement that the signatures to the general statement shall show the voting precinct of the signers is not applicable to a written withdrawal of signatures by those who have already signed. *Dye v. Augur*, 138–538, 110 N. W. 323.

As no name may be counted that was not signed within thirty days prior to the filing of the statement of general consent, one who has, after filing, withdrawn his name cannot reinstate it by withdrawing such withdrawal, for the effect would be to sign his name to the statement after its filing. *In re Consent to Sell Intoxicating Liquors, De Board v. Williams*, 155–149, 134 N. W. 620.

The term "reputable" used in this section to designate the person who may make an affidavit to signatures means one of good repute in the community. Therefore, a false statement in the affidavit alone is not sufficient to show that the maker of such affidavit is not a reputable person. *Ibid.*

One who six years before making such affidavit had been convicted of gambling, but during three years preceding the making of the affidavit had engaged in a lawful occupation, held to have been properly found by the lower court to be a reputable person in the absence of any other evidence on the subject. *Ibid.*

The fact that one who procured, witnessed and verified the signatures to a petition of consent had been enjoined from the illegal sale of liquors nine years before the time when he attested the petition, held not alone sufficient to disqualify him as such subscribing witness. *Taft v. Snouffer*, 157– —, 137 N. W. 922.

Canvassers for signatures who have altered the names of signers to the petition in order to make them correspond with the names of such signers as found in the poll books are not "reputable persons" within the meaning of the provision of this section as to the verification of the signatures of signers. *Jackman v. Board of Supervisors*, 156–620, 137 N. W. 906.

Where there is a contest as to the

jurisdictional facts entitling the board to consider signatures to the petition of consent, the burden rests on proponents to establish such facts by at least a prima-facie showing. *Ibid.*

Where the particular signatures improperly affixed or altered cannot be pointed out, the entire petition is vitiated. *Ibid.*

SEC. 2453. Inspection of papers.

It appears from this section that the poll books referred to in code § 2448 are those filed with the county auditor and not those filed with the township, city or town clerk. *In re Consent to Sell Intoxicating Liquors, De Board v. Williams*, 155–149, 134 N. W. 620.

A poll book not duly certified and filed with the auditor and opened to inspection during the time allowed for the signing of a petition of consent cannot be considered in determining the validity of signatures to such petition. *Jackman v. Board of Supervisors*, 156–620, 137 N. W. 906.

If the petition is insufficient when filed and offered for canvass, defects therein cannot be cured by any device short of a new petition in the making and presentation of which the requirements of the statute have been observed. *Ibid.*

SEC. 2455. Additional taxes and regulations.

The bond required by code § 2448, par. 3, does not cover payments required to be made by the city ordinance. *Ottumwa v. Hodge*, 112–430, 84 N. W. 533.

A city has no authority to provide by ordinance for the punishment of the act of keeping a saloon open on election day, as prohibited in code § 2448. Such provision would be inconsistent with the criminal laws of the state. *Iowa City v. McInnerny*, 114–586, 87 N. W. 498.

The mulct tax required to be paid by one selling intoxicating liquors under the mulct law is a tax. *Ahlers v. Estherville*, 130–272, 104 N. W. 453.

A failure to pay the tax imposed by the city under this section works a forfeiture of the resolution of consent of the city council and all sales thereafter made are invalid. *Cheadle v. Roberts*, 150–639, 130 N. W. 368.

Failure to pay the tax provided for in this section removes the bar of the mulct statute. *Silvers v. Vermilion*, 151–163, 130 N. W. 913.

PERMISSION TO MANUFACTURE.

SEC. 2460. Drinking or retailing on premises.

Where the premises occupied by a brewery constitute one entire property, permitting retail sales within any portion of such property is unlawful and the owner forfeits his right to carry on his wholesale business and to recover payment for sales made in such business. *Orke v. McManus*, 142–654, 121 N. W. 177.

As the provisions of this section relate to corporations as well as to individuals, it is apparent that corporations are authorized to engage in the business of the sale of intoxicating liquors under the mulct law. (But now see 33 G. A., ch. 143, supp. §§ 2383-a–2383-e.) *State v. Delahoyde*, 147–327, 126 N. W. 330.

MISCELLANEOUS PROVISIONS.

SEC. 2461-a. "Bootlegger" defined. Any person who shall, by himself, or his employe, servant or agent, for himself or any person, company or corporation, keep or carry around on his person, or in a vehicle, or leave in a place for another to secure, any intoxicating liquor as herein defined, with intent to sell or dispose of the same by gift or otherwise, in violation of law, shall be termed a bootlegger. [30 G. A., ch. 84, § 1.]

One who is operating a restaurant and lunch counter where a beverage is sold as not being intoxicating, should not be enjoined under this statute, although it appears that the beverage sold is within the statutory description of intoxicating liquor. *Barr v. Neel*, 151–458, 131 N. W. 650.

SEC. 2461-b. Penalty. Every such bootlegger may be restrained by injunction from doing or continuing to do any of the acts prohibited by law, and all the proceedings for injunctions, temporary and permanent, and for fines and costs for violation of same, as defined by law, shall be applicable to such person, company or corporation, and the fact that an

offender has no known or permanent place of business or base of supplies, or quits the business after the commencement of an action shall not prevent a temporary or permanent injunction, as the case may be, from issuing. [30 G. A., ch. 84, § 2.]

SEC. **2461-c. Annual mulct tax—quarterly installments.** Every person, partnership or corporation that shall engage in the business of holding intoxicating liquors in store and collecting for the owner thereof the purchase price of said liquors from those to whom they have been conditionally sold or from those not authorized by law to sell the same, shall pay to the treasurer of the county where the business is carried on an annual mulct tax of six hundred dollars in quarterly installments on the first day of January, of April, of July, and of October; and such tax shall be paid for each separate office or place where such business is carried on, and all the provisions of the law relating to the levying, collecting and enforcing of what is known as the mulct tax shall apply and govern in the levying and collecting of the tax herein provided for so far as applicable. [32 G. A., ch. 123, § 1.]

SEC. **2461-d. First quarter payable in advance.** No person, partnership or corporation shall engage in the business described in section one of this act without first paying the tax herein required for the quarter during which such business is carried on; and when the tax is so paid it shall go into the general fund of the county collecting the same. [32 G. A., ch. 123, § 2.]

SEC. **2461-e. Sale near military reservations—penalty.** No person shall open, maintain or conduct any shop or other place for the sale of wine, beer or any other intoxicating liquors, or sell the same at any place within a distance of one mile from any permanent military post or reservation established by the United States within the state of Iowa; and any person violating the provisions of this section shall be punished by a fine not to exceed fifty dollars for each offense, or by imprisonment in the county jail for a term not to exceed thirty days, or by both such fine and imprisonment. [32 G. A., ch. 124.]

SEC. **2461-f. Drinking on passenger cars—profane language—penalty.** Any person who shall drink intoxicating liquors as a beverage on any passenger railway car or street car in service or who shall use profane or indecent language on such railway or street car shall be guilty of a misdemeanor. [33 G. A., ch. 141, § 1.]

The commission of a misdemeanor by a passenger will not justify or excuse the carrier for the act of its employe in assaulting or mistreating him. *Heggen v. Ft. Dodge, D. M. & S. R. Co.*, 150–313, 130 N. W. 148.

SEC. **2461-g. Powers of conductor.** Any conductor of a railway train or street car carrying passengers shall have the right to refuse to permit any person, not in the custody of an officer, to enter any passenger car on his train or street car in his charge who shall be in a state of intoxication; and shall have the further right to eject from his train at any station or from his street car at any regular stop any person found in a state of intoxication or drinking intoxicating liquors as a beverage, or using profane or indecent language on any passenger car of his train or any street car under his charge and for that purpose may call to his aid any employe of the railway or street car company. [33 G. A., ch. 141, § 2.]

The statute does not impose any duty upon the conductor of a railroad train as to passengers who are in a state of intoxication or otherwise violating its provisions and it does not, therefore, relieve the railroad company of liability on account of the misconduct of a conductor in attempting to exercise his authority with refer-

ence to such passenger. *Heggen v. Ft. Dodge, D. M. & S. R. Co.*, 150–313, 130 N. W. 148.

The authority conferred upon the conductor of a railway train by this section will not justify the use of excessive force nor afford any protection against the willful or wanton action of a conductor in ejecting an intoxicated person who is in such condition as to be placed in peril of physical injury by such ejection. *Adams v. Chicago G. W. R. Co.*, 156–31, 135 N. W. 21.

LIMITING NUMBER OF SALOONS IN CITIES AND TOWNS.

SEC. **2461-h. According to last preceding census.** From and after the passage of this act, no city or town council shall, by resolution, grant consent to sell intoxicating liquors as a beverage at retail to a greater number of persons than one to every one thousand of the population of said city or town as shown by the last preceding state or national census; provided, however, that in towns where the law has been otherwise complied with, the town council of any incorporated town of one thousand population or less, may by resolution grant consent to one person to sell intoxicating liquors as a beverage in such town. [33 G. A., ch. 142, § 1.]

The statute of which this and the following sections are a part is not unconstitutional on account of the method of its adoption. *Conly v. Dilley*, 153–677, 133 N. W. 730.

A consent by the city council to sell intoxicating liquors after the date of the passage of this act and in excess of the number of consents permitted by it, held to be invalid although such consent was granted before the date of the taking effect of the statute. *Sawyer v. Gallagher*, 151–64, 130 N. W. 173.

SEC. **2461-i. Existing consent resolutions—applicable to certain cities—reduction of number.** In all cities and towns where a greater number of persons than are provided in section one hereof, now hold resolutions of consent to sell intoxicating liquors at retail, it shall not be mandatory under the provisions of this act for city or town councils to cancel or withdraw a sufficient number of such resolutions of consent to comply with the provisions of section one hereof, and such resolutions of consent may be renewed by city or town councils to the person or persons holding the same or their assignees or grantees, unless said resolutions of consent shall become inoperative by reason of the person holding the same violating any of the laws of the state, either civil or criminal, relating to the sale or disposition of intoxicating liquors, or by reason of a permanent injunction issuing against such person for a violation of law, or by reason of a civil or criminal action being commenced or instituted against said person for the violation of any of the laws of the state relating to the sale or disposition of intoxicating liquors, and said persons surrendering such resolution of consent before said action is prosecuted to final judgment or a conviction had in the court in which the same was instituted or by reason of the city or town council withdrawing such resolution of consent for cause, in which event, no new or additional resolution shall be granted to any person to sell intoxicating liquors as a beverage at retail except in accordance with the provisions of this act.

This act shall also apply to cities acting under special charter and in such cities in which a greater number of persons than are authorized under section one of chapter one hundred forty-two, acts of the thirty-third general assembly,[1] to keep and sell intoxicating liquors as a beverage under the mulct law now hold resolutions of consent to sell intoxicating liquors at retail, it shall be mandatory under the provisions of this act for the city councils of such cities to cancel or withdraw on July first, nineteen hundred thirteen, one third of the excess of such resolutions of consent over those

authorized under section one of said chapter, and on July first, nineteen hundred fourteen, one half of such remaining excess of such resolutions of consent, and on July first, nineteen hundred fifteen, all of the excess of such resolutions of consent shall be canceled or withdrawn; provided, however, that from and after the passage of this act all resolutions of consent granted by the council of any city acting under special charter in excess of the number existing in such city at the time of the passage of this act shall be void and of no force and effect. [35 G. A., ch. 195, § 1; 33 G. A., ch. 142, § 2.]

[1§ 2461-h herein. EDITOR.]

The amendment of this statute by 35 G. A., ch. 195, so as to make it applicable to special charter cities, cannot be considered as a legislative construction of the original statute in determining whether, without such amendment, it was applicable to such cities. *Babbitt v. Alger*, 141 N. W. 915.

The grant of authority to maintain an excess of saloons over and above the general statutory limit expires with the expiration of the petitions of general consent outstanding and in force at the date of the enactment of this statute. If the council disregards such limitation and grants consents in excess thereof, such consents afford no protection to persons doing business under color of the authority so given. *Conly v. Dilley*, 153–677, 133 N. W. 730.

SEC. **2461-j. Conviction or injunction bar to holding permit—time limitation.** No person who shall be hereafter convicted of violating the laws of this state relating to the sale of intoxicating liquors, or shall be permanently enjoined by any court of this state for such violation, shall be permitted to sell intoxicating liquors in this state within five years from the date of such conviction or injunction, and no resolution of consent or permit shall be granted such person within said period. [33 G. A., ch. 142, § 3.]

An injunction granted against a defendant prohibiting him from the illegal sale of intoxicating liquors will not prevent his becoming entitled after five years as here prescribed to again engage in the sale of liquors under the mulct law upon compliance with the provisions of that law. *Denmead v. Parker*, 145–581, 124 N. W. 780.

A finding that one previously enjoined is guilty of a violation of such injunction does not constitute a conviction of violating the laws of the state relating to the sale of intoxicating liquors within the meaning of this section. *Judge v. Powers*, 156–251, 136 N. W. 315.

SEC. **2461-k. Resolutions granted in violation are invalid.** No resolution of consent granted by any city or town council in violation of the provisions of this act, shall be valid or of any force or effect, or operate as a bar against any of the penalties provided in chapter six, title twelve of the code, the supplement to the code, 1907, and amendments thereto and supplementary thereof, but nothing in this act shall operate to extend any consent now or hereafter granted beyond the time at which such consent shall expire, as by law provided. [33 G. A., ch. 142, § 4.]

SEC. **2461-l. Acts in conflict repealed.** All acts and parts of acts, in so far as they are in conflict with this act, are hereby repealed. [33 G. A., ch. 142, § 5.]

CHAPTER 7.

OF FIRE COMPANIES.

SECTION **2467. Removal of fire apparatus.** No person shall remove any engine or other apparatus for the extinguishment of fire from the house or other place where it is kept or deposited, except in time of fire or

alarm thereof, unless authorized so to do by the president, director or foreman of the company to whom the same shall belong. Any person violating the provisions of this section shall be guilty of a misdemeanor and shall be punished by a fine not exceeding one hundred dollars, or by imprisonment in the county jail not exceeding thirty days. [32 G. A., ch. 125, § 1; C. '73, § 1565; R. § 1767.]

SEC. **2468. False alarms.** No person or persons shall cause or give a false alarm of fire, by setting fire to any combustible material, or by crying or sounding an alarm, or by any other means, without cause. Any person violating the provisions of this section, shall be guilty of a misdemeanor and shall be punished by a fine not exceeding one hundred dollars or by imprisonment in the county jail not exceeding thirty days. [32 G. A., ch. 125, § 2; C. '73, § 1566; R. § 1768.]

CHAPTER 7-A.

OF THE STATE FIRE MARSHAL.

SECTION **2468-a. Office created — appointment — term — removal.** There is hereby created the office of state fire marshal and upon the taking effect of this act the governor shall appoint a citizen of the state versed in the causes of fires and having a knowledge of improved methods of preventing fires, to fill the position hereby created. The term of office of the state fire marshal shall be four years and the term of the first incumbent of the office shall end July first, nineteen hundred fifteen. During the thirty-sixth session of the general assembly and quadrennially thereafter the governor with the consent of the senate shall appoint a citizen of the state possessing the above requirements as state fire marshal, and the person so appointed shall assume the duties of his office July first following the date of his appointment. The state fire marshal may be removed for cause at any time by the governor and vacancies arising shall be filled by appointment by the governor, which appointment shall be for the unexpired term. The state fire marshal shall maintain an office at the seat of government and for that purpose the executive council shall provide him with suitably furnished rooms, furniture, books, supplies, printing and stationery necessary to the proper conduct of his office. Before entering upon the discharge of his duties he shall give a bond in the penal sum of five thousand dollars conditioned as provided in section eleven hundred eighty-three of the code. [34 G. A., ch. 128, § 1.]

SEC. **2468-b. Deputy and other assistants—compensation.** The state fire marshal is hereby empowered to appoint a deputy fire marshal to assist him in his work, and with the approval of the executive council may appoint and fix the compensation of such additional deputies, clerks and assistants as may be necessary to properly and efficiently conduct the affairs of his office. [34 G. A., ch. 128, § 2.]

SEC. **2468-c. Vacancy filled by deputy.** While any vacancy shall exist in the office of state fire marshal or during his absence or inability to perform his duties, the same shall devolve upon and be performed by the deputy fire marshal. [34 G. A., ch. 128, § 3.]

SEC. **2468-d. Inspectors—appointment—powers.** With the approval of the executive council the state fire marshal may, in addition to the provisions of section two, appoint any person, or persons, as state in-

spector, or inspectors, who may be known to him to be competent and skilled in the inspection of buildings and their contents. Such person or persons shall have all the powers of a deputy fire marshal to enter and inspect buildings, including their contents and occupancies, as provided in section nine hereof, and it shall be the duty of such inspector to report to the fire marshal any faulty or dangerous condition found. Such state inspector or inspectors shall be duly commissioned and shall receive such compensation as is provided for in section fifteen of this act. [34 G. A., ch. 128, § 4.]

SEC. 2468-e. **Investigation of causes of fires—duties of city and other officers—reports—penalties.** The state fire marshal either by himself or through other persons as in this act provided shall investigate the cause, origin and circumstances of every fire occurring within the state and it shall be the duty of the chief of the fire department of every city, town or village in which a fire department is established, and of the mayor of every incorporated town, or village in which no fire department exists, and of the township clerk of every organized township, outside the limits of any organized city, town or village, to investigate the cause, origin and circumstances of every fire occurring in such city, town, village or township by which property has been destroyed, or damaged, and to specially make investigation as to whether such fire was the result of carelessness or design. Such investigation shall be begun within two days, not including Sunday, of the occurrence of such fire, and the state fire marshal shall have the right to supervise and direct such investigation whenever he deems it expedient or necessary. The officer making investigation of fires occurring in cities, villages, towns or townships shall forthwith notify said fire marshal, and shall within one week of the occurrence of the fire furnish to the said fire marshal a written statement of all facts relating to the cause and origin of the fire and such other information as may be called for by the blanks provided by said fire marshal. Any chief of a fire department, mayor or township clerk who fails or refuses to make the investigation and report required of him by this section shall be deemed guilty of a misdemeanor, and shall, upon conviction, be fined in a sum not less than five dollars nor more than one hundred dollars. [35 G. A., ch. 224, § 1; 34 G. A., ch. 128, § 5.]

SEC. 2468-f. **Record of fires.** The state fire marshal shall keep in his office a record of all fires occurring in the state, showing the name of the owners and name or names of occupants of the property at the time of the fire, the sound value of the property, and amount of insurance thereon, the total amount of insurance collected, and the total amount of loss to the property owner, together with all the facts, statistics, and circumstances, including the origin of the fire, which may be determined by the investigation provided by this act. Such record shall at all times be opened to public inspection. [34 G. A., ch. 128, § 6.]

SEC. 2468-g. **Testimony under oath—arrest for arson.** The state fire marshal shall, when in his opinion further investigation is necessary, take or cause to be taken the testimony under oath of all persons supposed to have knowledge of any facts, or to have means of knowledge in relation to the matter in which an examination is herein required to be made, and shall cause the same to be reduced to writing. If the state fire marshal shall be of the opinion that there is evidence sufficient to charge any person with the crime of arson, or with the attempt to commit the crime of arson, or of conspiracy to defraud, or criminal conduct in connection with such

fire, he shall cause such person to be arrested and charged with the offense, or either of them, and shall furnish to the proper prosecuting attorney all such evidence, together with the names of witnesses and all of the information obtained by same, including a copy of all matter and testimony taken in the case. [34 G. A., ch. 128, § 7.]

SEC. **2468-h. Power to require attendance of witnesses—evidence —violation—penalty.** The state fire marshal and his deputy shall each have power in any county in the state to administer an oath and compel the attendance of witnesses before them, or either of them, to testify in relation to any matter which is by the provisions of this act a subject of inquiry and investigation, and may require the production of any books, papers, or documents necessary for such investigation. False swearing in any matter of proceeding aforesaid shall be deemed perjury and shall be punished as such. Any witness who refuses to be sworn, or refuses to testify, or who disobeys any lawful order of said state fire marshal, or deputy state fire marshal, or who fails to produce any books, papers or documents touching any matter under examination, or who is guilty of any contentious conduct after being summoned by them or either of them to appear before them or either of them, to give testimony in relation to any matter or subject under investigation as aforesaid, shall be guilty of a misdemeanor, and it shall be the duty of the state fire marshal or deputy state fire marshal, or either of them, to make or compel said person or persons so refusing to comply with the summons or orders of said state fire marshal, or deputy state fire marshal, before any justice of the peace, police magistrate, or any court of record in the county in which said investigation is being had, and upon the filing of such complaint for such cause, shall proceed in the same manner as other criminal cases. Any person convicted of the violation of any of the provisions of this act shall be deemed guilty of a misdemeanor and shall be fined in a sum not exceeding one hundred dollars or imprisoned not to exceed thirty days, or both, in the discretion of the court; provided, however, any person so convicted shall have the right of appeal. [34 G. A., ch. 128, § 8.]

SEC. **2468-i. Authority to enter buildings.** Said state fire marshal and his deputy, or either of them, shall have the right and authority at all times of day or night in the performance of the duties imposed by the provisions of this act, to enter upon, or examine any buildings or premises, where any fire has occurred, and other buildings or premises adjoining or near the same. [34 G. A., ch. 128, § 9.]

SEC. **2468-j. Examination of buildings—order for removal or change—penalty—appeal.** The state fire marshal, his deputy and assistants, the chief of the fire department of all cities, towns or villages where a fire department is established, and the clerk of each township in the territory outside the limits of an organized city, or village, upon complaint of any person having an interest in any building or property adjacent, and without any complaint, shall have a right at all reasonable hours, for the purpose of examination, to enter into and upon all buildings and premises within their jurisdiction. Whenever any of said officers shall find any building[1] or structure, which by want of proper repair or by reason of age and dilapidated condition, or for any cause, is especially liable to fire, and is so situated as to endanger other buildings or property therein, or whenever any such official shall find in any building or upon any premises combustible or explosive matter or inflammable conditions dangerous to the safety of certain buildings or premises, they shall order the same to be removed or remedied and such order shall be forthwith complied

with by the owner or occupant of said building or premises, providing, however, that if said occupant or owner shall deem himself aggrieved by such order he may within forty-eight hours appeal to the state fire marshal, and the cause of complaint shall be at once investigated under the direction of the latter, and unless by his authority the order is rejected, such order shall remain in force and be forthwith complied with by said owner or occupant. Any owner or occupant of buildings or premises failing to comply with the order of the authorities above specified shall be punished by a fine of not less than ten dollars nor more than fifty dollars for each day's neglect; such penalty to be sued in the name of the state of Iowa upon complaint of the fire marshal, deputy fire marshal or county attorney, or of any officer named herein in the county in which such building or buildings shall be situated, before any justice of the peace or any court of record; right of appeal shall be granted, and such penalty, when recovered, shall be paid into the county treasury of the county wherein such recovery is had; provided, however, that in municipalities having building inspection and limit ordinances, nothing herein shall be construed to affect such local regulations, but the jurisdiction of the state fire marshal shall be concurrent with that of the municipal authorities. [35 G. A., ch. 224, § 2; 34 G. A., ch. 128, § 10.]

["buildings" in enrolled bill. EDITOR.]

SEC. **2468-k. Fire drills in public schools—exits unlocked—bulletin—teachers—penalty.** It shall be the duty of the state fire marshal and his deputies to require teachers of public and private schools, in all buildings of more than one story, to have at least one fire drill each month, and to require all teachers of such schools, whether occupying buildings of one or more stories, to keep all doors and exits of their respective rooms and buildings unlocked during school hours. The state fire marshal shall prepare a bulletin upon the causes and dangers of fires, arranged in not less than four divisions or chapters, and under the direction of the executive council shall publish and deliver the same to the public schools throughout the state, and the teachers thereof shall be required to instruct their pupils in at least one lesson each quarter of the school year with reference to the causes and dangers of fires. Any teacher failing to comply with the provisions of this section shall be guilty of a misdemeanor and shall be punishable by a fine of not to exceed ten dollars for each offense. [34 G. A., ch. 128, § 11.]

SEC. **2468-l. Salaries—expenses.** The state fire marshal shall receive an annual salary of twenty-five hundred dollars and the deputy fire marshal shall receive an annual salary of eighteen hundred dollars. The said fire marshal, his deputies and assistants shall be entitled to their actual and necessary traveling, hotel and other expenses while away from the city of Des Moines on business of the office; and the said fire marshal may contract such other expenses as may be necessary in the performance of his official duties, but the total amount to be expended for all purposes, including salaries, compensation, fees and expenses, except the office expenses provided in section one hereof, shall not exceed the sum of thirteen thousand five hundred dollars annually. [35 G. A., ch. 224, §§ 3, 6; 34 G. A., ch. 128, § 12.]

SEC. **2468-m. Marshal and deputy shall devote entire time.** The state fire marshal shall devote his entire time to the duties of his office and he or his deputy shall, except when engaged elsewhere in the performance

of his duties, at all times be at the office of the state fire marshal, ready for such duties as are required by this act. [34 G. A., ch. 128, § 13.]

SEC. **2468-n. Annual report—publication—distribution.** The state fire marshal shall file with the governor annually, as early as consistent with full and accurate preparation and not later than the first day of February each year, a detailed report of his official action and of the affairs of his office, which report shall be published and distributed as the reports of other state officers. [34 G. A., ch. 128, § 14.]

SEC. **2468-o. Fee for fires reported.** There shall be paid to the chiefs of the fire department, and to mayors of incorporated villages, and to the township clerk of every organized township, who are by this act required to report fires to the state fire marshal, the sum of fifty cents for each fire so reported to the satisfaction of the state fire marshal, and in addition thereto there shall be paid to township clerks mileage at the rate of ten cents per mile for each mile traveled to the place of fire. Said allowance shall be paid by the state fire marshal out of any funds appropriated for the use of the office of said state fire marshal. [35 G. A., ch. 224, § 4; 34 G. A., ch. 128, § 15.]

SEC. **2468-p. Annual appropriation.** There is hereby appropriated out of any money in the state treasury not otherwise appropriated the sum of thirteen thousand five hundred dollars annually, or so much thereof as may be necessary for the purpose of maintaining the department of the state fire marshal and paying all expenses thereof. The said fire marshal shall keep on file in the office an itemized statement of all expenses incurred by his department, and shall approve all vouchers issued, and said vouchers shall be allowed and paid out of the funds hereby appropriated in the same manner that other claims against the state are paid, upon approval of the executive council. [35 G. A., ch. 224, § 5; 34 G. A., ch. 128, § 16.]

CHAPTER 8.

OF THE BUREAU OF LABOR STATISTICS.

SECTION **2469. Commissioner.** The bureau of labor statistics shall be under the control of a commissioner, biennially appointed by the governor by and with the advice and consent of the executive council, whose term of office shall commence on the first day of April in each odd-numbered year and continue for two years, and until his successor is appointed and qualified. He may be removed for cause by the governor, with the advice of the executive council, record thereof being made in his office; any vacancy shall be filled in the same manner as the original appointment. He shall give bonds in the sum of two thousand dollars with sureties to be approved by the governor, conditioned for the faithful discharge of the duties of his office, and take the oath prescribed by law. He shall have an office in the capitol, safely keep all records, papers, documents, correspondence, and other property pertaining to or coming into his hands by virtue of his office, and deliver the same to his successor, except as hereinafter provided. Provided, however, that the term of office of the labor commissioner which shall commence on the first day of April, nineteen hundred and six, shall expire on the thirty-first day of March, nineteen hundred and seven. [31 G. A., ch. 102, § 1; 20 G. A., ch. 132, §§ 1–4.]

SEC. **2470. Duties—report.** The duties of said commissioner shall be to collect, assort, systematize and present in biennial reports to the gov-

ernor statistical details relating to all departments of labor in the state, especially in its relations to the commercial, social, educational and sanitary conditions of the laboring classes, the means of escape from, and the protection of life and health in factories, the employment of children, the number of hours of labor exacted from them and from women, and to the permanent prosperity of the mechanical, manufacturing and productive industries of the state; and he shall, as fully as practicable, collect such information and reliable reports from each county in the state, the amount and condition of the mechanical and manufacturing interests, the value and location of the various manufacturing and coal productions of the state, also sites offering natural or acquired advantages for the profitable location and operation of different branches of industry; he shall, by correspondence with interested parties in other parts of the United States, impart to them such information as may tend to induce the location of mechanical and producing plants within the state, together with such other information as shall tend to increase the productions, and consequent employment of producers; and in said biennial report he shall give a statement of the business of the bureau since the last regular report, and shall compile and publish therein such information as may be considered of value to the industrial interests of the state, the number of laborers and mechanics employed, the number of apprentices in each trade, with the nativity of such laborers, mechanics' and apprentices' wages earned, the savings from the same, with age and sex of laborers employed, the number and character of accidents, the sanitary condition of institutions where labor is employed, the restrictions, if any, which are put upon apprentices when indentured, the proportion of married laborers and mechanics who live in rented houses, with the average annual rental, and the value of property owned by laborers and mechanics; and he shall include in such report what progress has been made with schools now in operation for the instruction of students in the mechanic arts, and what systems have been found most practical, with details thereof. Such report shall not contain more than six hundred printed pages, and shall be of the number, and distributed in the manner, provided by law. He shall make a report to the governor during the year nineteen hundred and six, and biennially thereafter. The report for the year nineteen hundred and six shall cover the period only from the date of his last preceding biennial report. [31 G. A., ch. 102, § 2; 29 G. A., ch. 97, § 1; 20 G. A., ch. 132, § 5.]

SEC. **2471. Power to secure evidence—witness fees.** The commissioner of the bureau of labor statistics shall have the power to issue subpœnas, administer oaths and take testimony in all matters relating to the duties herein required by said bureau, said testimony to be taken in some suitable place in the vicinity to which testimony is applicable. Witnesses subpœnaed and testifying before the commissioner of the bureau shall be paid the same fees as witnesses before a justice's court, such payment to be made out of the general funds of the state on voucher by the commissioner, but such expense for witnesses shall not exceed one hundred dollars annually. Any person duly subpœnaed under the provisions of this section, who shall wilfully neglect or refuse to attend or testify at the time and place named in the subpœna, shall be deemed guilty of a misdemeanor, and, upon conviction thereof before any court of competent jurisdiction, shall be punished by a fine not exceeding fifty dollars and costs of prosecution, or by imprisonment in the county jail not exceeding thirty days: provided, however, that no witness shall be compelled to

go outside the county in which he resides to testify. [29 G. A., ch. 97, § 2; 26 G. A., ch. 86, § 2; 20 G. A., ch. 132, § 6.]

SEC. 2472. **Right to enter premises—violation or neglect—written notice—prosecution.** The commissioner of the bureau of labor statistics shall have the power to enter any factory or mill, workshop, mine, store, business house, public or private work, when the same is open or in operation for the purpose of gathering facts and statistics such as are contemplated by this chapter, and to examine into the methods of protection from danger to employes, and the sanitary conditions in and around such buildings and places, and make a record thereof. If the commissioner shall learn of any violation of, or neglect to comply with the law in respect to the employment of children, or in respect to fire escapes, or the safety of employes, or for the preservation of health, he shall give written notice to the owner or person in charge of such factory or building, of such offense or neglect, and if the same is not remedied within sixty days after service of such notice, such officer shall give the county attorney of the county in which such factory or building is situated, written notice of the facts, whereupon that officer shall immediately institute the proper proceedings against the person guilty of such offense or neglect. And any owner or occupant of such factory or mill, workshop, mine, store, business house, public or private work, or any agent or employe of such owner or occupant, who shall refuse to allow any officer or employe of said bureau to so enter, or who shall hinder him, or in any way deter him from collecting information, shall be deemed guilty of a misdemeanor, and, upon conviction thereof before any court of competent jurisdiction, shall be punished by a fine of not exceeding one hundred dollars and costs of prosecution, or by imprisonment in the county jail not exceeding thirty days. [35 G. A., ch. 196, § 1.] [29 G. A., ch. 97, § 3; 26 G. A., ch. 86, § 3.]

Statements of the labor commissioner with reference to an examination of machinery cannot be shown for the purpose of negativing defects therein where it does not appear that the commissioner has made any examination. *Brusseau v. Lower Brick Co.*, 133–245, 110 N. W. 577.

SEC. 2474. **Reports to bureau—violation—penalty.** It shall be the duty of every owner, operator or manager of every factory, mill, workshop, mine, store, business house, public or private work, or any other establishment where labor is employed, as herein provided, to make to the bureau, upon blanks furnished by said bureau, such reports and returns as said bureau may require for the purpose of compiling such labor statistics as are contemplated in this chapter; and the owner, operator or business manager shall make such reports or returns within sixty days from the receipt of blanks furnished by the commissioner, and shall certify under oath to the correctness of the same. Any owner, operator or manager of such factory, mill, workshop, mine, store, business house, public or private work, as herein stated, who shall neglect or refuse, within thirty days after the receipt of notice given by said commissioner, to furnish to the commissioner of labor such reports or returns as may be required by the commissioner in order to enable him to fully comply with the duties enjoined upon him by section twenty-four hundred seventy, supplement to the code, 1907, and amendments thereto and supplementary thereof, shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be punished by a fine not exceeding one hundred dollars and costs of prosecution, or imprisoned in the county jail not exceeding thirty days. [35 G. A., ch. 196, § 2.] [26 G. A., ch. 86, § 5.]

SEC. 2477. **Compensation and expenses — inspectors — duties of woman inspector.** That section twenty-four hundred seventy-seven, sup-

plement to the code, 1907, and chapter one hundred forty-four of the acts of the thirty-third general assembly amendatory thereto, be and the same are hereby repealed and the following enacted in lieu thereof:

"The commissioner of the bureau of labor statistics shall receive a salary of eighteen hundred dollars per annum and shall be allowed a deputy at a salary of fifteen hundred dollars per annum payable monthly; he shall also be allowed three factory inspectors, one of whom shall be a woman, at a salary of one hundred dollars per month each, [and] one office clerk at a salary of one thousand dollars per annum. The woman factory inspector herein provided for shall, in addition to the general duties required of her, under the direction of the commissioner of the bureau of labor statistics, inspect the sanitary and general conditions under which the women and children are at work in all factories, workshops, hotels, restaurants, stores, and any other places where women and children are employed; collect statistics and make recommendations and report the same to the commissioner of labor, who shall make special reference thereto in his biennial report to the governor, and said woman factory inspector shall render any other or additional service under the direction of the labor commissioner as will tend to promote the health and general welfare of the women and children employes of this state. The appointment by the commissioner of such factory inspectors shall be subject to the approval of the executive council. Said commissioner shall be allowed the necessary postage, stationery and office expenses. The said salaries and expenses shall be paid as the salaries and expenses of other state officers are provided for. The commissioner or any officer or employe of the bureau of labor statistics shall be allowed in addition to his salary his actual and necessary traveling expenses while in the performance of his duties, said expenses to be audited by the executive council and paid out of the general fund of the state upon a voucher verified by the commissioner or his deputy; but the total amount of the expenses for the officers and employes of said bureau other than the salaries of the commissioner, his deputy, the factory inspectors and clerk, shall not exceed four thousand dollars per annum. [35 G. A., ch. 196, § 3; 33 G. A., ch. 144, § 1.] [32 G. A., chs. 126, 127; 30 G. A., ch. 85; 26 G. A., ch. 86, § 1; 20 G. A., ch. 132, §§ 1–4.]

SEC. **2477-1a. Record and report of accidents—violation—penalty.** "Manufacturers, manufacturing corporations, proprietors or corporations operating any mercantile establishments, mills, workshops, mines other than those subject to inspection by the state mine inspector, or business houses, shall keep a careful record of any accidents occurring to an employe while at work for the employer, when such accident results in the death of the employe or in such bodily injury as will or probably may prevent him from returning to work within four days thereafter. The said record shall at all times be open to inspection by an inspector of the bureau of labor statistics. Within forty-eight hours after the occurrence of an accident, the record of which is herein required to be kept, a written report thereof shall be forwarded to the commissioner of the bureau of labor statistics, and said commissioner may require further and additional report to be furnished him should the first report be by him deemed insufficient. No statement contained in any such report shall be admissible in any action arising out of the accident therein reported. Any employer who fails to keep the record or to furnish the report as herein provided shall be deemed guilty of a misdemeanor and upon conviction thereof shall

be fined not less than five dollars nor more than one hundred dollars and costs of prosecution." [35 G. A., ch. 196, § 4.]

SEC. **2477-a. Child labor in factories and mills—age limitation.** No person under fourteen years of age shall be employed with or without wages or compensation in any mine, manufacturing establishment, factory, mill, shop, laundry, slaughter house or packing house, or in any store or mercantile establishment where more than eight persons are employed, or in the operation of any freight or passenger elevator. [31 G. A., ch. 103, § 1.]

[See also § 4999-a2. EDITOR.]

SEC. **2477-b. Where life and health are endangered—age limitation.** No person under sixteen years of age shall be employed at any work or occupation by which, by reason of its nature or the place of employment, the health of such person may be injured, or his morals depraved, or at any work in which the handling or use of gunpowder, dynamite or other like explosive is required, and no female under sixteen years of age shall be employed in any capacity where the duties of such employment compel her to remain constantly standing. [31 G. A., ch. 103, § 2.]

SEC. **2477-c. Hours of labor—noon intermission.** No person under sixteen years of age shall be employed at any of the places or in any of the occupations recited in section one hereof before the hour of six o'clock in the morning or after the hour of nine o'clock in the evening, and if such person is employed exceeding five hours of each day, a noon intermission of not less than thirty minutes shall be given between the hours of eleven and one o'clock, and such person shall not be employed more than ten hours in any one day, exclusive of the noon intermission; but the provisions of this section shall not apply to persons employed in husking sheds or other places connected with canning factories where vegetables or grain are prepared for canning and in which no machinery is operated. [31 G. A., ch. 103, § 3.]

SEC. **2477-d. List posted—proof of age.** Every person, firm or corporation having in its employ, at any of the places or in any of the occupations recited in section one of this act, any persons under sixteen years of age, shall cause to be posted at some conspicuous location at the place of such employment, and where same shall be accessible to inspection at all times during business hours, a list of the names of such persons, giving after each name, the date of the birth of such person and the date when employed. Any officer whose duty it is to enforce the provisions of this act shall have authority to demand of employers proof of age of any child employed in their establishment; such proof shall be an authenticated birth record, and if there is no such record, then a baptismal record fully attested, that will establish the age of the child, and if there is no such record, a school record that will establish the age of the child, attested by a superintendent, principal, or teacher; where no such proof is obtainable, a parent's affidavit, together with affidavits made by two disinterested persons, who are in no way related to either the child or his employers, establishing date of birth, may be accepted, and if no such proof is furnished, such child shall forthwith be dismissed from his employment. [33 G. A., ch. 145, § 1.] [31 G. A., ch. 103, § 4.]

SEC. **2477-e. False statements—other violations—penalty.** Any parent, guardian or other person, who having under his control any person under sixteen years of age causes or permits said person to work or be employed in violation of the provisions of this act, or any person making,

certifying to, or causing to be made or certified to, any statement, certificate or other paper for the purpose of procuring the employment of any person in violation of the provisions of this act, or who makes, files, executes or delivers any such statement, certificate or other paper containing any false statement for the purpose of procuring the employment of any person in violation of this act, or for the purpose of concealing the violation of this act in such employment, and every person, firm or corporation, or the agent, manager, superintendent, or officer of any person, firm or corporation, whether for himself or such person, firm or corporation, either by himself or acting through any agent, foreman, superintendent or manager, who knowingly employs any person or permits any person to be employed in violation of the provisions of this act, or who shall refuse to allow any authorized officer or person to inspect any place of business under the provisions of this act, if demand is made therefor at any time during business hours, or who shall wilfully obstruct such officer or person while making such inspection, or who shall fail to keep posted the lists containing the names of persons employed under sixteen years of age and other information as required by this act, or who shall knowingly insert any false statement in such list, or who violates any other provision of this act, shall be deemed guilty of a misdemeanor, and upon being found guilty thereof, shall be fined not to exceed one hundred dollars or be imprisoned in the county jail not to exceed thirty days. [31 G. A., ch. 103, § 5.]

SEC. **2477-f. Enforcement.** It shall be the duty of the commissioner of the bureau of labor statistics to enforce the provisions of this act, and such commissioner and his deputies, factory inspectors, assistants and other persons authorized by him in writing, state mine inspectors, and county attorneys, mayors, chiefs of police and police officers, acting under their written directions, city and town marshals, sheriffs and their deputies within the territories where they exercise their official functions, and any person having authority therefor in writing from the judge of a court of record within the territory over which such judge has jurisdiction, shall have authority to visit any of the places enumerated in section one of this act, and make an inspection thereof to ascertain if any of the provisions of this act are violated or any person unlawfully employed thereat, and such persons shall not be interfered with or prevented from asking questions of any persons found at the place being inspected by them with reference to the provisions of this act. It shall be the duty of the county attorney to investigate all complaints made to him of the violation of this act, and to attend and prosecute at the trial of all cases for its violation upon any information that may be filed within his county. [31 G. A., ch. 103, § 6.]

SEC. **2477-g. Acts in conflict repealed.** All acts and part of acts in conflict with the provisions of this act are hereby repealed. [31 G. A., ch. 103, § 7.]

SEC. **2477-h. Employment agencies—failure to procure employment—fee returned.** Every person, firm or corporation who shall agree or promise, or who shall advertise through the public press, or by letter, to furnish employment or situations to any person or persons, and in pursuance of such advertisement, agreement or promise, shall receive any money, personal property or other valuable thing whatsoever, and who shall fail to procure for such person or persons acceptable situations or employment as agreed upon, within the time stated, or agreed upon, or if no time be specified then within a reasonable time, shall upon demand return all such money, personal property or valuable consideration of

whatever character, except an amount not to exceed one dollar to be charged as a filing fee. [32 G. A., ch. 128, § 1.]

SEC. **2477-i. Copy of application or agreement furnished applicant.** It shall be unlawful for any person, firm or corporation to receive any application for employment from, or enter into any agreement with, any person to furnish or procure for said person any employment unless there is delivered to any such person making such application or contract at the time of the making thereof a true and full copy of such application or agreement, which application or agreement shall specify the fee or consideration to be paid by the person seeking employment. [32 G. A., ch. 128, § 2.]

SEC. **2477-j. Division of fees between employment bureau and employer prohibited.** It shall be unlawful for any person, firm or corporation or any person employed or authorized by such person, firm or corporation to hire or discharge employes, to receive any part of any fee or any percentage of wages or any compensation of any kind whatever, that is agreed upon to be paid by any employe of said person, firm or corporation to any employment bureau or agency for services rendered to any such employe in procuring for him employment with said person, firm or corporation. [32 G. A., ch. 128, § 3.]

SEC. **2477-k. Investigation by labor commissioner.** The commissioner of the bureau of labor statistics, or his deputy, shall have authority to examine at any time the records, books and any papers relating in any way to the conduct of any employment agency or bureau within the state, and must investigate any complaint made against any such employment agency or bureau, and if any violations of law are found he shall at once file or cause to be filed an information against any person, firm or corporation guilty of such violation of law. [32 G. A., ch. 128, § 4.]

SEC. 2477-l. Penalty. Any person, firm or corporation violating any of the provisions of this act, or who shall refuse access to records, books or other papers relative to the conduct of such agency or bureau, to any person having authority to examine same, shall be deemed guilty of a misdemeanor and upon conviction thereof shall be punished by a fine not exceeding one hundred dollars, or imprisonment in the county jail not to exceed thirty days. [32 G. A., ch. 128, § 5.]

CHAPTER 8-A.

OF EMPLOYERS' LIABILITY AND WORKMEN'S COMPENSATION.

Part I.

SECTION **2477-m. Employers—employes—exceptions.** (a) *Presumption—employes excepted.* Except as by this act otherwise provided, it shall be conclusively presumed that every employer as defined by this act has elected to provide, secure and pay compensation according to the terms, conditions, and provisions of this act for any and all personal injuries sustained by an employe arising out of and in the course of the employment; and in such cases the employer shall be relieved from other liability for recovery of damages or other compensation for such personal injury, unless by the terms of this act otherwise provided; but this act shall not apply to any household or domestic servant, farm or other laborer

engaged in agricultural pursuits, nor persons whose employment is of a casual nature.

(b) *Compulsory.* Where the state, county, municipal corporation, school district, cities under special charter or[1] commission form of government is the employer, the terms, conditions and provisions of this act for the payment of compensation and amount thereof for such injury sustained by an employe of such employer shall be exclusive, compulsory and obligatory upon both employer and employe.

(c) *Rejection of terms—reasons for.* An employer having the right under the provisions of this act to elect to reject the terms, conditions and provisions thereof and [who] in such case exercises the right in the manner and form by this act provided, such employer shall not escape liability for personal injury sustained by an employe of such employer when the injury sustained arises out of and in the usual course of the employment because:

(1) The employe assumed the risks inherent in or incidental to or arising out of his or her employment, or the risks arising from the failure of the employer to provide and maintain a reasonably safe place to work, or the risks arising from the failure of the employer to furnish reasonably safe tools or appliances, or because the employer exercised reasonable care in selecting reasonably competent employes in the business;

(2) That the injury was caused by the negligence of the coemploye;

(3) That the employe was negligent unless and except it shall appear that such negligence was wilful and with intent to cause the injury; or the result of intoxication on[2] the part of the injured party.

(4) [d] *Negligence presumed—burden of proof—notices of election to reject—presumption on failure to give notice.* In actions by an employe against an employer for personal injury sustained arising out of and in the course of the employment where the employer has elected to reject the provisions of this act, it shall be presumed that the injury to the employe was the direct result and growing out of the negligence of the employer; and that such negligence was the proximate cause of the injury; and in such cases the burden of proof shall rest upon the employer to rebut the presumption of negligence.

Every such employer shall be conclusively presumed to have elected to provide, secure and pay compensation to employes for injuries sustained arising out of and in the course of the employment according to the provisions of this act, unless and until notice in writing of an election to the contrary shall have been given to the employes by posting the same in some conspicuous place at the place where the business is carried on, and also by filing notice with the Iowa industrial commissioner with return thereon by affidavit showing the date that notice was posted as by this act provided. Provided, however, that any employer beginning business after the taking effect of this act and giving notice at once of his desire not to come under the provisions of this act, shall not be considered as under the act; provided, however, that such employer shall not be relieved of the payment of compensation as by this act provided until thirty days after the filing of such notice with the Iowa industrial commissioner, which notice shall be substantially in the following form:

EMPLOYERS' NOTICE TO REJECT.

To the employes of the undersigned, and the Iowa industrial commissioner:

You and each of you are hereby notified that the undersigned rejects the

terms, conditions and provisions to provide, secure and pay compensation to employes of the undersigned for injuries received as provided in the acts of the.....[thirty-fifth] general assembly known as chapter .....[one hundred forty-seven], and elects to pay damages for personal injuries received by such employe under the common law and statutes of this state modified by subdivisions one, two, three and four of section one, chapter.....[one hundred forty-seven] of the acts of the..... [thirty-fifth] general assembly and acts amendatory thereto.

Signed.....

State of Iowa, }
..... County. } ss:

The undersigned being first duly sworn deposes and says that a true, correct and verbatim copy of the foregoing notice was on the ..... day of ....., 19...., posted at.....

(State fully place where posted.)

.....

Subscribed and sworn to before me by ....., this ..... day of ....., 19....

.....

Notary Public.

The employer shall keep such notice posted in some conspicuous place which shall apply to the employes subsequently employed by the employer with the same force and effect and to the same extent and in like manner as employes in the employ at the time the notice was given.

Where the employer and employe have not given notice of an election to reject the terms of this act, every contract of hire express or implied, shall be construed as an implied agreement between them and a part of the contract on the part of the employer to provide, secure and pay, and on the part of the employe to accept compensation in the manner as by this act provided for all personal injuries sustained arising out of and in the course of the employment. [35 G. A., ch. 147, § 1.]

[1"and" in enrolled bill. EDITOR.]
[2"of" in enrolled bill. EDITOR.]

SEC. **2477-m1. Wilful injury—intoxication.** No compensation under this act shall be allowed for an injury caused:

(a) By the employe's wilful intention to injure himself or to wilfully injure another; nor shall compensation be paid to an injured employe if injury is sustained where intoxication of the employe was the proximate cause of the injury. [35 G. A., ch. 147, § 2.]

SEC. **2477-m2. Rights of employe—notice to reject.** (a) *Exclusive of other rights—presumption—notice.* The rights and remedies provided in this act for an employe on account of injury shall be exclusive of all other rights and remedies of such employe, his personal or legal representatives, dependents or next of kin, at common law or otherwise [,] on account of such injury; and all employes affected by this act shall be conclusively presumed to have elected to take compensation in accordance with the terms, conditions and provisions of this act until notice in writing shall have been served upon his employer, and also on the Iowa industrial commissioner, with return thereon by affidavit showing the date upon which notice was served upon the employer.

(b) *Rejection — procedure — oath — form — undue influence.* In the event such employe elects to reject the terms, conditions and provisions of this act, the rights and remedies thereof shall not apply where an employe

brings an action or takes proceedings to recover damages or compensation for injuries received growing out of and in the course of his employment, except as otherwise provided by this act; and in such actions where the employe has rejected the terms of this act the employer shall have the right to plead and rely upon any and all defenses, including those at common law, and the rules and defenses of contributory negligence, assumption of risk and fellow-servant shall apply and be available to the employer as by statute authorized unless otherwise provided in this act. Provided, however, that if an employe sustains an injury as the result of the employer's failure to furnish or failure to exercise reasonable care to keep or maintain any safety device required by statute or rule, or violation of any of the statutory provisions or rules and regulations now or hereafter in force relating to safety of employes, the doctrine of assumed risk in such case growing out of the negligence of the employer shall not apply or be available as defensive matter to such offending party. The notice required to be given by an employe shall be substantially in the following form:

EMPLOYES' NOTICE TO REJECT.

To ..... and the Iowa industrial commissioner:
(Name of employer.)

You and each of you are hereby notified that the undersigned hereby elects to reject the terms, conditions and provisions of an act for the payment of compensation as provided by [chapter one hundred forty-seven of] the acts of the..... [thirty-fifth] general assembly and acts amendatory thereto, and elects to rely upon the common law as modified by section three of [chapter one hundred forty-seven of] the acts of the..... [thirty-fifth] general assembly for the right to recover for personal injury which I may receive, if any, growing out of and arising from the employment while in line of duty for my employer above named.

Dated this ..... day of ....., 19....

Signed.....

State of Iowa, }
..... County. } ss:

The undersigned being first duly sworn deposes and says that the written notice was on the ..... day of ....., 19....., served on the within named employer of the undersigned by delivering to ..... a true, correct and verbatim copy thereof.

.....
(Name of person served.)

Subscribed and sworn (or affirmed) to before me by the said .....
..... this ..... day of ....., 19....

.....
Notary Public.

In any case where an employe or one who is an applicant for employment elects to reject the terms, conditions and provisions of this act, he shall, in addition to the notice required by subdivision (b) of section three of this act, state in an affidavit to be filed with said notice who, if any person, requested, suggested, or demands of such person to exercise the right to reject the provisions of this act. And if request, suggestion, or demand has been made of such employe by any person, such employe shall give and state the name of the person who made the request, suggestion, or demand, and all of the circumstances relating thereto, the date and place when and where made, and persons present, and if it be found that the employer of such employe, or an employer to whom an applicant for

employment, or any person a member of the firm, association, corporation, or agent or official of such employer, made a request, suggestion or demand of such employe or applicant for employment to reject the terms, conditions and provisions of this act, such request, suggestion or demand if made under such conditions, shall be conclusively presumed to have been sufficient to have unduly influenced such employe or an applicant for employment to exercise the right to reject the terms of this act, and the rejection made under such circumstances shall be conclusively presumed to have been procured through fraud and thereby fraudulently procured, and such rejection shall be null and void and of no effect.

No person interested in the business of such employer, financially or otherwise, shall be permitted to administer the oath to the affidavit required in case an[1] employe or applicant for employment elects to exercise the right to reject the provisions of this act. And the person administering such oath in making such affidavit, shall carefully read the notice and affidavit to such person making such rejection, and shall explain that the purpose of the notice is to bar such person from recovering compensation in accordance with the schedule and terms of this act in the event that he sustains an injury in the course of such employment; all of which shall be shown by certificate of the person administering the oath herein contemplated. The Iowa industrial commissioner, or any person acting for such commissioner, shall refuse to file the notice and affidavit, unless such notice, affidavit and certificate fully, and in detail, comply with the requirements hereof. And if such rejection, affidavit and certificate is found insufficient for any cause, [it] shall be returned by mail or otherwise to the person who executed the instrument. [35 G. A., ch. 147, § 3.]

[1"as" in enrolled bill. EDITOR.]

SEC. **2477-m3. Tenure of election.** (a) *Until provisions complied with.* When the employer or employe has given notice in compliance with this act electing to reject the terms thereof such election shall continue and be in force until such employer or employe shall thereafter elect to come under the provisions of this act as is provided in subdivision (b) of this section.

(b) *Notice—how filed.* When an employer or employe rejects the terms, conditions or provisions of this act, such party may at any time thereafter elect to waive the same by giving notice in writing in the same manner required of the party in electing to reject the provisions of the act and which shall become effective when filed with the Iowa industrial commissioner. [35 G. A., ch. 147, § 4.]

SEC. **2477-m4. Liability of employer after election to reject.** Where the employer and employe elect to reject the terms, conditions and provisions of this act, the liability of the employer shall be the same as though the employe had not rejected the terms, conditions and provisions thereof. [35 G. A., ch. 147, § 5.]

SEC. **2477-m5. Subsequent election to reject—security for compensation.** An employer having come under this act, who thereafter elects to reject the terms, conditions and provisions thereof, shall not be relieved from the payment of compensation to such employe who sustains an injury in the course of the employment before the election to reject becomes effective; and in such cases the employer shall be required to secure the payment of any compensation due or that may become due to such workman, subject to the approval of the Iowa industrial commissioner. [35 G. A., ch. 147, § 6.]

SEC. **2477-m6. Liability of other than that of employer.** Where an employe coming under the provisions of this act receives an injury for which compensation is payable under this act and which injury was caused under circumstances creating a legal liability in some person other than the employer, to pay damages in respect thereof:

(a) *Proceedings against both parties.* The employe or beneficiary may take proceedings both against that person to recover damages and against the employer for compensation, but the amount of the compensation to which he is entitled under this act shall be reduced by the amount of damages recovered.

(b) *Indemnity—subrogation.* If the employe or beneficiary in such case recovers compensation under this act, the employer by whom the compensation was paid or the party who has been called upon to pay the compensation, shall be entitled to indemnity from the person so liable to pay damages as aforesaid, and shall be subrogated to the rights of the employe to recover therefor. [35 G. A., ch. 147, § 7.]

SEC. **2477-m7. Contract to relieve not operative.** No contract, rule, regulation or device whatsoever shall operate to relieve the employer, in whole or in part, from any liability created by this act except as herein provided. [35 G. A., ch. 147, § 8.]

SEC. **2477-m8. Notice of injury—form—failure to give.** Unless the employer or representative of such employer shall have actual knowledge of the occurrence of an injury, or unless the employe or someone on his behalf, or some of the dependents or someone on their behalf, shall give notice thereof to the employer within fifteen days of the occurrence of the injury, then no compensation shall be paid until and from the date such notice is given or knowledge obtained; but if notice is given or the knowledge obtained within thirty days from the occurrence of the injury, no want, failure or inaccuracy of a notice shall be a bar to obtaining compensation, unless the employer shall show that he was prejudiced by such want, defect or inaccuracy, and then only to the extent of such prejudice. Provided, that if the employe or beneficiary shall show that his failure to give prior notice was due to mistake, inadvertence, ignorance of fact or law, or inability, or to the fraud, misrepresentation or deceit of another or to any other reasonable cause or excuse, then compensation may be allowed, unless and then to the extent only that the employer shall show that he was prejudiced by failure to receive such notice. Provided, further, unless knowledge is obtained or notice given within ninety days after the occurrence of the injury, no compensation shall be allowed. No form of notice shall be required but may substantially conform to the following form:

FORM OF NOTICE.

To .....

You are hereby notified that on or about the .... day of ....., 19...., personal injury was sustained by ..... while in your employ at .....,

(Give name of place employed and point where located when injury occurred.)

and that compensation will be claimed therefor.

Signed.....

but no variation from this form of notice shall be material if the notice is sufficient to advise the employer that a certain employe, by name, received an injury in the course of his employment on or about a specified time at or near a certain place. Notice served upon one [upon] whom an original notice may be served in civil cases shall be a compliance with this act.

The notice required to be given to the employer may be served by any person over sixteen years of age, who shall make return upon a copy of the notice, properly sworn to, showing the date of service where and upon whom served, but no special form of the return of service of the notice shall be required. It shall be sufficient if the facts therefrom can be reasonably ascertained. The return of service may be amended at any time. [35 G. A., ch. 147, § 9.]

SEC. **2477-m9. Compensation schedule.** If any employe has not given notice to reject the terms, conditions and provisions of this act, or has given such notice and waived the same as by this act provided, and the employer has not rejected the terms, conditions and provisions of the act or has given such notice and waived the same and the employe receives a personal injury arising out of and in the course of the employment, compensation shall be paid as herein provided.

(a) The compensation provided for in this act shall be paid in accordance with the schedule unless otherwise provided.

(b) At any time after an injury and until the expiration of two weeks of incapacity, the employer, if so requested by the workman, or anyone for him, or if so ordered by the court or Iowa industrial commissioner, shall furnish reasonable surgical, medical and hospital services and supplies, not exceeding one hundred dollars.

(c) Where the injury causes death the compensation under this act shall be as follows:

The employer shall in addition to any other compensation pay the reasonable expense of the employe's last sickness and burial not to exceed one hundred dollars. If the employe leaves no dependents this shall be the only compensation.

(d) If death results from the injury, the employer shall pay the dependents of the employe wholly dependent upon his earnings for support at the time of the injury, a weekly payment equal to fifty per cent. of his average weekly wages, but not more than ten dollars nor less than five dollars per week for a period of three hundred weeks.

(e) If the employe leaves dependents only partially dependent upon his earnings for support at the time of the injury, the weekly compensation to be paid as aforesaid shall be equal to the same proportion of the weekly payments for the benefit of persons wholly dependent as the amount contributed by the employe to such partial dependents bears to the annual earnings of the deceased at the time of the injury. When weekly payments have been made to an injured employe before his death, the compensation to dependents shall begin from the date of the last of such payments, but shall not continue more than three hundred weeks from the date of the injury.

(f) Where injury causes death to an employe, a minor, whose earnings were received by the parent, the compensation to be paid the parent shall be two thirds of the amount provided for payment in subdivision (d) section ten.

(g) No compensation shall be paid for an injury which does not incapacitate the employe for a period of at least two weeks from earning full wages; but if incapacity extends beyond a period of two weeks, compensation shall begin on the fifteenth day after the injury.

(h) For injury producing temporary disability, fifty per cent. of the average weekly wages received at the time of injury, subject to a maximum compensation of ten dollars and a minimum of five dollars per week; pro-

vided, that if at the time of injury the employe receives wages less than five dollars per week, then he shall receive the full amount of wages per week. This compensation shall be paid during the period of such disability, not, however, beyond three hundred weeks.

(i) For disability total in character and permanent in quality [,] fifty per cent. of the average weekly wages received at the time of the injury, subject to a maximum compensation of ten dollars per week, and a minimum of five dollars per week; provided, that if at the time of injury, the employe receives wages less than five dollars per week, then he shall receive the full amount of wages per week. This compensation shall be paid during the period of such disability, not [,] however, beyond four hundred weeks.

(j) For disability partial in character and permanent in quality [,] the compensation shall be based upon the extent of such disability.

For all cases included in the following schedule [,] compensation shall be paid as follows, to wit:

(1) For the loss of a thumb [,] fifty per cent. of daily wages during forty weeks.

(2) For the loss of a first finger, commonly called the index finger, fifty per cent. of daily wages during thirty weeks.

(3) For the loss of a second finger, fifty per cent. of daily wages during twenty-five weeks.

(4) For the loss of a third finger, fifty per cent. of daily wages during twenty weeks.

(5) For the loss of a fourth finger, commonly called the little finger, fifty per cent. of daily wages for fifteen weeks.

(6) For the loss of the first phalange of the thumb or of any finger shall be considered to be equal to the loss of one half of such thumb or finger and compensation shall be one half of the amounts above specified.

(7) The loss of more than one phalange shall be considered as the loss of the entire finger or thumb; provided, however, that in no case shall the amount received for more than one finger exceed the amount provided in this schedule for the loss of a hand.

(8) For the loss of a great toe, fifty per cent. of daily wages during twenty-five weeks.

(9) For the loss of one of the toes other than the great toe, fifty per cent. of daily wages during fifteen weeks.

(10) For the loss of the first phalange of any toe, shall be considered to be equal to the loss of one half of such toe and the compensation shall be one half of the amount above specified.

(11) The loss of more than one phalange shall be considered as the loss of the entire toe.

(12) For the loss of a hand [,] fifty per cent. of daily wages during one hundred fifty weeks.

(13) For the loss of an arm [,] fifty per cent. of daily wages during two hundred weeks.

(14) For the loss of a foot [,] fifty per cent. of daily wages during one hundred twenty-five weeks.

(15) For the loss of a leg, fifty per cent. of daily wages during one hundred seventy-five weeks.

(16) For the loss of an eye, fifty per cent. of daily wages during one hundred weeks.

(17) For the loss of both arms, or both hands, or both feet, or both legs, or both eyes, or of any two thereof, shall constitute total and permanent disability, to be compensated according to provisions of clause (i), section ten, part one hereof.

(18) In all other cases in this, clause (j), the compensation shall bear such relation to the amount stated in the above schedule as the disability bears to those produced by the injuries named in the schedule. Should the employe and employer be unable to agree upon the amount of compensation to be paid in cases not specifically covered by the schedule, the amount of compensation shall be settled according to provisions of this act as in other cases of disagreement.

(19) The amounts specified in this, clause (j) and subdivisions thereof[,] shall be subject to the same limitations as to maximum and minimum weekly payments as are stated in clause (h), section ten hereof. [35 G. A., ch. 147, § 10.]

SEC. **2477-m10. Death—payment of unpaid balance.** Where an employe is entitled to compensation under this act for an injury received and death ensues from any cause not resulting from the injury for which he was entitled to the compensation, payments of the unpaid balance for such injury shall cease and all liability therefor shall terminate. [35 G. A., ch. 147, § 11.]

SEC. **2477-m11. Examination of injured employe—suspension of compensation.** After an injury [,] the employe, if so requested by his employer, shall submit himself for examination at some reasonable time and place within the state and as often as may be reasonably requested, to a physician or physicians authorized to practice under the laws of this state, without cost to the employe; but if the employe requests [,] he shall, at his own cost, be entitled to have a physician or physicians of his own selection present to participate in such examination. The refusal of the employe to submit to such examination shall deprive him of the right to compensation during the continuance of such refusal. When a right to compensation is thus suspended no compensation shall be payable in respect to the period of suspension. [35 G. A., ch. 147, § 12.]

SEC. **2477-m12. Contributions from employes—no reduction of employer's responsibility.** The compensation herein provided shall be the measure of the responsibility which the employer has assumed for injuries or death that may occur to employes in his employment subject to the provisions of this act, and it shall not be in any wise reduced by contribution from employes. [35 G. A., ch. 147, § 13.]

SEC. **2477-m13. Trustees for minors and those mentally incapacitated—reports.** When a minor dependent or one physically or mentally incapacitated from earning is entitled to compensation under this act, payment shall be made to a trustee appointed by the judge of the district court for each county in the respective judicial districts, and the money coming into the hands of the said trustee shall be expended for the use and benefit of the person entitled thereto under the direction and orders of the judge during term time or in vacation. The trustee shall make annual reports to the court of all money or property received and expended for each person, and for services rendered as trustee shall be paid such compensation by the county as the court may direct by written order directed to the auditor of the county who shall issue a warrant therefor upon the treasurer of the county in which the appointment is made. If the judge making the appointment deems it advisable, a trustee may be appointed to serve for more

than one county in the district and the expenses shall be paid ratably by each county according to the amount of work performed in each county. The trustee shall qualify and give bond in such amount as the judge may direct, which may be increased or diminished from time to time as the court may deem best. [35 G. A., ch. 147, § 14.]

SEC. **2477-m14. Commutation of future payments—discretion of court.** In any case where the period of compensation can be determined definitely either party may, upon due notice to the other, apply to any judge of the district court for the county in which the accident occurred for an order commuting future payments to a lump sum. And such judge may make such an order when it shall be shown to his satisfaction that the payment of a lump sum in lieu of future monthly or weekly payments, as the case may be, will be for the best interest of the person or persons receiving or dependent upon said compensation, or that the continuance of periodical payments will[,] as compared with lump sum payments[,] entail undue expense or undue hardship upon the employer liable therefor. Where the commutation is ordered, the court shall fix the lump sum to be paid at an amount which will equal the total sum of the probable future payments capitalized at their present value and upon the basis of interest, calculated at five per cent. per annum. Upon the payment of such amount the employer shall be discharged from all further liability on account of such injury or death, for which said compensation was being paid, and be entitled to a duly executed release, upon filing which the liability of such employer under any agreement, award, finding or judgment shall be discharged of record. [35 G. A., ch. 147, § 15.]

SEC. **2477-m15. Schedule of computation.** The basis for computing compensation provided for in this act shall be as follows:

(a) The compensation shall be computed on the basis of the annual earnings which the injured person received as salary, wages or earnings in the employment of the same employer during the year next preceding the injury.

(b) Employment by the same employer shall be taken to mean employment by the same employer in the grade in which the employe was employed at the time of the accident, uninterrupted by absence from work due to illness or any other unavoidable cause.

(c) The annual earnings, if not otherwise determinable, shall be regarded as three hundred times the average daily earnings in such computation.

(d) If the injured person has not been engaged in the employment for a full year immediately preceding the accident, the compensation shall be computed according to the annual earnings which persons of the same class in the same or in neighboring employments of the same kind have earned during such period. And if this basis of computation is impossible, or should appear to be unreasonable, three hundred times the amount which the injured person earned on an average of those days when he was working during the year next preceding the accident, shall be used as a basis for the computation.

(e) In case of injured employes who earn either no wages or less than three hundred times the usual daily wage or earnings of the adult day laborer in the same line of industry of that locality[,] the yearly wage shall be reckoned as three hundred times the average daily local wages of the average wage earner in that particular kind or class of work; or if

information of that class is not obtainable, then of the class or kindred or similarity in the same general employment in the same neighborhood.

(f) As to employes in employments in which it is the custom to operate for a part of the whole number of working days in each year, such number shall be used instead of three hundred as a basis for computing the annual earnings, provided the minimum number of days which shall be used for the basis of the year's work shall not be less than two hundred.

(g) Earnings, for the purpose of this section, shall be based on the earnings for the number of hours commonly regarded as a day's work for that employment, and shall exclude overtime earnings. The earnings shall not include any sum which the employer has been accustomed to pay the employe to cover any special expense entailed on him by the nature of the employment.

(h) In computing the compensation to be paid to any employe who, before the accident for which he claims compensation, was disabled and drawing compensation under the terms of this act, the compensation for each subsequent injury shall be apportioned according to the proportion of incapacity and disability caused by the respective injuries which he may have suffered. [35 G. A., ch. 147, § 16.]

SEC. **2477-m16. Terms defined.** In this act unless the context otherwise requires:

(a) "Employer" includes and applies to any person, firm, association or corporation, and includes state, counties, municipal corporations, cities under special charter and under commission form of government and shall include school districts and the legal representatives of a deceased employer. Whenever necessary to give effect to section seven of this act, it includes a principal or intermediate contractor.

(b) "Workman" is used synonymously[1] with "employe"[,] and means any person who has entered into the employment of, or works under contract of service, express or implied, or apprenticeship for an employer, except a person whose employment is purely casual and not for the purpose of the employer's trade or business or those engaged in clerical work only,[2] but clerical work shall not include one who may be subjected to the hazards of the business or one holding an official position or standing in a representative capacity of the employer, or an official elected or appointed by the state, county, school district, municipal corporation, cities under special charter and commission form of government; provided that one who sustains the relation of contractor with any person, firm, association, corporation or the state, county, school district, municipal corporation, cities under special charter or commission form of government, shall not be considered an employe thereof.

The term "workman" shall include the singular and plural of both sexes. Any reference to a workman who has been injured shall, where the workman is dead, include a reference to his dependents as herein defined, legal representatives or where the workman is a minor or incompetent to his guardian or next friend.

(c) The following shall be conclusively presumed to be wholly dependent upon a deceased employe:

(1) The surviving spouse, unless it be shown that the survivor wilfully deserted deceased without fault upon the part of the deceased; and if it be shown that the survivor deserted deceased without fault upon the part of deceased, the survivor shall not be regarded as a dependent in any degree. No surviving spouse shall be entitled to the benefits of this act

unless she shall have been married to the deceased at the time of the injury.

(2) A child or children under sixteen years of age (and over said age if physically or mentally incapacitated from earning) whether actually dependent for support or not upon the parent at the time of his or her death.

(3) A parent of a minor entitled to the earnings of the employe at the time when the injury occurred, subject to provisions of subdivision (f), section ten hereof.

(4) If the deceased employe leaves dependent surviving spouse, the full compensation shall be paid to such spouse; but if the dependent surviving spouse dies before payment is made in full, the balance remaining shall be paid to the person or persons wholly dependent, if any, share and share alike. If there be no person or persons wholly dependent, then payment shall be made to partial dependents.

(5) In all other cases [,] questions of dependency in whole or in part shall be determined in accordance with the fact as the fact may be at the time of the injury; and in such other cases if there is more than one person wholly dependent, the death benefit shall be equally divided among them, and persons partially dependent, if any, shall receive no part thereof. If there is no one wholly dependent and more than one person partially dependent, the death benefit shall be divided among them according to the relative extent of their dependency. Provided, however, that when a lump sum is paid as contemplated by this act, the court or commissioner, in making distribution thereof, shall take into consideration the contingent rights of partial beneficiaries or the rights of those who may become such after a wholly dependent child or children become sixteen years of age.

(6) Step-parents shall be regarded in this act as parents.

(7) Adopted child or children or stepchild or children shall be regarded in this act the same as if issue of the body.

(d) "Injury" or "personal injury" includes death resulting from injury.

(e) The words "personal injury arising out of and in the course of such employment" shall include injuries to employes whose services are being performed on, in or about the premises which are occupied, used or controlled by the employer, and also injuries to those who are engaged elsewhere in places where their employer's business requires their presence and subjects them to dangers incident to the business.

(f) The words "injury" and "personal injury" shall not include injury caused by the wilful act of a third person directed against an employe for reasons personal to such employe or because of his employment.

(g) They shall not include a disease except as it shall result from the injury.

(h) "Industrial employment" includes only employment in occupation, callings, businesses or pursuits which are carried on by the employer for the sake of pecuniary gain.

(i) The word "court" whenever used in this act, unless the context shows otherwise, shall be taken to mean the district court. [35 G. A., ch. 147, § 17.]

[1"synonymous" in enrolled bill. EDITOR.]

[2The bill does not seem to be correctly enrolled here The records indicate that the amendment "but clerical work shall not include anyone who may be subjected to the hazards of the business" should have been placed before the comma following the word "only." EDITOR.]

SEC. **2477-m17. Insurance against compensation prohibited—penalty.** (a) Any contract of employment, relief benefit or insurance or other device whereby the employe is required to pay any premium or premiums for insurance against the compensation provided for in this act shall be null and void; and any employer withholding from the wages of any employe any amount for the purpose of paying any such premium shall be guilty of a misdemeanor and punishable by a fine not less than ten dollars nor more than fifty dollars for each offense [,] in the discretion of the court.

No employe or beneficiary shall have power to waive any of the provisions of this act in regard to the amount of compensation which may be payable to such employe or beneficiary hereunder to whom the act applies. [35 G. A., ch. 147, § 18.]

SEC. **2477-m18. Contract respecting claim for injury deemed fraudulent.** Any contract or agreement made by any employer or his agent or attorney with any employe or any other beneficiary of any claim under the provisions of this act within twelve days after the injury shall be presumed to be fraudulent. [35 G. A., ch. 147, § 19.]

SEC. **2477-m19. Safety appliances—standards.** The Iowa industrial commissioner coöperating with the employers affected by this act, or any committee or committees appointed by such employers or the Iowa industrial commissioner, shall fix standards of safety for safety appliances or places of employment, except mines under the jurisdiction of the mine inspectors. [35 G. A., ch. 147, § 20.]

SEC. **2477-m20. Attorney's lien—subject to approval.** No claim of an attorney at law for services in securing a recovery under this act shall be an enforceable lien thereon unless the amount of the same be approved in writing by a judge of a court of record or the Iowa industrial commissioner, which approval may be made in term time or vacation. [35 G. A., ch. 147, § 21.]

SEC. **2477-m21. Applicable to intra-state and interstate commerce.** The provisions of this act shall apply to employers and employes as defined in this act engaged in intra-state commerce and also those engaged in interstate or foreign commerce for whom a rule or method of compensation has been or may be established by the congress of the United States, only to the extent that their mutual connection with intra-state work or foreign commerce shall be clearly separable and distinguishable from interstate or foreign commerce; provided that any such employer and workman of such employer working only in this state may, subject to the approval of the Iowa industrial commissioner, and so far as not forbidden by any act of congress or permitted, voluntarily by written agreement, accept and become bound by the provisions of this act in like manner and with the same force and effect in every respect as by this act provided for other employers and employes. [35 G. A., ch. 147, § 22.]

PART II.

SEC. **2477-m22. Iowa industrial commissioner—appointment—term.** There is hereby created the office of Iowa industrial commissioner, to be appointed by the governor, by and with the consent of the senate. The term of office of the commissioner shall be six years. An appointment may be made to fill a vacancy or otherwise when the senate is not in session, but shall be acted upon at the next session thereof. [35 G. A., ch. 147, § 23.]

SEC. **2477-m23. Salary — expenses—office—seal—assistants — accounts—political activity—annual appropriation.** The salary and actual necessary expenses of the commissioner shall be paid by the state, and he shall be provided with adequate and necessary office rooms, furniture, equipment, supplies and other necessaries in the transaction of the business. The salary of the commissioner shall be three thousand dollars per annum. The commissioner, by and with the consent of the executive council [,] may fix the salary and appoint a secretary and other assistants and clerical help as may be required and needed, provided, that the salary of the secretary shall not exceed fifteen hundred dollars per annum. The salary and actual personal expense account of the commissioner shall be itemized and sworn to, and filed as other current bills as provided by statute, and warrant therefor shall be issued by the auditor upon the treasurer of the state for the payment thereof at the end of each calendar month; provided, however, that the expense account may be audited, allowed and paid at the end of each week. The commissioner shall provide himself with a seal, which shall be used to authenticate his orders, decisions and other proceedings deemed necessary, upon which shall be inscribed the words "Iowa Industrial Commissioner's Seal" and the date of organization. All other accounts made by, through or under the commissioner for salaries [and] expenditures, unless otherwise by this act provided, shall be itemized and sworn to by the parties entitled thereto, audited by the commissioner, attested by the secretary, filed as other bills are required by statute, and a warrant shall issue therefor by the auditor of state upon the treasurer, who shall pay the same out of the funds appropriated for the use of the commissioner as by this act provided. The salaries of all persons under the commissioner shall be audited, allowed and paid at the end of each month, and expense accounts may be audited, allowed and paid at the end of each week. The commissioner shall have the power to remove the secretary or any other person appointed to an office by him at any time the commissioner may see fit.

It shall be unlawful for any appointee by the commissioner to espouse the election or appointment of any candidate for or to any political office, or contribute to the campaign fund of any political party, or to the campaign fund of any person who is a candidate for election or appointment to any political office, and any person performing the duties as an appointee under the commissioner violating the provisions of this act shall be sufficient cause for dismissal and removal from office.

Before entering upon his duties the commissioner shall qualify by taking the oath of his office, that he will support the constitution of the United States and of the state of Iowa, and will faithfully and impartially, without fraud, fear or favor, discharge the duties of his office incumbent upon him, as provided by the law of the state of Iowa, to the best of his ability and understanding.

There is hereby appropriated out of any money not otherwise appropriated for the use of the commissioner, as contemplated within the terms of this act or acts amendatory thereof, or other statutes relating to the commissioner, his duties and responsibilities empowered by law, the sum of twenty thousand dollars annually, and in addition thereto the executive council shall provide and furnish the commissioner with such printing as may be necessary in the transaction of the business within the contemplation of law. [35 G. A., ch. 147, § 24.]

SEC. **2477-m24. Powers—rules—witnesses—reports.** The commissioner may make rules and regulations not inconsistent with this act for

carrying out the provisions of the act. Process and procedure under this act shall be as summary as reasonably may be. The commissioner shall have the power to subpoena witnesses, administer oaths and to examine such books and records of the parties to a proceeding or investigation as relate to questions in dispute or under investigation. The fees for attending as a witness before the industrial commissioner shall be one dollar and fifty cents per diem; for attending before an arbitration committee, one dollar per diem; in both cases five cents per mile for traveling to and from the place of hearing. The district court is hereby empowered to enforce by proper proceedings the provisions of this section relating to the attendance and testimony of witnesses and the examination of books and records. The commissioner shall make biennial reports to the governor who shall transmit the same to the general assembly, in which [,] among other things, the commissioner shall recommend such changes in the law covered by this act as he[1] may deem necessary. [35 G. A., ch. 147, § 25.]

[1]"It" in enrolled bill. EDITOR.]

SEC. **2477-m25. Compensation agreements—approval.** If the employer and the employe reach an agreement in regard to the compensation under this act, a memorandum thereof shall be filed with the Iowa industrial commissioner by the employer or employe, and unless the commissioner shall, within twenty days, notify the employer and employe of his disapproval of the agreement by registered letter sent to their addresses as given on the memorandum filed, the agreement shall stand as approved and be enforceable for all purposes under the provisions of this act. Such agreement shall be approved by said commissioner only when the terms conform to the provisions of this act. [35 G. A., ch. 147, § 26.]

SEC. **2477-m26. Committee of arbitration.** If the employer and the injured employe or representatives or dependents fail to reach an agreement in regard to compensation under this act, either party may notify the industrial commissioner, who shall thereupon call for the formation of a committee of arbitration. The arbitration committee shall consist of three persons, one of whom shall be the industrial commissioner who shall act as chairman. The other two shall be named, respectively, by the two parties. If a vacancy occurs it shall be filled by the party whose representative is unable to act. [35 G. A., ch. 147, § 27.]

SEC. **2477-m27. Oath of arbitrators.** The arbitrators appointed by the parties shall be sworn by the chairman to take the following oath:

I ..... do solemnly swear (or affirm) that I will faithfully perform my duties as arbitrator and will not be influenced in my decision by any feeling of friendship or partiality toward either party.

(Signed) .....

[35 G. A., ch. 147, § 28.]

SEC. **2477-m28. Appointment of arbitrators.** It shall be the duty of the industrial commissioner, upon notification that the parties have failed to reach an agreement, to request both parties to appoint their respective representatives on the committee of arbitration. The commissioner shall act as chairman, and, if either party does not appoint its member on this committee within seven days after notification as above provided, or after a vacancy has occurred, the commissioner shall fill the vacancy and notify the parties to that effect. [35 G. A., ch. 147, § 29.]

SEC. **2477-m29. Powers of committee—hearings—decision.** The committee on arbitration shall make such inquiries and investigations as

it shall deem necessary. The hearings of the committee shall be in the city, town or place where the injury occurred and the decision of the committee, together with the statement of evidence submitted before it, its findings of fact, rulings of law and any other matters pertinent to questions arising before it shall be filed with the industrial commissioner. Unless a claim for a review is filed by either party within five days, the decision shall be enforceable under the provisions of this act. [35 G. A., ch. 147, § 30.]

SEC. **2477-m30. Examination by physician—fee—evidence.** The industrial commissioner may appoint a duly qualified impartial physician to examine the injured employe and make report. The fee for this service shall be five dollars, to be paid by the industrial commissioner, together with traveling expenses, but the commissioner may allow additional reasonable amounts in extraordinary cases. Any physician so examining any injured employe shall not be prohibited from testifying before the Iowa industrial commissioner or any other person, commission or court, as to the results of his examination or the condition of the injured employe. [35 G. A., ch. 147, § 31.]

SEC. **2477-m31. Compensation of arbitrators—costs.** The arbitrators named by or for the parties to the dispute shall each receive five dollars as a fee for his services, but the industrial commissioner may allow additional reasonable amounts in extraordinary cases. The fees shall be paid by the employer who may deduct an amount equal to one half of the sum from any compensation found due the employe. And all other costs incurred in the hearing before the board of arbitration shall be taxed to the losing party, or an equitable apportionment made thereof by the committee according to the facts. [35 G. A., ch. 147, § 32.]

SEC. **2477-m32. Review—second hearing.** If a claim for review is filed, the industrial commissioner shall hear the parties and may hear evidence in regard to any or all matters pertinent thereto and may revise the decision of the committee in whole or in part, or may refer the matter back to the committee for further findings of fact, and shall file its decision with the records of the proceedings and notify the parties thereof. No party shall as a matter of right be entitled to a second hearing upon any question of fact. [35 G. A., ch. 147, § 33.]

SEC. **2477-m33. Decree by district court—appeal.** Any party in interest may present certified copy of an order or decision of the commissioner or a decision of an arbitration committee from which no claim for review has been filed within the time allowed therefor, or a memorandum of agreement approved by the commissioner, and all papers in connection therewith, to the district court of the county in which the injury occurred, whereupon said court shall render a decree in accordance therewith and notify the parties. Such decree shall have the same effect and in all proceedings in relation thereto shall thereafter be the same as though rendered in a suit duly heard and determined by said court, except that there shall be no appeal therefrom upon questions of fact or where the decree is based upon an order or decision of the commissioner which has not been presented to the court within ten days after the notice of the filing thereof by the commissioner. Upon the presentation to the court of a certified copy of a decision of the industrial commissioner, ending, diminishing or increasing a weekly payment under the provisions of this act, the court shall revoke or modify the decree to conform to such decision. [35 G. A., ch. 147, § 34.]

SEC. **2477-m34. Review of payment—notice.** (a) Any payment to be made under this act may be reviewed by the industrial commissioner at the request of the employer or of the employe, and on such review it may be ended, diminished or increased subject to the maximum or minimum amounts provided for in this act if the commissioner finds the condition of the employe warrants such action.

(b) Any notice to be given by the commissioner or court provided for in this act shall be in writing but service thereof shall be sufficient if registered and deposited in the mail, addressed to the last known address of the parties. [35 G. A., ch. 147, § 35.]

SEC. **2477-m35. Fees subject to approval.** Fees of attorneys and physicians for services under this act shall be subject to the approval of the industrial commissioner unless otherwise provided in this act. [35 G. A., ch. 147, § 36.]

SEC. **2477-m36. Reports by employers — records — inspection.** Every employer shall hereafter keep a record of all injuries, fatal or otherwise, sustained by his employes in the course of their employment. Within forty-eight hours [,] not counting Sundays and legal holidays, after the employer has knowledge of the occurrence of an accident resulting in personal injury, a report shall be made in writing by the employer to the industrial commissioner on blanks to be procured from the commissioner for that purpose.

Upon the termination of the disability of the injured employe, or if such disability extends beyond a period of sixty days, at the expiration of such period, the employer shall make a supplemental report on blanks to be procured from the commissioner for that purpose. The said reports shall contain the name and nature of the business of the employer, the location of the establishment, the name, age, sex and occupation of the injured employe, and shall state the date and hour of the accident, the nature and cause of the injury, and such other information as may be required by the commissioner. Any employer who refuses or neglects to make the report required by this section shall be punished by a fine of not more than fifty dollars for each offense.

All books, records and pay rolls of the employers, coming under this act showing or reflecting in any way upon the amount of wage expenditure of such employers, shall always be open for inspection by the industrial commissioner, or any of his representatives presenting a certificate of authority from said commissioner for the purpose of ascertaining the correctness of the wage expenditure; the number of men employed and such other information as may be necessary for the uses and purposes of the commissioner in his[1] administration of the law. But information obtained within the contemplation of this act shall be used for no other purpose than the information of the commissioner or insurance association with reference to the duties imposed upon such commissioner. A refusal on the part of the employer to submit his books, records or pay rolls for the inspection of the commissioner, or his authorized representatives presenting written authority from the commissioner, shall subject the employer to a penalty of one hundred dollars for each such offense[,] to be collected by civil action in the name of the state, and paid into the state treasury.[2] [35 G. A., ch. 147, § 37.]

[1"its" in enrolled bill. EDITOR.]
[2"treasurer" in enrolled bill. EDITOR.]

SEC. **2477-m37. Political activity and contributions prohibited—penalty.** It shall be unlawful for the commissioner, during his term of office, to serve upon any committee of any political party or espouse the election or appointment of any person for any political office or contribute to any campaign fund of any political party, or to the campaign fund of any person who is a candidate for election or appointed to any political office. A violation of this section shall be deemed a misdemeanor and upon conviction shall be fined one hundred dollars. [35 G. A., ch. 147, § 38.]

SEC. **2477-m38. Candidates for commissioner—political promises prohibited—penalty.** It shall be unlawful for any person who is a candidate for the appointment as commissioner to make any promise to another, expressed or implied, in consideration of any assistance or influence given or recommendation made that the candidate will, if appointed as commissioner, vote to appoint such person or one whom he may recommend to an office within the power of the commissioner to appoint. A violation thereof shall be deemed a misdemeanor and upon conviction thereof shall be fined one hundred dollars. [35 G. A., ch. 147, § 39.]

SEC. **2477-m39. Recommendations of candidates to be in writing—record—public inspection—financial interest prohibited—penalty.** All recommendations to the governor of any person asking the appointment of another as commissioner shall be reduced to writing signed by the person presenting the same, which shall be filed by the governor in his office and open at all reasonable times for public inspection, and all recommendations made by any person to the commissioner for the appointment of another within the power of the commissioner to appoint, shall be reduced to writing, signed by the person presenting the same and filed by the commissioner and open for public inspection at all reasonable times and hours. If any person recommending the appointment of another within the contemplation of this act refuse to reduce the same to writing, it shall be the duty of the person to whom the recommendation is made, to make a brief memorandum[1] thereof [,] stating the name of the person recommended and the name of the person who made the same, which shall be filed as by this act in other cases provided. It shall be unlawful for the commissioner to be financially interested in any business enterprise coming under or affected by this act during his term of office [,] and [2]if he offend this statute, it shall be sufficient grounds for his removal from office and in such case the governor shall at once declare the office vacant and appoint another to fill the vacancy. [35 G. A., ch. 147, § 40.]

[1]"memoranda" in enrolled bill. EDITOR.]
[2]"any member offending" in enrolled bill. EDITOR.]

SEC. **2477-m40. Removal from office—filing of charges—executive council shall hear.** The governor shall remove from office the commissioner on the grounds of inefficiency, neglect of duty, or malfeasance in office, upon written charges having been filed with the executive council and sustained by proofs; but written notice of such charges, together with a copy thereof, shall be served upon the accused ten days before the time fixed for hearing. The executive council shall have jurisdiction to hear the case, and shall make such finding in accordance with justice and the law. The finding shall be reduced to writing, and report and finding filed with the governor. [35 G. A., ch. 147, § 41.]

PART III.

SEC. **2477-m41. Insurance of liability.** Every employer, subject to the provisions of this act, shall insure his liability thereunder in some corporation, association or organization approved by the state department of insurance. Every such employer shall within thirty days after this act goes into effect exhibit on demand of the state insurance department evidence of his compliance with this section; and if such employer refuses, or neglects to comply with this section, he shall be liable in case of injury to any workman in his employ under part one of this act. [35 G. A., ch. 147, § 42.]

SEC. **2477-m42. Mutual companies—conditions.** For the purpose of complying with the foregoing section, groups of employers by themselves or in an association with any or all of their workmen, may form insurance associations as hereafter provided, subject to such reasonable conditions and restrictions as may be fixed by the state insurance department and membership in such mutual insurance organization as approved, together with evidence of the payment of premiums due, shall be evidence of compliance with the preceding section. [35 G. A., ch. 147, § 43.]

SEC. **2477-m43. Benefit insurance—approval.** Subject to the approval of the Iowa industrial commissioner [,] any employer or group of employers may enter into or continue an agreement with his or their workmen to provide a scheme of compensation, benefit or insurance in lieu of the compensation and insurance provided by this act; but such scheme shall in no instance provide less than the benefits here secured, nor vary the period of compensation provided for disability or for death, or the provisions of this act with respect to periodic payments, or the percentage that such payments shall bear to weekly wages, except that the sums required may be increased; provided, further, that the approval of the Iowa industrial commissioner shall be granted, if the scheme provides for contribution by workmen, only when it confers benefits in addition to those required by this act commensurate with such contributions. [35 G. A., ch. 147, § 44.]

SEC. **2477-m44. Certificate of approval.** Whenever such scheme or plan is approved by the Iowa industrial commissioner, he shall issue a certificate to that effect, whereupon it shall be legal for such employer, or group of employers, to contract with any or all of his or their workmen to substitute such scheme or plan for the provisions of this act during a period of time fixed by said department. [35 G. A., ch. 147, § 45.]

SEC. **2477-m45. Termination — appeal to district court.** Such scheme or plan may be terminated by the Iowa industrial commissioner on reasonable notice to the interested parties if it shall appear that the same[1] is not fairly administered, or if its operation shall disclose latent defects threatening its solvency, or if for any substantial reason it fails to accomplish the purpose of this act; but from any such order of said Iowa industrial commissioner the parties affected, whether employer or workman, may, upon the giving of proper bond to protect the interests involved [,] appeal for equitable relief to the district court of this state. [35 G. A., ch. 147, § 46.]

[1]"sum" in enrolled bill. EDITOR.]

SEC. **2477-m46. Maximum commission or compensation for reinsurance.** No insurer of any obligation under this act shall either by himself or through another, either directly or indirectly, charge or accept as

a commission or compensation for placing or renewing any insurance under this act more than fifteen per cent. of the premium charged. [35 G. A., ch. 147, § 47.]

SEC. **2477-m47. Policy requirements.** Every policy issued by any insurance corporation, association or organization to assure the payment of compensation under this act shall contain a clause providing that between any employer and the insurer, notice to and knowledge of the occurrence of injury or death on the part of the insured shall be notice and knowledge on the part of the insurer; and jurisdiction of the insured for the purpose of this act shall be jurisdiction of the insurer and the insurer shall be bound by every agreement, adjudgment, award or judgment rendered against the insured. [35 G. A., ch. 147, § 48.]

SEC. **2477-m48. Insolvency clause prohibited—lien of insured.** No policy of insurance issued under this act shall contain any provision relieving the insurer from payment if the insured becomes insolvent or discharged in bankruptcy during the period that the policy is in operation, or the compensation, or any part of it, is due and unpaid. Every policy shall provide that the workman shall have a first lien upon any amount becoming due on account of such policy to the insured from the insurer, and that in case of the legal incapacity, inability or disability of the insured to receive the amount due and pay it over to the insured workman, or his[1] dependents, said insurer shall pay the same directly to such workman, his agent, or to a trustee for him or his dependents, to the extent of discharging any obligation of the insured to said workman or his dependents. [35 G. A., ch. 147, § 49.]

[1"its" in enrolled bill. EDITOR.]

SEC. **2477-m49. Proof of solvency—revocation of approval.** Where an employer coming under this act furnishes proofs to the insurance department satisfactory to the insurance department and Iowa industrial commissioner, of such employer's solvency and financial ability to pay the compensation and benefits as by this act provided and to make such payments to the parties when entitled thereto, or when such employer deposits with such insurance department security satisfactory to such insurance department and the Iowa industrial commissioner as will secure the payment of such compensation, such employer shall be relieved of the provision of section forty-two of this act; provided that such employer shall from time to time, as may be required by such insurance department and Iowa industrial commissioner, furnish such additional proof of solvency and financial ability to pay as by this section of this act provided.

The insurance department and Iowa industrial commissioner may, at any time, upon reasonable notice to such employer and upon hearing, revoke for cause any order or approval theretofore made, as by this act provided and within the contemplation of this section. [35 G. A., ch. 147, § 50.]

SEC. **2477-m50. When effective.** Part one of this act shall take effect from and after July first, nineteen hundred fourteen, and parts two and three July fourth, nineteen hundred thirteen, and any employer or employe who serves the notice to reject the terms of the act as by the act provided not less than thirty days before part one thereof takes effect, such notice for the purpose of rejecting the terms of the act shall have the same force and effect as though part one had taken effect July fourth, nineteen hundred thirteen. [35 G. A., ch. 147, § 51.]

SEC. **2477-m51. When applicable.** That the law enacted by the thirty-fifth general assembly known as senate file number three[1] relating

to employers' liability for personal injury sustained by employes in line of duty, and fixing compensation therefor, shall not apply to an injury sustained by such employe of such employer which occurs prior to the time when such act takes effect in all of its parts; but the law and procedure in force at the time such injury occurs, if before such act takes effect in all of its parts, shall be the same as though such act had not been enacted[,] whether such action is brought before or after such act takes effect in all of its parts. [35 G. A., ch. 148, § 1.]

[1Senate file No. 3 is ch. 147, 35 G. A. EDITOR.]

CHAPTER 8-B.

OF BOARDS OF ARBITRATION FOR SETTLEMENT OF DISPUTES BETWEEN EMPLOYERS AND EMPLOYES.

SECTION **2477-n. Petition for appointment.** Whenever any dispute arises between any person, firm, corporation, or association of employers and their employes or association of employes, of this state, except employers or employes having trade relations directly or indirectly based upon interstate trade relations operating through or by state or international boards of conciliation, which has or is likely to cause a strike or lockout, involving ten or more wage earners, and the parties thereto are unable to adjust the same, and which does or is likely to interfere with the due and ordinary course of business, or which menaces the public peace, or which jeopardizes the welfare of the community, either or both parties to the dispute, or the mayor of the city, or the chairman of the board of supervisors of the county in which said employment is carried on, or on petition of any twenty-five citizens thereof, over the age of twenty-one years, or the commissioner of the bureau of labor, after investigation, may make written application to the governor for the appointment of a board of arbitration and conciliation, to which board such dispute may be referred under the provisions of this act. Provided, however, the manager of the business of any person, firm, corporation or association of such employers, or any organization representing such employes, or if such employes are not members of any organization, then a majority of such employes affected may make the application as provided in this act, but in no case shall more than twenty employes be required to join in such application. [35 G. A., ch. 292, § 1.]

SEC. **2477-n1. Notification by governor — appointment.** The governor shall at once upon application made to him as herein provided and upon his being satisfied that the dispute comes within the provisions of section one of this act, notify the parties to the dispute of the application for the appointment of a board of arbitration and conciliation and make request upon each party to the dispute that each of them recommend within three days from the date of notice, the names of five persons who have no direct interest in such dispute and are willing and ready to act as members of the board, and the governor shall appoint from each list submitted one of such persons recommended. Should either of the parties fail or neglect to make any recommendation within the said period, the governor shall, as soon thereafter as possible, appoint a fit person who shall be deemed to be appointed on the recommendation of either of the said

parties. The members of the board so appointed shall within five days of their appointment recommend to the governor the name of one person who is ready and willing to act as a third member of the board, and upon failure or neglect upon their part to make such recommendation within the said period, or upon the failure or refusal of the person so recommended to act, the governor shall as soon thereafter as possible appoint some person to act as the third member of the board. [35 G. A., ch. 292, § 2.]

SEC. **2477-n2. Agreement to be bound by decision.** In all cases when the application is made by both parties to the dispute, they shall set forth in the application whether or not they agree to be bound by the decision of the board of arbitration and conciliation; and if both parties agree to be so bound by such decision, then the same shall be binding and enforceable as set out in section seven of this act. [35 G. A., ch. 292, § 3.]

SEC. **2477-n3. Oath—organization—compensation.** Each member of the board shall, before entering upon the duties of his office, be sworn to a faithful and impartial discharge thereof: they shall organize at once by the choice of one of their number as chairman, and one of their number as secretary, and shall have power to employ all necessary clerks and stenographers to properly carry out the duties of their appointment. The members of the board shall receive a compensation of five dollars per diem for the time actually employed, together with their traveling and other necessary expenses, the same to be payable out of the state treasury upon warrants drawn by the state auditor. [35 G. A., ch. 292, § 4.]

SEC. **2477-n4. Evidence—witnesses—fees.** For the purpose of this inquiry the board shall have all the powers of summoning before it and enforcing the attendance of witnesses, of administering oaths and of requiring witnesses to give evidence or solemn affirmation and to produce books, papers and other documents or things as the board may deem requisite to the full investigation of the matters into which it is inquiring, as is vested in the district court in civil cases. Any member of the board may administer an oath, and the board may accept, admit and call for such evidence as in equity and good conscience it thinks fit, whether strictly legal evidence or not. A subpoena or any notice may be delivered or sent to any sheriff, constable or any police officer who shall forthwith serve the same, and make due return thereof, according to directions. Witnesses in attendance and officers serving subpoenas or notices shall receive the same fees as are allowed in the district court, payable from the state treasury, upon the certificate of the board that such fees are due and correct, upon warrants drawn by the auditor of state. The board shall have the same power and authority to maintain and enforce order at the hearings and obedience to its writs of subpoena as is by law conferred upon the district court for like purposes. [35 G. A., ch. 292, § 5.]

SEC. **2477-n5. Investigation—report filed—public inspection.** The board shall as soon as practical, visit the place where the controversy exists, and make careful inquiry into the cause, and the said board may, with the consent of the governor, conduct such inquiry beyond the limits of the state. The board shall hear all persons interested who come before it, advise the respective parties what ought to be done or submitted to by either or both of the parties to the dispute to adjust said controversy, and make a written decision thereof, which shall at once be made public and open to public inspection and shall be recorded by the secretary of the board, and a copy of such report shall be filed in the office of the clerk of

the city or town in which the controversy arose and shall be open for public inspection. [35 G. A., ch. 292, § 6.]

SEC. **2477-n6. Time limit for investigation—suspension of strike or lockout—decision binding for one year.** The board of arbitration and conciliation shall within ten days from the date of their appointment, unless such time shall be extended by the governor, complete the investigation of any controversy submitted to them, and during the pendency of such period neither party shall engage in any strike or lockout. Any decision made by the board shall date from the date of the appointment of the board and shall be binding upon the parties who join in the application as herein provided for a period of one year. [35 G. A., ch. 292, § 7.]

SEC. **2477-n7. Report to governor—copies served and filed—publication—evidence preserved.** Within five days after the completion of the investigation, unless the time is extended by the governor for good cause shown, the board or a majority thereof shall render a decision, stating such details as will clearly show the nature of the controversy and the points disposed of by them, and make a written report to the governor of their findings of fact and of their recommendation to each party to the controversy. Every decision and report shall be filed in the office of the governor, and a copy served upon each party to the controversy, and a copy furnished to the labor commissioner for publication in the report of the bureau of labor and shall be published at a rate of not to exceed thirty-three and one-third cents per ten lines of brevier type or its equivalent, in two newspapers of general circulation in the county in which the business is located upon which the dispute arises. All evidence taken and exhibits and documents offered shall be carefully preserved and at the close of the investigation shall be filed in the office of the governor of the state and shall only be subject to inspection upon his order. [35 G. A., ch. 292, § 8.]

SEC. **2477-n8. Expenses.** The expenses incurred under the provisions of this act shall be audited by the executive council and shall be paid out of any money in the state treasury not otherwise appropriated upon warrants drawn by the auditor of state. [35 G. A., ch. 292, § 9.]

CHAPTER 9.

OF MINES AND MINING.

SECTION **2478. Inspectors.** That section one of chapter one hundred and six, acts of the thirty-fourth general assembly, be and the same is hereby repealed and the following enacted as a substitute therefor:

"The governor shall appoint three mine inspectors from those receiving certificates of competency from the board of examiners as by law provided, who shall hold their office for a term of six years and until their successors shall be appointed and qualified, subject to removal by him for cause, their term to commence on the fourth day of July, nineteen hundred thirteen, and at six-year periods thereafter. The present incumbents shall continue in office until their successors are appointed and qualified. Any vacancies occurring shall be filled in the same manner as original appointments and the appointee to hold for the unexpired term only. Each inspector shall in no way be financially interested in or connected with any mining property, or directly or indirectly act as the agent, officer or rep-

resentative of any person, firm or corporation, and shall devote his entire time and attention to the duties incumbent upon him as inspector of mines in the state of Iowa, and shall before entering upon the discharge of his duties give a bond in the sum of two thousand dollars and take an oath to be endorsed upon his bond, with sureties to be approved by the secretary of state, conditioned in accordance with the tenor of the oath. The bond shall be conditioned to faithfully and impartially without fear or favor perform the duties incumbent upon him, which shall be filed with the oath and commission and recorded in the office of the secretary of state." [35 G. A., ch. 197, § 1; 34 G. A., ch. 106, § 1.] [21 G. A., ch. 140, §§ 1, 3, 5; 20 G. A., ch. 21, §§ 1, 3, 5.]

[The substitute for S. F. 6 (ch. 197, 35 G. A.) does not appear to have been enrolled as passed. The records indicate that the term of office in the bill as passed was made four instead of six years. EDITOR.]

SEC. 2479. **Board of examiners—repealed.** [29 G. A., ch. 98, § 1.]

[See § 2479-a.]

SEC. 2479-a. **Board of examiners.** That chapter nine, title twelve of the code be and the same is hereby amended by striking out section twenty-four hundred seventy-nine and inserting in lieu thereof the following:

"The executive council shall appoint a board of five examiners consisting of two practical miners and two mine operators, all holding certificates of competency as mine foremen, and one mining engineer, each of whom shall have had at least five years' actual experience in his profession immediately preceding his appointment, who shall hold office for a term of two years. The members of said board shall qualify by taking oath to perform the duties devolving upon them fairly, faithfully and impartially, without fear or favor, uninfluenced by personal or political considerations. No member of said board shall be interested in or connected with any school, scheme, plan or device having for its object the preparation, education or instruction of persons in the knowledge required of applicants for certificates of competency. Any member of said board shall be summarily removed from office by the executive council, upon due notice and hearing, for violation of the law, misfeasance or malfeasance in the performance of his duties, or for other sufficient cause, and his successor shall thereupon be appointed by the said executive council for the unexpired term." [30 G. A., ch. 86; 29 G. A., ch. 98, § 1.]

SEC. 2482. **Inspection districts—powers and duties of inspector—expenses and supplies.** The governor shall divide the state into three inspection districts, and assign one inspector to each district, who shall devote his entire time to his work, and, before entering thereon, procure, to be paid for by and to belong to the state, all instruments necessary for the discharge of his duties, including a complete set of standards, balances and other means of adjustment in testing any and all apparatus used in weighing, and shall examine, test and adjust, as often as occasion demands, all scales, beams and other apparatus used in weighing coal at the mines. He shall examine all the mines in his district as often as the time will permit, which examination shall be made at least once in every six months of all mines having an average output of fifty tons or more of coal per day, keep a record of the inspections made, showing date, the condition in which the mine is found, the extent and manner in which the laws relating to the government of mines and their operation are observed and

obeyed, the progress made in improvements for the better security to health and life, number of accidents happening and their character, the number employed, and such other and further matters as may be of public interest and connected with the mining industries of the state. He shall have the right at all reasonable times, by night or by day, to enter any mine in his district, or any district to which he may be sent by the governor for the purpose of ascertaining its condition, and the manner of its operation, by making personal examination and inquiry in relation thereto, but not so as to unnecessarily obstruct or impede the working of the mines; and to this end the mine owner or person in charge shall furnish such mine inspector all assistance in his power, and forthwith, upon the happening of any accident to any miner in or about the mine by reason of the working thereof which causes loss of life, shall report the same, by mail or otherwise, to the mine inspector and the coroner of the county. Each inspector shall have and maintain, at some suitable place in his district, to be approved by the governor, an office, and shall reside in the district and remain therein, unless otherwise engaged in the conduct of his official duties. The costs and expenses of the office of the mine inspector other than at the capitol, including rental, telephone, office supplies and necessary fixtures, shall be paid for by the state, and the bills audited and allowed by the executive council who shall direct a warrant to issue therefor. The bills for current expenses shall be presented monthly and shall not exceed the sum of fifteen dollars per month for each inspector, whose office is maintained at a place other than at the capitol. [34 G. A., ch. 107, § 1.] [29 G. A., ch. 99, § 1; 22 G. A., ch. 54, § 2; 21 G. A., ch. 140, §§ 1, 2, 6; 20 G. A., ch. 21, §§ 1, 2, 6.]

SEC. **2483. General office—report to governor—compensation.** The three inspectors shall maintain a general office in the capitol, and keep therein all records, correspondence, documents, apparatus or other property pertaining to their office; they shall meet in said office biennially on or before August fifteenth preceding the regular session of the general assembly, and make report to the governor of their official doings, including therein all matters which by this chapter are specially committed to their charge, adding such suggestion as to needed future legislation as in their opinion may be important. Each inspector shall receive for his services the sum of eighteen hundred dollars per annum and actual traveling expenses, not exceeding seven hundred fifty dollars yearly, the traveling expenses to be paid quarterly upon an itemized statement duly verified and audited by the state auditor. [32 G. A., ch. 129; 28 G. A., ch. 79, § 1; 22 G. A., ch. 52, § 1; 21 G. A., ch. 140, §§ 3, 4; 20 G. A., ch. 21, §§ 3, 4.]

SEC. **2484. Removal of inspector—appeal.** Section twenty-four hundred eighty-four of the code is hereby repealed and the following enacted in lieu thereof:

"Charges of gross neglect of duty or malfeasance in office against any inspector may be made in writing, sworn to and filed with the governor, and must be made by five miners, or one or more mine operators; they shall be accompanied with a bond in the sum of five hundred dollars, running to the state, executed by two or more freeholders, approved and accepted by the clerk of the district court of the county of their residence, conditioned for the payment of all costs and expenses arising from the investigation of the charges, and thereupon the governor shall convene the board of examiners at such time and place as he may designate, giving the inspector and the person whose name first appears in the charge ten

days' notice thereof. The board, at the time and place fixed, shall proceed to hear, try and determine the matter, and for this purpose shall summon any material witness desired, by either party, and may administer the proper oath to all witnesses. Evidence may also be taken by deposition as in other cases, and continuances of the hearing may be granted in the furtherance of justice and upon the application of either party. After the evidence has been fully heard, the board shall report to the governor the results of its investigation, and if the charges are sustained the inspector shall be forthwith removed by the governor, and in that event the costs and expenses of the hearing shall be awarded against the inspector or the bondsmen as the case may be, with the right, however, upon the part of the aggrieved party to appeal from such findings and order to the district court of any county in the inspector's district against whom charges were made, by giving notice in writing to the board, or any member thereof, served in the same manner as original notices are served, within ten days from the time of filing the findings with the governor, or if the order of removal is made within ten days therefrom. Upon such appeal all matters shall be heard bearing upon the charges made, and the pleadings may be amended within the discretion of the court in the furtherance of justice. The appeal shall be tried as an equitable action and such order made as the evidence supports and justice demands. Provided that nothing herein contained shall be construed to prevent the governor from proceeding under the law provided for the suspension or removal of state officers for malfeasance or nonfeasance in office. [34 G. A., ch. 106, § 2.] [21 G. A., ch. 43; 20 G. A., ch. 21, § 16.]

SEC. **2484-a. Uniform reports.** "The board of inspectors shall prepare a standard form of reports which shall be uniform for and throughout the state and which shall be used in all cases where reports are required to be made to the district mine inspectors or the board of inspectors as the case may be." [34 G. A., ch. 106, § 3.]

SEC. **2485. Maps of mines—surveys.** Section twenty-four hundred eighty-five of the code is hereby repealed and the following enacted in lieu thereof:

"The owner, operator, lessee or person in charge of any mine shall make or cause to be made an accurate map or plan of such mine drawn to a scale not more than two hundred feet to the inch, on which shall appear the name of the state, county and township in which the mine is located, the designation of the mine, the name of the company or owner, operator, lessee or person in charge, the certificate of the mining engineer or surveyor as to the accuracy and date of the survey, the north point and the scale to which the drawing is made. Every such map or plan shall correctly show the surface boundary lines of the coal rights pertaining to each mine and all sections or quarter section lines or corners within the same; the lines of town lots and streets; the tracks and sidetracks of all railroads, the location of all wagon roads, rivers, streams, ponds, reservations made of coal and mineral. For the underground workings said maps shall show all shafts, slopes, tunnels or other openings to the surface or to the workings of a contiguous mine; all excavations, entries, rooms and crosscuts; the location of the escape ways, and of the fan or furnace or other means of ventilation and the direction of air currents and the location of permanent pumps, hauling engines, engine planes, abandoned works, fire walls and standing water. A separate and similar map drawn to the same scale in all cases shall be made of each and every seam of coal operated in

any mine in this state. A separate map shall also be made of the surface whenever the surface buildings, lines or objects are so numerous as to obscure the details of the mine workings if drawn upon the same sheet with them, and in such case the surface map shall be drawn upon transparent cloth or paper so that it can be laid upon the map of the underground workings and thus truly indicate the local relation of lines and objects on the surface to the excavations of the mine, together with any other principal workings of the mine. Each map shall also show by profile drawing and measurement, the last one hundred fifty feet approaching the boundary lines, showing the rise and dip of the seam. The original or true copies of all such maps shall be kept at the office of the mine and true copies thereof shall also be furnished the state mine inspector for the district in which said mine is located within thirty days after the completion of the same. The maps so delivered to the inspector shall be the property of the state and shall remain in the custody of the said inspector during his term of office, and be delivered to his successor in office. They shall be kept at the office of the inspector and be open to examination of all persons interested in the same; but such examination shall only be made in the presence of the inspector or his office assistant, and he shall not permit any copies of the same to be made without the written consent of the operator or the owner of the property, except as herein and otherwise provided. An accurate extension of the last preceding survey of every mine in active operation shall be made once in every twelve months prior to July first of every year and the result of such survey with the date thereof, shall be promptly and accurately entered upon the original map and a true, correct and accurate copy of said extended map shall be forwarded to the inspector of mines in the district in which said mine is located so as to show all changes in plan of new work in the mine, and all extensions of the old workings to the most advanced face or boundary of said workings which have been made since the last preceding survey, and the parts of the mine abandoned or worked out after the last preceding survey shall be clearly indicated and shown by colorings, which copy must be delivered to the inspector of mines within thirty days after the last survey is made. When any coal mine is worked out or is about to be abandoned or indefinitely closed, the owner, operator, lessee or person in charge of the same shall make or cause to be made a completed and extended map of said mine and the result of the same shall be duly extended on all maps of the mine and copies thereof so as to show all excavations and the most advanced workings of the mine, and their exact relation to the boundary or section lines on the surface, and deliver to the inspector a copy of the completed map. The state inspector of mines shall order a survey to be made of the workings of any mine and the result to be extended on the maps of the same and the copies thereof whenever in his judgment the safety of the workmen, the support of the surface, the conservation of the property or the safety of an adjoining mine requires it; and if not made by the owner, operator, lessee or person in charge when ordered by the inspector it shall be made or caused to be made by the inspector and paid for by the state and the amount collected from the owner, operator, lessee or person in charge as other debts are collected. [34 G. A., ch. 106, § 4.] [20 G. A., ch. 21, § 7.]

The statute authorizing the recovery of double damages occasioned by the removal of coal from the land of an owner without his authority is not unconstitutional. *Mier v. Phillips Fuel Co.*, 130–570, 107 N. W. 621.

Evidence in a particular case considered and held sufficient to show such trespass as a basis for the recovery of double dam-

ages; but held that evidence as to removal of coal from adjoining land was irrelevant and should not have been admitted. *Ibid.*

As to whether double damages should be computed on the value of the coal after severed or after removed to the mouth of the mine, the judges of the court were equally divided. *Stewart v. Colfax Consol. Coal Co.*, 147–548, 126 N. W. 449.

SEC. **2485-a. Failure to furnish map—penalty.** "Whenever the owner, operator, lessee or person in charge of any mine neglects and refuses for a period of three months to furnish to said inspector the map or plan of such mine or a copy thereof or of the extension thereof as provided for by this act, such owner, operator, lessee, or person shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined one hundred dollars and shall stand committed to the county jail until such fine is paid, and in addition thereto the inspector shall make or cause to be made an accurate map or plan of such mine or extension as the case may be, at the expense of the owner, operator, lessee or person in charge thereof; the cost to be paid by the state and recovered by law from the said owner, operator, lessee or person in charge in the same manner as other debts by suit; and it shall be the duty of the county attorney of the county in which such mine is located, at the request of the inspector, to bring such action in the name and for the benefit of the state. [34 G. A., ch. 106, § 5.]

SEC. **2485-b. Right of adjoining landowner—expenses of examination—double damages.** "Upon affidavit of an adjoining landowner in the vicinity of said mine, or his agents, filed with the inspector of the district stating that it is necessary for the protection of his property to know how near his land the excavations in the mine extend, the inspector shall make an examination or employ a surveyor therefor if necessary, to determine the length and direction of entries and other works toward the land of the applicant and the extent of excavation of same on all of his land, if any, and make report to the inspector to whom the application may have been made; the inspector may in such case permit examination of such map or copies thereof as may be in the possession of the inspector for the purpose of and to aid and assist in determining the location of the workings as herein contemplated. The necessary expenses incurred and compensation of five dollars per day to the inspector in favor of the state and ten dollars per day to the surveyor shall be paid by the applicant except when it shall be shown that said applicant's property has been undermined, in which case the expense shall be paid by the mine owner, operator, lessee or person in charge; and in any case where any owner, operator, lessee or person operating a mine, who without permission takes coal from adjoining land he shall be liable for double damages therefor and for all expense caused thereby. If it be found necessary to survey the premises to discover the facts as contemplated by this act the owner or person filing the affidavit shall first give a bond or other security to the inspector in favor of the state in the sum of one hundred dollars conditioned to pay all costs and expenses incurred thereby." [34 G. A., ch. 106, § 6.]

SEC. **2486. Escape ways and air shafts.** The owner, operator, lessee or person in charge of any mine hereafter constructed and operated by shaft, or one having a slope or drift opening in which five or more persons are employed, shall construct and maintain at least two distinct openings for each seam of coal worked, which in mines operated by shaft shall be separated by natural strata of not less than three hundred feet in breadth, and in mines operated by slope or drift not less than two hundred feet in breadth, through which ingress and egress at all times shall be unobstructed to the employes and persons having occasion to use the same as

escape ways or place of exit from the mine. [34 G. A., ch. 106, § 7.] [22 G. A., ch. 56, §§ 1, 2; 20 G. A., ch. 21, §§ 8, 9.]

SEC. **2486-a. Stairways in escape shafts.** All escape shafts hereafter constructed not provided with hoisting appliances as hereinafter provided shall have stairs at an angle of not more than sixty degrees in ascent, nor less than two and one-half feet in width with proper, safe and substantial landings at convenient and easy distances, and equipped with good and substantial handrails or banisters. If a shaft be used for an escape shaft and air shaft, that part of the shaft used as an escape way shall be divided and partitioned closely with good and substantial material from the part used as an air shaft, all of which shall be kept in safe condition as by this act provided. [34 G. A., ch. 106, § 8.]

SEC. **2486-b. Hoisting appliances for use of workmen.** All escape shafts not provided with stairs shall be provided with suitable appliances for hoisting underground workmen at all times ready for use both day and night, while the workmen are at labor, which hoisting apparatus shall be separate and apart from the hoisting shaft, and the equipment shall include a depth indicator, brake on the drum, steel or iron cage, safety catches on cages, and covers on cages to securely protect any person while on the cage. [34 G. A., ch. 106, § 9.]

SEC. **2486-c. Underground connection with contiguous mine.** Where two or more mines are connected underground the several owners by joint agreement may use the hoisting shaft, slope or drift of the one as an escape for the other, and the road or traveling ways to the boundary on either side shall be kept clear of every obstruction to travel by the respective operators, and the intervening doors, if any, shall remain unlocked and ready at all times for immediate use, and when such communication has once been established between contiguous mines it shall be unlawful for the owner, operator, or person in charge of either mine to close the same without the consent both of the contiguous operators and of the state inspector of mines of the district, provided that when either operator desires to abandon mining operations, the expense and duty of maintaining such communication shall devolve upon the party continuing operation. [34 G. A., ch. 106, § 10.]

SEC. **2486-d. Location of shafts—approval of inspector—appeal.** No escape shaft or other place of exit or any air shaft or opening for ventilation not including hoisting shafts shall be located or constructed without first giving notice to the state mine inspector and obtaining[1] his approval thereof in writing, who shall retain a copy and file in his office and preserve with other records of that mine. The state mine inspector of the district in which any mine is located shall have the right at any time to order any additional air and escape way, shaft or openings therefor or other place of exit as may be deemed necessary for the purpose of furnishing additional ventilation or reasonably necessary means of escape and such additional air and escape ways shall only be used in cases of emergency; but if the owner, operator, lessee or person in charge of the mine feels aggrieved with the order as made by the mine inspector of the district in which the mine is located he shall have the right to appeal from the decision or the order of the mine inspector in such case to the district court, where the action shall be tried as an equitable action, and shall have precedence over any and all other cases, and the first term of such court held after the taking of such appeal shall be the appearance term; provided, however, that in any case the state mine inspector may elect by

giving four days' notice to the party taking the appeal, to bring said cause on for hearing before any judge of the judicial district in which such mine is located, who shall make such order as the case demands; provided, however, that from and after the fourth day of July, nineteen hundred eleven, it shall be unlawful to construct a furnace shaft in connection with an escape shaft or other means of exit for the employes of a mine, and all furnace shafts hereafter constructed shall be separate and apart from the escape way or means of exit. [34 G. A., ch. 106, § 11.]

[1"obtain" in enrolled bill. EDITOR.]

SEC. **2486-e. Ventilation—obstructions prohibited.** The escape way shall be ventilated and kept free from vitiated air, accumulation of ice and obstructions of every kind; nor shall steam or heated air be discharged therein during the daytime unless an attendant be kept in charge thereof and the equipment so arranged that the steam or warm air may be readily turned off at any time when required and a conspicuous signboard placed in plain view indicating the point where the steam or warm air may be turned off as by this act contemplated; and all surface or other water which flows therein shall be conducted by rings or otherwise to receptacles for the same so as to keep the stairway reasonably free from falling water. [34 G. A., ch. 106, § 12.]

SEC. **2486-f. Traveling ways—sign boards—inspection—appeal.** In any mine affected by this act and every seam of coal or other mineral worked therein, there shall be constructed, kept and maintained safe and accessible traveling ways to and from any and all escape ways or place of exit, which shall be maintained free from falls of roof, standing water and other obstructions and made at least five feet high and seven feet wide. At all points where the passage or traveling ways to the escapement shaft or place of exit intersect other roadways or entries, conspicuous signboards shall be placed thereat indicating the way to such place of exit. All traveling ways shall be inspected by the mine foreman or his assistant at least once each week, and written report of their[1] condition made and filed in the office at the mine which shall be open for examination to all the employes of the mine and such other persons entitled thereto at all reasonable times. Provided, however, that in any case, when in the judgment of the mine inspector of the district where the mine is located it is deemed impracticable by reason of the conditions or strata, to make the traveling way herein referred to five feet in height, then and in that case the traveling way may be made and maintained less than five feet in height and seven feet in width, but in no case shall the traveling way be less than three feet in height or six feet in width. But if any dispute or difference should arise as to the findings or orders of the mine inspector, in the premises, between such inspector and employer operating the mine, or between such inspector and at least five operatives working in the mine, then and in that case the inspector shall furnish, on demand, to the aggrieved party or parties a copy of the findings or orders complained of and he shall also file the originals thereof in the office of the board of state mine inspectors and the aggrieved party or parties may have the right to appeal from said findings and orders to the district court of any county in which said mine is located on the same terms and conditions, so far as applicable, as those provided for the trial and appeal under section two hereof. When appeal is taken as herein provided the case shall be docketed and precedence given over all other cases excepting criminal cases where the party is in jail, and the inspector may bring the case on for hearing before any judge of the judicial district

where the mine is located by giving five days' notice in writing to the opposite party and if the evidence fails to show that the order was not a reasonable one as made by the inspector the findings and order of the inspector shall stand as made by him. [34 G. A., ch. 106, § 13.]

["'its" in enrolled bill. EDITOR.]

SEC. **2486-g. Precaution against fire—location of buildings.** It shall be unlawful to erect, keep or maintain any inflammable structure or buildings or other material in the space intervening between the main or hoisting shafts, slopes or drifts, and the escapement shaft or other place of exit or any powder magazine in such location or manner as to jeopardize the free and safe exit of the employes from the mine by said escapement shaft or other place of exit in case of fire or other casualty to the main shaft, slope or drift buildings. [34 G. A., ch. 106, § 14.]

SEC. **2486-h. Boiler and engine rooms.** All boiler and engine rooms erected or constructed on the surface at any mine from and after July fourth, nineteen hundred eleven, shall be constructed of fireproof material and in no case shall the boiler room be placed within sixty feet of the hoisting shaft, slope or drift. [34 G. A., ch. 106, § 15.]

SEC. **2486-i. Shaft lights.** In all cases, after twilight, or when by reason of steam or other causes obscuring the plain view of the top and openings of any shaft, there shall be maintained a good and substantial light, but in no case shall an open light or torch be used. [34 G. A., ch. 106, § 16.]

SEC. **2486-j. Traveling way around hoisting shafts.** At the bottom of each hoisting shaft there shall be constructed a safe and convenient traveling way around the shaft for employes and animals, and it shall be unlawful for any person to pass across the shaft bottom in any other manner than by the traveling way herein contemplated; except such employes as may be necessary to perform the work at the bottom of the shaft or those engaged in making repairs. [34 G. A., ch. 106, § 17.]

SEC. **2486-k. Places of refuge in haulage roads—signals—trip car lights.** On all single-track haulage roads wherever hauling is done by machinery or other mechanical device, and on all gravity or inclined planes in mines where it is impractical to construct a separate traveling way and which persons employed in the mines must use while performing their work or travel on foot to and from their work, places of refuge must be cut in the side wall not less than three feet in depth and four feet wide and five feet high, and not more than twenty yards apart unless there be a clear space of not less than two and one-half feet between the car when on the track and the rib or side of the entry of the haulage way; but in no case shall such haulage way be used as a traveling way unless it shall first be determined by the inspector that it is impracticable to construct, keep or maintain a separate traveling way, and in all such cases, unless otherwise determined by the inspector to be impracticable, there shall be kept and maintained a separate traveling way for the employes which shall at all times be maintained in good and safe condition and free from falls of roof and other obstructions. On every such haulage road which is more than one hundred feet in length a code of signals shall be established between the hauling engineer and all points on the road, except where hauling is done by motor; and a conspicuous light shall be carried on the front of every trip or train of trip cars moved by machinery. [34 G. A., ch. 106, § 18.]

SEC. **2486-1. Entries used by draft animals.** All entries hereafter constructed in which the hauling is done by draft animal and wherein the employes perform their work or use as a means of ingress and egress to and from their working places, shall be maintained substantially eight feet in width from one rib or side of the entry or haulage way to the opposite side, which shall be kept free from timbers or other refuse and as reasonably even on the surface of each side of the track as may be reasonably practicable; provided, however, that this section of this act shall not apply to such haulage ways in longwall work when the inspector of the district where the mine is located shall determine that it is impracticable to maintain the width of the entry or haulage way as herein provided. [34 G. A., ch. 106, § 19.]

SEC. **2487. Time for constructing outlets.** Section twenty-four hundred eighty-seven of the code is hereby repealed and the following enacted in lieu thereof:

"In all mines there shall be allowed one year to make escape shafts or other means of exit as provided by law, but not more than twenty persons shall be employed in such mine at any time until the provisions of the law relating to escape shafts or other means of exit shall have been complied with and after the expiration of the period above mentioned it shall not be operated until made to conform to the provisions of law with reference to the escape shafts or other means of exit." [34 G. A., ch. 106, § 20.]

SEC. **2488. Ventilation—measurements of air.** The law as it appears in section twenty-four hundred eighty-eight of the supplement to the code, 1907, is hereby repealed and the following enacted in lieu thereof:

"The owner, operator, lessee or person in charge of any mine, whether operated by shaft, slope or drift shall provide and maintain an amount of ventilation of not less than one hundred cubic feet of air per minute for each person employed in the mine, nor less than five hundred cubic feet of air per minute for each mule, horse or other animal used therein, which shall be so circulated throughout the mine so as to dilute, render harmless and expel all noxious and poisonous gases in all working parts of the same; but in no case shall the air current be a greater distance than sixty feet from the working face except when making crosscuts in entries for an air course, then in that case the distance shall not be greater than seventy feet; provided, however, that in a special case requiring it, the state mine inspector may, in writing grant permission to go beyond the limit herein mentioned. When the air current is carried to the working face of the room in double room mining, such air current shall be treated as that contemplated in this act. The measurements of the air currents as herein contemplated shall be taken at the bottom of the intake and near the mouth of each split thereof, and also near the working face of the entries; the person in charge of the mine shall be furnished with an anemometer by the owner or lessee of the mine, who shall take the measurements of the air as herein contemplated at least once each week and make a record thereof showing the time and place and when and where measurements were taken, copy thereof shall be retained at the office of the mine where operated, and report sent each month to the state mine inspector of the district in which said mine is operated. [34 G. A., ch. 106, § 21.] [27 G. A., ch. 59, § 1; 22 G. A., ch. 56, § 3; 20 G. A., ch. 21, § 10.]

Failure of a mine owner to so far remove or dilute noxious gases as to render the mine a safe place for the miners to work will render him liable. *Mosgrove v. Zimbleman Coal Co.*, 110–169, 81 N. W. 227.

SEC. **2488-a. Air currents to be split.** "In every mine the air current shall be split and so conducted that not more than eighty employes at any time shall be employed on or in each split except in case of emergency. Provided that the inspector of the district where the mine is located may in writing grant permission for a greater number not to exceed fifty when the required number of cubic feet of air per minute is properly circulated therein. [34 G. A., ch. 106, § 22.]

SEC. **2488-b. Contrivances for supplying air current.** "Artificial means of exhaust steam, fans, furnaces or other contrivances of sufficient capacity shall be kept in operation to supply the air current, but if a furnace is used it shall be so constructed by lining the upcast for a distance for not less than fifty feet or for such greater distance as special cases may be required and determined by the state mine inspector, with indestructible material so that fire cannot be communicated to any part of the works. [34 G. A., ch. 106, § 23.]

SEC. **2488-c. Doors in haulage ways—duty of employes.** "On all haulage ways where doors are maintained to direct the air current, it shall be the duty of the driver or other employes, passing through the same, to see that the same are properly closed. [34 G. A., ch. 106, § 24.]

SEC. **2488-d. Breaks-through in entries.** "All breaks-through in entries except the last one shall be securely closed and all stoppings in breaks-through except the one next to the last in the entries shall be made with some substantial material so as to securely and completely close the same, and thereby prevent the air from passing through or in any part thereof, which shall be subject to the state mine inspector's approval, who is hereby authorized and empowered to require any change to be made in the material or construction for the purpose of and to reasonably comply with the provisions of law and for the purposes intended. The stoppings in the next to the last break-through in entries may be constructed temporarily of some suitable material until one additional break-through has been made when the temporary stopping shall be replaced with material as by this act contemplated. [34 G. A., ch. 106, § 25.]

SEC. **2488-e. Breaks-through in rooms.** "All breaks-through in the rooms, except the last one shall be closed and securely fastened so as to prevent the air from passing through the same, which stoppings shall be of suitable material and subject to the approval of the state mine inspector of the district in which the mine is operated. The mouth or openings of all abandoned rooms shall be securely closed in the manner as provided for permanent stoppings in entries and all abandoned works shall be closed in like manner. All breaks-through in entries must be of an area of not less than twenty-five feet and in rooms not less than twenty feet for the purpose of and to accommodate the air current as herein contemplated. [34 G. A., ch. 106, § 26.]

SEC. **2488-f. Unhealthful conditions—changes ordered—suspension of work—violation—penalty.** "When the state mine inspector finds the air insufficient or the employes working in unsafe or under improper health conditions, he shall at once give notice to the mine owner or his agent or person in charge, and upon failure to make the necessary changes within such reasonable time as said mine inspector may fix, he shall then and there order the employes, except such as may be necessary to correct the defect and make the repairs, to cease work and remain out of the mine until the defects are corrected and the mine put in proper condition, and any person, employer or employe failing to comply with the order of the state

mine inspector relating thereto shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined not less than five dollars and not more than one hundred dollars." [34 G. A., ch. 106, § 27.]

SEC. **2489. Speaking tubes—signal men.** Section twenty-four hundred eighty-nine of the code, is hereby repealed and the following enacted in lieu thereof:

"The owner, lessee, operator or person in charge of any mine shall in all mines operated by shaft, slope or drift, where the voice cannot be distinctly heard, provide and maintain a metal speaking tube or other adequate means of communication and keep the same in complete order from the bottom or interior to the top or exterior, and in all cases where mechanical means are used in any shaft, slope or drift, to hoist or lower employes, the owner, lessee, operator or person in charge of such mine shall keep and maintain a suitable, sober and competent person at the top and bottom in charge of the signals during such time of lowering and raising the employes, who shall be and remain on duty for at least thirty minutes before and after the usual hours for beginning and stopping the ordinary work of the mine. [34 G. A., ch. 106, § 28.] [20 G. A., ch. 21, §§ 11–13, 18.]

Whether a roof which is in a dangerous condition should be propped by the miner or by the mine owner is to be determined by the jury with reference to whether it is the roof of a room under the charge of the miner, or of an entry for the safety of which the mine owner is responsible. *Taylor v. Star Coal Co.*, 110–40, 81 N. W. 249.

The requirement that safety gates shall be maintained at the entrance to a mine shaft contemplates the guarding of the shaft opening so as to prevent involuntary entrance and not an absolute and complete covering of the shaft. *Jacobson v. Smith*, 123–263, 98 N. W. 773.

An employe engaged at work on top of the cage in a mine shaft cannot complain of the negligence of the mine owner in not providing the cage with a cover. *Ibid.*

The superintendent of a mine having the authority to provide an engineer as a substitute for the regular engineer in charge of the hoisting machinery and power, held that the superintendent himself attempting to operate such machinery and power in the absence of the engineer rendered the employer liable for damages from his own incompetency to discharge such duty. *Beresford v. American Coal Co.*, 124–34, 98 N. W. 902.

The duty to furnish the necessary props is on the owner and the duty to use them in rooms being made by the employes is upon such employes. *Lammey v. Center Coal Mining Co.*, 144–640, 123 N. W. 356.

Negligence of a coemploye in failing to procure or use props will defeat recovery by an employe who is injured. *Ibid.*

The overhead covers required on cages are obviously intended to protect the employe and others who may be upon a cage or in a shaft beneath, from injury from the falling of coal or other heavy substance from the top. *Poli v. Numa Block Coal Co.*, 149–104, 127 N. W. 1105.

The employer cannot avail himself of the plea of assumption of risk as against the consequences of failing to afford to the employe the protection required by this statutory provision. *Ibid.*

Although the company is by law required to employ only duly licensed engineers and pit bosses, nevertheless those persons are not to be treated as quasi officers of the state so as to relieve the employer from liability for their negligence. *Ibid.*

SEC. **2489-1a. Safety appliances and regulations.** "In all shafts where the employes are raised and lowered by machinery or otherwise, there shall be provided a good and sufficient brake on the drum, so adjusted that it may be operated by the engineer without leaving his post at the levers. Flanges shall be so attached or arranged to the sides of the drum of any engine used, with a clearance of not less than four inches when the whole rope is wound on the drum. The ends of the hoisting cables shall be well secured on the drum and at least two and one-half laps of the same shall remain on the drum when the cage is at rest at the lowest caging place in the shaft. An index dial or indicator shall be so arranged to show at all times the true position of the cages in the shaft which shall be so attached to the machinery as to furnish constant information and guidance

to the engineer; and all cages used in any shaft shall be equipped with good safety catches and must be suspended between good substantial guides, the cages so constructed overhead with boiler iron that falling objects cannot strike persons being hoisted therein, and at all landings and openings at the top of all shafts there shall be maintained an approved safety gate constructed in such manner as to at all times close the opening or entrance to the shaft when the cage is not at rest at that point, and proper or adequate springs at the top of each slope and a trail or dog attached to each train used therein, and not more than ten persons shall be allowed to descend or ascend in any cage at one time or such less number as may be fixed by the state mine inspector; but no person at any time shall be allowed to ride in the shaft or any cage with a car, tools or other material or when such car, tools or material is on the opposite cage, except when absolutely necessary in the performance of work in the making of repair; and no person shall ride upon a loaded trip while in any part of the mine, except the conductor or person in charge thereof or any person in the performance of his duty. [34 G. A., ch. 106, § 29.]

SEC. **2489-2a. Speed and use of cages.** "Cages on which employes are riding shall not be lifted or lowered at a rate of speed greater than four hundred feet per minute, and no cage having any unstable or self-dumping platform or device shall be used for the carriage of employes or material other than coal or mineral unless the same is provided with some convenient device by which the cage platform can be securely locked when employes are being conveyed thereon. [34 G. A., ch. 106, § 30.]

SEC. **2489-3a. Engineers—competency—duties.** "The owner, lessee or operator or any person in charge of any mine shall not place in charge of any engine in and around the mine any but competent and sober engineers who shall not permit any person but those designated to handle, operate, or interfere with it or any part of the machinery except such as may be necessary in making proper and needed repairs, or an apprentice and then only when the engine or machinery is not in use in hoisting or lowering employes or hoisting coal or mineral; and no person shall be permitted to talk to the engineer while in the performance of his duty in hoisting or lowering employes, coal or mineral. There shall be placed in plain view of the engineer while at his post of duty at some conspicuous point, a code of signals as by this act provided, and which shall be in like manner placed at the top and bottom of each shaft, slope or drift; and it shall be the duty of the engineer at least once each day to carefully inspect all of the machinery and apparatus under his charge and carefully note all of its parts, and if any defects appear which will endanger the life or limb of any employe in the use thereof he shall cease operating the machinery until the defects are corrected. No person but the engineer shall be allowed in the engine room except on business connected with the operation of the mine or to repair machinery, and in such case shall immediately retire therefrom when the work is completed or business transacted. [34 G. A., ch. 106, § 31.]

SEC. **2489-4a. Code of signals.** "In all mines operated by shaft, slope or drift where machinery is used in the operation of the plant, the following code of signals shall be used between the engineer and other employes for the purpose of operation:

One ring or whistle shall signify to hoist coal or empty cage; and also to stop when the cage is in motion.

Two rings or whistles shall signify to lower cage.

Three rings or whistles shall signify that employes are coming up; when return signal or one ring or whistle is received from the engineer employes shall then be permitted to enter the cage but not before, when one ring or whistle shall be given to start.

Four rings or whistles shall signify to hoist slowly; implies danger.

Five rings or whistles shall signify accident within the mine and a call for stretcher and supplies.

Six rings or whistles shall call for a reversal of the fan.

From top to bottom one ring or whistle shall signify all ready, get on cage.

Two rings or whistles from top to bottom shall signify send away empty cage, which shall be answered from the bottom with one ring or whistle and the cage may then be moved.

Provided that the owner, lessee or operator in charge of such mine may with written consent of the state mine inspector add to this code of signals in his discretion when deemed necessary for the efficiency of the mine or the safety of the employes, but any addition thereto shall be posted as by this act provided for the information of the engineer and employes. [34 G. A., ch. 106, § 32.]

SEC. **2489-5a. Caps—timbers—props.** "The owner, lessee, operator or person in charge of any mine shall at all times keep a sufficient supply of caps and timbers to be used as props or otherwise, convenient and ready for use and shall send such caps, timber and props down when requested and deliver them to the places where needed. [34 G. A., ch. 106, § 33.]

SEC. **2489-6a. Material for tamping.** "In all mines where coal is blasted from the solid, the owner, lessee, operator or person in charge shall furnish sand, soil or clay to be used for tamping which shall be delivered to the employe and placed at a convenient distance from the working places ready for use, and so as not to obstruct the employe in the performance of his ordinary duties as a workman; and in such work no person shall be permitted to use any substance or material other than sand, soil or clay for tamping. [34 G. A., ch. 106, § 34.]

SEC. **2489-7a. Sprinkling of roadways.** "The owner, operator, lessee or person in charge of any mine shall not permit the accumulation of dust upon and along the roadways; and where the roadway is dry and dusty shall cause the same to be sprinkled at least once each week and as much oftener as conditions may require. [34 G. A., ch. 106, § 35.]

SEC. **2489-8a. Stables—location—construction—use.** "The owner, lessee, operator or person in charge of any mine shall not be allowed to locate a stable at a point in any mine where the air current supplied to the employes passes[1] through such place and in no case shall such stable be located without first having given notice to the state mine inspector who shall determine the suitability of the place proposed for the location of the stable in any mine in this state, and if approved shall consent thereto in writing; a copy thereof shall be retained and filed in the office of the inspector of mines of the district where the mine is located. The material used in the construction of the stables herein contemplated shall, as near as reasonably practicable, be incombustible and such stables shall not be used as a place for storing, or any inflammable material stored therein, except such hay as may be reasonably necessary for one day's use. [34 G. A., ch. 106, § 36.]

[1]"pass" in enrolled bill. EDITOR.]

SEC. **2489-9a. Gasoline and engines—hand fire extinguishers.** "No gasoline engine, except gasoline haulage motors where the exhaust is properly cared for, or supplies of gasoline therefor, shall be located in or near the air current which supplies the employes of any mine with air, but in all cases shall be placed upon the return and located at least twenty feet from any and all traveling ways, but in no case shall any gasoline engine or place for supply of gasoline therefor be located without first having the approval in writing of the state mine inspector who shall determine the suitability of the location of said engine or supplies. The supply of gasoline required for the operation of said engine shall be kept at the place selected, and shall not exceed twelve gallons at any one time, except that in case of emergency such engine may be temporarily placed where needed and the inspector of the district where the mine is located immediately notified thereof, who shall at once proceed to the mine and determine as to the safety of the employes of the mine while the engine is so operated at the place required, and if in his judgment the operation thereof can be continued with reasonable safety to the employes of the mine at the place required, the owner, lessee or person in charge of the mine may continue the operation thereof while the employes of the mine are at work until the emergency therefor shall have ceased; otherwise the inspector shall order the employes, except such as are required to operate the engine and work connected therewith, to leave the mine until the same is made safe. At all hoisting shafts, air shafts, escape shafts and places of exit, boiler and engine rooms, stables in mines and places where gasoline engines are used, there shall be kept ready for use at all times at least two good hand fire extinguishers, conveniently placed for immediate use when needed. [34 G. A., ch. 106, § 37.]

SEC. **2480-10a. Telephone systems.** "In all mines where the working parts thereof exceed three thousand feet from the foot of the slope, shaft or the mouth of a drift as the case may be, a good and substantial telephone system or other like suitable means of communication shall be maintained from the bottom to some suitable and convenient point at all times ready for use, which shall be extended as the works of the mine progress three thousand feet therefrom. [34 G. A., ch. 106, § 38.]

SEC. **2489-11a. Stretchers—blankets—bandages.** "The owner, operator, or person in charge of any mine shall at all times keep in readiness for use in case of accident and at the mine at some convenient place, one good and substantial stretcher for each fifty employes engaged in the operation of the mine, and proper and sufficient blankets for each stretcher, together with a sufficient and reasonable supply of bandages. [34 G. A., ch. 106, § 39.]

SEC. **2489-12a. Annual reports—reports of accidents.** "The owner, lessee, operator or person in charge of any mine shall on or before the first day of August in each year send to the office of the inspector of the district where the mine is located, upon blanks furnished by the state, a correct return with respect to the year ending July first of each year, the quantity of coal mined and the number of persons ordinarily employed at, in and around such mine, designating the number of persons below and above ground and such other information as required by such blank. In all cases, the owner, operator, lessee or person in charge of any mine in this state, upon the happening of any accident, by which injury occurs to any of the employes above or below ground, shall immediately report the same to the state mine inspector of the district in which said mine is lo-

cated, which report shall contain a detailed statement of the extent of the accident, and the manner in which it occurred, which report shall conform to the standard form of reports, as provided by the state mine inspector in such cases. [34 G. A., ch. 106, § 40.]

SEC. **2489-13a. Foreman or pit boss—duties.** "It shall be the duty of the mine foreman or pit boss in charge of any mine or part thereof to make careful inspection of the mine from day to day by himself or assistant and at such other times as in his judgment conditions may require. He shall give such directions and formulate such rules for the guidance of the men employed in the mine as skillful and safe operation of the mine may require. He shall see that the mines are supplied with props of proper lengths, caps and other timbers necessary to securely prop the roof of such mine and the rooms wherein the men are employed, and such material shall be conveniently placed for the use of the miners. He shall keep a careful watch over the ventilating apparatus and airways, together with all of the stoppings, doors and other means of directing the air current. He shall keep a record of the boys under sixteen years of age employed by him during the time of school vacation, showing their ages, names and residence of parents or guardian and character of employment, which record shall be kept at the office of the mines and open for inspection at all reasonable times. He shall examine the escape shaft, manway, the traveling ways leading thereto, or cause them to be examined by his assistant once each day, and written report of the conditions shall be made and filed in the office at the mine, which shall be open for examination at all reasonable times to representatives of the employes and such other persons entitled thereto. A copy of such report shall be sent each month to the state mine inspector of the district in which said mine is operated. If he finds the conditions of the escape shaft, manway or traveling ways impassable or dangerous, he shall immediately notify the employes of the mine thereof, and shall immediately upon the discovery of the defect, place such obstructions at the defective place as may be reasonably necessary to apprise the employes of the danger. [34 G. A., ch. 106, § 41.]

SEC. **2489-14a. "Mine foreman" defined.** "The term 'mine foreman,' as mentioned in this act, and the law of this state, shall mean and be construed to be one in charge of the underground workings or department of the mine or any part thereof, either by day or night. [34 G. A., ch. 106, § 42.]

SEC. **2489-15a. Revocation of certificate of mine foreman, pit boss or engineer.** "In any case where the mine foreman, pit boss, engineer or other person receiving a certificate under the law pertaining to mines and mining within this state, shall have wilfully disobeyed the orders of the mine inspector or have been convicted of a misdemeanor as by this act provided, his certificate shall be revoked, if the evidence warrants upon complaint being filed with the board of examiners who shall proceed to hear the case at such time and place as they may determine, which shall be as soon as practicable after the charges are filed and notice by them given to the accused. The board shall have power to subpoena the witnesses and administer oaths and a majority of the board required to determine the questions at issue; the costs incurred shall be taxed to the losing party and collected as in other cases. [34 G. A., ch. 106, § 43.]

SEC. **2489-16a. Duties of miners or other employes.** "It shall be the duty of each employe to examine his working place upon entering the same and shall not commence to mine or load coal or other mineral until

it is made safe. Each miner or other employe employed in a mine shall securely prop and timber the roof of his working place therein and shall obey any order or orders given by the superintendent or mine foreman relating to the width of the working place and to the security of the mine in the part thereof where he is at work. Each miner or other person shall avoid waste of props, caps, timbers and other material and when he has props, caps, timbers or other material not suitable for his purpose he shall place the same at some convenient point near the track and where the same may be readily seen, and inform the mine foreman or other person in charge, of their being unsuitable for the purpose intended. When draw-slate or other like material is over the coal he shall see to it that proper timbers are placed thereunder for his safety before working under the same, and it shall be unlawful and a violation of this act for any person working in a mine at any time to leave any of the doors open that direct the air current after he has passed through the same, but shall closely observe after passing through such doors that the same are properly closed. [34 G. A., ch. 106, § 44.]

SEC. **2489-17a. Injury to property—violation of rules and regulations.** "No workman or other person shall knowingly injure a water gauge, barometer, air course, brattice, equipment, machinery or live stock; obstruct or throw open any airway, handle or disturb any part of the machinery of the hoisting engine of the mine; open a door of a mine and neglect to close it; endanger the mine or those working therein; disobey any order given in pursuance of law or do a wilful act whereby the lives of persons working therein or the security of the mine or the machinery connected therewith may be endangered; and it shall be unlawful for any workmen or person to place any refuse material or any obstruction in any part of the air course or any part of the breaks-through in the entries or rooms other than as by this act provided. [34 G. A., ch. 106, § 45.]

SEC. **2489-18a. Use of intoxicants.** "No person shall go into, at or around a mine or the buildings, tracks or machinery connected therewith while under the influence of intoxicants and no person shall use, carry or have in his possession, at, in or around the mine or the buildings, tracks or machinery connected therewith, any intoxicants. [34 G. A., ch. 106, § 46.]

SEC. **2489-19a. Drill holes—shot examiner.** "It shall be unlawful for any miner or other person to charge a drill hole with powder or other explosive until the shot examiner shall have first examined the same, and the shot examiner shall forbid the charging of any drill hole with powder or other explosive, if in his judgment he believes it would be unsafe to the employes to discharge the shot as herein contemplated; and in any case where the shot examiner forbids the charging of any drill hole as by this act provided, he shall immediately make a cross with chalk markings at the mouth of the hole when condemned and make an entry thereof in a book retained by him for that purpose, stating the name of the person working in such place, the number of drill holes in such place which he forbids being charged with powder or other explosives and the date thereof, which record shall be retained and kept intact for at least one week; and it shall be unlawful for any shot firer or any other person to discharge any shot or blast until it has first been examined; nor shall any person fire a shot or blast which has been condemned by the shot examiner as by this act provided, and in any case when the mine foreman shall have forbidden the charging of any drill hole or the firing of any shot, no person shall be permitted to charge such hole or fire such shot, and if the shot examiner

forbids the charging of a hole or the firing of a shot, the mine foreman shall not cause the hole to be charged or the shot fired." [34 G. A., ch. 106, § 47.]

SEC. **2489-a. Certificate of competency of foreman, pit boss or hoisting engineer.** That from and after January first, nineteen hundred and one, it shall be unlawful for any person to discharge, or attempt to discharge, any of the duties of mine foreman, pit boss, or hoisting engineer at any coal mine, employing five or more persons therein, unless he shall hold a certificate of competency for such position as provided in this act. But in case of the discharge, resignation, or disability of any person lawfully performing such duties the owner, agent, operator, or managing officer of said mine shall have thirty days within which to secure the services of a certificated person to take the place of the one so discharged, resigned, or disabled; and during such time a competent and capable person, whether certificated as provided in this act or not, may be temporarily employed to perform such services. [34 G. A., ch. 106, § 48; 33 G. A., ch. 146, § 1.] [28 G. A., ch. 82, § 1.]

SEC. **2489-b. How procured.** Any person may secure the certificate of competency herein provided for by appearing before the board created by section twenty-four hundred seventy-nine of the code for the examination of state mine inspectors, and submitting to such examination as to his qualifications, or producing such evidence of service, as required by this act. [28 G. A., ch. 82, § 2.]

SEC. **2489-c. Board of examiners to adopt rules—compensation.** The board of examiners referred to in the last preceding section shall meet at such times and places, shall adopt such rules, conditions, and regulations, and shall prescribe and conduct such examinations as shall be more efficient to give effect to the spirit and intent of this act. The members of said board shall each receive the sum of five dollars per day for every day actually employed in the discharge of the duties imposed herein, together with their actual expenses incurred in the performance of such duties, which expenses shall be itemized and verified as provided by section twenty-four hundred eighty of the code, but they shall not be allowed compensation for more than seventy days in any one year. [28 G. A., ch. 82, § 3.]

SEC. **2489-d. Issuance of certificate.** The certificate of competency herein provided shall be issued (1) to any person who shall satisfactorily pass such examination, written or oral, as may be prescribed by said board; (2) to any person who shall produce satisfactory evidence that he has for a period of four years immediately preceding the examination, continuously and capably performed the duties of mine foreman, pit boss, or hoisting engineer as the case may be. [28 G. A., ch. 82, § 4.]

SEC. **2489-e. Fees—certificates recorded.** Every person applying for a certificate under this act shall pay to said examining board a fee of two dollars, and every successful applicant shall pay to said board an additional fee of two dollars, all of said fees to be accounted for and covered into the state treasury. Each certificate issued under this act shall be recorded in the office of the examining board, and shall show the name, age, residence, and years of experience of the person to whom it was issued. [28 G. A., ch. 82, § 5.]

SEC. **2489-f. Penalty.** No owner, agent, operator, or managing officer of any coal mine to which this act applies shall employ any mine foreman, pit boss, or hoisting engineer who does not hold the certificate herein contemplated. And any person violating any of the provisions of

this act shall be punished by fine not exceeding five hundred dollars, or by imprisonment in the county jail not exceeding six months, or by both fine and imprisonment, in the discretion of the court. [28 G. A., ch. 82, § 6.]

SEC. 2490. **Scales and weighers—records—payment in money.** The owner or operator shall, if the miners are paid by weight, provide the mine with suitable scales of standard make, and require the person selected to weigh the coal delivered from the mine to be sworn before some person authorized to administer oaths, to the effect that he will keep the scales correctly and truly balanced, and accurately weigh and a true record keep of each car delivered, which oath, with that of the checkweighman hereinafter provided for, shall be conspicuously displayed with record of weights at the place of weighing, which record shall carry the account of each miner by itself, be open to the inspection at all proper times of miners and all others having a pecuniary interest in the mine, and all damages sustained on account of a failure to weigh and credit to the proper person any coal mined shall be recoverable in an action brought within two years from the time the right thereto accrued, and a knowledge of a violation of this provision by the miner shall not be a defense thereto. The miners employed and working in any mine may furnish a competent checkweighman, who, before entering upon his duties, shall make and subscribe to an oath to the effect that he is duly qualified and will faithfully discharge his duties as checkweighman, and he shall at all proper times have access to and the right to examine the scales, machinery or apparatus used in weighing and seeing all measures and weights of coal mined and the accounts kept thereof; but not more than one person on the part of the miners collectively shall have this right, and such examination and inspection shall be so made as to create no unnecessary interference with the use of such scales, machinery or apparatus. The owner or agent shall, where the miner is by contract to be paid by the ton or other quantity, unless otherwise agreed upon in writing, weigh the coal before screening, and the miner shall be credited at the rate of eighty pounds to the bushel and two thousand pounds to the ton, but no payment shall be demanded for sulphur, rock, slate, blackjack, dirt or other impurities which may be loaded or found with the coal. Where ten or more miners are employed, such owner or agent shall not sell, give, deliver or issue, directly or indirectly, to any person employed, in payment for labor due or as advances for labor to be performed, any script, check, draft, order or other evidence of indebtedness payable or redeemable otherwise than in money at the face value, and he shall not compel or in any manner endeavor to coerce any employe to purchase goods or supplies from any particular person, firm, company or corporation; but all wages shall be paid in money upon demand semimonthly, by paying for those earned during the first fifteen days of each month not later than the first Saturday after the twentieth of said month, and for those earned after the fifteenth of each month not later than the first Saturday after the fifth of the succeeding month. A failure or refusal to make payment within five days after demand shall entitle the laborer to recover the amount due him, and one dollar per day additional for each day such payment is neglected or refused, not exceeding the sum due, and in any action therefor the court shall tax as a part of the costs a reasonable attorney fee to plaintiff's attorney. [28 G. A., ch. 81, § 1; 28 G. A., ch. 80, § 1; 25 G. A., ch. 98; 22 G. A., ch. 53, §§ 1–3; 22 G. A., ch. 54, §§ 1, 3; 22 G. A., ch. 55, § 1.]

Section applied. *Mitchell v. Burwell*, 110–10, 81 N. W. 193.

SEC. 2491. **Penalties.**

Where a miner was injured by the fall of slate in an entry, held that the question as to whose duty it was to inspect and repair was to be determined in view of the custom and usage in the business. *Thayer v. Smoky Hollow Coal Co.*, 121–121, 96 N. W. 718.

Although the company fails to furnish props as requested, the act of an employe in continuing to work in a place which he knows to be unsafe on account of defective or improper props will constitute contributory negligence. *Lammey v. Center Coal Mining Co.*, 144–640, 123 N. W. 356.

SEC. 2493. **Purity of oil.** Section twenty-four hundred ninety-three of the code is hereby repealed and the following enacted in lieu thereof:

"Only pure animal or vegetable oil or other means for illuminating purposes equally as safe and free from smoke or offensive odor shall be used in any mine in this state; and for the purpose of determining the purity of oils the state board of health shall fix a standard of purity of the said oils and establish regulations for testing the same, and when so determined and established shall be recognized by all of the courts of this state. And in any case where any material, substance or other means of illumination is used for illuminating purposes as by this act contemplated any refuse part thereof remains after use which gives off any gas or offensive odor shall by the person using it be removed from the mine at the end of his day's work." [34 G. A., ch. 106, § 49.] [26 G. A., ch. 92, § 1; 26 G. A., ch. 93.]

SEC. 2494. **Penalty.** That the law as it appears in section twenty-four hundred ninety-four, supplement to the code, 1907, is hereby repealed and the following enacted in lieu thereof:

"Any person, firm or corporation either by themselves, agents or employes selling or offering to sell for illuminating purposes in any mine in this state any adulterated or impure oil, or oil not recognized by the state board of health as suitable for illuminating purposes or other substance to be used for illuminating purposes not equally as safe and free from smoke or offensive odor as oils contemplated by this act, shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined not less than twenty-five dollars or more than one hundred dollars for each offense; and any mine owner, lessee, operator or employe thereof who shall knowingly use, or any mine owner, lessee, or operator who shall knowingly permit to be used, for illuminating purposes in any mine in this state, any impure or adulterated oil or any oil or other means of illuminating, the use of which is forbidden by this act, shall, upon conviction thereof be fined not less than five dollars or more than twenty-five dollars. [34 G. A., ch. 106, § 50.] [27 G. A., ch. 60, § 1; 26 G. A., ch. 92, § 2.]

SEC. 2494-a. **Inspector may order changes not covered by statute —petition—burden of proof—contempt—penalty.** "In all cases arising when not covered by statute it is found necessary that some change, improvement or device is required to reasonably protect the life, health or limb of the employes of any mine or works connected therewith, and the owner, lessee, operator or person in charge, fails or refuses to make the change or the improvement or supply the device needed within a reasonable time after written notice thereof, having been given by the inspector of the district within the district where the mine is located, the inspector shall file a verified petition with the clerk of the district court of the county where the mine is located setting out the facts and thereupon give five days' notice to the accused in the same manner as original notices are given and served, stating the time and place and the name of the judge before whom the case will be tried, who shall hear the evidence offered by either party,

and when and where the defaulting party shall be required to appear at the time and place mentioned in the notice which may be at any place convenient for the judge in the judicial district. The proceedings shall be entitled the state of Iowa as plaintiff and the owner, operator or person in charge as defendant, who shall plead on or before noon of the fourth day after notice. At the time and place fixed in the notice the case shall be heard and tried by the judge as in equity, who shall make such order as the evidence supports. The burden of proof shall rest upon the plaintiff to show that the order of the inspector was a reasonable one or the proposed change, improvement or device reasonably required for the purpose intended; and if the evidence in the whole case fails to prove that the order as made by the inspector was a reasonable one or the proposed change, improvement or device necessary for the purposes intended, the judge shall forthwith issue a mandatory order for compliance therewith, and enter the same of record in the district court of the county in which the hearing is had or the mine in controversy located. If the defendant has failed to comply with the order made by the judge, such defendant may be charged with contempt of court and upon conviction thereof be fined not to exceed five hundred dollars and committed to the county jail until such fine is paid. The clerk of the district court where such petition has been filed shall issue subpoenas at the request of either party, and witnesses shall be required to respond thereto as in other cases, and it shall be a part of the county attorney's official duty to represent the plaintiff in all matters pertaining to the proceedings. Pending such proceedings, the judge may, if in his judgment it is deemed advisable for the safety of the employes, order the mine closed until such changes are made as have been directed by him. [34 G. A., ch. 106, § 51.]

SEC. **2494-b. Applicable.** "In all cases the penalties as provided by the law in sections twenty-four hundred ninety-one and twenty-four hundred ninety-two of the code, shall apply to this act, except when otherwise herein provided." [34 G. A., ch. 106, § 52.]

SEC. **2495. Testing oil—repealed.** [27 G. A., ch. 60, § 2.]

[See § 2495-a.]

SEC. **2495-a. Inspection by oil inspector.** That section twenty-four hundred ninety-five be stricken out and the following substituted therefor:

"It shall be the duty of an inspector of petroleum products to inspect and test all oil offered for sale, sold, or used for illuminating purposes in coal mines in this state, and for such purpose he may enter upon the premises of any person. If upon test and examination the oil shall meet the requirements made and provided by the state board of health, he shall brand, over his own official signature and date, the barrel or vessel holding the same with the words 'Approved for illuminating coal mines.' Should it fail to meet such requirements, he shall brand it over his official signature and date, 'Rejected for illuminating coal mines.' All inspection shall be made within this state, and paid for by the person for whom the inspection is made at the rate of ten cents per barrel or vessel, which charge shall be a lien on the oil inspected, and be collected by the inspector. Each inspector shall be governed in all things respecting his record, compensation, expenses, and returns to the treasurer of state and secretary of state as provided in sections twenty-five hundred and six and twenty-five hundred and seven of the code. It shall be the duty of the inspector whenever he has good reason to believe that oil is being sold or used in violation of the pro-

visions of this chapter to make complaint to the county attorney of the county in which the offense was committed, who shall forthwith commence proceedings against the offender in any court of competent jurisdiction. All reasonable expenses for analyzing suspected oil shall be paid by the owner of the oil whenever it is found that he is selling or offering to sell impure oil in violation of the provisions of this chapter. Such expenses may be recovered in a civil action, and in criminal proceedings such expenses shall be taxed as part of the costs." [27 G. A., ch. 60, § 2; 26 G. A., ch. 92, §§ 3, 4.]

SEC. **2495-b. Shot examiners—proof of competency.** In all mines, where the coal is blasted from the solid, competent persons shall be employed to examine all shots, before they are charged, said examiners to have the power to prohibit the charging and firing of any shot which, in their judgment is unsafe. Before entering upon the discharge of their duties, said examiners shall give proof of their competency to the state mine inspector of the district in which the mine, where they are employed, is located, and said inspector shall certify to the operator of each mine the persons who have given proof of their competency to act in the capacity of shot examiners, the state mine inspector to have the power to refuse to give permission to any person to act as shot examiner who, in his judgment, is not sufficiently competent; or he may revoke the permission granted, should it appear that a shot examiner is negligent, or careless in the performance of his work. [29 G. A., ch. 100, § 1.]

SEC. **2496-a. Transportation of powder into coal mines.** That no person, firm or corporation, shall be permitted to transport, carry or convey by any electrical process whatever, any powder or other explosives, into any coal mine where twenty or more persons are employed therein until after the coal miners and other employes have ceased their work and have departed from the mines. [32 G. A., ch. 130, § 1.]

SEC. **2496-b. Storage of powder—what permitted.** No operator or other person in charge of any coal mine, shall suffer or permit under any circumstances the storing of powder, or other explosives, in any coal mine except as follows: Each miner shall be permitted to have in his separate and individual possession at one time not more than two kegs containing twenty-five pounds of powder each, and other explosives sufficient for one day's use. Such powder, or other explosives, shall be kept by the miner in a wooden or metallic box or boxes securely locked, and said boxes shall be kept at a reasonable distance from the track; nor shall black powder and high explosives be kept in the same box. [32 G. A., ch. 130, § 2.]

SEC. **2496-c. Supply for following day—where deposited.** It shall not be construed as storing powder, as defined in section two hereof, to deposit the powder, or other explosives, at the end of the electrical or mechanical haulage at the face of the mine for the following day's use; provided, that it is transported, conveyed or deposited in conformity with the provisions of section one hereof. [32 G. A., ch. 130, § 3.]

SEC. **2496-d. Transportation and delivery—by whom.** The transportation and delivery of all powder and other explosives in said coal mines shall be done by the operator or by men employed by him for that purpose. [32 G. A., ch. 130, § 4.]

SEC. **2496-e. Penalty.** Any person, firm or corporation violating any of the provisions of this act shall be guilty of a misdemeanor and upon conviction shall be fined in any sum not exceeding one hundred dollars, or be imprisoned in the county jail not exceeding thirty days. [32 G. A., ch. 130, § 5.]

CHAPTER 9-A.

OF THE CONSTRUCTION AND OPERATION OF GYPSUM MINES.

SECTION **2496-f. Escape and air shafts—contiguous mines.** The owner or person in charge of any gypsum mine operated by shaft or one having a slope or drift opening in which five or more men are employed shall construct and maintain at least two distinct openings, which in shaft mines hereafter constructed shall be separated by not less than three hundred feet and in slope or drift mines by not less than two hundred feet in breadth through which, in every shaft or slope mine, ingress and egress at all times shall be unobstructed and free from water. All escape shafts hereafter constructed shall have stairs at an angle of not more than sixty degrees in descent, with a stairway not less than two feet in width, kept in safe condition, with proper landings at easy and convenient distances apart and adequate means of escape from mines now in operation. He shall provide all air shafts with fans for ventilating purposes, and no combustible material shall be allowed to be or remain between any escape shaft and hoisting shaft nor shall any building hereafter erected be located within two hundred feet of an escape shaft without written permission from the state inspector. Where two or more mines are connected underground the several owners may, by agreement, use the hoisting shaft or slope of one mine as an escape for the other. No escape shaft shall be located or constructed without first giving notice to, and obtaining the approval in writing of the state mine inspector. [35 G. A., ch. 198, § 1.]

SEC. **2496-g. Time allowed to make changes.** In all mines there shall be allowed one year to make outlets as provided for in section one hereof but no more than twenty men shall be employed in such mine at one time until the provisions of section one are complied with, and after the expiration of the period above mentioned, should the mine not have the outlets aforesaid, it shall not be operated until made to conform to the provisions of section one. [35 G. A., ch. 198, § 2.]

SEC. **2496-h. Ventilation—air measurement—inspection.** The owner or person in charge of any mine shall provide and maintain, whether the mine be operated by shaft, slope or drift, an amount of ventilation of not less than one hundred cubic feet of air per minute for each person, nor less than five hundred cubic feet of air per minute for each mule or horse employed therein, which shall be so circulated throughout the mines as to dilute, render harmless and expel all noxious and poisonous gases in all working parts of the same. But in no case shall the air current be a greater distance than sixty feet from the working face, except when making crosscuts in entries for air courses; then, in that case, the distance shall not be greater than seventy feet; provided, however, that the state mine inspector may, in writing, grant permission to go beyond the limit herein mentioned, when the conditions are such in a special case as to require it. When the mine inspector shall find the air insufficient, or men working under unsafe conditions, he shall at once give notice to the mine owner or his agent or person in charge, and, upon the failure to make the necessary changes within a reasonable time, to be fixed by him, he may order the men out, to remain out until the mine is put in proper condition. [35 G. A., ch. 198, § 3.]

SEC. **2496-i. Speaking tubes—safety appliances—engineers—props.** The owner or person in charge of any mine shall in all mines operated by shaft or slope, where the voice cannot be distinctly heard,

provide and maintain a metal speaking tube or other means of communication, kept in complete order from the bottom or interior to the top or exterior, also a sufficient safety catch and proper cover overhead on all cages, and an adequate brake to all drums or other devices used for lowering or hoisting persons, an approved safety gate at the top of each shaft, springs at the top of each slope, and a trail attached to each train used therein. He shall not knowingly place in charge of any engine used in or about the operation of the mines any but experienced, competent and sober engineers, who shall have the same qualifications as are required of hoisting engineers at coal mines, and who shall not allow anyone but those designated for that purpose to handle or in any way interfere with it or any part of the machinery, nor shall more than ten persons be allowed to descend or ascend in any cage at one time, or such less number as may be fixed by the state mine inspector, nor anyone but the conductor on a loaded car or cage. He shall at all times keep a sufficient supply of timber to be used as props, convenient and ready for use, and shall send such props down when required and deliver them to the places where needed. [35 G. A., ch. 198, § 4.]

SEC. **2496-j. Violation—writ of injunction.** In addition to any and all other remedies if any owner or person in charge of any mine shall fail to provide the requirements herein specified, or such owner or agent neglect for twenty days after notice given in writing by the state mine inspector of such failure to remedy the same, such inspector may apply to the district court or any judge thereof in an action brought in the name of the state for a writ of injunction to restrain the working of the mine with more persons at the same time than are necessary to make the improvements needed, save as may be required to prevent waste, until such appliances have been provided, and in case an injury happens to those engaged in the work because of such failure, the same shall be held culpable negligence on the part of the operator of the mine. [35 G. A., ch. 198, § 5.]

SEC. **2496-k. Duties and powers state mine inspector.** It is hereby made the duty of the state mine inspector to enforce the provisions of this act. He shall have the right to enter any gypsum mine under the provisions of this act, at any time, but shall not unnecessarily interfere with the working of any mine, nor shall more than six months intervene between examinations of any such mine. [35 G. A., ch. 198, § 6.]

SEC. **2496-l. Fatal accidents—reports.** Every person in charge of a mine under the provisions of this act shall, within twenty-four hours after a fatal accident happens to any employe in or around the mine, report the same to the coroner of the county in which the mine is operated and to the state mine inspector. [35 G. A., ch. 198, § 7.]

SEC. **2496-m. Maps—surveys—abandoned mines.** The owner, aperator, lessee or person in charge of any gypsum mine shall make or cause to be made an accurate map or plan of such mine, drawn to a scale not more than two hundred feet to the inch, on which shall appear the name of the state, county and township in which the mine is located, the designation of the mine, the name of the company or owner, operator, lessee or person in charge, the certificate of the mining engineer or surveyor as to the accuracy and date of the survey, the north point and the scale to which the drawing is made. Every such map or plan shall correctly show the surface boundary lines of the rights pertaining to each mine and all sections or quarter section lines or corners within the same; the lines of town lots or streets; the tracks or side tracks of all railroads, the location of all

wagon roads, rivers, streams, ponds, reservations made of gypsum and mineral. For the underground workings said map shall show all shafts, slopes, tunnels or other opening to the surface or to the workings of a continuous mine; all excavations, entries, rooms and crosscuts; the location of the escape ways, and of the fan or furnace or other means of ventilation and the direction of air currents and the location of permanent pumps, hauling engines, engine planes, abandoned works, fire walls and standing water. A separate and similar map drawn to the same scale in all cases shall be made of each and every seam of gypsum operated in any mine in the state. A separate map shall also be made of the surface whenever the surface buildings, lines or objects are so numerous as to obscure the details of the mine workings if drawn upon the same sheet with them and in such case the surface map shall be drawn upon transparent cloth or paper so it can be laid upon the map of the underground workings and thus truly indicate the local relation of lines and objects on the surface to the excavation of the mine, together with any other principal workings of the mines. Each map shall also show by profile drawing and measurement, the last one hundred fifty feet approaching the boundary lines, showing the rise and dip of the seam. The original or true copies of all such maps shall be kept at the office of the mine and true copies thereof shall also be furnished the state mine inspector for the district in which said mine is located within thirty days after the completion of the same. The maps so delivered to the inspector shall be the property of the state and shall remain in the custody of the said inspector during his term of office and be delivered to his successor in office. They shall be kept at the office of the inspector and be open to examination to all persons interested in the same. But such examination shall only be made in the presence of the inspector or his office assistant, and he shall not permit any copies of the same to be made without the written consent of the operator or the owner of the property, except as herein and otherwise provided. An accurate extension of the last preceding survey of every mine in active operation shall be made once in every twelve months prior to July first of every year and the result of such survey with the date thereof shall be promptly and accurately entered upon the original map and a true, correct and accurate copy of said extended map shall be forwarded to the inspector of mines in the district in which said mine is located so as to show all changes in plan of new work in the mine, and all extension of the old workings to the most advanced face or boundary of said workings which have been made since the last preceding survey, and the parts of the mine abandoned or worked out after the last preceding survey shall be clearly indicated and shown by colorings, which copy must be delivered to the inspector of mines within thirty days after the last survey is made. When any gypsum mine is worked out or is about to be abandoned or indefinitely closed, the owner, operator, lessee or person in charge of the same shall make or cause to be made a complete extended map of said mine and the result of the same shall be duly extended on all maps of the mine and copies thereof so as to show all excavations and the most advanced workings of the mine and their exact relation to the boundary of section lines on the surface, and deliver to the inspector a copy of the completed map. The state inspector of mines shall order a survey to be made of the workings of any mine and the result to be extended on the maps of the same and the copies thereof whenever in his judgment the safety of the workmen, the support of the surface, the conservation of the property or the safety of the adjoining mine requires

it; and if not made by the owner, operator, lessee or person in charge when ordered by the inspector it shall be made or caused[1] to be made by the inspector and paid for by the state and the amount collected from the owner, operator, lessee or person in charge as other debts are collected. [35 G. A., ch. 198, § 8.]

[1"cause" in enrolled bill. EDITOR.]

SEC. **2496-n. Violation—penalties.** Any owner or person in charge of any gypsum mine who shall fail to comply with the provisions of this act, or either of them, or shall hinder or obstruct the carrying out of any of the requirements of this act shall be punished by imprisonment in the county jail not exceeding sixty days or by a fine not exceeding five hundred dollars or if any miner, workman or other person knowingly injure or interfere with any air course or brattice, or obstruct or throw open doors or disturb any part of the machinery, or disobey any order given in carrying out the provisions of this act whereby the lives and health of the persons, or the security of the mines and machinery is endangered, or shall neglect or refuse to securely prop any entries under his control, or refuse to obey any order given by the superintendent in relation to the safety of the mine or that part of the mine under his charge or control he shall be punished by a fine not exceeding one hundred dollars or imprisonment in the[1] county jail not exceeding thirty days. [35 G. A., ch. 198, § 9.]

[1"that" in the enrolled bill. EDITOR.]

CHAPTER 10.

OF THE GEOLOGICAL SURVEY.

SECTION **2500. Detailed reports—coöperation with other surveys.** That sections twenty-five hundred, twenty-five hundred and one and twenty-five hundred and two of the code be and the same are hereby repealed and there is hereby enacted as a substitute therefor the following:

"He shall make detailed maps and reports of counties and districts as fast as the work is completed, which shall embrace such geological, mineralogical, topographical and scientific details as are necessary to make complete records thereof, and, when the information obtained warrants it, the results of any special investigation made by him may be brought together in a report for publication, accompanied by proper illustrations and diagrams. He shall coöperate with the United States geological survey and with adjoining state surveys in the making of topographic maps and the study of geologic problems of the state when in the opinion of the geological board such coöperation will result in profit to the state. He shall, before the first day of January of each year, make to the geological board a full report of the work in the preceding year, together with such minor reports and papers as may be considered desirable for publication." [31 G. A., ch. 104, §§ 1, 2; 24 G. A., ch. 71, § 4.]

SEC. **2501. Annual report—bulletins.** The annual report, together with bulletins of educational and scientific value, and special bulletins containing information necessary for the immediate use of the people at large, shall be published by the state under the direction of the board, and disposed of as other published reports of state officers when no special provision is made, but the copies remaining in the control of the board after

such distribution, after retaining a sufficient number to supply probable future demands, shall be sold to persons making application therefor at the cost price of publication, the money thus accruing to be turned into the treasury of the state. [31 G. A., ch. 104, § 3; 24 G. A., ch. 71, § 5.]

[For repeal of original code section see § 2500. EDITOR.]

SEC. **2502. Expenses.** The members of the board shall be allowed actual expenses incurred in attending to the duties assigned to them by this chapter. Postage, stationery and office expenses of the state geologist shall be paid by the state, as are the expenses of the other state officers, but all other expenses of the survey shall be audited and allowed by the board; and the entire expenses provided for under this chapter, aside from the above exception relating to office supplies and expenses, and that of the publication and distribution of reports and bulletins, shall not exceed the sum of eight thousand dollars per annum, which amount is hereby appropriated annually, to be paid out on warrants of the state auditor on the presentation of bills duly audited and allowed as provided in this section. [31 G. A., ch. 104, § 4; 25 G. A., ch. 159; 24 G. A., ch. 71, §§ 6, 7.]

[For repeal of original code section see § 2500. EDITOR.]

CHAPTER 11.

OF INSPECTION OF PETROLEUM PRODUCTS.

SECTION **2503. Inspectors — chief inspector.** The governor shall appoint inspectors of products of petroleum, not exceeding fourteen in number, one of whom shall be designated as chief inspector, who shall have general supervision of the inspection service of the state, except in the matter of making reports and the payment and receipts of fees. All differences arising in the inspection of oils shall be referred to the chief inspector and his decision of the question shall be final. The chief inspector shall make such recommendations to the state board of health as may be deemed necessary to improve the inspection service. He shall devote his time and service wholly to the inspection of oil and the duties of his office. Inspectors may appoint such deputies, helpers and branders as may be necessary in the proper discharge of their official duties, but such appointments before becoming effective must be submitted to, approved and confirmed, and their compensation fixed by the executive council as in their judgment may be necessary, equitable and just. Each inspector shall be a resident of the state, and not interested directly or indirectly in the manufacture or sale of products of petroleum. His term of office shall begin on the first day of July in each odd-numbered year. He shall give bond to the state in the penal sum of five thousand dollars, conditioned upon the faithful performance of his duties, with sureties who shall, in addition to the usual justification, make oath, entered on the bond, that they are not directly or indirectly interested in the manufacture or sale of products of petroleum for illuminating purposes, which bond shall be for the benefit of all persons injured through the failure of the inspector to perform his duties, and shall be filed with, and the sureties thereon approved by, the secretary of state. Provided however, that the term of office of the inspectors appointed during the year nineteen hundred and six shall expire on the thirtieth day of June, nineteen hundred and seven. [31 G. A., ch.

105, § 1; 30 G. A., ch. 87, § 1; 27 G. A., ch. 61, § 1; 21 G. A., ch. 149, § 4; 20 G. A., ch. 185, §§ 1, 3, 12, 14.]

[For repeal of original code and supplement section see § 2510. EDITOR.]

SEC. 2504. **Regulations.** The state board of health shall make rules and regulations for the inspection of petroleum products, for the government of inspectors, and prescribe the instruments and apparatus to be used. Such rules and regulations shall be approved by the governor, and, when so approved, shall be binding upon all inspectors. [30 G. A., ch. 87, § 2; 20 G. A., ch. 185, § 2.]

[For repeal of original code section see § 2510. EDITOR.]

SEC. 2505. **Inspection—branding—fees—supplies—rebate.** Each inspector shall be furnished, at reasonable expense to the state, with the necessary supplies, instruments and apparatus for testing, and shall promptly make inspection, and test and brand all illuminating oils kept for sale, and for such purpose may enter upon the premises of any person. He shall reject all oils for illuminating purposes which will emit a combustible vapor at a temperature of 100° standard Fahrenheit thermometer, closed test, not less than one-half pint of oil to be used in the flash test. If upon test and examination the oil shall meet the requirements, he shall brand over his official signature and date the barrel or package holding the same, "Approved, flash test ..... degrees," inserting in the blank the number. Should it fail to meet the requirements, it shall be branded under his official signature and date, "Rejected for illuminating purposes." All inspections shall be made within the state, and paid for by the person for whom the inspection is made, at the rate of ten cents per barrel, fifty-five gallons for this purpose constituting a barrel, which charge shall be a lien upon the oil inspected, and be collected by the inspector, reported and paid to the secretary of state, on or before the fifteenth day of each month. For the purposes of this act, gasoline, benzine and naphtha shall be deemed illuminating oil. No gasoline shall be sold, given away or delivered to any person in this state until the package, cask, barrel or vessel containing the same has been plainly marked "gasoline" in such manner as the executive council may prescribe. There shall be no refund nor rebate of charges made or paid for inspection, except upon a duly verified certificate of the owner that the goods, for which such rebate is asked, have been disposed of outside of the state. Said certificate to be in such form as shall be prescribed by the secretary of state and shall be delivered to the inspector and attached to his monthly report. The amount of such rebate per barrel allowed during any fiscal year shall be determined by the secretary of state during the month of July of each year and shall equal approximately the net proceeds per barrel from the inspection service of the state during the preceding fiscal year, the same to be even cents per barrel and in no case more than the net proceeds above mentioned. Any person, firm, corporation or agent violating any of the provisions of this act shall be deemed guilty of a misdemeanor and punished accordingly. All necessary supplies, labels, instruments and apparatus as contemplated in this chapter, shall be purchased by the executive council, and shall be furnished to inspectors as needed by them, upon requisition therefor, made to the chief inspector, approved by him and forwarded to the executive council. Every person who receives products of petroleum for sale which have not been inspected as provided in this chapter, shall, within five days after the receipt thereof, notify the inspector of that inspection district that the

same is in his possession; and to neglect so to do shall be deemed a misdemeanor. [34 G. A., ch. 108, § 1; 33 G. A., ch. 147, § 1.] [30 G. A., ch. 87, § 3; 26 G. A., ch. 94; 24 G. A., ch. 52, § 1; 21 G. A., ch. 149, §§ 1, 2, 4; 20 G. A., ch. 185, §§ 1, 2, 4, 14.]

[For repeal of original code section see § 2510. EDITOR.]

The failure of the seller to label a vessel containing gasoline sold to a customer, as required by this section, held to constitute negligence *per se* so as to render the seller liable for injuries sustained by a minor daughter of the purchaser in using the gasoline to start a fire, under the belief that it was the ordinary form of coal oil. *Ives v. Welden*, 114–476, 87 N. W. 408.

SEC. **2506. Record and report from companies, agents—violation—penalty.** Each inspector shall keep an accurate record of all oils inspected and branded, the number of gallons, the number and kind of barrels or packages, the date and number of gallons approved, the number rejected, the name of the person for whom inspection was made, and the amount of money received therefor, the necessary traveling expenses incurred, and the expenses incurred in prosecution, which record at all reasonable times shall be open to public inspection. A copy of this record duly verified under oath for the preceding month shall be filed with the secretary of state on or before the fifteenth day of each month, who shall examine said report and if found correct endorse his approval thereon, and certify the same to the executive council, and when approved by said council, the auditor of state shall issue his warrant upon the treasurer of state for the amount so approved and due the several inspectors, and no item of expense shall be allowed and paid not shown in such reports. It shall be the duty of all persons, firms or corporations, officers or agents thereof within the state, receiving any of the products of petroleum subject to inspection, to file with the secretary of state on or before the tenth day of each month, a certificate duly verified, in such form as shall be approved by the secretary of state, to cover the month preceding the one in which said report is made. Such report shall show the number of tanks or barrels, and if in tanks the tank number, of each product inspected for such person, firm, corporation, officer or agent, the amount of fees paid for such inspection, to whom paid, and that the amounts so stated are all the products received by him or them which are subject to inspection during such period. For any failure to make the reports contemplated in this section the person, firm, corporation, officer, agent or employe shall be liable to a fine of not less than ten dollars nor more than one hundred dollars. [30 G. A., ch. 87, § 4; 24 G. A., ch. 52, §§ 1, 4; 22 G. A., ch. 82, § 38; 20 G. A., ch. 185, § 5.]

[For repeal of original code section see § 2510. EDITOR.]

SEC. **2507. Compensation of inspectors—expenses.** Each inspector shall be allowed as full compensation for his services all fees and commissions earned and collected by him up to fifty dollars per month, and twenty-five per cent. of the sum collected in any one month in excess of fifty dollars, but in no case shall his compensation exceed one hundred dollars per month, except that the chief inspector shall be allowed twenty-five per cent. of any sum collected by him in any one month in excess of fifty dollars, up to and not exceeding one hundred fifty dollars. Inspectors shall also be allowed such other sums necessarily and actually expended in the discharge of their official duties; and for necessary expenses incurred for prosecution of violation of the provisions of this chapter, and for neces-

sary help in branding barrels. All money collected each month by inspectors shall, on or before the fifteenth day of the following month, be paid to the secretary of state, and by him accounted for as other fees of his office. [30 G. A., ch. 87, § 5; 24 G. A., ch. 52, §§ 2–4.]

[For repeal of original code section see § 2510. EDITOR.]

Where an oil inspector dies after having rendered services for part of a month and his successor completes the service for that month, each is entitled to the maximum salary for that part of a month during which he has served. *State v. Dyer*, 106–640, 77 N. W. 329.

SEC. **2508. Penalties—damages.** If any person, company or corporation, or agent thereof, shall sell, or attempt to sell, any product of petroleum for illuminating purposes which has not been inspected and branded as in this chapter provided, or shall falsely brand any barrel or package containing such petroleum product, or shall refill with products of petroleum barrels or packages having the inspector's brand thereon, without erasing such brand and having the contents thereof inspected, and the barrel or package rebranded, or shall purchase, sell or dispose of any empty barrel or package without thoroughly removing the inspection brand, or shall knowingly or negligently sell or cause to be sold, or shall use or cause to be used, any product of petroleum mentioned in this chapter not inspected and tested, except as otherwise authorized herein; or if any person shall adulterate with any substance for the purpose of sale or use any product of petroleum to be used for illuminating purposes in such a manner as to render it dangerous, or shall sell or offer for sale, or use any product of petroleum for illuminating purposes, which will emit a combustible vapor at a temperature of less than 105°, standard Fahrenheit thermometer, closed test, except as otherwise provided in this section for illuminating railway cars, boats and public conveyance, and except when the oils from which said gas or vapor is generated in closed reservoirs outside the building to be lighted thereby, and except the lighter products of petroleum when used in such lamps or apparatus which, having been submitted to the state board of health and having been examined and tested by said board shall be found to be safe for the use of the public and for street light by street lamps, shall be fined not less than ten dollars nor more than fifty dollars, or if any common carrier shall carry in any railway passenger, baggage, mail, or express car, street railway car, boat, stage coach, omnibus, or other means of public conveyance, or use or burn therein any oil or fluid, whether composed wholly or in part of petroleum or its products, which will ignite and burn at a temperature of 300° Fahrenheit thermometer, open test, for lighting any lamp, vessel, or fixture of any kind, or boat or street railway car, stage coach or other means of public conveyance; or if any inspector shall falsely brand any package or barrel, or shall practice any fraud or deceit in office, or be guilty of any official misconduct or culpable negligence to the injury of another, or shall deal or have any pecuniary interest, directly or indirectly in any oils or fluids sold for illuminating purposes while holding such office, he or such person, company, corporation or agent shall be fined not less than fifty dollars and shall be liable in a civil action for all damages which may be sustained on account thereof, and each such inspector shall be fined in a sum not less than ten dollars nor more than one thousand dollars, or imprisoned in the county jail not exceeding six months, or be punished by both fine and imprisonment. [30 G. A., ch. 87, § 6; 29 G. A., ch. 168, § 1;

29 G. A., ch. 101, § 1; 28 G. A., ch. 83, § 1; 27 G. A., ch. 62, § 1; 21 G. A., ch. 149, § 3; 20 G. A., ch. 185, §§ 1, 6, 7, 8, 10, 11, 13.]

[For repeal of original code and supplement section see § 2510. EDITOR.]

The exception of the proviso in this section as to the "Welsbach hydrocarbon incandescent lamp" is unconstitutional as attempting to confer a special privilege, but the whole section is not invalid on that account, as the exception is not necessary to the completeness of the general statutory provision which had been in force prior to the attempt to incorporate the exception. *State v. Santee*, 111–1, 82 N. W. 445.

Even though the seller is put upon notice that the oil may be dangerous, he is not required as a matter of law to provide himself with apparatus for making a closed test such as the statute requires to be made by an inspector, nor to call upon an inspector to make such test. The duty of the seller upon receiving information such as would lead a reasonably prudent man to think that the oil which he is selling does not correspond to the brand on the barrel, is to make, or cause to be made, such inspection as would reasonably determine whether the oil which he is selling is in fact dangerous. *Chapman v. Pfarr*, 145–196, 123 N. W. 992.

It cannot be said as a matter of law that the brand of the inspector will protect the dealer from a charge of negligence in selling oil erroneously branded. The seller may be negligent in not detecting the true nature of the article which he is handling. *Chapman v. Pfarr*, 153–20, 132 N. W. 957.

SEC. 2508-a. **Duties of state board of health — examination of lamps and apparatus.** The state board of health shall examine the particular design, mechanism, and workmanship of such lamps or apparatus as shall be presented to such board, and test said lamps or apparatus, and, if it shall find any lamp or apparatus to be safe, said board shall enter the findings of the board upon the records of the proceedings of said board. The board shall have power, in case it comes to the notice of the board that any lamp or apparatus which it has heretofore approved as safe, because either of change of design, the use of unsuitable material, or poor workmanship in the construction of such lamps or apparatus, or for any other cause, is unsafe as then manufactured, and dangerous to public safety, to cancel its approval of such lamp or apparatus, and after such cancellation of the approval of said lamp or apparatus, it shall be unlawful to sell or use the same, and no lamps or apparatus manufactured or sold after such disapproval shall be used in burning the lighter products of petroleum for illuminating purposes. The state board of health shall notify by registered letter the several inspectors of any approval or disapproval by them of any lamp or apparatus submitted to them for examination. [30 G. A., ch. 87, § 7; 29 G. A., ch. 168, § 1; 28 G. A., ch. 83, § 2.]

[For repeal of original supplement section see § 2510. EDITOR.]

SEC. 2509. **Removal of inspectors.** It shall be the duty of the governor to remove from office any inspector who is incompetent or unfaithful in the discharge of his official duty, or, having knowledge of the violation of any of the provisions of this chapter, shall neglect or refuse to prosecute the offender. In July of each year each inspector shall file with the secretary of the executive council an inventory of all instruments and apparatus belonging to the state, in his possession, or that of his deputy or helper, which shall be fully accounted for in such manner as may be prescribed by the executive council. [30 G. A., ch. 87, § 8; 20 G. A., ch. 185, § 9.]

[For repeal of original code section see § 2510. EDITOR.]

SEC. 2509-a. **Biennial report.** The secretary of state shall make and deliver to the governor a report, for the fiscal year ending on the thirtieth day of June in each even-numbered year, of all inspections made, the receipts and expenditures therefor, and such other items as are by this chap-

ter required to be made of record. Provided, however, he shall make and deliver report to the governor for the fiscal year ending on the thirtieth day of June, nineteen hundred and six, which report shall cover the period only from the date of his last biennial report. [31 G. A., ch. 105, § 2; 30 G. A., ch. 87, § 9.]

SEC. **2510. Repeal.** The law as it appears in chapter eleven, title twelve, of the code and the law as it appears in sections twenty-five hundred and three, twenty-five hundred and eight and twenty-five hundred and eight-a, of the supplement to the code, [1902] relating to the inspection of petroleum products, are hereby repealed and the foregoing enacted in lieu thereof. [30 G. A., ch. 87, § 10.]

SEC. **2510-1a. Gasoline—benzine—naphtha—labels—brands.** That all products of petroleum, known as gasoline, benzine or naphtha, sold or kept for sale within this state, shall be labeled or branded in plain, clear, legible letters in English and figures showing the Baume gravity test at a temperature of 60° Fahrenheit. If such petroleum products are sold by the barrel, half-barrel or cask, the label shall be placed in a conspicuous place on each barrel, half-barrel or cask. If sold from a tank wagon, the person selling or delivering the same shall show on each sale ticket the gravity test as hereinbefore provided. [34 G. A., ch. 109, § 1.]

SEC. **2510-2a. Failure to brand—false labels.** Any person, firm, company, association or corporation, or any employe or agent of any such person, firm, company, association or corporation, who shall sell or cause to be sold or keep for sale within this state, any products of petroleum known as gasoline, benzine or naphtha, which has not been branded as above required, or which shall be falsely or incorrectly branded, or which is labeled so as to mislead or deceive the purchaser, or which is not equal to the gravity test as stated therein, shall be guilty of a misdemeanor. [34 G. A., ch. 109, § 2.]

SEC. **2510-3a. Inspection.** It shall be the duty of the chief oil inspector, or such state inspector or deputy as may be directed by him, upon complaint, to inspect gasoline, benzine or naphtha for the purpose of determining as to whether the same is up to the standard and quality as shown by the label thereon; or said chief oil inspector may at his own option inspect, or cause to be inspected, such petroleum products. [34 G. A., ch. 109, § 3.]

SEC. **2510-4a. Authority to enter premises.** The chief oil inspector, or any state inspector or deputy, is hereby invested with authority and jurisdiction to enter upon the premises of anyone selling or keeping for sale within this state any gasoline, benzine or naphtha, for the purpose of inspecting the same as herein provided. [34 G. A., ch. 109, § 4.]

CHAPTER 11-A.

OF THE MANUFACTURE AND SALE OF PAINT, THE ADULTERATION THEREOF AND PENALTY.

SECTION **2510-a. Repeal.** Sections twenty-five hundred ten-a, twenty-five hundred ten-b, twenty-five hundred ten-c, twenty-five hundred ten-d and twenty-five hundred ten-e of the supplement to the code [1902] are hereby repealed. [32 G. A., ch. 131, § 8; 27 G. A., ch. 52, §§ 1–5.]

SEC. **2510-b. Duty of manufacturers and dealers.** Every person, firm or corporation who shall expose for sale, or sell, within this state, any white lead, or paint, shall accurately label the same as hereinafter required. [34 G. A., ch. 110, § 9; 33 G. A., ch. 148, § 1.] [32 G. A., ch. 131, § 1.]

[For repeal of original 1902 supplement section see § 2510-a. EDITOR.]

[For special provisions respecting this section see § 2510-m. EDITOR.]

SEC. **2510-c. "Paint" defined.** The term "paint" as used in this act shall include white lead in oil or any compound intended for the same use, paste or semi-paste, and liquid or mixed paint ready for use, or any compound intended for the same use. [33 G. A., ch. 148, § 1.] [32 G. A., ch. 131, § 2.]

[For repeal of original supplement section see § 2510-a. EDITOR.]

[For special provisions respecting this section see § 2510-m. EDITOR.]

SEC. **2510-d. Labels.** Labels required by this act shall clearly and distinctly state the name and address of the manufacturer of the article, or the dealer therein, or of the party for whom the same is manufactured and show, with substantial accuracy, the percentage of each ingredient, both solid and liquid, contained therein (in continuous list with no intervening matter of any kind); provided that in case of paint other than white paint, the ingredients, other than the coloring material, may be treated as one hundred per cent., in which case it shall be necessary to state the description or trade name of such coloring matter and state, with substantial accuracy, its chemical analysis. The label shall also state, in case of liquid paints and other compounds, on packages holding one quart or more, the net measure of contents of each can, package or container. In case of white lead and other paints and compounds, the label shall show on package weighing four pounds or more the net weight of each can, package or container. [34 G. A., ch. 110, § 9; 33 G. A., ch. 148, § 1.] [32 G. A., ch. 131, § 3.]

[For repeal of original 1902 supplement section see § 2510-a. EDITOR.]

[For special provisions respecting this section see § 2510-m. EDITOR.]

SEC. **2510-e. Flax seed or linseed oil—chemical and temperature tests—repeal.** Sections twenty-five hundred ten-e and twenty-five hundred ten-f of the supplement to the code, 1907, are hereby repealed. [34 G. A., ch. 110, § 9.] [32 G. A., ch. 131, § 4.]

[For repeal of original 1902 supplement section see § 2510-a. EDITOR.]

The evident purpose of the statute in requiring the inspection of linseed oil is to prevent fraud and deceit. The statute does not prohibit the sale of linseed oil that is adulterated, or any compound that contains such oil, where the product is not sold as pure linseed oil. *State v. Holton*, 148–724, 126 N. W. 1125.

The provision as to the sale of linseed oil not conforming to the chemical test for purity only applies to raw linseed oil, inasmuch as boiled linseed oil always contains a dryer and no test for purity thereof is found in the United States Pharmacopoeia. *State v. Manhattan Oil Co.*, 155–453, 136 N. W. 197.

SEC. **2510-f. Tanks or vessels containing oil to be marked—repealed.** [34 G. A., ch. 110, § 9.] [32 G. A., ch. 131, § 5.]

[See § 2510-e. EDITOR.]

This section has no application to boiled linseed oil, as prior to the enactment of 34 G. A., ch. 110, there was no recognized standard of purity as to such oil. *State v. Manhattan Oil Co.*, 155–453, 136 N. W. 197.

SEC. 2510-g. **Enforcement—bulletins.** It is hereby made the duty of the state food and dairy commissioner to enforce the provisions of this act. The inspectors, assistants and chemists appointed by the state food and dairy commissioner shall perform the same duties and have the same authority under this act as are prescribed by chapter one hundred sixty-six, laws of the thirty-first general assembly. The state food and dairy commissioner shall, from time to time, with the approval of the executive council, publish bulletins, giving the results of inspections and analyses, together with such additional information as he may deem suitable. [32 G. A., ch. 131, § 6.]

SEC. 2510-h. **Penalty.** Whoever shall violate any of the provisions of this act shall be guilty of a misdemeanor and shall, upon conviction thereof, be punished by a fine not exceeding one hundred dollars. [33 G. A., ch. 148, § 1.] [32 G. A., ch. 131, § 7.]

[For special provisions respecting this section see § 2510-m. EDITOR.]

SEC. 2510-i. **When effective.** This act shall take effect on January first, nineteen hundred and eight. [32 G. A., ch. 131, § 9.]

SEC. 2510-j. **Sale of gasoline—conditions—penalty.** Every person dealing at retail in gasoline in this state shall after the first day of January, nineteen hundred and seven, deliver the same to the purchaser, in quantities of more than one quart and less than six gallons, only in barrels, casks, packages, cans or measures painted vermilion red and having the word "gasoline" plainly stenciled or marked thereon. No such dealer shall deliver kerosene in a barrel, cask, package or can painted or marked as above. Every person purchasing gasoline for use shall procure and keep the same only in barrels, casks, packages or cans painted and marked as above. No person keeping for use, or using, kerosene shall put or keep the same in any barrel, cask, package or can painted or marked as above. Any person violating any of the provisions of this section shall be deemed guilty of a misdemeanor, and upon conviction, shall be punished by fine of not less than five, nor more than one hundred dollars. [31 G. A., ch. 106, § 1.]

In a particular case held that defendant's having violated the law in putting gasoline into a kerosene can, not being the proximate cause of the injury complained of, was not material. *Dubois v. Luthmers*, 147–315, 126 N. W. 147.

SEC. 2510-k. **For manufacturing or mechanical purposes.** This act shall not be construed to prohibit the use of gasoline from tanks or reservoirs, of not less than ten gallons capacity, for manufacturing or mechanical purposes. [31 G. A., ch. 106, § 2.]

SEC. 2510-l. **Acts in conflict repealed.** All acts or parts of acts in conflict with this act are hereby repealed. [31 G. A., ch. 106, § 3.]

SEC. 2510-m. **Effective as to certain articles—when.** That the provisions of sections twenty-five hundred ten-b, twenty-five hundred ten-c, twenty-five hundred ten-d, and twenty-five hundred ten-h of the supplement to the code, 1907, shall not until November first, nineteen hundred ten, apply to any articles therein described which were in the state in the hands of jobbers and dealers on January first, nineteen hundred and eight, provided such articles were not manufactured or contracted for after July fourth, nineteen hundred and seven. [33 G. A., ch. 148, § 1.]

CHAPTER 11-B.

OF THE ADULTERATION OF AND DECEPTION IN THE SALE OF RAW AND BOILED LINSEED OIL.

SECTION **2510-n. "Raw linseed oil" designated.** That no person, firm or corporation shall expose for sale, sell, or take orders for sale and delivery within this state, any "raw linseed oil," unless the same is wholly obtained from the seeds of the flax plant (Linum usitatissimum), and unless the same fulfills all the requirements recognized by the United States Pharmacopoeia. [34 G. A., ch. 110, § 1.]

SEC. **2510-o. "United States Pharmacopoeia."** The term "United States Pharmacopoeia" as used in this act, shall refer to the latest revision of the United States Pharmacopoeia, official at the time of the sale in question. [34 G. A., ch. 110, § 2.]

SEC. **2510-p. Boiled linseed oil—requirements.** That no person, firm or corporation shall expose for sale, sell, or take orders for sale and delivery within this state, any "boiled linseed oil" or so-called "boiled oil," unless the same shall have been prepared by heating pure raw linseed oil to a temperature of at least 107° centigrade, and, if desired, incorporating not to exceed three per cent. by weight of dryer. And for the purpose of this act, it shall also be deemed a violation hereof if boiled linseed oil does not conform to the following requirements:

First. Its specific gravity at $^{20}/_{20}°$ centigrade must be not less than 0.935 and not greater than 0.945.

Second. Its saponification number must not be less than 186.

Third. Its iodine absorption number shall not be less than 160.

Fourth. Its acid value must not exceed 10.

Fifth. The volatile matter expelled at 100° centigrade must not exceed one half of one per cent.

Sixth. No mineral oil shall be present, and the amount of unsaponifiable matter as determined by standard methods, shall not exceed two per cent.

Seventh. The film left after flowing the oil over glass and allowing it to drain in a vertical position, must dry free from tackiness in not to exceed twenty hours, at a temperature of about 20° centigrade. [34 G. A., ch. 110, § 3.]

Prior to the enactment of this provision there was no recognized test as to the purity of boiled linseed oil. *State v. Manhattan Oil Co.*, 155–453, 136 N. W. 197.

SEC. **2510-q. Labels.** That no person, firm or corporation shall expose for sale or sell any flaxseed or linseed oil unless it is exposed for sale or sold under its true name, and each original unbroken tank car, tank, barrel, keg or vessel containing such oil has distinctly and durably marked thereon the true name of such oil, and the name and place of business of the manufacturer thereof, in ordinary bold-faced capital letters not less than five-line pica in size, the words "pure linseed oil—raw," "pure linseed oil—boiled," as the case may be. [34 G. A., ch. 110, § 4.]

SEC. **2510-r. Substitutes—how labeled.** That no person, firm or corporation shall expose for sale, sell, or take orders for sale and delivery within this state, any compound or mixture of linseed oil (raw or boiled) with other products, or any product which is intended to be used as a substitute for linseed oil (raw or boiled), unless it is exposed for sale and sold under the name, "substitute for linseed oil," and, if the words "lin-

seed" or "flaxseed" are used other than in the name, the true name of each and every ingredient of said product shall also appear, giving preference of order to the ingredients present in the greater proportion, but all letters used in naming the ingredients shall be of the same size and color, using the style of type as hereinafter specified. Each tank car, tank, barrel, keg, can, jug or vessel (both wholesale and retail), also all storage receptacles containing said product, shall be distinctly and durably marked in a conspicuous place, using the English language and kind of type as hereinafter specified, giving the name under which it is sold, the names of ingredients when required and the name and place of business of the manufacturer thereof, in continuous list, with no intervening matter of any kind, using ordinary bold-faced capital letters not less than five-line pica in size, and there shall be such a contrast between the color of the type and the background of the label as to render the same easily and plainly legible; provided that nothing in this section shall be construed as interfering with the sale of boiled linseed oil containing not to exceed three per cent. by weight of dryer as defined in section three of this act. [34 G. A., ch. 110, § 5.]

SEC. **2510-s. Failure to label—false label.** Any failure to label said article as above specified or any erasures, defacements or carelessness in printing or stamping labels or any statement regarding the composition of said article or any statements of any kind which are misleading, deceptive or which are not true are hereby declared a violation of this act. [34 G. A., ch. 110, § 6.]

SEC. **2510-t. Dairy and food commissioner shall enforce—bulletins.** It is hereby made the duty of the state food and dairy commissioner to enforce the provisions of this act. The inspectors, assistants and chemists appointed by the state food and dairy commissioner shall perform the same duties and have the same authority under this act as are prescribed by chapter ten-a, page ten hundred eighty-six of the supplement to the code, 1907. The state food and dairy commissioner may, from time to time, with the approval of the executive council, publish bulletins, giving the results of inspections and analyses, together with such additional information as he may deem suitable. [34 G. A., ch. 110, § 7.]

SEC. **2510-u. Violation—penalty.** Whoever shall violate any of the provisions of this act shall be guilty of a misdemeanor and shall, upon conviction thereof, be punished by a fine not exceeding one hundred dollars. [34 G. A., ch. 110, § 8.]

CHAPTER 11-C.

OF THE ADULTERATION AND DECEPTION IN THE SALE OF PURE OIL OF TURPENTINE.

SECTION **2510-v. Oil of turpentine—properties and requirements.** That no person, firm or corporation shall expose for sale, sell, or take orders for sale and delivery within this state, any "oil of turpentine" or so-called "spirits of turpentine," "turpentine" or "turps," unless the same is wholly the volatile portion obtained by distillation of the oleoresinous exudation from various species of coniferous trees; and for the purpose of this act, it shall also be deemed a violation hereof if oil of turpentine does not conform to the following requirements:

1. Its specific gravity at $^{20}/_{20}^{\circ}$ centigrade must be not less than 0.860 and not greater than 0.875.
2. Its index of refraction at 20° centigrade must not be less than 1.4680 and not greater than 1.4725.
3. Its iodine absorption number must not be less than 340.
4. The undissolved (unpolymerized) residue, or treatment of ten cubic centimeters with forty cubic centimeters of a sulphuric acid containing twenty per cent. of the fuming acid, should not exceed ten per cent. by volume of the sample.
5. The initial boiling point must not be lower than 150° centigrade under ordinary atmospheric pressure, and ninety-five per cent. by volume must distill below 166° centigrade.
6. The residue left after evaporation over a steam bath must not exceed two per cent.
7. No mineral oil shall be present. [34 G. A., ch. 111, § 1.]

SEC. **2510-v1. Labels.** That no person, firm or corporation shall expose for sale or sell any oil of turpentine unless it is exposed for sale or sold under its true name, and each original unbroken tank car, tank, barrel, keg or vessel containing such oil has distinctly and durably marked thereon the true name of such oil, and the name and place of business of the manufacturer thereof, in ordinary bold-faced capital letters not less than five-line pica in size. [34 G. A., ch. 111, § 2.]

SEC. **2510-v2. Substitutes—how labeled.** That no person, firm or corporation shall expose for sale, sell, or take orders for sale and delivery within this state, any compound or mixture of oil of turpentine with other products, or any product which is intended to be used as a substitute for oil of turpentine unless it is exposed for sale and sold under the name, "substitute for oil of turpentine," and, if the word "turpentine" is used other than in the name, the true name of each and every ingredient of said product shall also appear, giving preference of order to the ingredients present in the greater proportion, but all letters used in naming the ingredients shall be of the same size and color, using the style of type as hereinafter specified. Each tank car, tank, barrel, keg, can, jug or vessel (both wholesale and retail), also all storage receptacles containing said product, shall be distinctly and durably marked in a conspicuous place, using the English language and kind of type as hereinafter specified, giving the name under which it is sold, the names of ingredients when required and the name and place of business of the manufacturer or jobber thereof, in continuous list, with no intervening matter of any kind, using ordinary bold-faced capital letters not less than five-line pica in size and there shall be such a contrast between the color of the type and the background of the label as to render the same easily and plainly legible. [34 G. A., ch. 111, § 3.]

SEC. **2510-v3. Failure to label—false label.** Any failure to label said article as above specified or any erasures, defacements or carelessness in printing or stamping labels or any statement regarding the composition of said article or any statements of any kind which are misleading or deceptive or which are not true are hereby declared a violation of this act. [34 G. A., ch. 111, § 4.]

SEC. **2510-v4. Dairy and food commissioner to enforce—bulletins.** It is hereby made the duty of the state food and dairy commissioner to enforce the provisions of this act. The inspectors, assistants, and chemists appointed by the state food and dairy commissioner shall perform the same

duties and have the same authority under this act as are prescribed by chapter ten-a page ten hundred eighty-six of the supplement to the code, 1907. The state food and dairy commissioner may from time to time, with the approval of the executive council, publish bulletins giving the results of inspections and analyses, together with such additional information as he may deem suitable. [34 G. A., ch. 111, § 5.]

SEC. **2510-v5. Violation—penalty.** Whoever shall violate any of the provisions of this act shall be guilty of a misdemeanor and shall, upon conviction thereof, be punished by a fine not exceeding one hundred dollars. [34 G. A., ch. 111, § 6.]

[The secretary of state, in compiling the session laws of 34 G. A., indicated in the title of the above act (ch. 111, 34 G. A.) that the act is additional to ch. 11-A, title XII, of the supplement to the code, 1907; but in view of the fact that the title of ch. 11-A was so amended by § 9 of ch. 110, 34 G. A. (§ 2510-e), as to eliminate everything except paint, it has been deemed advisable to place the said act as 11-C in this work. EDITOR.]

CHAPTER 12.

OF THE INSPECTION OF PASSENGER BOATS.

SECTION **2512. Certificates—fees.** Any inspector, on the request of the owner, agent or master of any boat other than rowboat, upon the inland waters of the state, having a carrying capacity of five or more passengers, shall carefully and thoroughly inspect such boat, its appliances and machinery, and, if found in proper condition and safe for the carriage of persons or passengers, give his certificate thereof, including therein the number of persons or passengers that may be carried, and on what waters; which certificate, or a copy thereof, shall be posted in a conspicuous place on the boat, and any boat so inspected and certified shall be entitled to run for the season following the date thereof. In like manner, upon the request of any pilot or engineer for a license as such, the inspector shall forthwith investigate the competency of the applicant, his acquaintance with and experience in his business, his habits as to sobriety, and other qualifications, and, if found capable of performing well his duties, and of good habits, he shall issue his certificate authorizing him to act as pilot or engineer, as the case may be, for five years from the date thereof, unless sooner revoked for cause, which revocation when made shall take effect upon approval by the governor. The inspector may charge and require advance payment for inspection, for each sailboat, one dollar, each boat propelled by other power, with a capacity of not more than twenty persons, five dollars, those of greater capacity, ten dollars, and for each applicant for license as pilot or engineer, three dollars. [28 G. A., ch. 84, § 1; 22 G. A., ch. 107, §§ 3–5.]

SEC. **2513. Penalties.** If any owner, agent or master of any such boat, having a capacity of carrying five or more persons, plying the inland waters of the state, shall hire, or offer to hire, such boat for the carrying of persons, or receive persons thereon for hire, without first obtaining annually, before the boating season, a certificate as in this chapter required, or if such owner, agent or master, having obtained such certificate, shall permit or receive for carriage on such boat a greater number of persons than authorized therein, or if any person shall act as pilot or engineer on any boat mentioned for which inspection and license are herein required, without first obtaining a license therefor, or if, having such license, he continues to follow such avocation after the same has been revoked, or

has expired, he shall be fined in a sum not exceeding one thousand dollars, or imprisoned in the county jail not exceeding one year, or punished by both fine and imprisonment; but the provisions of this chapter shall not apply to vessels licensed by authority of the United States. [28 G. A., ch. 84, § 2; 22 G. A., ch. 107, §§ 1, 3, 4.]

SEC. **2514. Reports.** Each inspector annually, on or before the first day of January, shall report to the governor the number and date of licenses granted pilots or engineers, to whom issued, the date thereof, the number and kind of boats inspected, the time and place of inspection, upon what waters to be used and such other matters as may be considered useful or of general interest, with the total amount of fees received from all sources. [28 G. A., ch. 84, § 3; 22 G. A., ch. 107, § 6.]

SEC. **2514-a. Headlights.** Any person or company operating any boat, launch or other vessel propelled by machinery, or through the means of sails, upon the public waters of the state of Iowa between the hours of thirty minutes after sunset and thirty minues before sunrise shall cause the same to carry at the bow thereof, properly lighted, operated and conspicuously displayed, a headlight, the lens or mirror of which shall be not less than five inches in diameter. [33 G. A., ch. 149, § 1.]

SEC. **2514-b. Safety appliances for prompt stoppage.** All such vessels operated by machinery having a speed exceeding ten miles per hour shall be equipped with reverse gear, reversible propeller or other adequate means for prompt stoppage and reversal thereof. [33 G. A., ch. 149, § 2.]

SEC. **2514-c. Speed at bridge.** All such vessels when passing through a draw or bridge or beneath same shall slow down to a speed of not more than four miles per hour. [33 G. A., ch. 149, § 3.]

SEC. **2514-d. Penalty.** Any person or company violating any of the provisions of this act shall upon conviction be fined not to exceed one hundred dollars or be imprisoned in the county jail not to exceed thirty days. [33 G. A., ch. 149, § 4.]

SEC. **2514-e. Life preservers.** That every boat for which a certificate of inspection is issued as provided in this chapter shall at all times when in service be supplied with a number of life preservers of recognized standard make and efficiency equal to one half the number of passengers that may be carried by such boat under its certificate of inspection; said life preservers to be kept within view and easy reach of the passengers. [34 G. A., ch. 112, § 1.]

SEC. **2514-f. Inspection.** At the time of inspecting the boat under the provisions of this chapter the life preservers shall be inspected and if found in proper condition such fact shall be included in the certificate of inspection; and no certificate of inspection shall be issued to the owner, agent, or master of any boat unless supplied with the life preservers as above provided. [34 G. A., ch. 112, § 2.]

SEC. **2514-g. Penalties.** Any owner, agent or master of any such boat who shall violate the terms of this act shall be subjected to the penalties provided for in section twenty-five hundred thirteen, title twelve, chapter twelve, of the 1907 supplement to the code. [34 G. A., ch. 112, § 3.]

CHAPTER 12-A.

OF HOTELS, INNS AND LODGING HOUSES.

SECTION **2514-h. "Hotel" defined.** Every building or structure kept, used, advertised as or held out to the public to be an inn, hotel or public lodging house, or place where sleeping accommodations are furnished for hire to transient guests whether with or without meals in which four or more sleeping rooms are used for the accommodation of such guests, shall for the purpose of this act be defined to be a hotel, and wherever the word "hotel" shall occur in this act, it shall be construed to mean and cover every such building or structure as is described in this section, except as herein provided. [35 G. A., ch. 186, § 1; 33 G. A., ch. 168, § 1.]

This statute relating to hotel inspection is not unconstitutional as not of uniform operation nor as involving a delegation of legislative power. *Hubbell v. Higgins*, 148–36, 126 N. W. 914.

SEC. **2514-i. Fire escapes—ropes.** Every hotel of three or more stories in height shall be provided and equipped with a fire escape or fire escapes of the style and character and in the manner described in section forty-nine hundred ninety-nine-a eight of the supplement to the code, 1907, and in addition thereto, every bedroom or sleeping apartment which has no other approved fire escape above the ground floor, except in hotels which are of approved fireproof construction, shall be provided with a manila rope at least five eighths of an inch in diameter and of sufficient length to reach the ground, with knots or loops not more than fifteen inches apart, and of sufficient strength to sustain a weight and strain of at least five hundred pounds. Such ropes shall be securely fastened to the building as near the window as practicable and shall be kept coiled in plain sight at all times, nor shall such rope be covered by curtain or other obstruction. Provided, however, that any other contrivance or appliance for reaching the ground from said bedroom or sleeping apartment may be used in lieu of said rope, if approved by the state hotel inspector. The provisions herein as to providing ropes shall apply to all hotels of more than one story. [33 G. A., ch. 168, § 2.]

SEC. **2514-j. Notices posted.** In every such hotel there shall be posted and maintained notices, printed in black ink on white paper or cardboard with type not less than one inch in height, at the entrance to each hall, stairway, elevator shaft, and in each bedroom or sleeping apartment, above the ground floor, [giving] directions how to reach the fire escapes and there shall also be posted and maintained in each bedroom or sleeping apartment, above the ground floor, except in hotels which are of approved fireproof construction, notices printed in large bold-faced type, calling attention to the rope therein, and giving directions how to use it. [33 G. A., ch. 168, § 3.]

SEC. **2514-k. Fire extinguishers.** Every such hotel shall be provided with at least one efficient chemical fire extinguisher on each floor to each twenty-five hundred feet of floor space, which extinguisher or extinguishers shall be placed and maintained in the hallway outside of the sleeping rooms and kept and maintained in condition for immediate use, or in lieu thereof such hotel shall be equipped with a standpipe placed in the hall of not less than one and one-fourth inches in diameter, with hose always attached of sufficient length to reach any and every part of the interior of the building, which standpipe shall be kept and maintained with a sufficient pressure of water. [33 G. A., ch. 168, § 4.]

SEC. **2514-l. Elevator shafts—how constructed.** [In] every hotel, except in hotels which are of approved fireproof construction, which is equipped with an elevator or elevators, such portion of the shaft or shafts thereof as extend below the level of the first floor shall be inclosed with an iron or steel sheeting or other fireproof material as nearly air-tight as practicable with tight doors to the shaftway, the door to be made as far as practicable of wire glass, or in lieu thereof shall be provided with an automatic floor trap at the first floor in each elevator shaft; each or either of such appliances shall be constructed in the most approved manner for the prevention of spread of fire by means of such elevator shaft. [33 G. A., ch. 168, § 5.]

SEC. **2514-m. Sanitary conditions—sewerage—bed linen.** Every hotel located or situated in a city or town having a system of sewerage shall be thoroughly drained, constructed and plumbed according to approved sanitary principles; all hotels shall be kept and maintained in a clean and sanitary condition and free from any effluvia, gas or offensive odors arising from any sewer, drain, privy, or any other source whatsoever within the control of the owner, manager, agent or person in charge thereof. Hotels in cities or towns not provided with a sewerage system shall be provided with an approved cesspool or with privies or water-closets properly screened and separated for the use of males and females, which cesspools, privies and water-closets shall be properly cleaned and disinfected as often as necessary to keep and maintain them in an approved sanitary condition.

Each bed, bunk, cot or other sleeping place provided for the use of guests shall be supplied with pillow slips and under and top sheets, each top sheet to be made ninety-six inches long, and of sufficient width to completely cover the mattress and springs; said sheets and pillow slips to be made of white cotton or linen, and all such sheets and pillow slips, after being used by one guest, to be washed and ironed before they are used by any other guest, a clean set being furnished each succeeding guest. All bedding used in any hotel shall be thoroughly aired and kept clean. Any room in any hotel under this act which shall become infested with vermin or bedbugs shall be renovated until said vermin or bedbugs are exterminated. [35 G. A., ch. 186, § 2; 33 G. A., ch. 168, § 6.]

SEC. **2514-n. Inside courts or lightwell—openings into—ladders.** The owner, proprietor, manager or person in charge of every hotel except in hotels which are of approved fireproof construction now or hereafter constructed with an inside court or lightwell and with sleeping rooms or sleeping apartments, the only windows of which open upon or into such court or lightwell unless the same extends to the ground floor, shall cause the roof or covering to such court or lightwell to be supplied with a trap door or other opening, which opening shall be provided with rope or other ladder of sufficient length to reach from such door or opening to the ground floor so as to enable those escaping in case of fire to such court or lightwell to reach the ground floor. [33 G. A., ch. 168, § 7.]

SEC. **2514-o. Halls—outside fire escapes.** Every hotel hereafter constructed that is three or more stories high shall be provided with a hall on each floor, above the ground floor, extending from one outside wall to the other, and at each end of such hall shall be equipped with an iron or steel fire escape on the outside of the building, connecting on each floor with one or more convenient and ample openings, such fire escapes to comply

with the provisions of section forty-nine hundred ninety-nine-a eight of the supplement to the code, 1907. [33 G. A., ch. 168, § 8.]

SEC. **2514-p. Inspector of hotels—deputies—bonds.** The civil engineer member of the state board of health shall by virtue of his office be inspector of hotels and shall be required to give bonds to the state in the penal sum of five thousand dollars, conditioned for the faithful performance of his duty, to be approved by and filed with the secretary of state, and shall maintain his office in the state board of health rooms at the capitol. Such inspector may, with the consent of a majority of the members of the state board of health, appoint, and at his pleasure remove, one or more deputies who shall assist under his direction in performing the duties imposed by this act; such deputies shall each give bond to the state in the penal sum of two thousand dollars, conditioned as that of the inspector and be approved by and filed with the secretary of state. [33 G. A., ch. 168, § 9.]

SEC. **2514-q. Annual inspection—certificates.** It shall be the duty of the inspector and his deputies to see that all of the provisions of this act are enforced and complied with, and for such purpose such inspector or deputy shall personally inspect once each year every hotel in the state coming within the provisions of this act. If upon inspection of any hotel, it shall be found that this law has been fully complied with, and the inspection fee has been paid to the inspector, he shall issue a certificate to that effect to the person operating the same, and such certificate shall be kept posted in plain view in some conspicuous place in said hotel, said inspector or his deputy being hereby empowered and authorized to enter any hotel at all reasonable hours to make such inspection; and it is hereby made the duty of every person in the management or control of such hotel to afford free access to every part of the hotel and render all aid and assistance necessary to enable the inspector to make a full, thorough and complete examination thereof. [33 G. A., ch. 168, § 10.]

SEC. **2514-r. Reports.** The inspector or deputy shall make a full and complete report to the state board of health of every hotel inspected, upon blanks furnished for that purpose, which report shall show the condition of the hotel inspected, as to its sanitary condition, the number and condition of its fire escapes, number of stories high, number of sleeping rooms or sleeping apartments, name of the proprietor, fee charged for inspection, and such other information as the state board of health may determine will be for the betterment of the public health. [33 G. A., ch. 168, § 11.]

SEC. **2514-s. Inspection fees.** The proprietor or manager of every hotel containing twenty rooms or less for the accommodation of the public, shall pay the person making the inspection a fee of four dollars, and every hotel containing more than twenty rooms for the accommodation of the public, a fee of eight dollars when inspected under the provisions of this act. But no hotel shall be inspected oftener than once a year unless there is a change of proprietors or unless upon a verified complaint signed by three or more patrons setting forth facts showing that such hotel is in an unsanitary condition or that fire escapes and appliances are not kept and maintained in accordance with the provisions of law. Upon receipt of such complaint, the inspector shall make or cause to be made an inspection or examination of the matters complained of, and, if upon inspection such complaint is found to be justifiable, the legal fee of inspection shall be charged and collected. In case the complaint is found to be without reasonable grounds the ordinary fee for such inspection shall be chargeable

against and collected from the person or persons making the complaint. All fees for the inspection shall be forthwith paid over to the state treasurer and his receipt taken and filed with the secretary of the state board of health. Such fees shall be by the treasurer kept as a separate fund to be known as a hotel inspection fund, and only paid out upon warrants or orders issued by the secretary of the state board of health and countersigned by the chairman thereof. [33 G. A., ch. 168, § 12.]

SEC. **2514-t. Compensation—expenses.** In addition to the compensation now received by the civil engineer as a member of the state board of health, he shall receive as inspector, a salary of fifteen hundred dollars per annum and necessary expenses out of the hotel inspection fund. Each deputy inspector shall receive such compensation out of the hotel inspection fund as shall be fixed by the inspector, not to exceed five dollars per day and necessary expenses when actually engaged in the work of inspection. All salaries, compensation, printing, stationery, postage, and other contingent expenses necessarily incurred under the provisions of this act shall be paid from said fund. All bills for compensation and necessary expenses shall be itemized, verified, audited, and warrant drawn on the hotel inspection fund in the same manner as other expenses of the state board of health, provided that no salaries, compensation or expenses shall be paid in excess of the inspection fees received; and provided that at the close of each fiscal year all fees remaining in the state treasury in excess of the outstanding warrants and the sum of five hundred dollars shall be transferred to the general fund. [33 G. A., ch. 168, § 13.]

SEC. **2514-u. False certification—penalty.** Any inspector or deputy who shall knowingly certify falsely regarding any hotel inspected by him, or shall issue a certificate to any person owning, managing, or operating a hotel when such person has not complied with the provisions of this act, shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine not exceeding five hundred dollars or imprisonment in the county jail not exceeding six months or by both such fine and imprisonment. [33 G. A., ch. 168, § 14.]

SEC. **2514-v. Notice to owner or manager.** It shall be the duty of the inspector upon ascertaining by inspection or otherwise, that any hotel is being carried on contrary to any of the provisions of this act, to notify the manager, proprietor or owner in writing in what respect it fails to comply with the law and requiring such person within a reasonable time, to be fixed by the inspector, to do or cause to be done the things necessary to make it comply with the law. [33 G. A., ch. 168, § 15.]

[For additional provisions relating to duties of hotel inspectors see §§ 2514-y to 2514-y5, inclusive, herein. EDITOR.]

The right of inspection provided for in this section is incidental to the police power in the exercise of which the statute is enacted. *Hubbell v. Higgins*, 148–36, 126 N. W. 914.

SEC. **2514-w. Interference with inspector—failure to comply—penalty.** Any owner, manager, agent or person in charge of a hotel who shall obstruct, hinder or interfere with an inspector or his deputy in the proper discharge of his duty, or who shall wilfully fail or neglect to comply with any of the provisions of this act, or who shall fail to pay the proper fee for inspection shall be guilty of a misdemeanor and upon conviction thereof, be fined not exceeding one hundred dollars or imprisoned in the county jail not exceeding thirty days. [33 G. A., ch. 168, § 16.]

The provision that a mere failure on the part of the hotel keeper to pay the inspection fee is a misdemeanor, even though he complies with every other requisite of the law, is objectionable as authorizing imprisonment for debt. But this provision may be eliminated without affecting the validity of the other provisions of the statute. *Hubbell v. Higgins*, 148–36, 126 N. W. 914.

SEC. **2514-x. Injunction—duty of county attorney.** It shall be the duty of the inspector upon ascertaining that any owner, manager, agent or person in charge is violating any of the provisions of this act after the expiration of the time fixed in the notice provided in section fifteen hereof to make complaint, and [he] may file his petition in any court of competent jurisdiction or before any judge of such court in vacation, upon which an injunction may issue with or without bond as may be ordered by the court or judge, restraining the further use of such hotel until the provisions of this act are fully complied with; but no injunction shall issue until after the defendant has had at least five days' notice of the application therefor, fixing a time for hearing thereon. It is hereby made the duty of the county attorney in either case to prepare the necessary papers and conduct all prosecutions or litigation connected therewith. [33 G. A., ch. 168, § 17.]

CHAPTER 12-B.

OF SANITARY CLOSETS AT RAILWAY STATIONS.

SECTION **2514-y. Maintenance—sanitation.** That all railway stations in this state, where a depot and waiting rooms for passengers are maintained, there shall be within the same or connected therewith sanitary closets, including separate closets for women, which in cities or towns having a system of sewerage, so located that the same can be reasonably used by the railroad property, shall be thoroughly drained, constructed and plumbed according to approved sanitary principles and said depots and closets shall be kept in a clean and sanitary condition, free from any offensive odors. Depots in cities or towns not provided with a sewerage system, shall be provided with privies or closets properly screened and separated for the use of males and females, which shall be cleaned and disinfected as often as necessary to keep and maintain them in an approved sanitary condition. [35 G. A., ch. 175, § 1.]

SEC. **2514-y1. Enforcement by hotel inspector.** It shall be the duty of the hotel inspector and his deputies to see that the provisions of the act are fully complied with and on complaint being filed by an employe or patron of the railway company shall by himself or deputy personally inspect the same. [35 G. A., ch. 175, § 2.]

SEC. **2514-y2. Delinquency—notice to station agent.** It shall be the duty of the inspector upon ascertaining by inspection or otherwise that any railroad company has not complied with the provisions of this act at any of its depots, to notify the station agent of such depot, in writing, stating in what respect it is delinquent and requiring it in a reasonable time, to be fixed by the inspector, to do or cause to be done the things necessary to make it comply with the law. [35 G. A., ch. 175, § 3.]

SEC. **2514-y3. Violation—penalty.** Any railroad company which after receiving said notice fails to comply, within the time fixed, with the provisions of this act, shall be guilty of a misdemeanor and upon conviction shall be fined not exceeding one hundred dollars for each offense and the inspector shall file information in such a case. [35 G. A., ch. 175, § 4.]

SEC. **2514-y4. Fee—who liable for.** Such railroad companies shall pay a fee of five dollars to the person making the inspection. If there is no cause of complaint, the person complaining shall be liable for such fee. All fees shall forthwith be paid over to the state treasurer to be kept in the hotel inspection fund. [35 G. A., ch. 175, § 5.]

SEC. **2514-y5. Expenses.** The inspector shall be allowed his necessary expenses while engaged in the actual work of inspection, to be audited and paid out of the hotel inspection fund as provided in section thirteen thereof. [35 G. A., ch. 175, § 6.]

CHAPTER 13.

OF THE DAIRY AND FOOD COMMISSIONER AND IMITATION DAIRY PRODUCTS.

SECTION **2515. Appointment—bond—powers and duties—assistants—equipment—state chemist—salaries—expenses—report.** That sections twenty-five hundred fifteen, supplement to the code, [1907] twenty-five hundred twenty-five of the code, twenty-five hundred twenty-eight of the code, forty-nine hundred eighty-nine, supplement to the code, 1907, forty-nine hundred ninety, supplement to the code, 1907, forty-nine hundred ninety-nine-a seventeen, supplement to the code, 1907, and five thousand and seventy-seven-a one, supplement to the code, 1907, are hereby repealed and the following enacted in lieu thereof; provided, however, this bill shall not operate to remove from office the dairy commissioner or his assistants who may be serving when this bill becomes a law:

"On or before the first day of April of each even-numbered year, the governor shall appoint a dairy and food commissioner, who shall have practical knowledge of, and experience in the manufacture of dairy products, and hold his office for two years from the first day of May following his appointment, and until his successor is appointed and qualified, subject to removal by the governor for inefficiency, neglect or violation of duty. He shall give bond in the sum of ten thousand dollars conditioned for the faithful performance of his duties, with sureties to be approved by and filed with the secretary of state. He shall keep on hand a supply of standard test tubes or bottles and milk measures or pipettes adapted for use by each milk testing machine. He shall furnish to any firm or corporation desiring the same one such tube or bottle, and such milk measure or pipette for each factory, of the kind adapted for the machine operated therein, upon request therefor, certifying it to be reliable, accurate and standard, placing thereon the words [letters] 'D. C.' as a permanent mark, the tubes or bottles and pipettes to be furnished at the actual cost thereof. He shall have and keep an office in the capitol, and preserve therein all correspondence, documents, records, and all property of the state pertaining thereto, and shall have authority to take all proper educational measures to foster and promote the manufacture and sale of pure food and dairy products. The commissioner shall be allowed necessary postage, stationery, and office supplies, and shall receive an annual salary of twenty-seven hundred dollars and necessary expenses, which shall not exceed forty-five hundred dollars per year including expenses, such expenses to be itemized, verified by him, and when examined and approved by the executive council, to be paid by warrant of the state auditor drawn upon the state treasurer. The commissioner may appoint a deputy commissioner at a

salary of eighteen hundred dollars per year, a state dairy inspector at a salary of sixteen hundred dollars per year. He may also appoint, with the approval of the Iowa state college of agriculture and mechanic arts, the director of the Iowa experiment station and the professor of dairying, two assistants at a salary of sixteen hundred dollars per year, and two assistants at a salary of fourteen hundred dollars per year, who shall perform such duties as may be assigned to them by the commissioner. Such deputy, dairy inspector and assistants shall be allowed in addition to their salaries, actual and necessary traveling expenses, when in the performance of their official duties, said expenses to be itemized, verified under oath, and when audited and approved by the executive council to be paid upon warrant of the state auditor upon the state treasurer provided that such expenditure shall not exceed the appropriation made for this purpose. The commissioner shall, with the approval of the executive council, appoint a state chemist, who shall be an expert analytical, food and pharmaceutical chemist, who shall be the official chemist of the dairy and food department. He shall devote his whole time to the duties of such office. He shall receive a salary of twenty-four hundred dollars per year, to be paid in the same manner as the salaries of other state officers. He shall make all the examinations necessary in enforcing the provisions of the various laws enforced by the dairy and food department, shall be allowed actual and necessary traveling expenses, and shall be furnished necessary laboratory, apparatus, supplies and chemicals, to be paid for in the same manner as the accounts of assistants. The commissioner shall during his term of office hold no other official position or any professorship in any state educational institution, and on or before the first day of November he shall make annual report to the governor, which shall contain a detailed account of all of his doings as commissioner and the receipts and disbursements of his office since the preceding report, with such facts and statistics in regard to the production, manufacture and sale of dairy products, with such suggestions as he may regard of public importance in connection therewith. In the conduct of his office, he shall have power to issue subpœnas for witnesses, enforce their attendance and examine them under oath by him to be administered, such witnesses to be allowed fees as in justice courts, to be paid by the commissioner as part of the expenses of his office and do such other acts and things as are necessary and proper in the enforcement of the provisions of this chapter. [34 G. A., ch. 113, §§ 1, 2.] [32 G. A., ch. 132; 30 G. A., ch. 88, § 1; 28 G. A., ch. 85, § 1; 25 G. A., ch. 47; 24 G. A., ch. 50, § 6; 23 G. A., ch. 52, § 5; 22 G. A., ch. 98, § 1; 21 G. A., ch. 52, §§ 11–14.]

SEC. **2515-a. Milk license—fee—revocation.** "No person, firm or corporation shall sell milk or cream in, or to be used in, any municipal corporation except for the purpose of supplying the same to an establishment for the purpose of manufacture, without being licensed by the state dairy and food commissioner, and the fee for such license shall be one dollar for each place or vehicle from which sale is made. Every such license shall expire July fourth next after its issue; shall be given only to a person owning or leasing the vehicle or place from which sales are to be made, and shall not be transferable. No license shall be issued for less than one dollar. Each license shall be numbered and shall contain the name, residence and place of business of the licensee and the number of vehicles and places to be used. The name of the dairy or the name of the person, firm or corporation to whom the license is issued shall appear on both sides of

each vehicle, in letters not less than two inches in height and there shall be such contrast between the color of the letters and the background as shall render the letters plainly legible. Every sale from a vehicle not so inscribed shall be deemed a violation of this act. But nothing herein shall be construed as requiring persons to procure such license unless such person shall sell milk or cream from a store or vehicle. The commissioner may withhold a license from any applicant therefor whom he may deem unworthy and he may revoke any license issued by him to any person who has violated the terms thereof, or who has failed to comply with any requirements of this chapter, or refused or failed to obey his lawful request or direction, and every conviction of the licensee for an offense punishable under this chapter shall be sufficient grounds for such revocation. [34 G. A., ch. 113, § 3.] [24 G. A., ch. 50, § 7.]

SEC. **2515-b. Impure or skimmed milk or cheese—sale—labels.** "If any person shall sell, exchange, or expose for sale or exchange or deliver or bring to another, for domestic or potable use, or to be converted into any product of human food, any unclean, impure, unhealthy, adulterated, unwholesome or skimmed milk, or milk from which has been held back what is commonly known as strippings, or milk taken from an animal having disease, sickness, ulcers, abscess or running sore, or which has been taken from the animal within fifteen days before or five days after parturition; or if any person shall purchase, to be converted into any product of human food, any unclean, unhealthful, adulterated or unwholesome milk or cream, or shall manufacture any such milk or cream into any product of human food, or if any person having cows for the purpose of producing milk or cream for sale, shall stable them in any unhealthy place or in crowded manner, or shall knowingly feed them food which produces impure, unwholesome milk, or shall feed them distilled glucose or brewery waste in any state of fermentation, or upon any substance in a state of putrefaction or rottenness or of an unhealthy nature, or shall sell or offer for sale cream which has been taken from milk the sale of which is prohibited or who shall sell or offer for sale as cream, an article which shall contain less than the amount of butter fat as prescribed in this chapter; or if any person shall sell or offer for sale any cheese manufactured from skimmed milk, or from milk that is partially skimmed, without the same being plainly branded, stamped or marked on the side or top of both cheese and package, in a durable manner, in the English language, the words 'skimmed-milk cheese,' the letters of the words to be not less than one inch in height and one-half inch in width, he shall be fined as provided in section nine hereof, and be liable for double damages to the person or persons upon whom such frauds shall be committed. [34 G. A., ch. 113, § 4.]

SEC. **2515-c. Skimmed milk—how labeled.** "No person shall offer or expose for sale or sell any skimmed milk or partially skimmed milk unless each receptacle and carrying can containing the same shall be kept plainly marked on the same with the words 'skimmed milk' in the English language in letters not less than one inch in height. [34 G. A., ch. 113, § 5.]

SEC. **2515-d. Adulteration—"milk" and "cream" defined.** "For the purpose of this chapter, the addition of water or any other substance or thing to cream or whole milk or skimmed milk or partially skimmed milk is hereby declared an adulteration, and milk which is obtained from animals fed upon waste as defined in this chapter, or upon any substance of an unhealthy nature, is hereby declared to be impure and unwholesome,

and milk which is proved by any reliable method of test or analysis to contain less than twelve per cent. of milk solids to the one hundred pounds of milk, or less than three pounds of milk fat to one hundred pounds of milk, shall be regarded as skimmed or partially skimmed milk. Milk is the fresh, clean, lacteal secretion obtained by the complete milking of one or more healthy cows properly fed and kept, excluding that obtained within fifteen days before and five days after calving, and contains no less than twelve per cent. of milk solids and not less than three per cent. of milk fat. Cream is the portion of milk, rich in milk fat, which rises to the surface of milk on standing, or is separated from it by a centrifugal force, is fresh and clean, and contains not less than sixteen per cent. of milk fat. [34 G. A., ch. 113, § 6.]

SEC. **2515-e. Testing contrivances—false manipulation—prima-facie evidence.** "It shall be unlawful for any person, firm or corporation by himself, or as the officer, servant, agent or employe of any person, firm or corporation to falsely manipulate or underread or overread the Babcock test or any other contrivance used for the purpose of determining the amount of milk fat in milk or cream, or to make any false determination of any test or contrivance used for the purpose of determining the amount of milk fat in any dairy products. For the purpose of this act the writing of a check or payment of money for cream or milk at any given test shall constitute prima-facie evidence that such test was made. [34 G. A., ch. 113, § 7.]

SEC. **2515-f. License to operate milk-testing apparatus—examination for—fee—penalty.** "No person shall operate a milk or cream testing apparatus duly approved by the state dairy and food commissioner, to determine the percentage of milk fat in milk or cream for the purpose of purchasing the same either for himself or another without first securing a license from the dairy and food commissioner of this state, or from his duly appointed agent or representative, authorizing such person to so operate such tester. Any person desiring to secure such license shall make application therefor on a blank to be prepared and provided by the dairy and food commissioner, and such applicant before being issued such license may be required to pass a satisfactory examination in person and prove by actual demonstration that he is competent and qualified to properly use such tester and make an accurate test with the same. Such license shall be valid until May thirty-first next after its issue and a fee of two and one-half dollars shall be paid by the licensee to the state dairy and food commissioner before such license shall be issued. Licenses issued to operators of the Babcock or other approved test under this act shall take effect and be in force from and after May thirty-first, nineteen hundred eleven. The dairy and food commissioner shall have authority to revoke any license issued under this act. The testing of each lot of milk or cream by any such unlicensed person shall constitute a separate offense, provided that any licensed person may for valid reasons appoint a substitute for a period not to exceed six days, subject to the approval of the dairy and food commissioner. The fees collected under the provisions of this act shall be paid into the state treasury by the dairy and food commissioner. [34 G. A., ch. 113, § 8.]

SEC. **2515-g. Violation—penalties.** "Any person violating any of the provisions of this act shall be guilty of a misdemeanor, and upon conviction therefor shall be punished by a fine of not less than twenty-five nor

more than one hundred dollars or by imprisonment for not less than thirty days in the county jail. [34 G. A., ch. 113, § 9.]

SEC. 2515-h. **Construction of terms.** "The state food and dairy commissioner shall, by this act, become the state dairy and food commissioner, and wherever the title food and dairy commissioner appears in the statutes of the state of Iowa, it shall be construed to mean state dairy and food commissioner. He shall on and after taking effect of this act have all the powers and allowances and shall be charged with all the duties now imposed by law upon the state food and dairy commissioner. [34 G. A., ch. 113, § 10.]

SEC. 2515-i. **Acts in conflict repealed.** "All acts or parts of acts in conflict herewith are repealed." [34 G. A., ch. 113, § 11.]

SEC. 2516. **Imitation butter or cheese.**

These provisions, with those of the two following sections, prohibit the sale of oleomargarine which is the color of butter made from pure milk and cream. *State v. Armour Packing Co.*, 124–323, 100 N. W. 59.

SEC. 2522. **Milk dealers — manufacturers and packers — reports — penalty.** Every city milk dealer, or every person furnishing milk or cream to such dealer, or the employe of such milk dealer, and every person or corporation, or the employe of such person or corporation, who operates a creamery, cheese or condensed milk factory, or reworks or packs butter, shall maintain his premises and utensils in a clean and hygienic condition, and shall make, upon blanks furnished by the dairy commissioner, such reports and statistics as may be required for the purpose of compiling statistics authorized by this chapter, and such dealer, owner, operator or business manager shall make such returns and reports within thirty days after receiving the proper blank form from the dairy commissioner and shall certify to the correctness thereof. Whoever shall violate any provision of this section shall be punished by a fine of not less than twenty-five nor more than one hundred dollars, or by imprisonment in the county jail for not more than thirty days. [29 G. A., ch. 102, § 1.]

SEC. 2525. **Permits—repealed.** [34 G. A., ch. 113, § 1.]

[See § 2515. EDITOR.]

An ordinance of a city providing for the issuance of licenses to city milk dealers at the discretion of the city board of health and providing a penalty for selling without such license is invalid. *Bear v. Cedar Rapids*, 147–341, 126 N. W. 324.

SEC. 2527-a. **Food producing establishments—sanitation—"food" defined.** That every building, room, basement or cellar occupied or used as a bakery, confectionery, cannery, packinghouse, slaughterhouse, dairy, creamery, cheese factory, restaurant, hotel, grocery, meat market or other place or apartment used wholly or in part for the preparation for sale, manufacture, packing, storing, sale or distribution of any food, shall be properly lighted, drained, plumbed, and ventilated and conducted with strict regard to the influence of such conditions upon the purity and wholesomeness of the food therein produced; and for the purpose of this act the term "food" as used herein, shall include all articles used for food, drink, confectionery or condiment, intended for man or domestic animals, whether simple, mixed or compound and all substances or ingredients used in the preparation thereof. [35 G. A., ch. 201, § 1.]

SEC. 2527-b. **Equipment — vehicles — employes.** The floors, side walls, ceilings, furniture, receptacles, implements, equipment and machinery of every establishment or place where food is manufactured, packed, stored, sold or distributed, and all cars, trucks and vehicles used

in the transportation of food products, shall at all times be kept in a clean, healthful and sanitary condition, and for the purpose of this act, unclean, unhealthful or unsanitary conditions shall be deemed to exist unless food in the process of manufacture, preparation, packing, storing, sale, distribution or transportation is securely protected from flies, dust, dirt, and as far as may be necessary by all reasonable means, from all other foreign or injurious contamination; and unless the refuse, dirt and the waste products subject to decomposition and fermentation incident to the manufacture, preparation, packing, storing, selling, distributing and transporting of food are removed daily; and unless all trucks, trays, boxes, baskets, buckets, and all other receptacles, chutes, platforms, racks, tables, shelves, hooks and all knives, saws, cleavers, and all other utensils and machinery used in moving, handling, cutting, chopping, mixing, canning and all other processes are kept thoroughly cleaned, and unless the clothing of operatives, employes, clerks, or other persons therein employed, is clean. [35 G. A., ch. 201, § 2.]

SEC. **2527-c. Interior of buildings—how finished.** The side walls and ceilings of every bakery, confectionery, creamery, cheese factory, hotel and restaurant kitchen, shall be plastered, wainscoted or ceiled with metal, cement or other suitable material approved by the state dairy and food commissioner, and shall be oil painted or kept well limewashed, and all interior woodwork in every bakery, confectionery, creamery, cheese factory, hotel and restaurant kitchen, shall be washed clean and every building, room, basement or cellar occupied or used for the preparation, manufacture, packing, storage, sale or distribution of food, shall have an impermeable floor made of cement or tile laid in cement, grouted brick, wood or other suitable nonabsorbent material which can be flushed and washed clean with water. [35 G. A., ch. 201, § 3.]

SEC. **2527-d. Screens.** The doors, windows and other openings of every food-producing or distributing establishment during the fly season shall be fitted with self-closing screen doors and wire window screens of not coarser than fourteen mesh wire gauze; provided that this section shall not apply to sheds used for husking corn, nor to warehouses or storerooms used for the storage or handling of the finished product in original packages. [35 G. A., ch. 201, § 4.]

SEC. **2527-e. Toilet rooms—lavatories—care and equipment.** Every building, room, basement or cellar occupied or used for the preparation, manufacture, packing, canning, sale or distribution of food, shall have convenient toilet, or toilet rooms separate and apart from the room or rooms where the process of production, manufacture, packing, canning, selling or distribution is conducted. The floors of such toilet rooms shall be cement, tile, wood, brick or other nonabsorbent material and shall be washed and scoured daily. Such toilet or toilets shall be furnished with separate ventilating flues or pipes, discharging into soil pipes, or on the outside of the building in which they are situated. Lavatories and wash rooms shall be adjacent to toilet rooms and shall be supplied with soap, running water and clean towels, and shall be maintained in a sanitary condition. Operatives, employes, clerks and all persons who handle the material from which food is prepared or the finished product, before beginning work or after visiting toilet or toilets, shall wash their hands and arms thoroughly in clean water. [35 G. A., ch. 201, § 5.]

SEC. **2527-f. Cuspidors.** Cuspidors for the use of operatives, employes, clerks or other persons shall be provided whenever necessary, and

each cuspidor shall be thoroughly emptied and washed daily with disinfectant solution and five ounces of such solution shall be left in each cuspidor while it is in use. No operative, employe, or other person shall expectorate within any building, room, basement or cellar where the production, manufacture, packing, storing, preparation or sale of any food is conducted, except in cuspidors as provided for herein. [35 G. A., ch. 201, § 6.]

SEC. **2527-g. Use as living room prohibited.** No person or persons shall be allowed to live or sleep in any workroom of a bakeshop, kitchen, dining room, confectionery, creamery, cheese factory, or place where food is prepared for sale, served or sold. [35 G. A., ch. 201, § 7.]

SEC. **2527-h. Diseased persons—employment prohibited.** No employer shall require, permit or suffer any person, nor shall any person work in a building, room, basement, cellar or vehicle occupied or used for the production, manufacture, packing, storage, sale, distribution and transportation of food, who is affected with any venereal disease, smallpox, diphtheria, scarlet fever, yellow fever, tuberculosis or consumption, bubonic plague, Asiatic cholera, leprosy, trachoma, typhoid fever, epidemic dysentery, measles, mumps, German measles, whooping cough, chickenpox or any other infectious or contagious disease. [35 G. A., ch. 201, § 8.]

SEC. **2527-i. Slaughterhouses — construction — what constitutes insanitation—floors.** (a) Every person owning, leasing or occupying any place, room or building wherein cattle, sheep, swine, poultry or other animals are killed or dressed, or any market, public or private, shall cause such place, room, building or market to be kept at all times thoroughly cleaned and purified, and all offal, blood, fat, garbage, manure or other unwholesome or offensive refuse shall be removed therefrom at least once every twenty-four hours, if used continuously, or if only occasionally, within twenty-four hours after using; and the floors of such building, place or premise shall have an impermeable floor, made of cement or tile laid in cement, brick or other nonabsorbent material which can be flushed and washed clean with water, and which shall be approved by the state dairy and food commissioner or his authorized agent. No blood pit, dung pit, offal pit, or privy well shall remain or be constructed within any place, room or building; nor shall swine be kept or fed within one hundred fifty feet of the slaughterhouse. Doors and windows must be screened to exclude flies, and side walls painted or whitewashed.

(b) Slaughterhouses are required to be kept in a sanitary condition, and unsanitary conditions shall be deemed to exist wherever any one or more of the following conditions appear or are found, to wit: If the slaughterhouse is dilapidated, and in a state of decay; if the floors or side walls are soaked with decaying blood or other animal matter; if cobwebs or other evidence of filth or neglect are present; if the drainage of the slaughterhouse or slaughterhouse yard is not sufficient; if maggots or filthy pools or hog wallows exist in the slaughterhouse yard or under the slaughterhouse; if storage hides kept in [the] slaughterhouse are in pools of filth, or infested with maggots, or giving out vile odors; if the water supply used in connection with the cleansing or preparation is not pure and unpolluted; or if the odors of putrefaction plainly exist therein; if the bones or refuse are not burned or buried; if dead animals are being used as feed without first being thoroughly cooked; if carcasses are transported from place to place when not covered with clean, white cloths,[1] or if kept in unclean, bad-smelling ice boxes, refrigerators or storage rooms.

(c) If the floors of such killing places are found to be in an unsanitary condition by the inspector or health officer, he may require such floors to be constructed of cement or tile laid in cement, or brick, so as to prevent the blood, foul liquid or washings from being absorbed. All new slaughterhouses shall be constructed with cement floor and killing beds. [35 G. A., ch. 201, § 9.]

[1"clothes" in enrolled bill. EDITOR.]

SEC. **2527-j. Street display of food.** The sidewalk or street display of food products is prohibited unless such products are enclosed in a show case or similar device which shall protect the same from flies, dust or other contamination; and in such display the bottom of the container shall be at least two feet above the surface of the sidewalk; but the sidewalk or street display of meat or meat products is prohibited. The polishing of fruit or any other product by any process or in any manner which is unsanitary or unclean is hereby declared to be a violation of this act. [35 G. A., ch. 201, § 10.]

SEC. **2527-k. Covering of foods.** Confectionery, dates, figs, dried and fresh fruits, berries, butter, cheese, and bakery products while on sale or display are required to be properly screened or covered to effectively protect the same from contamination or damage by flies, dust, vermin, or other means. [35 G. A., ch. 201, § 11.]

SEC. **2527-l. Vendor's license—fee—revocation.** No person, firm, or corporation shall operate or conduct a bakery, candy factory, ice cream factory, canning factory, slaughterhouse, meat market, or place where fresh meats are sold at retail, without being licensed by the state dairy and food commissioner. Each license shall be valid for one year from date of issue, and shall be numbered and contain the name of the person and the location of the place for which the license is issued. No license shall be issued until a fee of three dollars has been paid to the state dairy and food commissioner, and application for such license shall be made on blanks to be provided by the state dairy and food commissioner. The state dairy and food commissioner may withhold a license from any applicant therefor, whom he may deem unworthy, and he may revoke any license issued under this act. Fees collected under the provisions of this act shall be paid into the state treasury by the state dairy and food commissioner. [35 G. A., ch. 201, § 12.]

SEC. **2527-m. Enforcement—authority of commissioner.** It shall be the duty of the state dairy and food commissioner or appointees to enforce this act. The state food and dairy commissioner, and the food or dairy inspectors of the state shall have full power at all times to enter, and inspect every building, room, basement, cellar or vehicle occupied or used for the production of foods intended for sale, manufactured for sale, used for storage, distribution, or transportation; and to inspect the premises and all utensils, fixtures, furniture and machinery used as aforesaid. If any person, firm or corporation or food-producing or distributing establishment, conveyance, employer, operative, employe, clerk, driver or other person is found to be violating any of the provisions of this act, or if the production, preparation, manufacture, packing, storing, sale, distribution or transportation of foods is being conducted in a manner detrimental to the character or quality of the food therein produced, manufactured, packed, stored, sold, distributed or conveyed, such person, firm, or corporation shall be punished as herein provided. [35 G. A., ch. 201, § 13.]

SEC. **2527-n. Violation—penalties.** Any person, firm or corporation who violates any of the provisions of this act shall be guilty of a misdemeanor and on conviction shall be punished for the first offense by a fine of not less than ten dollars nor more than fifty dollars; for the second offense by a fine of not less than twenty-five dollars nor more than one hundred dollars; and for the third and subsequent offense by a fine of two hundred dollars and imprisonment in the county jail for not less than thirty nor more than ninety days. [35 G. A., ch. 201, § 14.]

SEC. **2527-o. Acts in conflict repealed.** All acts and parts of acts in conflict with the provisions of this statute are hereby repealed. [35 G. A., ch. 201, § 15.]

SEC. **2528. Compensation—expenses—repealed.** [34 G. A., ch. 113, § 1.]

[See § 2515. EDITOR.]

SEC. **2528-a. Access to factories and buildings.** The state food and dairy commissioner and his deputy and assistants shall have full access to all places of business, factories, buildings, wagons and cars used in the manufacture, sale or transportation within the state of any dairy products or imitation thereof. [31 G. A., ch. 107, § 1.]

SEC. **2528-b. Examination and inspection.** They may examine and open any package, can or vessel containing, or believed to contain any article or product which may be manufactured, sold or exposed for sale in violation of the laws of this state relative to the dairy products and imitation thereof, and may inspect the contents therein and take therefrom samples for testing or analysis. [31 G. A., ch. 107, § 2.]

SEC. **2528-c. Interference with inspector—penalty.** Whosoever shall refuse to allow the inspection herein provided for or shall in any way hinder or obstruct the proper officers performing their duties hereunder shall be punished by fine not exceeding one hundred dollars or by imprisonment in the county jail not exceeding thirty days. [31 G. A., ch. 107, § 3.]

SEC. **2528-d. Cold storage and refrigerating—terms defined.** The term "cold storage" as used in this act shall be construed to mean a place artificially cooled to a temperature of 40° Fahrenheit or below, but shall not include such a place in a private home, hotel, or restaurant, or to refrigerator cars. The term "cold stored" as used in this act shall be construed to mean the keeping of articles of food in cold storage for a period exceeding thirty days. The term "articles of food" as used in this act shall be construed to mean and include fresh meat, and fresh meat products except in process of manufacture, fresh fruit, fish, game, poultry eggs, butter, and other articles intended for human consumption. [35 G. A., ch. 199, § 1.]

SEC. **2528-d1. License to operate warehouse—application—examination—fee.** Any person, firm or corporation desiring to operate a cold storage or[1] refrigerating warehouse, shall make application in writing to the state dairy and food commissioner for that purpose, stating the location of its plant or plants. On receipt of the application the state dairy and food commissioner shall cause an examination to be made into the sanitary condition of said plant or plants, and if found to be in a sanitary condition and otherwise properly equipped for the business of cold storage, the state dairy and food commissioner shall cause a license to be issued authorizing the applicant to operate a cold storage or refrigerating warehouse for and during the period of one year. The license shall be issued

upon payment by the applicant of a license fee of twenty-five dollars to the state dairy and food commissioner, and all licenses shall expire December thirty-first following the issue thereof. [35 G. A., ch. 199, § 2.]

["of" in enrolled bill. EDITOR.]

SEC. **2528-d2. Conditions warranting suspension of certificate.** In the event that any place or places, or any part thereof, covered by a license, under the provision of this act shall at any time be deemed by the state dairy and food commissioner to be in an unsanitary condition, it shall be his duty to notify licensee of such condition and upon the failure of the licensee to put said specified place or places, or the specified part thereof, in a sanitary condition within a designated time it shall be the duty of the state dairy and food commissioner to prohibit the use under its license [of] such specified place or places, or part thereof, as it deems in an unsanitary condition until such time as it may be put in a sanitary condition. [35 G. A., ch. 199, § 3.]

SEC. **2528-d3. Receipt and withdrawal of food—records—quarterly reports.** It shall be the duty of any person, firm or corporation licensed to operate a cold storage or refrigeration warehouse to keep an accurate record of the receipts and the withdrawals of the articles of food, and the state dairy and food commissioner[1] or his assistants shall have free access to these records at any time. Every such person, firm or corporation shall, furthermore, submit a quarterly report to the state dairy and food commissioner, setting forth in itemized particulars quantity of food products held in cold storage. Such quarterly reports shall be filed on or before the sixth day of January, April, July and October of each year, and the reports, so rendered, shall show the conditions existing on the first day of the month in which the report is filed. The state dairy and food commissioner shall have the authority to require such reports to be made at more frequent intervals than the times herein specified, if in his judgment more frequent reports shall be needed in the interest of a proper enforcement of this act, or for other reasons affecting the public welfare. [35 G. A., ch. 199, § 4.]

[1"Commission" in enrolled bill. EDITOR.]

SEC. **2528-d4. Diseased or contaminated food—storing prohibited —labeling.** No article of food intended for human consumption shall be placed in cold storage if diseased, tainted or so deteriorated as to injure its keeping qualities, or if not slaughtered, handled and prepared for storage in accordance with the pure food and sanitary food laws and such rules and regulations as may be prescribed by the state dairy and food commissioner for the sanitary preparation of food products for cold storage, under the authority hereinafter conferred. Any article of food if intended for use other than human consumption before being cold stored shall be marked by the owner in accordance with forms prescribed by the dairy and food commissioner (under authority hereinafter conferred) in such a way as to plainly indicate the fact that such articles are not to be sold for human food. [35 G. A., ch. 199, § 5.]

SEC. **2528-d5. Inspection.** It shall be the duty of the dairy and food commissioner or his assistants to inspect and supervise all cold storage or refrigerating warehouses in this state, and to make such inspection of the entry of articles of food therein as the state dairy and food commissioner may deem necessary to secure proper enforcement of this act. The state dairy and food commissioner's employes shall be permitted access to such

establishments and all parts thereof at all reasonable times for purposes of inspection and enforcement of the provisions of this act. The said state dairy and food commissioner may also appoint and designate such person or persons as he deems qualified to make the inspections herein required. [35 G. A., ch. 199, § 6.]

SEC. **2528-d6. Containers—marking.** All articles of food when deposited in cold storage shall be marked plainly on the containers in which they are packed or on, or in connection with, the individual article with the date of receipt, and when removed from cold storage shall be marked with the date of withdrawal, in accordance with such forms as may be prescribed by the state dairy and food commissioner, under the authority hereinafter conferred. [35 G. A., ch. 199, § 7.]

SEC. **2528-d7. Storage period.** No person, firm or corporation as owner or having control shall keep in cold storage any article of food for a longer period than twelve calendar months, except with the consent of the state dairy and food commissioner as hereinafter provided. The state dairy and food commissioner shall upon application grant permission to extend the period of storage beyond twelve months for a particular consignment of goods, if the goods in question are found, upon examination, to be in proper condition for further storage at the end of twelve months. The length of time for which further storage is allowed shall be specified in the order granting the permission. A report on each case in which such extension of storage may be permitted, including information relating to the reason for the action of the state dairy and food commissioner, the kind and the amount of goods for which the storage period was extended, and the length of time for which the continuance was granted, shall be included in the annual report of the state dairy and food commissioner. [35 G. A., ch. 199, § 8.]

SEC. **2528-d8. Sale of cold storage goods—sign displayed.** It shall be unlawful to sell, or to offer or expose for sale, uncooked articles of food which have been held in cold storage without notifying persons purchasing, or intending to purchase the same, that they have been so kept by the display of a sign marked "Cold Storage Goods Sold Here," and it shall be unlawful to represent or advertise as fresh goods articles of food which have been held in cold storage. [35 G. A., ch. 199, § 9.]

SEC. **2528-d9. Return to storage prohibited.** It shall be unlawful to return to cold storage any article of food that has once been released from such storage and placed on the market for sale to consumers, but nothing in this section shall be construed to prevent the transfer of goods from one cold storage or refrigerating warehouse to another, provided that such transfer is not made for the purpose of evading the provisions of this act. [35 G. A., ch. 199, § 10.]

SEC. **2528-d10. Rules and regulations.** The state dairy and food commissioner may make rules and regulations to secure a proper enforcement of the provisions of this act, including rules and regulations with respect to the sanitary preparation of articles of food for cold storage, the use of marks, tags, or labels and the display of signs, and the violation of such rules shall be punished on conviction, as provided in section twelve of this act. [35 G. A., ch. 199, § 11.]

SEC. **2528-d11. Penalties.** Any person, firm or corporation violating any of the provisions of this act shall upon conviction be punished for the first offense by a fine of not less than twenty-five dollars nor more than one hundred dollars and for the second offense by a fine not less than one

hundred dollars nor more than five hundred dollars or by imprisonment for not more than six months, or by both such fine and imprisonment. [35 G. A., ch. 199, § 12.]

SEC. **2528-d12. Acts in conflict repealed.** All acts and parts of acts conflicting with the provisions of the statute are hereby repealed. [35 G. A., ch. 199, § 13.]

SEC. **2528-e. Calcium carbide—how sold.** Whenever any calcium carbide or so-called carbide is exposed for sale or sold within this state for the purpose of producing acetylene gas for heating or illuminating purposes, the same shall be exposed for sale and sold in air and water-tight metallic containers. [35 G. A., ch. 200, § 1.]

SEC. **2528-e1. Containers—how labeled.** Each container shall be labeled to show the volume in cubic feet and decimal fractional parts thereof of acetylene gas, which will be liberated when an average sample of the carbide shall be mixed with water in the proportion of sixty-four parts of carbide to thirty-six parts of water. Said label shall be distinctly printed in the English language using type not smaller than eight-point heavy Gothic caps and securely placed in a conspicuous place on the outside of the package and shall contain the name and place of business of the manufacturer, packer or dealer. [35 G. A., ch. 200, § 2.]

SEC. **2528-e2. Analysis—fee.** Any person, firm or corporation purchasing any calcium carbide or so-called carbide for his or their own use may have the product analyzed by submitting a true sample (carriage prepaid), to the chemist of the dairy and food department and paying to the dairy and food commissioner an analysis fee of fifty cents for each sample analyzed. [35 G. A., ch. 200, § 3.]

SEC. **2528-e3. Sampling—how carried out.** The sampling of the calcium carbide is to be carried out as follows: Each container is to be turned over end for end three times to get rid of any local accumulation of dust, then removing a sample weighing not less than one pound, place the same into a dry mason jar or other air and water-tight vessel, then close air and water-tight. [35 G. A., ch. 200, § 4.]

SEC. **2528-e4. Enforcement—prima-facie evidence.** The state dairy and food commissioner is charged with the enforcement of this act. All fees collected for the analysis of samples of calcium carbide shall be paid into the state treasury. The commissioner and his appointees may collect samples of calcium carbide whenever the same is offered or exposed for sale or sold and if the product is not packed and labeled as specified in this act or if the product is not truthfully branded as to the volume of acetylene gas liberated by the test herein prescribed, it shall be deemed a violation of this act. The having in possession by any person who is a dealer in calcium carbide any calcium carbide shall be prima-facie evidence of having in possession with intent to sell. [35 G. A., ch. 200, § 5.]

SEC. **2528-e5. Violation—penalty.** Any person, firm or corporation or agent thereof who refuses to comply on demand with any of the requirements of this act or who shall violate any of its provisions or who shall obstruct or hinder the commissioner or any of his assistants in the discharge of any duty imposed by this act shall be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of[1] not exceeding twenty-five dollars. [35 G. A., ch. 200, § 6.]

[1]"or" in enrolled bill. EDITOR.]

SEC. **2528-f. Commercial fertilizers—manufacture and sale—label—certificate.** That any person, firm or corporation who shall offer, sell,

or expose for sale, in the state of Iowa, any commercial fertilizer, the price of which exceeds three dollars per ton, shall affix to every package in a conspicuous place on the outside thereof, or furnish to the purchasers of goods sold in bulk, a plainly printed certificate, naming the materials, including the filler, if any, of which the fertilizer is made, stating the number of pounds in the package sold, the name or trademark under which the article is sold, the name of the manufacturer and the place of manufacture, and a chemical analysis, stating the minimum percentages of nitrogen in available form, of potassium soluble in water, of phosphorus in available form (soluble or reverted) and of insoluble phosphorus. [35 G. A., ch. 202, § 1.]

SEC. **2528-f1. Filing of certified copy of certificate—license fee.** Before any commercial fertilizer is sold, or offered for sale, the manufacturer, importer, or party who causes it to be sold, or offered for sale, within the state of Iowa, shall file in the office of the dairy and food commissioner, a certified copy of the certificate referred to in section one of this act, and shall pay to the dairy and food commissioner on or before May first of each year a license of twenty dollars for each brand of fertilizer offered for sale or sold within the state. Provided that whenever the manufacturer or importer shall have paid the license fee herein required for any year, no other person shall be required to pay such license fee, for that brand. [35 G. A., ch. 202, § 2.]

SEC. **2528-f2. Enforcement—authority of commissioner.** The state dairy and food commissioner and his assistants shall enforce the provisions of this act and he may publish annually a report of all analyses made and certificates filed. The inspectors and assistants of the dairy and food commissioner shall exercise in the enforcement of this act, all the authority and powers now granted such assistants under the food and dairy laws of the state of Iowa. The state dairy and food commissioner is hereby authorized, in person or by deputy, to take for analysis a sample from any lot or package of commercial fertilizer in this state, not exceeding two pounds in weight. [35 G. A., ch. 202, § 3.]

SEC. **2528-f3. Violation—penalties.** Any person, firm or corporation who shall offer or expose for sale or sell any commercial fertilizer in the state of Iowa without complying with the provisions of this act, or who shall use an analysis regarding any commercial fertilizer which shall be false as to the constituents named in section one of this act, or who shall obstruct or interfere with the dairy and food commissioner or any of his assistants in the discharge of their duties shall be deemed guilty of a misdemeanor and upon conviction shall be fined not less than twenty-five dollars nor more than one hundred dollars for each offense. [35 G. A., ch. 202, § 4.]

CHAPTER 14.

OF STATE VETERINARY SURGEON.

SECTION **2529. Appointment—qualification.** The state veterinary surgeon shall be appointed by the governor, subject to removal by him for cause, who shall hold office for three years. He shall be a graduate of some regularly established veterinary college, skilled in that science, and shall be by virtue of his office a member of the state board of health. He

shall maintain an office at the capitol in a room assigned for his use by the executive council, and his postage, stationery and office supplies shall be furnished by the state. [32 G. A., ch. 133, § 1; 20 G. A., ch. 189, § 1.]

SEC. 2530. **Powers—regulations—office assistants.** He shall have supervision of all contagious and infectious diseases among domestic animals in, or being driven or transported through, the state, and is empowered to establish quarantine against animals thus diseased, or that have been exposed to others thus diseased, whether within or without the state, and, with the concurrence of the state board of health, may make such rules and regulations as he may regard necessary for the prevention and suppression, and against the spread, of said disease or diseases, which rules and regulations, the executive council concurring, shall be published and enforced, and in the performance of his duties he may call for the assistance of any peace officer. He may call experts to his assistance when the exigencies of any case demand such action, and may appoint a secretary, who shall receive a salary of twelve hundred dollars per annum and he may appoint a stenographer who shall receive a salary of nine hundred dollars per annum, which shall be paid from the state treasury. [33 G. A., ch. 150, § 1.] [32 G. A., ch. 133, § 2; 20 G. A., ch. 189, § 2.]

SEC. 2533. **Contagious diseases—duty of veterinary—appointment of assistants.** That section twenty-five hundred thirty-three of the code be and the same is hereby repealed and the following enacted in lieu thereof:

"It shall be the duty of all local boards of health in the state, upon the appearance of any contagious or infectious disease among domestic animals, to notify the state veterinary surgeon at once of the existence of such contagious or infectious disease; and it shall be his duty, whenever notified in writing by a majority of any board of supervisors, township trustees, or of any city or town council, whether in session or not, of the existence of, or probable danger from, any contagious or infectious disease among domestic animals, to repair at once to the place designated in such notice, and make an investigation, and take such action as the exigencies of the case may demand. The governor may appoint such assistant state veterinary surgeons as may be deemed advisable, who shall act under the instruction of the state veterinary surgeon, and, when engaged in the discharge of their duties, shall receive the sum of five dollars a day and their actual expenses, which compensation and expenses shall be paid from the state treasury upon itemized and verified accounts, audited and approved by the executive council." [32 G. A., ch. 133, § 3; 20 G. A., ch. 189, § 5.]

SEC. 2534. **Destruction of stock—compensation—appeal.** Whenever in the opinion of the state veterinary surgeon the public safety demands the destruction of any stock, the same may be destroyed upon the written order of such surgeon, with the consent of the owner, or upon approval of the governor, and by virtue of such order such surgeon, his deputy or assistant, or any peace officer, may destroy such diseased stock, and the owner thereof shall be entitled to receive its actual value in its condition when condemned, to be ascertained and fixed by the state veterinary surgeon and the nearest justice of the peace, who, if unable to agree, shall call upon the nearest or other justice of the peace upon whom they agree as umpire, and their judgment shall be final when the value of the stock, if not diseased, would not exceed twenty-five dollars; but in all other cases either party shall have the right of appeal to the district court, but such appeal shall not delay the destruction of the diseased animals. The

veterinary surgeon shall at once file with the executive council his written report thereof, who shall, if found correct, indorse their finding thereon, whereupon the auditor of state shall issue his warrant therefor upon the treasurer of state, who shall pay the same out of any moneys at his disposal under the provisions of this act, but no compensation shall be allowed for stock destroyed while in transit through or across the state, and the word "stock," as herein used, shall be held to mean cattle, horses, mules and asses. [32 G. A., ch. 133, § 4; 20 G. A., ch. 189, § 6.]

This section has reference only to animals suffering from contagious or infectious diseases. Code § 2339 does not apply to such cases. *Waud v. Crawford*, 141 N. W. 1041.

SEC. **2536. Appropriation.** There is annually appropriated out of any moneys, not otherwise appropriated, the sum of eleven thousand dollars, or so much thereof as may be necessary, for the uses and purposes herein set forth; but no part of said sum shall be used for the purpose of reimbursing the owner for any stock destroyed under the provisions of this chapter. [33 G. A., ch. 150, § 2.] [30 G. A., ch. 89; 27 G. A., ch. 63, § 1; 20 G. A., ch. 189, § 8.]

SEC. **2538. Compensation of veterinary surgeon—expenses.** That section twenty-five hundred thirty-eight of the code be and the same is hereby repealed, and the following enacted as a substitute therefor:

"The state veterinary surgeon shall receive an annual salary of eighteen hundred dollars, which shall be paid in equal monthly installments from the state treasury, and shall also receive the actual expenses incurred by him in the discharge of his official duties. All claims for expenses shall be itemized, verified and paid from the state treasury when audited and allowed by the executive council." [32 G. A., ch. 133, § 5; 20 G. A., ch. 189, § 1.]

CHAPTER 14-A.

OF THE PRACTICE OF VETERINARY MEDICINE, SURGERY AND DENTISTRY.

SECTION **2538-a. Unlawful practice.** That it shall be unlawful for any person to practice veterinary medicine, surgery, or dentistry in this state, who shall not have complied with the provisions of this act. [28 G. A., ch. 93, § 1.]

SEC. **2538-b. Persons previously engaged in practice—registration.** Section two of chapter ninety-three of the acts of the twenty-eighth general assembly is hereby repealed and the following enacted in lieu thereof:

Any person of good moral character who has practiced the profession of veterinary medicine, surgery and dentistry in this state for a period of five years immediately preceding the passage of the act of which this is an amendment shall be deemed eligible to registration as an existing practitioner upon presenting to the board of veterinary medical examiners, created by the act of which this is an amendment, satisfactory evidence that such person is of good moral character and that such person had actually practiced veterinary medicine, surgery and dentistry in the state of Iowa for a period of five years immediately preceding the passage of the act of which this is an amendment, application for such registration to be made before July fourth, nineteen hundred and two. [29 G. A., ch. 170, § 1; 28 G. A., ch. 93, § 2.]

SEC. **2538-c. Graduates.** Any person who is a graduate of a legally chartered and authorized veterinary college or veterinary department of any university or agricultural college, at the time of the passage of this act, or who shall hold a diploma from such institutions prior to nineteen hundred and one, shall be entitled to registration as an existing practitioner upon the presentation of his diploma, duly verified, all applications for such registration to be made before July fourth, nineteen hundred and two. [29 G. A., ch. 170, § 2; 28 G. A., ch. 93, § 3.]

SEC. **2538-d. State board of veterinary medical examiners—term—vacancies.** The governor of the state shall appoint a board of examiners within sixty days after the passage of this act, said board to be known as the state board of veterinary medical examiners. This board shall consist of three qualified veterinarians, residents of the state, each of whom shall be a graduate of a legally chartered and authorized veterinary college or veterinary department of any university or agricultural college, and who shall be of good standing in the profession. One of these members shall be appointed for one year; one for two years; and each succeeding appointment shall be for three years. Each shall hold office until his successor is duly appointed and qualified. No member of any veterinary college or veterinary department of the state university or agricultural college, or any person connected therewith, shall be eligible to appointment upon said board. The governor shall fill any vacancy which shall occur on the board, and may remove any member of said board for continued neglect of duty, for incompetency, unprofessional, or dishonorable conduct. [28 G. A., ch. 93, § 4.]

[The state board of veterinary medical examiners was abolished by ch. 115, 34 G. A. (§ 2538-q herein). EDITOR.]

SEC. **2538-e. Powers.** This board shall have power to make all needed regulations for its government and proper discharge of its duties in accordance with this act, and shall have power to administer oaths, and take testimony concerning all matters within its jurisdiction. It shall also have the power to revoke any certificate issued by it when it is shown that such certificate was procured by false representation or where good cause for revocation of such certificate has arisen since the issuance thereof. [29 G. A., ch. 170, § 3; 28 G. A., ch. 93, § 5.]

[See editorial note at § 2538-d.]

SEC. **2538-f. Meetings.** The meetings of the examining board shall be held at least once a year, or at such times and places as it may elect. At any meeting of the board, a majority shall constitute a quorum to transact business, or to conduct examinations. [28 G. A., ch. 93, § 6.]

[See editorial note at § 2538-d.]

SEC. **2538-g. Certificate of qualification.** Said board shall receive applications for registration, according to sections two and three of this act, and shall issue a certificate of qualification to all applicants who conform to the requirements for such registration, signed by the members of the board, provided that the certificate thus granted specifically and plainly states whether or not the one to whom it is granted is a graduate or non-graduate in veterinary medicine. Such certificate shall be conclusive as to the rights of the lawful holder of the same to practice veterinary medicine, surgery, or dentistry in this state. [28 G. A., ch. 93, § 7.]

[See editorial note at § 2538-d.]

SEC. **2538-h. Registration fee.** The fee for registration shall be five dollars, payable in advance to the secretary of the board. [28 G. A., ch. 93, § 8.]

SEC. **2538-i. Qualifications—examination—fee—license.** From and after January first, nineteen hundred and one, any person not authorized to practice veterinary medicine, surgery, and dentistry in this state, and desiring to enter upon such practice, shall be a graduate of a legally chartered and recognized veterinary college or veterinary department of a university or agricultural college, and shall pass the examination required by said state board of veterinary medical examiners. The fee for such examination shall be fifteen dollars payable in advance to the secretary of the board. The applicant shall be at least twenty-one years of age and of good moral character. Any person conforming to these requirements shall receive a license to practice veterinary medicine, surgery, or dentistry within this state, signed by the members of the board, which license shall be recorded in the office of the recorder of the county in which said person resides, the recording fee to be paid by holder of certificate:

(a) A certificate of registration showing that an examination has been made by the proper board of any state or foreign country, the holder thereof having been at the time of said examination a graduate of a legally chartered and authorized veterinary college, or veterinary department of any university or agricultural college, recognized as in good standing by the Iowa state board of veterinary medical examiners.

(b) A certificate of registration or license issued by proper board of any state or foreign country, may be accepted as evidence of qualification for registration in this state, provided that the holder thereof was at the time of such registration the legal possessor of a diploma issued by a legally chartered and authorized veterinary college or veterinary department of any university or agricultural college in any state or foreign country, and that the date thereto was prior to the legal requirement of the examination test in this state. The fee for such registration shall be fifty dollars. [30 G. A., ch. 90, § 1; 29 G. A., ch. 170, § 4; 28 G. A., ch. 93, § 9.]

[See editorial note at § 2538-d.]

There is nothing in the statute to prohibit the continuance of practice on the part of a veterinary surgeon who has been engaged in practice for more than five years prior to its enactment. *State v. McCoy*, 149–500, 128 N. W. 846.

SEC. **2538-i1. Restrictions.** If by the laws of any state or foreign country, or rulings or decisions of the appropriate officers of boards thereof any burden, obligation, requirement, disqualification or disability is put upon veterinarians registered in any state or foreign country, or holding diplomas from any legally chartered and authorized veterinary college, or veterinary department of any university or agricultural college, recognized as in good standing by the Iowa state board of veterinary medical examiners, affecting the right of said veterinarians to be registered or admitted to practice in said state or foreign country, then the same or like burdens, obligations, requirements, disqualifications or disability shall be put upon the registration in this state of veterinarians registered in said state or foreign country or holding diplomas from any legally chartered and authorized veterinary college, or veterinary department of any university or agricultural college recognized as in good standing by the Iowa state board of veterinary medical examiners. [30 G. A., ch. 90, § 2.]

[See editorial note at § 2538-d.]

SEC. **2538-j. Register—treasurer to hold fees—bond—vouchers.** The board shall keep a register of all registered practitioners in the state, setting forth such facts as the board shall see fit. All fees accruing under this act shall be held by the treasurer of the board, who shall execute good and sufficient bond to said board to faithfully discharge his duties, and who shall pay out such funds, only, on vouchers, certified by a majority of said board. It shall be the duty of each person registered as a practitioner under this section, to pay to the secretary of the board an annual fee of one dollar, on or before June first of each year, as long as he shall continue in practice in the state of Iowa. [30 G. A., ch. 91, § 1; 28 G. A., ch. 93, § 10.]

[See editorial note at § 2538-d.]

SEC. **2538-k. Compensation—expenses.** Each member of said board shall be entitled to receive five dollars per diem, also actual and necessary traveling expenses, incurred while actually engaged in the discharge of his official duties, provided such compensation and expenses do not exceed said income of fees accruing under this act. [28 G. A., ch. 93, § 11.]

[See editorial note at § 2538-d.]

SEC. **2538-l. Penalty.** Any person violating any of the provisions of this act shall be guilty of a misdemeanor and upon conviction shall be punished by a fine of not less than twenty-five dollars nor more than one hundred dollars, or by imprisonment in the county jail for a period of not more than thirty days for each and every such offense. It shall be the duty of the county attorney of the county in which violation occurs to conduct all proceedings against violators of this act. [28 G. A., ch. 93, § 12.]

SEC. **2538-m. Exceptions.** Nothing in this act shall be construed to apply to commissioned veterinarians in the United States army or to persons who dehorn cattle, or castrate domestic animals, or to persons who gratuitously treat diseased animals. [28 G. A., ch. 93, § 13.]

SEC. **2538-n. Veterinary title—unlawful use—penalty.** Any person who shall, without having been authorized so to do legally, append any veterinary title to his name, or shall assume or advertise any veterinary title in such a manner as to convey the impression that he is a lawful practitioner of veterinary medicine or any of its branches, shall be guilty of a misdemeanor, and punished according to the provisions of section twelve of this act. [28 G. A., ch. 93, § 14.]

SEC. **2538-o. Reëxaminations.** In case the examination of any person shall prove unsatisfactory and his name be not registered, he shall be permitted to present himself for reëxamination within any period not exceeding twelve months next thereafter, and no charges shall be made for reëxamination. [28 G. A., ch. 93, § 15.]

SEC. **2538-p. Accounting to executive council.** The board shall render under oath annually on January first to the executive council an account of all fees collected and per diem expenses paid, together with the necessary expenses of the board, and pay over the balance into the state treasury. [30 G. A., ch. 91, § 2; 28 G. A., ch. 93, § 16.]

[See editorial note at § 2538-d.]

SEC. **2538-q. State board of veterinary medical examiners abolished—transfer of powers and duties.** That the board known as the state board of veterinary medical examiners is hereby abolished, and all of the powers and duties thereof are hereby transferred to and enjoined upon the state veterinary surgeon, except as hereinafter provided. All of the

books, documents, records, stationery and office equipment now in possession of the board or of any officer or employe thereof shall, upon the taking effect of this act, be turned over to the state veterinary surgeon. [34 G. A., ch. 115, § 1.]

SEC. **2538-r. Commission of animal health—how constituted and appointed—terms.** There is hereby created a commission to be known as a commission of animal health, which commission shall consist of the state veterinary surgeon, who shall be the chairman and executive officer thereof, two veterinarians and two stock raisers, all of whom shall be appointed by the governor. The veterinarians shall possess the same qualifications required for the state veterinary surgeon. One such veterinarian shall be appointed to serve until June thirtieth, nineteen hundred twelve, and one until June thirtieth, nineteen hundred thirteen, and as their terms expire their successors shall be appointed for three years. The state veterinary surgeon shall be appointed to serve until June thirtieth, nineteen hundred fourteen, and thereafter his term shall be three years. The other members of the commission shall be appointed, one to serve until June thirtieth, nineteen hundred twelve, and the other until June thirtieth, nineteen hundred thirteen, and as their terms expire their successors shall be appointed for a term of two years. [34 G. A., ch. 115, § 2.]

SEC. **2538-s. Meetings—rules and regulations—contagious diseases.** The commission shall hold at least two meetings each year, one in July and one in January, at the office of the state veterinary surgeon, and may meet at such other times and places, in the state, as may seem necessary. It shall have the power and authority to make such rules and regulations as it shall deem necessary for the prevention, suppression, or against the spread of any contagious or infectious disease among animals in or being driven or transported through or brought into the state, and may provide for quarantining against animals thus diseased or that have been exposed to others so diseased, whether within or without the state. When such rules and regulations have been submitted to and approved by the executive council they shall be published and enforced by the veterinary surgeon and in the performance of his duties he may call to his assistance any peace officer. [34 G. A., ch. 115, § 3.]

SEC. **2538-t. Examining board.** The state veterinary surgeon and the two veterinarians upon the commission shall constitute a board for the examination of applicants to practice veterinary medicine, surgery and dentistry in the state. [34 G. A., ch. 115, § 4.]

SEC. **2538-u. Compensation—expenses.** The members of the commission, other than the state veterinary surgeon shall receive as compensation for their services one hundred dollars each per annum, together with their actual and necessary traveling, hotel, and other expenses and in addition thereto the veterinarians upon the commission shall receive one hundred dollars each per annum for their services as members of the examining board, all of which shall be paid upon vouchers duly approved by the executive council. [34 G. A., ch. 115, § 5.]

SEC. **2538-v. Acts in conflict.** All acts or parts of acts in conflict with the provisions of this act are hereby amended to conform to the provisions hereof. [34 G. A., ch. 115, § 6.]

CHAPTER 14-B.

OF THE MANUFACTURE AND DISTRIBUTION OF HOG CHOLERA SERUM.

SECTION **2538-w. Laboratory — establishment — director and assistants.** The state board of education is hereby authorized and directed to establish at Ames, Iowa, in connection with the Iowa state college of agriculture and mechanic arts, a laboratory for the manufacture of hog cholera serum, toxines, vaccines and biological products and to provide the necessary equipment therefor. The president of said college shall appoint the director of said laboratory and such assistants as are deemed necessary to efficiently carry on said work and shall, with the approval of said board, fix the salaries of said assistants. [35 G. A., ch. 227, § 1.]

SEC. **2538-w1. Sale of serum.** The director of said laboratory shall, on application, furnish said serum to any person within the state of Iowa for use in his herd only, together with specific instructions for the use of same. at the approximate cost of manufacture, and such cost shall be stated on the package. Any surplus serum or other biological products may be sold by said director at a reasonable profit to any applicant outside of the state. The director of the serum laboratory is authorized to purchase serum or other biological products which he deems reliable and he may sell the same at approximate cost in the same manner as products of the laboratory are sold, at any time it appears to him that the available supply will not be sufficient to meet the demand. [35 G. A., ch. 227, § 2.]

SEC. **2538-w2. Receipts—how deposited—expenses.** The director shall issue receipts for all moneys received by him for serum and other biological products sold and shall deposit all such funds with the treasurer of the college, which treasurer shall be responsible on his bond for the same. Upon receipt of said moneys the said treasurer shall issue duplicate receipts therefor, one of which he shall deliver to the director and the other to the secretary of the state board of education. Said moneys shall be kept by said treasurer in a separate fund to be known as the serum fund, and he shall pay out from said fund as other college funds are expended, but only for expenses directly connected with the maintaining of said laboratory and the manufacture, purchase and distribution of said serum and biological products. [35 G. A., ch. 227, § 3.]

SEC. **2538-w3. Standard of potency—permit to sell—powers of director—bond.** The director of said laboratory shall have the power and it is made his duty to establish and declare the standard degree of potency of hog cholera serum for successfully treating, curbing and controlling hog cholera or swine plague. Any person, firm, company or corporation, before selling or offering for sale within this state any hog cholera serum, shall first make application to the director of the laboratory herein created, for permission to sell the same in the state. Said application shall give the name of said person, firm, company or corporation with its place or places of business. Such other information and samples of serum shall be furnished whenever required by the director. If the director is satisfied that said person, firm, company or corporation is fit, proper and reliable, upon the furnishing of a bond in the sum of one thousand dollars by said applicant, which bond shall be approved by the director, he shall issue to said person, firm, company or corporation a permit to sell said serum within the state for a period of one calendar year or part thereof, for which permit he shall collect the sum of twenty-five dollars, which money shall be deposited and handled the same as moneys received for the sale of serum.

At the time of issuing said permit, the said director shall deliver to said applicant a statement showing the standard or degree of potency of hog cholera serum as established by said director and said permit may at any time be revoked and canceled by said director when it becomes evident to him that the terms on which it was issued are being violated. No hog cholera serum shall be sold or offered or kept for sale or use, or be used in this state which is below the standard test of potency established by the director, except for experimental purposes at the place of manufacture of hog cholera serum and under the direction of the manager thereof. [35 G. A., ch. 227, § 4.]

SEC. **2538-w4. Requirements of bond — inspection — forfeiture.** The bond required in section four of this act, shall be to the effect that the person, firm, company or corporation holding a permit shall forfeit and pay to the director the sum of five hundred dollars whenever upon inspection it shall be ascertained that any serum kept for sale or distribution or offered for sale by any person, firm, company or corporation is below the standard provided for by the director, which money shall when collected be deposited and handled the same as moneys received from the sale of serum. The attorney-general is hereby authorized and it is made his duty to proceed upon the bond to collect the amount forfeited. [35 G. A., ch. 227, § 5.]

SEC. **2538-w5. Virus—distribution and sale—use—violation.** The director of said laboratory is authorized to procure virulent blood or virus from cholera-infected hogs and to distribute the same at approximate cost for use with hog cholera serum and under restrictions concerning payments as established in section three of this act. No person, firm, company or corporation shall distribute or sell any portion of virulent blood or virus from cholera-infected hogs unless permitted in writing so to do by the director of said laboratory and under such regulations as the said director may issue, and such permit shall specify the time and place, and when and where the said virus may be used. And no person shall use any portion of virulent blood or virus from cholera-infected hogs unless he has received special instruction in reference to such use of such virulent blood or virus which is satisfactory to the director of said laboratory and said director has issued a permit to such person, and such permit shall be canceled by said director for cause which said director may deem sufficient; provided that these restrictions shall not apply to official work of, first, veterinary members of the animal health commission or, second, representatives of the United States bureau of animal industry; but all virulent blood or virus used by such persons shall be reported to the director of the serum laboratory in such manner as he may require. Any person, firm, company or corporation violating the terms herein stated shall be punished the same as provided for in section eight of this act. [35 G. A., ch. 227, § 6.]

SEC. **2538-w6. Seizure for examination.** The director of said laboratory or the state veterinarian or their duly qualified deputies or assistants are hereby authorized to seize and forward to the state laboratory for examination, samples of any serum or virus used or kept for use or for sale within this state, at any time or at any place, under the police and health regulations in force in this state. The director of the state laboratory shall have power to condemn or destroy any serum or virus which he deems to be unsafe. [35 G. A., ch. 227, § 7.]

SEC. **2538-w7. Sale without permit—penalty.** After the taking effect of this act, any person, firm, company or corporation offering or

keeping for sale in this state any hog cholera serum or virus without securing a permit from the director, or selling or offering or keeping for sale after said permit has been canceled or has expired, any hog cholera serum, or while holding a permit, selling or offering or keeping for sale any hog cholera serum which is below the standard of potency as established and declared by said director, shall be fined in a sum not less than one hundred dollars or more than five hundred dollars. In default of the payment of such fine, the individual, or if it be a company, firm or a corporation offending, the managing agent or executive officer of such firm, company or corporation within the state, shall be imprisoned in the county jail not less than thirty days or more than one hundred fifty days. [35 G. A., ch. 227, § 8.]

SEC. **2538-w8. Use—violation—penalty.** After the taking effect of this act, any person, firm, company or corporation wilfully using or keeping for use in this state any hog cholera serum other than that manufactured at the state laboratory or that sold by a holder of a valid permit issued by the director of the laboratory shall be punished as provided for in section eight of this act. [35 G. A., ch. 227, § 9.]

SEC. **2538-w9. State laboratory discontinued.** The laboratory for the manufacture of hog cholera serum now being operated by the state of Iowa, shall be discontinued and the state veterinarian is hereby directed to turn over to the director of the laboratory hereby provided for, the equipment of said discontinued laboratory. The state veterinarian is hereby authorized and directed to adjust all claims and leases and to dispose of the same in such manner and on such terms as shall be approved by the governor of the state of Iowa. [35 G. A., ch. 227, § 10.]

SEC. **2538-w10. Appropriation.** There is hereby appropriated out of any money in the state treasury not otherwise appropriated the sum of thirty-five thousand dollars or as much thereof as may be necessary to carry out the provisions of this act. The above amount or so much thereof as may be necessary to carry out the provisions of said act shall be paid by warrants drawn by the auditor of state upon the state treasurer upon the order of the board of education. [35 G. A., ch. 227, § 11.]

SEC. **2538-w11. Repeal.** That chapter one hundred fifty-one of the acts of the thirty-third general assembly and chapter one hundred fourteen of the acts of the thirty-fourth general assembly be and the same are hereby repealed. [35 G. A., ch. 227, § 12; 34 G. A., ch. 114, §§ 1, 2; 33 G. A., ch. 151, § 1.]

CHAPTER 15.

OF THE CARE AND PROPAGATION OF FISH AND THE PROTECTION OF BIRDS AND GAME.

SECTION **2539. Warden—compensation—expenses—duties—seizure without warrant—sale.** There is hereby created the office of state fish and game warden. The warden shall be appointed by the governor, and hold his office for three years from the first day of April of the year of his appointment. He shall receive a salary of twenty-two hundred dollars annually, together with his necessary traveling, contingent and office expenses, to be paid out of moneys collected under the provisions of

chapter one hundred fifty-four, acts of the thirty-third general assembly. He shall have charge and management of the state fish hatcheries, which shall be used in stocking the waters of the state with fish native to the country and to the extent of the means provided by the state. He shall impartially and equitably distribute all fry raised by or furnished to the state, or for it through other sources, in the streams and lakes of the state; shall faithfully and impartially enforce obedience of the provisions of this chapter, and shall make a biennial report to the governor of his doings, together with such information upon the subject of the culture of fish and the protection of game in the country as he may think proper, accompanied with an itemized statement monthly to the executive council under oath of all moneys expended and for what purpose, and of the number and varieties of fish distributed, and in what waters. It shall be the duty of the fish and game warden, sheriffs, constables, and police officers of this state to seize and take possession of any fish, birds, or animals which have been caught, taken, or killed at a time, in a manner, or for a purpose, or had in possession or under control, or have been shipped, contrary to the provisions of this chapter. Such seizure may be made without a warrant. Any court having jurisdiction of the offense, upon receiving proof of probable cause for believing in the concealment of any fish, birds, or animals, caught, taken, killed, had in possession, under control, or shipped contrary to any of the provisions of this chapter, shall issue a search warrant and cause a search to be made in any place therefor. Any fish, birds, or animals so found shall be sold for the purpose of paying the costs in the case, and the amount, if any, in excess of the costs shall be turned into the school fund of the county in which the seizure is made. Any net, seine, trap, contrivance, material, and substance whatever, while in use or had and maintained for the purpose of catching, taking, killing, trapping or deceiving any fish, birds, or animals contrary to any of the provisions of this chapter is hereby declared to be, and is, a public nuisance, and it shall be the duty of the fish and game warden, sheriffs, constables, and police officers of the state, without warrant or process, to take or seize any and all of the same, and abate and destroy any and all of the same without warrant or process and no liability shall be incurred to the owner or any other person for such seizure and destruction, and said warden or his regularly constituted deputies or other peace officers as hereinbefore named shall be released from all liability to any person or persons whomsoever for any act done or committed or property seized or destroyed under or by virtue of this section. [35 G. A., ch. 203, § 2; 34 G. A., ch. 116, § 1; 33 G. A., ch. 152, § 1.] [29 G. A., ch. 103, § 1; 27 G. A., ch. 64, § 1; 23 G. A., ch. 34, § 12; 17 G. A., ch. 80, §§ 1, 4.]

SEC. **2539-a. Repeal.** That section five of chapter sixty-four of the laws of the twenty-seventh general assembly be and the same is hereby repealed. [29 G. A., ch. 103, § 3.]

SEC. **2540. Fishing — rules and regulations — shipment — statement to common carrier—confiscation.** Between the first days of October and April fifteenth no one shall take from the waters of the state any salmon or trout, nor between the first day of December and the fifteenth day of May any bass, pike, croppies, pickerel, or catfish, or other game fish, nor shall any one person take of said fish from the waters of the state in any one day more than forty of any or all of said kinds of fish, of which total number not more than twenty shall be bass, pike or pickerel. It shall be unlawful for any person, firm or corporation to offer for transportation

or to transport to any place within or without this state for purposes of sale, any game fish taken from the inland waters of the state.

Any person, firm or corporation desiring the shipment or transportation of any game fish shall deliver to the common carrier, express or transportation company a statement under oath in duplicate, setting forth the name of the shipper, the person to whom the package is shipped, the residence of both, the kind and number of fish contained in such package, and that the fish contained in such package are not being shipped for the purpose of sale or market, and one copy thereof shall be retained by the common carrier, express or transportation company receiving such shipment for the period of twelve months thereafter and the other copy thereof shall be attached in a secure manner to such package.

Any agent of any common carrier, express or transportation company receiving such shipment is hereby authorized to administer to such shipper the oath contemplated in the last preceding paragraph. Any shipment made in violation of the provisions of this act may be seized, confiscated and sold by any game warden in this state at private or public sale, the proceeds thereof to be turned into the fish and game protection fund, or such shipment may be by such warden destroyed. Nor shall anyone fish for, or by any means catch any fish in any stream which has been stocked with breeding trout one or two years old, within one year from the date of the stocking thereof, if notice of such fact is by the authority of the warden posted where a public road crosses such stream; nor shall anyone at any time take from the waters of the state any fish, except minnows for bait. unless by hook and line; but any person may, between the fifteenth day of May and the first day of December use not more than one trot-line in streams only, and extending not more than halfway across; nor shall anyone place, erect or cause to be placed or erected, any trot-line, seine, net, trap, dam or other device or contrivance in the water in such a manner as to hinder or obstruct the free passage of fish, up, down or through the same for the purpose of catching them, except as provided in the next section; nor have, erect or use, while fishing on or through the ice, any house, shed or other protection against the weather, or have or use any stove or other means for creating artificial heat. The possession of a spear, trap, net or seine in or upon any of the public waters of the state, or upon the ice of the same, or on the shore within a limit of ten rods, or the taking or killing or attempting to take or kill any fish by any means other than by rod, line, hook and bait within three hundred feet of a fishway or dam shall be unlawful, but the provisions of this section shall not prevent the taking of carp, sucker, red horse or buffalo in the daytime by use of a spear in any months except March and April.

No person shall, at any time, kill, destroy, have in possession or under control, for any purpose whatever, any bass, catfish, wall-eyed pike, crappie, or trout less than six inches in length, except for the purpose of returning the same to the water from which they were taken, as soon as they are taken therefrom, with as little injury to the fish as possible. [35 G. A., ch. 205, § 1; 35 G. A., ch. 204, § 1; 33 G. A., ch. 153, § 1.] [30 G. A., ch. 93; 30 G. A., ch. 92, §§ 1, 2; 29 G. A., ch. 103, §§ 2, 4; 27 G. A., ch. 64, §§ 2, 4; 26 G. A., ch. 80, § 1; 25 G. A., ch. 65; 23 G. A., ch. 34, §§ 2, 3, 6, 7; 17 G. A., ch. 80, §§ 5, 6; 16 G. A., ch. 70, § 6.]

[Enrolled bill house file No. 534, 33 G. A. (ch. 153) does not show signature of the speaker of the house. EDITOR.]

Fish and game are so related to the public welfare that they have, time out of mind, been the subjects of legal control, and their preservation has ever been a

matter of legislative concern. Statutes relating to the preservation of fish and game are an abridgment of otherwise legal rights of the owners of the soil in taking fish and game thereon. *State v. Beardsley*, 108–396, 79 N. W. 138; *State v. Meek*, 112–338, 84 N. W. 3.

Several counts charging illegal seining of fish may be embraced in a single information before a justice of the peace, and the fact that the aggregate fine which may be imposed under such information exceeds one hundred dollars does not deprive the court of jurisdiction. *State v. Denhardt*, 129–135, 105 N. W. 385.

One who engages in the unlawful act of seining by which fish are taken and carried away may be punished although it does not appear that he assisted in carrying such fish away. *Ibid.*

SEC. **2540-a. Explosives—drugs—penalty.** It shall be unlawful for anyone to place in the waters of the state any lime, ashes, or drug of any kind or other substance, explode dynamite, gun cotton, giant powder or other compound or preparation or use electricity in any way with the intent to kill or so to affect any fish that it may be taken, and anyone guilty of any of said acts shall be guilty of a misdemeanor and upon conviction thereof be fined not less than fifty dollars nor more than one hundred dollars or imprisoned in the county jail not less than fifteen nor more than thirty days. [33 G. A., ch. 153, § 2.] [29 G. A., ch. 103, § 5.]

[See editorial note at § 2540.]

SEC. **2544. Violation—penalties.** That section twenty-five hundred forty-four of the code be repealed and the following enacted in lieu thereof:

"Any person, firm or corporation who shall violate any of the provisions of section twenty-five hundred forty of the supplement to the code, 1907, as herein amended, or twenty-five hundred forty-one, twenty-five hundred forty-two or twenty-five hundred forty-three of the code, shall be guilty of a misdemeanor, and, upon conviction, shall pay a fine of not less than five nor more than fifty dollars and cost of prosecution for each offense, or be imprisoned in the county jail for not less than one day nor more than thirty days, and the taking of each fish in violation of law shall be construed to be a separate offense." [33 G. A., ch. 153, § 3.] [26 G. A., ch. 80, § 3; 23 G. A., ch. 34, §§ 5, 8, 9; 16 G. A., ch. 170, §§ 4, 7.]

[See editorial note at § 2540.]

SEC. **2546. Taking by warden—written permits.** The warden may take from any of the public waters of the state, at any time and in any manner, any fish for the purpose of propagating or restocking other waters, or exchanging with fish commissioners or wardens of other states. Provided, further, that the warden may, upon proper application in writing, made upon blanks furnished by said warden, issue to whomsoever he may see fit, written permits, upon blank forms to be furnished by said warden, suspending for a specified period specified portions of this chapter relating to fishing and authorizing the person to whom said permit is issued, to take from certain designated lakes of the state, having an area of not less than two square miles, buffalo, carp, quillbacks, red horse, suckers and gar, as in said permit named, in any quantities and for all purposes; provided, however, that no such permit holder shall be authorized to exercise the rights granted in said permit, except in the presence and under the supervision of the warden or one or more of his regularly constituted deputies, without expense to the state, and provided that seining shall not be permitted between the first day of December and the fifteenth day of June. [30 G. A., ch. 94; 29 G. A., ch. 103, § 6; 23 G. A., ch. 34, § 2.]

The warden has no authority to take, or empower others to take, fish from the public waters for the purpose of stocking private ponds. *State v. Sears*, 115–28, 87 N. W. 735.

SEC. 2547. **Rivers excepted—dams.** Except as otherwise expressly stated, nothing herein contained shall be held to apply to fishing in the Mississippi or Missouri rivers, nor to so much of the Des Moines river as forms the boundary line between this state and Missouri, nor to forbid the erection of dams across the waters of the state for manufacturing or other lawful purposes, subject to the provisions of the following section. [33 G. A., ch. 155, § 1.] [29 G. A., ch. 104, § 1; 23 G. A., ch. 34, § 11; 18 G. A., ch. 92; 16 G. A., ch. 70, § 10.]

The exception of boundary rivers from the provisions of the statute regulating fishing does not include a nonnavigable slough lying wholly within the boundaries of this state though connected at each end and supplied by water from the Mississippi. *Little v. Green*, 144-492, 123 N. W. 367.

In ch. 155, acts 33 G. A., as amended by ch. 117, acts 34 G. A., the state attempted for the first time to regulate fishing in boundary rivers over which it has concurrent jurisdiction with other states. But such statutes are not in excess of the power of the state with reference to such boundary rivers. *State v. Moyers*, 155-678, 136 N. W. 896.

SEC. 2547-a. **Nets, seines and other contrivances—boundary waters—license—bond—fee.** It shall be unlawful for any person to take from the waters of that part of the Des Moines river forming a part of the boundary between this state and Missouri, or from the waters of the Big Sioux river within the jurisdiction of this state, any fish with net, seine, trap, contrivance, material or substance whatsoever except by rod, line, hook and bait. It shall be unlawful for any person to take from the Mississippi or Missouri rivers within the jurisdiction of this state any fish with nets or seines without first procuring from the state fish and game warden an annual license for the use of such nets and seines. Before any such license shall be issued to a nonresident of the state of Iowa, the applicant shall execute and deliver to the fish and game warden a bond running to the state of Iowa in the penal sum of two hundred dollars with two sureties who shall each justify in the sum of two hundred dollars in property in this state over and above all debts and liabilities, and property exempt by law from sale on execution. In lieu of such bond such licensee may make a cash deposit of two hundred dollars or provide bond of any surety company authorized to do business in this state. Such bond shall be conditioned that if the applicant shall well and faithfully observe and comply with all the requirements of this act and the rules and regulations which are or may be hereafter prescribed by law, such application to be null and void, otherwise to remain in full force and effect. The fee charged for such license shall be as follows: For each five hundred lineal feet of seine, or fraction thereof, ten dollars; for each pound net having more than one hundred feet lead on each side, four dollars; for each pound net having less than one hundred feet lead on each side one dollar; for each bait net, dip net, hoop net, and fyke net, fifty cents; for each three hundred lineal feet of trammel net used for floating fishing, five dollars. All licenses shall expire on the first day of March following their issuance. The state fish and game warden shall furnish to each licensee at an expense not to exceed ten cents each, a metal tag, numbered and stamped so as to show year of issuance and for what issued, for each net, and each five hundred feet, or fraction thereof, of seine; and it shall be unlawful to use any seine or net in the waters specified in this section without having a tag thus procured attached thereto; provided that no seine or net with less than two and one-half inch mesh, stretch measure, shall be licensed or used for fishing, under this act. [34 G. A., ch. 117, § 1; 33 G. A., ch. 155, § 2.]

These statutory provisions are not in excess of the power of the state with reference to boundary rivers over which it has concurrent jurisdiction with other states. *State v. Moyers*, 155–678, 136 N. W. 896.

SEC. 2547-b. **Funds—how expended—removal of fish from cut-off waters.** The funds received for such licenses and sale of tags shall be expended by the state fish and game warden for the maintenance of his department and meeting the expenses thereof, and so far as same are available he shall expend same in the preservation of food fishes in the waters described in section two[1] hereof by removing young fish from dead or cut-off waters to the live waters adjacent thereto, and where practicable, cleaning the channel from said dead and cut-off waters so that young fish can escape therefrom. He shall render an itemized account of all such funds in each biennial report. [34 G. A., ch. 117, § 2; 33 G. A., ch. 155, § 3.]

[1See § 2547-a herein. EDITOR.]

SEC. 2547-c. **Taking of certain fish prohibited.** It shall be unlawful for any person to take from the waters described in section two[1] of this act, except by hook and line and spear, any of the following fish in lengths less than as follows, to wit: carp, fifteen inches; buffalo, fifteen inches; black bass, eleven inches; striped or white bass, eight inches; pike, fifteen inches; croppies, eight inches; pickerel, eighteen inches; catfish, thirteen inches; and the following fish weighing less than as follows, to wit: sand sturgeon, one pound; rock sturgeon, three pounds; and no pike, bass or croppies between and including March thirty-first and June first of each year. [34 G. A., ch. 117, § 3; 33 G. A., ch. 155, § 4.]

[1See § 2547-a herein. EDITOR.]

SEC. 2547-d. **Food fishes not to be injured or destroyed.** It shall be unlawful for any person to take from the waters described in section two[1] of this act, by seine or net, any food fishes and cause or permit same to perish or be destroyed, or to remove such fish within such water so as to cause same to be destroyed or to perish, and any person taking any food fishes from such waters who does not make use of same shall immediately return same to such waters without injury. [33 G. A., ch. 155, § 5.]

[1See § 2547-a. EDITOR.]

SEC. 2547-e. **Violation—penalty.** Any person violating any of the provisions of this act shall be deemed guilty of a misdemeanor and be punished by imprisonment in the county jail for a period of not exceeding thirty days or by a fine not exceeding one hundred dollars. [33 G. A., ch. 155, § 6.]

SEC. 2548. **Fishways.**

The legislature may provide for the passage of fish along, and their protection in, unnavigable as well as navigable waters. *State v. Beardsley*, 108–396, 79 N. W. 138.

One who acquires the right to maintain a dam by grant from the state is subject, without reservation in the grant, to the subsequent control of the legislature as to the construction of fishways. *State v. Meek*, 112–338, 84 N. W. 3.

But where, in an action before a justice of the peace having jurisdiction, it was determined that the owner of the dam was not liable for a violation of the statute in not maintaining a fishway, on the ground that by reason of the grant from the state the statute was not applicable to him, and this judgment was not appealed from, held that this constituted a prior adjudication. *Ibid.*

SEC. 2551. **Game protected—penalty.** No person shall trap, shoot or kill any pinnated grouse or prairie chicken between the first day of

December and the first day of September next following; any woodcock, between the first day of January and the tenth day of July; any ruffed grouse or pheasant, wild turkey or quail, between the fifteenth day of December and the first day of November; any wild duck, goose or brant, rail, plover, sandpiper and marsh or beach bird, between the fifteenth day of April and the first day of September; or any gray or fox squirrel or timber squirrel, between the first day of January and the first day of September; provided that it shall be unlawful to kill any ruffed grouse or wild turkey prior to January first, nineteen hundred. Shooting or killing quail on the public highway shall be in violation of law. No person shall kill or attempt to kill any of the birds mentioned in this section from any artificial ambush of any kind or with the aid or use of any sneak boat or sink box or from any sailboat, gasoline or electric launch or steamboat, or any other water conveyance, except as propelled by oar or paddle, or other device used for concealment in the open water, nor use any artificial light, battery or other deception, contrivance or device whatever, with the intent to attract or deceive any of the birds mentioned in this chapter, except that decoys may be used in hunting wild geese and ducks, but no person shall at any time hunt or shoot from any boat, canoe, contrivance or device whatever on any of the waters of this state between sunset and sunrise. Any person violating any of the provisions of this section shall be held guilty of a misdemeanor and punished as provided for in section twenty-five hundred fifty-six of the supplement to the code, 1907, and in addition thereto for use of any ambush, sink box, sneak boat or other water conveyance, prohibited by law, on the waters of this state, a fine of not less than twenty-five dollars, nor more than one hundred dollars, and shall stand committed to the county jail for thirty days unless such fine and costs are paid. [33 G. A., ch. 153, § 4.] [30 G. A., ch. 92, § 3; 29 G. A., ch. 103, § 7; 27 G. A., ch. 66, § 1; 20 G. A., ch. 67; 18 G. A., ch. 193; 17 G. A., ch. 156, § 2.]

[See editorial note at § 2540.]

SEC. **2551-a. Protection of certain animals.** That it shall be unlawful for any person other than the owner, or person authorized by the owner, to kill, maim, trap, or in any way injure or capture any deer, elk, or goat except when distrained as provided by law. [27 G. A., ch. 65, § 1.]

SEC. **2551-b. Penalty.** Any person violating the provisions of this act shall be deemed guilty of a misdemeanor and be punished by imprisonment in the county jail for a period not exceeding thirty days or by a fine not exceeding one hundred dollars, or by both such fine and imprisonment. [27 G. A., ch. 65, § 2.]

SEC. **2552. Killing for traffic—destroying eggs or nests—penalty.** That section twenty-five hundred fifty-two of the supplement to the code, 1907, be repealed and the following enacted in lieu thereof:

"No person shall at any time or at any place within this state, trap, shoot or kill for traffic any of the birds, animals or game named in this chapter, nor shall any person shoot or kill more than twenty-five in any one day, of any kind of said named animals, birds or game, nor shall any one person, firm or corporation have more than twenty-five of either kind of said named birds or game named in this chapter in his or their possession at any time unless lawfully received for transportation; provided, however, the limit of ducks in possession is hereby made fifty. Nor shall any person capture or take, or attempt to catch or take, with any trap, snare or net any of the birds or animals named in the preceding sections,

or in any manner wilfully destroy the eggs or nest of any of the birds named in this chapter. Any person, firm or corporation violating any of the provisions of this section shall be held to be guilty of a misdemeanor and punished as provided for in section twenty-five hundred fifty-six of the supplement to the code, 1907." [33 G. A., ch. 153, § 5.] [30 G. A., ch. 95, §§ 1, 2; 18 G. A., ch. 193, § 2; 17 G. A., ch. 156, § 3.]

[See editorial note at § 2540.]

SEC. 2554. **Having in possession—violation—penalty.** That section twenty-five hundred fifty-four of the code be repealed and the following enacted in lieu thereof:

"It shall be unlawful for any person, firm or corporation to buy or sell, dead or alive, any of the birds, game or animals named in this chapter, and it shall be unlawful to have the same in possession during the period when the killing of such birds, game or animals is prohibited, except during the first five days of such prohibited period; and the possession by any person, firm or corporation of any of such birds, game or animals during such prohibited period, except during the first five days thereof, shall be presumptive evidence of the violation of this chapter relating to game and he or they shall be held to be guilty of a misdemeanor and shall be punished as provided for in section twenty-five hundred fifty-six of the supplement to the code, 1907." [33 G. A., ch. 153, § 6.] [17 G. A., ch. 156, § 5.]

[See editorial note at § 2540.]

SEC. 2555. **Shipments—intra-state and interstate.** No person, company or corporation shall at any time ship, take or carry out of this state any of the birds or animals named in this chapter. No person, firm or corporation shall at any time ship to any person, firm or corporation within this state any of the birds or animals named in this chapter, except in strict compliance with the following provisions: It shall be lawful for any person to ship to any person within this state any game birds named, not to exceed one dozen in any one day, during the period when the killing of such birds is not prohibited; but before such shipment is made, he shall first make an affidavit before some person authorized to administer oaths that said birds have not been unlawfully killed, bought, sold or had in possession, are not being shipped for sale or profit, giving the name and post-office address of the person to whom shipped, and the number of birds to be so shipped. A copy of such affidavit, indorsed "a true copy of the original" by the person administering the oath, shall be furnished by him to the affiant, who shall deliver the same to the railroad agent or common carrier receiving such birds for transportation, and the same shall operate as a release to such carrier or agent from any liability in the shipment or carrying of such birds. The original affidavit shall be retained by the officer taking the same, and may be used as evidence in any prosecution for violation of the sections of this chapter relating to game. Any person who shall ship more than one dozen of the birds named in this chapter in any one day, or any person shipping any of the birds named in this chapter without first complying with the provisions of this section, or any person, firm or corporation violating any of the provisions of this section at any time, shall be held to be guilty of a misdemeanor and shall be punished as provided for in section twenty-five hundred fifty-six of the supplement to the code, 1907. Provided, however, that it shall be lawful to have in possession game lawfully taken outside this state and lawfully brought into this state, but the burden shall rest upon the person in possession to

establish the fact that such game so shipped into the state was lawfully killed and lawfully shipped into this state. [33 G. A., ch. 153, § 7.] [17 G. A., ch. 156, § 6.]

[See editorial note at § 2540.]

The delivery to the carrier for transportation to a point beyond the state constitutes a violation of the statute, although the game shipped is taken from the carrier by the authorities while it is yet within the state. *State v. Carson*, 147–561, 126 N. W. 698.

SEC. 2556. **Penalty.** If any person use any device, kill, trap, ensnare, buy, sell, ship, or have in his possession, or ship, take or carry out of the state, or ship within this state contrary to the provisions of this chapter, any of the birds or animals named or referred to herein, or shall wilfully destroy any eggs or nests of the birds named or referred to in the preceding sections, he shall be guilty of a misdemeanor and be punished by a fine of ten dollars for each bird, beaver, mink, otter, or muskrat, or other animals named or referred to in this chapter, and ten dollars for each nest and the eggs therein, so killed, trapped, ensnared, bought, sold, shipped, had in possession, destroyed, or shipped, taken, or carried out of the state, or shipped within this state contrary to law, and shall stand committed to the county jail for thirty days unless such fine and costs of prosecuting are sooner paid. [33 G. A., ch. 153, § 8.] [29 G. A., ch. 103, § 8; 17 G. A., ch. 156, § 7.]

[See editorial note at § 2540.]

SEC. 2559. **Prosecutions — attorney's fee — opinion of attorney-general.** In all prosecutions under this chapter, any number of violations may be included in the information, but each one shall be set out in a separate count. Prosecutions for violations of any provision of this chapter may be brought either in the county in which the offense was committed, or in any other county where the person, company or corporation complained of has had or has in his or their possession any fish, birds or animals named herein and bought, sold, caught, taken, killed, trapped or ensnared in violation hereof. When requested by the fish and game warden the attorney-general shall give his opinion, in writing, upon all questions of law pertaining to the office of such warden. Nothing in this chapter shall be construed as prohibiting any person from instituting legal proceedings for the enforcement of any provisions hereof. [33 G. A., ch. 153, § 10.] [27 G. A., ch. 64, § 3; 17 G. A., ch. 156, § 11.]

[See editorial note at § 2540.]

SEC. 2561. **Protection of birds.** No person shall destroy the nests or eggs of, or catch, take, kill or have in possession or under control for any purpose whatever, except specimens for use of taxidermists, at any time, any whippoorwill, nighthawk, bluebird, finch, thrush, linnet, lark, wren, martin, swallow, bobolink, robin, turtledove, catbird, snowbird, blackbird, or any other harmless bird except blue jays and English sparrows, but nothing herein shall be construed to prevent the removal of nests from buildings, and the keeping of song birds in cages as domestic pets. Any person violating any of the provisions of this section shall be fined not less than one dollar nor more than twenty-five dollars and costs of prosecution, and may be committed to the county jail until such fine and costs are paid. [29 G. A., ch. 103, § 9.]

The exception of specimens as to taxidermists has no reference to the killing of game birds during the prohibited season, under code §§ 2551 and 2554. *State v. Fields*, 118–530, 92 N. W. 651.

SEC. **2562. Deputy wardens — compensation—expenses—bonds—powers.** That section twenty-five hundred sixty-two of the code be repealed and the following enacted in lieu thereof:

"The fish and game warden may appoint three assistant fish and game wardens who shall receive a salary of twelve hundred dollars per year, and such number of deputies as he may deem necessary, who shall receive a compensation of two dollars and fifty cents per diem and actual expenses, for the time and money actually employed and expended by them in the enforcement of the provisions of this act. Such deputy warden shall act under the advice and direction of the fish and game warden, and perform such duties in relation to their offices as may be required of them and submit, under oath, itemized statements of their per diem and expenses as aforesaid; and shall have full power and authority to serve and execute all warrants and process of law issued by any court in enforcing the provisions of this act, or any other law of this state relating to the propagation, preservation and protection of fish, game and birds, in the same manner as any constable or sheriff may serve and execute the same and receive the same fee therefor, and for the purpose of enforcing the provisions of this act they may call to their aid any sheriff, deputy sheriff, constable or police officer or any other person, and it shall be the duty of all sheriffs, deputy sheriffs, constables and police officers and other persons when called upon to enforce and aid in enforcing the provisions of this act. All deputy wardens shall have power to arrest without warrant any person or persons found in the act of violating any law enacted for the purpose of propagation and protection of fish, game and birds. All deputy wardens shall give bonds conditioned for the faithful performance of their duties, in such amounts as may be fixed by the state executive council." [35 G. A., ch. 203, § 1; 33 G. A., ch. 153, § 9.]

[See editorial note at § 2540.]

SEC. **2562-a. Acts in conflict repealed.** All acts and parts of acts inconsistent with this act are hereby repealed. [33 G. A., ch. 153, § 11.]

[See editorial note at § 2540.]

SEC. **2562-b. State ownership and title—exceptions.** The ownership and title of all wild game, animals, and birds, found in the state of Iowa, except deer in parks and public and private preserves the ownership of which has been acquired prior to taking effect of this act and all fish in any of the public waters of the state, including all ponds, sloughs, bayous, or other waters adjacent to any public waters, which ponds, sloughs, bayous and other waters are stocked with fish by overflow of public waters, is hereby declared to be in the state, and no wild game, animals, birds, or fish shall be taken, killed, or caught in any manner at any time or had in possession, except the person so catching, taking, killing, or having in possession, shall consent that the title to said wild game, animals, birds, or fish, shall be and remain in the state of Iowa for the purpose of regulating and controlling the use and disposition of the same after such catching, taking, or killing. [34 G. A., ch. 118, § 1.]

SEC. **2562-c. Violation deemed consent to title.** The catching, taking, killing, or having in possession, wild game, animals, birds, or fish at any time, or in any manner, or by any person, except as provided in section one hereof, shall be deemed a consent of said person that the title of the state shall be and remain in the state for said purpose of regulating

the use and disposition of the same and said possession shall be consent to such title in the state. [34 G. A., ch. 118, § 2.]

SEC. **2562-d. Deer—killing or capture.** That section three of chapter one hundred eighteen of the acts of the thirty-fourth general assembly be and the same is hereby repealed and the following enacted in lieu thereof:

"When it shall become necessary in the opinion of the state game warden or his deputies to kill or capture any deer now running at large within this state, it shall be done under the authority and direction of the state fish and game warden, who shall distribute such deer so killed or captured within this state and the expense of said killing or capture and distribution shall be paid by the person receiving such deer." [35 G. A., ch. 206, § 1; 34 G. A., ch. 118, § 3.]

CHAPTER 15-A.

IN RELATION TO THE PROTECTION OF GAME.

SECTION **2563-a. Repeal.** That sections twenty-five hundred sixty-three-a, twenty-five hundred sixty-three-b, twenty-five hundred sixty-three-c, twenty-five hundred sixty-three-d, twenty-five hundred sixty-three-e, twenty-five hundred sixty-three-f, twenty-five hundred sixty-three-g, and twenty-five hundred sixty-three-h of the supplement to the code, 1907, are hereby repealed and the following enacted in lieu thereof: [33 G. A., ch. 154, § 1.] [28 G. A., ch. 86, § 1.]

SEC. **2563-a1. License to hunt.** No person shall hunt, pursue, kill or take any wild animal, bird, or game in this state, with a gun, without first procuring a license as herein provided. [33 G. A., ch. 154, § 2.]

SEC. **2563-a2. Age limit—consent of parent or guardian.** No license shall be granted any person under eighteen years of age unless the written consent of parents or guardian is attached to the application. [33 G. A., ch. 154, § 3.]

SEC. **2563-a3. Application blanks—enclosed or cultivated lands.** The state fish and game warden shall furnish county auditors with application blanks for a license and license blanks. These blanks shall provide for the insertion of the name, age, sex, and place of residence of the applicant and of the licensee. The license shall authorize its holder to hunt in accordance with the provisions of this act in any county of the state, but not on enclosed or cultivated lands without permission of the owner or the tenant, or upon any public highway; and shall bear a facsimile signature of the state fish and game warden and the seal and signature of the county auditor [of the county] in which it is issued. [33 G. A., ch. 154, § 4.]

SEC. **2563-a4. Fees.** An applicant for a license shall fill out an authorized application blank and subscribe and swear to it before the county auditor, or a notary or justice of the peace. Before the license is issued, the applicant, if a resident of the state of Iowa, shall pay the county auditor the sum of one dollar as a license fee, and if a nonresident of the state of Iowa shall pay him the sum of ten dollars as a license fee. These fees the county auditor shall pay at the end of each month to the state treasurer, who shall place them to the credit of a fund known as the fish and game protection fund. [33 G. A., ch. 154, § 5.]

SEC. **2563-a5. Nonresidents—restrictions.** A nonresident holding a valid license may take from the state not to exceed twenty-five game

birds or animals, provided they are so carried as to be readily inspected and his license is shown on request. [33 G. A., ch. 154, § 6.]

SEC. **2563-a6. State fish and game protection fund—use.** The state fish and game protection fund shall be used for the payment of the expenditures made necessary under the provisions of section twenty-five hundred thirty-nine of the code, for the traveling, contingent and office expenses of the warden; for deputy wardens' salaries and expenses; for the protection and propagation of fish and game; for gathering and distributing fish in the public waters of the state; for the care and preservation of the lakes of the state; for the expenditures made necessary under the operation or enforcement of this statute or any other laws enacted affecting the fish and game service; and shall be paid out only on verified vouchers approved by the executive council. [33 G. A., ch. 154, § 7.]

SEC. **2563-a7. License record.** The county auditor shall keep a record of the licenses he issues which shall show the date of issue, the name and address of the person to whom issued, and the date of revocation, if revoked. [33 G. A., ch. 154, § 8.]

SEC. **2563-a8. Terms of license—owners or tenants—alteration—violation—penalties.** The license shall be signed by the licensee in ink, and shall entitle the person to whom issued to hunt, pursue and kill wild animals, birds or game within the state at any time when it shall be lawful to hunt, pursue and kill such wild animals, birds or game, but it shall not entitle the person to whom issued to hunt, pursue or kill wild animals, birds or game in this state without being prepared at the time of so doing to exhibit it for inspection and permitting it, on demand, to be examined by any person. All licenses shall be void after the first day of July next succeeding issuance. Provided, however, that owners of farm lands, their children or tenants, shall have the right, without procuring a license, to hunt and kill wild animals, birds or game upon the lands owned or occupied by them. Any person found guilty of violating any of the provisions of this section shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined in any sum not less than twenty-five dollars nor more than fifty dollars for each offense, and shall stand committed to the county jail until such costs and fines are paid, but such imprisonment shall not exceed thirty days for each offense. Any person who shall alter or change a license in any material manner shall be deemed guilty of forgery, and upon conviction thereof shall be subject to the penalties provided for the commission of forgery. Any person who uses or attempts to use the license of another, or altered license, shall be guilty of a misdemeanor, and upon conviction shall be fined not less than twenty-five dollars nor more than fifty dollars for each offense, and shall stand committed to the county jail until such fine and costs are paid, but such imprisonment shall not exceed thirty days for each offense. [33 G. A., ch. 154, § 9.]

SEC. **2563-a9. Revocation.** A license in the possession of any person other than to whom first issued, and on complaint, the license of any person hunting on enclosed or cultivated lands, without permission of the owner or tenant, may be revoked by the county auditor. [33 G. A., ch. 154, § 10.]

SEC. **2563-a10. Prima-facie evidence.** Possession of a gun in the fields or forests or on the waters of the state, or upon the ice of the same, and a failure to display a license when it is demanded by any person, shall be, except in the case of the owner or tenant, prima-facie evidence of a violation of the provisions of this act. [33 G. A., ch. 154, § 11.]

SEC. 2563-a11. **Appropriation—when available.** Any appropriation made by the general assembly for the use of the state fish and game warden shall not be drawn upon until the fund arising from license fees shall be exhausted. [33 G. A., ch. 154, § 12.]

SEC. 2563-a12. **Acts in conflict repealed.** All acts and parts of acts inconsistent with this act are hereby repealed. [33 G. A., ch. 154, § 13.]

SEC. 2563-b. **How issued—fees—repealed.** [33 G. A., ch. 154, § 1.] [28 G. A., ch. 86, § 2.]

[See § 2563-a. EDITOR.]

SEC. 2563-c. **Application filed—repealed.** [33 G. A., ch. 154, § 1.] [28 G. A., ch. 86, § 3.]

[See § 2563-a. EDITOR.]

SEC. 2563-d. **Restrictions—repealed.** [33 G. A., ch. 154, § 1.] [28 G. A., ch. 86, § 4.]

[See § 2563-a. EDITOR.]

SEC. 2563-e. **Penalty—repealed.** [33 G. A., ch. 154, § 1.] [28 G. A., ch. 86, § 5.]

[See § 2563-a. EDITOR.]

SEC. 2563-f. **Game protection fund—repealed.** [33 G. A., ch. 154, § 1.] [28 G. A., ch. 87, §§ 1, 6.]

[See § 2563-a. EDITOR.]

SEC. 2563-g. **Form of license—repealed.** [33 G. A., ch. 154, § 1.] [28 G. A., ch. 86, § 7.]

[See § 2563-a. EDITOR.]

SEC. 2563-h. **How enforced—repealed.** [33 G. A., ch. 154, § 1.] [28 G. A., ch. 86, § 8.]

[See § 2563-a. EDITOR.]

SEC. 2563-i. **Using birds as targets—penalty.** Any person who keeps or uses a live pigeon, fowl or other bird for the purpose of a target or to be shot at either for amusement or as a test of skill in marksmanship, or shoots at a bird kept or used as aforesaid, or is a party to such shooting, or leases any building, room, field or premises, or knowingly permits the use thereof, for the purpose of such shooting, shall upon conviction thereof be fined not less than ten dollars nor more than one hundred dollars or imprisoned in the county jail not exceeding thirty days. Nothing in this act shall apply to the shooting of wild game. [30 G. A., ch. 96.]

SEC. 2563-j. **Wild birds—property of state.** That all wild birds, both resident and migratory, in this state, shall be, and are hereby declared to be the property of the state. [31 G. A., ch. 108, § 1.]

SEC. 2563-k. **Sale of wild birds and plumage prohibited—game birds defined.** That no person shall, within the state of Iowa, kill or catch, or have in his or her possession, living or dead, any wild bird other than a game bird, or purchase, offer or expose for sale, transport or ship within or without the state, any such wild bird after it has been killed or caught, except as permitted by this act. No part of the plumage, skin, or body of any bird protected by this section shall be sold or had in possession for sale, irrespective of whether said bird was captured or killed within or without the state. For the purpose of this act the following only shall be considered game birds: The Anatidæ, commonly known as swans, geese, brant and river and sea ducks; the Rallidæ, commonly known as rails, coots, mud-hens and gallinules; the Limicolæ, commonly known as

shore birds, plovers, surf birds, snipe, woodcock, sandpipers, tatlers, and curlews; the Gallinæ, commonly known as wild turkeys, grouse, prairie chickens, pheasants, partridges, and quail. All other species of wild birds, either resident or migratory, shall be considered nongame birds. [31 G. A., ch. 108, § 2.]

SEC. **2563-l. Birds' nests and eggs.** That no person shall, within the state of Iowa, take or needlessly destroy or attempt to take or destroy the nest or the eggs of any wild birds, or have such nest in his or her possession, except as permitted by this act. [31 G. A., ch. 108, § 3.]

SEC. **2563-m. Transportation of wild birds prohibited.** That no person or persons, or any corporation acting as a common carrier, its officers, agents or servants, shall ship, carry, take or transport, either within or beyond the confines of the state, any resident or migratory wild nongame bird, except as permitted by this act. [31 G. A., ch. 108, § 4.]

SEC. **2563-n. Not applicable to holder of certificate.** That sections two, three, four and ten of this act shall not apply to any person holding a certificate giving the right to take birds, their nests, or eggs for scientific purposes only, as provided in section six of this act. [31 G. A., ch. 108, § 5.]

SEC. **2563-o. Certificate of permission for scientific purposes—fees.** That certificates may be granted by the fish and game warden of the state to any properly accredited persons of the age of fifteen years or upward, permitting the holder thereof to collect birds, their nests or eggs for scientific purposes only. The applicant for the same must present to said officer written testimonials from two well known ornithologists who must be residents of Iowa, certifying to the good character, and fitness of said applicant to be intrusted with such privilege and must pay said officer one dollar to defray the necessary expenses attending the granting of such certificate. On proof that the holder of such certificate has killed any bird, or taken the nest or eggs of any bird for other than strictly scientific purposes, his certificate shall become void, and he shall be liable to a fine of one hundred dollars, or imprisonment of thirty days, or both, at the discretion of the court. [31 G. A., ch. 108, § 6.]

SEC. **2563-p. Expiration of certificates.** That the certificates authorized by section six of this act shall expire on the thirty-first day of December of the year issued and shall not be transferable. [31 G. A., ch. 108, § 7.]

SEC. **2563-q. Certain birds not included.** That the English, or European house sparrow, great horned owl, sharp shinned hawk, Cooper's hawk, and blackbirds and crows are not included among the birds protected by this act. [31 G. A., ch. 108, § 8.]

SEC. **2563-r. Domestic pets—parrots and canaries.** That nothing in this act shall prevent a citizen of Iowa from taking or keeping any wild nongame bird in a cage as a domestic pet, provided that such bird shall not be sold, or exchanged, or offered for sale or exchange, or transported out of the state; and provided further that this act shall not be construed to forbid the selling or shipping of parrots, canaries or any other cage birds, which are imported from other countries or not native to any part of the United States. [31 G. A., ch. 108, § 9.]

SEC. **2563-s. Penalty.** That any person who violates any of the provisions of this act shall be guilty of a misdemeanor, and shall be liable to a fine of five dollars for each offense, and an additional fine of five dollars for each bird, living or dead, or part of bird, or nest, or set of eggs or part

thereof, possessed in violation of this act, or to imprisonment for thirty days, or both, at the discretion of the court. [31 G. A., ch. 108, § 10.]

SEC. **2563-t. Acts in conflict repealed.** All acts or parts of acts heretofore passed inconsistent with or contrary to the provisions of this act are hereby repealed. [31 G. A., ch. 108, § 11.]

SEC. **2563-u. Trapping, shooting or killing of pheasants prohibited.** No person shall trap, shoot, kill or take in any manner, any Mongolian, ring-neck, English or Chinese pheasants in this state prior to the first day of October, A. D. nineteen hundred fifteen. [32 G. A., ch. 134, § 1.]

SEC. **2563-v. Penalty.** Any person violating the provisions of this act shall upon conviction thereof be fined not to exceed one hundred dollars or imprisonment[1] in the county jail not to exceed thirty days. [32 G. A., ch. 134, §2.]

[1]This is the exact language of the enrolled bill. EDITOR.]

CHAPTER 16.

OF THE STATE BOARD OF HEALTH.

SECTION **2564. Members—terms—secretary—qualifications—meetings—board of appointment—powers.** That the law as it appears in section twenty-five hundred sixty-four of the supplement to the code, 1907, be and the same is hereby repealed, and the following enacted in lieu thereof:

"That the governor, secretary of state and auditor of state are hereby made a board of appointment, two of whom shall constitute a quorum for the purpose of making appointments as hereinafter provided, and the secretary of the executive council shall be the secretary thereof. Said board of appointment shall appoint a secretary of the state board of health, who shall be a legally qualified physician and a graduate of a reputable school of medicine, of not less than ten years' experience, and who shall serve for a term of five years or until his successor is appointed, as are the members of the state board of health, and who shall be the executive officer and commissioner of public health as hereinafter provided, and five members of the state board of health, of which not more than three shall belong to the same political party, nor more than two be of the same school of medical practice, which shall be constituted as follows: That the state board of health shall consist of one well qualified civil and sanitary engineer, who shall devote as much of his time to the service of the state as may be needed or required, and when so engaged, shall have all his necessary traveling and incidental expenses paid by the state, and shall have his salary fixed by the board of appointment, not to exceed eight dollars per day nor twenty-five hundred dollars per annum, and four physicians, each of whom shall be a graduate of a reputable school of medicine, each to serve for a term of five years, unless sooner removed by said board of appointment for good cause, same to apply to the secretary, and until his successor is appointed; provided, that the term of the office of the five members first appointed shall be for one, two, three, four and five years, respectively, their terms to be designated by the board of appointment, and to be so arranged that the term of one such member shall expire on the thirtieth day of June of each year. Any vacancies that may

occur shall be filled by appointment by the board of appointment, and at the expiration of the term of each member, his successor shall be appointed for a full term of five years. No member of the state board of health shall be an officer or a member of the faculty of any medical school, and the board of appointment shall have the power to remove any member or the secretary of said board of health for good cause. That the board of health shall meet semiannually, in July and January of each year, and at such other times as it may be deemed necessary by the secretary, or on the written request of two or more members of the board of health, such meeting to be held at the seat of government; suitable rooms, furniture, office supplies, postage, stationery and printing therefor, to be provided by the executive council in the same manner as for other departments of the state. That at the meeting held in July, a president shall be elected from the board of health for one year, and the board of appointment shall in July, nineteen hundred thirteen, name and appoint a secretary, as herein provided, not a member of the board of health, who shall serve for a term of five years or until his successor is appointed, unless sooner removed by the board of appointment for good cause; said secretary shall have charge of the office of the state board of health. That when the board of health is not in session, the secretary shall be the executive officer thereof, and commissioner of public health, and shall have full power and authority to execute and enforce all of the laws, rules and regulations of the board of health, pertaining to the health and life of the citizens of the state, to quarantine, to marriages, births and deaths, to sanitary investigations, and to all other matters subject to regulations and control by the board of health, the board of medical examiners, and all of the various other departments that are now or may hereafter be provided by law, or by the rules and regulations of such boards or commissions as are authorized to make and adopt rules with reference thereto. That the compensation of the members of the state board of health, except the civil and sanitary engineer which is otherwise provided for in this section, not only as such members, but as members of the state board of medical examiners, and for any and all other services which they may render, either in their individual capacity, or in connection with any other boards or commissions, by virtue of their membership, either upon the board of health, board of medical, embalmers, nurses or optometry examiners, shall be nine hundred dollars per annum, to be paid as are the salaries of other state officers, which shall be in lieu of all per diem and expenses, except transportation expenses. That all other laws pertaining to compensation or expenses of the physician members of the state board of health and state board of medical examiners as such members, or in connection with any of the other departments, board or commissions connected with the office of the state board of health, and all laws in conflict with any of the provisions of this act are hereby amended to conform to its provisions. That the terms of the present members of the state board of health and the secretary thereof as such, and in connection with all other departments connected with the office of said state board of health shall terminate upon the taking effect of this act. [35 G. A., ch. 207, § 1.] [30 G. A., ch. 97; 28 G. A., ch. 88, § 1; 27 G. A., ch. 67, § 1; 26 G. A., ch. 91; 20 G. A., ch. 173; 18 G. A., ch. 151, §§ 1, 9, 10, 12.]

[See §§ 2564-a and 2564-b. EDITOR.]

SEC. 2564-a. **Appropriation—how expended.** That all appropriations or provisions hereafter to be made or which have been made the state

board of health for public health purposes of whatever nature or character, shall be expended under the immediate supervision and direction of the executive council of the state, composed of the governor, secretary of state, auditor of state and treasurer of state, all of whom shall be members, *ex officio*, to serve without compensation, of the state board of health, and no bill for contingent or miscellaneous expenses, or expenses of any kind, of said state board of health shall be allowed or paid unless it is properly itemized, verified and certified to, and audited by the executive council of the state. [35 G. A., ch. 207, § 2.]

SEC. **2564-b. Acts in conflict repealed.** That all laws and parts of laws in conflict with any of the provisions of this act are hereby repealed. [35 G. A., ch. 207, § 3.]

SEC. **2565. Powers—regulations—reports.**

In a prosecution for violation of the regulations of the state board of health, the rules of the board may be established by certification of its secretary. *Pierce v. Doolittle*, 130–333, 106 N. W. 751.

SEC. **2566. Registration of births and deaths—repealed.** [31 G. A., ch. 109, § 9.]

[See § 2575-a19.]

SEC. **2567. Clerk of court to keep registry—repealed.** [31 G. A., ch. 109, § 9; 31 G. A., ch. 110, §§ 1, 2.]

[See § 2575-a19 for repeal and § 2575-a16 for substitute. § 2567, as amended by ch. 110, 31 G. A., appears in the supplement of 1907 but is omitted in this work as unnecessary duplication, all of the amendments shown in said section also appearing in § 2575-a16. The repealing act was approved subsequently to the amending act. EDITOR.]

SEC. **2568. Local board of health—quarantine.**

The physician appointed as a health officer by a local board of health becomes simply an officer to assist in the administration of the law and the enforcement of the regulations of the board and is not required to treat the sick in his professional capacity. If called into service by the board of health to treat persons infected with contagious disease he is entitled to compensation, although the county may have had a contract with another physician to treat all the paupers of the county. The fact that the patient is a pauper is material in determining who shall pay the bill and not with reference to who shall perform the services. *Lacy v. Kossuth County*, 106–16, 75 N. W. 689.

A certificate of the board of health attached to a physician's claim against the county for compensation for services in treating a person infected with contagious disease is admissible in evidence as a part of the claim for such compensation. *Ibid.*

There is nothing to prevent a member of a city council from acting as physician under the employment of the board of health appointed by the mayor of the city. *Dewitt v. Mills County*, 126–169, 101 N. W. 766.

It being made the duty of local boards of health to establish such relations as are necessary for the protection of the public health, and to proclaim and establish quarantine against infectious or contagious diseases, the members of such board are not individually liable for loss sustained by an individual on account of the establishment of a quarantine. *Beeks v. Dickinson County*, 131–244, 108 N. W. 311.

The provision that the mayor may declare a quarantine in case of infectious or contagious diseases, upon written notice given by any practicing physician of the existence of such disease, makes the written notice by such physician necessary before a quarantine against an individual can be declared, and in the absence of such notice there can be no punishment for violation of such quarantine. *State v. Kirby*, 120–26, 94 N. W. 254.

Expense of disinfecting premises is not chargeable to the county. *Schmidt v. Muscatine County*, 120–267, 94 N. W. 479.

Beyond the boundaries of the city the board of health of the city has no power or authority, and it cannot establish a smallpox pesthouse in an adjoining township. *Warner v. Stebbins*, 111–86, 82 N. W. 457.

(But see notes under § 2575-a.)

The written notice given by a practicing physician is only necessary when the mayor acts without authority of the board of health. Such notice is not necessary to confer jurisdiction on the board. *Kirby v. Harker*, 143–478, 121 N. W. 1071.

In the absence of evidence that the mayor has acted beyond the scope of his authority and with malice, he is not liable for damages to one injured by such action. *Ibid.*

SEC. **2569-a. Enforcement on complaint of citizens.** In any case where five or more citizens in any locality in this state present a petition to the state board of health signed by such citizens setting forth complaint regarding sanitary conditions in their locality, it is hereby made the duty of the state board of health to use all means at its command to make special effort to improve the sanitation and health conditions and precautions in such localities of this state. If the local board of health should fail to carry out the directions of the state board of health, the state board of health may employ the necessary assistants to carry out the provisions of this act. [35 G. A., ch. 208, § 1.]

SEC. **2569-b. Appropriation.** That there is hereby appropriated out of the funds in the state treasury, not otherwise appropriated, the sum of two thousand dollars, or so much thereof as may be necessary for carrying out the provisions and stipulations of senate file number four hundred ninety-one,[1] thirty-fifth general assembly, said sums of money to be paid by the state treasurer on order of the state board of health on warrants properly certified by said board. [35 G. A., ch. 332, § 1.]

['§ 2569-a herein. EDITOR.]

SEC. **2570. Care of infected person—repealed.** [29 G. A., ch. 105, § 1.]

[§ 2570 of the code was originally repealed and a substitute enacted therefor by 29 G. A., ch. 105, § 1. The substitute enactment was placed in the 1902 supplement under § 2570-a. EDITOR.]

This section does not enlarge the territorial limits of the jurisdiction of the city board of health, as specified in code § 2568, nor authorize a transfer of patients having contagious diseases to the jurisdiction of the board of health of an adjoining township. *Warner v. Stebbins*, 111–86, 82 N. W. 457.

A physician employed by the local board of health to treat cases of contagious diseases is entitled to recover by way of compensation from the county for such treatment given by him as is reasonable under the circumstances. *Bay v. Monroe County*, 121–302, 96 N. W. 854.

Where it is made to appear that smallpox or other disease dangerous to the public health exists, the board of health has power to make provision for the care of the patients and may provide nursing and medical attendance, which will be charged to the patients or those liable for his support, if able to pay; but if unable to pay it is to be at the expense of the county. A physician seeking to enforce a claim for such services against a county must show that the persons to whom such services were rendered are unable to pay the expense thereof. *Walker v. Boone County*, 123–5, 97 N. W. 1077.

Before amendment of this section by 29 G. A., ch. 105, the liability of the county for the services of a physician employed by a local board of health to attend a person afflicted with a contagious disease as allowed by the board of health was absolute if the patient or those liable for his support were unable to pay. And held that the acceptance of a portion of the claim as allowed by the board of supervisors did not defeat recovery for the balance. *Resner v. Carroll County*, 126–423, 102 N. W. 148.

While the statute as to local boards of health provides for the care of infected persons and for the payment of the expenses incurred on account thereof, it neither expressly nor by implication provides for compensation to one who is injured by the establishment of a quarantine. *Beeks v. Dickinson County*, 131–244, 108 N. W. 311.

SEC. **2570-a. Care of infected person—expenses—repealed.** [33 G. A., ch. 156, § 1.] [31 G. A., ch. 111, § 1; 30 G. A., ch. 98.]

[See §§ 2571-a and 2571-b. EDITOR.]

The expense of fitting up a permanent detention hospital is to be paid by the county, and not by the persons who are detained and treated there. *Kurtz v. Polk County*, 136–419, 109 N. W. 612.

The local board of health is directed to allow such amount as is reasonable, and the certificate of the board is made prima-facie evidence of the correctness of the bills, with the power of the supervisors to

review the amount allowed and fix the same. *Hoskins v. Woodbury County*, 146–165, 124 N. W. 894.

Where the services have in fact been rendered and plaintiff's bill therefor has been approved by the local board, such action constitutes a ratification and obviates the objection that there was no formal employment prior to the rendering of the services. *Ibid.*

Local boards of health are charged with the duty of caring for persons afflicted with contagious disease in such manner as shall best protect the community, either by segregation or at their place of residence; and the county is liable for the expense of disinfecting a building in which contagious disease has existed, irrespective of the question of quarantine. *Sawyer v. Wapello County*, 152–749, 133 N. W. 104.

The approval of a bill by the board of health for disinfecting a building in which a contagious disease has existed is only prima-facie evidence of the value of the service. *Ibid.*

A ratification by the board after the rendition of services is as effectual as a prior contract. *Ibid.*

SEC. **2570-a1. Saving clause—repealed.** [33 G. A., ch. 156, § 1.] [31 G. A., ch. 111, § 2.]

[See §§ 2571-a and 2571-b. EDITOR.]

SEC. **2570-b. Quarantine expenses—how paid—levy to reimburse—repealed.** [33 G. A., ch. 156, § 1.] [31 G. A., ch. 111, § 1; 30 G. A., ch. 98, § 2; 29 G. A., ch. 105, § 2.]

[See §§ 2571-a and 2571-b. EDITOR.]

[§ 2570-b, 1902 supplement, was repealed by § 2, ch. 98, 30 G. A., and ch. 98, 30 G. A., was repealed by ch. 111, 31 G. A.]

SEC. **2571. Meetings of local board—regulations—reports—expenses—tax—repealed.** [33 G. A., ch. 156, § 1.] [29 G. A., ch. 106, § 1.]

[See §§ 2571-a and 2571-b. EDITOR.]

SEC. **2571-a. Quarantine—care of infected person—fumigation—disinfection—report of undertaker—expenses.** That the law as it appears in sections twenty-five hundred seventy-a, twenty-five hundred seventy-a one, twenty-five hundred seventy-b, and twenty-five hundred seventy-one of the supplement to the code, 1907, is hereby repealed and the following enacted in lieu thereof:

"When any person shall be sick or infected with any contagious or infectious disease, dangerous to the public health, whether a resident or otherwise, the local board of health through the mayor or township clerk, shall make such provisions as are best calculated to protect the inhabitants therefrom, and may remove such person to a separate house, a house of detention or hospital; but quarantine shall not be established or maintained except in cases of scarlet fever (including scarlet rash and scarlatina) smallpox, diphtheria (including membranous croup), cholera, leprosy, cerebro-spinal meningitis, anterior poliomyelitis, and bubonic plague. In case any person or persons liable for the support of such person under quarantine or restrained under and by virtue of this act, shall be financially unable to secure the proper care, provisions or medical attendance, it shall be the duty of the mayor or township clerk to procure for such diseased person proper care, provisions, supplies and medical attendance, while so quarantined or restrained. All bills for supplies furnished and services rendered by order of the mayor or township clerk as herein provided, for persons removed to a separate house, or house of detention, or hospital, or for persons financially unable to provide for their sustenance and care, shall be allowed and paid for only on a basis of the local market price for such provisions, services and supplies in the locality in which such services and supplies may have been furnished. All services and supplies furnished

to individuals or families under the provisions of this section must be authorized by the local board of health or by the mayor or township clerk acting under standing regulations of such local board, and a written order therefor designating the person or persons employed to furnish such services or supplies, issued before said services or supplies were actually furnished, shall be attached to the bill when the same is presented for audit and payment. No bill for any expenses incurred for any person during quarantine or for disinfecting premises or effects shall be allowed or paid except in cases removed to a separate house, or house of detention, unless it shall be found that such person is financially unable to pay said bill. Provided that nothing contained in this section shall be construed to prevent any person removed to a separate house or house of detention or hospital, as herein provided, from employing, at his own expense, the physician or nurse of his choice, nor from providing such supplies and commodities as he may require. It is further provided that if the person receiving services or supplies be not a legal resident of the county in which such bills were incurred and paid, the amount so paid shall be certified to the board of supervisors of the county in which said party claims residence or owns property and the board of supervisors of such county shall reimburse the county from which such claim is certified, in the full amount originally paid by it. All fumigations and disinfections, for the protection of the public health, shall be done in accordance with the regulations of the state board of health and under the directions of the local board, which shall direct the attending physician to superintend or perform the work. In case there be no attending physician or in case the attending physician refuses to perform this duty, then it shall be the duty of the local board of health to provide some other suitable person to perform such work. The undertaker or person in charge of the funeral of any person, dying of tuberculosis, shall within forty-eight hours after the death of such person report to the mayor of the city or town, or to the township clerk, the name and residence of the deceased person, together with the cause of death. Upon receipt of the notice as herein provided, the mayor of the city or town, or clerk of the township shall cause said premises to be disinfected in accordance with the regulations of the state board of health. All bills and expenses incurred in carrying out the provisions of this section and establishing, maintaining and raising quarantine and furnishing necessary detention hospitals shall be filed with the clerk of the local board of health. This board at its next regular meeting or special meeting called for the purpose shall examine and audit the same and if found correct, approve and certify the same to the county board of supervisors for payment. If the board of supervisors determine such bills payable, under the provisions of this act, it shall order the county auditor to draw warrant therefor upon the poor fund of said county. The board of supervisors shall not be bound by the action of the local board of health in approving such bill but may increase or diminish the same as may be just and reasonable. The forcible removal of infected persons as herein provided shall be effected by an application to any civil magistrate in the manner provided in section twenty-five hundred sixty-nine of the code for the removal and abatement of nuisances, who shall issue the warrant, as directed in such cases, to remove such person or persons to the place designated by the local board of health and to take possession of a condemned or infected house, lodging room, premises or effects. The officers designated by such magistrate shall be entitled to receive for such services such reasonable compensation as

shall be determined by the local board of health, the amount so determined to be certified to and paid in the same manner as other expenses incurred under the provisions of this section. [34 G. A., ch. 119, § 1; 33 G. A., ch. 156, § 1.]

SEC. 2571-b. **Local boards—meetings—rules and regulations of state board—reports.** "Local boards of health shall meet for the transaction of business on the first Monday of April and November in each year and at such other times as it may be deemed necessary. Local boards of health shall furnish to the state board of health reports of their proceedings at such times and in such form as may be reasonably required by the state board of health. They shall give notice of all regulations adopted by publication thereof in some newspaper of general circulation in the town, city or township, or by posting a copy thereof in five public places therein. The secretary of the state board of health immediately after the adoption of any rules and regulations of said board, in accordance with section one of this act, shall forward a certified copy of such rules to the county auditor of each county. Whenever such rules may be amended or changed, similar notice shall be forwarded to each county auditor. The state board of health shall cause to be printed such number of copies of the rules and regulations by it adopted as may be necessary to supply the needs of the several counties of the state and upon application forward the required number to the county auditors of the state for distribution to the several boards of health within the county. The clerk of each local board of health shall upon request furnish a copy of said rules to any resident, physician or citizen. It shall be the duty of the official when establishing quarantine, to furnish to the person or persons quarantined a copy of the rules and regulations covering such quarantine." [33 G. A., ch. 156, § 2.]

SEC. 2572. **Regulations of state board.** Local boards of health shall obey and enforce the rules and regulations of the state board; and peace and police officers within their respective jurisdictions, when called upon to do so by the local boards, shall execute the orders of such board. If any local board of health shall refuse or neglect to enforce the rules and regulations of the state board of health, the state board of health may enforce its rules and regulations within the territorial jurisdiction of such local board, and for that purpose shall have and may exercise all of the powers given by statute to local boards of health; and the peace and police officers of the state, when called upon by the state board of health to enforce its rules and regulations, shall execute the orders of such board. All expenses incurred by the state board of health in determining whether its rules and regulations are enforced by a local board of health, and in enforcing the same when a local board has refused or neglected to do so, shall be paid in the same manner as is now provided for the payment of the expenses of enforcing such rules and regulations by local boards of health. [29 G. A., ch. 107, § 1.]

SEC. 2572-a. **Antitoxin department—establishment.** That for the purpose of furnishing antitoxin to the people of the state of Iowa, an antitoxin department is hereby established to be under the control and direction of the state board of health. [34 G. A., ch. 122, § 1.]

SEC. 2572-b. **Label.** All antitoxin furnished or distributed under the provisions of this act shall be labeled "Iowa State Board of Health Antitoxin." [34 G. A., ch. 122, § 2.]

SEC. 2572-c. **Distributing stations—rates.** It shall be the duty of the state board of health to establish such distributing stations throughout

the state as will enable physicians, druggists and other persons to secure the Iowa state board of health antitoxin at the reduced rates established by the board. [34 G. A., ch. 122, § 3.]

SEC. 2572-d. **Annual appropriation.** For the purpose of carrying into effect the provisions of this act and the payment of all expenses connected therewith, including necessary clerical assistance, there is hereby appropriated out of any funds in the state treasury, not otherwise appropriated, the sum of two thousand dollars per annum, or so much thereof as may be necessary to pay for clerical assistance and such other expenses as may be incurred by the state board of health in establishing antitoxin stations and providing for the distribution of Iowa state board of health antitoxin under the provisions of this act; provided that not to exceed nine hundred dollars of said sum shall be expended for clerical assistance. All bills for expenses of whatever nature or character are to be itemized, verified, certified, audited and paid as other expenses of the board. [34 G. A., ch. 122, § 4.]

SEC. 2573. **Failure to comply with orders or regulations.**

The violation by a physician of the rules of the state board of health is a misdemeanor punishable as provided in code § 4906. The rules of the board may be proved by certification of the secretary. *Pierce v. Doolittle*, 130–333, 106 N. W. 751.

Rules prescribed by the board prior to the enactment of the code of '97 continued in force after the enactment of such code. *Ibid.*

SEC. 2574. **Compensation of secretary — expenses of members.** [That section twenty-five hundred seventy-four of the code be repealed and the following enacted in lieu thereof:[1]]

The secretary of the state board of health shall receive such salary as the board shall fix, not to exceed three thousand dollars per annum, payable upon the certificate of the president to the state auditor, who shall issue his warrant for the amount due, upon the state treasurer; provided, however, that the aforesaid three thousand dollars shall be in lieu of any and all other compensation he may receive in any official capacity. Each member of the board shall receive only actual traveling and other necessary expenses incurred in the performance of his duties, said expenses to be itemized, verified, certified, audited, and a warrant drawn therefor in the same manner as the secretary's salary. [34 G. A., ch. 120, § 1.] [20 G. A., ch. 173; 18 G. A., ch. 151, § 10.]

[1]The direction to repeal and substitute appears only in the title of the enrolled bill. EDITOR.]

SEC. 2575-a1. **Location of pesthouses—controversy—how settled.** That when a controversy arises between municipalities or between boards of health thereof, respecting the location of pesthouses or hospitals for the treatment of infectious or contagious diseases, such matter shall be referred to the president of the state board of health who shall forthwith appoint a committee of three members thereof, which committee shall upon two days' notice to the parties interested, investigate the matter and make such order in the premises as the facts warrant, and such order shall be final. [29 G. A., ch. 108, § 1.]

A municipality may acquire in an adjoining school township a location for a pesthouse. *Hanson v. Cresco*, 132–533, 109 N. W. 1109.

SEC. 2575-a2. **Jurisdiction.** The health officers of the municipality which is allowed to maintain a pesthouse or hospital for patients affected by infectious or contagious diseases outside the limits of said municipality,

shall have exclusive jurisdiction and control of such pesthouse or hospital for the enforcement of all sanitary and health regulations. [29 G. A., ch. 108, § 2.]

SEC. 2575-a3. **Removal—written permission.** That no person known to be infected, or sick with any contagious disease dangerous to the public health shall move or be removed from one city, town or township to another city, town or township except as hereinafter provided and by written permission of the local board of health of the city, town or township to which such person is to be removed. [30 G. A., ch. 99, § 1.]

SEC. 2575-a4. **Expenses of removal and care.** If any person known to be infected or sick with smallpox or other contagious disease dangerous to the public health shall with the knowledge or consent of any member of the local board of health of the city, town or township in which he resides be removed from said city, town or township to another city, town or township either with or without the permission of the local board of such city, town or township to which he is removed, all expense of quarantine or care of such person incurred by the city, town or township to which he is removed shall be paid by the city, town or township from which such person was so removed, in the manner provided in section twenty-five hundred seventy-a of the supplement to the code [1902]. If said person be so removed to another county, said expenses shall in the first instance be paid by such county and recovered from the county from which such person had been removed. [30 G. A., ch. 99, § 2.]

SEC. 2575-a5. **Method of removal—warning signs—expenses.** When it is determined by any physician or health officer that any person is sick with smallpox or any other contagious disease dangerous to the public health while in any city, town or township other than the one in which he resides, provided the distance be not to exceed fifteen miles from his place of residence, then and in that event if the person so diseased elect to be moved to the city, town or township in which he resides, he may be so removed by private conveyance along the least frequented highways under escort of a health officer to his abode immediately on determining that he is so diseased; and every such vehicle shall carry as a signal of warning, conspicuously displayed, a yellow flag not less than two feet square. All expenses of removal, care and quarantine of such person shall be paid by the city, town or township to which he is removed and shall be paid in the manner provided in section two of this chapter. [30 G. A., ch. 99, § 3.]

SEC. 2575-a6. **Violation—penalty.** Any person who shall move, or any physician or any member of a local board of health who shall cause or assist any person known to be infected or sick with smallpox, or any contagious disease dangerous to the public health to be removed from one city, town or township, to another city, town or township, contrary to the provisions of this act or of any regulation of the state board of health, shall be guilty of a misdemeanor, and be punished by a fine not exceeding one hundred dollars or imprisonment not exceeding thirty days, or both at the discretion of the court. [30 G. A., ch. 99, § 4.]

SEC. 2575-a6a. **Syphilis and gonorrhea.** That syphilis and gonorrhea are hereby declared contagious and infectious and shall be reported as contagious diseases to the local board of health. [35 G. A., ch. 212, § 1.]

SEC. 2575-a6b. **Report of cases by number—duty of physician.** From and after the first day of January, A. D. nineteen hundred fourteen, it shall be the duty of every physician and surgeon practicing within the

state of Iowa, to report to the local board of health, within twenty-four hours, every case of syphilis or gonorrhea coming to his knowledge, and shall make and preserve a record of every such case so reported, numbering each case consecutively. He shall require the person to state whether or not he has been previously reported to a local board of health in this state and if so, when, where, by whom, and under what number. The report shall state the sex of the person and the age as nearly as practicable, together with the character of the disease and the probable source of infection, and whether previously reported or not, and if so, when, where, by whom, and under what number, but shall not disclose the name of the infected person. [35 G. A., ch. 212, § 2.]

SEC. **2575-a6c. Failure to report—penalty.** Any physician or surgeon who shall be called upon to treat professionally anyone afflicted with syphilis or gonorrhea who shall fail to report the same to the local board of health within twenty-four hours shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine not exceeding one hundred dollars or imprisonment in the county jail not more than thirty days. And in addition thereto, the state board of health may revoke his license or certificate to practice medicine, surgery and obstetrics in the state of Iowa. [35 G. A., ch. 212, § 3.]

SEC. **2575-a6d. Penalty for transmission of disease—liability for damage.** Any person afflicted with either of these diseases, who shall knowingly transmit or assume the risk of transmitting the same by intercourse to another person shall be guilty of a misdemeanor, and upon conviction thereof be fined in the sum of not to exceed five hundred dollars or imprisoned in the county jail not to exceed one year, or both such fine and imprisonment; and in addition thereto, shall be liable to the party injured in damages to be recovered in any court of competent jurisdiction. [35 G. A., ch. 212, § 4.]

SEC. **2575-a6e. Acts in conflict repealed.** All acts or parts of acts in conflict with any of the foregoing sections are hereby repealed. [35 G. A., ch. 212, § 5.]

CHAPTER 16-A.

OF THE BACTERIOLOGICAL LABORATORY.

SECTION **2575-a7. Establishment.** The bacteriological laboratory of the medical department of the state university at Iowa City is hereby established as a permanent part of the medical department of the university work, and it shall in addition to its regular work perform all scientific analyses and tests, chemical, microscopical or other scientific investigations, which may be required by the state board of health, and it shall make prompt report of the results thereof, under such rules and regulations as the said state board of health may from time to time adopt. [30 G. A., ch. 101, § 1.]

SEC. **2575-a8. Director—reports.** The professor of bacteriology of the medical department of the state university shall be the director of said laboratory and shall make or cause to be made all such analyses, tests and investigations as shall be required by the state board of health as provided in the preceding section, causing the same to be made without delay and giving such analyses, tests or investigations the preference of the point of time over all other work and shall make prompt report of the result thereof

to the board of health or to such person or persons as the board of health may by rule or designation designate. [30 G. A., ch. 101, § 2.]

SEC. **2575-a9. Appropriation—purposes.** That section three of chapter one hundred and one of the laws of the thirtieth general assembly and chapter one hundred thirteen of the laws of the thirty-first general assembly be and the same are hereby repealed and the following enacted in lieu thereof:

"There is hereby appropriated out of any money in the state treasury not otherwise appropriated, for the purpose of more perfectly equipping the present bacteriological laboratory at the state university and for the purpose of enabling it to perform the duties hereby imposed, and to provide it with the necessary apparatus and assistants to render the same effective, the sum of six thousand dollars annually or so much thereof as may be necessary, to be additional salary of the director, the assistants, the expenses of said laboratory as may be necessary by this act, including postage, stationery, and other contingent and miscellaneous expenses which may be incurred in the maintaining of said laboratory and performing the duties required therein by the provision of this act. The director shall receive such additional salary not to exceed twelve hundred dollars per year as the state board of health may fix. The appropriations hereby provided shall be expended in the manner provided in section twenty-five hundred seventy-five of the code." [32 G. A., ch. 137, § 1; 31 G. A., ch. 113; 30 G. A., ch. 101, § 3.]

SEC. **2575-a10. Acts in conflict repealed.** All acts and parts of acts inconsistent with this act are hereby repealed. [32 G. A., ch. 137, § 2.]

CHAPTER 16-B.

OF REGISTRATION OF BIRTHS AND DEATHS.

SECTION **2575-a11. State registrar of vital statistics.** That for the complete and proper registration of births and deaths for legal, sanitary and statistical purposes, the secretary of the state board of health is hereby constituted state registrar of vital statistics, and it shall be his duty to promulgate and enforce all necessary rules and regulations that may be required to carry out the purposes of this act. [31 G. A., ch. 109, § 1.]

SEC. **2575-a12. Certificates of death.** The undertaker or the person in charge of the funeral of any person dying in Iowa shall cause a certificate of death to be filled out, with all the personal particulars contained in the standard blanks adopted by the U. S. census bureau, and with a statement of cause of death by attending physician, or in his absence, by the health officer or coroner, and shall file it with the state registrar on or before the fifth day of each month for the month preceding and no sexton or superintendent of a cemetery shall permit interment, and no railroad or other transportation company shall permit shipment of the body unaccompanied by such certificate of death. [31 G. A., ch. 109, § 2.]

SEC. **2575-a13. Blanks—furnished by registrar.** The state registrar shall furnish blank certificates of death to physicians and undertakers, and all proper forms and instructions for the effectual execution of the law. [31 G. A., ch. 109, § 3.]

SEC. **2575-a14. Certified transcripts of certificates of death.** It shall be the duty of the state registrar to furnish to the clerk of the district

court of each county on or before the first day of February of each year, certified transcripts of the certificates of death filed with him from the respective counties as well as similar transcripts of deaths to the U. S. census bureau at Washington, and to arrange by counties, bind and deposit in the state historical building at Des Moines the original certificates; and transcripts sent each county shall be bound at the expense of said county, and preserved for reference by the clerk of the district court. [31 G. A., ch. 109, § 4.]

SEC. 2575-a15. **Assessor to report births and deaths.** It shall be the duty of all assessors at the time of making assessment to obtain and report to the clerk of the district court upon blanks adopted by the state registrar and furnished by the county auditor, such registration of births and deaths as occur within their respective districts for the year ending December thirty-first, immediately preceding. [32 G. A., ch. 135; 31 G. A., ch. 109, § 5.]

SEC. 2575-a16. **Record of marriages and divorces and births.** The clerk of the court in each county shall keep a book in which shall be recorded all marriages and divorces occurring within the county, together with such data respecting the same as shall be required by the state registrar and shall report to said state registrar on or before the first day of August in each year, such data respecting such marriages and divorces for the year ending June thirtieth immediately preceding, and the clerk of the district court of each county shall keep a book in which shall be recorded all births occurring within the county as shown by the returns filed in his[1] office by the assessor as provided in the section preceding, and on or before the first day of August in each year shall furnish to the state registrar a report of such births. [31 G. A., ch. 109, § 6.]

[1]"this" in 31 G. A. session laws. EDITOR.]

SEC. 2575-a17. **Appropriation.** There is hereby appropriated the sum of two thousand dollars, annually, or so much thereof as may be necessary, to pay the expense of printing, postage, clerk hire, and such other expenses as may be required. All bills to be itemized, certified to and approved by the state registrar. [32 G. A., ch. 136; 31 G. A., ch. 109, § 7.]

SEC. 2575-a18. **Penalty.** Any person acting as undertaker, sexton, agent of a transportation company, or other person, violating any of the provisions of this act shall be fined not less than ten dollars and not more than one hundred dollars or be imprisoned not more than sixty days or be subject to both fine and imprisonment at the discretion of the court. It shall be the duty of the prosecuting attorney in each county upon complaint of the state registrar to prosecute in such cases and the state registrar shall endeavor to see that this act is uniformly and officially executed throughout this state. [31 G. A., ch. 109, § 8.]

SEC. 2575-a19. **Acts in conflict repealed.** Sections twenty-five hundred sixty-six and twenty-five hundred sixty-seven of the code and chapter one hundred of the laws of the thirtieth general assembly and all other acts and parts of acts in conflict with this act are hereby repealed. [31 G. A., ch. 109, § 9; 30 G. A., ch. 100.]

CHAPTER 16-C.

OF MATERNITY HOSPITALS.

SECTION 2575-a20. **Erection, establishment or maintenance—permit.** That from and after the taking effect of this act, it shall be unlawful to erect. or establish or maintain, conduct, keep or carry on, or to continue to maintain, keep or carry on, within this state, any lying-in or maternity hospital, or any institution or place for the reception, care and treatment of women in labor, or where females may be received, cared for and treated during pregnancy or after delivery, or any hospital wherein women are received, cared for and treated during pregnancy, or after delivery, the proprietor, owner or persons in charge of which, or any person representing them, undertakes to adopt or procure or assist in procuring the adoption or disposal of any child born therein, within two hundred feet of any church building, university, school or other institution of learning, or public park, or in a building situated within seventy-five feet of premises owned by another. And it shall from and after the taking of this act be unlawful to so erect, establish, maintain, conduct, keep or carry on, or continue to keep or carry on elsewhere in this state, any place or places above enumerated, for any such purpose or purposes, without having first obtained a permit in writing, as hereinafter provided. This act shall not apply to general hospitals for the treatment of diseases, obstetrics and surgical cases. [32 G. A., ch. 138, § 1.]

SEC. 2575-a21. **Board of health to grant permit.** The state board of health is hereby authorized to grant a permit in writing, to establish, maintain, conduct, keep or carry on such lying-in or maternity hospital, or hospital ward, or institution, or place for the reception, care and treatment of women in labor, for pay, or where females may be received, cared for or treated during pregnancy or during or after delivery, for pay, at any place within the state, except as prohibited in section one of this act; but only one such permit shall be issued for any one premises. [32 G. A., ch. 138, § 2.]

SEC. 2575-a22. **Application—inspection of premises—issuance of permit—fees.** Any person or persons who desire to obtain the permit provided in section two of this act shall file with the state board of health an application for said permit, naming each person to whom said permit is to be granted, and particularly describing the place or premises to be used for said purposes, and the location thereof; and shall also cause to be filed with said state board of health a statement signed by two regular physicians, holding a certificate, in force, from the state board of medical examiners of this state, to the effect that, to the personal knowledge of each of said physicians, said person, or each of said persons, is of good character and reputation; that he has personally examined the premises described in the application for said permit, and that the same are suitable and properly furnished for the uses described in section one of this act, and that such hospital or ward or other institution or place will be for the public convenience. Upon the filing of such application for a permit, together with said physicians' certificate, the state board of health shall satisfy itself as to the correctness of the matters set forth in said application and physicians' certificate, and shall cause said premises to be inspected, for which inspection a fee of five dollars shall be paid by the person or persons signing such application, and when so satisfied, and upon the payment of a fee of twenty-five dollars by the person or persons applying for said permit to

the said state board of health, said state board of health shall issue its permit, particularly naming the person or persons to whom granted, the description and location of the premises to be used, and the purpose or purposes for which said permit is granted, which permit shall continue in force for one year from the date thereof, unless sooner revoked. Said permit may be renewed, from time to time, whenever said state board of health deem it proper so to do, and upon payment to said board of a fee of five dollars for each renewal thereof. Said permit shall not authorize the use of any other place or premises than the one named in said permit or in the renewal thereof. Provided that no fee mentioned in this section should [shall] be required of any religious or charitable institution conducting such lying-in or maternity hospital. [32 G. A., ch. 138, § 3.]

SEC. **2575-a23. Register of patients, births and deaths—reports.** The person or persons in charge of the place described in said permit shall keep a true, accurate and complete register of all patients and of all births and deaths occurring upon said premises, giving date of entry of each patient, date of birth and name of each child born on said premises, and the age of all children dying thereon, and the same particulars, as well as the name, so far as known, of any woman patient dying on said premises; and said person or persons in charge of the place described in said permit shall furnish to the officer authorized by law to receive them, all of the particulars required by law to be furnished for the due registration of each birth or death occurring on said premises, except when such particulars have been furnished by the physician in attendance at birth, or attending on the person so dying thereon. The state board of health shall furnish blanks to all permit holders specified in this act and to be filled out and returned to the state board of health within twenty-four hours after the birth or death of any child or death of any woman patient dying on the premises described in such permit, giving date of birth and sex of each child born on said premises and name and age of the mother, and if the true name of the mother cannot be ascertained then the assumed name given by her, and the age and sex of all children dying on said premises. And the state board of health shall keep a record of same, which record shall be accessible to the members of the state board of health, members of the board of control of state institutions, the attorney-general and any county attorney in the state, and to no other person except on order of a court of record. [32 G. A., ch. 138, § 4.]

SEC. **2575-a24. Articles of adoption—record.** The person or persons in charge of the premises described in such permit shall not adopt or dispose of by adoption or procure or assist in the disposal by adoption of any child born thereon, without the articles of adoption being filed as required by law. Within twenty-four hours after the departure, removal or withdrawal from said premises of any child born thereon, or of the body of any such child, the person or persons in charge thereof shall enter upon said register a record of such departure, removal or withdrawal and the name or other description of said child, the name or names and respective residences of the person or persons who took said child or its body, the disposition made of said child or its body, the place to which the same was taken and where the same was left. [32 G. A., ch. 138, § 5.]

SEC. **2575-a25. Inspections—by whom made—report.** Every person in charge of the premises described in any such permit, his servants, employes or agents, shall permit visitation or inspection of said premises, and of the register in this act provided to be kept, to be made at any time,

by the state board or local board of health or by any person designated in writing by the state or local board of health for that purpose. It shall be the duty of the local board of health of the city, town or township in which such premises are maintained to inspect such premises at least once in six months; and to file an accurate report of such inspection with the city, town or township clerk of the city, town or township in which such premises are maintained, and that such report shall be preserved as a permanent record. [32 G. A., ch. 138, § 6.]

SEC. **2575-a26. Revocation of permit.** Said permit may be revoked after reasonable notice by the state board of health, and a conviction under the succeeding section of this act shall operate to terminate and revoke said permit. [32 G. A., ch. 138, § 7.]

SEC. **2575-a27. Penalty.** Any person violating any of the provisions of this act or making any false entry on the register required by this act to be kept, shall be guilty of a misdemeanor, and shall be punished by a fine of not more than two hundred fifty dollars, or by confinement in the county jail not more than six months, or by both such fine and imprisonment. And the premises so unlawfully used are hereby declared to be a nuisance, and the same shall be subject to the procedure provided in sections twenty-four hundred and five, twenty-four hundred and six and twenty-four hundred and seven of the code, as far as applicable thereto. [32 G. A., ch. 138, § 8.]

CHAPTER 16-D.

OF THE PRACTICE OF NURSING.

SECTION **2575-a28. Certificate required.** That section twenty-five hundred seventy-five-a twenty-eight of chapter sixteen-D of the supplement to the code, 1907, be and the same is hereby repealed and the following enacted in lieu thereof:

"It shall be unlawful for any person to profess to be a registered or graduated nurse without first obtaining from the state board of health a certificate authorizing him or her to practice nursing in this state, except as hereinafter provided." [34 G. A., ch. 121, § 1.] [32 G. A., ch. 139, § 1.]

SEC. **2575-a29. Examining committee—qualifications of applicants—nurses previously engaged in practice.** That section twenty-five hundred seventy-five-a twenty-nine of the supplement to the code, 1907, be repealed and the following enacted in lieu thereof:

"At the annual meeting of the state board of health it shall select two physicians from its own membership, and two registered nurses, residents of this state actively engaged in the practice of nursing, who, together with the secretary of the state board of health, shall constitute the examining committee for the year. The examinations provided for in this act shall be held in the city of Des Moines, in July of each year and at such other times and places as the board of health shall direct. All applicants for certificates to practice nursing shall have attained the age of twenty-one years and shall be of good moral character. They shall be graduates of training schools recognized as being in good standing by the state board of health of Iowa, and shall have received at least two years' instruction in general hospital practice. After July first, nineteen hundred ten, no training school shall be accredited by the state board of health as a school of recognized standing which is not attached to a general hospital, and

which does not have a course of study of at least three years; provided, that all nurses who have had five or more years' training in a general hospital which prior to July first, nineteen hundred and seven, did not issue diplomas to its graduates, shall upon furnishing the board with satisfactory evidence that they were in actual attendance as students at said hospital for a period of not less than three years, shall upon the payment of a fee of ten dollars be entitled to registration and certificate without examination, provided such nurses were bona fide residents of the state of Iowa and actually engaged therein in the practice of nursing upon the twelfth day of March, nineteen hundred and seven, and that application for registration shall be filed not later than the first day of January, nineteen hundred ten." [33 G. A., ch. 157, § 2.] [32 G. A., ch. 139, § 2.]

SEC. **2575-a30. Examination — fees — certificates — where registered.** After the passage of this act, any person who is not exempt from examination by section two of this act and who shall apply for a certificate to practice nursing shall be examined in the following subjects: elementary hygiene, anatomy, physiology, materia medica, dietetics, and also practical nursing, medical and surgical nursing, obstetrics, nursing of children and the rules and regulations of the state board of health relating to infectious diseases and quarantine and such other subjects as the examining board may require from time to time. Each applicant shall pay the secretary of the state board of health a fee of five dollars. If the examination be satisfactory to three members of said committee it shall so report to the state board of health; if the board find the report and ratings correct, it shall authorize its president and secretary to issue a certificate to the successful candidate for which such candidate shall pay an additional fee of one dollar. This certificate shall confer upon the holder the right to practice as a registered nurse and be conclusive evidence thereof. The state board of health is empowered to recognize certificates issued to nurses under the laws of other states having substantially similar requirements to those existing in this state, provided, that such states recognize certificates issued by the state of Iowa; then certificates issued by authority of such other states may be deemed sufficient evidence of qualifications of the licentiate without further examination for certificate in this state; the fee for such certificate shall be ten dollars. The holder of such certificate provided for in this act, shall cause the same to be registered in the office of the county recorder of the county wherein he intends to reside. [32 G. A., ch. 139, § 3.]

SEC. **2575-a31. Unlawful practice.** That section twenty-five hundred seventy-five-a thirty-one, supplement to the code, 1907, as amended by chapter one hundred fifty-seven, acts of the thirty-third general assembly, be and the same is hereby repealed and the following enacted in lieu thereof:

"On and after the taking effect of this act, no person, except one holding a certificate under chapter sixteen-D of title twelve, supplement to the code, 1907, as amended, shall advertise to be, or assume, or use the title of registered or graduated nurse, or use the abbreviations 'R. N.' or 'G. N.' or any other figures or letters to indicate that the person using the same is a registered or graduated nurse; and it shall be unlawful for any nurse to practice nursing as registered or graduate nurse within this state without having first registered as provided in chapter sixteen-D, title twelve, supplement to the code, 1907, as amended by this act." [34 G. A., ch. 121, § 2; 33 G. A., ch. 157, § 1.] [32 G. A., ch. 139, § 4.]

SEC. **2575-a32. Not applicable to certain nurses.** This act shall not apply to any person nursing the sick with or without pay who does not in any way assume to be a registered or graduate nurse. [32 G. A., ch. 139, § 5.]

SEC. **2575-a33. Refusal to grant certificates—revocation of certificates.** The board of health may refuse to grant, or renew any certificate provided for in this act, to a person otherwise qualified, who obtained said certificate by false or fraudulent representation, or for immoral or unprofessional or dishonorable conduct, or for wilful or repeated violation of the rules or regulations of the state board of health; and the board may revoke any certificate issued by it, for any such or similar cause; provided, that before the revocation of any certificate issued under the provisions of this act, the licentiate shall have been afforded an opportunity for a hearing before the board. At least twenty days prior to the date set for such hearing, the secretary of the state board of health shall cause written notice, under registered mail, to be sent to the licentiate at his last known place of residence; said notice shall contain a statement of the charges, and the date and place set for the hearing before the board. If the party thus notified fails to appear, either in person or by counsel, at the time and place designated in said notice, the board may, after receiving satisfactory evidence of the truth of the charges and proper issuance of the notice, revoke said certificate. If the licentiate appear either in person or by counsel, the board shall proceed with the hearing as herein provided. The board may receive and consider affidavits and oral statements, and shall cause stenographic report of the oral testimony to be taken, which, together with all other papers pertaining thereto, shall be preserved for one year. If five members of the board present at the hearing are satisfied that the licentiate is guilty of any of the offenses charged, the certificate shall be revoked, for such time as the state board of health may determine. [32 G. A., ch. 139, § 6.]

SEC. **2575-a34. Compensation of examining committee—expenses.** Each member of the examining committee, except the secretary, shall receive for his services out of the funds created by the payment of fees by applicants for examination such compensation as is allowed to the members of the state board of medical examiners for like services and the secretary shall receive his necessary expenses, incurred for services which cannot be performed at the capitol. All printing, postage and other contingent expenses, necessarily incurred under the provisions of this act shall be paid from said fund. All expenses incurred under the provisions of this act shall be itemized, verified, and audited and a warrant drawn therefor on the nurses' fund in the same manner as other expenses of the state board of health. [32 G. A., ch. 139, § 7.]

SEC. **2575-a35. Penalty.** Any person who shall knowingly violate any of the provisions of this act shall be guilty of a misdemeanor, and upon conviction thereof shall be fined a sum not exceeding one hundred dollars or imprisoned in the county jail not to exceed thirty days. [32 G. A., ch. 139, § 8.]

CHAPTER 16-E.

OF THE PRACTICE OF EMBALMING.

SECTION **2575-a36. Unlawful practice.** It shall be unlawful for any person to embalm or otherwise prepare for transportation by railway or other public conveyance except as hereinafter provided, the dead body of any human being, or to embalm or otherwise prepare any such body, or to practice, or publicly profess to practice the art of embalming without first obtaining, from the state board of health, a license authorizing him to practice embalming in this state. [32 G. A., ch. 140, § 1.]

SEC. **2575-a37. Examining committee — applicants — qualifications.** At the annual meeting of the state board of health, it shall select two physicians from among its own membership, and two licensed embalmers, residents of this state, who, together with the secretary of the state board of health, shall constitute the examining committee for the year. The examinations provided for in this act shall be held in the city of Des Moines, in July and January of each year and at such other times as the board of health may direct. All applicants for license to practice embalming shall have attained the age of twenty-one years, and shall have had not less than two years' practical experience under a licensed embalmer in this state, or in lieu thereof, shall have had a practical experience of not less than one year under a licensed embalmer, and have completed the regular course of instruction in a school of embalming recognized as being in good standing by the state board of health of Iowa; in addition to all of said requirements, each applicant for an embalmer's license shall have actually embalmed not less than ten bodies, under the supervision of a licensed embalmer, prior to the date of examination. Each applicant for examination shall file with the secretary of the state board of health not later than ten days prior to the date of the next examination, a sworn statement of his age and other qualifications as required by this act, and a certificate of good moral character signed by three responsible citizens, one of whom must be a licensed embalmer personally acquainted with the applicant for at least one year. All applications under this act shall be upon blanks furnished by the state board of health. [32 G. A., ch. 140, § 2.]

SEC. **2575-a38. Examination—license—fee.** After the passage of this act, each applicant for license to practice embalming shall be examined in the following subjects: anatomy, sanitary science, the care, disinfection, preservation, transportation of and burial, or other final disposition of dead bodies, and the rules and regulations of the state board of health relating to infectious diseases and quarantine; he may also be required to demonstrate his proficiency as an embalmer by operations on a cadaver. The examination papers and oral answers shall, when concluded, be graded upon the scale of one hundred, each applicant first to pay, to the secretary of the state board of health, a fee of five dollars therefor. The average rating required to pass shall be fixed by the board of health prior to the examination. If the examination be satisfactory to three members of the examining committee, it shall so report to the state board of health; if the board find the report and ratings correct, it shall authorize its president and secretary to issue a license to the successful candidates, for which such candidates shall each pay an additional fee of one dollar. The license, while in force, shall confer upon the holder the right to practice embalming, or to otherwise prepare dead bodies for transportation, burial, or other

authorized mode of final disposition, and be conclusive evidence thereof. [32 G. A., ch. 140, § 3.]

SEC. **2575-a39. Licenses renewed annually—licentiates of other states—fees—licenses registered.** Any person now holding an unexpired license from the state board of health as an embalmer shall be held to be licensed as an embalmer under the terms of this act, but all licenses now in force, or hereafter issued, shall expire on the thirtieth day of June following the date of issuance of such license. Licenses shall be renewed without examination annually by the state board of health within thirty days after expiration, provided the holder of said license shall make written application to said board, and pay to the secretary thereof the sum of one dollar renewal fee. The state board of health is empowered to recognize licenses issued to embalmers by authorities under the laws of other states having substantially similar requirements to those existing in this state, provided, that such states recognize licenses issued by the Iowa state board of health, then licenses issued by authority of such other states may be deemed sufficient evidence of qualifications of the licentiate without further examination for license in this state; the fee for such license shall be ten dollars. The owner of any license, or renewal, provided for in this act shall cause the same to be registered in the office of the local board of health of each city or town wherein he intends to practice the art of embalming, and no transportation permit shall be issued by the local board to any person not so recorded. [32 G. A., ch. 140, § 4.]

SEC. **2575-a40. Secretary of state board of health to keep record.** The secretary of the state board of health shall keep a record of the names and residence of all persons to whom licenses have been issued, with the official number and date of issuance; a copy of this record, together with such other information as may tend to improve the public service, shall be published annually. [32 G. A., ch. 140, § 5.]

SEC. **2575-a41. Refusal to grant licenses—revocation.** The state board of health may refuse to grant, or renew, any license provided for in this act, to a person otherwise qualified, who obtained said license by false or fraudulent representation, or for habitual intoxication, or for immoral or unprofessional or dishonorable conduct, or for wilful or repeated violation of the rules or regulations of the state board of health; and the board may revoke any license, issued by it, for any such similar cause; provided, that before the revocation of any license issued under the provisions of this act, the licentiate shall have been afforded an opportunity for a hearing before the board. At least ten days prior to the date set for said hearing, the secretary of the state board of health shall cause written notice, under registered mail, to be sent to the licentiate at his last known place of residence; said notice shall contain a statement of the charges, and the date and place set for the hearing before the board. If the party thus notified fails to appear, either in person or by counsel, at the time and place designated in said notice, the board may, after receiving satisfactory evidence of the truth of the charges and the proper issuance of the notice, revoke said license. If the licentiate appear, either in person or by counsel, the board shall proceed with the hearing as herein provided. The board may receive and consider affidavits and oral statements, and shall cause a stenographic report of the oral testimony to be taken, which together with all other papers pertaining thereto shall be preserved for one year. If five members of the board, present at the hearing, are satisfied that the licentiate is guilty of any of the offenses named in this section, the

license shall be revoked. After the revocation of a license the licentiate, or holder thereof, shall not practice embalming or any of its branches in this state. [32 G. A., ch. 140, § 6.]

SEC. **2575-a42. Jurisdiction over transportation of dead bodies—rules and regulations.** The state board of health shall have sole jurisdiction over the transportation of all dead bodies and of all methods preparatory thereto, and the said board is hereby authorized to make such rules and regulations, relating thereto, as in its opinion are necessary to subserve and protect the public health; said rules and regulations when made shall be enforced by the secretary of the state board of health. [32 G. A., ch. 140, § 7.]

SEC. **2575-a43. Removal or shipping permit.** It shall be unlawful for any railway agent, express agent, baggage-master, conductor, or other person acting as such, to receive the dead body of any person for shipment, or transportation by railway or other public conveyance, to or from any point in this state or to a point outside of this state, unless said body be accompanied by a removal, or shipping permit signed by the health officer of the local board of health, and a certificate, attached to the outside box containing such body, showing the name and official number of the embalmer by whom it was prepared, and the method of preparation employed; provided, that nothing in this act shall be so construed as to prevent the shipment of dead bodies intended for use for anatomical purposes within this state when the same are so designated by the shipper. [32 G. A., ch. 140, § 8.]

SEC. **2575-a44. Compensation of examining committee—expenses.** Each member of the examining committee, except the secretary, shall receive for his services, out of the funds created by the payment of fees by applicants for examination or license and renewals, such compensation as is allowed the members of the state board of medical examiners for like services, and the secretary shall receive the sum of twenty-five dollars per month, and his necessary expenses incurred for services which cannot be performed at the capitol. All printing, postage, and other contingent office expenses necessarily incurred under the provisions of this act, shall be paid from said fund. Any balance of said funds remaining shall be turned over to the state treasurer for the use of the state. All expenses incurred under the provisions of this act shall be itemized, verified, and audited, and a warrant drawn therefor on the embalmers' fund in the same manner as other expenses of the state board of health. [32 G. A., ch. 140, § 9.]

SEC. **2575-a45. Penalty—enforcement.** Any person who shall knowingly violate any of the provisions of this act, or who shall offer a forged removal, shipping or transportation certificate, or who shall certify falsely as to the preparation of a dead body, or who shall represent himself to be the bona fide owner of a license or renewal when such license or renewal was not regularly issued to him by the state board of health, shall be guilty of a misdemeanor, and upon conviction thereof, shall be fined not exceeding one hundred dollars, or be imprisoned in the county jail for a period not exceeding thirty days, or both at the discretion of the court. It shall be the duty of the secretary of the state board of health to see that the provisions of this act are properly administered and enforced throughout the state, and all peace officers and county attorneys shall aid him in their several capacities in the discharge of these duties. [32 G. A., ch. 140, § 10.]

SEC. **2575-a46. Acts in conflict repealed.** All acts or parts of acts in conflict with this act are hereby repealed. [32 G. A., ch. 140, § 11.]

CHAPTER 16-F.

OF NURSERY STOCK INFESTED WITH THE SAN JOSE SCALE.

SECTION **2575-a47. State entomologist—ex officio—duties—assistants—fees.** The entomologist of the state experiment station is hereby constituted the state entomologist and charged with the execution of this act. He may appoint such qualified assistants as may be necessary, fix a reasonable compensation for their labor, and pay the same; and their acts shall have the same validity as his own. He shall, by himself or his assistants, between the first day of June and the fifteenth day of September, in each year, when requested by the owner or agent or where he has reasonable grounds to believe any dangerously injurious insect or plant disease exists, carefully examine any nursery, fruit farm, or other place where trees or plants are grown for sale, and if found apparently free from any dangerously injurious insect or plant disease, he shall issue his certificate stating the facts, and shall collect therefor a fee of not less than five dollars, nor more than fifteen dollars, according to the amount of stock inspected. It shall be unlawful to sell, or offer for transportation, any nursery stock unless accompanied by a copy of this certificate. [31 G. A., ch. 112, §§ 1, 2; 27 G. A., ch. 53, § 1.]

SEC. **2575-a48. Quarantine—treatment—collection of cost.** The state entomologist shall have authority, when requested by the owner or agent, or when he has reasonable grounds to believe any dangerously injurious insect or plant disease exists, to enter upon any grounds, public or private, for the purpose of inspection, and, if he finds any nursery, orchard, garden, or other place infested by the scale, he may, by himself or his assistants, enter upon such premises and establish quarantine regulations. If in his judgment any dangerously injurious insect or plant disease may be eradicated by treatment, he may, in writing, order such treatment, and prescribe its kind and character. In case any trees, shrubs, or plants are found so infested that it would be impracticable to treat them, he may order them burned. A failure for ten days after the delivery of such order to the owner or persons in charge to treat or destroy such infested trees or plants, as ordered, shall authorize the entomologist to perform this work by himself or his assistants, and to ascertain the cost thereof. He shall certify the amount of such cost to the owner or person in charge of the premises, and if the same is not paid to him within sixty days thereafter he shall certify the amount to the county auditor, who shall spread the same upon the tax books, to be collected as other taxes are, and turned over to the entomologist to become a part of the fund for carrying this act into effect. [31 G. A., ch. 112, § 1; 27 G. A., ch. 53, § 2.]

SEC. **2575-a49. Inspection of nursery stock shipped into state.** Where nursery stock is shipped into this state, accompanied by a certificate as herein provided, it shall be held prima-facie evidence of the facts therein stated, but the state entomologist, by himself or his assistants, when they have reason to believe any such stock is infested with any dangerously injurious insect or plant disease, shall be authorized to inspect the same and subject it to like treatment as provided in section two of this act. [31 G. A., ch. 112, § 1; 27 G. A., ch. 53, § 3.]

SEC. **2575-a50. Certificate of inspection—penalties.** It shall be unlawful for any person, firm or corporation to bring into this state any trees, plants, vines, cuttings, or buds, commonly known as nursery stock, unless accompanied by a certificate of inspection, signed by the state ento-

mologist of the state of Iowa or by another inspector duly approved by him, showing that the stock has been carefully inspected and found apparently free from any dangerously injurious insect or plant disease. Any person violating or neglecting to carry out the provisions of this act, or offering any hindrance to the carrying out of this act, shall be adjudged guilty of a misdemeanor and upon conviction before a justice of the peace shall be fined not less than ten dollars, nor more than one hundred dollars, for each and every offense, together with all the costs of the prosecution, and shall stand committed until the same are paid. All amounts so recovered shall be paid over to the state entomologist, and added to the fund herein provided for the carrying out [of] the provisions of this act. [31 G. A., ch. 112, § 3; 27 G. A., ch. 53, § 4.]

SEC. **2575-a51. Compensation.** The state entomologist shall be allowed and paid for his services while engaged in this work, all his necessary traveling expenses and the sum of five dollars per day. All funds coming into his hands shall be paid over to the state treasurer, with an itemized statement of the source whence received. He shall certify the amount of his expenses and per diem to the auditor of state, who shall thereupon draw his warrant upon the treasurer of state for the amount, which shall be paid out of the funds provided for carrying this act into effect. [27 G. A., ch. 53, § 5.]

SEC. **2575-a52. Annual appropriation.** That section twenty-five hundred seventy-five-a fifty-two of the supplement to the code, 1907, be and the same is hereby repealed and the following enacted in lieu thereof:

"There is hereby appropriated out of any moneys not otherwise appropriated, the sum of two thousand dollars annually, or so much thereof as may be necessary, for carrying out the provisions of this act." [35 G. A., ch. 210, § 1.] [27 G. A., ch. 53, § 6.]

CHAPTER 16-G.

OF THE PREVENTION OF DISEASE AMONG BEES AND INSPECTION THEREOF.

SECTION **2575-a53. Inspector — appointment — term — deputies.** The governor is hereby authorized to appoint a competent man as inspector of bees, who shall hold his office for a term of two years, or until his successor is appointed and qualified; and said inspector shall have the power to appoint deputies. [33 G. A., ch. 169, § 1.]

SEC. **2575-a54. Duties—"foul brood"—inspection—destroying of infected colonies.** It shall be the duty of such inspector, when notified in writing, by at least three beekeepers in any locality, of the existence, or supposed existence, of the disease known as "foul brood" among the apiaries of such locality, to at once thoroughly examine such apiaries as are reported to be diseased, and all other apiaries in the same locality, and thus ascertain whether such disease exists. If the bees in any apiary are in such place or condition as to prevent a thorough examination by the inspector, he may order the same to be put into proper place or condition for such examination. If such order is not complied with, and the inspector has reason to believe such bees to be diseased, he may cause them to be destroyed. If upon examination the inspector is satisfied of such disease, he shall give the owner or person in charge of such apiary full instructions as to the manner of treating the same. Within reasonable time after such

examination the inspector shall, without other notice, make further examination of such apiaries, and if the condition of any of them is such as in his judgment renders it necessary, he may burn, or cause to be burned, all the infected colonies of bees in any apiary, together with all the combs and hives, in order to prevent the further spread of the disease. [33 G. A., ch. 169, § 2.]

SEC. **2575-a55. Annual report.** The inspector shall make a yearly report to the governor, stating the number of apiaries visited, the number of those diseased and treated and the number of colonies of bees destroyed. Such report shall also show the expenses incurred by the inspector while in the discharge of his duties under the provisions of this act. [33 G. A., ch. 169, § 3.]

SEC. **2575-a56. Illegal sale or removal—penalty.** Anyone who knowingly sells, barters or gives away, moves or allows to be moved, a diseased colony or colonies of bees, be they queen or workers, or infected appliances, or who exposes any infected honey to the bees without the consent of the inspector, shall be deemed guilty of [a] misdemeanor and be liable on conviction before any justice of the county, to a fine of not less than twenty-five nor more than one hundred dollars or to imprisonment in the county jail not exceeding thirty days, or both fine and imprisonment. [33 G. A., ch. 169, § 4.]

SEC. **2575-a57. Sale after treatment without consent of inspector—penalty.** Any person whose bees have been destroyed or treated for foul brood who sells or offers for sale any bees, hives or appurtenances, after such destruction or treatment, without being authorized by the inspector to do so, or exposes[1] in his apiary or elsewhere any infected honey, or other infected thing, or conceals[2] the fact that said disease exists, shall be deemed guilty of a misdemeanor and on conviction thereof shall be liable to a fine of not less than twenty-five dollars nor more than fifty dollars or imprisonment in the county jail not exceeding thirty days. [33 G. A., ch. 169, § 5.]

[1"expose"; 2"conceal," in enrolled bill. EDITOR.]

SEC. **2575-a58. Violation—penalty.** Any owner or possessor of bees who disobeys the directions of the inspector, or offers resistance, or obstructs said inspector in the performance of his duties shall be deemed guilty of a misdemeanor and upon conviction thereof before any justice of the peace of the county, shall be fined not exceeding the sum of fifty dollars or by imprisonment in the county jail not exceeding thirty days. [33 G. A., ch. 169, § 6.]

SEC. **2575-a59. Compensation—expenses.** Such inspector shall receive as compensation the sum of five dollars per day for each day actually and necessarily employed in the discharge of the duties as herein provided, together with his expenses actually incurred while so employed, provided that the amount to be paid on account of such expenses shall in no event exceed the sum of fifteen hundred dollars for any one year, including salary and expenses of deputies. [35 G. A., ch. 211, § 1; 33 G. A., ch. 169, § 7.]

SEC. **2575-a60. Importation of diseased bees.** It shall be unlawful for any person, firm or corporation to bring into, or cause to be brought into the state of Iowa, any apiary or honey bees infected with foul brood or other infectious disease, or bee-destroying insects. [35 G. A., ch. 209, § 1.]

SEC. **2575-a61. Common carrier shall require certificate of health.** No common carrier shall accept colonies of bees for delivery at Iowa points unless the said bees be accompanied by a certificate of health signed by some duly authorized state or government inspector. [35 G. A., ch. 209, § 2.]

SEC. **2575-a62. Violation—penalty.** Any person convicted of a violation of this act shall be fined not less than twenty-five dollars nor more than one hundred dollars. [35 G. A., ch. 209, § 3.]

CHAPTER 17.

OF THE PRACTICE OF MEDICINE.

SECTION **2576. Board of medical examiners—examinations—certificates.** The state board of medical examiners shall consist of the physicians of the state board of health, and the secretary of the board of health shall be secretary thereof. It shall hold regular meetings in January and July and special ones as may be necessary, due notice thereof being given, at which it shall discharge the duties contemplated by this chapter. All examinations shall be in writing, each candidate for examination in any school of medicine being given the same set of questions, covering anatomy, physiology, general chemistry, pathology, surgery and obstetrics. In materia medica, therapeutics and the principles and practice of medicine, a set of questions shall be used corresponding to the school of medicine which the applicant desires to practice. The examination papers, when concluded, shall be marked upon a scale of one hundred, each candidate for examination first to pay to the secretary of the board a fee of ten dollars therefor. The average required to pass shall be fixed by the board prior to the examination. Each applicant shall, upon obtaining an order for examination, receive from the secretary a confidential number which he shall place upon his work when completed, so that the board, in passing thereon, shall not know by whom it was prepared. All matters connected therewith shall be filed with the secretary and preserved for five years as a part of the records of the board, during which time they shall be open to public inspection. If the examination is satisfactory to three members of the board, it shall issue its certificate, under its seal, signed by its president, secretary, and not less than three other members, who may, in the absence of the others, act as an examining board, and the different schools of medicine represented in the board of health shall be represented in said number. The certificate, while in force, shall confer upon the holder the right to practice medicine, surgery and obstetrics, and be conclusive evidence thereof. In all examinations made or proceedings had pursuant to the provisions of this chapter, any member of the board may administer oaths and take testimony in any manner authorized by law. Anyone failing in his examination shall be entitled to a second one, within three months thereafter, without further fee. If any person shall by notice in writing apply to the secretary of the board for an examination or reëxamination, and it fails or neglects for three months thereafter to give him the same, he may, notwithstanding any provision of this chapter, practice medicine until the next regular meeting of the board without the required certificate. [35 G. A., ch. 213, § 1.] [31 G. A., ch. 114; 28 G. A., ch. 89, § 1; 22 G. A., ch. 66; 21 G. A., ch. 104, §§ 1–3.]

When the question of license arises collaterally in a civil action between the physician and one who employs him, due qualification under the statute will be presumed and the burden will be upon him who denies such license. *Lacy v. Kossuth County*, 106–16, 75 N. W. 689.

All who hold themselves out to heal the sick, regardless of the particular school according to which they practice, are to be examined in anatomy, physiology, general chemistry, pathology, surgery and obstetrics. *State v. Heath*, 125–585, 101 N. W. 429.

Magnetic healers, so called, come within the provision of the statute requiring a physician to procure a license. *Ibid.*

It is contemplated by this section that a hearing be given as the result of which a certificate may be granted or revoked, and that the person concerned shall be given an opportunity to be heard. *Smith v. State Board of Med. Exam.*, 140–66, 117 N. W. 1116.

The general assembly having declared the subjects in which those who undertake to practice the healing art shall be proficient, the courts will not interfere to excuse from the requirements of the statute. *State v. Adkins*, 145–671, 124 N. W. 627.

The title of the chapter of the code of which this section is a part is sufficient to cover the subject matter. *State v. Miller*, 146–521, 124 N. W. 167.

These statutory provisions are not unconstitutional as discriminative or as granting to one class of citizens rights which all may not enjoy. *Ibid.*

The courts will not presume for the purpose of holding the statute unconstitutional that the state board has exceeded its authority or done an unlawful act. *Ibid.*

SEC. 2577. Recording certificate.

A practitioner who has procured the proper certificate and has had it recorded in the county of his residence is entitled to practice in any county in the state unless he is an itinerant physician as described in code § 2581, and he is required to have it recorded in another county only in event of a change of residence. *State v. Zechman*, 157–158, 138 N. W. 387.

Where the indictment charges practice without a certificate it is immaterial that it alleges a failure to record such certificate in a particular county without alleging that such county is the county of defendant's residence. *Ibid.*

SEC. 2578. Refusal of certificate or revocation for cause—"gross unprofessional conduct" defined. That section twenty-five hundred seventy-eight of the code be and the same is hereby repealed and the following is enacted in lieu thereof:

The board of medical examiners may refuse to grant a certificate to any person otherwise qualified and shall revoke any certificate issued by it to any physician, who is not of good moral character, or who solicits professional patronage by agents, or who profits by the acts of those representing themselves to be his agents, or who is guilty of fraudulent representations as to his skill and ability, or who is guilty of gross unprofessional conduct, or for incompetency, or for habitual intoxication or drug habit; or if the certificate has been granted upon false and fraudulent statements as to graduation or length of practice, the board of medical examiners shall, to safeguard the public health, revoke the certificate in the manner hereinafter set forth.

The words "gross unprofessional conduct" as used in this section are hereby declared to mean:

1. The procuring or aiding or abetting in procuring a criminal abortion.

2. The employment of what are popularly known as "cappers" or "steerers" in procuring practice.

3. The obtaining of a fee on the assurance that a manifestly incurable disease can be permanently cured.

4. A wilful betrayal of a[1] professional secret to the detriment of the patient.

5. Any advertisement of medical business in which untruthful and improbable statements are made.

6. Any advertisement of any kind, of any medicine or means, whereby the monthly periods of women can be regulated or the menses be re-established if suppressed.

7. Conviction of any offense involving moral turpitude.

8. Wilful neglect of a patient in a critical condition.

9. Accepting any fee for service as a witness in a case at law or equity other than such as is allowed by the court, or that the court is made cognizant of.

10. The splitting or division, or agreeing to split or divide, any fee or charge paid or to be paid on account of any operation performed or to be performed, upon any patient, with any other person for any service performed or agreed to be performed, or in any consideration of such other person accompanying, bringing or referring to him a patient for any treatment or operation, or on account of such other person assisting him in reference to such treatment or operation without the knowledge and consent of the patient or the person having the patient in charge or the patient's administrator or executor in the event of the patient's death.

11. Knowingly misstating the cause of a death in a death certificate, except where an exact statement would render the physician liable to suit for libel, or subject the decedent or his family to public odium. [35 G. A., ch. 214, § 1.] [32 G. A., ch. 141, § 1; 21 G. A., ch. 104, § 7.]

["the" in enrolled bill. EDITOR.]

The state board of examiners may revoke a certificate on account of "incompetency." The person whose right is involved should in such case be given a fair opportunity to meet the charges and evidence against him, but it is not necessary that the evidence be strictly confined to that which would be admissible in a court. Affidavits may be considered. *Traer v. State Board of Medical Examiners*, 106–559, 76 N. W. 833.

The provision for revocation of certificate for want of good moral character or incompetency is not unconstitutional. The statute contemplates a hearing before action of revocation is taken. *Smith v. State Board of Med. Exam.*, 140–66, 117 N. W. 1116.

SEC. **2578-a. Notice—charges—procedure.** Before the revocation of any certificate issued by the state medical examiners the licentiate shall have been afforded an opportunity for a hearing before the board. At least twenty days prior to the date set for such a hearing, the secretary of the state board of medical examiners shall cause written notice to be personally served upon the defendant in the manner prescribed for the serving of original notice in civil actions. Said notice shall contain a statement of the charges and the date and place set for the hearing before the board. If the party thus notified fails to appear, either in person or by counsel at the time and place designated in said notice, the board shall, after receiving satisfactory evidence of the truth of the charges and the proper issuance of notice, revoke said certificate. If the licentiate appear either in person or by counsel, the board shall proceed with the hearing as herein provided. The board may receive and consider affidavits and oral statements and shall cause stenographic reports of the oral testimony to be taken, which, together with all other papers pertaining thereto, shall be preserved for two years. If three members of the board, present at the hearing, are satisfied that the licentiate is guilty of any of the offenses charged, the license shall be revoked. After the revocation of a certificate the holder thereof shall not practice medicine, surgery or obstetrics in this state, for such times as the state board of medical examiners may determine. [35 G. A., ch. 213, § 2; 33 G. A., ch. 158, § 1.] [32 G. A., ch. 141, § 2.]

SEC. **2578-b. Appeal—certification of record.** Any person aggrieved by any ruling or order entered under the provisions of this act shall have the right of an appeal to the district court in the county in which the alleged offense was committed, upon giving notice to the board of medical examiners of such appeal within twenty days after the entry of such ruling, order, or judgment. Upon giving said notice the original complaint, affidavits, depositions and a duly certified transcript of evidence taken upon the hearing before the state board of medical examiners shall be by the secretary of said board certified to the clerk of the district court of the county to which said appeal is taken. Said appeal shall be triable at the next term of court in the county to which said appeal is taken convening not less than ten days after notice of appeal is served. The appeal shall be heard and determined upon the affidavits, depositions and evidence so transcribed and such further evidence as either party may offer. The provisions hereof shall apply to all cases not actually tried upon appeal at the time this act goes into effect. [35 G. A., ch. 215, § 1.] [32 G. A., ch. 141, § 3.]

SEC. **2579. Who deemed practitioner.**

These statutory directions as to qualifications for the practice of medicine are not unconstitutional on the ground that they grant to some citizens or classes of citizens privileges or immunities which on the same terms are not equally granted to all. The statute merely establishes a rule of evidence by which qualifications to practice medicine shall be ascertained. *State v. Bair*, 112–466, 84 N. W. 532.

Those who are to be deemed as practicing medicine under the statutory provisions requiring a license to practice are of three classes: (1) those professing to be physicians, surgeons or obstetricians and assume the duties incident thereto; (2) those who make a practice of prescribing or do prescribe and furnish medicine; and (3) those who publicly profess to heal. *State v. Heath*, 125–585, 101 N. W. 429.

It is proper to charge in the indictment as contemporaneous acts which considered together constitute the practice of medicine without a license, that the defendant professed to cure and heal and advertised so to do in newspapers, that he maintained an office with the sign of a doctor for this purpose, and that he actually undertook to cure and heal diseases. *State v. Wilhite*, 132–226, 109 N. W. 730.

The statute prohibiting the practice of medicine without a license is not unconstitutional. *Ibid.*

The design of the law is not to render any mode of treatment whatsoever unlawful, but that everyone before he shall undertake to prevent, cure or alleviate disease and pain as an occupation, shall have some knowledge of the nature of disease, its origin, its anatomical and physiological features, its causative relations, and of the preparation and action of drugs. *Ibid.*

In an indictment for practicing without a license, it is not necessary to allege specifically the time, place or circumstances of such unlawful practicing, nor is it necessary to allege that the prescribing of medicine or the practicing charged was for or upon human beings as distinguished from domestic animals. *State v. Kendig*, 133–164, 110 N. W. 463.

It is not necessary in the indictment to negative the exceptions contained in the statute. *Ibid.*

The exemption in the statute as to physicians who had practiced for five years referred to such citizens as were then and for five years prior to the enactment of the law had been practicing within this state. *State v. Miller*, 138–28, 115 N. W. 493.

One who has been illegally practicing medicine without a certificate, after the requirement of a certificate took effect, is not entitled to the exemption on account of the practice within the state for five consecutive years. *State v. Taylor*, 140–138, 118 N. W. 301.

The state may properly determine what acts constitute practice as a physician and may impose conditions on the exercise of that privilege. The provisions of this section apply to those who profess to cure and heal without medicine or the practice of surgery. It therefore applies to chiropractors. One professing and undertaking to cure and heal by that method of practice must possess the knowledge required of physicians. *State v. Corwin*, 151–420, 131 N. W. 659.

The acts prohibited disjunctively in the statute may be charged conjunctively as constituting a violation. *Ibid.*

One who professes to be a chiropractic and maintains an office for the practice of such system, holding himself out to treat and treating patients for disease, with the purpose of curing and healing, must have such certificate as is required in case of

physicians. *State v. Zechman*, 157–158, 138 N. W. 387.

The statute applies equally to those who profess to be physicians and assume the duties of such profession and to those who make a practice of prescribing for the sick. *Ibid.*

SEC. 2580. Penalties.

The practice of medicine is not a right but a privilege upon which the state may impose such license tax as it sees fit. *State v. Edmunds*, 127–333, 101 N. W. 431.

One who publicly announces his skill in the art of healing under circumstances indicating an intention to treat the sick, is guilty of a violation of the statute if without a certificate and not within the statutory exceptions, although he has not actually undertaken to render his services in any particular case. *State v. Heath*, 125–585, 101 N. W. 429.

The practice of medicine, or the prescribing and furnishing of medicine for the sick, is not necessarily included in the charge of publicly professing to be a physician and assuming the duties of such profession. The phrases used in the statute are not merely different expressions of the same idea. *State v. Bresee*, 137–673, 114 N. W. 45.

It is not necessary for the court to instruct the jury as to the meaning of the words "making a practice of" as used in the statute. *Ibid.*

The acts specified in this section may be charged conjunctively as constituting a single offense. *State v. Yates*, 145–332, 124 N. W. 174.

The filing for record of the certificate is in fact the recording, so far as the holder of the certificate is concerned, but an allegation as to recording is surplusage. *Ibid.*

SEC. 2581. **Itinerant physician.** Every physician practicing medicine, surgery or obstetrics, or professing or attempting to treat, cure or heal diseases, ailments or injuries by any medicine, appliance or method, who, by himself, agent or employe goes from place to place, or from house to house, or by circulars, letters or advertisements solicits persons to meet him for professional treatment at places other than his office at the place of his residence, shall be considered an itinerant physician; and any such itinerant physician shall, in addition to the certificate elsewhere provided for in this chapter, procure from the state board of medical examiners a license as an itinerant, for which he shall pay to the treasurer of state, for the use of the state of Iowa, the sum of two hundred fifty dollars per annum. Upon payment of this sum, the secretary shall issue to the applicant therefor a license to practice within the state, as an itinerant physician, for one year from the date thereof. The board may, for satisfactory reasons, refuse to issue such license, or may cancel such license upon satisfactory evidence of incompetency or gross immorality. Any person practicing medicine as an itinerant physician, as herein defined, without having procured such license shall be guilty of a misdemeanor, and, upon conviction thereof, shall be fined not less than three hundred dollars, nor more than five hundred dollars, and costs, and shall be committted to the county jail until such fine is paid: provided, however, that nothing herein shall be construed to prevent any physician otherwise legally qualified from attending patients in any part of the state to whom he may be called in the regular course of business, or in consultation with other physicians. [29 G. A., ch. 109, § 1.]

An indictment for practicing as a non-licensed itinerant physician by professing to cure by dieting patients and prescribing exercises and furnishing eye glasses is sufficient. *State v. Edmunds*, 127–333, 101 N. W. 431.

The words "medicine, appliance or method" used in this section are not to be limited to a medicine or drug or something administered as such. *Ibid.*

An itinerant physician licensed by the state board of medical examiners to practice within the state may be required by city ordinance to pay an additional license fee for practicing within the city. *Fairfield v. Shallenberger*, 135–615, 113 N. W. 459.

It is only in the case of an itinerant physician that it is necessary to record a certificate in a county other than that of the residence of the physician. *State v. Zechman*, 157–158, 138 N. W. 387.

SEC. 2582. **Examination and diploma required—registration—fee—temporary permits.** From and after January first, eighteen hundred ninety-nine, all persons beginning the practice of medicine in the state of Iowa must submit to an examination as set forth in this chapter, and, in addition thereto, shall present diplomas from medical colleges recognized as in good standing by the state board of medical examiners, and all persons receiving their diplomas subsequent to January first, eighteen hundred ninety-nine, shall present evidence of having attended four full courses of study of not less than twenty-six weeks each, no two of which shall have been given in any one year. The state board of medical examiners shall examine the graduates of the medical departments of the state university of Iowa and of such other medical colleges in this state as are recognized by said board of medical examiners as being in good and legal standing at the annual medical commencement and at the location of said state university and other medical colleges respectively:

(a) A certificate of registration showing that an examination has been made by the proper board of any state, on which an average grade of not less than seventy-five per cent. was awarded, the holder thereof having been at the time of said examination the legal possessor of a diploma from a medical college in good standing in this state, may be accepted in lieu of an examination, as evidence of qualification. But in case the scope of said examination was less than that prescribed by this state, the applicant may be required to submit to a supplemental examination in such subjects as have not been covered.

(b) A certificate of registration or license, issued by the proper board of any state, may be accepted as evidence of qualification for registration in this state, provided the holder thereof was, at the time of such registration, the legal possessor of a diploma issued by a medical college in good standing in this state, and that the date thereof was prior to the legal requirement of the examination test in this state. The fee for such examination shall be fifty dollars.

(c) Applicants for registration under the provision of clauses (a) and (b) of this section shall make proper application upon forms furnished by the board and file same together with the registration fee, with the secretary of said board. If the credentials of the applicant are complete and regular, the secretary shall issue a temporary permit authorizing the said applicant to practice in Iowa during the period intervening between the date of filing his application and the date upon which the board authorizes or refuses the issuance of a permanent certificate, but not more than one such permit shall be issued to the same applicant. The temporary permits herein provided for shall apply only to applicants for a certificate under reciprocal agreements with other states. [33 G. A., ch. 159, § 1.] [30 G. A., ch. 102, § 1; 28 G. A., ch. 89, § 2.]

The power given to the board of examiners by this section as amended is not open to the objection that it authorizes a discrimination against any class of citizens. *State v. Miller*, 146–521, 124 N. W. 167.

SEC. 2582-a. **Restrictions.** If, by the laws of any state or the rulings or decisions of the appropriate officers or boards thereof, any burden, obligation, requirement, disqualification or disability is put upon physicians registered in this state or holding diplomas from medical colleges in this state, which are in good standing therein, affecting the right of said physicians to be registered or admitted to practice in said state, then the same or like burdens, obligations, requirements, disqualification or disability

shall be put upon the registration in this state of physicians registered in said state, or holding diplomas from medical colleges situated therein. [30 G. A., ch. 102, § 2.]

SEC. **2583. Compensation—expenses of board.** Each member of the board of examiners shall receive, out of the fund created by the payment of fees by applicants for examination or certificates, the sum of eight dollars for each day, and necessary traveling expenses, for the time he is actually engaged in the discharge of his duties as a member of the board, and the secretary shall receive a sum not to exceed twenty-five dollars per month and his necessary expenses incurred for services which cannot be performed at the capitol. All printing, postage, and other contingent office expenses necessarily incurred under the provisions of this chapter shall be paid from said fund. Any balance of said funds remaining shall be turned over to the state treasurer for the use of the school fund. [28 G. A., ch. 90, § 1; 27 G. A., ch. 68, § 1; 22 G. A., ch. 66; 21 G. A., ch. 104, § 6.]

CHAPTER 17-A.

OF THE PRACTICE OF OSTEOPATHY.

SECTION **2583-a. Diploma—examination—certificate.** Any person holding a diploma from a legally incorporated school of osteopathy, recognized as of good standing by the Iowa osteopathic association, and wherein the course of study comprises a term of at least twenty months, or four terms of five months each, in actual attendance at such school, and which shall include instruction in the following branches, to wit: Anatomy, including dissection of a full lateral half of the cadaver, physiology, chemistry, histology, pathology, gynecology, obstetrics and theory of osteopathy and two full terms of practice of osteopathy, shall, upon the presentation of such diploma to the state board of medical examiners and satisfying such board that he is the legal holder thereof, be granted by such board an examination on the branches herein named (except upon the theory and practice of osteopathy until such time as there may be appointed an osteopathic physician on the state board of health and medical examiners). The fee for said examination, which shall accompany the application, shall be ten dollars and the examination shall be conducted in the same manner, and at the same place and on the same date that physicians are examined as prescribed by section twenty-five hundred seventy-six of the code. The same general average shall be required as in case of physicians; provided that osteopaths who are graduates of legally incorporated schools of osteopathy as above recognized, and who are at the time of the passage of this act engaged in the practice of osteopathy in Iowa, shall be entitled to receive a certificate upon the payment of the prescribed fee without such examination. Upon passing a satisfactory examination as above prescribed the said board of medical examiners shall issue a certificate to the applicant therefor, signed by the president and secretary of said board, which certificate shall authorize the holder thereof to practice osteopathy in the state of Iowa. This certificate when issued shall be registered with the recorder of the county in which the holder thereof resides and for which he shall pay a fee of fifty cents, and the holder thereof shall not be subject to the provisions of section twenty-five hundred eighty of the code. [29 G. A., ch. 158, § 1.]

SEC. **2583-b. Drugs—major or operative surgery.** The certificate

provided for in the foregoing section shall not authorize the holder thereof to prescribe or use drugs in his practice, nor to perform major or operative surgery. [29 G. A., ch. 158, § 2.]

SEC. **2583-c. Revocation of certificate.** The board of medical examiners may refuse to grant a certificate to any person otherwise qualified, who is not of good moral character. For like cause, or for incompetency, or habitual intoxication, or upon satisfactory evidence by affidavit or otherwise that a certificate has been granted upon false and fraudulent statements as to graduation or length of practice, the said board may revoke a certificate by an affirmative vote of at least three members of the board, which number shall include one or more members of the different schools of medicine, represented in said board. After the revocation of a certificate, the holder thereof shall not practice osteopathy, surgery, or obstetrics in the state. [35 G. A., ch. 216, § 1.] [29 G. A., ch. 158, § 3.]

SEC. **2583-d. Fraudulent diploma — false representation — penalties.** Any person who shall present to the board of medical examiners a fraudulent or false diploma, or one of which he is not the rightful owner, for the purpose of procuring a certificate as herein provided, or shall file, or attempt to file, with the recorder of any county in the state the certificate of another as his own, or who shall falsely personate anyone to whom a certificate has been granted by such board, or shall practice osteopathy, surgery or obstetrics in the state without first having obtained and filed for record the certificate herein required, and who is not embraced in any of the exceptions contained in this chapter, or who continues to practice osteopathy, surgery or obstetrics after the revocation of his certificate, is guilty of a misdemeanor, and upon conviction thereof, shall be fined not less than three hundred dollars, nor more than five hundred dollars and costs of prosecution, and shall stand committed to the county jail until such fine is paid; and whoever shall file or attempt to file with the recorder of any county in the state the certificate of another with the name of the party to whom it was granted or issued erased, and the claimant's name inserted, or shall file or attempt to file with the board of medical examiners any false or forged affidavit of identification, shall be guilty of forgery. [29 G. A., ch. 158, § 4.]

SEC. **2583-e. Itinerant osteopath—license.** Every person practicing osteopathy, or obstetrics, or professing to treat, cure or heal diseases, ailments or injury by osteopathic application or method, who goes from place to place, or from house to house, or by circulars, letters or advertisements solicits persons to meet him for professional treatment at places other than his office at the place of his residence, shall be considered an itinerant osteopath; and such itinerant osteopath shall, in addition to the certificate elsewhere provided for in this chapter, procure from the state board of medical examiners a license as an itinerant, for which he shall pay to the treasurer of state, for use of the state of Iowa, the sum of two hundred fifty dollars per annum. Upon payment of this sum, the secretary shall issue to the applicant therefor a license to practice within the state, as an itinerant osteopath, for one year from the date thereof. The board may, for satisfactory reasons, refuse to issue such license, or may cancel such license upon satisfactory evidence of incompetency or gross immorality. [29 G. A., ch. 158, § 5.]

SEC. **2583-f. Acts in conflict repealed.** All acts and parts of acts in conflict herewith are hereby repealed. [29 G. A., ch. 158, § 6; 27 G. A., ch. 89, §§ 1–5.]

[The title of ch. 158, 29 G. A., repeals ch. 89, 27 G. A. EDITOR.]

CHAPTER 17-B.

OF THE PRACTICE OF OPTOMETRY.

SECTION **2583-g. Defined.** The practice of optometry is defined to be the employment of any means other than the use of drugs for the measurement of the powers of vision and the adaptation of lenses for the aid thereof. [33 G. A., ch. 167, § 1.]

SEC. **2583-h. Board of examiners—appointment—terms—vacancies.** The board of optometry examiners shall be appointed by the governor and consist of three optometrists who have been engaged in the practice of optometry not less than five years in the state of Iowa, and are recommended by the Iowa state association of optometrists, one physician member of the state board of health, and the secretary of the state board of health. They shall be appointed on or before July first, nineteen hundred and nine, and each year thereafter and their terms of office shall be one year from July first of each year. Vacancies shall be filled by the governor, but the number of optometrists shall neither be increased nor diminished by any appointment to fill vacancy. [33 G. A., ch. 167, § 2.]

SEC. **2583-i. Organization—meetings—general powers.** The board shall organize by selecting one of its members as president and the secretary of the state board of health shall serve as secretary for the board. They shall meet at least once each year the second Tuesday in July and at such other times as they may deem necessary, in the office of the state board of health. A majority of the board shall constitute a quorum and its meetings shall at all reasonable times be open to the public. This board shall have power to make all needed regulations for its government and proper discharge of its duties in accordance with this act. [33 G. A., ch. 167, § 3.]

SEC. **2583-j. Who not eligible.** No members of the faculty of any optical school or college, or members of any wholesale or jobbing optical house shall be eligible to an appointment upon the state board of examiners in optometry. [33 G. A., ch. 167, § 4.]

SEC. **2583-k. Examination—requirements of—certificate—record.** The board shall, at any regular meeting, and may at any special meeting, examine applicants for a license to practice optometry. Such examination shall be confined to such knowledge and requirements as are essential to the practice of optometry. Said board shall issue a license or certificate duly authorizing such as are found to be qualified to practice optometry. Such certificate shall be conclusive as to the rights of the lawful holders of same to practice optometry in the state of Iowa. The name, age, nativity, location, number of years of practice of the person to whom a license is given, the number of the license and the date of registration thereof shall be entered in a book kept in the office of the secretary of the board, which shall be open to the inspection of the public, and the number of the book and page containing such entries shall be noted on the face of the license. [33 G. A., ch. 167, § 5.]

SEC. **2583-l. Qualifications of applicant—standards of education—license to persons from other states—fee.** Section six of chapter one hundred sixty-seven of the acts of the thirty-third general assembly is hereby repealed, and the following enacted in lieu thereof:

"On and after October first, nineteen hundred and nine, every person desiring to begin or continue the practice of optometry in this state must furnish satisfactory evidence that he is twenty-one years of age and of good

moral character; that he has a preliminary education equivalent to at least two years' study in an accredited high school; that he has studied three years in the office of a registered optometrist, or is a graduate from a standard school of optometry, before he shall be eligible to examination by the board. The standard school of optometry shall include a course of instruction of not less than two years' duration, and the terms of school shall not be less than three months' actual attendance each year. The requirements of a standard school of optometry shall be that each student shall devote seventy-eight hours to each subject named in this section during each three months' course. He shall not be entitled to be registered, or to receive a license from the board unless he shall show proficiency in the following subjects: physiology of the eye, optical physics, anatomy of the eye, ophthalmology, and practical optometry. Any person successfully passing such examination, and meeting all of the requirements in this section shall be registered by the board, and receive a license. The board of examiners may issue a certificate to any person taking up a permanent residence in the state of Iowa, and desiring to practice optometry, providing satisfactory evidence is furnished of his qualifications, including credentials from the state board of examiners in optometry of the state in which he formerly resided, and upon payment of a fee of fifteen dollars." [34 G. A., ch. 127, § 1; 33 G. A., ch. 167, § 6.]

SEC. **2583-m. Certificate of exemption—revocation of license—notice—hearing.** Every person entitled to a certificate of exemption from examination as herein provided must make application therefor and present the evidence to entitle him thereto on or before six months after the passage of this act or he shall be deemed to have waived his right to such certificate. Any license issued by said board of examiners may be revoked by said board for violation of the law, incompetency, immorality or inebriety; provided that before any certificate or license shall be revoked, the holder thereof shall have notice in writing of the charge or charges against him, and at a day specified in said notice, and at least five days after the service thereof, be given a public hearing and have ample opportunity to produce testimony in his behalf and confront the witnesses against him. Any person whose certificate has been revoked may, after the expiration of ninety days, apply to have same regranted upon a satisfactory showing that the disqualification has ceased. [33 G. A., ch. 167, § 7.]

SEC. **2583-n. Fees—privilege of second examination.** The fee for said examination shall be fifteen dollars, for which a license shall be issued, to practice optometry in this state, fee payable in advance to secretary of the board. Should the applicant fail in his first examination he shall have the right to appear at the next meeting of the board for another examination free of charge. For a certificate of exemption a fee of ten dollars shall be paid to the secretary of the board of examiners, for which a license shall be issued to practice optometry in this state; said fees constitute a fund for expenses made necessary by this act. From this fund the board shall cause to be paid all necessary expenses incurred in the administration of this act. [33 G. A., ch. 167, § 8.]

SEC. **2583-o. Filing of license—recording fee.** Every person to whom a license is issued under this act shall file the same for record with the clerk of the district court in the county or counties in which he desires to practice optometry and the clerk of the district court shall be entitled to a fee of fifty cents for recording such license. [33 G. A., ch. 167, § 9.]

SEC. **2583-p. Compensation of board of examiners—expenses.** Each member of the board of examiners (except the secretary) shall be paid five dollars for each day actually engaged in the duties of his office with actual expenses incurred by him in the discharge of such duties, from the fund created by the payment of fees by applicants for examination. [The] secretary shall receive his necessary expenses incurred for services which cannot be performed at the capitol. All printing, postage and other contingent expenses necessarily incurred under the provisions of this act shall be paid from said fund. All expenses incurred under the provisions of this act shall be itemized thereupon and audited and a warrant drawn therefor on the optometrists' fund in the same manner as other expenses of the state board of health. [33 G. A., ch. 167, § 10.]

SEC. **2583-q. Not applicable to dealers—unlawful use of prefix "doctor."** This act shall not be construed to apply to merchants or dealers who sell glasses as merchandise and who do not profess to be optometrists or practice optometry as herein defined. Any person practicing optometry shall be prohibited from using the prefix "doctor" to his name, unless he is a duly registered and licensed physician and surgeon and his rights to such being allowed by the state board of medical examiners, nor shall he advertise himself in such a manner as to lead the public to believe him to be different than an optometrist as defined in this section. [33 G. A., ch. 167, § 11.]

SEC. **2583-r. Violation—penalty.** Any person who shall practice optometry in this state in violation of the provisions of this act, shall be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine not exceeding one hundred dollars or imprisonment in the county jail not more than thirty days. [33 G. A., ch. 167, § 12.]

SEC. **2583-s. Disposition unappropriated funds.** Section thirteen of chapter one hundred sixty-seven of the acts of the thirty-third general assembly is hereby repealed and the following enacted in lieu thereof:

"All unappropriated funds arising under this act, shall be accounted for and turned into the state treasury on June thirtieth of each year, except the sum of five hundred dollars, which shall be placed to the credit of the optometry fund, by the state treasurer, to defray current expenses of the board of optometry examiners." [34 G. A., ch. 127, § 2; 33 G. A., ch. 167, § 13.]

CHAPTER 18.

OF PRACTICE OF PHARMACY.

SECTION **2585. Secretary and treasurer.** The commissioners of pharmacy shall annually, on the first Monday in May, elect a suitable person, who shall not be a member of said board, and who shall be known as secretary and treasurer; said secretary and treasurer shall enter upon the discharge of his duties as soon as he shall have filed with the secretary of state a good and sufficient bond in the penal sum of three thousand dollars signed by at least two sureties, who shall justify in the aggregate to double the amount of said bond, and which shall bear upon its face the approval of the governor. The salary of said secretary and treasurer shall not exceed eighteen hundred dollars per annum. The secretary shall have charge of the office of the commission and of all books, documents, records and other appurtenances thereof. He shall keep a full and complete record of

the proceedings of the commission and of all matters required by law or by the rules of the commission to be made of record and shall conduct and carry on all correspondence pertaining to the affairs of the commission and when unable to adjust any matter by correspondence, he shall refer the same to a member of the commission for investigation and determination. [34 G. A., ch. 123, § 1.] [32 G. A., ch. 2, § 8; 26 G. A., ch. 59, § 1.]

Under a prior statute making no provision for a treasurer of the commission under the statutes as to embezzlement, held that a person appointed treasurer by the commission was not a public officer. *State v. Spaulding*, 102-639, 72 N. W. 288.

SEC. **2587. Records—compensation.** The books, accounts, vouchers and funds belonging to or kept by said board of pharmacy shall at all times be open or subject to the inspection of the governor, or any committee appointed by him. Each commissioner of pharmacy shall receive as full compensation for his services the sum of five dollars for each day actually employed in attending meetings of the commission, in conducting examinations and while away from his place of residence in the discharge of his official duties, together with his actual traveling expenses in performing said duties, all of which shall be paid from the fees of the office, and each commissioner shall file with the auditor of state, at the end of each quarter of his official year, an itemized statement under oath of his actual time in days employed in the discharge of his duty, and traveling expenses incurred in the performance of his duty, for such quarter. [34 G. A., ch. 123, § 3.] [26 G. A., ch. 59, § 3.]

SEC. **2588. Registered pharmacists—labeling of poisons.** No person not a registered pharmacist shall conduct the business of selling at retail, compounding or dispensing drugs, medicines or poisons, or chemicals for medicinal use, or compounding or dispensing physicians' prescriptions as a pharmacist, nor allow anyone who is not a registered pharmacist to so sell, compound or dispense such drugs, medicines, poisons or chemicals, or physicians' prescriptions, except such as are assistants to and under the supervision of one who is a registered pharmacist, and physicians who dispense their own prescriptions only; but no one shall be prohibited by anything contained in this chapter from keeping and selling proprietary medicines and such other domestic remedies as do not contain intoxicating liquors or poisons, nor from selling denatured alcohol and poison fly paper, concentrated lye or potash having written or printed on the package or parcel its true name and the word "poison," sales of which need not be registered. Whoever violates either provision of this section, for the former shall pay five dollars for each day of its violation, to be recovered in an action in the name of the state, brought by the county attorney under the direction of the commission, and for the latter shall be guilty of a misdemeanor, and punished accordingly. In actions or prosecutions under this chapter it need not be proven that the defendant has not a pharmacist's certificate, but such fact shall be a matter of defense. No one shall be prohibited by the provisions of this chapter, relating to the practice of pharmacy, from selling insecticides or fungicides consisting of hellebore, Paris green, nicotine preparations, arsenical preparations, copper sulphate, formaldehyde and crude carbolic acid in original packages, provided the package or parcel containing same has plainly written or printed thereon its true name and if poisonous it shall be conspicuously marked with the word "poison" and its poisonous contents, correctly and conspicuously stated in conformity with the national insecticide act of June, nineteen hundred ten. Said insecticides and fungicides shall com-

ply with the law of the state as to strength and purity and the sales of such preparations when marked as specified above need not be registered. [34 G. A., ch. 124, § 1; 33 G. A., ch. 160, § 1.] [22 G. A., ch. 71, § 21; 22 G. A., ch. 81; 21 G. A., ch. 83; 19 G. A., ch. 137, § 4; 18 G. A., ch. 75, §§ 1, 2, 12.]

A registered pharmacist having a permit to sell intoxicating liquors is not liable for the payment of the mulct tax although he sells in violation of his permit. *In re Assignment of Shonkwiler*, 104–67, 73 N. W. 479.

A pharmacist selling liquor so compounded with other substances as to lose its distinctive character as an intoxicant, and to be no longer desirable for use as a stimulating beverage, and in fact a medicine, does not violate the prohibitory law, although he may be a permit holder, as provided in code § 2385. He is not required in such cases to take written requests. *State v. Gregory*, 110–624, 82 N. W. 335.

In an action against a person conducting a drug store for negligence of a clerk in compounding a prescription, it is no defense that the clerk was a registered pharmacist, although the principal was restricted to registered pharmacists in the employment of clerks. *Burgess v. Sims Drug Co.*, 114–275, 86 N. W. 307.

SEC. **2589. Repeal.** The law as it appears in section twenty-five hundred eighty-nine of the supplement to the code, [1902] and section twenty-five hundred ninety of the code, is hereby repealed and the following enacted in lieu thereof: [31 G. A., ch. 115, § 1; 27 G. A., ch. 70, § 1.]

SEC. **2589-a. Examination.** That section twenty-five hundred eighty-nine-a of the supplement to the code, 1907, be repealed and the following enacted in lieu thereof:

"To enable persons to engage in and conduct business as registered pharmacists within the meaning of section twenty-five hundred eighty-eight of the code, the commission shall hold not more than five examinations each year, one of which may be held at Iowa City and the others at the state house at Des Moines. Not more than three days previous to the holding of each such examination, the commission shall meet at its office in Des Moines and prepare lists of questions for such examination. When the examination is completed, the commission shall remain in session until all of the papers have been graded and passed upon and the record of the grades turned over to the secretary of the commission. Following any examination held at Iowa City, the commission shall repair to its office in Des Moines and complete the work of the examination as above provided." [34 G. A., ch. 123, § 2.] [31 G. A., ch. 115, § 2; 27 G. A., ch. 70, § 1; 22 G. A., ch. 71, § 20; 21 G. A., ch. 83, § 2; 18 G. A., ch. 75, §§ 5, 8.]

SEC. **2589-b. Conditions—registration—foreign licenses—fee.** No person shall be eligible to take this examination until he has passed his twenty-first birthday and has presented to the commission his own affidavit and that of his employer or employers, affirming that he has had not less than four years' practical experience (including the actual number of weeks he has spent in a reputable college of pharmacy as hereinafter defined) as clerk under the supervision of a registered pharmacist in a drug store or pharmacy in which physicians' prescriptions are compounded. Provided, however, that graduates of reputable pharmaceutical schools and colleges whose entrance and graduation requirements are equivalent to those prescribed by the American Conference of Pharmaceutical Faculties, and whose course of study consists of two years of not less than thirty-six weeks each, shall be eligible to take the examination without proof of experience as hereinbefore defined. Applicants who are graduates of a junior course, consisting of not less than thirty-six weeks in pharmaceutical schools and colleges whose course consists of or is equivalent to the requirements above specified, shall be allowed one year's credit

on store experience. If such applicant passes the required examination, he shall be granted a certificate of registration. Pharmacists thus registered shall have the sole right to keep and sell all medicines and poisons, except intoxicating liquors. A certificate of registration, or license, as pharmacist or assistant pharmacist, issued by the proper board or commission of any state, or foreign country, may be accepted as evidence of qualification for registration in this state, provided the holder thereof shall present satisfactory evidence of qualifications equal to those required of licentiates in this state, that he was registered or licensed by examination in such other state or foreign country, and that the standard of competency required in such other state or foreign country accords similar recognition to the licentiates of this state. Applicants for license under this section shall, with their application, forward to the secretary of the board of pharmacy a fee of ten dollars. [34 G. A., ch. 125, § 1; 33 G. A., ch. 161, § 1.] [31 G. A., ch. 115, § 3.]

SEC. **2589-c. Assistant's certificate.** If the applicant has passed his eighteenth birthday and has had at least two years' practical experience as hereinbefore defined (including actual number of weeks spent in a reputable college of pharmacy as defined herein) and has presented to the commission his own affidavit and that of his employer or employers, affirming that he has had such experience, he shall upon passing a satisfactory examination, be granted an assistant's certificate to be exchanged for full registration when he shall have reached the age of twenty-one years, and upon satisfactory proof that he has had since the taking of the examination, two additional years of practical experience in a drug store as defined herein. [31 G. A., ch. 115, § 4.]

SEC. **2589-d. Examination and registration fees.** Each person furnished a certificate under this act shall be charged a fee of five dollars which shall be in full for all services, and in case the examination of said person shall prove defective or unsatisfactory and his name be not registered, he shall be permitted to present himself for reëxamination within any period not exceeding twelve months next thereafter, and no charge shall be made for reëxamination. The said commissioners are authorized to administer oaths pertaining to their said office and take a certificate of acknowledgment of instruments in writing. After registration, an annual fee of one dollar for renewal certificate shall be paid on or before the twenty-second day of March by all pharmacists and assistants who continue in business, and the conduct of such business without such renewal shall be a misdemeanor. [31 G. A., ch. 115, § 5.]

SEC. **2590. Registration and examination fees—repealed.** [31 G. A., ch. 115, § 1.]

[See § 2589.]

SEC. **2593. Sale of poisons.** Section twenty-five hundred ninety-three of the code is hereby repealed, and the following enacted in lieu thereof:

"No persons shall sell at retail any poisons enumerated in the following schedule, to wit: Acids, hydrochloric, nitric, and sulphuric, arsenic, chloral hydrate, chloroform, ammoniated mercury, atropine, arsenate of copper, aconitine, benzaldehyde, bromine, cyanide of potassium, cobalt, corrosive-sublimate, dionin, ether sulphuric. hyoscine, morphine, kermes mineral, cantharides, cotton root, croton oil, carbolic acid, digitalis, ergot, hydrocyanic acid, nux vomica, opium and its preparations (excepting those containing less than two grains to the ounce), oils of bitter almonds, savin

and pennyroyal, oxalic acid, phosphorus, strychnine and its salts, veratrum, and wood alcohol; without affixing to the bottle, box, or other package containing the poison, a label bearing the name of the article and the word poison distinctly shown, with the name and place of business of the registered pharmacist from whom the article was obtained, nor sell or deliver such poison unless upon due inquiry it be found that the party receiving it is aware of its character and represents it to be used for proper purposes, nor sell or deliver the poisons heretofore enumerated, without entering same in a book kept for that purpose, the date of sale, the name and address of purchaser, the name of the poison, the purpose for which it was represented to be required, and the name of the dispenser, which book shall be open for inspection by the proper authorities and preserved for at least five years, provided that nothing in this section shall apply to the sale of patent medicines, or to drugs used in the filling of prescriptions from physicians, veterinary surgeons or dentists; provided that it shall not be necessary to keep a record in said book of sales of wood alcohol, when it is ascertained it is[1] to be used for mechanical purposes; provided however, that nothing herein contained shall be construed to permit or authorize the sale of any of the poisons herein named where the sale thereof is otherwise prohibited or regulated by law. The obtaining of any such poisons by any person under a false name or statement shall be deemed a violation of the provisions of this act. Any person violating any of the provisions of this act shall be adjudged guilty of a misdemeanor and be punished by a fine of not less than twenty-five dollars nor more than one hundred dollars, or by imprisonment in the county jail not more than thirty days." [33 G. A., ch. 162, § 1; 33 G. A., ch. 160, § 2.] [32 G. A., ch. 142; 18 G. A., ch. 75, § 9; C. '73, § 4038; R. § 4374; C. '51, § 2728.]

[1]The words "denatured alcohol and" which preceded the words "wood alcohol," were stricken out by 33 G. A., ch. 162; hence the words "they are" have been changed to "it is." The title of the act does not correspond with § 1 thereof. EDITOR.]

The provisions of this section have no application to the sale of phosphorus, and a pharmacist is not liable in damages for selling that substance without direction as to the care to be exercised in handling it. *Gibson v. Torbert*, 115–163, 88 N. W. 443.

One who sells poisons without the label required by statute is guilty of negligence rendering him liable for injury proximately resulting from his wrong. *Burk v. Creamery Pkg. Mfg. Co.*, 126–730, 102 N. W. 793.

SEC. **2593-a. Denatured alcohol not a poison.** Denatured alcohol shall not be deemed to be a poison within the meaning of the statutes relating to the sale or handling of poisons. [33 G. A., ch. 162, § 2.]

SEC. **2593-b. Acts in conflict repealed.** That all statutes or parts thereof in conflict herewith are hereby repealed. [33 G. A., ch. 162, § 3.]

SEC. **2594. Itinerant vendors of drugs—assignment of license.** Any itinerant vendor of any drug, nostrum, ointment, or appliance of any kind for the treatment of any disease or injury, and all those who by any method publicly profess to treat or cure diseases, injury or deformity, shall pay to the treasurer of the commission of pharmacy an annual fee of one hundred dollars, upon the receipt of which the secretary of the commission shall issue a license for one year from its date. Two thousand dollars annually of the money arising from the license fund, or so much as may be needed, shall be devoted to defraying expenses of the commission, and any balance remaining shall be paid into the state treasury. Said commission shall, on the first day of January of each year, make a verified and itemized statement in writing to the auditor of state of all receipts and expenditures of moneys coming into their hands by

virtue of their office. Any violation of this section shall be a misdemeanor, and any person shall, upon conviction thereof, pay a fine of not less than one hundred dollars, nor more than two hundred dollars. In actions or prosecutions under this chapter it need not be proven that the defendant has not a license, but such fact shall be a matter of defense. That the holder of any unexpired license may assign the same to any person, and that said license, as soon as assigned, shall be forwarded to the secretary of the board of pharmacy, who shall approve and record the assignment and shall at once return said license to the assignee, who shall thus acquire all the rights and privileges conferred upon the original holder of the said license. Provided, however, the person requesting the transfer shall accompany his request with a transfer fee of one dollar. [35 G. A., ch. 217, § 1.] [21 G. A., ch. 83, § 3; 19 G. A., ch. 137, § 2; 18 G. A., ch. 75, § 10.]

One who merely sells eyeglasses for defective eyes may perhaps be considered an itinerant vendor of drugs under provisions of this section. *State v. Edmunds*, 127–333, 101 N. W. 431.

One who travels from place to place taking orders for certain remedies and consulting with persons who apply as to their ailments is required to procure a license. *State v. Stewart*, 138–536, 116 N. W. 693.

SEC. **2596-a. Cocaine and certain other drugs—sale.** That section twenty-five hundred ninety-six-a of the supplement to the code, 1907, as amended by chapter one hundred sixty-three of the laws of the thirty-third general assembly, be and the same is hereby repealed and the following enacted in lieu thereof:

"No person, firm or corporation shall sell, exchange, deliver or have in his possession with intent to sell, exchange or expose or offer for sale or exchange any coca (Erythroxylum Coca), cocaine, alpha or beta eucaine, or derivatives of any of them, or any preparation containing coca, cocaine, alpha or beta eucaine or derivatives of any of them, or cotton root, ergot, oil of tansy, oil of savin or derivatives of any of them, except upon the original written prescription of a registered physician or veterinarian or licensed dentist, who is personally known to such person, firm or corporation, for medical, dental or veterinary purposes only, and no such prescription shall be refilled. Provided that nothing in this act shall prevent the sale thereof to a wholesale or retail dealer in drugs, nor to a registered physician or veterinarian or licensed dentist for use in practice of his profession." [34 G. A., ch. 126, §§ 1, 2; 33 G. A., ch. 163, § 1.] [32 G. A., ch. 143; 29 G. A., ch. 110, § 1.]

SEC. **2596-b. Penalty.** Anyone found guilty of violating the provisions of section one of this act, for the first offense, shall pay a fine of not less than twenty-five dollars and not more than one hundred dollars and cost of prosecution. For the second offense, and each subsequent offense, he shall pay on conviction thereof,[1] a fine of not less than one hundred dollars, and not more than three hundred dollars, or imprisonment in the county jail not to exceed three months. Any clerk, employe or agent, violating, or aiding in the violation of section one, shall be charged and convicted as principal. [29 G. A., ch. 110, § 2.]

[1"thereon" in 29 G. A. session laws. EDITOR.]

SEC. **2596-c. Enforcement.** Peace officers shall see that the provisions of this act are faithfully executed within their respective jurisdictions, and when they are informed, or have reason to believe that this act has been violated, and the proof thereof can be had, they shall file information to that effect against the offending party before a magistrate, who

thereupon shall proceed according to law. The county attorney shall prosecute violators of this act. [29 G. A., ch. 110, § 3.]

CHAPTER 19.

OF THE PRACTICE OF DENTISTRY.

SECTION **2597. Board of examiners—officers—meetings—examinations—license—reports—repealed.** [28 G. A., ch. 91, § 1; 27 G. A., ch. 71, § 1.]
[See § 2600-a.]

SEC. **2598. Temporary license—repealed.** [28 G. A., ch. 91, § 1.]
[See § 2600-a.]

SEC. **2599. License required—registration—repealed.** [28 G. A., ch. 91, § 1.]
[See § 2600-a.]

SEC. **2600. Penalty—repealed.** [28 G. A., ch. 91, § 1.]
[See § 2600-a.]

CHAPTER 19-A.

BOARD OF DENTAL EXAMINERS AND PRACTICE OF DENTISTRY.

SECTION **2600-a. Repeal.** That chapter nineteen of title twelve of the code be and the same is hereby repealed, and the following enacted in lieu thereof: [28 G. A., ch. 91, § 1.]

SEC. **2600-b. Board of examiners—how appointed—term.** The board of dental examiners shall consist of five practicing dentists, who shall have been engaged in the continuous practice of their profession in this state for the period of five years preceding their appointment, one of whom shall be appointed annually by the governor, and hold office for the term of five years from and after the first day of August following his appointment, and until his successor is appointed. The Iowa state dental society shall, at the request of the governor, submit a list of dentists of recognized ability, from which he may select the member of the board to be appointed. All vacancies occurring in the board shall be filled in like manner, and the appointee hold office for the unexpired term of his predecessor. All members of the present board shall continue in office under this act until the expiration of their respective terms of office. [28 G. A., ch. 91, § 2.]

SEC. **2600-c. Officers—meetings—quorum.** The board shall organize by selecting one of its members as president, and one as secretary and treasurer, and shall meet at least once each year, and at such other times as it may deem necessary, and at such place as it may select. A majority of the board shall constitute a quorum, and its meetings shall at all reasonable times be open to the public. [28 G. A., ch. 91, § 3.]

SEC. **2600-d. Examinations—license—record books—fees.** The board shall at any regular meeting, and may at any special meeting, examine applicants for a license to practice dentistry as to their knowledge and skill in dental surgery, and shall issue to such applicants as are found to be qualified a license authorizing them to practice dentistry. The license

shall be signed by each member of the board, attested by the president and secretary, and have the seal of the board affixed thereto, and shall be presumptive evidence of the right of the holder to practice dentistry in the state. The name, age, nativity, location, number of years of practice of the person to whom a license is given, the number of the license, and the date of the registration thereof shall be entered in a book kept in the office of the secretary of the board, which shall be open to the inspection of the public, under proper restrictions as to its safe keeping, and the number of the book and page containing such entries shall be noted on the face of the license. Each applicant for a license shall be a graduate of a reputable dental school, which is recognized as such by the board of dental examiners, and pay to the board a fee of twenty dollars before a license is issued. [28 G. A., ch. 91, § 4.]

SEC. **2600-e. Testimony—rules and regulations.** The board shall have authority to take testimony in relation to all matters within its jurisdiction, and the presiding officer thereof, or of any committee appointed thereby, may issue subpoenas for, and administer oaths to, witnesses called to testify before the board or such committee; and it may make and adopt all necessary rules, regulations and by-laws not inconsistent with law necessary to enable it to perform the duties and transact the business authorized and required by this act. [28 G. A., ch. 91, § 5.]

SEC. **2600-f. Treasurer to give bond.** The treasurer shall, on assuming the duties of his office, file with the secretary of state, a good and sufficient bond in the penal sum of one thousand dollars, conditioned for the faithful discharge of his duties; and shall keep a full and accurate account of all moneys received by him under the provisions of this act, and pay out the same upon the written order of the president countersigned by the secretary. [28 G. A., ch. 91, § 6.]

SEC. **2600-g. Compensation.** Each member of the board shall receive the sum of five dollars for each day he is actually engaged in the duties of his office, with the actual expenses incurred by him in the discharge of such duties, and the treasurer shall receive a salary not exceeding three hundred dollars per annum for his services as secretary and treasurer, which amounts shall be paid out of the fund received by the board under the provisions of this act, and from no other fund or source. [28 G. A., ch. 91, § 7.]

SEC. **2600-h. Biennial report—auditing committee.** The board shall make a biennial report to the governor of its proceedings, including a full and accurate account of all moneys received and disbursed and shall publish said report with a list of dentists licensed to practice in this state, and the president shall appoint an auditing committee consisting of three practicing dentists of the state who are not members of the board, whose duty it shall be to audit the accounts of the board annually, and make a full report thereof, which report shall accompany the biennial report made by the board to the governor. Any sum of money, remaining after the payment of the compensation and expenses of the members of the board and the salary of the secretary and treasurer, shall be by the treasurer paid into the state treasury on or before the first day of May of each year. [31 G. A., ch. 116, § 4; 28 G. A., ch. 91, § 8.]

SEC. **2600-i. License filed with clerk of district court—license filed in wrong county office—fee—repealed.** [35 G. A., ch. 218, § 9.] [32 G. A., ch. 144; 31 G. A., ch. 116, § 3; 28 G. A., ch. 91, § 9.]

[See § 2600-o8. EDITOR.]

SEC. **2600-j. Penalty—repealed.** [35 G. A., ch. 218, § 9.] [28 G. A., ch. 91, § 10.]

[See § 2600-o8. EDITOR.]

SEC. **2600-k. Who not eligible to appointment on board.** No member of a dental college faculty, or no person connected therewith, shall be eligible to an appointment upon the state board of dental examiners. [28 G. A., ch. 91, § 11.]

SEC. **2600-l. Provisions as to physicians, dental students and registered practitioners.** Nothing herein shall be construed to prevent physicians and surgeons from extracting teeth in the practice of their profession, or to prevent bona fide students of dentistry, in the regular course of their instruction, from operating upon patients at clinics, or under the supervision and in the presence of their preceptors, but no fee or salary for such operations shall be received, either directly or indirectly, by any such student of dentistry. And nothing herein shall be construed to prohibit the practice of dentistry in this state by any practitioner who has been duly registered in accordance with the laws of Iowa existing prior to the passage of this act; or any person who is a member of an incorporated society or community and practicing dentistry solely for and among the members of such community or incorporated society without charge or compensation. [28 G. A., ch. 91, § 12.]

SEC. **2600-m. License for practitioners from other states—fee.** The board of dental examiners may, without examination, issue license to practice to any dentist who shall have been in legal practice in some other state or territory for a period of at least five years, upon the certificate of the board of dental examiners or a like board of the state or territory in which such dentist was a practitioner, certifying his competency and that he is of good moral character and upon payment of twenty-five dollars. Provided, however, that the state from which any practitioner may come shall have, and maintain equal standards of laws regulating the practice of dentistry and recognize exchange certificates issued by the board of examiners of the state of Iowa. [31 G. A., ch. 116, § 1.]

SEC. **2600-n. Change of residence to another state—certificate—fee.** Any duly licensed dentist of the state of Iowa who is desirous of changing his residence to that of another state or territory shall upon application to the board of dental examiners, and the payment of a fee of five dollars receive a certificate which shall attest that he is a duly licensed dentist of the state of Iowa. [31 G. A., ch. 116, § 2.]

SEC. **2600-o. Practice defined—prima-facie evidence.** That all persons shall be regarded as practicing dentistry within the meaning of this act who, for a fee, salary, or reward, paid directly or indirectly, either to himself, or some other person, shall diagnose, or profess to diagnose, or treat, or profess to treat, any of the diseases or lesions[1] of the oral cavity, teeth, gums, or maxillary bones, or who shall extract teeth, or prepare or fill cavities in the human teeth, correct, or attempt to correct, malposition of teeth or jaws, or supply artificial teeth as substitutes for natural teeth, or administer anaesthetics, general or local, or give prophylactic treatments, or engage in any other practice included in the curricula of recognized dental colleges; provided, however, that nothing in this act shall be so construed as to prevent regularly licensed physicians or surgeons from extracting teeth or treating any diseases coming within the province of the practice of medicine or to prohibit bona fide students of dentistry from operating upon patients at clinics in connection with their regular course

of instruction in any reputable dental college. The opening up of an office for the purpose of practicing dentistry, or announcing to the public in any way, of an intention to practice dentistry, or the use of any sign, card, circular, device, or advertisements by any person as a dentist or a dental surgeon, or person skilled in the science of dentistry, or who shall make examination with the intent of performing, or causing to be performed, any operation in the oral cavity, shall be considered prima-facie evidence that such person is engaged in the practice of dentistry. [35 G. A., ch. 218, § 1.]

["lesion" in enrolled bill. EDITOR.]

SEC. **2600-o1. Posting of license and names of those employed.** Every person who shall practice dentistry, either personally or as proprietor, employe, or assistant, shall keep his license in open view in his operating room; and if he owns, operates or controls a dental office, where anyone other than himself is practicing dentistry, he shall also cause to be displayed, and keep in a conspicuous place at the entrance of his place of business, the name of each and every person employed by him in the practice of dentistry at that place. [35 G. A., ch. 218, § 2.]

SEC. **2600-o2. Employment of unlicensed dentist—laboratory work.** It shall be unlawful for any person owning, or conducting a dental office where dental work of any kind is done, or contracted for, to employ, retain, or permit any unlicensed dentist to practice dentistry in such dental office, contrary to the provisions of this act, but nothing in this act shall be construed to prevent a person not a licensed dentist from doing laboratory work. [35 G. A., ch. 218, § 3.]

SEC. **2600-o3. Recording license—forfeiture—change of residence—record.** The license issued to any dentist by this state shall, within six months after its issue, be filed for record with the clerk of the district court in the county where said licensed dentist desires to practice dentistry; and failure to so file such license for record within six months after its issue shall incur a forfeiture thereof, and said license shall not be restored by the board, except upon the payment to the board of the sum of twenty-five dollars as penalty therefor; and should said licensed dentist change his place of business to any other county within the state of Iowa, he shall, within three months, file his license for record with the clerk of the district court of such new residence, and the clerk of the court shall be entitled in all instances to a fee of fifty cents for recording such license. The clerk of the district court shall keep, as a part of the record, an alphabetical index, giving the names of the licensed dentists and a reference to the pages in the record wherein a copy of their licenses can be found. Upon the application of the state board of dental examiners, the clerk of the district court shall furnish said board with information as to whether or not any party named has filed his license in said county, together with the date of said license, and the date of recording, which information shall be furnished without expense to the state board of dental examiners. [35 G. A., ch. 218, § 4.]

SEC. **2600-o4. Violation—penalty.** It shall be unlawful for any person to practice dentistry in this state without having first complied with all the statutory provisions regulating the same, and any person who shall violate any of said statutory provisions shall be deemed guilty of a misdemeanor, and upon conviction thereof, shall be punished by a fine of not less than fifty dollars, nor more than five hundred dollars, or by im-

prisonment in the county jail not more than sixty days, or by both such fine and imprisonment. [35 G. A., ch. 218, § 5.]

SEC. **2600-o5. Revocation for cause—notice—procedure.** The state board of dental examiners may, by a four-fifths vote of its members, revoke the license of any dentist in this state for any of the following causes:

1. The presentation to the board of any diploma, license, or certificate, illegally or fraudulently obtained.

2. The conviction of any felony involving moral turpitude, or chronic or persistent inebriacy, or addiction to the excessive use of narcotics, or if the person holding such license shall be guilty of grossly unprofessional conduct, or of misrepresentation in his advertisements, whereby he deceives and defrauds the public.

In all proceedings for the revocation of a license, the holder thereof shall be given thirty days' notice to prepare for a hearing, and he shall be heard in person, or by counsel, or by both. The president and secretary of the state board of dental examiners shall have the power to administer oaths in the hearing of all matters arising in the course of their duties in such trials, and the state board of dental examiners may take such oral or written proof, for or against the complainant, as it may deem will best present the facts. In all cases of revocation, the holder may appeal to the governor of the state within thirty days after such action by the state board of dental examiners. [35 G. A., ch. 218, § 6.]

SEC. **2600-o6. "Person" defined.** That wherever the word "person" is used in this act, it shall be interpreted to mean corporation, association, company, person, or aggregation of persons, owning, operating, or controlling any room, or rooms, office, or dental parlor. [35 G. A., ch. 218, § 7.]

SEC. **2600-o7. Enforcement—duty of county attorney.** It shall be the duty of the several county attorneys throughout the state to enforce the provisions of this act, and to prosecute those guilty of its violation. [35 G. A., ch. 218, § 8.]

SEC. **2600-o8. Repeal.** That sections twenty-six hundred-i and twenty-six hundred-j of the supplement of the code, 1907, and all other acts and parts of acts inconsistent herewith are hereby repealed. [35 G. A., ch. 218, § 9.]

CHAPTER 19-B.

OF THE PREVENTION OF THE PROCREATION OF HABITUAL CRIMINALS, DEGENERATES AND OTHER PERSONS.

SECTION **2600-p. Unsexing—duty of board of parole.** That it shall be the duty of the state board of parole, with the managing officer and the physician of each public institution in the state, entrusted with the care and custody of criminals, rapists, idiots, feeble-minded, imbeciles, lunatics, drunkards, drug fiends, epileptics, syphilitics, moral and sexual perverts, and diseased and degenerate persons, and they are hereby authorized and directed to, annually or oftener, examine into the mental and physical condition, the records and family history of the inmates of such institutions, with a view of determining whether it is improper or inadvisable to allow any of such inmates to procreate and to judge of such matters. If a majority of them decide that procreation by any of such inmates would produce children with a tendency to disease, deformity, crime, insanity, feeble-mindedness, idiocy, imbecility, epilepsy or alcoholism, or if the

physical or mental condition of any such inmate will probably be materially improved thereby, or if such inmate is an epileptic or syphilitic, or gives evidence, while an inmate of such institution, that he or she is a moral or sexual pervert, then the physician of the institution, or one selected by him, shall perform the operation of vasectomy or ligation of the Fallopian tubes, as the case may be, upon such person. Provided that such operation shall be performed upon every convict or inmate of such institution who has been convicted of prostitution or violation of the law as laid down in chapter two hundred sixteen of the acts of the thirty-third general assembly,[1] or who has been twice convicted of other sexual offenses, including soliciting, as defined in section forty-nine hundred seventy-five-c of the supplement to the code, 1907, or who has been twice convicted of a felony, and each such convict or inmate shall be subjected to this same operation of vasectomy or ligation of the Fallopian tubes, as the case may be, by the physician of the institution, or one selected by him. [35 G. A., ch. 187, § 1; 34 G. A., ch. 129, § 1.]

[1See § 4944-j. EDITOR.]

SEC. **2600-q. Application for operation—restriction against marriage removed.** Those afflicted with syphilis or epilepsy may apply to the board of parole, or any judge of the district court, and upon order of such board or judge, the operation of vasectomy or ligation of the Fallopian tubes may be performed upon such person, and any law restricting the marriage of such persons shall be void and of none effect, in case one of the contracting parties has submitted to such operation and the same was known to both parties before their marriage. [35 G. A., ch. 187, § 2.]

SEC. **2600-r. Annual report.** The board of parole shall make an annual report to the governor of the state, fully covering their proceedings under the authority of this act, and also observations and statistics regarding its benefits. [35 G. A., ch. 187, § 3.]

SEC. **2600-s. Unauthorized operation—penalty.** Except as authorized in this act, every person who shall perform, encourage, assist in or otherwise promote the performance of either of the operations described in section one of this act, for the purpose of destroying the power to procreate the human species, or any person who shall knowingly permit either of such operations to be performed upon such persons, unless the same shall be a medical necessity, shall be fined not more than one thousand dollars, or imprisoned in the penitentiary not to exceed one year, or both. [35 G. A., ch. 187, § 4; 34 G. A., ch. 129, § 2.]

[The title of ch. 187, 35 G. A., is, "An act to repeal the law as it appears in ch. 129, acts of 34 G. A., and to enact a substitute therefor" * * *; but no repeal is shown in the body of the act. In view of the manifest intent of the legislature, and to avoid duplication, the said act of 34 G. A. is not shown herein. EDITOR.]

CHAPTER 20.

OF THE SOLDIERS' HOME.

SECTION **2601. Object—trustees—compensation—bond.** The Iowa soldiers' home, located at Marshalltown, shall be maintained for dependent honorably discharged Union soldiers, sailors and marines, their dependent widows, wives, fathers and mothers, and dependent army nurses,

and shall be under the management and control of five trustees[1] who served in the Union army or navy, who shall be appointed by the governor of the state by and with the consent of the senate, and not more than three of whom shall belong to the same political party, and no two of whom shall be from the same congressional district. No member of the general assembly shall be eligible to the office of trustee. The members of the board shall hold their office for the term of five years, or until their successor shall be appointed and qualified. The compensation allowed shall be four dollars per day for the time necessarily employed, and mileage at the rate of five cents per mile each way over the nearest traveled route. In case of a vacancy in the board of trustees by death or any other cause, the appointing power provided for shall have power to fill the vacancy for the unexpired portion of the term. Three members of the board shall constitute a quorum for the transaction of business: provided that, for the adoption of plans and letting of contracts for buildings, and for the selection of a commandant for said home, the affirmative vote of a majority of the entire board shall be required. Before entering upon his office, each member of the board of trustees shall take and sign an oath and execute a bond in the general sum of ten thousand dollars for the use of the state of Iowa, to be approved by the executive council and filed in the office of secretary of state, conditioned for the faithful performance of his duties. [33 G. A., ch. 164, § 1.] [21 G. A., ch. 58, §§ 2, 4.]

[1]See §§ 2727-a8 and 2727-a9. EDITOR.]

SEC. 2602. **Admission.** All persons named in section twenty-six hundred and one of this act, not having sufficient means for his or her own support, who are disabled by disease, wounds, old age or otherwise, who served in Iowa regiments or batteries, or were accredited to the state of Iowa, or who have been residents of the state for three years next preceding the date of application, shall be eligible to admission into said home. Before admission such person shall file with the officer having charge of such home a certificate signed by the board of supervisors of the county in which such person resides stating that such person is a resident of such county. Such certificate shall be conclusive evidence of the residence of such person in all matters affecting the liability of the county with respect to the expenses of such person in case of insanity or any other cause for which the county may be liable. If the applicant is entitled to admission and is not a resident of the state, a record shall be made thereof on admission. Nothing in this act shall be construed to bar any person from admission who is entitled to such admission under section twenty-six hundred and two of the code. [32 G. A., ch. 145; 21 G. A., ch. 58, § 2.]

SEC. 2602-a. **Members may pay cost of support—pension money.** That chapter one hundred sixty-six of the acts of the thirty-third general assembly is hereby repealed and in lieu thereof is enacted the following:

"It shall be lawful to receive in the soldiers' home persons who have sufficient means for their own support but are otherwise eligible to become members of the home, on payment of the cost of their support, which cost shall be fixed from time to time by the board of control of state institutions. All money paid under the provisions of this act shall be received by the commandant and remitted each month to the treasurer of state and placed to the credit of the support fund of the home. Provided, however, that no person having sufficient means for his or her own support shall be received or permitted to remain in the home unless there be room for all eligible applicants who do not have such means, but pension

money received by any member of the home from the United States government shall not be taken from him for his support in the home." [35 G. A., ch. 16, § 1; 33 G. A., ch. 166, § 1.]

SEC. 2604. **Commandant—inferior officers—vacancy.** The board of trustees shall appoint a commandant to serve during the pleasure of the board, and who shall be one who has an honorable discharge from the United States army or navy, and whose salary shall not exceed two thousand dollars per year, and use and occupancy of the commandant's house with lights, fuel, ice and water, which shall include all allowances. The commandant may appoint, subject to the approval of the board, the adjutant, quartermaster and surgeon, together with such assistant surgeons as may, from time to time, be required, and the said adjutant and quartermaster shall be of like qualifications, as to service in the army or navy, with himself, and also a matron and other necessary subordinate employes, and they shall be subject to removal by him for misconduct or incompetency, but in the case of every removal a detailed statement of the cause shall be reported at once to the board of trustees and subject to its approval. The board shall fix the compensation to be paid the subordinate officers and employes of the home, not to exceed that paid for like services in similar institutions. Provided that the adjutant, quartermaster and surgeon shall also be furnished without charge the houses erected by the state and now occupied by such officers, together with lights, heat, fuel, ice and water.

If at any time a vacancy shall exist in the office of commandant, adjutant, quartermaster or surgeon and a suitable person who has an honorable discharge from the United States army or navy is not available for the office, it shall be lawful to appoint any other person otherwise properly qualified to fill the vacancy. [35 G. A., ch. 219, § 1; 33 G. A., ch. 165, § 1.] [31 G. A., chs. 117, 118; 29 G. A., ch. 112, § 1; 29 G. A., ch. 111, § 1; 21 G. A., ch. 58, § 16.]

SEC. 2606. **Rules for admission.** That section twenty-six hundred and six of the supplement to the code, 1907, is hereby repealed, and there is hereby enacted in lieu thereof the following:

"The board of control of state institutions may receive into the home, under such rules and regulations, and subject to such conditions as said board may prescribe, the dependent persons not having sufficient means or ability to support themselves, designated as follows:

1. Honorably discharged Union soldiers, sailors and marines.

2. Women who, prior to the year eighteen hundred ninety married honorably discharged Union soldiers, sailors or marines, and who have ceased to be the wives of such soldiers, sailors or marines by reason of their death or because divorced from them without fault on the part of the wives, and a subsequent marriage shall not deprive such women of their right to the benefits of the home, nor shall such right depend upon the presence of the husband in the home as a member of it.

3. Army nurses, and the fathers and mothers of honorably discharged Union soldiers, sailors and marines.

The board may permit husbands and wives to occupy together cottages or other quarters on the home grounds." [35 G. A., ch. 220, § 1.] [31 G. A., ch. 119; 24 G. A., ch. 95, §§ 4, 5.]

SEC. 2606-a. **Restriction as to pension money.** The board of control shall not adopt or enforce any rule in the Iowa soldiers' home which will deprive any member of the home of any part of the pension money

which such member receives from the United States government, except as provided for in this act. [28 G. A., ch. 92, § 1.]

SEC. **2606-b. Penalty for intoxication.** Any member of the home, who shall, while a member of the home, be convicted twice by any court of justice, of violating the criminal statutes of the state, or who shall twice be found guilty by the commandant, or a court martial, if the member so elect, of intoxication or other misdemeanors, shall be required to deposit the money received from the United States government as a pension, with the commandant, immediately on the receipt of his pension check. In cases where such pensioner has a wife, child, or parent dependent upon him for support, at least one half of such pension money shall be sent to such dependent person, and if there be two or more dependent relatives the pensioner may determine to whom one half of the pension received by him shall be sent. The other half of such persion money, as well as all money received from such pensioners as have no dependent relatives, shall be kept on deposit by the commandant for such pensioner, subject to the direction of the board of control, and the money so deposited may be paid out with the consent of the depositor, subject to the approval of the commandant under such rules as the board of control may provide; but in case the pensioner abstain from intoxication and is not guilty of further violation of the criminal statutes of the state for a period of ten months from the date of conviction or of intoxication, as hereinbefore provided, he shall be entitled to receive two dollars for the eleventh month and four dollars for the twelfth month following such conviction, from his said pension; and if, during these two months, he shall conduct himself in an orderly and sober manner, he shall then have the same control of his pension money as though he had not been twice convicted of violating the criminal statutes, or of being intoxicated as provided in this act. In case any depositor is discharged from the said home, any balance of such deposit in the hands of the commandant, after his ticket has been purchased, shall be paid to such pensioner thirty days after his discharge, and in the case of the death of such depositor the money shall be paid to his heirs, legatees, or legal representatives. No assignment of the money deposited with the commandant, or any claim therefor shall be valid. [30 G. A., ch. 103; 29 G. A., ch. 169, § 1; 28 G. A., ch. 92, § 2.]

SEC. **2606-c. Pension money—when deposited.** Section three of said chapter [28 G. A., ch. 92] is hereby repealed, and the following is enacted in lieu thereof:

"Each member of the home who receives a pension, and who has a wife or minor children, shall deposit with the commandant forthwith on receipt of his pension check one half of the amount thereof, which shall be sent at once to the wife if she be dependent upon her own labor or others for support, or, if there be no wife, to the guardian of the minor child or children if dependent upon others for support. Provided, however, that the commandant if satisfied that the wife has deserted her husband, or is of bad character, or is not dependent upon others for support, may pay the money deposited as aforesaid to the guardian of the dependent minor child or children." [29 G. A., ch. 169, § 2; 28 G. A., ch. 92, § 3.]

SEC. **2606-d. Acts in conflict repealed.** All acts and parts of acts, in conflict with the provisions of this act, are hereby repealed. [28 G. A., ch. 92, § 4.]

SEC. **2608. Annual appropriation—support.** For the general support of said home, there is hereby appropriated the sum of fifteen dollars

per month for each member, and ten dollars per month for each officer and employe not a member of the home, or so much thereof as may be necessary, to be estimated by the average number present for the preceding quarter, these appropriations to be drawn monthly on the requisition of the board of trustees of the home in the usual manner, and then only in such amounts as the wants of the home may require. If the average number of members shall be less than eight hundred fifty in any month, the auditor of state and treasurer of state shall credit the home with the sum of twelve thousand seven hundred fifty dollars for that month in addition to the monthly allowance for each officer and employe, and the sums so credited shall be drawn from the state treasury in the same manner and for the same purposes as the regular monthly per capita allowance is drawn. [35 G. A., ch. 221, § 1.] [32 G. A., ch. 146; 29 G. A., ch. 113, § 1; 27 G. A., ch. 72, § 1; 23 G. A., ch. 58; 22 G. A., ch. 121.]

CHAPTER 21.

OF REGENTS AND TRUSTEES OF STATE INSTITUTIONS.

[For abolishment of boards of regents and trustees see §§ 2682-g, 2727-a8 and 2727-a9. EDITOR.]

SECTION **2617. Compensation—repealed.** [33 G. A., ch. 170, § 20.]
[See § 2682-v. EDITOR.]

SEC. **2618. Claims for compensation and mileage—repealed.** [33 G. A., ch. 170, § 20.]
[See § 2682-v. EDITOR.]

SEC. **2619. Blanks—repealed.** [33 G. A., ch. 170, § 20.]
[See § 2682-v. EDITOR.]

SEC. **2620. Report of auditor—repealed.** [33 G. A., ch. 170, § 20.]
[See § 2682-v. EDITOR.]

TITLE XIII.

OF EDUCATION.

CHAPTER 1.

OF THE SUPERINTENDENT OF PUBLIC INSTRUCTION.

SECTION **2621. Office—records—deputy—repealed.** [35 G. A., ch. 103, § 9.]

[See § 2671-i. The title of the act includes the following: "and to repeal ch. 1 of title 13 of the code * * and to enact a substitute therefor." EDITOR.]

SEC. **2622. Duties—teachers' conventions and institutes—repealed.** [35 G. A., ch. 225, § 1; 35 G. A., ch. 103, § 9.] [31 G. A., ch. 3, § 6; 28 G. A., ch. 94, § 1.]

[See § 2627-i. EDITOR.]

SEC. **2623. Opinions—appeals—repealed.** [35 G. A., ch. 103, § 9.]

[See editorial note at § 2621.]

SEC. **2624. Publication of school laws—repealed.** [35 G. A., ch. 103, § 9.]

[See editorial note at § 2621.]

SEC. **2625. Reports—repealed.** [35 G. A., ch. 103, § 9.] [31 G. A., ch. 121.]

[See § 2627-i. EDITOR.]

SEC. **2626. Appropriations for institutes—repealed.** [35 G. A., ch. 103, § 9.]

[See editorial note at § 2621.]

SEC. **2627. Salary and expenses—repealed.** [35 G. A., ch. 103, § 9.] [32 G. A., ch. 2, § 5; 28 G. A., ch. 94, § 2.]

[See § 2627-i. EDITOR.]

SEC. **2627-a. Appointment by governor—term—vacancy.** The governor shall, during the session of the thirty-sixth general assembly and every four years thereafter, nominate and with the consent of two thirds of the members of the senate in executive session, appoint a superintendent of public instruction, whose term of office shall commence on the first secular day of July next following his appointment, and shall continue for the period of four years, and until his successor is appointed and qualified; and the term of office of the superintendent of public instruction in office at the taking effect of this act is hereby extended until the appointment and qualification of such officer under this act. Vacancies at any time occurring in said office shall be filled by appointment by the governor, but no person so appointed shall hold office beyond the end of the session of the legislature next ensuing, unless approved by the senate as above provided. [35 G. A., ch. 103, § 1.]

SEC. **2627-b. Qualifications—oath.** The superintendent of public instruction shall, at the time of his appointment, be a graduate of an accredited university or college, or of a four-year course above high school grade in an accredited normal school, and shall have had at least five years' experience as a teacher or school superintendent. He shall, before entering upon his duties, take and subscribe the constitutional oath of office, which shall be filed in the office of the secretary of state. [35 G. A., ch. 103, § 2.]

SEC. **2627-c. General supervision—duties.** The superintendent of public instruction shall have general supervision and control over the rural, graded and high schools of the state, and over such other state and public schools as are not under the control of the state board of education, or board of control of state institutions, and his office shall be known as the department of public instruction. It shall be his duty:

1. *Inspection.* To ascertain, so far as practicable, by inspection or otherwise, the conditions, needs and progress of the schools belonging to his department.

2. *Recommendations.* To suggest, through public addresses, pamphlets, bulletins, and by meetings and conferences with school officers, teachers, parents, and the public generally, such changes and improvements as he may think desirable, and may publish and distribute such views and information as he may deem important.

3. *Promotion of interest in education.* To endeavor to promote among the people of the state a proper interest in the general subject of education, including industrial and commercial education, agriculture, manual and vocational training, domestic science and continuation work.

4. *Classification.* To classify and define the various schools belonging to his department, and to formulate suitable courses of study therefor, and to publish and distribute such classifications and courses of study.

5. *Officers' and teachers' reports—forms.* To prescribe the reports, both regular and special, which shall be made by public school officers, superintendents and teachers, and other persons or officers having the custody or control of public school funds or property, and to prepare suitable forms therefor, and to furnish blanks for such reports as are to be made to him.

6. *Days for special observance.* To publish and distribute from time to time leaflets and circulars relative to such days and occasions as he may deem worthy of special observance in the public schools.

7. *Appeals—opinions.* To examine and determine all appeals made to him according to law and the rules relating thereto, and to prescribe rules of practice therefor not inconsistent with law. He shall also render written opinions upon questions submitted by school officers pertaining to their duties.

8. *Reports.* He shall, on the first day of January of each year, report to the auditor of state the number of persons of school age in each county. He shall report biennially to the governor the conditions of the schools under his supervision, including the number and kind of school districts, the number of schools of each kind, the number and value of schoolhouses, the enrollment and attendance in each county for the previous year, any plans matured or measures proposed for the improvement of the public schools, and such financial and statistical information as may be of public importance; he may also include such general information relating to edu-

cational affairs and conditions within the state or elsewhere, as he may deem necessary.

9. *Plans and specifications for buildings.* He shall, when deemed necessary, cause to be prepared and published a pamphlet containing suitable plans and specifications for public school buildings, including the most approved means and methods of heating, lighting and ventilating the same, together with information and suggestions for the proper and economical construction thereof. It is hereby made the duty of the state architect to render such assistance and to perform such services in preparing such plans and specifications as may be requested by the superintendent of public instruction.

10. *Institutes.* He shall appoint county educational meetings or institutes to be held in each county once each year and not more than twice, and shall designate the time and place for holding them. The program therefor, and the instructors and lecturers therein, shall be subject to his approval.

11. *Examinations.* He shall prepare and supply questions for the examination of applicants for teachers' certificates and for the examination of pupils completing the eighth grade in the rural schools. [35 G. A., ch. 103, § 3.]

SEC. **2627-d. Office—records—clerks—supplies.** The superintendent of public instruction shall have an office in the capitol. He shall file and preserve all reports, documents and correspondence that may be of permanent value, which shall be open to inspection under reasonable conditions, by any citizen of the state. He shall keep a record of the business transacted by him, and shall turn over to his successor all records, papers, reports, documents, books and other state property pertaining to his office. He shall be furnished by the executive council with sufficient office room and clerical and stenographic help, and with all necessary books, blanks, stationery, printing, postage and office supplies, and with the reports of the supreme court of the state. [35 G. A., ch. 103, § 4.]

SEC. **2627-e. School laws—publication.** He shall every four years, if deemed necessary, cause to be printed in book form all school laws then in force, with such forms, rulings and decisions, and such notes and suggestions as may aid school officers in the proper discharge of their duties; a sufficient number of copies shall be sent to the county superintendent of each county to supply the school officers, directors, and superintendents therein. He may cause to be printed in pamphlet form after each session of the general assembly, any amendments or changes in the school laws with necessary notes and suggestions, which shall be distributed as above provided. [35 G. A., ch. 103, § 5.]

SEC. **2627-f. Reports of funds or school property—delinquency.** He may require from time to time reports under oath from all officers and persons who have any authority over, or who have any duties in connection with, public school affairs, or who have, or who have lately had, the custody or control of any public school funds or property. He shall furnish the proper blanks for such reports, and any such officer or person who unreasonably neglects or refuses to make a report required by the superintendent of public instruction shall be deemed guilty of a misdemeanor. [35 G. A., ch. 103, § 6.]

SEC. **2627-g. Deputy—chief clerk—inspectors.** He may appoint a deputy whose appointment must be approved by the governor of the state. The qualifications of the deputy shall be the same as required by section two

of this act. The deputy shall qualify in like manner as his principal and, in the absence or inability of the superintendent, shall perform the duties of the office. He shall also appoint a chief clerk and such regular inspectors of the public schools of the state, including rural, graded and high schools, as he may deem necessary, not exceeding three. [35 G. A., ch. 103, § 7.]

SEC. **2627-h. Salaries—expenses.** From and after the taking effect of this act the salary of the superintendent of public instruction shall be four thousand dollars per annum; the salary of his deputy shall be twenty-five hundred dollars per annum; the salary of the regular inspectors in the department of public instruction shall be two thousand dollars per annum each; the salary of the chief clerk shall be fifteen hundred dollars per annum, all such salaries to be paid monthly upon the warrant of the state auditor. The superintendent of public instruction and his deputy and the regular inspectors in his department shall also receive their actual necessary traveling expenses incurred in the performance of their official duties, to be allowed upon an itemized and verified account filed with and approved by the executive council and the state auditor who shall draw his warrant on the state treasurer for the amount allowed. [35 G. A., ch. 103, § 8.]

SEC. **2627-i. Repeal.** Chapter one of title thirteen of the supplement to the code, 1907, as amended, relating to the office of public instruction is hereby repealed and all other acts and parts of acts inconsistent with the provisions of this act are hereby repealed in so far as they may be inconsistent herewith. [35 G. A., ch. 103, § 9.]

CHAPTER 2.

OF THE BOARD OF EDUCATIONAL EXAMINERS.

SECTION **2629. Meetings—examinations.** The board shall meet for the transaction of business at such times and places as the president may direct, and shall annually hold at least two public examinations of teachers, to be conducted by a member or the secretary of the board or by such qualified person or persons as the board may select. All examinations shall be conducted in accordance with rules and regulations adopted by the board, not inconsistent with the laws of the state, and a record shall be kept of all of its proceedings. It may issue state certificates and state diplomas to such teachers as are found upon examination to possess a good moral character, thorough scholarship and knowledge of didactics, with successful experience in teaching, or with such other training and qualifications as the board may require. The examination for certificates and diplomas shall cover orthography, reading, writing, arithmetic, geography, English grammar, bookkeeping, physiology, history of the United States, algebra, botany, natural philosophy, drawing, civil government, constitution and laws of the state, and didactics; those for diplomas, in addition to the foregoing, geometry, trigonometry, chemistry, zoology, geology, astronomy, political economy, rhetoric, English literature, general history, and such other studies as the board may require. [32 G. A., ch. 6, § 2; 29 G. A., ch. 114, § 1; 28 G. A., ch. 95, § 1; 19 G. A., ch. 167, §§ 2–4.]

SEC. **2630. Certificates and diplomas—repealed.** [28 G. A., ch. 96, § 1.]

[See § 2630-a.]

SEC. **2630-a. Repeal.** Section twenty-six hundred thirty of the code is hereby repealed, and the following enacted in lieu thereof: [28 G. A., ch. 96, § 1.]

SEC. **2630-b. Special certificates.** The educational board of examiners may issue a special certificate to any teacher of music, drawing, penmanship, or other special branches, or to any primary teacher, of sufficient experience, who shall pass such examination as the board may require in the branches, and methods pertaining thereto, for which the certificate is sought. Such certificates shall be designated by the name of the branch and shall not be valid for any other department or branch. The board shall keep a complete register of all persons to whom certificates or diplomas are issued. [28 G. A., ch. 96, § 2; 23 G. A., ch. 22.]

SEC. **2630-c. Validation authorized.** The state educational board of examiners is hereby empowered to validate certificates issued by state departments of education in other states, where such certificates were issued upon evidence of scholarship and experience equivalent to that required for like certificates under the laws of this state. Such validated certificate shall authorize the holder to teach in any public school in the state for five years after the date of such validation. [34 G. A., ch. 130, § 1.] [32 G. A., ch. 149.]

[Acts in conflict with § 1, ch. 130, 34 G. A., are repealed by § 2634-h3. EDITOR.]

SEC. **2631. How long valid—revocation—fees.** A state certificate shall authorize the holder to teach in any public school in the state for five years thereafter, and a diploma shall confer such authority for life; but any certificate or diploma may be revoked by the board for sufficient cause, or such cause as would, if known at the time, have prevented issuance thereof, provided the holder of such certificate or diploma shall have due notice, and shall be allowed to be present and make his defense. For each certificate issued the applicant shall pay two dollars, and for each diploma five dollars, which may be required before the examination is commenced. All moneys obtained from this source shall be paid into the state treasury. [32 G. A., ch. 6, § 3; 19 G. A., ch. 167, §§ 5, 6.]

SEC. **2632. Registration—repealed.** [31 G. A., ch. 122, § 1.]

[See § 2734-a.]

SEC. **2634. Compensation—repealed.** [27 G. A., ch. 73, § 1.]

[See § 2634-a repealing the same section number of the 1902 supplement which contained a repeal of code § 2634. EDITOR.]

SEC. **2634-a. Compensation—secretary—employes—salaries.** That section twenty-six hundred thirty-four-a of the supplement to the code [1902] be and the same is hereby repealed and the following enacted in lieu thereof:

"Each member of the board shall receive for the time actually employed in such service, his actual necessary expenses, and those not salaried officers or employes of the state or any institution thereof shall be paid in addition, three dollars per day. The board shall have power to employ a secretary and prescribe his duties. He shall receive a salary not exceeding one hundred dollars per month and actual necessary expenses while engaged in the performance of his duties at places other than the capitol. The board shall have power to employ such persons as are necessary to assist in examinations and in reading answer papers and for clerical work and other necessary assistance. Persons so employed shall receive not

to exceed fifty cents per hour for the time actually employed and actual traveling expenses to and from the place where their services are required. All expenditures authorized to be made under the provisions of chapter two of title thirteen of the code and of the supplement to the code [1902] and amendments thereto and under the provisions of chapter one hundred twenty-two, acts of the thirty-first general assembly, and under the provisions of this act shall be certified by the chairman of the educational board of examiners to the executive council for payment. If found correct the executive council shall cause same to be paid from any funds paid into the state treasury under the provisions of section twenty-six hundred thirty-one of the code and chapter one hundred twenty-two, acts of the thirty-first general assembly, and amendments thereto." [32 G. A., ch. 6, § 4; 27 G. A., ch. 73, § 1; 25 G. A., ch. 36; 19 G. A., ch. 167, § 8.]

SEC. **2634-a1. Printing.** This act shall be construed as giving legal authority to the educational board of examiners to obtain all the necessary printing for the performance of their duties, as required by law, in the same manner as the printing is provided for state officers. [32 G. A., ch. 6, § 5.]

SEC. **2634-b. Repeal.** Sections twenty-six hundred thirty-four-b, twenty-six hundred thirty-four-c and twenty-six hundred thirty-four-d of the supplement to the code, 1907, are hereby repealed and the following enacted in lieu thereof: [34 G. A., ch. 131, § 1.] [29 G. A., ch. 115, § 1.]

[See § 2634-b1 to § 2634-b8 inclusive. EDITOR.]

SEC. **2634-b1. Training of teachers for rural schools—normal courses in certain high schools.** That section two of chapter one hundred thirty-one of the acts of the thirty-fourth general assembly be and the same is hereby repealed and the following enacted in lieu thereof:

For the purpose of increasing the facilities for training teachers for the rural schools, by requiring a review of such common branches as may be deemed essential by the superintendent of public instruction and for instruction in elementary pedagogy and the art of teaching elementary agriculture and home economics, provision is hereby made for normal courses of study and training in such four-year high schools as the superintendent of public instruction may designate, provided that such high schools shall be selected and distributed with regard to their usefulness in supplying trained teachers for the rural schools of all portions of the state, and with regard to the number of teachers required for rural schools in each portion of the state. It is further provided that where a township high school or a consolidated school organized in accordance with the provisions of chapter one hundred forty-three[1] of the acts of the thirty-fourth general assembly can meet the requirements of the superintendent of public instruction, it shall be given preference over a city high school. [35 G. A., ch. 242, § 1; 34 G. A., ch. 131, § 2.]

[[1]§ 2794-a herein. EDITOR.]

SEC. **2634-b2. Private and denominational schools.** Private and denominational[1] schools are eligible to the provisions of this act, except as to receiving state aid. [34 G. A., ch. 131, § 3.]

[[1]"denomination" in enrolled bill. EDITOR.]

SEC. **2634-b3. State aid—reports—limitations.** That section four of chapter one hundred thirty-one of the acts of the thirty-fourth general assembly be and the same is hereby repealed and the following enacted in lieu thereof:

Each high school approved under the provisions of this act shall receive state aid to the amount of seven hundred fifty dollars per annum, payable in two equal installments at the close of each semester as hereinafter provided. The superintendent of each approved training school shall at the close of each semester file such report with the superintendent of public instruction as said officer may require. Upon receipt of a satisfactory report, the superintendent of public instruction shall issue a requisition upon the auditor of state for the amount due the school corporation of said high school for said semester, whereupon the auditor of state shall draw a warrant on the state treasury payable to said school corporation for the amount of said requisition and forward the same to the secretary of said school corporation. No high schools shall be approved as entitled to state aid unless a class of ten or more shall have been organized, maintained and instructed during the preceding semester in accordance with the provisions of this act and the regulations of the superintendent of public instruction. [35 G. A., ch. 242, § 2; 34 G. A., ch. 131, § 4.]

[See § 2794-f respecting high school in consolidated district. EDITOR.]

SEC. **2634-b4. Inspector—salary—expenses.** The appropriation provided by this act for instruction of pupils in high schools in the science and practice of rural school teaching and the teaching of elementary agriculture and home economics, may be expended in part for inspection and supervision of such instruction by the superintendent of public instruction and by such person as he may designate, and the expense of such inspection and supervision shall be paid out of said appropriation on vouchers certified by the superintendent of public instruction. In accordance with the foregoing provisions of this section, the superintendent of public instruction is authorized to appoint an inspector of normal training in high schools and private and denominational schools at a salary of not to exceed two thousand dollars per year and necessary traveling expenses while in the discharge of his duties. [34 G. A., ch. 131, § 5.]

SEC. **2634-b5. Admission—course of instruction—rules—requirements for graduation.** The superintendent of public instruction shall prescribe the conditions of admission to the normal training classes, the course of instruction, the rules and regulations under which such instruction shall be given and the requirements for graduation subject to the provisions of this act. [34 G. A., ch. 131, § 6.]

SEC. **2634-b6. Examination for graduation—fee.** On the first Friday in February and the Wednesday and Thursday immediately preceding and on the second Friday in May and the Wednesday and Thursday immediately preceding, each year, in each high school approved under this act, an examination for graduation from the normal training course shall be conducted under such rules as the state board of examiners shall prescribe, but the county superintendent of the county in which an approved high school may be located shall be designated as the conductor of said examination. Each applicant for a certificate of graduation shall pay a fee of one dollar, one half of which shall be paid into the state treasury on or before the first day of the succeeding month, and one half of which shall be paid into the institute fund of the county wherein the examination is held. [34 G. A., ch. 131, § 7.]

SEC. **2634-b7. Certificate—license to teach—renewal.** A certificate of graduation from the normal training course provided for in this act shall be issued by the superintendent of public instruction, and shall be a valid license to teach in any public school in the state for a term of two

years, subject to registration as provided for other teachers' certificates. At the expiration of said certificate the superintendent of public instruction is authorized to renew it for a period of three years under the same conditions that apply to the renewal of first grade uniform county certificates. [35 G. A., ch. 242, § 4; 34 G. A., ch. 131, § 8.]

SEC. **2634-b8. Appropriation.** That section nine of chapter one hundred thirty-one of the acts of the thirty-fourth general assembly be and the same is hereby repealed and the following enacted in lieu thereof:

For the purpose of carrying out the provisions of this act, there is hereby appropriated out of any moneys in the state treasury, not otherwise appropriated, the sum of one hundred thousand dollars, available for the period ending June thirtieth, nineteen hundred fourteen, and the sum of one hundred twenty-five thousand dollars annually thereafter. [35 G. A., ch. 242, § 3; 34 G. A., ch. 131, § 9.]

SEC. **2634-c. Accredited schools—annual visitations—repealed.** [34 G. A., ch. 131, § 1.] [29 G. A., ch. 115, § 2.]

[See § 2634-b. EDITOR.]

SEC. **2634-d. Certificates—fees—repealed.** [34 G. A., ch. 131, § 1; 34 G. A., ch. 130, § 2.] [29 G. A., ch. 115, § 3.]

[See § 2634-b. EDITOR.]

SEC. **2634-e. Record of students—sworn statement.** At the close of each school year, the principal or superintendent of each accredited school shall file with the board of examiners a sworn statement, showing the name, age, post-office address, studies and attendance of each of the students in his school taking the prescribed teachers' course. [29 G. A., ch. 115, § 4.]

SEC. **2634-f. Graduates from accredited colleges.** That the state educational board of examiners may accept graduation from the regular and collegiate courses in the state university, state teachers college, state normal schools, and the state college of agriculture and mechanic arts, and from other institutions of higher learning in the state having regular and collegiate courses of equal rank, as evidence that a teacher possesses the scholarship and professional fitness for a state certificate. [35 G. A., ch. 226, § 1.] [32 G. A., ch. 148, § 1.]

SEC. **2634-f1. Graduates of accredited colleges—same recognition.** Graduates of colleges and schools located in other states than Iowa, having regular and collegiate courses of equal rank with the accredited colleges and schools of Iowa, may be given the same recognition as provided in section one of this act, providing they file with the board of educational examiners evidence of at least two years' successful experience as a teacher, principal or superintendent of schools. [35 G. A., ch. 226, § 2.]

SEC. **2634-g. State certificates granted.** That in all cases where such graduation shows the extent and quality of scholarship that is required by section twenty-six hundred twenty-nine of the supplement to the code, [1902] and when the teacher possesses a good moral character and satisfies the board of being professionally qualified, there shall be granted by the said board of examiners a state certificate valid for five years to teach in any public school in the state. [32 G. A., ch. 148, § 2.]

SEC. **2634-h. Renewal for life—fee.** That section twenty-six hundred thirty-four-h of the supplement to the code, 1907, is hereby repealed and the following enacted in lieu thereof:

"All certificates referred to in sections twenty-six hundred twenty-nine, twenty-six hundred thirty-b, twenty-six hundred thirty-c, twenty-six hun-

dred thirty-four-d, twenty-six hundred thirty-four-f, and twenty-six hundred thirty-four-g, of the supplement to the code, 1907, shall be renewed for life by the state board of educational examiners upon the payment of a fee of five dollars and proof of at least five years' successful teaching, three of which shall have been during the time the said certificate (with renewals) has been in force." [34 G. A., ch. 130, § 3.] [32 G. A., ch. 148, § 3.]

[Acts in conflict with § 3, ch. 130, 34 G. A., are repealed by § 2634-h3. EDITOR.]

SEC. **2634-h1. Conditions for renewal under certain sections—fee.** All certificates referred to in sections twenty-seven hundred thirty-four-d and twenty-seven hundred thirty-four-e of the supplement to the code, 1907, in section twenty-seven hundred thirty-four-g of the supplement to the code, 1907, as amended by chapter one hundred eighty-one of the acts of the thirty-third general assembly and by section five of this act, and in section six of this act, shall be renewed for life by the state board of educational examiners upon compliance by the holder with the following conditions:

1. The applicant shall show by testimonials from county or city superintendents or from the principals having immediate supervision of his school work and from a member of the local school board that he has had at least five years' continuous successful teaching experience (which may have been before or after the passage of this act), at least three of which shall have been immediately prior to the time validation is sought and under the grade of certificate for which such validation is desired;

2. The standing of such applicant in the several branches shown upon his certificate shall average not less than eighty-five per cent. and in no branch shall the per cent. be less than eighty per cent., provided that in case the standing is less than the per cent. required, either average or special, the holder of the certificate may, at any of the times provided in section twenty-seven hundred thirty-four-c of the supplement to the code, 1907, take an examination in any branch or branches he may desire and the per cent. then received shall be entered upon his certificate;

3. The applicant shall furnish proof of professional study during the entire five-year period such as is made necessary in the case of term renewals of certificates.

Upon the issue of a life certificate as herein contemplated, the applicant shall pay a fee of five dollars to be turned into the state treasury. [34 G. A., ch. 130, § 7.]

[Acts in conflict are repealed by § 2634-h3. EDITOR.]

SEC. **2634-h2. Lapse of certificate.** All life certificates provided for in this act shall lapse provided the holder shall not teach during a period of five successive years. [34 G. A., ch. 130, § 10.]

[Acts in conflict are repealed by § 2634-h3. EDITOR.]

SEC. **2634-h3. Acts in conflict repealed.** All acts and parts of acts inconsistent with the provisions hereof are hereby repealed. [34 G. A., ch. 130, § 13.]

CHAPTER 3.

OF THE STATE UNIVERSITY.

SECTION **2635. Board of regents—powers—repealed.** [33 G. A., ch. 170, § 20.]

[See § 2682-v.]

SEC. **2636. Secretary—repealed.** [33 G. A., ch. 170, § 20.]

[See § 2682-v.]

SEC. **2640-a. Homeopathic medical college—additional chairs.** The state board of education is hereby authorized and directed to establish three additional chairs in the college of homeopathic medicine of the state university of Iowa, to wit: a chair of surgery, a chair of ophthalmology, otology, rhinology and laryngology and a chair of gynecology and obstetrics; to elect professors for such chairs; to fix compensation for such professors and to do such other acts as are necessary and proper for the execution of the powers and duties hereby conferred upon them. [35 G. A., ch. 223, § 1.]

SEC. **2641. Reports.** On the first day of October preceding the meeting of the general assembly, the president of the university shall make a report to the board of regents, which shall exhibit the condition and progress of the institution, the different courses of study pursued, the branches taught, the means and methods of instruction adopted, the number of students, their names, classes, and residences, with such other matters as he may regard important. The board of regents, on the fifteenth day of October in each even-numbered year, shall make report to the governor, which report shall show the number of professors, tutors, and other officers, the compensation of each, the condition of the university fund, the income received therefrom, the amount of expenditures with the items thereof, and such other information and such recommendations as it shall regard important. [31 G. A., ch. 123; 22 G. A., ch. 82, § 29; C. '73, §§ 1600–1.]

SEC. **2642. Executive committee—repealed.** [33 G. A., ch. 170, § 20.]

[See § 2682-v.]

SEC. **2644. Tax for buildings.** For the purpose of providing for the erection, improvement and equipment of such necessary buildings as shall be determined upon by the board of regents of the state university, there shall be levied a special tax of one tenth of a mill on the dollar upon the assessed valuation of the taxable property of the state for the erection of buildings for the state university; and the proceeds thereof shall be carried into the treasury to the credit of said state university, said levy to commence with the levy made by the executive council in August, eighteen hundred ninety-six, and the same levy shall be made annually after said first levy for the five successive years thereafter. Any amount in excess of the sum of fifty-five thousand dollars raised by any one of such levies shall be paid into the state treasury. The money realized from such levy shall be held by the treasurer of state, and drawn as provided by law. The amount so realized by said levies shall be in lieu of all appropriations for the erection of buildings for said state university during said period of six years. The board of regents or managing board of the state university shall have authority to expend from time to time in the purchase of books for the university library not to exceed forty-one thousand nine hundred dollars in the aggregate, and warrants shall be issued therefor, payable when the

additional year's tax herein authorized is collected. There shall also be paid out of said additional year's tax the sum of thirteen thousand one hundred dollars expended in restoring the burned library building and repairing and replacing apparatus injured and destroyed, and in preserving the damaged books and property and warrants shall be issued therefor. [27 G. A., ch. 75, §§ 1, 2; 26 G. A., ch. 114.]

SEC. **2644-a. Repeal.** That chapter ninety-seven of the acts of the twenty-eighth general assembly of the state of Iowa is hereby repealed. [29 G. A., ch. 171, § 1; 28 G. A., ch. 97.]

SEC. **2644-b. Levy of special tax—purposes—how drawn.** For the purpose of providing for the erection, repair and improvement of such necessary buildings as shall be determined upon by the board of regents of the state university, there shall be levied annually for five years a special tax of one fifth of a mill on the dollar upon the assessed valuation of the taxable property of the state, and the proceeds thereof shall be carried into the treasury to the credit of the said state university. Said levy shall be first made with the levy made for state purposes in the year nineteen hundred and two, and the same levy shall be made annually for the four successive years thereafter. The money realized from such levy for said university shall be held by the treasurer of the state for the purposes hereinbefore provided and drawn upon requisition of the board of regents. The funds to be realized from the tax levies herein provided for shall not be anticipated by issuing warrants or other obligations of the state. [29 G. A., ch. 171, § 2.]

SEC. **2644-c. Colonel of cadets.** That the commandant and instructor of military science and tactics in the Iowa state university, the college of agriculture and mechanic arts and the state normal school be given the rank of colonel of cadets, and the governor of the state of Iowa is hereby authorized to issue commissions therefor, upon the request of the president of such educational institution. [29 G. A., ch. 116, § 1.]

CHAPTER 4.

OF STATE COLLEGE OF AGRICULTURE AND MECHANIC ARTS.

SECTION **2646. Board of trustees—repealed.** [33 G. A., ch. 170, § 20.] [27 G. A., ch. 76, § 1.]

[See § 2682-v. EDITOR.]

SEC. **2647. Powers—repealed.** [33 G. A., ch. 170, § 20.]

[See § 2682-v. EDITOR.]

SEC. **2650. Annual meetings—fiscal year—report—repealed.** [33 G. A., ch. 170, § 20.] [27 G. A., ch. 76, § 2.]

[See § 2682-v. EDITOR.]

SEC. **2651. President—repealed.** [33 G. A., ch. 170, § 20.]

[See § 2682-v. EDITOR.]

SEC. **2652. Secretary—repealed.** [33 G. A., ch. 170, § 20.]

[See § 2682-v. EDITOR.]

SEC. **2653. Auditing committee—repealed.** [33 G. A., ch. 170, § 20.]

[See § 2682-v. EDITOR.]

SEC. 2667. **Loans.** It may loan said funds upon approved real estate security, subject to the following regulations:

1. Each loan shall be for a term not exceeding ten years, at a rate of interest to be fixed by said board, payable annually;

2. Each loan shall be secured by a mortgage paramount to all other liens upon improved farm lands in the state, the loan not to exceed fifty per cent. of the cash value thereof, exclusive of buildings;

3. Principal and interest shall be payable to the order of the board at the office of the state treasurer, the notes and mortgages to provide for the payment by the borrower of all expenses, attorney fees and costs incurred in collecting the same;

4. A register containing a complete abstract of each loan, and showing its actual condition, shall be kept by the secretary of said board, and be at all times open to inspection. The attorney-general, under the direction of the executive council, shall prepare the necessary blanks, forms and instructions to carry into effect the provisions of this section and to keep such loans secure and unimpaired. [28 G. A., ch. 98, § 1; 25 G. A., ch. 110, § 1; 20 G. A., ch. 193, § 2.]

SEC. 2668. **Financial agent—repealed.** [33 G. A., ch. 170, § 20.]

[See § 2682-v. EDITOR.]

SEC. 2669. **Compensation—repealed.** [33 G. A., ch. 170, § 20.]

[See § 2682-v. EDITOR.]

SEC. 2670. **Foreclosure—repealed.** [33 G. A., ch. 170, § 20.]

[See § 2682-v. EDITOR.]

SEC. 2674-a. **Repeal.** That chapter ninety-nine of the acts of the twenty-eighth general assembly of the state of Iowa is hereby repealed. [29 G. A., ch. 172, § 1; 28 G. A., ch. 99.]

SEC. 2674-b. **Levy of special tax—purpose—how drawn.** For the purpose of providing for the erection, repair and improvement and equipment of such necessary buildings as shall be determined upon by the board of trustees of the Iowa state college of agriculture and mechanic arts, there shall be levied annually for five years a special tax of one fifth of a mill on the dollar upon the assessed valuation of the taxable property of the state, and the proceeds thereof shall be carried into the treasury to the credit of the said college. Said levy shall be first made with the levy made for state purposes in the year nineteen hundred and two and the same levy shall be made annually for the four successive years thereafter. The money realized from such levy for said college shall be held by the treasurer of the state for the purpose hereinbefore provided, and drawn upon requisition of the board of trustees. The funds to be realized from the tax levies herein provided for shall not be anticipated by issuing and discounting warrants or other obligations of the state. [29 G. A., ch. 172, § 2.]

[See also §§ 1400-s, 1400-s1 and 1400-s2. EDITOR.]

SEC. 2674-c. **Repeal not to affect collection and expenditure of taxes.** The repeal of said chapter ninety-nine, acts of the twenty-eighth general assembly, shall in no manner affect the collection and expenditure of the taxes heretofore levied thereunder, but the same shall be collected and expended as though said act remained in full force. [29 G. A., ch. 172, § 3.]

SEC. 2674-d. **Department of ceramics.** That the trustees of the Iowa state college [of agriculture] and mechanic arts be, and they are hereby required to establish in said college a department of ceramics for the

technical and practical education of clay workers, cement manufacturers and users, and other allied pursuits in all branches of those arts which exist in this state or which can be profitably introduced and maintained in this state from the mineral resources thereof; including the geology and properties of clays, cement materials, fuels, and other minerals required, and the testing of the products thereof; also the manufacture of fire brick, pressed brick, paving brick and of glazed and enameled brick of all kinds, of sewer pipe, drain tile, fireproofing and terra cotta, of pottery, porcelain, china and other specialties; also including the details of the manufacture and uses of cement and the details of other allied industries. [31 G. A., ch. 124, § 1.]

SEC. **2674-e. Investigation of clays, cement materials and mineral products.** Be it further enacted, that the said college shall provide as a part of its engineering experiment station work for the investigation of clays, cement materials, fuels, and other mineral resources of the state with especial reference to their economic uses, and for the publication and dissemination of information useful to such industries and for the testing of the products thereof. [31 G. A., ch. 124, § 2.]

SEC. **2674-f. Highway commission—duties—repeal.** That the law as it appears in section twenty-six hundred seventy-four-f of the supplement to the code, 1907, and chapter ninety-eight of the acts of the thirty-third general assembly be and the same is hereby repealed. [35 G. A., ch. 123, § 2; 35 G. A., ch. 122, § 22.] [30 G. A., ch. 105.]

CHAPTER 5.

OF THE IOWA STATE TEACHERS COLLEGE.

SECTION **2675. Official designation—board of trustees—officers.** The normal school at Cedar Falls, for the special instruction and training of teachers for the common schools shall be officially designated and known as the "Iowa State Teachers College" and shall be under the management and control of a board of trustees, of which the superintendent of public instruction shall be, by virtue of office, a member and president. It shall meet annually on or before June fifteenth, at the call of the president, and organize by the election of one of its members vice president, and a secretary and treasurer, neither of the latter to be a member of the board. The treasurer shall give bond in the sum of twenty thousand dollars, with good and sufficient sureties, to be filed with and approved by the secretary of state, which bond shall be conditioned for the safe keeping and proper disbursement of all money coming into his hands by virtue of his office. [33 G. A., ch. 171, § 1.] [16 G. A., ch. 129, §§ 1, 4.]

SEC. **2680. Report to governor.** The board shall biennially, through its secretary, make a detailed report to the governor of its proceedings during the preceding two years, which report shall show the number of teachers employed, the compensation of each, the number of pupils and classification, an itemized statement of receipts and expenditures, and such further information with such recommendations as may be regarded important to the interests of the institution, and with reference to its connection with the educational work of the state; provided that the report made in the year nineteen hundred and six shall cover the period only from the date of its last biennial report. [31 G. A., ch. 125; 22 G. A., ch. 64, § 2; 16 G. A., ch. 129, § 9.]

SEC. **2681. Compensation of officers—repealed.** [33 G. A., ch. 170, § 20.]

[See § 2682-v. EDITOR.]

SEC. **2682. Appropriation.** There is hereby appropriated the sum of twenty-eight thousand five hundred dollars annually as an endowment fund for the payment of the teachers of said normal school, and the further sum of nine thousand dollars annually as a contingent fund therefor. The amount herein appropriated shall be drawn and paid quarterly on the first days of March, June, September and December, on the requisition of the board of trustees of the school. [27 G. A., ch. 77, § 1.]

SEC. **2682-a. Special tax—purpose—how drawn.** For the purpose of providing for the erection, repair and improvement and equipment of such necessary buildings as shall be determined upon by the board of trustees of the state normal school, there shall be levied annually for five years, a special tax of one tenth of a mill on the dollar upon the assessed valuation of the taxable property of the state, and the proceeds thereof shall be carried into the treasury to the credit of said state normal school. Said levy shall be first made with the levy made for state purposes in the year nineteen hundred and two and the same levy shall be made annually for the four successive years thereafter. The money realized from such levy for said state normal school shall be held by the treasurer of the state for the purposes hereinbefore provided and drawn upon requisition of the board of trustees of said state normal school. [29 G. A., ch. 117, § 1.]

CHAPTER 5-A.

OF REPORTS FROM EDUCATIONAL INSTITUTIONS.

SECTION **2682-b. When made—what included.** That the secretary of the state university, the secretary of the state college of agriculture and mechanic arts and the secretary of the state normal school be required hereafter to make report to each general assembly within three days after the said general assembly shall have convened. Said reports shall show in plain manner the amount available each fiscal year from state appropriations and all other sources, for the erection, equipment, improvement and repair of buildings, also the funds received from state appropriations, interest on endowment funds, tuition, laboratory fees, janitor fees, donations, rent of lands and from all sources whatsoever going to effect the annual income of the support funds of said institutions. Any appropriation or funds received for any special purpose whatsoever shall also be reported. Hospital receipts and sales of departments shall be listed separately. The report shall show how the moneys thus received were expended, giving under separate heads the cost of instruction, administration, maintenance and equipment of departments, and the general expenses of the institutions. It shall clearly state the number of professors, instructors, fellows and tutors and the number of students enrolled in each course during each year of the biennial period. Students attending the short courses shall be reported separately. The amount of unexpended balances of departments remaining in the hands of the treasurer and the amounts undrawn from the state treasury on the thirtieth of June of the last year of the biennial period shall be given. The report of the secretary of the

state college of agriculture and mechanic arts shall also show the receipts of the experiment station from all sources for each fiscal year and how such funds were expended. [30 G. A., ch. 104.]

CHAPTER 5-B.

OF THE STATE BOARD OF EDUCATION.

SECTION 2682-c. **How constituted — institutions governed.** The state university, the college of agriculture and mechanic arts, including the agricultural experiment station, the normal school at Cedar Falls and the college for the blind at Vinton shall be governed by a state board of education consisting of nine members, and not more than five of the members shall be of the same political party. Not more than three alumni of the above institutions and but one alumnus from each institution may be members of this board at one time. [34 G. A., ch. 141, § 2; 33 G. A., ch. 170, § 1.]

SEC. 2682-d. **Appointment — terms — removal — suspension — vacancies.** The governor shall, prior to the adjournment of the thirty-third general assembly, nominate, and, with the consent of two thirds of the members of the senate in executive session, appoint nine persons from the state at large, and they shall be selected solely with regard to their qualifications and fitness to discharge the duties of their position. No nominations shall be considered by the senate until the same shall have been referred to a committee of five, not more than three of whom shall belong to the same political party, to be appointed by the president of the senate without the formality of a motion, which committee shall report to the senate in executive session, which report shall be made at any time when called for by the senate. The consideration of nominations, by the senate, shall not be had on the same legislative day that the nominations are so referred. Three of the members of said board of education shall hold office as designated by the governor for two years, three for four years and three for six years. Subsequent appointments shall be made as above provided, and, except to fill vacancies, shall be for a period of six years. The governor may, by and with the consent of a majority of the senate, during a session of the general assembly, remove any member of the board for malfeasance in office, or for any cause that renders him ineligible to appointment, or incapable or unfit to discharge the duties of his office, and his removal, when so made, shall be final. When the general assembly is not in session, the governor may suspend any member so disqualified and shall appoint another to fill the vacancy thus created, subject, however, to the approval or disapproval of the senate when next in session. All vacancies on said board that may occur while the general assembly is not in session shall be filled by appointment by the governor, which appointment shall expire at the end of thirty days from the time the general assembly next convenes, and vacancies occurring during the session of the general assembly shall be filled as regular appointments are made and before the end of said session. [33 G. A., ch. 170, § 2.]

SEC. 2682-e. **Meetings.** The board shall meet four times a year. Special meetings may be called by the board, by the president of the board, or they may be called by the secretary of the board, upon the written request of any five members thereof. [33 G. A., ch. 170, § 3.]

SEC. **2682-f. Organization—powers and duties.** The state board of education shall have power to elect a president from their number; a president and treasurer for each of said educational institutions, and professors, instructors, officers, and employes; to fix the compensation to be paid to such officers and employes; to make rules and regulations for the government of said schools, not inconsistent with the laws of the state; to manage and control the property, both real and personal, belonging to said educational institutions; to execute trusts or other obligations now or hereafter committed to the institutions; to direct the expenditure of all appropriations the general assembly shall, from time to time, make to said institutions, and the expenditure of any other moneys; and to do such other acts as are necessary and proper for the execution of the powers and duties conferred upon them by law. Within ten days after the appointment and qualification of the members of the board, it shall organize and prepare to assume the duties to be vested in said board, but shall not exercise control of said institutions until the first day of July, A. D. nineteen hundred and nine. [33 G. A., ch. 170, § 4.]

SEC. **2682-g. Boards of regents and trustees abolished.** The board of regents and the boards of trustees now charged with the government of the state university, the college of agriculture and mechanic arts, and the normal school, shall cease to exist on the first day of July, A. D. nineteen hundred and nine, and, on the same date, full power to manage said institutions, as herein provided, shall vest in the said state board of education. Nothing herein contained shall limit the general supervision or examining powers vested in the governor by the laws or constitution of the state. [33 G. A., ch. 170, § 5.]

SEC. **2682-h. Finance committee—organization—proceedings.** The said board of education shall appoint a finance committee of three from outside of its membership, and shall designate one of such committee as chairman and one as secretary. The secretary of this committee shall also act as secretary of the board of education and shall keep a record of the proceedings of the board and of the committee and carefully preserve all their books and papers. All acts of the board relating to the management, purchase, disposition, or use of lands or other property of said educational institutions shall be entered of record, and shall show who are present and how each member voted upon each proposition when a roll call is demanded. He shall do and perform such other duties as may be required of him by law or the rules and regulations of said board. Not more than two members of this committee shall be of the same political party, and its members shall hold office for a term of three years unless sooner removed by a vote of two thirds of the members of the state board of education. [34 G. A., ch. 132, § 1; 33 G. A., ch. 170, § 6.]

SEC. **2682-i. Oath—bond.** Each member of the board and each member of the finance committee shall take oath and qualify, as required by section one hundred seventy-nine of the code. The members of the finance committee, before entering upon their official duties, shall each give an official bond in the sum of twenty-five thousand dollars, conditioned as provided by law, signed by sureties approved by the governor and, when so given, said bonds shall be filed in the office of the secretary of state. [33 G. A., ch. 170, § 7.]

SEC. **2682-j. Offices—supplies—official publications.** The board and the finance committee shall be provided by the executive council with suitably furnished offices, at the seat of government, and shall be also fur-

nished with all necessary books, blanks, stationery, printing, postage, stamps and such other office supplies as are furnished other state officers; and the board may publish from time to time, and distribute, such circulars, pamphlets, bulletins and reports as may by it be deemed necessary for the best interests of the institutions under its control; but the board shall secure the approval of the executive council therefor before incurring such expense, which shall be paid out of any funds in the treasury not otherwise appropriated. [34 G. A., ch. 132, § 2; 33 G. A., ch. 170, § 8.]

SEC. **2682-k. Business offices—employes—visitation.** A business office shall also be maintained at each of the three educational institutions, and the board may hire such employes as may be necessary to enable the board to carry out the purposes of its creation, and to assist the said finance committee in the performance of its duties, and shall present to each general assembly an itemized account of the expenditures of said committee. The members of the finance committee shall, once each month, attend each of the institutions named for the purpose of familiarizing themselves with the work being done, and transacting any business that may properly be brought before them as a committee. [34 G. A., ch. 132, § 3; 33 G. A., ch. 170, § 9.]

SEC. **2682-l. Appropriation.** There is hereby appropriated from any funds in the state treasury not otherwise appropriated, sufficient thereof to pay the salaries and expenses of the board and the finance committee, including the salaries and expenses of their assistants. [33 G. A., ch. 170, § 10.]

SEC. **2682-m. Compensation—expenses—official residences.** Each member of the board shall be allowed seven dollars for each day that he is actually and necessarily engaged in the performance of official duties, not exceeding sixty days in any one year, and mileage at the rate of two cents per mile, by the nearest traveled and practicable route, in going from his home to the different institutions, or to other places, and in returning to his home when on official business. Members of the finance committee shall devote their entire time to the work of said institutions and shall each receive a salary of thirty-five hundred dollars a year. The members of the finance committee and other employes shall maintain their official residences at the places designated by the board, and shall be entitled to the necessary traveling expenses therefrom, by the nearest traveled and practicable route, incurred in visiting the different institutions and other places and returning therefrom when on official business; and to such other expenses as are actually and necessarily incurred in the performance of their official duties. [34 G. A., ch. 132, § 4; 33 G. A., ch. 170, § 11.]

SEC. **2682-n. Claims—approval.** All claims of members of the said board of education for attendance upon meetings of the board for time actually and necessarily spent in official duties, shall be itemized, showing the date of such service and the nature thereof and shall be sworn to by such member and certified by the secretary of the board. It shall then be filed with the auditor of state, who shall compute the mileage due such claimant by the nearest traveled and practicable route from his home to the place of meeting and return, and shall enter such mileage on the claim; and, if it be in due form of law, the auditor shall draw his warrant upon the treasurer of state for the amount of said attendance and mileage. No compensation shall be allowed any member of such board except as provided herein. [33 G. A., ch. 170, § 12.]

SEC. 2682-o. **Blanks for claims.** The secretary of the executive council shall, upon request, furnish proper blanks prepared in accordance with the preceding section for the purpose of making claims by the members of such board. [33 G. A., ch. 170, § 13.]

SEC. 2682-p. **Itemized statement of expenditures.** Before any expenses of the members of the finance committee, or other person employed to assist such committee in the performance of its duties, under the direction of the board, shall be paid, a minutely itemized statement of every item of expenditure, duly verified and sworn to by the claimant and certified to by the secretary of the board, shall be filed with the auditor of state. The verification shall show that the expense bill is just, accurate, and true, and is claimed for cash expenditures or cash disbursements, truly and actually made and paid to the parties named, as shown by said statement. Unless the statement is so verified, and duly audited, payment thereof shall not be made. [33 G. A., ch. 170, § 14.]

SEC. 2682-q. **Auditor's report.** The auditor shall include in his report to the governor the amount paid for such services, expenses, and mileage, and to whom paid. [33 G. A., ch. 170, § 15.]

SEC. 2682-r. **Financial agent—office abolished.** The office of the financial agent of the college of agriculture and mechanic arts shall cease to exist on the first day of July, A. D. nineteen hundred and nine; and on said date the said financial agent shall deliver to the finance committee of the board of education all books, papers, and other property belonging to the state and then in his hands. [33 G. A., ch. 170, § 16.]

SEC. 2682-s. **Authority to loan funds—conditions.** The finance committee may loan said funds upon approved real estate security, subject to the following regulations:

1. Each loan shall be for a term not exceeding ten years, at a rate of interest to be fixed by said board; payable annually, and the borrower shall have the privilege of paying one hundred dollars or any multiple thereof on any interest pay day;

2. Each loan shall be secured by a mortgage paramount to all other liens upon approved farm lands in this state, the loan not to exceed fifty per cent. of the cash value thereof, exclusive of buildings;

3. A register containing a complete abstract of each loan and showing its actual condition shall be kept by the secretary of said board and be at all times open to inspection. [33 G. A., ch. 170, § 17.]

SEC. 2682-t. **Mortgages—foreclosure—lands bid in.** The finance committee of the board shall negotiate loans in accordance with the provisions of the preceding sections and shall release the mortgages securing loans when paid by a satisfaction piece signed by the president[1] or secretary of said finance committee and the same shall be recorded in the office of the county recorder of the county where said mortgage is recorded, or by the president[1] or secretary of said finance committee signing the same on the margin of the record of said mortgage, and shall take charge of the foreclosure of mortgages and collections from delinquent debtors to said fund. The foreclosure of any mortgage belonging to the state university or to the college of agriculture and mechanic arts shall be made in the name of the state board of education for the use and benefit of the institution to which it belongs; and, in case of a sale upon execution under foreclosure, the premises may be bid off in the name of the board of education for the benefit of the institution to which it belongs; and, if a deed therefor is executed, the premises shall be held for the benefit of such in-

stitution, and such lands shall be subject to lease or sale, the same as its other lands. [35 G. A., ch. 222, § 1; 33 G. A., ch. 170, § 18.]

[1The 34 G. A., by ch. 132, § 1, amended § 6, ch. 170, 33 G. A. (§ 2682-h herein), by changing the word "president" to "chairman" of the finance committee. EDITOR.]

SEC. **2682-u. Reports.** The board shall make reports to the governor and legislature of its observations and conclusions respecting each and every one of the institutions named, including the regular biennial report to the legislature covering the biennial period ending June thirtieth, preceding the regular session of the general assembly. Said biennial report shall be made not later than October first in the year preceding the meeting of the general assembly, and shall also contain the reports which the executive officers of the several institutions are now or may be by the board required to make, including, for the use of the legislature, biennial estimates of appropriations necessary and proper to be made for the support of the said several institutions and for the extraordinary and special expenditures for buildings, betterments and other improvements. [33 G. A., ch. 170, § 19.]

SEC. **2682-v. Repeal.** Sections twenty-six hundred seventeen, twenty-six hundred eighteen, twenty-six hundred nineteen, twenty-six hundred twenty, twenty-six hundred thirty-five, twenty-six hundred thirty-six, twenty-six hundred forty-two, twenty-six hundred forty-seven, twenty-six hundred fifty-one, twenty-six hundred fifty-two, twenty-six hundred fifty-three, twenty-six hundred sixty-eight, twenty-six hundred sixty-nine, twenty-six hundred seventy and twenty-six hundred eighty-one of the code, and the law as it appears in sections twenty-six hundred forty-six, twenty-six hundred fifty, twenty-seven hundred twenty-seven-a fifty-three, twenty-seven hundred twenty-seven-a fifty-four, twenty-seven hundred twenty-seven-a fifty-five and twenty-seven hundred twenty-seven-a fifty-six of the supplement to the code, 1907, and all acts and parts of acts inconsistent with this act are hereby repealed. [33 G. A., ch. 170, § 20.]

SEC. **2682-w. College for blind—control transferred.** That all the powers heretofore granted to and exercised by the board of control over the college for the blind are hereby transferred to the state board of education and the state board of education is authorized and empowered to take charge of, manage and control said college for the blind. [34 G. A., ch. 141, § 3.]

SEC. **2682-x. Funds transferred.** All funds now in the hands of the treasurer of state to the credit of the said college for the blind are transferred from the board of control to the state board of education. [34 G. A., ch. 141, § 4.]

SEC. **2682-y. Appropriations—paid in monthly installments.** All appropriations made payable annually to the state university, the Iowa state college of agriculture and mechanic arts, the Iowa state teachers college and the college for the blind, shall on and after July first, nineteen hundred thirteen, be paid in twelve equal monthly installments on the last day of each month on order of the Iowa state board of education. [35 G. A., ch. 324, § 1.]

CHAPTER 6.

IOWA SOLDIERS' ORPHANS' HOME.

[27 G. A., ch. 78, § 1.]

[For general supervision by board of control and abolishment of board of trustees see §§ 2727-a8 and 2727-a9. EDITOR.]

SECTION **2683. Trustees and officers.** The Iowa soldiers' orphans' home, located at Davenport, shall be under the management and control of three trustees, one of whom shall be a resident of Scott county. They shall, at their meeting in May after the regular session of the legislature, elect a president and secretary from their number, and shall elect a treasurer who shall be a resident of the county in which the home is situated, and he shall serve without compensation. The treasurer shall give a bond in a sum to be fixed by the board, with good and sufficient sureties, to be filed with and approved by the secretary of state, and conditioned for the faithful discharge of his duties and the safe keeping and proper disbursement of all money coming into his hands by virtue of his office. The secretary shall keep full and accurate minutes of the doings of the board, the meetings of which shall be held at the home. The board of trustees shall examine all applications for admission, and reject any for good and sufficient cause. It shall appoint a superintendent, who shall hold his or her office at its pleasure and subject to its direction. The superintendent, subject to the board, shall have charge of the institution and its conduct, and the board shall make biennial reports to the governor of the condition of the home, financial and otherwise. [27 G. A., ch. 78, § 2; 22 G. A., ch. 74; 22 G. A., ch. 82, § 30; 16 G. A., ch. 94, §§ 4, 10; C. '73, §§ 1623–4, 1629, 1632.]

SEC. **2685. Admissions.** All destitute children of soldiers, sailors and marines, residents of the state, orphans of soldiers under fifteen years of age, who are destitute or unable to care for themselves, shall be admitted upon applications approved by the board of trustees of the home and become wards of the state, and such other destitute children of like age who have a legal settlement in the state, and whose applications for admission are approved by the board of supervisors or a judge of a court of record, shall be received into the home, but none in the latter class shall be so admitted as long as there are applicants denied in the former; all applications in the latter class to be made to a judge in the district of the applicant's residence, or the board of supervisors of the county in which the applicant is living. [31 G. A., ch. 126; 27 G. A., ch. 78, § 3; 21 G. A., ch. 111; 16 G. A., ch. 94, §§ 1, 2.]

SEC. **2688. Regulations.** All children admitted to the home shall be subject to the rules and regulations of the same, and, subject to the approval of the trustees, may be expelled by the superintendent for disobedience and refusal to submit to proper discipline. They shall also be discharged upon arriving at the age of sixteen years, or sooner if possessed of sufficient means to provide for themselves. [27 G. A., ch. 78, § 4; 16 G. A., ch. 94, § 3; C. '73, § 1634.]

SEC. **2690. Adoption of orphans—repeal.** Section twenty-six hundred ninety of the code and all acts and parts of acts in conflict with this act are hereby repealed. [31 G. A., ch. 127, § 5.]

SEC. **2690-a. Placing of child by adoption.** That any child in the Iowa soldiers' orphans' home who is an orphan or has been abandoned by its parents, and any child in the home who is not an orphan and who has

not been abandoned, with the consent in writing of its parents, or if but one be living, with the consent in writing of the survivor, may be adopted by any citizen of this state on the recommendations of the superintendent with the approval of the board of control of state institutions. The adoption shall be by an instrument in writing to be signed by the superintendent, subject to the approval, in writing, of the board of control, and by the person adopting, and except as herein otherwise provided such instrument shall be signed and recorded as provided by chapter seven of title sixteen of the code as amended and the adoption shall create the rights and liabilities provided by said chapter as amended. [31 G. A., ch. 127, § 1.]

SEC. **2690-b. Placing of child by contract.** That the law as it appears in section twenty-six hundred ninety-b of the supplement to the code, 1907, is hereby repealed and in lieu thereof is enacted the following:

"All children received in the soldiers' orphans' home, whether admitted on application of a parent, guardian or other person or committed as dependent or neglected under the law as it appears in chapter five-B of title three of the supplement to the code, 1907, shall when received become wards of the state. Any child so received, unless adopted as authorized under the law as it appears in section twenty-six hundred ninety-a of the supplement to the code, 1907, may be placed by the superintendent with any person or family of good standing and character where it will be cared for and educated properly. Such child shall be placed under articles of agreement to be signed by the person or persons taking the child and the superintendent, approved in writing by the board of control of state institutions, which articles shall provide for the custody, care, education, maintenance and earnings of the child for a time to be therein fixed which shall not extend beyond the time when the child shall attain its majority." [34 G. A., ch. 133, § 1.] [31 G. A., ch. 127, § 2.]

SEC. **2690-c. Recovery of possession of child.** In case any child, whether adopted or placed under articles of agreement for a term of years, is not furnished the care, education, treatment and maintenance required by the articles of adoption or agreement, the board of control may cause the child to be taken from the person or persons with whom it is placed, and may make such other disposition of it as shall seem to be for its best interests. And in case legal proceedings are necessary to recover the possession of such child they may be instituted and carried on in the name of the superintendent, and the county attorney of the county in which the child is placed shall, if requested by the superintendent, act as his attorney in the proceedings. [31 G. A., ch. 127, § 3.]

SEC. **2690-d. Interference of parent or other person prohibited.** It shall not be lawful for any parent or other person not a party to the placing of a child by adoption or for a term of years under the provisions of this act, to interfere in any manner with or to assume or exercise any control over such child or his earnings while so placed, but such earnings shall be used, held, or otherwise applied for the exclusive benefit of the child. [31 G. A., ch. 127, § 4.]

SEC. **2691. Appropriation—per capita allowance.** That the law as it appears in section twenty-six hundred ninety-one of the supplement to the code, 1907, is hereby repealed and in lieu thereof is enacted the following:

"For the support of the home there is hereby appropriated out of any money in the state treasury not otherwise appropriated, or so much thereof as may be needed, twelve dollars for each child actually supported, and

in addition the expense of his transmission to the home, which sums shall be paid upon abstracts and certificates as required by the law as it appears in section twenty-seven hundred twenty-seven-a forty-two and section twenty-seven hundred twenty-seven-a forty-three of the supplement to the code, 1907. The number of children shall be ascertained by taking the average attendance for the preceding month. Provided, however, that if the average number of children shall be less than five hundred fifty in any month the auditor of state and the treasurer of state shall credit the home with sixty-six hundred dollars for that month and the sum so credited shall be drawn from the state treasury in the same manner and for the same purposes as the regular monthly per capita allowance is drawn." [35 G. A., ch. 229, § 1.] [30 G. A., ch. 106, § 1; 16 G. A., ch. 94, § 5; C. '73, §§ 1630–1.]

SEC. **2692. Counties liable.** That the law as it appears in section twenty-six hundred ninety-two of the supplement to the code, 1907, is hereby repealed and in lieu thereof is enacted the following:

"Each county shall be liable for sums paid by the home in support of all its children, other than the children of soldiers, to the extent of six dollars per month for each child, and when the average number of children shall be less than five hundred fifty in any month each county shall be liable for its just proportion for each child of the amount credited to the home for that month. The sums for which each county is so liable shall be charged to the county, and collected as a part of the taxes due the state, and paid by the county at the same time state taxes are paid." [35 G. A., ch. 229, § 2.] [30 G. A., ch. 106, § 2; 27 G. A., ch. 78, § 5; 16 G. A., ch. 94, § 6.]

CHAPTER 6-A.

OF STATE AGENTS.

SECTION **2692-a. State agents—appointment—salary—office—supplies.** That the board of control of state institutions is authorized to appoint not more than three persons to act as state agents for the soldiers' orphans' home, and for the industrial school. The salaries of such agents shall be fixed by said board, in no case to exceed seventy-five dollars per month, and they may hold their positions during its pleasure. The board shall procure and furnish the agents with office room and such furniture, books, blanks and supplies as may be necessary for the proper discharge of their duties in the same manner as supplies are now furnished other officers of the board. Provided that the board may furnish such office room and supplies to said agents at one or more of the institutions for which they are to act, and may require the institutions to furnish the agents with room, board and facilities for transacting business when stopping therein without charge. [33 G. A., ch. 172, § 1.] [31 G. A., ch. 181, § 1.]

SEC. **2692-b. Duties.** The duties of the agents shall be as prescribed by law and by the board of control. In addition to other duties they shall be required to find suitable homes, positions and employment when desirable for inmates of said institutions who are to be or have been released, to inspect the homes of such persons, to exercise supervision over such persons, examine into their conduct and environment, and when the con-

duct of any such persons who have not been finally discharged has been bad or in violation of[1] any of the conditions of their release to return them or cause them to be returned to the institutions from which they were released, or in such cases or when the environment or associations are bad to require them to obtain other homes or places of employment. The state agent shall keep records of their acts and report to the board of control when required the work they do, and results accomplished, the treatment received and the failure or progress made by the persons under supervision and other information required by the board. [31 G. A., ch. 181, § 2.]

[1"or" in 31 G. A. session laws. EDITOR.]

SEC. **2692-c. Appropriation — how expended—money advanced.** That section two of chapter one hundred seventy-two of the acts of the thirty-third general assembly and the law as it appears in section twenty-six hundred ninety-two-c as amended are hereby repealed and in lieu thereof is enacted the following:

"There is hereby appropriated out of any money in the state treasury not otherwise appropriated the sum of five thousand dollars annually for the payment of salaries and expenses of the state agents and other expenses incurred under the provisions of this act, such salaries and expenses to be paid in the manner provided by section twenty-seven hundred twenty-seven-a six of the supplement to the code, 1907. Provided that the board of control may cause to be advanced from the funds hereby appropriated to each agent from time to time the sums to be used in defraying the official expenses of such agent, but the aggregate amount of money so advanced and not expended at any time shall not exceed the sum of two hundred fifty dollars, and the agent shall give security to be approved by the board for the proper use and accounting each month of all money so advanced." [34 G. A., ch. 134, § 1; 33 G. A., ch. 172, § 2.] [31 G. A., ch. 181, § 3.]

SEC. **2692-d. Repeal.** Chapter one hundred fifty-seven of the acts of the thirtieth general assembly and all other acts and parts of acts in conflict with this act are hereby repealed. [31 G. A., ch. 181, § 4; 30 G. A., ch. 157.]

CHAPTER 7.

OF THE INSTITUTION FOR FEEBLE-MINDED CHILDREN.

[For general supervision by board of control and abolishment of board of trustees see §§ 2727-a8 and 2727-a9. EDITOR.]

SECTION **2695-a. Admission of certain women.** That all feeble-minded women under forty-six years of age who are residents of the state of Iowa may be admitted to the institution for feeble-minded children at Glenwood. [29 G. A., ch. 118, § 1.]

SEC. **2695-b. Statutes applicable.** The provisions of chapter seven of title thirteen of the code, in regard to the admission and maintenance of children in said institution, shall apply to the admission and maintenance of feeble-minded women authorized by this act. [29 G. A., ch. 118, § 2.]

SEC. **2695-c. Admission of certain men.** That all feeble-minded men under forty-six years of age who are residents of the state of Iowa, may be admitted to the institution for feeble-minded children at Glenwood. [33 G. A., ch. 173, § 1.]

SEC. **2695-d. Statutes applicable.** The provision of chapter seven of title thirteen of the code in regard to the admission and maintenance of feeble-minded children in said institution shall apply to the admission and maintenance of feeble-minded men authorized by this act. [33 G. A., ch. 173, § 2.]

SEC. **2700. Support.** For the support of the institution, there is appropriated out of any money in the state treasury, not otherwise appropriated, the sum of twelve dollars monthly for each inmate therein supported by the state, counting the actual time such person is an inmate and so supported. Upon the presentation to the state auditor of a sworn statement of the average number of inmates supported in the institution by the state for the preceding month, he shall draw his warrant upon the state treasurer for such sum. [27 G. A., ch. 79, §§ 1, 2; 23 G. A., ch. 56; 19 G. A., ch. 40, § 9.]

CHAPTER 8.

OF INDUSTRIAL SCHOOLS.

[For general supervision by board of control and abolishment of board of trustees, see §§ 2727-a8 and 2727-a9. EDITOR.]

SECTION **2701-a. Separate institutions—designation.** That the state industrial schools at Eldora and Mitchellville are hereby declared to be separate and distinct institutions. The school at Eldora shall be known and designated hereafter as the Iowa Industrial School for Boys and the school at Mitchellville shall be known and designated hereafter as the Iowa Industrial School for Girls. [35 G. A., ch. 230, § 1.]

SEC. **2701-b. Acts in conflict repealed.** All acts and parts of acts in conflict with this act are hereby repealed. [35 G. A., ch. 230, § 2.]

SEC. **2702. Board of trustees—officers—repealed.** [28 G. A., ch. 100, § 1.]

[See § 2703-a.]

SEC. **2703. Powers—treasurer's bond—repealed.** [28 G. A., ch. 100, § 1.]

[See § 2703-a.]

SEC. **2703-a. Repeal.** That section twenty-seven hundred and two and section twenty-seven hundred and three of the code be and the same are hereby repealed. [28 G. A., ch. 100, § 1.]

SEC. **2704. Placing of boys and girls under contract—conditions.** That the law as it appears in section twenty-seven hundred and four of the supplement to the code, 1907, is hereby repealed and in lieu thereof is enacted the following:

"All boys and girls committed to and received in the industrial school may be placed by the superintendent, with the approval in writing of the board of control of state institutions, with any persons or in any families of good standing and character where they will be properly cared for and educated. They shall be so placed under articles of agreement to be signed by the person or persons taking them and the superintendent, approved by said board of control, which shall provide for their custody, care, education, maintenance and earnings for a time to be fixed in said articles, which shall not extend beyond the time when the persons bound shall attain their majority. In case a boy or girl so placed be not given the care, education,

treatment and maintenance required by such agreement, the board of control may cause the boy or girl to be taken from the person or persons with whom placed and returned to the institution, or may replace, release, or finally discharge him or her as may seem best. It shall not be lawful for any parent or other persons not a party to the placing of a boy or girl to interfere in any manner or assume or exercise any control over such boy or girl or his or her earnings which shall be used, held or otherwise applied for the exclusive benefit of such boy or girl. In case legal proceedings are necessary to enforce any right hereby conferred on any boy or girl, the county attorney of the county in which such proceedings should be instituted shall, on request of the superintendent, approved by the board of control, institute and carry on in the name of the superintendent, the proceedings in behalf of the superintendent." [34 G. A., ch. 135, § 1.] [31 G. A., ch. 128; 28 G. A., ch. 100, § 2; C. '73, § 1649.]

SEC. **2705. Visits—reports—repealed.** [28 G. A., ch. 100, § 3.] [See § 2705-a.]

SEC. **2705-a. Repeal.** That section twenty-seven hundred and five of the code be and the same is hereby repealed. [28 G. A., ch. 100, § 3.]

SEC. **2705-b. Report by superintendent.** The superintendent of the industrial school at Mitchellville shall, on or before the first day of January of each year, and at any other time when so requested by the board of control of state institutions, make a report to the said board in writing, touching all matters required of him by said board. [28 G. A., ch. 100, § 4.]

SEC. **2707. Superintendent—powers and duties.** The superintendent, with such subordinate officers and employes as he may appoint, shall have charge and custody of the inmates of the school. He shall discipline, govern, instruct, employ, and use his best endeavors to reform the pupils in his care, so that, while preserving their health, he may promote, as far as possible, moral, religious and industrious habits, regular, thorough and progressive improvement in their studies, trade and employment. He shall have charge of all the property of the institution. [28 G. A., ch. 100, § 5; C. '73, §§ 1651–2.]

SEC. **2708. Commitment—conditions—procedure.** That the law as it appears in section twenty-seven hundred and eight of the supplement to the code, 1907, and chapter one hundred seventy-four of the acts of the thirty-third general assembly is hereby repealed and in lieu thereof is enacted the following:

"When a boy over the age of ten years and under eighteen, or [a] girl over the age of ten years and under eighteen, of sound mind, excepting married women, prostitutes, or any girl who is pregnant, shall be found guilty in any court of record of any crime excepting that of murder, the court in its discretion may, instead of entering judgment of conviction, order and direct the party to be sent to the industrial school, if a boy to the department at Eldora, if a girl, to that at Mitchellville, which order, certified by the clerk of the court and under its seal, shall be sufficient authority for his or her transfer to and confinement in said school. If such a boy or girl is convicted before any inferior court of a crime, or shall be found to be guilty of being a disorderly person, he or she may be forthwith sent by the court, accompanied with all the papers filed in his office upon the subject, in custody of an officer, to a judge of a court of record, who shall thereupon issue an order, directed to the parent or guardian of the party, or to such person as may have him or her in charge, or with whom he or she last resided, or one known to be nearly related to him or her, or

if he or she be alone and friendless, then to any person the judge may appoint to act as guardian for the purposes of the case, requiring him or her to appear at a time and place stated and show cause why the party should not be committed to the industrial school, which order shall be served by an officer by delivering a copy to the party to whom it is addressed, or by leaving it with some person of full age at the residence or place of business of said party, and immediate return shall be made to the judge of the service. At the time and place mentioned in the order, or to which the hearing may be adjourned, on the appearance of the parent or guardian, or, in case of their failure to appear, then after the appointment of some suitable person as guardian for the purposes of the case, the judge shall proceed to take the voluntary examination of the boy or girl, to hear the statements of the party appearing for him or her, and such testimony in relation to the case as may be produced, and if upon such examination and hearing he shall be satisfied that the boy or girl is a fit subject for the industrial school, he may commit him or her to said school, until he or she arrives at the age of twenty-one years, by warrant, which warrant shall state the place in which the party resided at the time of arrest, and his or her age, as nearly as can be ascertained, and shall command the officer to take and deliver without delay to the superintendent of said school or other person in charge thereof the said boy or girl, and the statement as to residence or age shall be conclusive thereof for the purposes of this chapter. With the warrant, the judge shall also transmit a statement of the nature of the complaint, and such other particulars concerning the accused as he may be able to ascertain, including the date of birth, and a brief statement of the habits and environment of the accused, arrests if any for misconduct, influence and conduct of parents and other members of the family, and the substance of the evidence submitted. If the judge is of the opinion that the boy or girl is not a fit subject for the school, or if said boy or girl shall appeal from the decision of the court in which the conviction was had, he shall remand him or her to the custody of the officer who had him or her in charge, to be returned to the magistrate before whom the conviction was had, to be dealt with according to law." [34 G. A., ch. 136, § 1; 33 G. A., ch. 174, § 1.] [31 G. A., ch. 129; 29 G. A., ch. 119, §§ 1, 2; 28 G. A., ch. 100, §§ 6, 12; 27 G. A., ch. 80, § 1; 16 G. A., ch. 38, §§ 2–4; C. '73, §§ 1653–8.]

SEC. **2708-a. Repeal.** That section twelve, section thirteen, and section fourteen of chapter one hundred, laws of the twenty-eighth general assembly, be and the same are hereby repealed. [29 G. A., ch. 119, § 1; 28 G. A., ch. 100, §§ 12–14.]

SEC. **2709. Complaint by parent or guardian.** The law as it appears in section twenty-seven hundred and nine of the supplement to the code, 1907, is hereby repealed and in lieu thereof is enacted the following:

"If any parent or guardian shall make complaint to a judge of a court of record that any boy over the age of ten years and under eighteen, or girl over the age of ten years and under eighteen, the child or ward of such parent or guardian, is habitually vagrant, disorderly or incorrigible, said judge shall issue a warrant to the sheriff or constable to cause said boy or girl to be brought before him at such time and place as he may appoint, when and where he shall examine the parties, and if in his judgment the boy or girl is a fit subject for the industrial school, he may issue an order, with the consent of said parent or guardian indorsed thereon, to be executed by the sheriff or constable, committing said boy or girl to the

custody of the superintendent of said school for reformation and instruction until he or she attains the age of twenty-one years; but security for the payment of the expenses of said complaint, commitment and transportation to the school, and the expenses of board thereat, may, in the discretion of the judge, be required of said parent or guardian before such order is executed. Provided, however, that no married woman, prostitute, or girl who is pregnant shall be committed under the provisions of this section, and provided further that with the order the judge shall also transmit a statement of the nature of the complaint, and such other particulars as he may be able to ascertain, including the date of birth and a brief statement of the habits and environment of the accused, arrests if any for misconduct, influence and conduct of parents and other members of the family, and the substance of the evidence submitted." [34 G. A., ch. 136, § 2; 33 G. A., ch. 174, § 2.] [29 G. A., ch. 119, §§ 1, 3; 28 G. A., ch. 100, §§ 7, 11, 13; 27 G. A., ch. 80, § 2; 19 G. A., ch. 150; C. '73, § 1659.]

SEC. **2710. Return to county.** If any person committed to the industrial school shall prove unruly or incorrigible, or if his or her presence shall be manifestly and constantly dangerous or detrimental to the welfare of the school, the board of control of state institutions may order his or her removal to the county from which he or she came, and deliver to the jailer of such county, where proceedings shall be resumed as if no committal had been made to the industrial school. [28 G. A., ch. 100, § 8; C. '73, § 1662.]

SEC. **2711. Discharge—parole.** No one shall be committed to the industrial school for a longer term than until he or she attains the age of twenty-one years, and the board of control of state institutions may at any time after one year's service order the discharge or parole of any inmate as a reward for good conduct. And the board may, in exceptional cases, discharge or parole inmates without regard to the length of their service or conduct, when satisfied that the reasons therefor are urgent and sufficient. If paroled upon satisfactory evidence of reformation, the order may remain in effect or terminate under such rules and regulations as the board may prescribe. The binding out or the discharge of an inmate as reformed, or having arrived at the age of twenty-one years, shall be a complete release from all penalties incurred by the conviction for the offense upon which he or she was committed to the school. [29 G. A., ch. 120, § 1; 29 G. A., ch. 119, §§ 1, 4; 28 G. A., ch. 100, §§ 9, 11, 14; 27 G. A., ch. 80, § 2; 25 G. A., ch. 106; 19 G. A., ch. 150; C. '73, §§ 1660–1.]

[Ch. 80 of the acts of 27 G. A., amending above section, was repealed by 28 G. A., ch. 100, § 11 (§ 2711-a herein). § 1, ch. 119, of acts of the 29 G. A. (§ 2708-a, *supra*), repeals § 14, ch. 100, 28 G. A., amending said section.]

SEC. **2711-a. Repeal.** That chapter eighty of the laws of the twenty-seventh general assembly be and the same is hereby repealed. [28 G. A., ch. 100, § 11.]

SEC. **2713. Support—per capita allowance.** That chapter one hundred thirty-seven of the acts of the thirty-fourth general assembly is hereby repealed, and in lieu thereof is enacted the following:

"For the support of the industrial school there is hereby appropriated out of any money in the state treasury not otherwise appropriated, or so much thereof as may be necessary; thirteen dollars monthly for each boy and sixteen dollars monthly for each girl actually supported in said school, counting the average number therein for each month; the monthly statement for each department to be verified by its superintendent and pre-

sented to the state auditor who shall draw his warrant upon the state treasurer for the same; provided, however, that when the average number of inmates in the department for boys shall be less than four hundred eighty for any month said department shall be credited by the auditor of state and the treasurer of state with the sum of sixty-two hundred forty dollars, and when the average number of inmates in the department for girls shall be less than two hundred thirty-five for any month said department shall be credited by the auditor of state and the treasurer of state with the sum of thirty-seven hundred sixty dollars, and any sum which shall be credited to either department as aforesaid shall be drawn from the state treasury as the regular monthly per capita allowance is drawn." [35 G. A., ch. 231, § 1; 34 G. A., ch. 137, § 1.] [31 G. A., ch. 130, § 1; 30 G. A., ch. 143; 29 G. A., ch. 159, § 1; 28 G. A., ch. 101, § 1; 28 G. A., ch. 100, § 10; 27 G. A., ch. 81, § 1; 23 G. A., ch. 54; 19 G. A., ch. 92, § 1; 17 G. A., ch. 97, § 1; 15 G. A., ch. 21, § 1.]

[For repeal of 1907 supplement section see 34 G. A., ch. 137, § 1. EDITOR.]

SEC. **2713-1a. Appropriation for dental work.** There is further appropriated out of any money in the state treasury, not otherwise appropriated, the sum of one thousand dollars for the industrial school at Eldora and four hundred dollars for the industrial school at Mitchellville. The same, or so much thereof as shall be necessary, shall be used, in connection with the support fund heretofore appropriated, to furnish proper dental work for those supported in said schools. The statements to be made and vouchers drawn for said funds shall be as provided in the first section of this bill. [31 G. A., ch. 130, § 2.]

[This section was § 2713-a1 in the prior supplement. EDITOR.]

SEC. **2713-2a. Commitment to other institutions for girls authorized.** Whenever under the provisions of chapter eight, title thirteen, of the code, the supplement to the code, 1907, and amendments thereto, any court or judge is authorized to commit any female within the ages therein prescribed to the state industrial school, said court or judge may, instead of committing said female to said industrial school as therein provided, commit the said female to the care of any reputable institution within this state devoted to the detention and reformation of wayward and fallen girls, in which event the provisions of chapter eight, title thirteen, of the code, the supplement to the code, 1907, and amendments thereto, and sections thirty-two hundred sixty-g, thirty-two hundred sixty-j and thirty-two hundred sixty-k, supplement to the code, 1907, shall govern so far as applicable. [34 G. A., ch. 138, § 1.]

SEC. **2713-3a. Monthly allowance.** The institution receiving and caring for any female under the provisions of this act shall be entitled as compensation not to exceed a monthly allowance of sixteen dollars from the county of the legal settlement of such female, the same to be allowed by the board of supervisors and paid in the [same] manner as other claims against said county are paid. [34 G. A., ch. 138, § 2.]

SEC. **2713-4a. Report to governor.** Each institution above referred to shall, on or before the first day of January in each year, make a report to the governor of the state showing the number of inmates in such institution admitted under the provisions of this act, and the total amount paid for each inmate. [34 G. A., ch. 138, § 3.]

CHAPTER 8-A.

IOWA INDUSTRIAL REFORMATORY FOR FEMALES.

SECTION **2713-a. Name and location.** There is hereby established at Anamosa, Iowa, the Iowa industrial reformatory for females. [28 G. A., ch. 102, § 1.]

SEC. **2713-b. Management—officers—rooms.** Said reformatory shall be under the control of the board of control of state institutions, and the immediate management of it shall be under such officers as said board may deem proper, but the chief executive officer of said institution, so selected by the board, shall appoint all subordinate officers and employes, as provided in chapter one hundred eighteen, acts of the twenty-seventh general assembly, and the salary or compensation to be paid any officer or employe of said reformatory shall be fixed in the manner provided in said chapter. Said reformatory may use and occupy the building now known as the female department of the penitentiary at Anamosa, except the two rooms on the lower floor at the right of the main entrance of the said female department, which may be used as store rooms by said penitentiary and reformatory, and said rooms shall be under the control of the warden of the penitentiary. [28 G. A., ch. 102, § 2.]

SEC. **2713-c. When opened.** Said reformatory may be opened under the direction of the board of control of state institutions as soon as the female department of the penitentiary and the warden's house shall be completed. [28 G. A., ch. 102, § 3.]

SEC. **2713-d. Instruction.** Any woman or girl committed or transferred to said institution shall be instructed in piety and morality, and in such branches of useful knowledge as are adapted to her age and capacity, and in some regular course of labor, as is best suited to her age, strength, disposition, and capacity, and as promises best to secure the reformation and future well-being of the inmate, and to that end the board of control is authorized to establish, and cause to be operated, in such institutions, schools for education and industrial training as may be deemed best. [28 G. A., ch. 102, § 4.]

SEC. **2713-e. Commitment—minimum age.** All girls who may now be committed under chapter eight, title thirteen, of the code, to the industrial school at Mitchellville, may, in the discretion of the district court or judge thereof, be committed to said industrial school or to this reformatory; provided, however, that no girl under nine years of age shall in any event be committed to said reformatory or to said industrial school under the provisions of this act or of chapter eight, title thirteen, of the code. [28 G. A., ch. 102, § 5.]

SEC. **2713-f. Transfer from industrial school.** Any woman or girl over the age of fourteen years, who may be an inmate of the industrial school for girls, whom the superintendent of such school may report to the board of control of state institutions as being unruly and incorrigible, and whose presence is dangerous and detrimental to the welfare of such school, may be, upon investigation of the charge by the board of control, and the same being substantiated, ordered transferred by said board of control to said reformatory to be kept there, under such rules and regulations as may be provided therefor and for the length of time prescribed by chapter eight of title thirteen of the code. [28 G. A., ch. 102, § 6.]

SEC. **2713-g. Discharge or parole.** The board of control shall have power to order the discharge or parole of any person who is confined under

the provisions of this act in said reformatory, said discharge or parole to be a reward for good conduct and for proficiency in studies, and for excellency in work in the industrial department. If paroled, such order shall remain in effect, or terminate under such rules and regulations as may, with the approval of the board, be prescribed. [28 G. A., ch. 102, § 7.]

SEC. **2713-h. Officers of penitentiary shall serve.** The physician, chaplain, and storekeeper at the Anamosa penitentiary shall also serve in the same capacity for the Iowa industrial reformatory for females, for the compensation already provided by law. [28 G. A., ch. 102, § 8.]

SEC. **2713-i. Board to notify judges and clerks.** At least thirty days prior to the opening of said institution for the reception of inmates, the board of control shall officially notify each judge of the district, superior, or police courts, and each clerk of the district court, of each county in this state, of the time when such institution shall be open for the reception of inmates. [28 G. A., ch. 102, § 9.]

SEC. **2713-j. Board to name officers and fix salaries.** The board of control of state institutions shall determine what officers may be necessary at said institution, in addition to the superintendent heretofore provided for, and fix the salaries of the same, and may prescribe their duties, and they shall be appointed in the manner prescribed in chapter one hundred eighteen, acts of the twenty-seventh general assembly, which chapter shall apply to and govern said institution in all respects, except as herein provided. [28 G. A., ch. 102, § 10.]

SEC. **2713-k. Heat, light, water, furnished.** Heat, light, water, sewer facilities, power to operate machinery if needed, shall all be furnished to said reformatory free by the penitentiary at Anamosa. [28 G. A., ch. 102, § 11.]

SEC. **2713-l. Per capita appropriation—estimates for supplies.** There is hereby appropriated for the support, care, maintenance, clothing, and transportation of the inmates of the said reformatory, and for the purpose of maintaining the schools therein, the sum of fifteen dollars per month per capita, or so much thereof as may be necessary for each inmate thereof; said per capita to be based upon the average number present for the preceding month, and to be available one month in advance. The chief executive officer of said institution is hereby authorized, a month in advance of said opening, to make estimate herein provided for all supplies for the operation of said institution, on the basis of fifty inmates for the first month. Thereafter, all the provisions of chapter one hundred eighteen, acts of the twenty-seventh general assembly, relating to estimates, vouchers, reports, and otherwise, shall apply to this institution, providing that said estimates shall be made by the warden of the penitentiary at Anamosa, Iowa, upon information furnished by the chief executive officer of said institution, and the said warden shall return to the board of control of state institutions said estimates for approval; and requisitions for supplies needed in said reformatory shall be made upon said warden by such officer of said reformatory as the board of control may designate, and said requisitions shall be honored by the said warden and the storekeeper of said penitentiary. [28 G. A., ch. 102, § 12.]

SEC. **2713-m. Appropriation for industries.** For the purpose of establishing and operating proper industries in said institution, there is hereby appropriated the sum of one thousand dollars, or so much thereof as may be necessary, and for the purpose of furnishing said reformatory there is hereby appropriated the sum of fifteen hundred dollars, or so much thereof as may be necessary. [28 G. A., ch. 102, § 13.]

SEC. **2713-n. Government and discipline.** The board of control of state institutions is hereby authorized to make any provisions for the government, discipline, and control of said institution, not herein specifically provided for, and not in conflict with law. [28 G. A., ch. 102, § 14.]

CHAPTER 9.

OF THE COLLEGE FOR THE BLIND.

[For government by state board of education see §§ 2682-c and 2682-w. EDITOR.]

SECTION **2715. Admission.** All blind persons, residents of the state, of suitable age and capacity, shall be entitled to an education in this institution at the expense of the state, and nonresidents may also be entitled to the benefits thereof, if they can be accommodated therein, upon paying to the treasurer sixty-six dollars quarterly in advance. [30 G. A., ch. 107; 17 G. A., ch. 72, § 1; C. '73, §§ 1672, 1680; R. §§ 2147–8.]

SEC. **2717. Report.** On or before the fifteenth day of August in each even-numbered year, the principal of the college shall report to the governor the number of pupils in attendance, the name, age, sex, residence, place of nativity and cause of blindness, with the studies pursued, trades taught, and a complete statement of the expenditures made, and the number, kind and value of articles manufactured and sold. Provided that the report for the year nineteen hundred and six shall cover only the period from the date of the last biennial report. [31 G. A., ch. 131; 22 G. A., ch. 82, § 32; C. '73, § 1677.]

SEC. **2718. Appropriation—support—repealed.** [29 G. A., ch. 121, § 1.]

[See § 2718-a.]

SEC. **2718-a. Appropriation—per capita allowance.** That the law as it appears in section twenty-seven hundred eighteen-a of the supplement to the code, 1907, is hereby repealed and in lieu thereof is enacted the following:

"For the support of the college and to meet the ordinary and current expenses thereof, including the compensation of officers, teachers and other employes, the purchase of supplies of food, clothing, furniture and furnishings, books, maps and apparatus, and other incidental expenses, there is hereby appropriated out of any money in the state treasury not otherwise appropriated, or so much thereof as may be needed, twenty-two dollars per month for nine months each year for each resident pupil actually supported in the college. Said sum shall be placed to the credit of the college on the certificate of the board of control of state institutions, which shall show the average number of pupils in the college for the preceding month, and shall be paid from the state treasury as provided by the law as it appears in section twenty-seven hundred twenty-seven-a one and subsequent sections to and including section twenty-seven hundred twenty-seven-a fifty-one of the supplement to the code, 1907, and acts amendatory thereof. Provided, however, that when the average number of resident pupils shall be less than one hundred sixty for any one of the nine months, the sum of thirty-six hundred dollars shall be placed to the credit of the college and paid as herein provided." [34 G. A., ch. 139, § 1.] [29 G. A., ch. 121, § 1; 27 G. A., ch. 82; 19 G. A., ch. 166; 18 G. A., ch. 165; 17 G. A., ch. 72, § 2; C. '73, §§ 1675–6, 1679.]

SEC. **2718-b. Prior expenses—allowance.** All expenses of the college incurred prior to the first day of March, A. D. nineteen hundred and

two, shall be paid from the funds heretofore authorized by section twenty-seven hundred eighteen of the code, as amended, and the monthly allowance authorized by this act shall be computed from the first day of February, A. D. nineteen hundred and two. [29 G. A., ch. 121, § 2.]

SEC. **2718-c. Blind and deaf children—compulsory education.** Children, residents of the state, between twelve and nineteen years of age, who are so deaf as to be unable to obtain an education in the common schools, and children of such age whose sight is so defective that they cannot attend the public schools, must attend the school for the deaf or the college for the blind during the scholastic year, unless exempted as hereinafter provided. [33 G. A., ch. 175, § 1.]

SEC. **2718-d. Failure to comply—penalty.** Any person having such a child under his control and who fails to comply with any of the provisions of this act, shall be deemed guilty of a misdemeanor and shall be fined not exceeding twenty-five dollars, or imprisoned not exceeding eight days. [33 G. A., ch. 175, § 2.]

SEC. **2718-e. Encouraging absence—penalty for.** Any person who induces or attempts to induce any deaf or blind child to absent himself or herself from school, or employs or harbors any such child while his or her school is in session shall be deemed guilty of a misdemeanor and shall be fined or imprisoned as provided in the preceding section. [33 G. A., ch. 175, § 3.]

SEC. **2718-f. Attendance excused—conditions.** The superintendent of the school for the deaf, or the superintendent of the college for the blind, with the approval of the board of control of state institutions may excuse attendance when satisfied:

1. That the child is in such bodily or mental condition as to prevent his or her attendance at school.
2. That the child is so diseased or possesses such habits as to render his or her presence a menace to the health or morals of other pupils, or for any reason deemed good and sufficient.
3. That the child is efficiently taught for the scholastic year in a private or other school, or by a private tutor, the branches taught in the public schools. [33 G. A., ch. 175, § 4.]

CHAPTER 10.

OF THE INDUSTRIAL HOME FOR THE BLIND.

[See §§ 2727-a8 and 2727-a9 for supervision by board of control and abolishment of board of trustees. See also § 2722-h, which doubtless repeals all of ch. 10 of the code. EDITOR.]

SECTION **2722-a. Board of control to close institution—expenses of inmates.** As soon as practicable after the passage of this act, the board of control of state institutions is directed to close the industrial home for the blind at Knoxville, to cease all manufacturing thereat, and to cause to be sent to their homes in this state, all of the inmates therein, who may desire to return home, paying the actual expenses thereof, and they are also authorized to give each of said inmates a sum not exceeding twenty-five dollars to cover their incidental expense on their journey home. [28 G. A., ch. 103, § 1.]

SEC. **2722-b. Custodian.** Said board of control is hereby authorized to employ a proper person as a custodian, whose business it shall be to care

for said buildings and all other state property on said farm. He shall live in the building, and shall be paid such sum per month as the board may deem proper for his services. [28 G. A., ch. 103, § 2.]

SEC. **2722-c. Authority to lease the farm.** Said board is authorized to lease the farm and collect the rental thereof, or they may, if a suitable arrangement can be made, make the lessee of the farm the custodian of said buildings and property. [28 G. A., ch. 103, § 3.]

SEC. **2722-d. Disposition of personal property.** Said board is authorized to sell such of the personal property at said institution or on said farm as they may deem proper to any person, or they may sell the same to any other institution under their control, which may need the same, or any part of it at a price to be fixed by them. Groceries and other perishable articles and other articles which cannot be disposed of at a fair price may, in the discretion of the board, be given to the industrial school at Mitchellville for use in said institution. [28 G. A., ch. 103, § 4.]

SEC. **2722-e. Disposition of rent or sale money.** All money received by said board for rent or for sale of personal property shall be paid into the state treasury and placed to the credit of said institution. [28 G. A., ch. 103, § 5.]

SEC. **2722-f. Appropriation.** There shall be available for the purpose of carrying out the provisions of this act the moneys collected from rent and from sales of personal property; and there is hereby further appropriated for said purpose the sum of three thousand dollars or so much thereof as may be necessary, and the board is empowered to draw in the name of the present superintendent of said industrial home a sufficient sum in advance, on filing vouchers therefor, to in their judgment pay all expenses of transportation of inmates to their homes, and the incidental expenses above provided, on a certificate reciting the facts to said officers, all other sums to be drawn in the manner provided by chapter one hundred eighteen, acts of the twenty-seventh general assembly. [28 G. A., ch. 103, § 6.]

SEC. **2722-g. Authority to transfer balances.** The treasurer of state is hereby authorized to transfer the following balances of special appropriations to the general funds of the state, viz.: of appropriations made in chapter eighty-six, acts of the twenty-fourth general assembly. A balance of eighty-two dollars and ninety-five cents of the appropriations for additional furniture and machinery. A balance of one hundred eighteen dollars and fifty cents for planting orchard and small fruits. A balance of two hundred twenty-eight dollars and thirty-nine cents for ice house and cold storage. Also of chapter one hundred forty-four of the acts of the twenty-fifth general assembly, a balance of sixty dollars of the item for the building and grounds. [28 G. A., ch. 103, § 7.]

SEC. **2722-h. Acts in conflict repealed.** All acts and parts of acts in conflict with this act are hereby repealed. [28 G. A., ch. 103, § 8.]

CHAPTER 11.

OF THE SCHOOL FOR THE DEAF.

[For general supervision by board of control and abolishment of board of trustees see §§ 2727-a8 and 2727-a9. EDITOR.]

SECTION **2724. Admission.** That the law as it appears in section twenty-seven hundred twenty-four of the supplement to the code, 1907, is hereby repealed and in lieu thereof is enacted the following:

Every resident of the state of Iowa who is not less than five nor more than twenty-one years of age who is deaf and dumb, or so deaf as to be unable to acquire an education in the common schools, and every such person who is over twenty-one and under thirty-five years of age who has the consent of the board of control of state institutions, shall be entitled to receive an education in the institution at the expense of the state; and nonresidents similarly situated may be entitled to an education therein, upon the payment of sixty-six dollars quarterly, in advance. Each superintendent of common schools, on or before the first day of November of each year, shall report to the superintendent of the institution the name, age and post-office address of each deaf and dumb person, or person so deaf as to be unable to acquire an education in the common schools, between the ages of five and thirty-five years and residing in his county so far as he may ascertain. [35 G. A., ch. 232, § 1.] [30 G. A., ch. 108; C. '73, §§ 1688–9; R. §§ 2156, 2160.]

[For compulsory education of children defective in hearing see §§ 2718-c to 2718-f inclusive. EDITOR.]

SEC. **2726. Expenses—charged to county—how certified and paid.** Section twenty-seven hundred twenty-six of the code, relating to the expenses of the inmates of the school for the deaf, is hereby repealed, and the following enacted in lieu thereof:

"When pupils are not supplied with clothing, or transportation, it shall be furnished by the superintendent who shall make out an account therefor against the parent or guardian, if the pupil be a minor, and against the pupil if he have no parent or guardian, or has attained the age of majority, which bill shall be certified by him to be correct, and shall be presumptive evidence thereof in all courts. The superintendent shall on the first days of April and October of each year, certify to the auditor of state the amounts due from several counties, and the auditor of state shall thereupon pass the same to the credit of the institution, and charge the amount to the proper county. The superintendent shall at the time of sending certificate to the auditor of state, send a duplicate copy to the auditor of the county of the pupil's residence, who shall, when ordered by the board of supervisors, proceed to collect the same by action if necessary, in the name of the county, and when so collected, shall pay the same into the county treasury. The county auditor shall, upon receipt of said certificate, pass the same to the credit of the state, and thereupon issue a notice to the county treasurer authorizing him to transfer the amount from the general county fund to the general state revenue, which shall be filed by the treasurer as his authority for making such transfer, and shall include the amount in his next remittance of state taxes to the treasurer of state, designating the fund to which it belongs." [31 G. A., ch. 132; 23 G. A., ch. 55, § 1; C. '73, § 1695.]

SEC. **2727. Support—repealed.** [29 G. A., ch. 122, § 1.]

[See § 2727-a. EDITOR.]

SEC. **2727-a. Appropriation—support—residence during vacation.** That section twenty-seven hundred twenty-seven-a of the supplement to the code, 1907, be and the same is hereby repealed and in lieu thereof is enacted the following:

For the support of the school and to meet the ordinary and current expenses thereof, including the compensation of officers, teachers, and other employes, the purchase of supplies, of food, clothing, furniture and furnishings, books, maps, apparatus, and other incidental expenses, there

is hereby appropriated, out of any money in the state treasury not otherwise appropriated, or so much thereof as may be needed, twenty-two dollars per month for nine months of each year, for each resident pupil actually supported in the school. Said sum shall be placed to the credit of the school on the certificate of the board of control of state institutions which shall show the average number of pupils in the school for the preceding month, and shall be paid from the state treasury, as provided by chapter one hundred eighteen of the acts of the twenty-seventh general assembly and acts amendatory thereof. Provided, however, that whenever the average number of pupils in any month shall be less than two hundred seventy-five, the school shall be credited by the auditor of state and the treasurer of state with the sum of six thousand and fifty dollars.

[1]Provided the residence of indigent or homeless pupils may, by order of the board of control of state institutions, be continued during vacation months, and for such purposes the provisions of this section shall apply for twelve months. [33 G. A., ch. 177, § 1; 33 G. A., ch. 176, § 1.] [29 G. A., ch. 122, § 1; 27 G. A., ch. 83; 23 G. A., ch. 55, § 2; 20 G. A., ch. 73; 19 G. A., ch. 105; 18 G. A., ch. 203; 17 G. A., ch. 98; C. '73, § 1696.]

[1]33 G. A., by ch. 176, amended § 2727-a by adding this paragraph. The act became effective by publication and thereafter the same session by ch. 177, repealed the said section and enacted a substitute therefor which is shown above, preceding the figure 1. Whether the paragraph following the figure 1 is now a part of the law, *quaere*. EDITOR.]

[See § 2727-1a. EDITOR.]

SEC. **2727-1a. Minimum monthly allowance—how computed.** The minimum monthly allowance provided for by this act shall be computed from and after the first day of October, A. D. nineteen hundred and eight, and credit shall be given as hereinbefore authorized for a sum which shall make the credits given to said school since said date equal to the credits which it would have received if the provisions of this act had been in force during that time. [33 G. A., ch. 177, § 2.]

SEC. **2727-2a.**[1] **Prior expenses.** All expenses of the school, incurred prior to the first day of April, A. D. nineteen hundred and two, shall be paid from the funds heretofore authorized by section twenty-seven hundred twenty-seven of the code, as amended, and the monthly allowance authorized by this act shall be computed from the first day of February, A. D. nineteen hundred and two. [29 G. A., ch. 122, § 2.]

[1]The above section was 2727-b in the last supplement. Changed here so that subsequent numbers may appear alphabetically. EDITOR.]

CHAPTER 11-A.

OF THE SALARIES OF THE CHIEF EXECUTIVE OF CERTAIN STATE INSTITUTIONS AND THE QUALIFICATION OF THE SUPERINTENDENT OF THE SCHOOL FOR THE DEAF.

SECTION **2727-3a.**[1] **Salaries.** From and after July first, eighteen hundred ninety-eight, the annual salary of the chief executive officer of the following institutions shall be: For the institution for feeble-minded children at Glenwood, twenty-four hundred dollars; for the industrial school, boys' department, at Eldora, eighteen hundred dollars; for the school for the deaf at Council Bluffs, fifteen hundred dollars; for the Iowa

soldiers' orphans' home at Davenport, eighteen hundred dollars; for the industrial school, girls' department, at Mitchellville, eighteen hundred dollars; for the industrial home for the blind at Knoxville,[2] six hundred dollars. The superintendent of the school for the deaf shall be proficient in the use of the sign language. [35 G. A., ch. 234, § 1; 35 G. A., ch. 233, § 1.] [31 G. A., ch. 133; 28 G. A., ch. 141, § 1; 27 G. A., ch. 74, § 1.]

[1This section number was 2727-c in the last supplement. 2See ch. 10, title XIII. EDITOR.]

CHAPTER 11-B.

OF THE BOARD OF CONTROL OF STATE INSTITUTIONS.

SECTION **2727-a1. Nomination — term of office — confirmation — salaries—removal—vacancies.** The governor shall, prior to the adjournment of the twenty-seventh general assembly, nominate and, with the consent of two thirds of the members of the senate in executive session, appoint three electors of the state, not more than two of whom shall belong to the same political party, and no two of whom shall reside at the time of their appointment in the same congressional district, as members of a board to be known as a board of control of state institutions. Said members shall hold office, as designated by the governor, for two, four, and six years respectively. Subsequent appointments shall be made as above provided and, except to fill vacancies, shall be for a period of six years. The board shall at all times be subject to the above limitations and restrictions. No nomination shall be considered by the senate until the same shall have been referred to a committee of five, not more than three of whom shall belong to the same political party, to be appointed by the president of the senate without the formality of a motion, which committee shall report to the senate in executive session, which report shall be made at any time when called for by the senate. The consideration of nominations, by the senate, shall not be had on the same legislative day the nominations are referred. The chairman of the board for each biennial period shall be the member whose term first expires, and each member thereof shall receive a salary of three thousand dollars per annum. The governor may, by and with the consent of the senate, during a session of the general assembly, remove any member of the board for malfeasance or nonfeasance in office, or for any cause that renders him ineligible to appointment, or incapable or unfit to discharge the duties of his office, and his removal when so made shall be final. When the general assembly is not in session the governor may suspend any member so disqualified, and shall appoint another to fill the vacancy thus created, subject, however, to the action of the senate when next in session. All vacancies on said board that may occur while the general assembly is not in session shall be filled by appointment by the governor, which appointment shall expire at the end of thirty days from the time the general assembly next convenes, and vacancies occurring during a session of the general assembly shall be filled as regular appointments are made and before the end of said session.

The term of office of the member of the board whose term expires April, nineteen hundred twelve, is hereby extended to June thirtieth, nineteen hundred thirteen; the term of office of the member of the board whose term expires April, nineteen hundred fourteen, is hereby extended to June thirtieth, nineteen hundred fifteen; and the term of office of the member

of the board whose term expires April, nineteen hundred sixteen, is hereby extended to June thirtieth, nineteen hundred seventeen. [34 G. A., ch. 140, § 1.] [27 G. A., ch. 118, § 1.]

SEC. 2727-a2. **Oath—bond—examination—not excused from testifying.** Each member of the board shall take the oath, and qualify, as required by section one hundred seventy-nine of the code, and shall devote his whole time to the duties of his office. Before entering on the duties of his office, each member shall give an official bond in the sum of twenty-five thousand dollars, conditioned as provided by law, signed by sureties, to be approved by the governor, and when so approved, said bonds shall be filed in the office of the secretary of state. No member of the board of control shall be eligible to any other lucrative office in the state during his term of service or for one year thereafter or to any position in any state institution during the term for which he was appointed, nor within one year after his term shall have expired. The said board of control shall be subject to the examination of the joint committee on retrenchment and reform, created by section one hundred eighty-one of the code. The claim that any testimony or evidence sought to be elicited or produced on such examination may tend to criminate the person giving or producing it, or expose him to public ignominy, shall not excuse him from testifying or producing evidence, documentary or otherwise; but no person shall be prosecuted or subjected to penalty or forfeiture for and on account of any matter or thing concerning which he may testify or produce such evidence, provided that he shall not be exempted from prosecution and punishment for perjury committed in so testifying. [27 G. A., ch. 118, § 2.]

SEC. 2727-a3. **Officers—secretary—salary—acting secretary—supplies.** The board shall be provided by the proper authorities with suitably furnished offices at the seat of government, and shall employ a competent secretary, who shall receive a salary not to exceed two thousand dollars per annum, and may also hire a stenographer and such other employes as may be necessary. In the absence or disability of the secretary, and the business of the board requires it, the board of control may appoint a member of the board as acting secretary during such absence or disability, who shall at such time have the powers of the secretary of the board. Said appointment shall be made of record in the proceedings of the board, and no additional compensation shall be paid because of the service of such acting secretary. This board shall, by the proper authorities, be also furnished with all necessary books, blanks, stationery, printing, postage stamps, and such other office supplies as are furnished other state officers. It shall present to each general assembly an itemized account of its expenditures, to the end that the legislature may, for the future, fix the maximum amount of such expenditures. [28 G. A., ch. 143, § 4; 27 G. A., ch. 118, § 3.]

SEC. 2727-a4. **Appropriation.** There is hereby appropriated from any funds in the state treasury not otherwise appropriated sufficient thereof to pay the salaries and expenditures hereby authorized. [27 G. A., ch. 118, § 4.]

SEC. 2727-a5. **Traveling expenses—governor's approval.** In addition to the salaries paid the members of the board and the secretary or other employes they shall be entitled to the necessary traveling expenses, by the nearest traveled and practicable route, incurred in going from Des Moines to the different institutions, or to other places in the state, when on official business. No expenditure for traveling expenses to other states

shall be made by the board, or by any officer or agent thereof, or by any officer, employe, or agent of any state institution subject to this board, unless the authority to make such trip is granted at a meeting of the board of control upon a written resolution, adopted by the board, which shall state the purpose of such trip, and the reason the same is deemed necessary. Said resolution, if adopted, shall then be submitted to the governor for his written approval, and if he does not approve the same such trip shall not be made at the expense of the state. [27 G. A., ch. 118, § 5.]

SEC. **2727-a6. Itemized statement.** Before any expenses of the members of the board, any officer, or agent thereof, or before any expenses incurred by others under the direction of the board, or the expenses of any officer or employe of any institution under the charge of the board, shall be paid, a minutely itemized statement of every item of expenditure shall be presented to the proper authority, duly verified, which verification shall aver that the expense bill is just, accurate and true, and is claimed for cash expenditures, or cash disbursements, truly and actually made and paid to the parties named, as shown by said statement. Unless the statement is so verified and duly audited, payment thereof shall not be had. The expense bills of the members of the board, the secretary and its other employes, when so verified, shall be presented to the governor for his written audit, before payment is made. The salaries and such actual expenses of the board, and of the secretary and other officers, and the salaries of employes, shall be paid monthly by the treasurer of state, upon the warrant of the auditor of state. [27 G. A., ch. 118, § 6.]

SEC. **2727-a7. Official seal.** The board shall have an official seal, and every commission, order, or other paper executed by the board may, under its direction, be attested with its seal affixed, by the secretary, or any member of the board. [27 G. A., ch. 118, § 7.]

SEC. **2727-a8. Institutions under control.** The board of control shall have full power to manage, control, and govern, subject only to the limitations contained in this act, the soldiers' home; the state hospitals for insane; the school for the deaf; the institution for the feeble-minded; the soldiers' orphans' home; the industrial home for the blind; the industrial school, in both departments; and the state penitentiaries. Within ten days after the appointment and qualification of the members of the board, it shall organize and assume the duties vested in said board, but shall not exercise full control of the institutions until July first, eighteen hundred ninety-eight. [34 G. A., ch. 141, § 1.] [27 G. A., ch. 118, § 8.]

[The board of control is given control over the state hospital for inebriates by § 2310-a8, and over the state colony for epileptics by § 2727-a93. EDITOR.]

SEC. **2727-a9. Powers—duties—annual statement.** The boards of trustees and commissioners now charged with the government of the institutions named in section eight hereof shall on and after July first, eighteen hundred ninety-eight, have no further legal existence. All trustees now in office shall continue in office until July first, eighteen hundred ninety-eight. The powers possessed by the governor and executive council, with reference to the management and control of the state penitentiaries, shall, on July first, eighteen hundred ninety-eight, cease to exist in the governor and executive council, and shall become vested in the board of control; and the said board is, on July first, eighteen hundred ninety-eight, and without further process of law, authorized and directed to assume and exercise all the powers heretofore vested in or exercised by the several boards of trustees, the governor, or the executive council with reference to

the several institutions of the state herein named. The duties imposed on the executive council, by statute, to establish an uniform system of books and accounts for state institutions, and to cause the same to be examined annually by a skilled accountant, and to annually require a settlement with the officers of each state institution, are transferred from said council to the board of control as to the institutions herein named. Nothing herein contained shall limit the general supervisory or examining powers vested in the governor by the laws or constitution of the state, or that are vested by him in any committee appointed by him. The board shall prepare annually for publication, in accordance with the provisions of section one hundred sixty-three of the code, a statement of the cost for the preceding year of maintaining each of said institutions, including improvements, itemized so far as practicable, and so arranged as to show the cost of the various kinds of provisions and supplies. [27 G. A., ch. 118, § 9.]

SEC. **2727-a10. Investigation—witnesses—contempt of court.** It shall be the duty of said board, or a committee thereof, to visit and inspect, at least once in six months, the institutions named, and investigate the financial condition and management of such institutions; and in aid of any investigation the board shall have the power to summon and compel the attendance of witnesses; to examine the same under oath, which any member thereof shall have the power to administer; and shall have access to all books, papers and property material to such investigation, and may order the production of any other books or papers material thereto. Witnesses other than those in the employ of the state shall be entitled to the same fees as in civil cases in the district court. The claim that any testimony or evidence sought to be elicited or produced on such examination may tend to criminate the person giving or producing it, or expose him to public ignominy, shall not excuse him from testifying or producing evidence, documentary or otherwise; but no person shall be prosecuted or subjected to any penalty or forfeiture for and on account of any matter or thing concerning which he may testify or produce such evidence, provided that he shall not be exempted from prosecution and punishment for perjury committed in so testifying. And it shall be the duty of the board to cause the testimony so taken to be transcribed and filed in the office of the secretary of the board at the seat of government within ten days after the same is taken, or as soon thereafter as practicable and when so filed the same shall be open for the inspection of any person. Any person failing or refusing to obey the orders of the board issued under the provisions of this section, or to give or produce evidence when required, shall be reported by the board to the district court or any judge thereof, and shall be dealt with by the court or judge as for contempt of court. [27 G. A., ch. 118, § 10.]

SEC. **2727-a11. Monthly visitation—may appoint a woman—visiting committee abolished.** The board, by a committee, or its secretary, shall visit each hospital for the insane once each month, and in making such visits shall be vested with and exercise the powers and functions now granted the visiting committee to such hospitals, except that the discharge of employes for cause shall be left with the superintendent as hereinafter provided. If the board deem it prudent, it may appoint a woman who resides within fifty miles of any hospital, whose duty it will be to visit such hospital, when directed by the board, and to report to the board, and who shall be paid the same compensation from the funds of the institution visited as is now provided for members of the visiting committee, upon proper audit of the bill for such services and expenses by the board, in the

manner provided for payment of current expenses of institutions. The visiting committee to the hospitals for the insane is hereby abolished, and the members are relieved from further duty upon the passage of this act. [27 G. A., ch. 118, § 11.]

SEC. **2727-a12. Biennial report.** The board shall make reports to the governor and legislature of its observations and conclusions respecting each and every of the institutions named, including the regular biennial report to the legislature, covering the biennial period ending June thirtieth, preceding the regular session of the general assembly. Said biennial report shall be made not later than November fifteenth in the year preceding the meeting of the general assembly, and shall also contain the reports which the executive officers of the several institutions are now or may be by the board required to make, also a statement of visitations to the several institutions and when and by whom made. [27 G. A., ch. 118, § 12.]

SEC. **2727-a13. Books and accounts.** It shall keep at its office a proper and complete system of books and accounts with each institution, which shall show every expenditure authorized and made thereat and said books shall exhibit an account of each extraordinary or special appropriation made by the legislature, with every item of expenditure thereof. [27 G. A., ch. 118, § 13.]

SEC. **2727-a14. Uniform system of records and accounts—expert help.** It shall prescribe the form of records and the kind of accounts to be made and kept by the institutions heretofore specified. In providing for the books of accounts the said board shall establish as uniform a system as possible, compelling similar institutions to keep similar books in the financial operations of such institutions; and the board shall institute and require the keeping of a perfected system of accounts, and requisitions showing the purchase, storing and consumption of supplies for subsistence, construction or other purposes. For the purpose of establishing said system of accounts, the board is authorized to employ competent and expert help, and to inaugurate in the institutions on July first, eighteen hundred ninety-eight, the most modern and complete method of accounts. The board shall, within six months after the passage of this act, determine the kinds and quality of provisions and supplies for the several institutions subject to its charge. [27 G. A., ch. 118, § 14.]

SEC. **2727-a15. Biennial estimates of special appropriations.** It shall prepare for the use of the legislature, biennial estimates of appropriations necessary and proper to be made for the support of the said several institutions, and for the extraordinary and special expenditures for buildings, betterments, or other improvements. [27 G. A., ch. 118, § 15.]

SEC. **2727-a16. Suggestions for legislation.** The board shall incorporate in its report to the legislature, suggestions respecting legislation for the benefit of the several institutions, or for the dependent, defective or criminal classes of the state. The board and its secretary shall on request, attend the meetings of legislative committees to which such questions may be submitted for consideration, and furnish such committees such information in regard to its doings and the conduct of such institutions as may be demanded. [27 G. A., ch. 118, § 16.]

SEC. **2727-a17. Plans and specifications—limited to amount of appropriation—penalty.** It shall prepare plans for all betterments, improvements or buildings costing more than one thousand dollars for which it may recommend an appropriation. But when an appropriation for any amount has been made, there shall be no expenditure thereof until the

board has secured suitable plans and specifications prepared by a competent architect, and accompanied by a detailed statement of the amount, quality and description of all the material and labor required for the completion of said structure; and no plan or plans shall be adopted, and no betterments, improvements or buildings constructed, that contemplate the expenditure of more money for completion than the amount appropriated by the legislature therefor, unless exempted from the provisions of this section by the act making such appropriation. In no event shall the board direct or permit an expenditure for any purpose in excess of the amount appropriated by law, or contemplated by the statute, and the members of the board, its officers and agents, are subject to the provisions of sections one hundred seventy-eight, one hundred eighty-two, one hundred eighty-four, one hundred eighty-five, one hundred eighty-six, one hundred eighty-seven and one hundred eighty-nine of the code, to the same extent as if said named persons were particularly specified in said sections. The violation of any of the provisions of either of the sections of the code above named by any of such named officers or persons, shall be deemed a misdemeanor, and on conviction the offender shall be fined in any sum not less than two hundred dollars, nor more than five thousand dollars, in the discretion of the court, or imprisoned in the county jail not exceeding one year, or by both such fine and imprisonment. [27 G. A., ch. 118, § 17.]

SEC. **2727-a18. Report to governor.** It shall investigate and report to the governor any abuses or wrongs alleged to exist in the state institutions referred to in this act. [27 G. A., ch. 118, § 18.]

SEC. **2727-a19. What to inspect.** The board or any member thereof at the stated visits to any of the institutions under its control shall inspect every part of each institution, and all the places, buildings and grounds belonging thereto, or used in connection therewith. They shall make an examination of the general and special dietary, the stores, and methods of supply; as far as circumstances may permit they shall see every inmate of the soldiers' home, and the charitable institutions, especially those admitted since the preceding visit, and shall give such as may require it, suitable opportunity to converse with the members of the board apart from the officers and attendants. They shall, if deemed necessary, examine under oath the officers, attendants, guards and other employes, and make such inquiries as will determine their fitness for their respective duties. [27 G. A., ch. 118, § 19.]

SEC. **2727-a20. Recommendations — quarterly conferences.** The board shall, during the first six months after its creation, meet in conference as often as it may determine, the superintendents, wardens and other executive officers of each of the said institutions, or as many thereof as it deems practicable, and consider in detail, all questions of management, and the methods to be adopted to secure the economical management of the several institutions, and shall send to such officers such recommendations in regard to the management and improvement of the institutions, as it may deem necessary or advisable, and the board is vested with power to enforce such recommendations and directions. After six months from the creation of the board a consultation and conference of the superintendents, wardens and chief executive officers shall be held quarterly with the board at its office in Des Moines, at a time to be designated by the board, at which meeting all matters concerning the government and management of the institutions shall be considered and discussed, and the chairman of the board of control shall preside at such meetings, and full minutes there-

of shall be preserved by the secretary of such board, who shall be secretary of said meeting. [27 G. A., ch. 118, § 20.]

SEC. 2727-a21. **Districts.** The board shall divide the state into proper districts from which the several institutions may receive patients or inmates. The limit of such districts may, from time to time, as the occasion warrants, be changed or altered. And in making such districts, or the rearrangement thereof, the superintendents, wardens, or executive heads of the institutions shall be consulted, at a time and place to be fixed by the board. When the districts are established, or a change thereof is had, the board shall notify the proper county or judicial officers of such establishment or change. [27 G. A., ch. 118, § 21.]

SEC. 2727-a22. **Records—transfer—managing officer.** The board shall keep in its office, accessible only to the members, secretary and proper clerks, except by the consent of the board, or on the order of a judge or court of record, a record showing the residence, sex, age, nativity, occupation, civil condition and date of entrance or commitment of every person, patient, inmate, or convict in the several institutions governed by the board, the date of discharge of every such person from the institution, and whether such discharge was final, and the condition of the person at the time he left the institution. The record shall also indicate if a person is transferred from one institution to another, and to what institution; and if dead, the date and cause of death. This information shall be furnished to the board by the several institutions, and such other obtainable facts as the board may from time to time require. It is the duty of the managing officer of each institution, who shall be named by the board, within ten days after the commitment or entrance of a person, patient, inmate or convict to the institution, to cause a true copy of his entrance record to be made and forwarded to the office of the board of control. When a patient or inmate leaves, or is discharged, transferred, or dies in any institution, the superintendent or person in charge shall, within ten days thereafter, send such information to the office of the board, all of which information shall be furnished on forms which the board may prescribe. [27 G. A., ch. 118, § 22.]

SEC. 2727-a23. **State architect—expenses—assistant draftsmen.** The board may employ an architect who shall be skilled in the most improved method of sanitation, and competent to prepare plans, specifications, estimates and details for the buildings, betterments, and every item of equipment which may be necessary in any of the institutions, whose duty shall be to perform the work usually done by architects in preparing plans and specifications, and supervising the work of construction on all the buildings, betterments and improvements done at institutions under the control of the board. Said architect shall also perform such other labor as may be designated by the board, and shall receive a compensation to be by the board fixed, which, including expenses, shall in no event exceed three thousand dollars per annum. In cases of sufficient magnitude, the board may secure the advice of a consulting architect, or may procure plans and specifications and drawings from other architects, but the expense thereof shall not exceed fifteen hundred dollars in any one year. The state architect shall be entitled to receive in addition to the compensation for his services fixed by the board, his necessary traveling expenses within the state when engaged in official business, and the board may allow him compensation for assistant draftsmen for services performed for the state when, in the opinion of the board, such services are necessary; provided, however, that the total amount allowed for traveling expenses and drafts-

men shall not exceed two thousand dollars in any biennial period. [30 G. A., ch. 109; 29 G. A., ch. 160, § 1; 27 G. A., ch. 118, § 23.]

SEC. **2727-a24. Institution officers—term of office—removal—qualifications.** It shall be the duty of the board to appoint a superintendent, warden or other chief executive officer of each institution under the control of the board. The tenure of office of said officers shall be four years from the date of their appointment, and the superintendent, warden or other chief executive officer now in charge of the several institutions placed under the control of this board and who is now holding under an election or contract for a definite term shall continue in office until the expiration of such term or contract; all other superintendents, wardens, or other chief executive officer shall hold office until January first, eighteen hundred ninety-nine. This provision shall not be applicable to the present warden at the Anamosa penitentiary, and the warden elect, W. A. Hunter, shall hold his office for the time for which he has been elected. The superintendent, warden, or other chief executive officer of any of the institutions named, may be removed by the board for misconduct, neglect of duty, incompetency, or other proper cause showing his inability or refusal to properly perform the duties of his office, but such removal shall be had only after an opportunity is given such person to be heard before such board upon preferred written charges, but the removal, when made, shall be final. The officers of the several institutions shall have the qualifications, and perform the duties now imposed and required of them by the statute, except as the same are modified or abrogated in this act. In case there is an alleged or seeming conflict between the powers of the superintendents or other executive officers and the board of control, the determination of such question by the board shall be final. [27 G. A., ch. 118, § 24.]

SEC. **2727-a25. Power to investigate question of insanity.** The board shall have the power to investigate the question of the insanity and condition of any person committed to any state hospital, and shall discharge any person so committed or restrained, if, in its opinion, such person is not insane, or can be cared for after such discharge, without danger to others, and with benefit to the patient, but in determining whether such patient shall be discharged, the recommendation of the superintendent of such hospital shall be secured. The granting of this power to the board to serve as a commission for the determination of the insanity of a person is merely permissive, and does not repeal or alter any statute respecting the discharge or commitment of inmates to the state hospitals. [27 G. A., ch. 118, § 25.]

SEC. **2727-a26. Power to transfer.** Patients shall be sent to the state hospital and convicts shall be sent to the penitentiary located in the district embracing the county from which they are committed. But the board may transfer the inmate in any hospital, or the convict in any penitentiary to another hospital or to the other penitentiary, at the expense of the state, and shall see that proper record thereof is made at the hospitals and penitentiaries, and in the office of the board. [27 G. A., ch. 118, § 26.]

SEC. **2727-a27. Collection of information—bulletins—forms.** The board shall gather and present information embodying the experience of soldiers' homes, charitable, reformatory and penal institutions in this and other countries, regarding the best and most successful methods of caring for the insane, delinquent and criminal classes. And it shall encourage and urge the scientific investigation of the treatment of insanity and epilepsy by the medical staffs of the insane hospitals, and the institution for the feeble-minded, and shall publish from time to time bulletins and reports of

the scientific and clinical work now done in said institutions, or which it may require to be done therein. It shall also provide for the several institutions the forms for statistical returns to be made by them in their annual and other reports. [27 G. A., ch. 118, § 27.]

SEC. **2727-a28. Repeal.** The law as it appears in section twenty-seven hundred twenty-seven-a twenty-eight of the supplement to the code [1902] and all acts and parts of acts in conflict with this act are hereby repealed. [31 G. A., ch. 92, § 3; 27 G. A., ch. 118, § 28.]

SEC. **2727-a28a. Nonresident insane — care and removal.** That when the commissioners of insanity of any county shall find to be insane a person who is a nonresident of this state, or whose residence is found by the commissioners to be unknown, they shall at once report the case to the board of control of state institutions and furnish it with a copy of the evidence taken on the question of the legal settlement of the insane person. The board shall investigate the case and if the legal settlement cannot be ascertained the board shall cause him to be taken to a state hospital for the insane as a charge of the state, and if the legal settlement of the patient is found thereafter to be in any county of this state the cost of maintaining him shall be charged to that county and collected as provided by law in other cases. If the board of control find that the insane person is a nonresident of this state it may cause him to be conveyed to the place of his legal settlement forthwith or to a state hospital for the insane, there to be treated and cared for until released, at the cost of the state. When the legal settlement of any nonresident patient received in a state hospital is known or if then unknown is afterwards ascertained, he may be transferred to the place of his legal settlement if his condition permit such transfer, unless the cost thereof, or other reasons, shall, in the opinion of the board of control, make the transfer inadvisable. No patient to be maintained at the expense of the state shall be received in a state hospital without the formal order of the board of control. [31 G. A., ch. 92, § 1.]

[Acts in conflict are repealed by § 2727-a28. EDITOR.]

SEC. **2727-a28b. Transfers of insane persons — expenses.** The transfer of insane persons to state hospitals or to the places of their legal settlement under the provisions of this act or under the provisions of chapter seventy-eight of the acts of the thirtieth general assembly shall be made according to the directions of the board of control, and when practicable by employes of state hospitals, and the actual and necessary expenses of such transfers shall be paid on itemized vouchers sworn to by the claimants and approved by the board of control from any funds in the state treasury not otherwise appropriated. [31 G. A., ch. 92, § 2.]

[Acts in conflict are repealed by § 2727-a28. EDITOR.]

SEC. **2727-a29. Questionable commitment.** The superintendents for the hospitals for the insane and the institution for the feeble-minded are required to immediately notify the board if there is any question as to the propriety of the commitment or detention of any person received at such institution, and said board, upon such notification, shall inquire into the matter presented, and take such action as may be deemed proper in the premises. [27 G. A., ch. 118, § 29.]

SEC. **2727-a30. Protection against fire—means of escape.** It shall be the duty of the board to compel the superintendent, warden or other chief executive officer of each of the institutions under the control of the board, to provide at each institution, adequate and ready means of protection against fire, and to construct proper means of escape for the inmates and attendants where the same are not already constructed and to estab-

lish and enforce rigid rules and regulations, by which the danger of fire shall be minimized, and prevent, as far as possible, injury to the persons of the inmates, and the loss or destruction, by any cause, of the property of the state. [27 G. A., ch. 118, § 30.]

SEC. **2727-a31. Official bonds.** It shall be the duty of the board of control to require its secretary and each officer and employe of said board, and of every institution under its control who may be charged with the custody or control of any money or property belonging to the state, and who is not now required by statute to give bond, to give an official bond, properly conditioned, and signed by sufficient sureties, in a sum to be fixed by the board, which bond shall be approved by the board, and filed in the office of secretary of state. [27 G. A., ch. 118, § 31.]

SEC. **2727-a32. Inventory of stock and supplies.** The board shall require within thirty days after its organization, the chief executive officer of each institution under its charge, to make a complete, minute and accurate inventory of the stock and supplies on hand, the amount and value thereof, which inventory shall be under the following heads: Live stock, produce of the farm on hand, carriages and vehicles, agricultural implements, machinery, mechanical fixtures, real estate, beds and bedding in inmates' department, other furniture in inmates' department, personal property of the state in superintendent's department, ready-made clothing, dry goods, provisions and groceries, drugs and medicines, fuel, library, and all other property under such other heads as the board may deem proper. A like inventory shall be submitted by the proper officer of each institution to the board when the annual report of said officer is submitted to the board. [27 G. A., ch. 118, § 32.]

SEC. **2727-a33. Gifts or gratuities—penalties.** No member of the board of control, or officer, agent or employe thereof, and no superintendent, officer, manager or employe of any of the institutions under the charge and control of said board, shall, directly or indirectly, for himself or any other person or for any institution under the charge of said board, receive or accept any gift or gratuity from any person or persons, firm or corporation who are dealers in goods, merchandise or supplies which may be used in any of said institutions, or from any employe, servant or agent of such person or persons, firm or corporation. Any person violating the provisions of this section shall be deemed guilty of a misdemeanor and upon conviction be punished as provided in section forty-nine hundred and four of the code, and such violation shall be cause for his removal from office. [27 G. A., ch. 118, § 33.]

SEC. **2727-a34. Contents of biennial report—daily record.** The board shall publish in its biennial report to the legislature the name and salary of every employe of said board, the name and salary of each officer and employe in the several institutions, subject to its control. It shall be the further duty of the board to require the proper officer of each institution to keep in a book prepared for the purpose, a daily record, to be made each day, of the time and the number of hours of service of each employe, and the monthly pay roll shall be made from such time book, and shall be in accord therewith. When an appropriation is based on the number of inmates in or persons at an institution, the board shall require a daily record to be kept of the persons actually residing at and domiciled in such institution. [27 G. A., ch. 118, § 34.]

SEC. **2727-a35. Political activity or contributions prohibited.** Any member, employe, or officer of the board of control, or any officer or employe of a state institution subject to this board, who by solicitation or

otherwise, exerts his influence directly or indirectly, to induce other officers or employes of the state to adopt his political views or to favor any particular person or candidate for office, or who shall in any manner contribute money or other thing of value to any person for election purposes shall be removed from his office or position by the proper authorities. [28 G. A., ch. 143, § 2; 27 G. A., ch. 118, § 35.]

SEC. **2727-a36. Solicitation of contributions for political purposes prohibited—penalty.** Any person who demands or solicits, from any member, employe, or officer of the board of control, or from any officer or employe of any institution subject to this board, a contribution of money or other thing of value, for election purposes, or for the payment of the expenses of any political committee or organization, shall be deemed guilty of a misdemeanor and punished accordingly. [28 G. A., ch. 143, § 3.]

SEC. **2727-a37. Assistants—discharge.** The superintendent, warden, or other chief executive officer of the several institutions shall appoint all assistants, guards and employes required in the management of the institution, the number of whom shall be determined by the board. It is hereby declared a misdemeanor for the members of the board, or any officer thereof, to exert any influence, by solicitation or otherwise, on the managing officer of an institution in the selection of any employe or assistant. The said chief executive officer may, at his pleasure, discharge any person employed, but shall keep in the record of employes the date of such discharge, and shall place opposite his name the reason therefor. [27 G. A., ch. 118, § 36.]

SEC. **2727-a38. Institution salaries.** The board shall, prior to July first, eighteen hundred ninety-eight, and annually thereafter fix, with the written approval of the governor, the annual or monthly salaries of all the officers and employes in the several institutions, except such as are fixed by the general assembly. The board shall classify the officers and employes into grades, and the salaries and wages to be paid in each grade shall be uniform in similar institutions in the state. The schedule of wages so fixed shall become operative on July first of each year. The salaries and wages shall be included in the monthly estimates as hereinafter provided, and paid in the same manner as other expenses of the several institutions. Officers entitled to food supplies for their families shall receive such allowances from the supplies furnished for the patients and inmates of the institution. The word "family" shall be construed to mean only the wife and minor children of an officer. [27 G. A., ch. 118, § 37.]

SEC. **2727-a39. Local treasurer abolished.** The treasurers of the institutions placed under the management of the board of control will be relieved of their duties, and all such offices will be abolished on July first, eighteen hundred ninety-eight. Such local treasurer shall account to the proper authorities for all moneys, books, records, vouchers or other evidences of property belonging to his office, and in his possession. It shall be the duty of the state treasurer to receive all moneys and evidences of indebtedness in the hands of said treasurer, and a failure on the part of any such treasurer to properly account to the state treasurer on July first, eighteen hundred ninety-eight, without further process of law, shall be by the said state treasurer immediately reported to the attorney-general for such action as may be proper in the premises. [27 G. A., ch. 118, § 38.]

SEC. **2727-a40. Moneys remitted to state treasurer.** All moneys belonging to the state, derived from any source at any of the institutions under the control of this board, shall be by the proper executive officer, named by the board, accounted for and remitted to the state treasurer on

the first day of each month, and all funds for the necessary expenditures of such institutions shall be drawn from the state treasury, as provided in this act. [27 G. A., ch. 118, § 39.]

SEC. **2727-a41. Triplicate estimates—revision—purchase of supplies.** The superintendent, warden, or other chief executive officer, as may be designated by the board of control, shall on or before the fifteenth day of each month, cause to be prepared triplicate estimates in minute detail, including estimated cost of each item, of all the expenditures required for the institution for the ensuing month. Such estimate shall also include a statement of the source and amount of all the revenues received by the said institution and accounted for to the state treasurer on the first day of each month. Two of said triplicate estimates shall be sent to the office of the board, and the third shall be kept by said superintendent, warden, or other chief executive officer. The board may revise the estimates for supplies or other expenditures, either as to quantity, quality or the estimated cost thereof, and shall certify that it has carefully examined the same, and that the articles contained in such estimate, as approved or revised by it, are actually required for the use of said institution. When the estimates have been so certified and revised, a copy of such revised estimate, duly certified, shall be sent to the institution, and another copy retained by the board. The certified copy sent to the institution shall be sufficient authority to the management of the institution to purchase the supplies enumerated in said estimate, at prices not to exceed those therein named, and not otherwise. Said supplies shall be so purchased as to permit at least thirty days' time to pay therefor, and the steward, clerk, or other officer of the institution, designated by the board, shall require itemized bills to be rendered by the persons who furnish supplies, in duplicate, for all purchases, whether made upon contract or otherwise, which shall be in the following form:

The state of Iowa, on account of the..... Institution (Date).

To.....Dr. (Here insert an itemized account of goods or property purchased.)

The state of.....
} ss.
County of.....

I, ..., on oath say that the foregoing bill of account is correct and just, and wholly unpaid; that the exact consideration therein charged for was received by the said institution; that neither the same nor any part thereof has since been commuted; and that neither bonus, commission, discount, nor any other consideration, directly or indirectly, has been given, or stipulated, within my knowledge or belief, because of the purchase thereof, as therein set forth, or for any other reason. (To be signed by the person having personal knowledge of the facts therein set forth.)

.....

Sworn to and subscribed before me this.....day of.....

.....

I hereby certify that the above account is correct, and that the articles therein charged have been received in good order by the..... institution.

.....

Steward, clerk or other designated officer.

It shall be endorsed as follows:

No....., ...Institution. $.....

Passed upon by the board of control on the.....day of....., and ordered paid.

.....

Secretary of the board of control.

[27 G. A., ch. 118, § 40.]

SEC. **2727-a42. Monthly statement—affidavit.** The steward, clerk or other officer who may be designated by the board, shall prepare a monthly statement showing purchases and expenditures of every kind for the preceding month, which shall be signed by such officer, approved by the chief executive officer of the institution, and filed with the board on a day certain to be fixed by said board. Attached thereto shall be the affidavit of such steward, clerk, or officer, as the case may be, stating that the goods and other articles therein specified were purchased and received by him or under his direction at the institution, and were purchased at a fair cash market price, on credit not exceeding thirty days, and that neither he nor any person in his behalf had any pecuniary or other interest in the purchases made, or received any pecuniary or other benefit therefrom, directly or indirectly, by commission, percentage, deductions, or in any other manner whatever, and that the articles contained in such bill conformed in all respects to the invoiced goods received and ordered by him, or the samples from which the goods were purchased, both in quality and quantity. If any invoice or statement, or part thereof, is found objectionable, the board shall endorse its disapproval thereon, with its reason therefor, and return it to the management of the institution, and when the matter complained of is corrected, said statement and invoice shall be returned to the board. [27 G. A., ch. 118, § 41.]

SEC. **2727-a43. Pay roll—triplicate abstract—duties of state treasurer.** When the monthly statement is so made, approved and verified, it shall be forwarded to the board of control, together with the original invoices of the purchases and a complete and itemized statement of every expense of said institution, including the receipted pay roll, for the examination and audit of the board, which board shall fix a regular time for the auditing of the accounts of the institution for the preceding month. The monthly pay roll of each institution shall show the name of each officer and employe, when first employed, the monthly pay, time paid for, the amount of pay, and any deductions for the careless loss or destruction of property. This requirement shall be observed in all cases, and in no event shall a substitute be permitted to receive compensation in the name of the employe for whom he is acting. When the said accounts are audited, the secretary of the board of control shall, under the seal of the board, prepare in triplicate an abstract showing the name, residence and amount due each claimant, and the institution and the fund thereof on account of which the payment is made, which abstract shall also be certified by at least one member of the board, who shall be so authorized by the board, and the proceedings granting such authority shall be preserved in the records of the board. He shall deliver one copy thereof to the auditor of state, another to the treasurer of state, and the third shall be retained in the office of the board. Upon such certificate the auditor of state shall, if the institution named has sufficient funds, issue his warrant upon the treasurer of state for the gross amount as shown by such certified abstract. Said last named officer, upon being furnished by the board with a certified copy of such abstract as herein provided, shall send checks of the treasurer

of state to the several persons for the amounts of their respective claims, as certified by the board of control. The treasurer of state shall preserve in his books a record of each check and remittance in the proper manner, showing the date of the issuance of each check, the name of the person to whom it was made payable, and such other data as may be evidence for the state, showing the payment of such indebtedness. The pay roll of each institution can be paid by a single check sent to the steward, clerk or other officer designated by the board of control. If the treasurer of state shall require more clerical help because of this enactment, the executive council may authorize him to employ an assistant. [28 G. A., ch. 143, § 5; 27 G. A., ch. 118, § 42.]

SEC. **2727-a44. Contingent fund.** The board of control may permit a contingent fund, not to exceed in any institution two hundred fifty dollars, to remain in the hands of the managing officer of such institution, from which expenditures may be made in case of actual emergency requiring immediate action to prevent loss or danger to the institution or to the inmates thereof. A full, minute, and itemized statement of every expenditure made during the month from such fund, shall be submitted by the proper officer of said institution to the board under such rules and regulations as may be by said board established. If necessary, the board shall make proper requisition upon the auditor of state for a warrant on the state treasurer to secure the said contingent fund for each institution. [27 G. A., ch. 118, § 43.]

[For payment out of this fund of costs of recommitting and returning patients to the hospital for inebriates see § 2310-a30a. EDITOR.]

SEC. **2727-a45. Blanks and forms.** The board of control shall formulate and furnish to each institution proper blanks and forms for all statements and accounts necessary to furnish the information required of such institution. [27 G. A., ch. 118, § 44.]

SEC. **2727-a46. Duties of institution officers.** The stewards of the hospitals for the insane, the clerks of the prisons, and the proper officer of the other institutions who shall be designated by the board, shall have charge of and be accountable for all the supplies and stores of such institution, and shall be charged therewith at their invoice value, and shall in conjunction with the chief executive officer of each institution, make or direct all purchases for such institution as may be ordered by the board, under the estimates as hereinbefore provided. Such officer shall issue all the stores upon requisition approved by the superintendent or other officer designated by the board, which shall be his voucher therefor. He shall present monthly to the board of control an abstract of all expenditures, together with the accounts and pay rolls for the preceding month, and shall examine and register all goods delivered, according to their amount and quality, and if found to correspond with the samples, and in good order, and correct in charge, he shall certify the bills as herein provided. He shall quarterly take an account of the subsistence supplies and stock in his possession and under his control, and transmit a copy of such invoice, duly verified, to the board; and at the close of the biennial period he shall make a consolidated report of all purchases, and all other transactions of his department, to the state board. If it shall appear that there is any shortage in the stores of the institution, the board shall appoint a committee from its number to investigate the cause thereof, and if it shall appear that the said shortage resulted from unavoidable loss, without the negligence of such steward, clerk or other designated officer, then such officer[1]

shall be credited therewith; otherwise, he shall be charged with the amount thereof, and shall be required to pay the same into the state treasury within sixty days after the determination of the loss. If default shall be made in said payment, he shall forfeit his office, and suit shall be instituted upon his official bond to recover the same. [27 G. A., ch. 118, § 45.]

["The words "then such officer" did not appear in the last supplement, but do appear in the 1902 supplement and the session laws. As it seems that the words were unintentionally omitted, it has been thought best to insert them in this compilation. EDITOR.]

SEC. **2727-a47. Purchase of supplies from one institution for use of another.** Without complying with the provisions of chapter one hundred eighteen of the laws of the twenty-seventh general assembly, requiring estimates to be made, the board of control is empowered to direct the purchase of materials, or any articles of supply, for any institution subject to its management, from any other institution under its control, which purchase shall be made at the reasonable market value of the commodity so purchased, the value thereof to be ascertained and fixed by the said board, and payments therefor shall be made as between institutions in the manner provided by law for payments for supplies. [28 G. A., ch. 143, § 1.]

SEC. **2727-a48. Rules—additional duties.** The board of control is authorized to make its own rules for the proper execution of its powers, and may require the performance of additional duties by the officers of the several institutions, so as to fully enforce the requirements, intents and purposes of this enactment, and particularly so much thereof as relates to the making of the estimates and furnishing proper proofs of the expenditures or use of all stocks of subsistence and supplies. [27 G. A., ch. 118, § 46.]

SEC. **2727-a49. Contracts.** Contracts may be entered into under the direction of the board of control by the proper officers of one or more of the institutions for staples and other articles of supplies, as may be found feasible by the board for the institutions to purchase in bulk for use or consumption for periods longer than thirty days. Such contracts shall not, however, be made except in conformity with the provisions of this act relating to estimates. If thought advisable, such contracts may be executed by the representative of one institution, who may be designated by the board to act for other institutions. [27 G. A., ch. 118, § 47.]

SEC. **2727-a50. Purchase of supplies—rules and regulations.** It shall be the duty of the board to make specific rules and regulations respecting the manner in which supplies shall be purchased and contracts made for the several institutions, so as to insure the competition and publicity necessary to secure the economical management of each institution. Jobbers, or others desirous of selling supplies to an institution shall, by filing with the chief executive officer of such institution, or with the secretary of the board, a memorandum showing their address and business, be afforded an opportunity to compete for the furnishing of the supplies under such limitations and rules as the board may prescribe. In purchasing all supplies, local dealers shall have the preference, when such can be given without loss to the state. When samples are furnished the same shall be properly marked and preserved for six months after purchase of such merchandise. [27 G. A., ch. 118, § 48.]

SEC. **2727-a51. Letting of contracts—labor of inmates utilized.** Contracts for the erection, repairs or improvements of buildings, grounds, or properties of the institutions under charge of this board, and for which

appropriations have been or may be made by the legislature, must be let for the whole or for any part of the work to be performed, by the chief executive officer of the institution, subject, however, to the same rules and regulations as herein provided for the furnishing of estimates by said institution to, and the approval and revision thereof by the board of control. If the cost of the erection or betterment is not in excess of three hundred dollars, the board may permit the management of the institution to construct the same by day's labor, without contracting the work. All plans or specifications for the said erections, repairs and improvements, shall be prepared by the architect of the board, under the board's direction. The board shall determine to what extent and for what length of time, and by what means advertisements are to be inserted in newspapers for proposals for the said erections, repairs or improvements. All contracts shall be awarded by the management of the institution to the lowest responsible bidder, subject to the provisions of this act, and the approval of the board, prior to the execution of the contract. The management of the institution has the right to reject any and all bids, and to readvertise, upon the approval of the board. A preliminary deposit of money or certified check upon a solvent bank in such amount as the board may prescribe shall be required as an evidence of good faith, upon all proposals for the construction of said buildings, repairs and improvements, which deposit or certified check shall be held by the management of the institution under the direction of the board. The provision of this section which requires all work to be let by contract, shall not be mandatory as to the labor on the construction work at the penitentiaries, but the board shall establish such rules, and enforce the provisions of this act so that the construction work at the penitentiaries shall be performed in a manner agreeable thereto, with the strictest accountability exacted in the consumption of all supplies for construction purposes, and in the expenditure of the public moneys. On proper representations the board is authorized to so construct the erections, betterments and improvements at other institutions that the work of inmates may be utilized, if it is found to be advantageous to the state, and a substantial saving made, but the attempt to use such labor shall not permit a substantial departure from the requirements of this section; and in no case shall any expenditure be made except on estimates submitted to and approved by the board, as provided herein. No payment shall be authorized for construction purposes until satisfactory proof has been furnished to the board of control, by the proper officer or supervising architect, that the contract has been complied with by the parties; and all payments shall be made in a manner similar to that in which the current expenses of the several institutions are paid. [27 G. A., ch. 118, § 49.]

SEC. **2727-a52. Cherokee hospital commission abolished.** The members of the building commission authorized to construct the hospital for the insane at Cherokee shall be relieved from such duty, and the commission abolished on July first, eighteen hundred ninety-eight. Before said last named day the said commission shall surrender to the board of control all plans, specifications, books, records and other properties belonging to or in the possession of the said commission, or any member thereof. The said board shall succeed to and be vested with all the powers of the said building commission, and all duties thereof will be performed by said board, and all legislation affecting the powers, duties or obligations of said building commission shall, so far as applicable, apply with equal force to the said board of control. The said board shall call upon

any of the superintendents of the hospitals for the insane for such information or service as the board shall deem proper; and the said superintendents shall respond to such call for the compensation provided in the act relating to the building commission of the hospital for the insane at Cherokee. All outstanding obligations of said commission shall be executed and performed by the board of control, but this shall not prevent said board from selecting all its agents or employes in the work of construction, which shall be executed in a manner agreeable to and pursuant to the provisions of this act. [27 G. A., ch. 118, § 50.]

SEC. **2727-a53. Educational institutions—repealed.** [33 G. A., ch. 170, § 20.] [27 G. A., ch. 118, § 51.]

[See § 2682-v. EDITOR.]

SEC. **2727-a54. Powers as to the same—repealed.** [33 G. A., ch. 170, § 20.] [27 G. A., ch. 118, § 52.]

[See § 2682-v. EDITOR.]

SEC. **2727-a55. Investigation of management—repealed.** [33 G. A., ch. 170, § 20.] [27 G. A., ch. 118, § 53.]

[See § 2682-v. EDITOR.]

SEC. **2727-a56. Estimates of cost—repealed.** [33 G. A., ch. 170, § 20.] [27 G. A., ch. 118, § 54.]

[See § 2682-v. EDITOR.]

SEC. **2727-a57. Existing laws—acts in conflict repealed.** Existing laws relating to the institutions referred to in this act, which are not inconsistent with the provisions of this act, shall remain in force, and all acts or parts of acts in conflict with, or inconsistent with this act, are hereby repealed. [27 G. A., ch. 118, § 55.]

SEC. **2727-a58. County and private insane institutions—governed by board of control.** All county and private institutions wherein insane persons are kept are hereby placed under the supervision of the board of control of state institutions. [28 G. A., ch. 144, § 1.]

SEC. **2727-a59. Visitation, when and by whom—reports.** It shall be the duty of said board of control as soon as practicable after the passage of this act, and at least twice annually thereafter, by one or more of its members or by some competent and disinterested person, whom the board shall appoint, to visit every private and county institution wherein insane persons are kept. Said visitor shall carefully examine into the capacity of said institutions for the care of insane patients, the number kept therein, and their sex, the arrangement of buildings and the method of their construction, their adaptation for the purposes intended, their condition as to sewerage, ventilation, light, heat, cleanliness, means of water supply, fire escapes and fire protection, the care of patients, their food, clothing, medical attendance, and treatment, their employment, if any, the number, kind, and sex of employes, their duties and salaries, including nurses, attendants, and night watches, the cost to the state or county maintaining patients, which shall in all cases be kept separate and distinct from the cost of keeping paupers, and such other information which the said board shall deem proper. Said visitors shall make a written report including all of said matters to said board. [28 G. A., ch. 144, § 2.]

SEC. **2727-a60. Patients to have a hearing.** The person making the visit above provided for shall see all patients in the institutions and shall give each an opportunity to converse with him out of the hearing of any officer or employe of the institution, and shall fully investigate and inquire

into any complaint by making inquiry from the persons in charge of said institution, and others, and report the result thereof in writing to said board; but said board, before acting on said report adversely to the institution, shall give the persons in charge thereof a copy of such report and an opportunity to be heard thereon. [28 G. A., ch. 144, § 3.]

SEC. **2727-a61. Compensation of inspector.** In case the inspection herein provided for shall be made by a person appointed by the board of control of state institutions, such person shall be allowed such a sum as the board may, in its discretion, deem proper, not to exceed five dollars per day for the time actually employed in said work and in going to and from the same. The actual expenses of the person making the visit, and his per diem, if any, shall be allowed and paid when itemized, sworn to, and approved, as provided for in chapter one hundred eighteen of the acts of the twenty-seventh general assembly in relation to the expenses of the board. [28 G. A., ch. 144, § 4.]

SEC. **2727-a62. Board to make rules and regulations.** As soon as all private and county institutions in which insane persons may be kept shall have been visited and reports thereon received, the board of control shall adopt reasonable rules and regulations touching the care and treatment of, and make orders in relation to, such insane patients as may be kept in said institutions, which rules and regulations shall not interfere with the medical treatment given to private patients by competent physicians. Copies of such rules and regulations, when adopted, shall be mailed to the chief executive officer of each private institution, and to the clerk of the district court, the chairman of the board of supervisors, and the officer in charge of the institution in all counties having county institutions caring for insane persons. The board shall allow in this case a reasonable time for the management of these institutions to comply with such rules and regulations. [28 G. A., ch. 144, § 5.]

SEC. **2727-a63. Failure to comply with rules—penalty.** If any such institution shall fail, neglect, or refuse within the time fixed by the board to comply substantially in all respects with said rules, regulations, and orders, said board is authorized to remove all said insane persons kept therein at public expense, to the proper state hospital, or to some private or county institution or hospital for the care of the insane that has complied with the rules and regulations prescribed by said board of control, at the expense of the county which sent said patient to said institution, such removal of patients, if to a state hospital, to be made by an attendant or attendants sent from the state hospital, and the cost of such removal including all expenses of said attendant, shall be certified, by the superintendent of the hospital receiving the patient, to the auditor of state, whereupon he shall draw his warrant upon the treasurer of state for said sum, which shall be credited to the support fund of said hospital and charged against the general revenues of the state and collected by the auditor of state from said county. And the board of control shall notify the guardian, or one or more of the relatives of patients kept therein at private expense, that the rules as to their care are being disregarded, and of the action taken by the board as to the other patients. And should the board of control believe any person in any such institution sane, or illegally restrained of liberty, it shall institute and prosecute proceedings in the name of the state of Iowa, before the proper officer, board, or court, for the discharge of such person. If a female is removed under the provisions of this section, at least one attendant shall be a female. [28 G. A., ch. 144, § 6.]

SEC. **2727-a64. Removal of patient from one institution to another.** Whenever it shall be found by said board of control that any patient cared for at public expense is confined in any private asylum or county institution, who is violent and whose case is acute and said board shall be of the opinion, after taking competent medical testimony, that said patient can be better cared for in the state hospital with better hopes of recovery, it may remove said patient to the proper state hospital, at the expense of the proper county, said expense to be recovered as provided for in section six hereof. And whenever said board shall find any patient in a state hospital, who shall have become chronic, or likely to do as well in a county or private institution as in the state hospital, it may order the county to which the keeping of said patient is chargeable to remove him or her to some county or private institution in the state which shall have complied with the rules of said board relative to the keeping of insane patients; but in no case shall a patient, the relative or guardian of whom pays the expense of their keep in a state hospital, be thus transferred except upon the written consent of such relative or guardian; but a patient, the expense of whom is borne by the county, may be transferred on the written request of the board of supervisors, or the commissioners of insanity of the county to which the patient is chargeable, and of the board of control; nor shall a patient in a state hospital, who is not cured, be discharged without the consent of the board of control. [35 G. A., ch. 235, § 1.] [28 G. A., ch. 144, § 7.]

SEC. **2727-a65. Insane of other counties.** The commissioners of insanity, with the consent of the board of supervisors of any county, having insane persons within such county, and having no proper facilities, either at a public or private institution, for the care, keeping and treatment of such persons within the county, may, with the consent of the board of control, provide for their care at the expense of said county at any convenient private or county institution having proper facilities for the care of the same, and which will care for them to the satisfaction of the said board of control, and which will comply with the rules and regulations that may be prescribed by the board of control, relative to the care and keeping of insane persons. [28 G. A., ch. 144, § 8.]

SEC. **2727-a66. Authority of private asylums.** No person shall be confined and restrained in any private institution or hospital for the care or treatment of the insane, except upon the certificate of a board of commissioners of insanity of some county in the state, or of two reputable physicians, at least one of whom shall be a bona fide resident of the state of Iowa, who shall certify that such person is a fit subject for treatment and restraint in said institution or hospital, which certificate shall be the authority of the owners and officers of said hospital or institution for receiving and confining said patient or person therein. [28 G. A., ch. 144, § 9.]

SEC. **2727-a67. Appropriation.** To provide for the expenses of the inspection herein required and the per diem, there is hereby appropriated the sum of three thousand dollars, or so much thereof as may be necessary, from any funds of the state treasury not otherwise appropriated. [28 G. A., ch. 144, § 10.]

SEC. **2727-a68. Difference of opinion—how adjudicated.** When a difference of opinion exists between the board of control and the authorities in charge of any private or county asylum in regard to the removal of a patient or patients as herein provided, the matter shall be submitted

to the district court, or judge thereof, of the proper county and shall be summarily tried as an equitable action, and the judgment of the district court or judge shall be final. [28 G. A., ch. 144, § 11.]

SEC. **2727-a69. Annual appropriation — purpose.** That there is hereby appropriated out of any money in the state treasury not otherwise appropriated the sum of two hundred fifty dollars annually for the payment of the actual and necessary expenses of persons who shall, at the solicitation of the board of control of state institutions, read papers at the quarterly conferences of the chief executive officers of the state institutions under the management of said board. The papers so read shall have especial application to the objects and work of one or more of said institutions. [30 G. A., ch. 110, § 1.]

SEC. **2727-a70. How and when payable.** The money hereby appropriated shall be payable on the first day of July of each year and shall be paid from the state treasury as the expenses of the members of the board of control are paid. [30 G. A., ch. 110, § 2.]

SEC. **2727-a71. Special policemen.** That upon the application and recommendation of the board of control of state institutions the governor shall commission any number of employes of any institution under the control of said board, not exceeding three, to be designated by the chief executive officer, to be special policemen thereof; and such officer or officers shall take an oath of office and shall have power to protect the property of such institution, to suppress riots, disturbances and breaches of the peace, and to enforce all laws for the preservation of good order, and may, upon view or information, without warrant, arrest any person trespassing upon the grounds or destroying the property of such institution, or violating any of the existing laws of the state, and bring such person so offending before the mayor or any justice of the peace within such township, to be dealt with according to law. This act shall not be construed to authorize any additional employes in any institution, or any increase of compensation to any employe so designated. [30 G. A., ch. 111.]

SEC. **2727-a72. Personal property of deceased inmates—collection—disposition—record.** That when an inmate of any institution under the control of the board of control of state institutions dies intestate, leaving money, certificate of deposit, promissory note, or other evidence of indebtedness in writing on deposit with the chief executive or other officer, or shall leave in the possession of such institution or of any officer or employe thereof any personal property, it shall be the duty of the chief executive officer of said institution to take into his possession, if he does not already have it, such money, certificate of deposit, promissory note or other evidence of indebtedness in writing, and to receive any money which may have been due, or property which may have been owned by the decedent, and to dispose of the same as follows:

(a) To deliver such money or other property to the legal representative of the decedent so soon as he shall have qualified and become authorized to receive it.

(b) If administration be not granted within one year from the date of the death of the decedent, and the value of the estate of decedent is so small as to make the granting of administration under the general law inadvisable, then delivery of the money and other property left by the decedent may be made to the surviving spouse and heirs, if known, of the decedent.

(c) If administration be not granted within one year from the date of the death of the decedent and no surviving spouse or heir is known to the institution, although diligent search for them shall have been made, the chief executive officer of the institution shall be authorized to collect the certificate of deposit, promissory note or other evidence of indebtedness, and for that purpose is authorized to indorse the name of decedent as made by himself in his official capacity, and such indorsement shall have the same effect as though actually made by the decedent in his lifetime; and said chief executive officer shall be authorized to sell at either public or private sale, as shall be approved in writing by the said board of control, all personal property of the decedent which shall have come into his possession. The money which shall be received by said chief executive officer as aforesaid shall be transmitted to the treasurer of state at the end of one year from the death of the intestate, or as soon thereafter as is practicable, and shall be credited to the support fund of the institution from which it was sent. A complete permanent record of the money so sent, showing by whom and with whom it was left, its amount, the date of the death of the owner, his reputed place of residence before he became an inmate of the institution, the date on which it was sent to the state treasurer and any other facts which may tend to identify the intestate and explain the case shall be kept by the chief executive officer of the institution and a transcript thereof shall be sent to and kept by the treasurer of state. [33 G. A., ch. 178, § 1.] [30 G. A., ch. 112, § 1.]

SEC. **2727-a73. Payment to party entitled thereto.** The money so sent to treasurer of state, or any part thereof, shall be paid at any time within ten years from the death of the intestate to any person who is shown to be entitled thereto by evidence satisfactory to the board of control or to the district court of the county in which the institution from which the money was sent is located. Payment shall be made from the state treasury out of the support fund of such institution in the manner provided for the payment of other claims from that fund. [30 G. A., ch. 112, § 2.]

SEC. **2727-a74. Applicable to money now held.** The provision of this act shall also apply to all money left by inmates of institutions who have heretofore died intestate and which is now held by the chief executive or other officer of the institutions. [30 G. A., ch. 112, § 3.]

SEC. **2727-a74a. Contract for making butter tubs—limitation.** The state board of control is hereby authorized to enter into a contract for the employment of not to exceed fifty inmates of the reformatory at Anamosa in the making of butter tubs. Such employment shall end not later than January first, nineteen hundred fifteen. [33 G. A., ch. 179, § 1.]

[See also §§ 5702-b and 5718-a11. EDITOR.]

SEC. **2727-a74b. Charges against officers or employes of private and county institutions—investigation.** That the board of control of state institutions may investigate charges of abuse, neglect or other misconduct made against the management or any officer or employe of any county or private institution in which insane persons are kept, and against any association or society coming within the provisions of the law as it appears in section thirty-two hundred sixty-j of the supplement to the code, 1907. In aid of such investigations all of the provisions of the law as it appears in section twenty-seven hundred twenty-seven-a ten of the supplement to the code, 1907, in regard to the power of the board of control and of its members, the rights, duties, liabilities and privileges of wit-

nesses and others, shall apply and be in full force. [33 G. A., ch. 180, § 1.]

SEC. **2727-a74c. Annual vacations—officers—employes.** That each officer and employe of the state institutions under the control of the board of control of state institutions who shall have been in the service of said state not less than one year continuously, giving all his or her time to said service, shall be entitled to a vacation each year on full pay as follows: after having served one year, to seven days; and after having served two years, to ten days; and after having served three years, to fourteen days. Provided, however, that the vacations authorized by this act shall not be taken by any person in any institution unless the executive officer thereof shall have given to that person a permit in writing to take such vacation, specifying in the permit the days on which the vacation may be taken. A copy of such permit shall be attached to the pay roll of the institution for the month during which the vacation was taken, and the pay roll shall show the number of days the person was absent under the permit. [33 G. A., ch. 232, § 1.]

SEC. **2727-a74d. When granted.** It shall be the duty of the chief executive officer of each institution to arrange for the vacations hereby authorized to be taken at such times as will interfere as little as possible with the work of the institution, and be just to the employes. [33 G. A., ch. 232, § 2.]

SEC. **2727-a74e. Not applicable to certain employes.** This act shall not apply to any officer or other employe who is not required to render service for twelve months each year. [33 G. A., ch. 232, § 3.]

CHAPTER 11-C.

OF THE STATE SANATORIUM FOR THE TREATMENT OF TUBERCULOSIS.

SECTION **2727-a75. Establishment—incipient stages.** There is hereby established a state sanatorium for the care and treatment of persons afflicted with incipient pulmonary tuberculosis which shall be called the state sanatorium for the treatment of tuberculosis. [32 G. A., ch. 147, § 1; 31 G. A., ch. 120, § 1.]

SEC. **2727-a76. Superintendent, officers and employes.** The officers and employes of said sanatorium shall consist of a superintendent and such other officers and employes to be appointed as the board of control of state institutions shall deem necessary for the proper operation of said institution, including examining physicians. Said superintendent shall be a well-educated physician with an experience of at least five years in actual practice of medicine. Said superintendent shall be appointed by the board of control of state institutions for the term of four years and shall receive such salary as the said board may fix, not exceeding twenty-five hundred dollars per annum. [32 G. A., ch. 147, § 1; 31 G. A., ch. 120, § 2.]

SEC. **2727-a77. Control.** The board of control of state institutions shall have the same power and control over said institutions as is now given it with reference to the several institutions mentioned in chapter one hundred eighteen of the acts of the twenty-seventh general assembly and all amendments thereto, and said acts and amendments shall apply to and govern said sanatorium in every respect in so far as they are not in conflict with the provisions of this act. [32 G. A., ch. 147, § 1; 31 G. A., ch. 120, § 3.]

SEC. **2727-a78. Appropriation.** There is hereby appropriated fifty thousand dollars for the purpose of carrying out the provisions of this act to be expended by the board of control, as herein provided for. [31 G. A., ch. 120, § 4.]

SEC. **2727-a79. Purchase of land—erection and equipment of buildings.** As soon as practicable after the passage and publication of this act, and when the funds are available therefor, said board of control shall proceed to purchase the necessary land for said sanatorium, and erect, furnish and equip the needed buildings. In locating said sanatorium, it shall take into consideration climate, healthfulness, water supply, drainage, quality of soil, facility of access, timber protection to buildings and a suitable building site. Said site shall contain not less than one hundred sixty acres or whatever may be deemed necessary by the board of control. The buildings shall be planned to accommodate at least one hundred patients and necessary officers and employes. [32 G. A., ch. 147, § 1; 31 G. A., ch. 120, § 5.]

SEC. **2727-a80. Proclamation of the opening.** When said sanatorium buildings are erected, furnished, equipped and ready for use, said board of control shall notify the governor of the fact, who shall thereupon issue his proclamation of the opening of said sanatorium. [32 G. A., ch. 147, § 1; 31 G. A., ch. 120, § 6.]

SEC. **2727-a81. Duties of superintendent.** In addition to the duties which may now be imposed by law, the superintendent shall oversee and secure the individual treatment and professional care of each and every patient residing in the sanatorium. He shall prescribe rules subject to the approval of the board of control and not inconsistent with the statutes for the application, examination, reception and government of patients and their discharge, and shall keep a full record of their condition and prospects. He shall endeavor to stimulate the organization and assist in the establishment of [1]hospital, dispensaries, in various counties or large centers of population, for the treatment of patients with advanced tuberculosis. He shall reside at the institution. [32 G. A., ch. 147, § 1; 31 G. A., ch. 120, § 7.]

[1]Probably should be "hospitals or dispensaries" as in § 2727-a89. EDITOR.]

SEC. **2727-a82. What patients received—applications—examination.** No patients shall be received except those afflicted with pulmonary tuberculosis in the incipient stage, and who show a reasonable probability of satisfactory improvement by treatment in the sanatorium. Any person wishing to become a patient in the institution shall first make application and if it shall appear to the superintendent from the answers to the questions therein that the applicant has been and is a bona fide resident of this state and is in all other respects entitled under the law to admission, said applicant shall be sent by the superintendent to the examining physician living nearest to the residence of the applicant, and said applicant directed to report to said examining physician for an examination. Said examining physician shall examine said applicant fully with a view of ascertaining whether he is afflicted with incipient tuberculosis, and shall so far as possible fill out the blanks which may be furnished him for that purpose and shall mail the same to the superintendent of the sanatorium, who shall examine the same and if he finds that the applicant as shown by the answers, or by the examination of the examining physician, has been and is a bona fide resident of this state and is in all other respects under the law entitled to admission, he shall receive the applicant as a patient providing

there is room, and if no room be then available, he shall enter the name on a book in the order in which the application is made, and the applicant shall be admitted in said order whenever there is room. In case it shall appear from the application itself, or from the report of the examining physician, that the applicant does not come within the provisions of the law, or in case the superintendent shall be in possession of reliable information which convinces him that the applicant is not entitled to the benefits of this act, he shall forthwith notify the applicant that he cannot be admitted as a patient. If, however, the superintendent, after receiving the report of the examining physician, is in doubt as to whether it is a case of incipient pulmonary tuberculosis, he shall personally examine the applicant in case he presents himself at the institution for that purpose. [32 G. A., ch. 147, § 1; 31 G. A., ch. 120, § 8.]

SEC. **2727-a83. Examining physicians.** The board of control of state institutions shall on the recommendation of the superintendent, and on the approval of the said board, appoint physicians in such localities in the state as they may deem proper, whose duty shall be to examine all persons who apply to them, and who have previously made application to the superintendent to be admitted as patients[1] in the sanatorium; provided, however, that the applicant shall in each case pay said examining physician the sum of three dollars which shall be in full for such examination. He shall carefully fill out the blanks in the examination paper and shall also give any additional information he may possess which may aid in determining the eligibility of the person so examined for admission as a patient in the institution. Said examining physicians shall be graduates of a medical school in good standing under the laws of Iowa, and shall be selected, so far as it is practicable, because of their[2] experience with and[3] knowledge of pulmonary diseases. [32 G. A., ch. 147, § 1; 31 G. A., ch. 120, § 9.]

[1"patient," 2"his," 3"the" in 31 G. A. session laws. EDITOR.]

SEC. **2727-a84. Transportation and other expenses—how paid.** In case an applicant who has been authorized to be received as a patient in the sanatorium is without means to pay for the transportation and other necessary expenses to and from, including treatment at the institution, and such fact is duly certified to by the board of health of the city or incorporated town where the applicant resides, or by the majority of the township trustees in case the applicant resides outside of a city or incorporated town, and the superintendent is satisfied that such is the fact, then such expense shall be paid by the state out of any funds in the state treasury not otherwise appropriated after the same is certified by said superintendent and approved by the board of control. [32 G. A., ch. 147, § 1; 31 G. A., ch. 120, § 10.]

SEC. **2727-a85. Per capita allowance.** That the law as it appears in section twenty-seven hundred twenty-seven-a eighty-five of the supplement to the code, 1907, is hereby repealed and in lieu thereof is enacted the following:

"The board of control of state institutions shall fix the per capita allowance which may be charged by the said institution for the care, treatment and maintenance of each patient therein, which shall not exceed the sum of forty-five dollars per capita per month, which shall be certified by the superintendent to said board of control and paid out as provided by the law as it appears in this chapter of the supplement to the code, 1907; provided that if the aggregate per capita allowance for the patients shall not equal the sum of four thousand dollars for any month, the auditor of

state and treasurer of state shall credit the institution with that sum for that month." [35 G. A., ch. 237, § 1.] [32 G. A., ch. 147, §§ 1, 2; 31 G. A., ch. 120, § 11.]

SEC. **2727-a86. Charges for care, treatment and maintenance—liability of counties.** The law as it appears in section twenty-seven hundred twenty-seven-a eighty-six of the supplement to the code, 1907, is hereby repealed and in lieu thereof is hereby enacted the following:

"Each county shall be liable to the state for the support of all patients from that county in the state sanatorium and the amounts due shall be certified by the superintendent to the auditor of state, and by him be collected from the counties liable, at the times and in the manner required for the certification and collection of money from counties for the support of insane patients and patients in the sanatorium, and persons legally bound for their support shall be liable for the maintenance of patients in the sanatorium. The provisions of law for the collection by boards of supervisors of amounts paid by their respective counties from the estates of insane patients and from persons legally bound for their support shall apply in cases of patients cared for in the sanatorium." [35 G. A., ch. 238, § 2.] [32 G. A., ch. 147, § 1; 31 G. A., ch. 120, § 12.]

SEC. **2727-a87. Support for first month.** For the purpose of the maintenance of the sanatorium during the first month of its operation, the superintendent thereof may estimate, in advance of said opening and on the basis of a population of two hundred patients at twenty dollars per capita per month, for the supplies to operate the sanatorium, to furnish and equip the same, and to purchase tools, animals, implements and other articles so far as then necessary, for the first month, and the aggregate of said per capita shall be credited to said institution by the auditor of state and the treasurer of state and may be drawn against as provided in chapter one hundred eighteen of the acts of the twenty-seventh general assembly. [32 G. A., ch. 147, §§ 1, 3; 31 G. A., ch. 120, § 13.]

SEC. **2727-a88. Acts in conflict repealed.** All acts and parts of acts in conflict with this act are hereby repealed. [32 G. A., ch. 147, § 4; 31 G. A., ch. 120, § 14.]

SEC. **2727-a89. Appropriation for collection and dissemination of information.** There is hereby appropriated out of any funds in the state treasury not otherwise appropriated the sum of five thousand dollars annually, or so much thereof as may be necessary, to be used by the board of control of state institutions for the collection and dissemination of information regarding tuberculosis. Said board of control may arrange exhibits, employ lecturers, coöperate with other institutions or organizations or use any means necessary to give to the people of the state a practical knowledge of tuberculosis. Said board of control shall, with the superintendent or such assistance as it may deem advisable, stimulate the organization of, and assist in establishing hospitals or dispensaries or make other provisions, in the various counties or large centers of population, for the treatment of patients in the advanced stages of tuberculosis. [32 G. A., ch. 147, § 4.]

SEC. **2727-a90. Appropriation for completion and equipment.** There is hereby further appropriated the sum of fifty thousand dollars for the purpose of completing and equipping said sanatorium and in making it ready for use. [32 G. A., ch. 147, § 5.]

SEC. **2727-a91. Advanced stages—additional department.** That a department for persons afflicted with pulmonary tuberculosis in advanced stages is hereby established at the state sanatorium for the treatment of

tuberculosis. The board of control of state institutions shall adopt rules and regulations for receiving patients and managing said department. Whenever there shall not be sufficient room to accommodate all applicants qualified for admission preference shall be given to those most in need of the care of the institution and whose condition is most dangerous to the public. Patients may be transferred from the department for incipient cases to the department for advanced cases and from the department for advanced cases to the department for incipient cases, as may be deemed advisable by the superintendent. [35 G. A., ch. 238, § 1.]

SEC. **2727-a92. Appropriation.** For the purpose of constructing and equipping the necessary buildings, making connections and improving grounds for the department for advanced cases, there is hereby appropriated out of any money in the state treasury not otherwise appropriated, the sum of five thousand dollars. [35 G. A., ch. 238, § 3.]

CHAPTER 11-D.

OF THE STATE COLONY FOR EPILEPTICS.

SECTION **2727-a93. Establishment — object — government.** That there is hereby established the state colony for epileptics. The object of the colony shall be the custody, care and treatment of epileptics and the scientific study of epilepsy. The board of control of state institutions shall have the same power and control over said colony as is now given it by the law as it appears in sections twenty-seven hundred twenty-seven-a one to section twenty-seven hundred twenty-seven-a fifty-one inclusive, of the supplement to the code, 1907, and all amendments thereto, and said acts and amendments shall apply to and govern said colony in every respect in so far as they are not in conflict with the provisions of this act. [35 G. A., ch. 236, § 1.]

SEC. **2727-a94. Location.** Whenever the state by a levy or otherwise shall have provided funds for the purchase of land and for the erection of buildings for a state colony for epileptics, the land shall be selected by the board of control of state institutions. It shall be conveniently located with respect to railways and with regard to water supply and proper drainage, and shall be suitable for an institution on the colony plan for both male and female inmates. The land and buildings shall be paid for on vouchers executed by the person or persons entitled to the purchase or contract price and approved by said board. [35 G. A., ch. 236, § 2.]

SEC. **2727-a95. Admission.** All adults afflicted with epilepsy who have been residents of Iowa for at least one year preceding the application for admission and all children so afflicted whose parents or guardians have been residents of Iowa for a like period shall be eligible for admission. [35 G. A., ch. 236, § 3.]

SEC. **2727-b.**

[See § 2727-2a and editorial note following.]

SEC. **2727-c.**

[See § 2727-3a and editorial note following.]

CHAPTER 12.

OF COUNTY HIGH SCHOOLS.

SECTION **2728. How established.** Any county may establish a high school in the following manner: When the board of supervisors shall be presented with a petition signed by one third of the electors of the county as shown by the returns of the last preceding election, requesting the establishment of a county high school at a place in the county named therein, it shall submit the question together with the amount of tax to be levied to erect the necessary buildings, at the next general election to be held in the county, or at a special one called for that purpose, first giving twenty days' notice thereof in one or more newspapers published in the county, if any be published therein, and by posting such notice, written or printed, in each township of the county, at which election the vote shall be by ballot, for or against establishing the high school, and for or against the levying of the tax, the vote to be canvassed in the same manner as that for county officers. Should a majority of all the votes cast upon the question be in favor of establishing such school, and the levying of such tax, the board of supervisors shall at once appoint six trustees, residents of the county, not more than two from the same township, who, with the county superintendent of common schools as president, shall constitute a board of trustees for said high school. [27 G. A., ch. 84, § 1; C. '73, §§ 1697–9, 1701.]

The provisions of code § 2803 relating to tuition for pupils attending school in another district than that in which they reside, have no application to county high schools organized under this section. *Boggs v. School Township*, 128–15, 102 N. W. 796.

SEC. **2729. Trustees—officers.** The trustees, within ten days after appointment, shall qualify by taking the oath of civil officers, and giving bond in such sum as the board of supervisors may require, with sureties to be approved by it, and shall hold office until their successors are elected and qualified, who shall be elected at the general election following. The trustees then elected shall be divided into two classes of three each and hold their office two and four years respectively, their several terms to be decided by lot; and in all county high schools heretofore established the terms of all trustees therefor shall expire on the first day of January, nineteen hundred and seven, and at the general election in nineteen hundred and six there shall be six trustees elected for each of said county high schools, three of whom shall be elected for two years, and three of whom for four years, and at each general election thereafter three trustees shall be elected for the term of four years, the trustees so elected to qualify in the same manner and at the same time as other county officers and all vacancies occurring to be filled by appointment by the board of supervisors, the appointee to hold the office until the next general election, and a majority of which trustees shall constitute a quorum for the transaction of business. At the first meeting held in each year, the board shall appoint a secretary and treasurer from their own number, who shall perform the usual duties devolving upon like officers. The treasurer, in addition to his bond as trustee, shall give one as treasurer, in such sum and with such sureties as may be fixed by the board, and receive all moneys from all sources belonging to the funds of the school, and pay them out as directed by the board of trustees, upon orders drawn by the president and countersigned by the secretary; both of which officers shall keep an accurate account of all moneys received and paid out, and at the close of

each year, and whenever required by the board, shall make a full itemized and detailed report. [31 G. A., ch. 135; C. '73, §§ 1699, 1700, 1704, 1711.]

SEC. **2730. Site—tax—approval of electors.** As soon as convenient after the organization of the board, it shall proceed to select the best site that can be obtained without expense to the county, at the place named in the petition upon which the vote was taken, for the erection of the necessary school buildings, the title to be taken in the name of the county, and shall procure plans and specifications for the erection of such buildings, and make all necessary contracts for the erection of the same, the cost of which, when completed, shall not exceed the amount of the tax so levied therefor. They shall also annually make and certify to the board of supervisors on or before the first Monday of September of each year, an estimate of the amount of funds needed for improvements, teachers' wages and contingent expenses for the ensuing year, designating the amount for each, which, in the aggregate shall not exceed in any one year, two mills on the dollar, upon the taxable property of the county. No expenditures for buildings or other improvements shall be made, or contract entered into therefor, by said board, involving an outlay of to exceed five hundred dollars in any one year, without the same first being submitted to the electors of the county in which said school be located, for their approval; the tax to be levied and collected in the same manner as other county taxes, and paid over by the county treasurer in the same manner as school funds are paid to district treasurers. [27 G. A., ch. 84, § 2; C. '73, §§ 1702–3, 1705.]

SEC. **2731. Management.** Said board shall make no purchases, nor enter into any contracts in any year, in excess of the funds on hand and to be raised by the levy of that year. It shall employ, when suitable buildings have been furnished, a competent principal teacher to take charge of the school, and such assistant teachers as may be necessary, and fix the salaries to be paid them, and in the conduct of the school may employ advanced students to assist in the work. Annual reports shall be made by the secretary to the board of supervisors, which report shall give the number of students, with the sex of each, who have been in attendance during the year, the branches taught, the textbooks used, number of teachers employed, salary paid to each, amount expended for library, apparatus, buildings, and all other expenses, the amount of funds on hand, debts contracted, and such other information as may be deemed important, and this report shall be printed in at least one newspaper in the county, if any is published therein, and a copy forwarded to the superintendent of public instruction. And for their services the trustees shall each receive the sum of two dollars per day for the time actually employed in the discharge of official duties, claims for services to be presented, audited, and paid out of the county treasury, in the same manner as other accounts against the county. [27 G. A., ch. 84, § 3; C. '73, §§ 1705–6, 1710, 1712.]

SEC. **2732. Regulations.** The principal of any such high school, with the approval of the board of trustees, shall make such rules and regulations as is deemed proper in regard to the studies, conduct and government of the pupils, and such rules and regulations shall prohibit the use of tobacco in any form by any student of such school; and any pupil who will not conform to and obey such rules may be suspended or expelled therefrom by the board of trustees. Said board of trustees shall make all necessary rules and regulations in regard to the age and grade of attainments necessary to entitle pupils to admission into the school, and shall on or before the tenth day of July of each year make an apportionment between the

different school corporations of the county, of the pupils that shall attend said school, and shall apportion to each of said school corporations its proportionate number, based upon the number of pupils that can be reasonably accommodated in said school, and the number of pupils of school age, actual residents of such school corporations, as shown by the county superintendent's report last filed with the county auditor of said county; said apportionment shall be published in the official papers of such county, to be paid for as other county printing; pupils from the said school corporations to the number so designated in such apportionment shall be entitled to admission into said school, tuition free, and none others, and it shall be unlawful to accredit pupils so attending to any other school corporation than the one in which they are enumerated for school purposes. Should there be more applicants for such admission from any school corporation than its proportionate number, so determined, then the board of directors of such school corporation shall designate which of said applicants shall be entitled to so attend. If the school shall be capable of accommodating more pupils than those attending under such apportionment, others may be admitted by the board of trustees, preference at all times being given to pupils desiring such admission, who are residents of the county. The board of trustees shall fix reasonable tuition for such pupils. If such pupils are residents of the county the school corporation from which they attend shall pay their tuition out of its contingent fund. The principal of such high school shall report to the said board of trustees under oath, at the close of each term, the names and number of pupils attending such school during said term, from what school corporation they attended, and the amount of tuition, if any, paid by each, the same to be included in the annual report of the secretary of the board of trustees to the board of supervisors, provided for in section twenty-seven hundred thirty-one of the code, the tuition so paid to be turned over to the treasurer of the board of trustees to be used in paying the expense of said school under the direction of said board. [35 G. A., ch. 241, § 1.] [27 G. A., ch. 84, § 4; C. '73, § 1709.]

The legislature may provide for the establishment and maintenance of county high schools and require the payment of tuition for pupils attending from any one district in excess of the number allotted to such district. *Boggs v. School Township*, 128–15, 102 N. W. 796.

SEC. **2733. Admission—repealed.** [27 G. A., ch. 84, § 5.]

[See § 2733-a.]

SEC. **2733-1a. Attendance at schools outside home district—tuition.** That chapter one hundred forty-six of the acts of the thirty-fourth general assembly is hereby repealed and the following is enacted in lieu thereof:

Any person of school age who is a resident of a school corporation which does not offer a four-year high school course and who has completed the course as approved by the department of public instruction for such corporation shall be permitted to attend any public high school or county high school in the state approved in like manner, that will receive him. Any person applying for admission to any high school under the provisions of this act shall present the officials of said high school the affidavit of his or her father, mother or guardian that such applicant is of school age and a resident of a school district of this state, specifying the district. He shall also present a certificate signed by the county superintendent showing proficiency in the common school branches, reading, orthography, arithmetic, physiology, grammar, civics of Iowa, geography, United States history,

penmanship and music. The school corporation in which such student resides shall pay to the secretary of the corporation in which such student shall be permitted to enter a tuition fee equal to the average cost of tuition and the average proportion of contingent expenses in the high school department in the latter corporation during the time he so attends, not exceeding, however, a total period of four school years; such payment to be made out of the teachers' fund and the contingent fund or out of the general fund of the debtor corporation and such tuition fee as collected by the secretary shall be turned over by him with an itemized statement, to the treasurer of the school funds on or before February fifteenth and June fifteenth of each year, provided the maximum fee collected from any district for each pupil shall not exceed the sum of three and one-half dollars per month except in high schools where free textbooks are provided by the district such additional amount may[1] be charged as will cover the cost of the textbooks furnished to such pupil. If payment is refused or neglected the board of the creditor corporation shall file with the auditor of the county of the pupil's residence a statement certified by its president specifying the amount due for tuition and for contingent expenses respectively, and the time for which the same is claimed; and the auditor shall transmit to the county treasurer an order directing such treasurer to transfer the amount of such account from the debtor corporation to the creditor corporation, and the treasurer shall pay the same in accordance therewith. No school corporation situated in a county maintaining a county high school shall be required to pay the tuition of pupils at any high school other than such county high school, but this shall not apply to pupils who, while residing at home, attend some high school other than that of the school corporation in which they reside; and the tuition to be paid by school corporations in such county shall be two dollars per pupil per month. [35 G. A., ch. 239, § 1; 35 G. A., ch. 240, § 1; 34 G. A., ch. 146, §§ 1–4.]

[1"made" in enrolled bill. EDITOR.]

SEC. **2733-a. Petitions to abolish—election.** That section twenty-seven hundred thirty-three of the code be repealed and the following substituted:

"Whenever citizens of any county having a county high school desire to abolish the same or to dispose of any part of the buildings or property thereof, they may petition the board of supervisors at any regular session thereof in relation thereto, and sections three hundred ninety-seven, three hundred ninety-eight, three hundred ninety-nine and four hundred of the code shall apply to and govern the whole matter, including the manner of presenting and determining the sufficiency of such petitions and remonstrances thereto, so far as applicable. If an election is ordered the same shall be held at the time of the general election or at a special election called for that purpose and the proposition shall be submitted and the election conducted in the manner provided in title six of the code. If any proposition as herein provided be legally submitted and adopted, the board of supervisors is hereby empowered to carry the same into effect." [27 G. A., ch. 84, § 5.]

CHAPTER 13.

OF COUNTY SUPERINTENDENT.

SECTION **2734. Qualifications—deputy—repealed.** [31 G. A., ch. 122, § 1.]

[See § 2734-a.]

SEC. **2734-a. Repeal.** There is hereby repealed sections twenty-six hundred thirty-two, twenty-seven hundred thirty-four, twenty-seven hundred thirty-five, twenty-seven hundred thirty-six, twenty-seven hundred thirty-seven of the code, and sections twenty-seven hundred thirty-four, twenty-seven hundred thirty-six, twenty-seven hundred thirty-seven of the supplement to the code, [1902] and the following enacted in lieu thereof: [31 G. A., ch. 122, § 1.]

SEC. **2734-b. Qualifications—powers and duties—deputy.** That the law as it appears in section twenty-seven hundred thirty-four-b, supplement to the code, 1907, be and the same is hereby repealed and the following enacted in lieu thereof:

The county superintendent, who may be of either sex, shall be the holder of a regular five-year state certificate or a life diploma, and shall have had at least five years' experience in teaching or superintending, but this provision as to certification and experience shall not apply until September first, nineteen hundred eighteen, provided that any county superintendent of schools now serving shall be deemed eligible to reappointment under this act. The county superintendent shall, under the direction of the superintendent of public instruction, serve as the organ of communication between the department of public instruction and the various officers and instructors in his county, and shall transmit or deliver to them all books, pamphlets, circulars or communications designed for them. He shall visit the different schools in his county at least once during the school year and also when requested by a majority of the directors of any school corporation. He shall also, at the request of the superintendent of public instruction, visit and report upon such schools as may be designated. He may appoint a deputy, for whose acts he shall be responsible, and who may act in his stead except in visiting schools and trying appeals, the salary of such deputy to be fixed by the representatives in convention assembled. He shall, on the first Monday of each month, file with the county auditor an itemized and verified statement of his actual and necessary expenses incurred during the previous month in the performance of his official duties within his county, and such expenses shall be paid by the county board of supervisors out of the county fund, but the total amount so paid for any one year for such purposes shall not exceed the sum of two hundred fifty dollars. [35 G. A., ch. 107, § 3.] [31 G. A., ch. 122, § 2; 27 G. A., ch. 85, § 1; 16 G. A., ch. 136, § 2; C. '73, §§ 1765, 1770; R. § 2069.]

One who had secured a first grade certificate from a county superintendent between the time of the passage of 31 G. A., ch. 122, and the time it took effect, but had not secured a first grade certificate under the provisions of that act, held not qualified to hold the office of county superintendent. *State v. Huegle*, 135–100, 112 N. W. 234.

SEC. **2734-b1. Term—vacancy.** The term of office of the county superintendent of schools shall be for three years and until his successor is elected and qualified and such term shall begin on the first secular day of September after his election; and the terms[1] of county superintendents

now in office are hereby extended until the first day of September, nineteen hundred fifteen, and until their successors are elected and qualified. Should a vacancy in such office occur, by death, removal, resignation, or otherwise, the county auditor shall at once call a special meeting for the purpose of filling such vacancy. [35 G. A., ch. 107, § 4.]

["term" in enrolled bill. EDITOR.]

SEC. **2734-b2. Acts in conflict repealed.** All acts or parts of acts in conflict herewith are, so far as in conflict, hereby repealed. [35 G. A., ch. 107, § 5.]

SEC. **2734-c. Examinations.** On the last Friday, and Wednesday and Thursday preceding, in the months of January, June, July and October, the county superintendent shall meet and, with such assistants as may be necessary, examine all applicants for a teachers' certificate. Such examinations shall be held at the county seat, in a suitable room which shall be provided for that purpose by the board of supervisors; but the county superintendent may at his discretion cause to be held at the time of any regular examination an additional examination at some other place in the county. The questions used in such examinations shall be furnished by the educational board of examiners, who shall cause the same to be printed, and the examinations shall be conducted strictly under rules prescribed by the board. [31 G. A., ch. 122, § 3; 19 G. A., ch. 161, § 2; 17 G. A., ch. 143; C. '73, §§ 1766, 1768, 1774; R. §§ 2066, 2068, 2073; C. '51, § 1148.]

SEC. **2734-d. Subjects.** The examination for the first grade certificate shall include competency in and ability to teach orthography, reading, writing, arithmetic, geography, grammar, history of the United States, didactics, elementary civics, elementary algebra, political economy, elementary economics, elementary physics, elements of vocal music, physiology and hygiene, which in each division of the subject shall include special reference to the effects of alcohol, stimulants and narcotics upon the human system. [31 G. A., ch. 122, § 4; 27 G. A., ch. 86, § 1; 21 G. A., ch. 1, §§ 1, 3; 17 G. A., ch. 143; C. '73, §§ 1766, 1768; R. §§ 2066, 2068; C. '51, § 1148.]

SEC. **2734-e. Special certificates.** That a special certificate may be issued for any subject, or any group of subjects, taught in the public schools of Iowa, upon examination in such special subject or group of subjects and per cents. therein such as are required for the issue of a first grade county certificate. A special certificate shall be issued for a term of three years and shall be renewable under the same conditions as apply to the renewal of first grade certificates. It shall state the names of the subjects for which it is issued, and shall not be valid for the teaching of any other subjects. [34 G. A., ch. 130, § 4.] [31 G. A., ch. 122, § 5.]

SEC. **2734-f. Record kept.** A record shall be kept by the county superintendent of all examinations taken within his county, with the name, age and residence of each applicant and the date of examination. [31 G. A., ch. 122, § 6.]

SEC. **2734-g. First grade certificate—renewal.** Applicants who have taught successfully for at least thirty-six weeks and whose examination entitles them to the first grade certificate, shall receive the same for a term of three years from the date thereof, and such certificates shall be renewable without examination provided the applicants shall show by testimonials from superintendents or principals who had immediate supervision of their professional study that at least one line of professional inquiry has been successfully conducted during the life of the certificate, it being made

the duty of the board to forward with each certificate subject to renewal, outlines setting forth various lines of professional study. It is provided further that each application for renewal shall be accompanied by such proof of successful experience and professional spirit as the educational board of examiners may require. [34 G. A., ch. 130, § 5; 33 G. A., ch. 181, §1.] [31 G. A., ch. 122, § 7; 27 G. A., ch. 86, § 2; 26 G. A., ch. 39; 21 G. A., ch. 1, § 3; C. '73, §§ 1767, 1771; R. §§ 2067, 2070.]

A certificate issued by a county superintendent prior to the taking effect of 31 G. A., ch. 122, does not qualify the holder to fill the office of county superintendent under provisions of § 2 of the act. *State v. Huegle*, 135–100, 112 N. W. 234.

SEC. **2734-h. Second grade certificate—renewal.** That section twenty-seven hundred thirty-four-h of the supplement to the code, 1907, as amended by chapter one hundred eighty-one of the acts of the thirty-third general assembly, is hereby repealed and the following enacted in lieu thereof:

"Applicants whose examination entitles them to second grade certificates only, shall receive the same for not to exceed two years with the privilege of renewal of the same without further examination under the same conditions as govern the renewal of first grade certificates. The holder of a second grade certificate may at any of the examinations provided for in section twenty-seven hundred thirty-four-c of the supplement to the code, 1907, take an examination in any one or more of the additional branches, required for the issue of a first grade certificate, or he may at any such time be reëxamined in any branch or branches in which he desires to raise his grade, and in each case the new per cent. shall be placed on his certificate, and when he has thus successfully passed in all the branches required for the issue of a first grade certificate, such certificate shall then be issued to him, provided he has had at least thirty-six weeks' successful experience in teaching; if not, then at the conclusion of such experience. In like manner third grade certificates may be changed into those of the second or first grade, and in all cases whether the certificate be of the first, second or third grade, credit shall be given for all examinations taken under the auspices of the board, it being the intention of the law that an examination once taken shall be final unless the certificate holder desires to be reëxamined in any one or more branches with a view of raising his per cent. in such branches or his general average." [34 G. A., ch. 130, § 6; 33 G. A., ch. 181, § 2.] [31 G. A., ch. 122, § 8.]

SEC. **2734-i. Third grade certificate—renewal.** That section twenty-seven hundred thirty-four-i of the supplement to the code, 1907, is hereby repealed and the following enacted in lieu thereof:

"Applicants whose examination entitles them to third grade certificates only, shall receive the same for one year, at the end of which time upon proof of successful teaching and the payment of a fee of one dollar, one renewal shall be granted." [34 G. A., ch. 130, § 8.] [31 G. A., ch. 122, § 9.]

SEC. **2734-j. Applicants without experience.** Applicants who have had no experience in teaching, but whose examination entitles them to the first grade, shall receive a second grade certificate for two years, provided that when they have taught successfully under such certificate for not less than thirty-six weeks, they shall be entitled to receive a first grade certificate on the conditions herein provided for a renewal of a certificate. [31 G. A., ch. 122, § 10.]

SEC. **2734-k. Certificates renewed—conditions—repeal.** That section twenty-seven hundred thirty-four-k of the supplement to the code,

1907, is hereby repealed. [34 G. A., ch. 130, § 9.] [31 G. A., ch. 122, § 11.]

SEC. **2734-l. Proof of good character.** Before admitting anyone to the examination, the county superintendent must be satisfied that the person seeking a certificate is of good moral character, of which fact he may require proof, and is in all respects other than in scholarship possessed of the necessary qualifications as an instructor. [31 G. A., ch. 122, § 12; 27 G. A., ch. 86, § 2; 26 G. A., ch. 39; 21 G. A., ch. 1, § 3; C. '73, §§ 1767, 1771; R. §§ 2067, 2070.]

SEC. **2734-m. Examination papers graded—certificates issued.** As soon as the examination is completed the county superintendent shall forward to the superintendent of public instruction a list of all applicants examined, with the standings of each in didactics and oral reading, and his estimate of each applicant's personality and general fitness, other than scholarship, for the work of teaching. He shall at the same time forward to the superintendent of public instruction the answer papers written, with the exception of those in didactics. Under the supervision of the educational board of examiners, the papers[1] shall be graded and the scholastic qualifications determined. The result of such examination of persons who pass the same shall be entered upon a certificate provided by such board, and shall be transmitted to the county superintendent of the county in which the person entitled thereto resides. [31 G. A., ch. 122, § 13.]

[1]"paper" in 31 G. A. session laws. EDITOR.]

SEC. **2734-n. Readers—clerical help—compensation.** Immediately following each examination authorized by this act, the board of examiners shall call to their assistance a sufficient number of competent readers previously selected by the board, ten of whom shall be county superintendents. The county superintendents so chosen shall be known as head readers and shall also constitute a review board in cases of doubt. They shall also make a list of applicants from each county, nearest the passing mark for a third grade certificate. The head readers shall receive necessary traveling expenses only. All other readers shall receive actual traveling expenses to and from the capitol and not to exceed fifty cents an hour for time actually employed in reading and marking answer papers. Such additional clerical help as may be required may be employed by the board at not to exceed thirty cents per hour for time actually employed. [31 G. A., ch. 122, § 14.]

SEC. **2734-o. Expenditures certified and paid.** All expenditures authorized by this act shall be certified by the superintendent of public instruction to the executive council, who shall cause the auditor of the state to draw warrants therefor upon the treasurer of state, but not to exceed the fees paid into the treasury under the provisions of this act. [31 G. A., ch. 122, § 15.]

SEC. **2734-p. Qualifications of applicants—fee.** Each applicant for a certificate shall pay a fee of one dollar, one half of which shall be paid into the state treasury on or before the first day of the succeeding month, and one half shall be paid into the county institute fund. Provided, however, that applicants for teachers' certificates after July first, nineteen hundred fifteen, shall have had at least twelve weeks of normal training, and shall at the time of making such application furnish a certificate in writing from the institution where such training was received, showing such fact. It is further provided, that this act shall not apply to the regular graduates of the state university, state college of agriculture and mechanic arts, state teachers college, any accredited[1] college of the state, or

of any other college of like character outside of the state. [35 G. A., ch. 243, § 1.] [31 G. A., ch. 122, § 16.]

["credited" in enrolled bill. EDITOR.]

SEC. **2734-p1. Experience as qualification.** The provisions of this act shall in no way bar any teacher who can furnish evidence of at least six months' successful teaching experience. [35 G. A., ch. 243, § 2.]

SEC. **2734-p2. Provisional certificates.** If there should be schools without teachers and teachers cannot be secured with qualifications as provided in sections one or two of this act, then provisional certificates may be issued regardless of qualifications as provided in said sections to so many teachers as shall be required to supply such schools. [35 G. A., ch. 243, § 3.]

SEC. **2734-q. Registration fee.** No person shall teach in any public school in this state whose certificate has not been registered with the county superintendent of the county in which such school is located. [34 G. A., ch. 130, § 12.] [31 G. A., ch. 122, § 17.]

SEC. **2734-r. Third grade certificates, when not to be registered.** In case a sufficient number of life diplomas, state certificates, first grade certificates, special certificates and second grade certificates are held in any county to supply the schools thereof, it shall not be incumbent on the county superintendent to register third grade certificates. [31 G. A., ch. 122, § 18.]

SEC. **2734-s. Special examination—provisional certificates.** When a sufficient number of licensed teachers cannot be secured to fill the schools of any county, the board of examiners may, upon the request of the county superintendent, appoint a special examination for such county to be conducted in all respects as a regular examination and the answer papers to be forwarded to the president of the board as required in regular examinations, and thereupon provisional certificates may be issued by the educational board of examiners. [31 G. A., ch. 122, § 19.]

SEC. **2734-t. Certificates, where valid—revocation.** All certificates provided for in this act shall be valid in any county within the state, when registered in such county, but a provisional certificate shall be valid, upon registration, only in the county in which it is issued and shall be issued for the same time and subject to the same extension as a third grade certificate, but no person shall be entitled to receive more than one provisional certificate, except upon the approval of the county superintendent. Any certificate or diploma issued by the board may be revoked for any cause which would have authorized or required a refusal to grant the same, or in case the holder thereof violates any of the provisions of this act. [31 G. A., ch. 122, § 20.]

SEC. **2734-u. Revocation of certificate — charges — trial — appeal.** When in the judgment of the county superintendent there is probable cause for the revocation of a certificate or diploma held by any teacher employed in his county, or when charges are preferred, supported by affidavits charging incompetency, immorality, intemperance, cruelty or general neglect of the business of the school, the county superintendent shall within ten days transmit to such person a written statement of the charges preferred and set the time and place for the hearing of the same, at which trial the teacher shall be privileged to be present and make defense. If in the judgment of the county superintendent there is sufficient grounds for the revocation of the certificate or diploma, he shall at once issue in duplicate an order revoking the certificate or diploma, and the same shall

become operative and of full force and effect ten days after the date of its issue, one copy of the order to be mailed to the holder of the certificate and the other to be mailed to the superintendent of public instruction. Provided that the person aggrieved by such order shall have the right to appeal to the superintendent of public instruction within ten days from the date of such mailing and in case of appeal the revocation shall not be effective until the same is affirmed, after full hearing, by the superintendent of public instruction. Provided further, that in the case of life diplomas or state certificates of whatever class, the revocation shall not be effective until affirmed by the educational board of examiners after full review by said board. [31 G. A., ch. 122, § 21.]

SEC. **2734-v. List of persons holding certificates and attending normal institute.** The county superintendent shall annually, on the first Monday of September, file with the president of the educational board of examiners a list of all persons who for the preceding year have held certificates and have attended the normal institute, with the number of days' attendance of each. A similar report of summer school attendance shall be secured by the president of the board. In any subsequent examination or renewal the board may give such credit for institute or summer school attendance as it may determine, any rule adopted to apply equally to all similar cases. [31 G. A., ch. 122, § 22.]

SEC. **2735. Duties—examinations—repealed.** [31 G. A., ch. 122, § 1.]

[See § 2734-a.]

SEC. **2736. Subject—repealed.** [31 G. A., ch. 122, § 1.]

[See § 2734-a.]

SEC. **2737. Certificate—revocation—repealed.** [31 G. A., ch. 122, § 1.]

[See § 2734-a.]

SEC. **2738. Normal institutes—adjournment of schools—attendance—lectures—funds—reports—summer schools—fees.** That the law as it appears in section twenty-seven hundred thirty-eight, supplement to the code, 1907, as amended by chapter one hundred thirty of the acts of the thirty-fourth general assembly, be and the same is hereby repealed and the following enacted in lieu thereof:

The county superintendent shall hold annually at least one, but not more than two, county teachers' institutes at such times as the schools of the county are generally in session; and shall, with the concurrence of the superintendent of public instruction, procure such assistance as may be necessary to conduct the same.

The school board of every school district except in city independent school districts where twenty-five or more teachers are regularly employed, shall adjourn the school or schools of said district for not less than two days in each school year in order to allow teachers to attend county teachers' institutes held in the county, without loss of salary. The county superintendent shall issue a certificate of attendance to each teacher showing number of days of attendance at said institute, and any teacher failing to attend said teachers' institute two days shall forfeit his or her average daily salary for each day of nonattendance, except when excused by the county superintendent for physical disability to perform his or her duties in the schoolroom.

In city independent districts where twenty-five or more teachers are regularly employed, the county superintendent shall coöperate with the

city superintendent in arranging for educational lectures relating to the professional work of the teacher and to such matters of public education as may best meet the needs of the teachers in such districts and at such times as may be approved by the city superintendent and city board of education, in so far as the condition of the county institute fund shall permit. All arrangements concerning plans for professional teachers' meetings in said city districts shall be subject to final approval by the superintendent of public instruction. It shall be the duty of teachers in said districts to attend said lectures and the county superintendent shall issue a certificate of attendance showing number of lectures attended as provided by this act.

To defray the expenses of said teachers' institutes, in addition to the fifty dollars received annually from the state and one half of all examination fees collected in the county, one hundred fifty dollars from the general county fund shall be available for that purpose in counties having a population of thirty thousand or less, which amount shall be appropriated by the board of supervisors of such county at their January session in each year, and in counties of over thirty thousand, two hundred dollars shall be thus appropriated for such purpose.

No part of the county teachers' institute fund received from the aforesaid sources may be used for any other purpose than to pay instructors, for special supplies needed in order to properly conduct said teachers' institutes, for janitor service, and rent for building in which to conduct said institute if necessary.

On the first secular day of each month, the county superintendent shall transmit to the county treasurer all moneys received for examination fees and the state appropriation for institutes, which, together with the county appropriation, shall be designated as the county teachers' institute fund; he shall also report monthly the names of all applicants for teachers' certificates to the county auditor. All disbursements of the institute fund shall be by warrants drawn by the county auditor, who shall draw said warrants upon the written order of the county superintendent, and said written order must be accompanied by an itemized bill for services rendered or expenses incurred in connection with the institute, which bill must be signed and sworn to by the party in whose favor the order is made and must be verified by the county superintendent. All said orders and bills shall be kept on file in the auditor's office until the final settlement of the county superintendent with the board of supervisors at the close of his term of office. No warrant shall be drawn by the auditor in excess of [the] institute fund then in the county treasury. The county superintendent shall furnish to the county board of supervisors a certified itemized account of the receipts and disbursements of all moneys collected and paid out by him for teachers' institutes and summer schools, which account they shall examine, audit and publish a summary thereof with the proceedings of the regular June meeting of the board. The county superintendent shall report to the board of supervisors on the first of January annually a summary of his official financial transactions for the previous year.

County superintendents are hereby authorized by law to conduct from four to six weeks summer school where it may be deemed advisable, for the purpose of giving teachers and prospective teachers academic instruction. A fee shall be collected from each attendant sufficient in the aggregate to meet all necessary expenses for the support of said summer school. The fee so collected shall be paid into the county institute fund and a list of the names of all attendants shall be filed with the county auditor. Warrants for the purpose of paying instructors employed in summer schools

shall be drawn by the county auditor, who shall draw said warrant upon written order of the county superintendent, and said written order must be accompanied by a certified itemized bill for services rendered or expenses incurred in connection with said summer school, but no warrant shall be issued in excess of the fees received from the summer school and deposited with the county treasurer. This act shall not take effect until July first, nineteen hundred fourteen. [35 G. A., ch. 225, § 2; 34 G. A., ch. 130, § 11.] [30 G. A., ch. 113; 29 G. A., ch. 123, § 1; 27 G. A., ch. 87, § 1; 17 G. A., ch. 54; 15 G. A., ch. 57; C. '73, § 1769.]

SEC. **2739. Reports.** The county superintendent shall annually, on the last Tuesday in August, make a report to the superintendent of public instruction, giving a full abstract of the several reports made to him by the secretaries and treasurers of school boards, stating the manner in and extent to which the requirements of the law regarding instruction in physiology and hygiene are observed, and such other matters as he may be directed by the state superintendent to include therein, or he may think important in showing the actual condition of the schools in his county. At the same time, he shall file with the county auditor a statement of the number of persons of school age in each school township and independent district in the county. He shall also report, as provided by law, to the superintendent of the college for the blind, the name, age, residence and post-office address of every person, resident of the county, so blind as to be unable to acquire an education in the common schools; to the superintendent of the institution for the deaf and dumb, with the same detail, all persons of school age whose faculties in respect to hearing or speaking are so deficient as to prevent them from acquiring an education in such schools; and to the institution for the feeble-minded, all persons of like age who, because of mental defects, are entitled to admission therein. [31 G. A., ch. 136, § 1; 21 G. A., ch. 1, § 2; C. '73, §§ 1772, 1775; R. § 2071.]

SEC. **2742. Compensation.** He shall receive a salary of twelve hundred fifty dollars a year, the expenses of necessary office stationery and postage, and those incurred in attendance upon meetings called by the superintendent of public instruction; claims therefor to be made by verified statements filed with the county auditor, who shall draw his warrant upon the county treasurer therefor; and the board of supervisors may allow him such further sum by way of compensation as may be just and proper. Provided, however, that from and after the first day of September, nineteen hundred fifteen, county superintendents shall receive the following salary, payable monthly, and the representatives of the school corporations in session may allow them such further sum by way of compensation as may be just and proper. He shall receive a salary of fifteen hundred dollars a year, the expenses of necessary office stationery and postage, and those incurred in attendance upon meetings called by the superintendent of public instruction; claims therefor to be made by verified statements filed with the county auditor, who shall draw his warrant upon the county treasurer therefor; and the board of supervisors may allow him such further sum by way of compensation as may be just and proper. [35 G. A., ch. 107, § 2.] [29 G. A., ch. 124, § 1; 19 G. A., ch. 161, § 1; C. '73, § 1776; R. § 2074.]

[Acts in conflict with § 2, ch. 107, 35 G. A., are repealed by § 2734-b2. EDITOR.]

CHAPTER 14.

OF THE SYSTEM OF COMMON SCHOOLS.

SECTION 2743. School districts—corporate powers.

While it is not essential that contracts made by the board be limited to the term of office of the individual members, yet it is evidently the legislative intention that contracts with teachers shall not be made for more than one year. *Burkhead v. Independent Sch. Dist.*, 107–29, 77 N. W. 491.

A school township may maintain an action in equity to enjoin persons from assuming without authority to act as officers of a district within such township. *School Township v. Wiggins*, 122–602, 98 N. W. 490.

While the district has power to hold property for any purpose for which property is authorized to be acquired by it, yet if it has by action of the board taken a conveyance of property for a new site and the action of the board in establishing such site is reversed on appeal to the county superintendent, the conveyance becomes invalid and inoperative without any action on the part of the board for rescission. *Ind. School Dist. v. McClure*, 136–122, 113 N. W. 554.

SEC. **2744. Names.** District townships now existing shall hereafter be called school townships, subdivisions of which shall be called subdistricts. School corporations shall be designated as follows: The school township of (naming civil township), in the county of (naming county), state of Iowa; or, the independent school district of (naming city, town, or village, and if there are two or more districts therein, including some appropriate name or number), in the county of (naming county), state of Iowa; or, the rural independent school district of (some appropriate name or number), township of (naming township), in the county of (naming county), state of Iowa. [27 G. A., ch. 91, § 1; C. '73, § 1716; R. § 2026; C. '51, § 1108.]

SEC. 2745. Directors.

The management of school affairs is left to the discretion of the board of directors, and such discretion will not be interfered with by the courts so far as it is exercised within the scope of the powers conferred upon the board. *Kinzer v. Independent School Dist.*, 129–441, 105 N. W. 686.

The board of directors being given exclusive control over the affairs of the school corporation subject to appeal to the county superintendent, an action of mandamus will lie to compel the board to comply with the orders of the superintendent in a matter as to which the board has exclusive jurisdiction. *State v. Thomas*, 152–500, 132 N. W. 842.

SEC. **2745-a. Duty of boards of school directors—fence.** It shall be the duty of all boards of school directors in school districts where the schoolhouse site adjoins the cultivated or improved lands of another to build and maintain a lawful fence between said site and cultivated or improved lands. [27 G. A., ch. 88, § 1.]

SEC. **2745-b. Rights of owner of adjoining lands.** The owner of lands adjoining any schoolhouse site shall have the right to connect the fence on his lands with the fences around any schoolhouse site, but he shall not be liable to contribute to the maintenance of the fence around said site. [27 G. A., ch. 88, § 2.]

SEC. 2746. Annual meeting of corporation.

By reason of the provisions of this section as to giving notice of propositions to be submitted to and determined by the voters at school meetings, and code § 2749, that the board may, or under certain conditions shall, provide in the notice for the annual meeting for submitting any proposition authorized by law to the voters, notice of the proposition to be submitted at such meeting is essential to the validity of their adoption, the statutory provision as to notice being construed as mandatory. *Goerdt v. Trumm*, 118–207, 91 N. W. 1067.

The board may provide in the notice of a school meeting for the submission of the question as to voting a schoolhouse tax. *Kinney v. Howard*, 133–94, 110 N. W. 282.

Unless there has been a valid order of the board of directors for the submission of a proposition, the adoption thereof by the electors is of no validity, even though notice of the submission of the proposition has been given. *McNees v. School Township*, 133–120, 110 N. W. 325.

The law presumes that the officer charged with the posting of the notices has performed his duty. *Calahan v. Handsaker*, 133–622, 111 N. W. 22.

Although school elections are referred to in this chapter as school meetings, a meeting of the voters at which officers are chosen in school corporations is an election. Therefore held that sale of liquors under the mulct law is prohibited on the days of school elections. *Hammond v. King*, 137–548, 114 N. W. 1062.

SEC. 2747. Electors.

Women are expressly authorized to vote on the proposition whether a tax shall be levied for the erection of a schoolhouse. *Kinney v. Howard*, 133–94, 110 N. W. 282.

SEC. 2749. Powers.

Irregularity in recording the acts of the electors will not prevent such action being recognized and taken into account in a court of equity. *Locker v. Keiler*, 110–707, 80 N. W. 433.

It is not necessary that the ballot contain a recital of every preliminary step necessary to render the election valid. *Calahan v. Handsaker*, 133–622, 111 N. W. 22.

No specific form of ballot is prescribed; all that is necessary is that the ballot fairly and intelligently present the question that is to be voted upon. A substantial compliance with the statute is sufficient. So held where the question was as to the validity of bonds issued on a vote of the electors. *Ibid.*

Where the ballot prepared and used by the electors was in the form of the Australian ballot with reference to the submission of propositions, and not in strict conformity with the statutory provision as to submission of propositions at school elections, held that the irregularity would not defeat the result of the election. *Kinney v. Howard*, 133–94, 110 N. W. 282.

The vote of the electors on a proposition of which notice of submission is given is of no validity unless the submission of such proposition has been duly authorized by the board of directors. *McNees v. School Township*, 133–120, 110 N. W. 325.

This provision does not take away the power previously existing in the board of directors to change the schoolhouse site without such vote. *James v. Gettinger*, 123–199, 98 N. W. 723.

The electors of a district township having the power to vote a tax may rescind such vote unless, by so doing, they interfere with vested rights; and held that where the board and its officers had failed to certify a schoolhouse tax for collection, and the persons desiring to secure the schoolhouse for which the tax was levied had no interest except the right to bring action to compel the certification of the tax, they had no such vested interest as to authorize them to object to the rescission of the tax. *Hibbs v. Board of Directors*, 110–306, 81 N. W. 584.

While a tax voted without the necessary notice is *ultra vires* as to the school district, yet if schoolhouses have been built in reliance on such tax, and a portion of the tax has been paid, taxpayers who have allowed the secretary to certify such tax to the board of supervisors cannot be heard to question the validity of such tax. *Loesche v. Goerdt*, 123–55, 98 N. W. 571.

A schoolhouse tax voted by the electors at their regular meeting is enforceable against property which is brought into the school district by extension of its limits prior to the levy of such tax, although at the time the tax was voted the owner was not a resident and could not participate in the election, and notwithstanding the fact that the tax had been certified to the county board for levy before such annexation took place. *Grout v. Illingworth*, 131–281, 108 N. W. 528.

In the absence of a written request for the submission at the annual meeting of any proposition authorized by law, it is discretionary with the board to provide in the notice of the meeting for such proposition to be submitted. *Kirchner v. Board of Directors*, 141–43, 118 N. W. 51.

Electors may vote a fund for the erection of a schoolhouse in excess of the amount that can be realized by the statutory levy and in such case the board of supervisors should make the legal levy notwithstanding the excessive amount voted by the electors. The vote of the electors in such case is not void although larger in amount than can be legally levied in any one year. *Ibid.*

The taxpayers have no such vested right in a schoolhouse built in accordance with the vote of the electors as to justify a court of equity in enjoining the sale thereof as ordered at an annual meeting or a special meeting duly called. *Barclay v. School Township*, 157–181, 138 N. W. 395.

SEC. 2750. **Special meeting.** The board of directors may call a special meeting of the voters of any school corporation by giving notice in the same manner as for the annual meeting, which shall have the powers given to a regular meeting with reference to the sale of school property and the application to be made of the proceeds, and to vote a schoolhouse tax for the purchase of a site and the construction of a necessary schoolhouse, and for obtaining roads thereto. [28 G. A., ch. 104, § 1; 24 G. A., ch. 21; 18 G. A., ch. 84.]

The submission of a proposition to a special meeting, even though requested by the electors, is discretionary with the board and its action will not be interfered with by mandamus. *Kirchner v. Board of Directors*, 141–43, 118 N. W. 51.

SEC. 2751. **Subdistrict meeting.**

The failure to make a record of an election at an annual school meeting will not deprive the officer selected of his right to office. The statute does not declare that the record shall be the sole and exclusive evidence, and if the record be not kept as required, or if it does not contain evidence of the fact sought to be proved, parol evidence is admissible. *State v. Cahill*, 131–155, 105 N. W. 691.

SEC. 2752. **Number of directors.** The board of directors of a school township shall be composed of one director from each subdistrict. But when there is an even number of subdistricts another member shall be elected at large by all the voters of the school township. When the school township is not divided into subdistricts, a board of three directors shall be elected at large, on the second Monday in March, by all the voters of the school township. [27 G. A., ch. 92, § 1; 15 G. A., ch. 27; C. '73, §§ 1720–1; R. §§ 2031, 2035, 2075–6; C. '51, § 1112.]

SEC. 2754. **Elections in independent districts—tie vote—nominations—ballot.** At the annual meeting in all independent districts members of the board shall be chosen by ballot. In any district including all or part of a city of the first class, or a city under special charter, the board shall consist of seven members, three of whom shall be chosen on the second Monday in March, eighteen hundred ninety-eight, two on the second Monday in March, eighteen hundred ninety-nine, and two on the second Monday in March, nineteen hundred. In all other independent city, town, or village districts, and in all rural independent districts where the board now consists of six members, the board shall consist of five members, one of whom shall be chosen on the second Monday in March, eighteen hundred ninety-eight, two on the second Monday in March, eighteen hundred ninety-nine, and two on the second Monday in March, nineteen hundred. In all independent city, town, or village districts where the board now consists of three members such board shall hereafter consist of five members, three of whom shall be elected on the second Monday in March, eighteen hundred ninety-eight, one for one year, one for two years, and one for three years. In all other rural independent districts the board shall consist of three members, one of whom shall be chosen on the second Monday in March, eighteen hundred ninety-eight, and one each year thereafter. In districts composed in whole or in part of cities or towns, a treasurer shall be chosen in like manner, whose term shall begin on the first day of July, unless that date falls on Sunday, in which case on the day following, and continue for two years, or until his successor is elected and qualified. The term of office of the incumbent treasurer in said district shall expire on the third Monday in March, eighteen hundred ninety-eight. In such districts the polls must remain open not less than five hours, and in rural independent districts and school townships not less than two hours. In each case the polls shall open at one o'clock p. m., except as provided in section twenty-

seven hundred fifty-six of this chapter. A tie vote for any elective school office shall be publicly determined by lot forthwith, under the direction of the judges. The names of all persons nominated as candidates for office in all independent city or town districts shall be filed with the secretary of the school board not later than seven days previous to the day on which the annual school election is to be held, each candidate to be nominated by a petition signed by not less than ten qualified electors of the district. The secretary of the school board shall cause to be printed, ballots upon which shall appear in alphabetical order the names of all candidates for each office, filed as herein provided, and a blank line for each such officer to be elected, and there shall be at the left of each name and each blank line a square and there shall also be a direction to the voter as to the number of candidates to be voted for at said school election. Ballots shall be printed upon plain substantial paper of uniform quality and shall have no party designation or mark whatever. The secretary of the board shall cause to be delivered at the several polling places a sufficient number of ballots. In all other respects the said school election in independent city or town districts shall be conducted under the general election laws of the state of Iowa, so far as same may be applicable. [35 G. A., ch. 245, § 1.] [31 G. A., ch. 136, § 2; 27 G. A., ch. 93, § 1; 27 G. A., ch. 91, § 2; 22 G. A., ch. 51; 18 G. A., ch. 7, § 2; C. '73, §§ 1789, 1808.]

A deviation from the statutory provision as to the time for keeping the polls open will not invalidate the election where it appears that no one was thereby deprived of the opportunity to cast his ballot. *District Twp. v. Independent Dist.*, 112-321, 83 N. W. 1068.

SEC. **2755. Election precincts—register of voters—notice.** Each school corporation having five thousand or more inhabitants may be divided into such number of precincts as the board of directors shall determine, in each of which a poll shall be held at a convenient place, fixed by the board of directors, for the reception of the ballots of voters residing in such precinct. A separate register of the voters of each precinct shall be prepared by the board from the register of the electors of any city included within such school corporation, and for that purpose a copy of such register of electors shall be furnished by the clerk of the city to the board of directors. Before each annual meeting these registers shall be revised and corrected by comparison with the last register of elections of such cities, and shall have the same force and effect at school meetings held under this section, in respect to the reception of votes thereat, as the register of election has by law at general elections. The board of directors of such school corporation, on or before the last Monday preceding such election shall appoint two suitable persons to be registrars in each of the election precincts of such school corporation for the registration of voters therein, who shall have the same qualifications as registrars appointed for general elections and shall qualify in the same manner, and receive the same compensation to be paid by the school corporation. The registrars shall meet on the day of election at the voting place in the precinct in which they have been appointed and shall hold continuous session from nine o'clock in the forenoon until seven o'clock in the afternoon. Any person claiming to be a voter, and who is not already registered in the proper precinct, may appear before them in the election precinct where he claims he is entitled to vote and make and subscribe under oath a statement in the registry book, which oath and statement shall be of the same general character as that prescribed by section ten hundred seventy-seven of the code, and shall thereupon be granted a certificate of registration. Nothing in this section shall

be construed to prohibit women from voting at all elections at which they are entitled to vote. The secretary must post a notice of the meeting in a public place in each precinct at least ten days before the meeting, and by publication once each week for two consecutive weeks preceding the same in some newspaper, published in the corporation, such notice to state the time, respective voting precincts and the polling place in each precinct, and also to specify what questions authorized by law, in addition to the election of director or directors, shall be voted upon and determined by the voters of the several precincts. [31 G. A., ch. 9, § 3; 29 G. A., ch. 125, §§ 1, 2; 28 G. A., ch. 105, § 1; 18 G. A., ch. 8, §§ 1–4.]

[The amendment by the 31 G. A., ch. 9, § 3, ignored the code supplement, 1902, where the same section is found. The amendment was by inserting matter in line 17 of the code section, while the same words, after which the matter should be inserted, appear in line 32 of the code supplement, where the change has been made.]

The register of voters for school elections is admissible in evidence as tending to show the number of voters in the district. *State v. Grefe*, 139–18, 117 N. W. 13.

SEC. 2756. **Conduct of elections.** As judges of the election referred to in the preceding section, the board shall appoint three voters of the precinct, one of whom shall act as clerk, who shall be sworn as provided in case of a general election. Such judges may or may not be members of the board, as the board may determine, provided that not more than one member of the school board shall act as such judge at any one voting precinct. If any person so appointed fails to attend, the judge or judges attending shall fill the place by the appointment of any voter present, and like action shall follow a refusal to serve or to be sworn. Should all of the appointees fail to attend, their places shall be filled by the voters from those in attendance. The board shall provide the necessary ballot box and poll book for each precinct, and the judges shall make and certify a return to the secretary of the corporation of the canvass of the votes for office and upon each question submitted. On the next Monday after the meeting the board shall canvass the returns made to the secretary, ascertain the result of the voting with regard to every matter voted upon, declare the same, cause a record to be made thereof, and at once issue a certificate to each person elected. At all meetings held under this and the next preceding section, the polls shall be kept open from nine o'clock a. m. until seven o'clock p. m. [35 G. A., ch. 245, § 2.] [18 G. A., ch. 8, §§ 5, 6.]

[As to how long polls shall be kept open, see notes to code §§ 2751, 2754.]

SEC. 2757. **Meetings of directors—election of officers.** That section twenty-seven hundred fifty-seven of the code be and the same is hereby repealed and the following enacted in lieu thereof:

"The board of directors of all independent city, town and village corporations shall organize on the third Monday in March, and those of all other school corporations on the first day of July, unless that date falls on Sunday, in which case the day following. Such organization shall be effected by the election of a president from the members of the board, who shall be entitled to vote as a member. Such special meetings may be held as may be determined by the board, or called by the president, or by the secretary upon the written request of a majority of the members of the board, upon notice specifying the time and place, delivered to each member in person, but attendance shall be a waiver of notice. Such meetings shall be held at any place within the civil township in which the corporation is situated. On the first day of July, unless that date falls on Sunday, in which case on the day following, the board of all independent city, town and village

corporations and the retiring board in all other school corporations shall meet, examine the books of, and settle with the secretary and treasurer for the year ending on the thirtieth day of June preceding, and for the transaction of such other business as may properly come before it. On the same day the board of each independent city, town and village corporation, except as provided in section twenty-seven hundred fifty-four of this chapter, and the new board of every other school corporation, shall elect from outside the board a secretary and treasurer, but in independent districts no teacher or other employe of the board shall be eligible as secretary. All officers shall be elected by ballot and the vote shall be recorded by the secretary. Should the secretary or treasurer fail to report as provided in sections twenty-seven hundred sixty-five and twenty-seven hundred sixty-nine of this chapter, it shall be the duty of the new board to take any action necessary to secure a proper settlement." [31 G. A., ch. 136, § 3; 18 G. A., ch. 176; 15 G. A., ch. 27; C. '73, §§ 1721–2; R. §§ 2035–6, 2076; C. '51, § 1121.]

The provision as to notice of special meetings of the board contemplates some form of specific personal notice on each member. It does not authorize the mailing of such notice. Personal delivery of some form of notice is required. On failure to give proper notice to a member, a special meeting of the board is not lawfully called and it cannot lawfully act. *Barclay v. School Township*, 157–181, 138 N. W. 395.

SEC. 2758. Qualification of directors—vacancies. Any member of the board may administer the oath of qualification to any member elect, and to the president of the board. Each director elected in March, nineteen hundred and six, or at any regular election thereafter, shall qualify on or before the date for the organization of the board of the corporation in which he was elected, by taking an oath to support the constitution of the United States and that of the state of Iowa, and that he will faithfully discharge the duties of his office; and shall hold the office for the term to which he is elected, and until a successor is elected and qualified. In case of a vacancy, the office shall be filled by appointment by the board until the next annual meeting. In all rural school corporations, the term of office of directors whose terms expire on the third Monday in March, nineteen hundred and six, is hereby extended to July first, nineteen hundred and six. [31 G. A., ch. 137; C. '73, §§ 1752, 1790; R. §§ 2032, 2079; C. '51, §§ 1113, 1120.]

Where a board of directors, in the absence of the election of a new director to succeed one holding office, permitted the director then in office to qualify as his own successor, held that the director thus qualified was at least a *de facto* officer. *District Twp. v. Myles*, 109–541, 80 N. W. 544.

The term of a director does not begin at the time of his election, but at the time when by statute the regular meeting of the board of directors following the election is to be held, at which the board is to be organized; and if the director elected is ineligible and is therefore unable to qualify, the vacancy is not caused by failure to elect, but by the failure to qualify, and the old director will hold over if he qualifies within ten days from that time. *State v. Cahill*, 131–155, 105 N. W. 691.

SEC. 2759. President—employment of counsel.

The president has no authority to represent that at the time of settlement with the treasurer the funds called for by his accounts were produced, counted and found to be correct. *Independent Sch. Dist. v. Hubbard*, 110–58, 81 N. W. 241.

SEC. 2760. Bonds of secretary and treasurer.

Where the treasurer about to succeed himself in office makes a settlement with the board as by statute provided, producing in some tangible form the money which he should have on hand, the sureties on his new bond are conclusively bound thereby and they will be estopped from pleading or proving that the funds so exhibited were borrowed or otherwise temporarily or fraudulently procured and never in fact went into the public treasury. But where the money is not pro-

duced in any form and the board charged by law with making the settlement accepts a mere book account or personal statement of the treasurer that he has the funds in his possession, then the liability on the bond is *prima facie* only and the sureties will be relieved if it be fairly established that the shortage originated during the prior term. *Independent School Dist. v. Herkenrath*, 155–275, 135 N. W. 1086.

The treasurer is not guilty of any breach of official duty in depositing funds of the district in a bank if he acts in good faith and without negligence in making such deposit. *Hansen v. Independent School Dist.*, 155–264, 135 N. W. 1090.

Further, see notes to code § 2768 in this supplement.

SEC. 2761. **Duties of secretary.** The secretary shall file and preserve copies of all reports made to the county superintendent, and all papers transmitted to him pertaining to the business of the corporation; keep a complete record of all the proceedings of the meetings of the board and the voters of the corporation in separate books; keep an accurate, separate account of each fund with the treasurer, charge him with all warrants and drafts drawn in his favor, and credit him with all orders drawn on each fund; and he shall keep an accurate account of all expenses incurred by the corporation, and present the same to the board for audit and payment. At the annual meeting he shall record, in a book provided for that purpose, the names of all persons voting thereat, the number of votes cast for each candidate, and for and against each proposition submitted. The secretary of each independent town or city district shall file monthly, on or before the tenth day of each month, with the board of directors, a complete statement of all receipts and disbursements from the various funds during the preceding month, and also the balance remaining on hand in the various funds at the close of the period covered by said statement, which monthly statements shall be open to public inspection. [35 G. A., ch. 246, § 1.] [C. '73, §§ 1741, 1743; R. §§ 2041–2; C. '51, §§ 1126, 1128.]

Informality in the records kept by the secretary of the action of the board will not defeat subsequent proceedings based on such action if in fact taken. *Kinney v. Howard*, 133–94, 110 N. W. 282.

SEC. 2762. **Warrants.** He shall countersign all warrants and drafts upon the county treasurer drawn or signed by the president; draw each order on the treasurer, specify the fund on which it is drawn and the use for which the money is appropriated; countersign and keep a register of the same, showing the number, date, to whom drawn, the fund upon which it is drawn, the purpose and the amount; and at each regular annual meeting furnish the board with a copy of the same. [31 G. A., ch. 136, § 4; 19 G. A., ch. 46; C. '73, §§ 1739, 1782; R. §§ 2039, 2061; C. '51, §§ 1122–3.]

SEC. 2763. **Notice of meetings—repeal.** That section twenty-seven hundred sixty-three of the code be and the same is hereby repealed, and the following enacted in lieu thereof: [31 G. A., ch. 138, § 1.]

SEC. 2763-a. **Notice of special meetings in school corporations—divided into precincts.** The secretary of the board of directors of any school corporation which is divided into precincts, shall give notice of all special meetings of the voters, as provided by section twenty-seven hundred fifty-five of the supplement to the code [1902]. Each notice shall state the date, place and hours during which the meeting will be in session, and the object of the meeting. [31 G. A., ch. 138, § 2.]

Under this section before its repeal by 31 G. A., ch. 138, held that it had no application to submission of propositions to the electors. *Kinney v. Howard*, 133–94, 110 N. W. 282.

It will be presumed that the secretary has posted the notices as required by statute, in the absence of a showing to the contrary. *Calahan v. Handsaker*, 133–622, 111 N. W. 22.

SEC. 2763-b. **Incorporations of certain cities and towns.** The secretary of the board of directors for any school corporation, located wholly within or partly within the corporate limits of cities of the first class, cities of the second class, or incorporated towns, which may not have adopted the provisions of section twenty-seven hundred fifty-five of the supplement to the code [1902] and divided into precincts, shall give notice of special meeting of the voters in the same manner as for the annual meeting, by posting at least five notices in five public places within said corporation, for not less than ten days next preceding the day of special meeting. Each notice shall state the date, place and hours during which the meeting will be in session, and the object of the meeting. [31 G. A., ch. 138, § 3.]

SEC. 2763-c. **In other school corporations.** The secretary of the board of directors for any school township or for any school corporation not included in the preceding section shall give ten days' printed or written notice of special meeting to the voters, posted in at least five public places within the corporation. The notice shall be posted at the door of each schoolhouse, and also at or near the last place of meeting, and each notice shall state the date, place and hours during which the meeting will be in session, and the object of the meeting. [31 G. A., ch. 138, § 4.]

SEC. 2764. **Register of persons of school age.** He shall, between the first day of June and the first day of July of each year, enter in a book made for that purpose, the name, sex and age of every person between five and twenty-one residing in the corporation, together with the name of the parent or guardian. [31 G. A., ch. 136, § 5.]

SEC. 2765. **Reports.** He shall notify the county superintendent when each school is to begin and its length of term, and, within five days after the regular July meeting in each year, file with the county superintendent a report which shall give the number of persons in the corporation, male or female, of school age, the number of schools and branches taught, the number of scholars enrolled and average attendance in each school, the number of teachers employed and the average compensation paid per month, distinguishing the sexes, the length of school in days, and the average cost of tuition per month for each scholar, the textbooks used, number of volumes in library, the value of apparatus belonging to the corporation, the number of schoolhouses and their estimated value, the name, age and post-office address of each deaf and dumb or blind person in the corporation between the ages of five and twenty-one years, and this shall include those who are so blind or deaf as to be unable to obtain an education in the common schools, a like report as to all feeble-minded children of and between such ages, and the number of trees set out and in a thrifty condition on each schoolhouse ground. [31 G. A., ch. 136, § 6; 19 G. A., ch. 23, § 3; 16 G. A., ch. 112, § 1; C. '73, §§ 1744–5; R. § 2046; C. '51, § 1127.]

The auditor in apportioning school taxes has no authority to review the school census reported to him by the secretaries of school townships, and cannot be restrained by injunction from acting on the census as thus reported because of the misconduct of a district secretary in taking the census of his township. *Judson v. Agan*, 134–557, 111 N. W. 943.

SEC. 2767. **Certifying tax.**

After the voting of a tax for a schoolhouse on a proposition submitted to the electors, and the certification of such tax to the board of supervisors, nothing remains to be done before the board proceeds to the erection of the schoolhouse. *Kinney v. Howard*, 133–94, 110 N. W. 282.

After the electors have voted a tax it is the imperative duty of the secretary of the board to certify the same to the board of supervisors unless the vote has subsequently been rescinded. *Kirchner v. Board of Directors*. 141–43, 118 N. W. 51.

SEC. 2768. **Duties of treasurer—payment of warrants—deposit of funds—interest.** The treasurer shall receive all moneys belonging to the corporation, pay the same out only upon the order of the president countersigned by the secretary, keeping an accurate account of all receipts and expenditures in a book provided for that purpose. He shall register all orders drawn and reported to him by the secretary, showing the number, date, to whom drawn, the fund upon which drawn, the purpose and amount. The money collected by tax for the erection of schoolhouses and the payment of debts contracted therefor shall be called the schoolhouse fund; that collected for the payment of school buildings bonds shall be called the school building bond fund; that for rent, fuel, repairs, and other contingent expenses necessary for keeping the school in operation, the contingent fund; and that received for the payment of teachers, the teachers' fund; and he shall keep a separate account with each fund, paying no order that fails to state the fund upon which it is drawn and the specific use to which it is to be applied. Whenever an order cannot be paid in full out of the fund upon which it is drawn, partial payment may be made. All school orders shall draw lawful interest after being presented to the treasurer and by him indorsed as not paid for want of funds. It is hereby made the duty of the treasurer of each school corporation to deposit all funds in his hands as such treasurer in some bank or banks in the state at interest at the rate of at least two per cent. per annum on ninety per cent. of the daily balances payable at the end of each month, all of which shall accrue to the benefit of the contingent fund of such school corporation; but before such deposit is made, such bank shall file a bond with sureties to be approved by the treasurer and the board of directors of such corporation in double the amount deposited, conditioned to hold the school corporation harmless from all loss by reason of such deposit or deposits; provided that in cases where an approved surety company's bond is furnished, said bond may be accepted in an amount equal to ten per cent. more than the amount deposited. Said bond shall be filed with the president of the school board and action may be brought thereon either by the treasurer or the school corporation as the board may elect. [35 G. A., ch. 247, § 2.] [31 G. A., ch. 139; C. '73, §§ 1747–50; R. §§ 2048–50; C. '51, §§ 1138–40.]

Officers are presumed, in the absence of any showing to the contrary, to have properly discharged their duties, and the treasurer's book of account is rightly received in evidence in an action against the sureties on his bond to show the true statement of his accounts at the time such report was rendered. *Independent School Dist. v. Hubbard*, 110–58, 81 N. W. 241.

A school treasurer may lawfully deposit the funds of the school district in a bank, under a contract between such treasurer and the bank, by which the bank agrees to furnish security to the treasurer for funds so deposited, and such contract is not contrary to public policy. *Hunt v. Hopley*, 120–695, 95 N. W. 205.

On the deposit of school funds in a private bank, the banker does not become a trustee *ex maleficio*. *Hanson v. Roush*, 139–58, 116 N. W. 1061.

Since the change of this statutory provision by the substitution of the word "receive" for the word "hold," as formerly used, the early cases making the treasurer responsible for money deposited in a bank, although in the exercise of reasonable care, are no longer applicable, and a general deposit of the school funds in a bank to the separate account of the treasurer as such is not a technical conversion. *School Township v. Stevens*, 157– —, 138 N. W. 927.

Where a treasurer had without negligence deposited funds in a bank which had been placed in the hands of a receiver and had advanced from his own personal funds money for the payment of school warrants in the expectation that the funds would be ultimately realized for the township in the receivership proceedings, held that he was entitled to reimbursement. *Ibid.*

Further held that intervening settlements in which the funds on deposit in the insolvent bank were treated as money on hand did not bar the right of the treas-

urer to recover the amount advanced by him in payment of warrants. *Ibid.*

See also notes to code § 2760 in this supplement.

SEC. 2769. **Financial statement.** He shall render a statement of the finances of the corporation whenever required by the board, and his books shall always be open for inspection. He shall make an annual report to the board at its regular July meeting, which shall show the amount of the teachers' fund, the contingent fund, and the schoolhouse fund held over, received, paid out, and on hand, the several funds to be separately stated, and he shall immediately file a copy of this report with the county superintendent. [31 G. A., ch. 136, § 7; 16 G. A., ch. 112, § 2; C. '73, § 1751; R. § 2051; C. '51, § 1141.]

SEC. 2771. **Quorum of board—filling vacancies.** A majority of the board of directors of any school corporation shall constitute a quorum for the transaction of business, but a less number may adjourn from time to time. Vacancies occurring among the officers or members shall be filled by the board by ballot, and the person receiving the highest number of votes shall be declared elected, and shall qualify as if originally elected or appointed. When the board is reduced below a quorum, by resignation or otherwise, the secretary of the board, or if there be no secretary, the county superintendent, shall call a special election to fill the vacancies, giving notice in the same manner as for the annual meeting on the second Monday in March. [32 G. A., ch. 150; 28 G. A., ch. 106, § 1; 24 G. A., ch. 19; C. '73, §§ 1730, 1738; R. §§ 2037–8.]

SEC. 2772. **Temporary officers—course of study—regulations—use of tobacco prohibited.** The board shall appoint a temporary president and secretary, or either of them, in the absence of the regular officers, and shall prescribe a course of study for the schools of the corporation, make rules and regulations for its own government and that of the directors, officers, teachers and pupils, and the care of the schoolhouse, grounds and property of the school corporation, and aid in the enforcement of the same, and require the performance of duty by said persons not in conflict with law and said rules and regulations, and such rules and regulations shall prohibit the use of tobacco in any form by any student of such schools and such board may suspend or expel such student for any violation of such rule. [35 G. A., ch. 241, § 2.] [C. '73, §§ 1730, 1737; R. § 2037.]

The board has power to make rules and regulations as to the conduct of pupils, and a court will interfere with the making and enforcement of such rules only where the board has plainly exceeded its authority. *Kinzer v. Independent School Dist.*, 129–441, 105 N. W. 686.

But a rule may be so far unreasonable or beyond the exercise of discretion that the courts can say it is made without authority. *Ibid.*

The general character of the school and the conduct of its pupils as affecting the efficiency of the work to be done in the schoolroom and the discipline of the school are matters to be taken into account by the school board in making rules for the government of the school. While the board has no concern with the individual conduct of the pupils wholly outside of the schoolrooms and school grounds while they are presumed to be under the control of their parents, yet the conduct of pupils which directly relates to and affects the management of the school and its efficiency is within the scope of proper regulation. *Ibid.*

Therefore held that a rule prohibiting the playing of football by pupils under the auspices of the school, or in a team purporting to represent the school, was valid. *Ibid.*

SEC. 2773. **Schoolhouse site—division of district—length of school.** It may fix the site for each schoolhouse, taking into consideration the geographical position, number and convenience of the scholars, provide for the fencing of schoolhouse sites, determine the number of schools to be taught, divide the corporation into such wards or other divisions for school

purposes as may be proper, determine the particular school which each child shall attend, and designate the period each school shall be held beyond the time required by law. Every school shall be free of tuition to all actual residents between the ages of five and twenty-one years, and each school regularly established shall continue for at least twenty-four weeks of five school days each, in each school year commencing the first of July, unless the county superintendent shall authorize the board to shorten this period in any one or more schools, when in his judgment there are sufficient reasons for so doing. No school shall be in session during the time of holding a teachers' institute except by written permission of the county superintendent. [31 G. A., ch. 136, § 8; 19 G. A., ch. 172, § 21; 17 G. A., ch. 54; 15 G. A., ch. 57; C. '73, §§ 1724, 1727, 1769; R. §§ 2023, 2037.]

The directors of a school township have power to change the site of a schoolhouse without a vote of the electors. *James v. Gettinger*, 123–199, 98 N. W. 723.

The matter of the relocation of the schoolhouse site is for the determination of the school board, subject to appeal to the county superintendent, and the action of the board cannot be questioned by injunction. *Kinney v. Howard*, 133–94, 110 N. W. 282.

Primarily the location of a schoolhouse site is within the exclusive jurisdiction of the school board, subject to review on appeal to the county superintendent and from him to the state superintendent. After final decision on appeal to the state superintendent he has no authority to change such decision on account of subsequent change of conditions. *Doubet v. Board of Directors*, 135–95, 111 N. W. 326.

In selecting the site of a schoolhouse the board is controlled by the provision of code § 2814 as to the acquisition of a site within thirty rods of the residence of an owner who objects to such location. *Mendenhall v. Board of Directors*, 137–554, 115 N. W. 11.

The action of the board of directors in fixing a new schoolhouse site is subject to the review of the county superintendent; and if the action of the board is reversed on such appeal the district has no longer authority to hold or use the site purchased for the purpose, and a conveyance of property for such new site becomes invalid and inoperative without any action for rescission on the part of the board. *Ind. School Dist. v. McClure*, 136–122, 113 N. W. 554.

SEC. 2774. **Renting room—instruction in other schools—transportation of children.**

The remedy against a school board for failing to provide school accommodations is not by certiorari. *Molyneaux v. Molyneaux*, 130–100, 106 N. W. 370.

An arrangement for transportation of children is to be made only when it will result in a saving of expense and increased advantage to the children. These needs involve an investigation and determination by the board of directors and the remedy upon its refusal to make such arrangement is by appeal and not by mandamus. *Queeny v. Higgins*, 136–573, 114 N. W. 51.

In determining whether a school shall be maintained in a district or the attendance of the pupils provided for in another district, the board is given a discretion which can only be reviewed by appeal to the county superintendent and from him to the state superintendent. In such a case, mandamus will not lie to control the action of the board. *Templer v. School Township*, 141 N. W. 1054.

SEC. 2775-a. **Elementary agriculture—domestic science—manual training—instruction—teachers' examination.** The teaching of elementary agriculture, domestic science, and manual training shall, after the first day of July, nineteen hundred fifteen, be required in the public schools of the state; and the state superintendent of public instruction shall prescribe the extent of such instruction in the public schools. And after the date aforesaid elementary agriculture and domestic science shall be included among the subjects required in the examination of those applicants for teachers' certificates who are required by the provisions of this act to teach agriculture and domestic science. [35 G. A., ch. 248, § 1.]

SEC. 2778. **Contracts—election of teachers—employment of teachers in subdistricts.** The board shall carry into effect any instruction

from the annual meeting upon matters within the control of the voters, and shall elect all teachers and make all contracts necessary or proper for exercising the powers granted and performing the duties required by law. But the board may authorize any subdirector to employ teachers for the schools in his subdistrict. Contracts with teachers must be in writing, and shall state the length of time the school is to be taught, the compensation per week of five days or month of four weeks, and such other matters as may be agreed upon, signed by the president and teacher, and filed with the secretary before the teacher commences to teach under such contract. [28 G. A., ch. 107, § 1; 22 G. A., ch. 60; C. '73, §§ 1723, 1757; R. §§ 2037, 2055.]

In general: Under this section as amended by 28 G. A., ch. 107, the board of directors is authorized to carry into effect instructions from the annual meeting upon matters which are within the control of the voters and have properly been submitted to them for action. The recording of the action of the electors is immaterial. *Kinney v. Howard*, 133–94, 110 N. W. 282.

A court of equity will not, at the suit of a resident taxpayer of a school district brought against its officers, enforce repayment of money expended under an executed contract of which the school district retains the benefit, although the contract is invalid, there being no claim that the officers acted corruptly or fraudulently or paid an unreasonable amount. *Kagy v. Independent Dist.*, 117–694, 89 N. W. 972.

Where the directors sign a contract in behalf of the district, although not in pursuance of any action of the board, they are not individually liable. *Hanna v. Wright*, 116–275, 89 N. W. 1108.

Where directors individually signed a contract for apparatus purporting to bind the board of directors and not indicating an assumption of personal liability, held that they were not individually liable thereon and that the school district having through the board of directors accepted and received the benefit of the apparatus was bound by the contract. *Johnson v. School Corporation*, 117–319, 90 N. W. 713.

It is the vote of the directors which is binding on the district, and not the record thereof. And where no record of the action of the directors was made it may be proven by oral testimony. *German Ins. Co. v. Independent Sch. Dist.*, 80 Fed. 366.

A contract or order given by members of the board of directors acting individually is not binding on the district, but such a contract may be ratified by the acceptance, retention and use by the school district of the property thus contracted or paid for. *Richards v. School Township*, 132–612, 109 N. W. 1093.

Where contracts made by a board of directors with persons occupying a fiduciary or official relation to the school corporation have been carried out, a taxpayer will not be allowed to maintain a suit in the name of the corporation against the contractor to recover the money paid to him under such contract, the benefits of which are retained by the school corporation. *Kagy v. Independent Dist.*, 117–694, 89 N. W. 972.

Contracts with teachers: The rules and regulations of the district fixing the time for opening the schools are part of the contract. *Burkhead v. Independent Sch. Dist.*, 107–29, 77 N. W. 491.

Such a contract cannot be made for a longer time than one year. *Ibid.*

Where a teacher offered by way of tender of resignation to renounce his contract, but this offer was not accepted by the board of directors until after they were notified of its withdrawal, held that a discharge of the teacher, not in accordance with the provisions of code § 2782, was not authorized. Also held that the fact that the teacher after such unauthorized discharge drew the balance of pay due him and delivered the key of the schoolhouse on demand of the board did not show an abandonment of the contract. *Curtright v. Independent Sch. Dist.*, 111–20, 82 N. W. 444.

When a contract with a teacher is disregarded by the school board and the teacher is denied the right to perform, the teacher is not required by way of diminution of damages to seek employment in a different grade of the service or in a different locality. *Byrne v. Ind. School Dist.*, 139–618, 117 N. W. 983.

SEC. 2778-a. **Minimum teachers' wage—based on certificate grade.** That all teachers in the public schools of this state shall be paid for their services a minimum wage of not less than the amounts hereinafter set forth, all fractions in average grades to be figured at the nearest whole number:

1. Teachers holding a first grade uniform county certificate or higher, shall be paid a daily wage of not less than a sum obtained by multiplying three cents by the general average grade shown on such certificate.

2. Teachers holding a second grade uniform county certificate shall be paid a daily wage of not less than a sum obtained by multiplying two and three-quarters cents by the general average grade shown on such certificate up to and including a general average grade of eighty-five per cent.

3. Teachers holding a third grade uniform county certificate shall be paid a daily wage of not less than a sum obtained by multiplying two and one-half cents by the general average [grade] shown on such certificate.

Provided that a teacher having contracted on a second or third grade certificate in conformity with this act, shall fulfill such contract at the wage fixed at the time of signing same, plus any additional credit earned under section two hereof. [35 G. A., ch. 249, § 1.]

SEC. **2778-b. Credits for attending training school.** Every teacher holding either a second or third grade certificate who has taught successfully for one year and attended an approved teachers' training school for a period of six weeks following, shall, upon proper certification of such attendance, receive a credit of three points in estimating the salary due, and to be paid, but such credit shall not operate to raise the grade of such certificate. [35 G. A., ch. 249, § 2.]

SEC. **2778-c. Contracts for less than minimum wage prohibited.** It shall be unlawful for any school board or any school officer to contract for or pay a less wage to any teacher in the public schools of this state than the minimum amounts herein fixed for the grade certificate held by such public school teacher. But nothing herein shall be construed as limiting the right to make a lawful contract for a higher wage than herein specified as a minimum. [35 G. A., ch. 249, § 3.]

SEC. **2778-d. Violation—penalty.** Any school officer violating the provisions of this act shall be fined a sum of not less than twenty-five dollars, nor more than one hundred dollars, in the discretion of the court, and shall be suspended from office. [35 G. A., ch. 249, § 4.]

SEC. **2779. Erection or repair of schoolhouse.**

The board of directors may delegate to a committee the ministerial duty of carrying out a contract for the erection of a schoolhouse, but the duty of selecting the site, adopting the plans and awarding the contract cannot thus be delegated. *Kinney v. Howard*, 133–94, 110 N. W. 282.

Upon refusal of the lowest bidder to enter into a contract for the construction of a schoolhouse, the board cannot disregard all the bids submitted and enter into a contract with a nonbidder and hold the lowest bidder liable under his deposit for the difference between his proposition and the price fixed in such subsequent contract. *Cedar Rapids Lumber Co. v. Fisher*, 129–332, 105 N. W. 595.

A telegram to one whose bid was found to be the lowest, advising him that his was the lowest bid, held not to be such acceptance of his bid as to render the contract binding upon him. *Ibid.*

SEC. **2780. Allowance of claims—settlements—compensation of officers—treasurer.** It shall audit and allow all just claims against the corporation, and no order shall be drawn upon the treasury until the claim therefor has been audited and allowed; it shall from time to time examine the accounts of the treasurer and make settlements with him; shall present at each regular meeting of the electors a full statement of the receipts had and expenditures made since the preceding meeting, with such other information as may be considered important; and shall fix the compensation to be paid the secretary. But no member of the board or treasurer shall receive compensation for official services. [35 G. A., ch. 247, § 1.] [C. '73, §§ 1732–3, 1738, 1813; R. §§ 2037–8; C. '51, §§ 1146, 1149.]

Claims against the school district must be audited and allowed by the board of directors and not by the president, and until such claim has been presented to the board and the board has had an opportunity to act upon it, no suit can be maintained. *Pierson v. Independent Sch. Dist.*, 106–695, 77 N. W. 494.

SEC. 2782. Visiting schools—regulations—discharge of teachers—expulsion of scholars.

Where the validity of a teacher's contract is in question he is not limited to an appeal, but may sue in the courts. *Burkhead v. Independent Sch. Dist.*, 107–29, 77 N. W. 491.

While a teacher who has been discharged cannot sue for breach of contract on the ground that the discharge is wrongful without first appealing to the county superintendent, yet, where such an appeal has been taken and decided in the teacher's favor, the action for the wrongful discharge may be maintained, although the decision of the county superintendent was not on the merits. *Jackson v. Independent Sch. Dist.*, 110–313, 81 N. W. 596.

Where a teacher tendered his resignation, which was not accepted by the board until after it was withdrawn, held that the discharge of the teacher, which was not in accordance with the provisions of this section, was not authorized. *Curtright v. Independent Sch. Dist.*, 111–20, 82 N. W. 444.

Where the action of the board in discharging a teacher was reversed on appeal to the county superintendent on the ground that the teacher had been given no notice or opportunity to be heard, held that the teacher might be tried on new charges, with due notice and a time fixed for the hearing, without reinstating such teacher in charge of the school, and that such action of the directors would not be enjoined. *White v. Wohlenberg*, 113–236, 84 N. W. 1026.

The hearing having by reason of a temporary injunction been postponed until a time when the teacher's contract had expired, held that on dissolution of the temporary injunction the hearing to be had would relate back to the time when the further action of the board had been prevented by such temporary injunction. *Ibid.*

The board has authority to expel pupils who violate the reasonable regulations made for the government and conduct of such pupils in matters within the jurisdiction of the board. *Kinzer v. Independent School District*, 129–441, 105 N. W. 686.

SEC. 2782-a. Secret societies and fraternities prohibited in schools. That from and after the passage of this act it shall be unlawful for any pupil, registered as such, and attending any public high school, district, primary, or graded school, which is partially or wholly maintained by public funds, to join, become a member of, or to solicit any other pupil of any such school to join, or become a member of any secret fraternity or society wholly or partially formed from the membership of pupils attending any such schools or to take part in the organization or formation of any such fraternity or society, except such societies or associations as are sanctioned by the directors of such schools. [33 G. A., ch. 185, § 1.]

SEC. 2782-b. Enforcement. The directors of all such schools shall enforce the provisions of section one of this act, and shall have full power and authority to make, adopt, and modify all rules and regulations which, in their judgment and discretion, may be necessary for the proper governing of such schools and enforcing all the provisions of section one of this act. [33 G. A., ch. 185, § 2.]

SEC. 2782-c. Suspension or dismissal. The directors of such schools shall have full power and authority, pursuant to the adoption of such rules and regulations made and adopted by them, to suspend, or dismiss any pupil or pupils of such schools therefrom, or to prevent them, or any of them, from graduating or participating in school honors when, after investigation, in the judgment of such directors, or a majority of them, such pupil or pupils are guilty of violating any of the provisions of section one of this act, or who are guilty of violating any rule, rules, or regulations adopted by such directors for the purpose of governing such schools or enforcing section one of this act. [33 G. A., ch. 185, § 3.]

SEC. 2782-d. Rushing or soliciting to join prohibited—jurisdiction—penalty. It is hereby made a misdemeanor for any person, not a pupil of such schools, to be upon the school grounds, or to enter any school building for the purpose of "rushing" or soliciting, while there, any pupil or pupils of such schools to join any fraternity, society, or association organ-

ized outside of said schools. All municipal courts and justice courts in this state shall have jurisdiction of all offenses committed under this section, and all persons found guilty of such offenses shall be fined not less than two dollars nor more than ten dollars, to be paid to the city or village treasurer, when such schools are situated inside of the corporate limits of any city or village, and to the county treasurer, when situated outside of the corporate limits of any such city or village, or upon failure to pay such fine, to be imprisoned for not more than ten days. [33 G. A., ch. 185, § 4.]

SEC. 2783. **Use of contingent fund—free textbooks.** It may provide and pay out of the contingent fund to insure school property such sum as may be necessary, and may purchase dictionaries, library books, including books for the purpose of teaching vocal music, maps, charts and apparatus for the use of the schools thereof to an amount not exceeding twenty-five dollars in any one year for each schoolroom under its charge; and may furnish schoolbooks to indigent children when they are likely to be deprived of the proper benefits of the school unless so aided; and shall, when directed by a vote of the district, purchase and loan books to scholars, and shall provide by levy of contingent fund therefor. [30 G. A., ch. 115; 26 G. A., ch. 37; 25 G. A., ch. 34; 21 G. A., ch. 107; 19 G. A., ch. 149, § 1; C. '73, § 1729.]

Under this section, which differs from the corresponding section of the code of '73, the board of directors may contract an indebtedness for books, payable out of the contingent fund, although no funds are on hand at the time from which the indebtedness may be paid. *Hanna v. Wright*, 116–275, 89 N. W. 1108; *Johnson v. School Corporation*, 117–319, 90 N. W. 713.

The school board may charge the contingent fund beyond the unappropriated money on hand to an extent not exceeding twenty-five dollars for each schoolroom under its control, and in an action against the school district for an indebtedness thus contracted, the burden is on the district to show that the indebtedness was contracted in excess of the amount which the school board might contract for that purpose. *Farmers' & Merchants' State Bank v. School Township*, 118–540, 92 N. W. 676.

SEC. 2785. **Duties of directors—contracts.** The board of directors of a school township may authorize the director of each subdistrict, subject to its regulations, to make contracts for the purchase of fuel, the repairing or furnishing of schoolhouses, and all other matters necessary for the convenience and prosperity of the schools in his subdistrict. Such contracts shall be binding upon the school township only when approved by the president of the board, and must be reported to the board. Each director shall, between the first and fifteenth days of June in each year, prepare a list of the heads of families in his subdistrict, the number and sex of all children of school age, and by the twentieth day of said month report this list to the secretary of the school township, who shall make full record thereof. The powers specified in this section cannot be exercised by individual directors of independent districts. [31 G. A., ch. 136, § 9; C. '73, §§ 1753–5; R. §§ 2052–3; C. '51, §§ 1124, 1142.]

SEC. 2791. **Attaching territory to adjoining corporation.**

In a particular case held that what was done by the superintendent and the board of directors was sufficient to make an effectual change of the boundary attempted, notwithstanding some irregularities in the way in which it was done. *Newlon v. Independent Dist.*, 109–169, 80 N. W. 316.

Under statutory provisions prior to the present code, held that boundaries of independent districts might be changed under the same provisions as applied to the change of boundaries of district townships. *Ibid.*

Where it appears that the change has been made on grounds which are sufficient to authorize such change it will be presumed, until the contrary is shown, that the proceedings were regular and the grounds sufficient. *Ibid.*

Where a property owner has acquiesced in the attempted change of boundary and recognized it as valid, he cannot after-

wards, nor can his grantee, question its validity. *Ibid.*

Where no natural obstacles exist there is nothing on which the county superintendent may base an order, and an action of his with reference to change of boundaries is without jurisdiction. *School Twp. v. Independent School Dist.*, 110–30, 81 N. W. 184.

By virtue of the provisions of this section it is possible that an independent district may be reduced in size to less than four sections of land. *Rural Ind. School Dist. v. New Ind. School Dist.*, 120–119, 94 N. W. 284.

SEC. 2792. Restoration.

This provision has no application to the severance of a portion of the territory originally included in such district. *Williams v. Core*, 124–213, 99 N. W. 732.

SEC. 2793. **Boundary lines changed.** That section twenty-seven hundred ninety-three of the code be and the same is hereby repealed, and the following enacted in lieu thereof:

The boundary lines of contiguous school corporations may be changed by the concurrent action of the respective boards of directors at their regular meetings in July, or at special meetings thereafter, called for that purpose. The corporation from which territory is detached shall, after the change, contain not less than four government sections of land, and its boundary lines must conform to the lines of congressional divisions of land. In the same manner, the boundary lines of contiguous school corporations may be so changed that one corporation shall be included in and consolidated with the other as a single corporation. [34 G. A., ch. 142, § 1.] [31 G. A., ch. 136, § 10; 22 G. A., ch. 62, § 1.]

This section provides for extending the limits of the school district with the expansion of the city limits. *State v. Grefe*, 139–18, 117 N. W. 13.

SEC. 2793-a. **Corporation limits changed.** When the boundary line between a school township and an independent city or town district is not also the line between civil townships, such boundary may be changed at any time by the concurrence of the boards of directors; but in no case shall a forty-acre tract of land, by the government survey, be divided; and such subdivisions shall be excluded or included as entire forties. The boundaries of the school township or the independent district may in the same manner be extended to the line between civil townships, even though by such change one of the districts shall be included within and consolidated with the other as a single district. When the corporate limits of any city or town are extended outside the existing independent district or districts, the boundaries of said independent district or districts shall be also correspondingly extended. But in no case shall the boundaries of an independent district be affected by the reduction of the corporate limits of a city or town. [27 G. A., ch. 89, § 1.]

Property brought into a school district by annexation after the voting and certification of a schoolhouse tax, but before the levy of such tax, is subject to the tax, although the owner was not a resident of the district at the time the election was held. *Grout v. Illingworth*, 131–281, 108 N. W. 528.

This section has no application to the original incorporation of a town embracing territory of two or more school districts. *Ind. School Dist. v. Jones*, 142–8, 120 N. W. 315.

SEC. 2794. **Formation of independent district.** Upon the written petition of any ten voters of a city, town or village of over one hundred residents, to the board of the school corporation in which the portion of the town plat having the largest number of voters is situated, such board shall establish the boundaries of a proposed independent district, including

therein all of the city, town or village, and also such contiguous territory as is authorized by a written petition of a majority of the resident electors of the contiguous territory proposed to be included in said district, in not smaller subdivisions than entire forties of land, in the same or any adjoining school corporations, as may best subserve the convenience of the people for school purposes, and shall give the same notices of a meeting as required in other cases, at which meeting all voters upon the territory included within the contemplated independent district shall be allowed to vote by ballot for or against such separate organization. When it is proposed to include territory outside the town, city or village, the voters residing upon such outside territory shall be entitled to vote separately upon the proposition for the formation of such new district, by presenting a petition of at least twenty-five per cent. of the voters residing upon such outside territory, and if a majority of the votes so cast is against including such outside territory, then the proposed independent district shall not be formed. [29 G. A., ch. 126, § 1; 19 G. A., ch. 118, § 1; 18 G. A., ch. 139; C. '73, §§ 1800–1; R. §§ 2097, 2105.]

A written petition of ten voters is essential before the board acquires jurisdiction to act. The territory with reference to which there is no petition cannot be included, but the proposed district need not necessarily contain all the territory for which the petition is presented. *Munn v. School Twp.*, 110–652, 82 N. W. 323.

The desirability or necessity for the independent district is for the determination of the electors. The board is to say whether the village contains one hundred residents and whether the requisite number of electors have signed the respective petitions, and having so found, no option is left save to fix the boundaries of the proposed district and order the election. *Ibid.*

On appeal from the action of the board to the county superintendent, the latter determines the question *de novo*, and may enter such order as ought to have been entered by the board. *Ibid.*

Although the language of this section before its amendment by 29 G. A., ch. 126, and the enactment of 27 G. A., ch. 89, did not in specific language authorize the formation of an independent district coextensive with the territory of a city or town out of territory in part belonging to a school township and in part to an independent district, nevertheless the manifest purpose of the legislature was to authorize such action. *Rural Ind. School Dist. v. New Ind. School Dist.*, 120–119, 94 N. W. 284.

Although, under the language of sections of the code relating to the division of independent districts, it is provided in some cases that such districts shall not be reduced to a size less than four sections of land, nevertheless there is no provision in the code that an independent district cannot exist containing less than that amount of territory. *Ibid.*

While the assent of the voters, outside of the corporate limits, to the annexation of territory to an independent district embracing a city or town is to be separately ascertained, yet when the acquiescence of the majority of the outside voters is given and acted upon, a portion of such voters cannot have their land severed from the independent district by proceedings in accordance with code § 2792. *Williams v. Core*, 124–213, 99 N. W. 732.

Where a petition is presented to the proper board for the formation of an independent district to correspond with a town plat, an independent district may be formed which includes territory theretofore a part of a school township, and it is not essential that the board of directors of the township out of which the new district is formed shall concur in the formation thereof. *School Township v. Independent School Dist.*, 134–349, 112 N. W. 5.

The original incorporation of territory as a town embracing parts of several independent school districts does not affect the boundaries of such school districts. *Ind. School Dist. v. Jones*, 142–8, 120 N. W. 315.

This section as amended was not superseded or impliedly repealed by the enactment of code supp. § 2794-a. This section authorizes proceedings which would not be sufficient under the other and the latter contains limitations not found in this. *School Dist. Township v. Independent School Dist.*, 149–480, 128 N. W. 848.

The existence of an independent district including a city, town, or village and adjoining territory, does not prevent the formation of a new independent district including other territory than that of the independent district already formed. *Ibid.*

The fact that surrounding subdistricts are left with less than four sections of land included within their limits is not an objection to the formation of an independent district under this section. *Ibid.*

The question whether the inclusion of contiguous territory subserves the conven-

ience of the people for school purposes is one to be determined by the board to which the petition is directed and, on appeal, by the county superintendent. It is not a matter for determination by the court in passing upon the validity of the consolidation. *Ibid.*

Proceedings in a particular case in the organization of an independent school district held to be sufficient as against the contention that such proceedings were ineffectual. *Independent School Dist. v. Independent School Dist.*, 153-598, 134 N. W. 75.

SEC. **2794-a. Consolidated independent districts—organization—dissolution.** (a) *Organization—petition—election—board of directors.* When a petition describing the boundaries of contiguous territory containing not less than sixteen sections within one or more counties is signed by one third of the electors residing on such territory, and approved by the county superintendent, if of one county, and the superintendent of each if of more than one county, and by the state superintendent of public instruction if the county superintendents do not agree, and filed with the board of the school corporation in which the portion of the proposed district having the largest number of voters is situated, requesting the establishment of a consolidated independent district, it shall be the duty of said board, within ten days, to call an election in the proposed consolidated district, for which they shall give the same notices as are required in section twenty-seven hundred forty-six of the code, and twenty-seven hundred fifty of the supplement to the code, 1907, at which election all voters residing in the proposed consolidated district shall be entitled to vote by ballot for or against such separate organization. When it is proposed to include in such district a city, or town or village, the voters residing upon the territory outside the incorporated limits of such city, town or village shall vote separately upon the proposition for the creating of such new district. The judges of said election shall provide separate ballot boxes in which shall be deposited the votes cast by the voters from their respective territory, and if a majority of the votes cast by the electors residing either within or without the limits of such city, town or village, is against the proposition to form a consolidated independent corporation, then the proposed corporation shall not be formed. If a majority of the votes so cast in each territory shall be in favor of such independent organization, the organization of the proposed consolidated independent school corporation shall be completed by the election of a board of directors for said school corporation, as provided in section twenty-seven hundred ninety-five of the code, and when so organized shall not be reduced to less than sixteen sections unless dissolved as provided by this act. No school corporation from which territory is taken to form such a consolidated independent corporation shall, after the change, contain less than four government sections, which territory shall be contiguous and so situated as to form a suitable corporation.

(b) *Organization of board—taxes previously certified—levy for general fund.* The organization of the school board in consolidated independent school corporations shall be effected on or before the first day of July following their election, and when completed, all taxes previously certified shall be void so far as the property within the limits of the consolidated independent school corporation is concerned, and the board of said consolidated independent school corporation shall at a regular meeting or a special meeting called for the purpose, at any time prior to the third Monday in August of each year, levy for the general fund of said school the amount of all necessary taxes for all school purposes, which, including the amount received from the semiannual apportionment, shall not exceed thirty-two dollars for each person of school age, the amount so levied to be certified

by them to the county board of supervisors on or before the first Monday of September in each year, and the board of supervisors shall levy said tax at the same time, and in the same manner that other school taxes are required to be levied.

(c) *Central school—transportation.* It shall be the duty of the school board of any consolidated independent school corporation and school townships maintaining a central school to provide suitable transportation to and from school, for every child of school age living within said district, and outside the limits of any city, town or village, but the board shall not be required to cause the vehicle of transportation to leave the public highway to receive or discharge occupants thereof. The board shall from time to time, by resolution regularly adopted, number and designate the route to be traveled by each conveyance in transporting children to and from school. The school board may require that children living an unreasonable distance from school shall be transported by the parent, or guardian, a distance of not to exceed two miles, to connect with any vehicle of transportation to and from school; or may, in the discretion of the board, contract with an adjoining school corporation for the instruction of any child living an unreasonable distance from school, and they shall allow a reasonable amount of compensation for the transportation of children to and from the point where they are taken over, or discharged from, the vehicle used to convey them to and from school, or for transporting to an adjoining district. In determining what an unreasonable distance would be, consideration shall be given to the number and age of the children, the condition of the roads, and the number of miles to be traveled in going to and from school. The board shall have the right on account of inclemency of the weather to suspend the transportation of any route upon any day or days when in the judgment of the said board it would be a hardship on the children, or when the roads to be traveled are unfit or impassable.

(d) *Contracts for transportation—rules and regulations.* The school board of any consolidated independent school corporation shall contract with as many suitable persons as they deem necessary for the transportation of children of school age to and from school, such contract to be in writing and shall state the number of the route, the length of time contracted for, the compensation to be allowed per week of five school days, or per month of four school weeks, and may provide that two weeks' salary shall be retained by the board pending full compliance therewith by the party contracted with, and shall always provide that any party or parties to said contract and every person in charge of vehicles conveying children to and from school, shall be at all times subject to any rules or regulations said board shall adopt for the protection of the children, or to govern the conduct of the person in charge of said conveyance.

(e) *School building—tax levy—location.* It shall be the duty of the school board of any consolidated independent district to provide a suitable school building within such district, and shall at any regular meeting or at a special meeting called for that purpose submit the question of levying a tax for the building of any school building suitable for the needs of the district, or for the repairing of any school building where the cost of such repairs exceeds the sum of two thousand dollars to the qualified voters of said district, and all moneys received from such source to be placed in the schoolhouse fund of said corporation and to be used for such purposes only. In locating said building they shall take into consideration the geographical position, number and convenience of the scholars, and may submit the question of location to the voters of the district at any regular meeting or

special meeting called for that purpose; providing that whenever a city, town or village containing a school population of twenty-five or more, is included within any consolidated independent district, then said building shall be located within the incorporated limits of said city, town or village, on such a site as the school board may determine.

(f) *Dissolution—petition—election—boards of directors—division of assets and liabilities.* Whenever a petition signed by one third of the electors in a consolidated independent school corporation asking that said district be dissolved and describing the boundaries of the district or districts proposed to be organized out of the territory then included in such consolidated independent school corporation and having the approval of the county superintendent, if one county, and the superintendent of each if more than one county, and by the state superintendent of public instruction if the county superintendents do not agree, is[1] filed with the board of said consolidated independent district, it shall be the duty of said board within ten days to call an election for which they shall give the same notices as are required in section twenty-seven hundred forty-six of the code, and twenty-seven hundred fifty of the supplement to the code, 1907, at which election all voters residing within the district shall be allowed to vote by ballot for or against such dissolution. If a majority of all votes cast at said election be in favor of dissolving the consolidated district, same shall be dissolved and the organization of a new district or districts be forthwith completed by the election of a board of directors as provided by statute; provided, however, that such dissolution shall become effective only when the reorganization of the territory included in the original consolidated district is completed. The assets and liabilities of any such school corporation thus dissolved shall be equitably divided as provided in section twenty-eight hundred and two of the supplement to the code, 1907.

(g) *Violation of transportation rules and regulations—penalty.* Any person driving, managing, or in charge of any vehicle used in transporting children to and from school, in any consolidated independent school corporation, who shall be found guilty of violating any of the rules and regulations adopted by the board of said school for the guidance of any person in charge of such conveyance, shall be guilty of a misdemeanor, and for the first offense shall be fined not less than five dollars or more than ten dollars and for a subsequent offense shall be fined not less than twenty-five dollars or more than fifty dollars and shall be dismissed from the service. [34 G. A., ch. 143, § 1.] [31 G. A., ch. 141.]

[1"and" in enrolled bill. EDITOR.]

As to whether the territory of consolidated school districts organized under the provisions of this section may be subsequently reduced by the organization of other school districts of the same character, the judges of the court were equally divided. *State v. Board of Directors*, 148–487, 127 N. W. 982.

This section contemplates the submission of the question at a special election. *Wallace v. Independent School Dist.*, 150–711, 130 N. W. 804.

The statute is applicable to independent districts. *Ibid.*

SEC. **2794-b. State aid to consolidated schools—equipment and maintenance—two-room building—agriculture and home economics.** That all consolidated schools organized in accordance with the provisions of the code supplement section twenty-seven hundred ninety-four-a as amended by chapter one hundred forty-three of the acts of the thirty-fourth general assembly, which are now or hereafter established with suitable grounds and a two-room school building and the necessary departments and equipment for teaching agriculture and home economics, or

other industrial and vocational subjects, and employing teachers holding a certificate showing their qualifications to teach said subjects, and in which said subjects are provided as a part of the regular course in such schools, subject to the approval of the superintendent of public instruction, shall be awarded and paid from the state treasury from moneys not otherwise appropriated, the sum of two hundred fifty dollars towards the equipment required, and the further sum of two hundred dollars annually. [35 G. A., ch. 250, § 1.]

SEC. **2794-c. Same—three-room building—manual training.** That all such schools established with a three-room school building and suitable grounds and the necessary departments and equipment for teaching agriculture, home economics and manual training, or other industrial and vocational subjects, and employing teachers holding a certificate showing their qualification to teach said subjects, and in which said subjects are provided as a part of the regular course in such schools, subject to the approval of the superintendent of public instruction, shall be awarded and paid from the state treasury from moneys not otherwise appropriated, the sum of three hundred fifty dollars towards the equipment required, and the further sum of five hundred dollars annually. [35 G. A., ch. 250, § 2.]

SEC. **2794-d. Same—four-room building.** That all such schools established with four rooms or more and suitable grounds and the necessary departments and equipment for teaching agriculture, home economics and manual training, or other industrial and vocational subjects, and employing teachers holding a certificate showing their qualifications to teach said subjects, and in which said subjects are provided as a part of the regular course in such schools, subject to the approval of the superintendent of public instruction, shall be awarded and paid from the state treasury from moneys not otherwise appropriated the sum of five hundred dollars towards the equipment required, and the further sum of seven hundred fifty dollars annually. [35 G. A., ch. 250, § 3.]

SEC. **2794-e. Report by secretary—requisition—warrant.** The secretary of each school corporation shall, at the close of each school year, report to the superintendent of public instruction as said officer may require; upon receipt of a satisfactory report, the superintendent of public instruction shall issue a requisition upon the auditor of state for the amount due such school corporation for said year; whereupon the auditor of state shall draw a warrant on the state treasury payable to such school corporation for the amount of said requisition, and forward the same to the secretary of such school corporation. [35 G. A., ch. 250, § 4.]

SEC. **2794-f. No additional aid for normal course in high school.** No consolidated school having a high school department shall receive additional aid for maintaining the normal training course in high schools as provided in chapter one hundred thirty-one,[1] acts of the thirty-fourth general assembly. [35 G. A., ch. 250, § 5.]

[1]See § 2634-b3. EDITOR.]

SEC. **2794-g. Annual appropriation.** For the purpose of carrying out the provisions of this act there is hereby appropriated out of any money in the state treasury not otherwise appropriated, the sum of thirty thousand dollars or so much thereof as may be necessary, for the period ending June thirtieth, nineteen hundred fourteen, and the sum of fifty thousand dollars, or so much thereof as may be necessary, annually thereafter, for a period of four years. [35 G. A., ch. 250, § 6.]

SEC. 2796. Taxes certified and levied.

This section relates to perfecting an organization already determined upon by the elected officers, and is directory only. *Munn v. School Twp.*, 110-652, 82 N. W. 323.

SEC. 2797. Rural independent districts.

Suit against the new districts on indebtedness of the old district must be brought in equity. *Fairfield v. Rural Ind. School Dist.*, 111 Fed. 108.

If the new districts have by agreement divided and apportioned between them the indebtedness of the old district, then an action against them may be at law. *Fairfield v. Rural Ind. School Dist.*, 111 Fed. 453.

SEC. 2799. Uniting independent districts.

The invalidity of the petition and notice cannot be urged by electors who were present and voted upon the proposition for consolidation. *Molyneaux v. Molyneaux*, 130-100, 106 N. W. 370.

The elections in the different districts with reference to the consolidation need not be held on the same day and at the same time. If any such requirement is contemplated by the statute it is directory merely. *Ibid.*

SEC. 2800. Rural independent districts united into school township. A township which has been divided into rural independent districts may be erected into a school township by a vote of the electors, to be taken upon the written request of one third of the legal voters residing in such civil township. Upon presentation of such written request to the township trustees, they shall call a meeting of the electors at the usual place or places of holding the township election, upon giving at least ten days' notice thereof by posting three written notices in each rural independent district in the township, and by publication in a newspaper, if one be published in such township, at which meeting the said electors shall vote by ballot for or against a school township organization. If a majority of the votes cast at such election be in favor of such organization, each rural independent district shall become a subdistrict of the school township, and shall organize as such on the first Monday in March following by the election of a director, notice of which shall be given as in other cases by the secretary of each of the rural independent districts, and the directors so elected shall organize as a board of directors of the school township on the first day of July following, unless that date falls on Sunday, in which case on the day following. [31 G. A., ch. 136, § 11; 16 G. A., ch. 155; C. '73, §§ 1815-20.]

SEC. 2801. Division of school township into subdistricts. The board of any school township may by a vote of a majority of all the members thereof, at the regular meeting in July, or at any special meeting called thereafter for that purpose, divide the school township into subdistricts such as justice, equity and the interests of the people require, and may make such alterations of the boundaries of subdistricts heretofore formed as may be deemed necessary, and shall designate such subdistricts and all subsequent alterations in a distinct and legible manner upon a plat of the school township provided for that purpose, and shall cause a written description of the same to be recorded in the records of the school township, a copy of which shall be delivered by the secretary to the county treasurer and also to the county auditor, who shall record the same in his office. The boundaries of subdistricts shall conform to the lines of congressional divisions of land, and the formation or alteration of subdistricts as contemplated in this section shall not take effect until the first Monday in March thereafter, at which time a director shall be elected for any subdistrict newly formed. [31 G. A., ch. 136, § 12; 21 G. A., ch. 124; 16 G. A., ch. 109; C. '73, §§ 1725, 1738, 1796; R. § 2038.]

After portions of an independent district have been taken away in the formation of a new consolidated district, the board may readjust subdistricts so as to obviate inconveniences resulting from some of the subdistricts being left with inadequate territory. *School Dist. Township v. Independent School Dist.*, 149–480, 128 N. W. 848.

SEC. 2802. Changes of boundaries—division of assets and liabilities. That section twenty-eight hundred and two of the code be and the same is hereby repealed and the following enacted in lieu thereof:

"When any changes are made in the boundaries of any school corporations the new corporation shall elect a board of directors in accordance with the new boundaries, and such new boards shall organize as provided in section twenty-seven hundred fifty-seven of this chapter. The boards of directors in office at the time the changes are made in the boundaries of the school corporations shall continue to act until the boards of directors representing the newly formed districts have been duly organized, whereupon the new boards shall make an equitable division of all assets and liabilities of the corporations affected; and, if they cannot agree, the matters upon which they differ shall be decided by disinterested arbitrators, one selected by each board having an interest therein, and if the number thus selected is even then one shall be added by the county superintendent, and the decision of the arbitrators shall be made in writing, either party having the right to appeal therefrom to the district court." [31 G. A., ch. 136, § 13; C. '73, § 1715.]

In making the division of assets and liabilities here contemplated the arbitrators are limited to those existing between the parties at the time the new district was organized. *Independent Dist. v. District Twp.*, 107–73, 77 N. W. 525.

In a suit by the holder of bonds of a district which has ceased to exist by reason of subdivision of its territory into new districts, a court of equity may enforce payment by the new districts in accordance with an equitable apportionment of the liability on the basis of taxable property and population. *Gamble v. Rural Ind. School Dist.*, 146 Fed. 113.

The schoolhouse and all its belongings are the property of the original district until awarded to the newly formed independent district. Such division must be made by the board, and not by the courts. *District Twp. v. Wiggins*, 110–702, 80 N. W. 432.

The division of assets on the severance of the territory from an independent district necessitates either the sale of the schoolhouse and grounds of such district or the payment to the district to which the severed territory should be attached of a portion of the value of such property. *Williams v. Core*, 124–213, 99 N. W. 732.

A district which is created from another district is liable for its proportion of the indebtedness of the parent district regardless of whether such indebtedness is in excess of the constitutional limitation of indebtedness which the new district might create. *Taylor v. School Dist.*, 97 Fed. 753.

The holder of bonds against the original district may maintain an action in equity against the new districts created out of the original district to enforce the payment of his bonds. *Everett v. Independent Sch. Dist.*, 109 Fed. 697.

SEC. 2803. Attending school in another corporation.

One district may become liable to another for children of the former attending school in the latter under implied contract. Therefore a settlement between the districts for tuition in such cases may be made after the attendance on which it is based has ceased. *Weldon Ind. Sch. Dist. v. Shelby Ind. Sch. Dist.*, 113–549, 85 N. W. 794.

The provisions for paying tuition for pupils attending in another district do not relate to high schools which are established under code § 2728, and as to which special provision is made. *Boggs v. School Township*, 128–15, 102 N. W. 796.

SEC. 2804. School age—nonresidents.

The fact question as to the residence of the pupil who is required to pay tuition on that account is for the determination of the board, and its finding and judgment on that question cannot be reviewed in an action of mandamus. The remedy is by appeal to the county superintendent. *Preston v. Board of Education*, 124–355, 100 N. W. 54.

SEC. **2804-a. Display of United States flag—duty of board—flagstaff.** That it shall be the duty of the board of directors of each school corporation of this state to provide a suitable flagstaff on each public school building maintained under the authority of such board of directors and to provide each of such school buildings with a suitable flag, and such flag shall be raised over such building on all days when weather suitable therefor shall prevail. [35 G. A., ch. 244, § 1.]

SEC. **2804-b. Services for raising of flag.** That at the commencement of each school day the teacher, superintendent, principal or whoever has the general supervision of the school administration within any such building, may arrange for the raising of such flag, as herein provided for, over the said building, with appropriate services, when weather conditions will permit, at the beginning of each school day. [35 G. A., ch. 244, § 2.]

SEC. **2804-c. Flag upon all public buildings.** That it shall be the duty of the custodians of all public buildings of the state of Iowa to raise over such building the flag of the United States of America, upon each secular day when weather conditions are favorable, and it shall be the duty of any board of public officers charged with the duty of providing for the supplies of any such public building, to provide in connection with other supplies for any such building of the state of Iowa, a suitable flag for the purposes herein provided. [35 G. A., ch. 244, § 3.]

SEC. **2806. School taxes—transportation fund—contract for use of library.** The board of each school corporation shall at its regular meeting in July, or at a special meeting called for that purpose between the time designated for such regular meeting and the third Monday in August, estimate the amount required for the contingent fund, not exceeding ten dollars for each person of school age, but each school corporation may estimate not exceeding seventy-five dollars for each school thereof, and such additional sum as may be necessary not exceeding five dollars for each person of school age for transporting children to and from school; and also such additional sum as may be authorized in the chapter on uniformity of textbooks; also such sum as may be required for the teachers' fund, which shall not exceed thirty dollars for each person of school age therein, but each corporation may estimate not exceeding two hundred seventy dollars, for each regular school therein. No tax shall be estimated by the board after the third Monday in August, in each year. School corporations containing territory in adjoining counties may vote and estimate all taxes for school purposes in mills. The board shall apportion any tax voted by the annual meeting for schoolhouse fund among the several subdistricts in such a manner as justice and equity may require, taking as the basis of such apportionment the respective amounts previously levied upon said subdistricts for the use of such fund. The board of directors of any school corporation in which there is no free public library shall have power to contract with any free public library for the free use of such library by the residents of such school district as provided in section one[1] of this act and to pay such library the amount agreed therefor, and to certify annually a tax not exceeding one mill on the dollar of the taxable property of such district, to be used exclusively therefor; and during the existence of such contract a tax sufficient to pay such library the consideration agreed upon, not exceeding one mill on the dollar, shall be certified annually by such board. Each school corporation making such contract shall, during the existence of such contract, be relieved from the requirements of section twenty-eight hundred twenty-three-n of the supplement to the code, 1907. This section shall not be construed to apply

in townships where a contract is in existence under the provisions of section two[2] of this act. [35 G. A., ch. 251, §§ 1, 2; 35 G. A., ch. 70, § 5; 33 G. A., ch. 182, § 1.] [31 G. A., ch. 136, § 14; 28 G. A., ch. 108, § 1; 15 G. A., ch. 67, § 1; C. '73, §§ 1738, 1777–8; R. §§ 2033–4, 2037–44, 2088.]

[1§ 729-a herein. EDITOR.]
[2§ 592-a herein. EDITOR.]

Property which is within the limits of the school district at the time school taxes are determined and certified by the board of directors and levied by the board of supervisors, is subject to such taxes, although annexed to the district after the election of the board of directors imposing such taxes. *Grout v. Illingworth*, 131–281, 108 N. W. 528.

Approximation of the amount of the tax to be levied is all that is called for from the board of directors in its estimate and from the board of supervisors in levying the tax. *Giliman v. Talley*, 140–718, 119 N. W. 144.

SEC. 2807. Levy by board of supervisors.

The board of supervisors should make a levy to the legal limit for the purpose of carrying out a vote of the electors although such vote is for a tax in excess of the amount which can be legally levied. *Kirchner v. Board of Directors*, 141–43, 118 N. W. 51.

Further, see notes to last preceding section.

SEC. **2808. Apportionment.** The county auditor shall, on the first Monday in April and the first Monday in October of each year, apportion the school tax, together with the interest of the permanent school fund and rents on unsold school lands to which the county is entitled as shown in notice from the auditor of state, and all other money in the hands of the county treasurer belonging in common to the schools of the county and not included in any previous apportionment, among the several corporations therein, in proportion to the number of persons of school age, as shown by the report of the county superintendent filed with him for the year immediately preceding. He shall immediately notify the county treasurer of such apportionment and of the amount due thereby to each corporation. The county treasurer shall thereupon give notice to the president of each corporation, and shall pay out such apportionment moneys in the same manner that he is authorized to pay other school moneys to the treasurers of the several school districts. [32 G. A., ch. 151, § 3; 27 G. A., ch. 94, § 1; C. '73, §§ 1781–2, 1841; R. §§ 1966, 2060–1.]

[The amendment by 32 G. A. was by adding matter after the word "fund" in the fourth line. The word "fund" occurs only in line three and the change has been made there.]

An action by one independent district against another to recover money collected as taxes on property in the plaintiff district and erroneously paid by the county treasurer to the defendant is one for money had and received, and the statute of limitations will commence to run at the time of payment and not from the discovery of the mistake. *Independent School Dist. v. Independent School Dist.*, 123–455, 99 N. W. 106.

The school census as reported to the auditor is conclusive as to the apportionment of taxes by him. *Judson v. Agan*, 134–557, 111 N. W. 943.

SEC. **2809. County auditor to report.** That section twenty-eight hundred and nine of the code, relating to the school fund, be and the same is hereby repealed and the following enacted in lieu thereof:

"The county auditor shall, on the first Monday in January of each year, forward to the superintendent of public instruction a certificate of the election or appointment and qualification of the county superintendent, and shall also on the first day of January of each year make out and transmit to the auditor of state, in accordance with such forms as said auditor may prescribe, a report of the amount of permanent school fund held by the

county and also the amount of interest due prior to January first, still remaining unpaid, and shall file said report with the auditor of state on or before the first day of February." [32 G. A., ch. 151, § 2; C. '73, § 1783.]

SEC. 2812. **Bonds—repealed.** [29 G. A., ch. 127, § 1.]

[See § 2812-a.]

Recital in the bonds that they are not in excess of the constitutional limitation cannot be relied on by the purchaser. *Fairfield v. Rural Ind. Sch. Dist.*, 111 Fed. 453.

SEC. 2812-a. **Repeal.** That section twenty-eight hundred twelve of the code, section one of chapter ninety-five of the acts of the twenty-seventh general assembly and chapter one hundred forty-two of the acts of the twenty-eighth general assembly be and the same are hereby repealed. [29 G. A., ch. 127, § 1; 28 G. A., ch. 142; 27 G. A., ch. 95, § 1.]

SEC. 2812-b. **Repeal.** That chapter one hundred forty, laws of the thirty-first general assembly, be and the same is hereby repealed and the following sections enacted in lieu thereof: [32 G. A., ch. 152, § 1; 31 G. A., ch. 140, §§ 1, 2; 29 G. A., ch. 127, § 2.]

SEC. 2812-c. **School funding bonds.** The board of directors of any school corporation may issue the bonds of said school corporation to pay any judgment against said school corporation or any indebtedness represented by bonds heretofore lawfully issued. Said bonds shall be known as school funding bonds and shall be authorized by resolution of the board. The proceeds derived from said bonds shall be applied in payment of any such outstanding judgment or bonded indebtedness, or said bonds may be exchanged for outstanding judgments or bonds, par for par. [32 G. A., ch. 152, § 2.]

It is not provided how the authority to issue bonds shall be given by the voters, and the sufficiency of the ballots on such a vote is to be determined under the provisions relating to annual meetings of the electors. *Calahan v. Handsaker*, 133–622, 111 N. W. 22.

SEC. 2812-d. **School building bonds.** For the purpose of borrowing money necessary to erect, complete, equip, furnish or improve a schoolhouse, or to purchase sites therefor, the board of directors of any school corporation, when they have been heretofore, or when they may hereafter be authorized by the voters at the annual meeting or at a special meeting called for that purpose, may issue the negotiable interest-bearing bonds of said school corporation, said bonds to be known as school building bonds. [32 G. A., ch. 152, § 3.]

SEC. 2812-e. **Form—duration—rate of interest—where registered.** All of said bonds shall be substantially in the form provided for county bonds, but subject to changes that will conform them to the action of the board providing therefor, shall run not more than ten years, except that in independent districts having, at the time of issuance of any bonds, other bonds outstanding amounting to not less than four hundred thousand dollars, any bonds in excess of such amount may in the discretion of the board be made to run for any period or periods not exceeding twenty years, and may be sooner paid if so nominated in the bond; be in denomination of not more than one thousand dollars or less than one hundred dollars each, to bear a rate of interest not exceeding five per centum per annum, payable semiannually, to be signed by the president and countersigned by the secretary of the board of directors, and shall not be disposed of for less than par value, nor issued for other purposes than this chapter provides. All of said bonds shall be registered in the office of the county auditor. The expenses of engraving and printing of bonds may be paid out of the contingent fund. [33 G. A., ch. 183, § 1.] [32 G. A., ch. 152, § 4.]

SEC. 2812-f. **Redemption—treasurer to keep record.** Whenever the amount in the hands of the treasurer, belonging to the funds set aside to pay bonds, is sufficient to redeem one or more of the bonds which by their terms are subject to redemption, he shall give the owner of said bonds thirty days' written notice of the readiness of the district to pay and the amount it desires to pay. If not presented for payment or redemption within thirty days after the date of such notice, the interest on such bonds shall cease and the amount due thereon shall be set aside for its payment whenever it is presented. All redemptions shall be made in the order of their numbers. The treasurer shall keep a record of the parties to whom the bonds are sold, together with their post-office addresses, and notice mailed to the address as shown by such record shall be sufficient. [32 G. A., ch. 152, § 5.]

SEC. 2813. **Tax to pay bonds.** That section twenty-eight hundred thirteen, supplement to the code, 1907, be and the same is hereby repealed and the following enacted in lieu thereof:

"The board of each school corporation shall, when estimating and certifying the amount of money required for general purposes, estimate and certify to the board of supervisors of the proper county, the amount required to pay interest due or that may become due for the year beginning January first thereafter, upon lawful bonded indebtedness and in addition thereto such amount as the board may deem necessary to apply on the principal; but the amount estimated and certified to apply on principal and interest for any one year shall not exceed five mills on the dollar of the actual valuation of the taxable property of the school corporation. [35 G. A., ch. 252, § 1.] [27 G. A., ch. 95, § 2; 18 G. A., ch. 51, § 2; 18 G. A., ch. 132, § 6; C. '73, § 1823.]

[See §§ 2813-a to 2813-b. EDITOR.]

SEC. 2813-a. **Tax levy.** "The board of supervisors of the county to which the certificate is addressed within the contemplation of this act shall levy the necessary tax to raise the amount estimated, or so much thereof as may be lawful and within the limitation of this act, which levy shall be made as other taxes for school purposes. [35 G. A., ch. 252, § 2.]

SEC. 2813-b. **To what applicable.** "This act shall apply to estimates heretofore made, certificates furnished, or taxes levied, together with such as may hereafter be made, furnished or levied for the purposes contemplated by this act; but this act shall not apply to pending litigation." [35 G. A., ch. 252, § 3.]

SEC. 2814. **Schoolhouse sites—acquisition.** That section twenty-eight hundred fourteen of the code be and the same is hereby repealed and the following enacted as a substitute therefor:

Any school corporation may take and hold so much real estate as may be required for schoolhouse sites, for the location or construction thereon of schoolhouses, and the convenient use thereof, but not to exceed one acre, exclusive of public highway, except in a city, town or village it may include one block exclusive of the street or highway as the case may be, and may take and hold such additional real estate, not exceeding five acres, as may be required for school playground or other purposes; (provided nothing in this act shall affect pending litigation;)[1] or in districts consolidated under the provisions of section twenty-seven hundred ninety-nine of the code, or chapter one hundred forty-one of the laws of the thirty-first general assembly, or in school townships holding not more than two school sites, may consist of not to exceed four acres, for any one site, unless by

the owner's consent, which site must be upon some public road already established or procured by the board of directors and shall, except in cities, towns, or villages, be at least thirty rods from the residence of any owner who objects to its being placed nearer, and not in any orchard, garden or public park. [35 G. A., ch. 253, § 1.] [32 G. A., ch. 153; C. '73, §§ 1825–6.]

[1This cause has been placed within parenthesis by the editor. It refers to the amendment made by ch. 253, 35 G. A., as follows: "and may take and hold such additional real estate, not exceeding five acres, as may be required for school playground or other purposes,". EDITOR.]

Ample grounds are essential for the exercise or recreation of the children and land may be condemned for the purpose of providing such grounds in addition to grounds for a site already secured. *Independent Sch. Dist. v. Hewitt*, 105–663, 75 N. W. 497.

Any owner of property may object to the procurement of a site for a schoolhouse within thirty rods of his residence. The objection is not limited to owners of land a portion of which is taken for such site. *Mendenhall v. Board of Directors*, 137–554, 115 N. W. 11.

SEC. 2815. Condemnation.

Inconvenience due to the taking of property for school purposes and naturally resulting from such appropriation, by which the market value of the premises is unfavorably affected, should be considered in determining the damages resulting from such taking. *Haggard v. Independent Sch. Dist.*, 113–486, 85 N. W. 777.

Benefits will not be taken into account in determining the damage to be assessed. *Ibid.*

Notice of appeal is to be given to the county superintendent in such cases instead of to the sheriff, as directed in code § 1999. *Ibid.*

Judgment for the damage to property should not be rendered against the school district on appeal where the property has not been actually appropriated. *Ibid.*

The power to obtain the opening of public roads for better access to a schoolhouse having been conferred upon the district, it is fairly to be implied that the district may accomplish that purpose by purchase or by any of the usual and appropriate methods by which a public way may be established. The district may through its board of directors and electors petition the board of supervisors for a road for the benefit of the district, and the funds of the district may be lawfully appropriated for the payment of damages assessed in such proceeding. Certiorari will not lie to review the action of the board of supervisors in establishing such a road. *Brockway v. Board of Supervisors*, 133–293, 110 N. W. 844.

The provisions of this section do not so far incorporate the provisions of code § 2007 as to authorize the allowance of attorney's fees as costs. *Jones v. School Board*, 140–179, 118 N. W. 265.

SEC. **2816. Reversion.** Section twenty-eight hundred sixteen of the code is hereby repealed and the following enacted in lieu thereof:

"In any school district wholly outside any city or incorporated town, in the case of nonuser for school purposes for two years continuously of any real estate acquired for a schoolhouse site it shall revert, with improvements thereon, to the owner of the tract from which it was taken, upon repayment of the purchase price without interest, together with the value of the improvements, to be determined by arbitration, and upon such payment the school corporation shall make formal conveyance to such owner. During its use the owner of the right of reversion shall have no interest in or control over the premises." [34 G. A., ch. 144, § 1.] [C. '73, § 1828.]

Where the school board has taken conveyance of property for a new site and its action in establishing such site is reversed on appeal to the county superintendent, the conveyance becomes inoperative without any action on the part of the board for a rescission. *Independent School Dist. v. McClure*, 136–122, 113 N. W. 554.

SEC. 2818. Appeal to county superintendent.

A teacher seeking to recover for the breach of his contract may sue thereon and is not limited to an appeal. *Burkhead v. Independent Sch. Dist.*, 107–29, 77 N. W. 491.

Where a teacher sued for a breach of

contract, claiming that an attempted discharge was not in accordance with the requirements of code § 2782, and therefore invalid, held that he was not to be denied relief because he had not appealed from the illegal action of the board in attempting to discharge him. *Curttright v. Independent Sch. Dist.*, 111–20, 82 N. W. 444.

The right of appeal to the county superintendent does not exclude the courts from considering on an application for mandamus whether in the matter complained of the board acted within the scope of its powers as defined by statute. *Kinzer v. Independent School Dist.*, 129–441, 105 N. W. 686.

The action of a school board in determining that a pupil is a nonresident and therefore must pay tuition, cannot be reviewed by mandamus, but only by appeal to the county superintendent. *Preston v. Board of Education*, 124–355, 100 N. W. 54.

The legality of the incorporation of an independent school district may be questioned in an action of quo warranto. Appeal to the county superintendent is not the exclusive remedy. *State v. Alexander*, 129–538, 105 N. W. 1021.

The action of a school board with reference to a matter vested in their discretion with the right of appeal to the county superintendent cannot be controlled by injunction. *Kinney v. Howard*, 133–94, 110 N. W. 282.

The expediency of the formation of a consolidated district out of portions of the territory of other districts with reference to the effect on such other districts is to be determined by the county superintendent on appeal and not by the court which is asked to pass upon the validity of the action of the board to which the petition is directed. *School Dist. Township v. Independent School Dist.*, 149–480, 128 N. W. 848.

Where a discretion is vested in the school board subject only to appeal to the county superintendent and from him to the state superintendent, the courts will not interfere with the exercise of such discretion by mandamus. *Templer v. School Township*, 141 N. W. 1054.

SEC. 2820. Appeal to state superintendent—no money judgment.

Where a county superintendent acts without jurisdiction, an appeal to the state superintendent cannot confer such jurisdiction, and the correctness of an order made can be contested in the courts. *School Twp. v. Independent Dist.*, 110–30, 81 N. W. 184.

The state superintendent does not have authority to change his decision as to the proper location of a schoolhouse site on account of change of conditions after the rendering of his decision. *Doubet v. Board of Directors*, 135–95, 111 N. W. 326.

The decision of the state superintendent on an appeal involving the action of a board of directors on a matter as to which such board has exclusive jurisdiction, may be enforced as against the board by mandamus. *State v. Thomas*, 152–500, 132 N. W. 842.

SEC. 2820-a. Indebtedness authorized—amount—repealed. [33 G. A., ch. 184, § 1.] [30 G. A., ch. 114, § 1.]

[See § 2820-d1. EDITOR.]

The change of the law as to the limit of indebtedness for schoolhouse purposes may be taken into account by the board of directors in changing their action with reference to the establishment of a schoolhouse site. *Doubet v. Board of Directors*, 135–95, 111 N. W. 326.

SEC. 2820-b. Petition—repealed. [33 G. A., ch. 184, § 1.] [30 G. A., ch. 114, § 2.]

[See § 2820-d1. EDITOR.]

SEC. 2820-c. Question submitted—repealed. [33 G. A., ch. 184, § 1.] [31 G. A., ch. 9, § 29; 30 G. A., ch. 114, § 3.]

[See § 2820-d1. EDITOR.]

SEC. 2820-d. Bonds—repealed. [33 G. A., ch. 184, § 1.] [30 G. A., ch. 114, § 4.]

[See § 2820-d1. EDITOR.]

SEC. 2820-d1. Indebtedness authorized in certain districts.

That sections twenty-eight hundred twenty-a, twenty-eight hundred twenty-b, twenty-eight hundred twenty-c, and twenty-eight hundred twenty-d of the supplement to the code, 1907, be and the same are hereby repealed and the following enacted in lieu thereof:[1]

Any independent district containing or contained in any city, town or village, or any consolidated independent district shall be allowed to become indebted, for the purpose of building and furnishing a schoolhouse or houses and procuring a site therefor, or for the purpose of purchasing land to add to a site already owned, to an amount not to exceed in the aggregate, including all other indebtedness, five per centum of the actual value of the taxable property within such independent school district, such value to be ascertained by the last county tax list previous to the incurring of such indebtedness, anything contained in section thirteen hundred and six-b of the supplement to the code, 1907, to the contrary notwithstanding. [35 G. A., ch. 254, § 1; 35 G. A., ch. 10, § 1; 34 G. A., ch. 145, § 1; 33 G. A., ch. 184, § 1.]

[1Substitute continues to § 2820-d5 inclusive. EDITOR.]

SEC. **2820-d2. Petition for election.** Provided, that before such indebtedness can be contracted in excess of one and one-quarter per centum of the actual value of the taxable property ascertained as provided in this act, a petition signed by a number equal to twenty-five per cent. of those voting at the last school election shall be filed with the president of the board of directors, asking that an election shall be called, stating the purpose for which the money is to be used, and that the necessary schoolhouse or houses cannot be built and furnished, or that sufficient land cannot be purchased to add to a site already owned, within the limit of one and one-quarter per centum of the valuation. [35 G. A., ch. 254, § 2; 34 G. A., ch. 145, § 2; 33 G. A., ch. 184, § 2.]

SEC. **2820-d3. Submission of question—notice—ballot.** The president of the board of directors, on receipt of such petition shall, within ten days, call a meeting of the board who shall call such election, fixing the time and place thereof, which may be at the time and place of holding the regular school election. Four weeks' notice of such election shall be given by publication once each week, in some newspaper published in the said town or city, or if none be published therein, in the next nearest town or city in the county. At such election the ballot shall be prepared and used in substantially the following form:

	Yes
——	——
	No

Shall the (naming the independent district) issue bonds in the sum of ..... dollars ($.....) for the purpose of constructing or equipping schoolhouses? [33 G. A., ch. 184, § 3.]

SEC. **2820-d4. Bonds.** If a majority of all the electors voting at such election vote in favor of the issuance of such bonds, the board of directors shall issue the same and make provision for the payment of the same and the interest thereon as provided in sections twenty-eight hundred twelve-d, twenty-eight hundred twelve-e, twenty-eight hundred twelve-f and twenty-eight hundred thirteen of the supplement to the code, 1907. [33 G. A., ch. 184, § 4.]

SEC. **2820-d5. To what applicable.** But this act shall in no wise affect pending litigation nor act or acts of any school board under the statute or statutes herein repealed; but the transaction, if any, may be completed with the same force and effect as if the statute were not repealed. [33 G. A., ch. 184, § 5.]

SEC. **2820-e. Consolidation authorized.** That in all cities of the first class containing a population of fifty thousand or over, according to any census taken by the authority or under the direction of the state of Iowa or of the United States, all the territory embraced within the corporate limits

of any such city may be consolidated into and become one independent school district, known as the independent school district of (naming the city), state of Iowa, in the manner following: [32 G. A., ch. 155, § 1.]

Several school districts may exist wholly or in part within a city or town. *Independent School Dist. v. Jones*, 142–8, 120 N. W. 315.

SEC. 2820-f. **Petition—question submitted—consolidation effected—board of directors—officers.** When a written petition, requesting the establishment of a consolidated independent district whose territory shall be coëxtensive with that of such city, signed by one hundred voters of such city, is filed with the board of the school corporation therein having the largest number of voters, it shall be the duty of said board within ten days, to call an election, at which all the voters residing in the proposed district shall be allowed to vote by ballot for or against the proposition, "Shall all the territory within the city of (naming it) be united into one school district"? The board calling said election shall divide the territory within the proposed district into such number of precincts as the board shall determine, and the judges of election shall make and certify a return of the vote to the secretary of the same board which shall, on the next Monday after the election, canvass the returns made to the secretary, ascertain the result of the election, declare the same and cause a record to be made thereof, and in all other respects, except as inconsistent with the provisions of this act, the election shall be conducted as provided by law for elections in independent school districts in cities of the first class. If a majority of the votes cast at such election is favorable to the proposition, the consolidation and formation of said independent district shall thereby be effected, and the board of directors, treasurer, and other officers of the school corporation then holding office in the district affected by such consolidation having the largest number of voters, shall become the board of directors, treasurer and other officers of such consolidated district, and shall continue to hold their respective offices until the terms for which they were originally elected shall expire. The terms of office of all directors, treasurers and officers of boards in all the other districts affected by this act, lying wholly within such consolidated district and holding office at the time of such consolidation, shall cease and determine, and in case of districts lying partly without such consolidated district, the directors, officers and treasurers shall continue to have authority only over the territory lying within their districts, and without the consolidated district; provided that nothing herein contained shall affect the terms of employment of superintendents, principals, or teachers for the current school year, in which such consolidation may be effected. [32 G. A., ch. 155, § 2.]

In determining the population of the different districts to be consolidated, the last state census is admissible in evidence, and also the school register prepared under code § 2755. *State v. Grefe*, 139–18, 117 N. W. 13.

This statute does not repeal by implication code supp. § 2793, which relates to consolidation effected by the concurrent action of the several boards. *Ibid.*

The provision as to officers of the consolidated district simply indicates those who are to be temporarily in authority, leaving the succession to office as regulated by code supp. § 2802. The new board of directors alone can act in equitably apportioning assets and liabilities. *Ibid.*

SEC. 2820-g. **Taxes.** All taxes previously certified during that year shall be void so far as the property within the limits of the consolidated independent district is concerned. And all taxes necessary for the new corporation for that year shall be certified and levied as provided in section twenty-seven hundred ninety-six of the code. All property belonging to

districts affected by such consolidation shall become the property of the consolidated district, except that in case of districts lying partly without such city, the liabilities and assets of such districts shall be equitably apportioned in accordance with chapter one hundred thirty-six, section thirteen, acts of the thirty-first general assembly, but nothing herein contained shall affect the rights of existing creditors. [32 G. A., ch. 155, § 3.]

SEC. **2820-h. Election expense.** The expense of such election shall be borne by the consolidated district, in case such district shall be formed, otherwise by the separate districts in proportion to the assessed valuation therein within the proposed consolidated district. [32 G. A., ch. 155, § 4.]

CHAPTER 14-A.

OF COMPULSORY EDUCATION.

SECTION **2823-a. Duties of parents and guardians—penalty—exceptions.** Any person having control of any child of the age of seven to sixteen years inclusive, in proper physical and mental condition to attend school, shall cause such child to attend some public, private, or parochial school, where the common school branches of reading, writing, spelling, arithmetic, grammar, geography, physiology, and United States history are taught, or to attend upon equivalent instruction by a competent teacher elsewhere than school, for at least twenty-four consecutive school weeks in each school year, commencing with the first week of school after the first day of September, unless the board of school directors shall determine upon a later date which date shall not be later than the first Monday in December; but the board of school directors in any city of the first or second class may require attendance for the entire time the schools are in session in any school year. Provided that this section shall not apply to any child who lives more than two miles from any school by the nearest traveled road except in those districts in which the pupils are transported at public expense, or who is over the age of fourteen and is regularly employed; or has educational qualifications equal to those[1] of pupils who have completed the eighth grade; or who is excused for sufficient reasons by any court of record or judge thereof; or while attending religious service or receiving religious instructions. Any person who shall violate the provisions of this section shall be guilty of a misdemeanor, and upon conviction thereof shall pay a fine of not less than three dollars nor more than twenty dollars, for each offense. [35 G. A., ch. 255, § 1; 33 G. A., ch. 187, § 1; 33 G. A., ch. 186, § 1.] [30 G. A., ch. 116, § 1; 29 G. A., ch. 128, § 1.]

[1"that" in enrolled bill. EDITOR.]

[For provisions respecting children defective in hearing and sight, see §§ 2718-c to 2718-f, inclusive. EDITOR.]

This section has no bearing on the question under code § 2774 as to the provisions for transportation of children to school. *Queeny v. Higgins*, 136–573, 114 N. W. 51.

SEC. **2823-b. Reports to secretary.** Upon notice from the secretary of the school corporation within which such school is conducted, it shall be the duty of each principal of each private or parochial school, once during each school year, and at any time when requested in individual cases, and within ten days from the receipt of such notice, to furnish to such secretary a certificate and report of the names, ages and attendance of the pupils in attendance at such school during the preceding year and from the time of

the last preceding report to the time at which a report is required; and any person having the control of any child between seven and fourteen years of age inclusive, who shall place the same under private instruction, not in a regularly conducted school, upon receiving notice from the secretary of the school corporation, shall furnish a like certificate stating the name and age of such child and the period of time during which said child has been under said private instruction; and any person having the control of such child who is physically and mentally unable to attend school, public or private, shall furnish proofs by affidavit or affidavits as to the physical or mental condition of such child. All such certificates, reports and proofs shall be filed and preserved in the office of the secretary of the school corporation as a part of the records of his office. [29 G. A., ch. 128, § 2.]

SEC. **2823-c. Certified copies.** It shall be the duty of the secretary of the school corporation to furnish to any person interested, where so requested, certified copies of all certificates contemplated by this act, on file in his office. [29 G. A., ch. 128, § 3.]

SEC. **2823-d. Truant schools.** The board of directors of any school corporation may establish truant schools, or set apart separate rooms in any public school building, for the instruction of children who are habitually truant from instruction, as contemplated by this act. Such directors may provide for the confinement, maintenance, and instruction of such children in such schools, under such reasonable rules and regulations as they may prescribe. If any child, committed or sent to the truant school shall prove insubordinate and escape from such school during school hours, or absent himself or herself therefrom without the consent of the persons in charge thereof, then it shall be the duty of the person in charge of said school with the consent of the parent or guardian to file information before the judge of a court of record, who may, if the charge be found to be true and the said child be habitually vagrant, disorderly, or incorrigible, commit such child to one of the industrial schools of the state, under the same proceeding as is provided by section twenty-seven hundred and eight of the code, so far as the same may be applicable. [29 G. A., ch. 128, § 4.]

SEC. **2823-e. Truant officers.** The board of directors of each school corporation may, and in school corporations having a population of twenty thousand or more shall, at their annual meeting in each year, appoint one or more truant officers, who shall serve for one year, and who may be a constable or a member of the police force, whose duty it shall be to report violations of this act to the secretary of the school corporation, and see to the enforcement of the provisions of this act. It shall be the duty of said truant officer or officers to apprehend and take into custody without warrant any child of the age of seven to fourteen years inclusive, who habitually frequents or loiters about public places during school hours without lawful occupation, or cannot produce a certificate as provided in section two hereof, also any truant child who absents himself or herself from school, and place him or her in charge of the teacher having charge of any school which said child is entitled to attend, and which school may be designated to said officers by the person having legal control of such child. Provided, however, in case the school so designated by the parent or person having the care and control of said child be a public school it shall be such as directed by the rules and regulations of the school board and the statutes of the state, and if other than a public school, the maintenance of said child in such school shall be without expense to the school corporation or state. Upon failure of such child to properly attend, or when, on report of the teacher having the custody of such child, said child is shown

to not properly conduct itself in the school where placed as herein provided, the child may be removed therefrom by the board of directors and placed either in a public school or a truant school conducted in said district. The truant officer or officers shall be entitled to such compensation for service rendered under this act, as shall be fixed by the board of directors appointing him or them, which compensation shall be paid from the contingent fund of said district. In towns and cities of the second class, the independent school district may employ the marshal or other police officer of such city or town to act as truant officer, and pay him a salary in addition to that received from such city or town of not to exceed five dollars per month. [33 G. A., ch. 188, § 1.] [30 G. A., ch. 116, § 2; 29 G. A., ch. 128, § 5.]

SEC. **2823-f. Enforcement.** It shall be the duty of the director or president of any board of directors, or any truant officers appointed by such board of directors, to enforce the provisions of this act, to sue for and recover the penalties herein provided, and to institute criminal prosecution against any person violating the provisions of this act, and any such officers neglecting to do so within thirty days after a written notice has been served upon him by any citizen of said district, or the county superintendent of the county within which the offending person shall reside, shall himself be liable for a fine of not less than ten dollars nor more than twenty dollars for each offense. [32 G. A., ch. 154; 29 G. A., ch. 128, § 6.]

SEC. **2823-g. Teachers and school officers—duties.** All teachers of the public schools of the state and county superintendents and school officers and employes shall promptly report to the secretary of the school corporation any violations of the provisions of this act, of which they have knowledge or information, and he shall promptly inform the president of the board of directors thereof and such president shall, if necessary, call a meeting of the board of directors to take such action thereon as the facts shall justify, and any child placed in any truant school may be discharged therefrom at the discretion of the board, upon sufficient assurance of the future good conduct of such child. [29 G. A., ch. 128, § 7.]

SEC. **2823-h. Provisions for punishment.** The board of directors of every school corporation is hereby authorized to provide such reasonable methods of punishment of children who are habitually truant from school, or who habitually frequent or loiter about public places during school hours without lawful occupation, as may be necessary to carry out and make effectual the provisions of this act. [29 G. A., ch. 128, § 8.]

SEC. **2823-i. School census.** It shall be the duty of all officers, empowered to take the school census, to ascertain the number of children of the ages of seven to sixteen years, inclusive, in their respective districts, the number of such children who do not attend school, and so far as possible the cause of failure to attend school. [35 G. A., ch. 255, § 2.] [29 G. A., ch. 128, § 9.]

CHAPTER 14-B.

OF THE PUBLICATION AND DISTRIBUTION OF THE SCHOOL LAWS OF IOWA.

SECTION **2823-j. Compilation — number — distribution.** That sections twenty-eight hundred twenty-three-j, twenty-eight hundred twenty-three-k, twenty-eight hundred twenty-three-l and twenty-eight hundred

twenty-three-m, supplement to the code, 1907, be and the same are hereby repealed and the following enacted in lieu thereof:

"The superintendent of public instruction shall every four years, if deemed necessary, cause to be printed, bound and distributed all school laws in force up to that time, the number to be determined by the executive council. Each county superintendent shall be furnished a sufficient number of copies to supply the school officers of the state and such others as may request them." [35 G. A., ch. 256, § 1.] [27 G. A., ch. 90, § 1.]

SEC. **2823-k. Sale—price—repealed.** [35 G. A., ch. 256, § 1.] [27 G. A., ch. 90, § 2.]

[See § 2823-j. EDITOR.]

SEC. **2823-l. Statement of copies sold—repealed.** [35 G. A., ch. 256, § 1.] [27 G. A., ch. 90, § 3.]

[See § 2823-j. EDITOR.]

SEC. **2823-m. Copies delivered to successor—repealed.** [35 G. A., ch. 256, § 1.] [27 G. A., ch. 90, § 4.]

[See § 2823-j. EDITOR.]

CHAPTER 14-C.

LIBRARIES FOR THE USE OF TEACHERS, PUPILS AND OTHER RESIDENTS IN SCHOOL DISTRICTS.

SECTION **2823-n. Library fund.** The treasurer of each school township and each rural independent district in this state shall withhold annually, from the money received from the apportionment for the several school districts, not less than five nor more than fifteen cents, as may be ordered by the board, for each person of school age residing in each school corporation, as shown by the annual report of the secretary, for the purchase of books as hereinafter provided. When so ordered by the board of directors, the provisions of this section shall apply to any independent district. [28 G. A., ch. 110, § 1.]

A library is considered to be within the proper range of school apparatus, and held that a public library, though privately endowed, is an educational institution within the provisions of code § 1304 as amended, exempting the endowment fund of educational institutions from taxation. *Webster City v. Wright County*, 144–502, 123 N. W. 193.

SEC. **2823-o. Purchase of books—distribution.** Between the third Monday of September and the first day of December in each year the president and secretary of the board, with the assistance of the county superintendent of schools, shall expend all money withheld by the treasurer as provided in section one of this act, in the purchase of books selected from the lists prepared by the state board of educational examiners as hereinafter provided, for the use of the school district; in school townships the secretary shall distribute the books thus selected to the librarians among the several subdistricts, and at least semiannually collect the same and distribute others. [28 G. A., ch. 110, § 2.]

SEC. **2823-p. State board of educational examiners to prepare lists of books.** It is hereby made the duty of the state board of educational examiners to prepare at its discretion lists of books suitable for use in school district libraries, and furnish copies of such lists to each president, secretary, and each county superintendent, as often as the same shall be

published or revised, from which lists the several presidents and secretaries and county superintendents shall select and purchase books. [33 G. A., ch. 189, § 1.] [28 G. A., ch. 110, § 3.]

SEC. **2823-q. Record book.** It shall be the duty of each secretary to keep in a record book, furnished by the board of directors, a complete record of the books purchased and distributed by him. [28 G. A., ch. 110, § 4.]

SEC. **2823-r. Librarian.** Unless the board of directors shall elect some other person, the secretary in independent districts and director in subdistricts in school townships shall act as librarian and shall receive and have the care and custody of the books, and shall loan them to teachers, pupils, and other residents of the district, in accordance with the rules and regulations prescribed by the state board of educational examiners and board of directors. Each librarian shall keep a complete record of the books in a record book furnished by the board of directors. During the periods that the school is in session the library shall be placed in the schoolhouse, and the teacher shall be responsible to the district for its proper care and protection. The board of directors shall have supervision of all books and shall make an equitable distribution thereof among the schools of the corporation. [28 G. A., ch. 110, § 5.]

CHAPTER 14-D.

OF THE TEACHING OF THE ELEMENTS OF VOCAL MUSIC IN THE PUBLIC SCHOOLS.

SECTION **2823-s. Instruction authorized.** That the elements of vocal music, including when practical the singing of simple music by note, be taught in all of the public schools of Iowa, and that all teachers teaching in schools where such instruction is not given by special teachers be required to satisfy the county superintendent of their ability to teach the elements of vocal music in a proper manner. Provided, however, that no teacher shall be refused a certificate or the grade of his or her certificate lowered on account of lack of ability to sing. [28 G. A., ch. 109, § 1.]

SEC. **2823-t. Normal institute.** That it shall be the duty of each county superintendent to have taught annually in the normal institute the elements of vocal music. [28 G. A., ch. 109, § 2.]

CHAPTER 14-E.

OF PUBLIC RECREATION AND PLAY GROUNDS.

SECTION **2823-u. Establishment — maintenance — supervision.** Boards of school directors in school districts containing or contained in cities of the first or second class, cities under special charter, or cities under the commission plan of government, are hereby authorized to establish and maintain for children in the public school buildings and on the public school grounds under the custody and management of such boards, public recreation places and playgrounds and necessary accommodations for same, without charge to the residents of said school district; also to coöperate with the commissioners or boards having the custody and man-

agement in such cities of public parks and public buildings and grounds of whatever sort, and by making arrangements satisfactory to such boards controlling public parks and grounds to provide for the supervision, instruction and oversight necessary to carry on public educational and recreational activities, as described in this section in buildings and upon grounds in the custody and under the management of such commissioners or boards having charge of public parks and public buildings on grounds of whatever sort, in such cities of the first or second class, cities under special charter, or cities under commission plan of government. [35 G. A., ch. 257, § 1.]

SEC. **2823-u1. Tax levy—petition—submission.** The board of directors of any school district containing, or contained in, any city of the first or second class, city under special charter, or city under the commission plan of government, may, and upon petition to that effect signed by legally qualified voters aggregating not less than twenty-five per cent. of the number voting at the last preceding school election, shall, submit to the electors of such school district the question of levying a tax as in this act provided; and if a majority of the votes cast upon such proposition be in favor thereof, then the board of school directors shall proceed to organize the work as authorized in this act and levy a tax therefor at the time and in the manner provided in section three of this act. If at the time of filing said petition it shall be more than three months till the next regular school election, then the board of school directors shall submit said question at a special election within sixty days. [35 G. A., ch. 257, § 2.]

SEC. **2823-u2. Certification to board of supervisors—collection—limitation.** Boards of school directors in such districts shall fix and certify to the board of supervisors on or before the first Monday of September the amount of money required for the next fiscal year for the support of the aforementioned activities, in the same manner as the amount of necessary taxes for other school purposes is certified and said board of supervisors shall levy and collect a tax upon all the property subject to taxation in said school district at the same time and in the same manner as other taxes are levied and collected by law which shall be equal to the amount of money so required for such purposes by the said board of school directors as provided in this act; provided that the tax so levied upon each dollar of the assessed valuation of all property, real and personal in said district, subject to taxation, shall not in any one year exceed two mills for the purpose of the activities hereinbefore mentioned in this act; the said tax shall not be used or appropriated directly or indirectly for any other purpose than provided in this act. [35 G. A., ch. 257, § 3.]

SEC. **2823-u3. Duties of school treasurer.** All moneys received by, or raised in such city for the aforementioned purpose shall be paid over to the treasurer of the school district, to be disbursed by him on orders of such board of school directors in such district in the same manner as other funds of said school district are disbursed by him, but the tax provided for in this act shall not be levied or collected nor shall the board of school directors, as provided in this act, have authority to certify the amount of taxes necessary for this purpose until after the question of the levy of such tax shall have been authorized by a majority vote at a regular or special election. [35 G. A., ch. 257, § 4.]

SEC. **2823-u4. Annual levy.** After the question of the levy of such special tax has been submitted to and approved by the voters as provided in this act, the authority shall remain, and such tax shall be levied and collected annually until such time as the voters of the school district of such

city shall by majority vote order the discontinuance of the levy and collection of such tax. [35 G. A., ch. 257, § 5.]

SEC. **2823-u5. Discontinuance of levy—submission of question.** The board of school directors in any district governed by this act, may, and on petition to that effect signed by legally qualified voters aggregating not less than twenty-five per cent. of the number voting at the last preceding school election, shall submit to the electors of such school district the question of discontinuing the levying of such tax as may have been previously authorized under the provisions of this act, and if a majority of the votes cast upon such proposition be in favor thereof, then the levying of such tax shall be discontinued and shall not be resumed unless again authorized under the provisions of section two of this act. [35 G. A., ch. 257, § 6.]

SEC. **2823-u6. Appropriation by city.** The board of school directors in any district governed by this act is also empowered to receive and expend for the purpose of this act, any sums of money appropriated and turned over to them by the city council or commissioners of such city for such purposes; and the city council or commissioners of such city, shall have authority to appropriate and turn over to the board of school directors of the school district containing or contained in such city, any reasonable sums of money which the said council or commissioners may desire to appropriate out of the general funds of such city and turn over to the said board of school directors for the purposes herein set forth. [35 G. A., ch. 257, § 7.]

CHAPTER 15.

OF THE UNIFORMITY, PURCHASE AND LOANING OF TEXTBOOKS.

SECTION **2824. Adoption—contract—agent.**

The school board has no authority to contract with a book seller and pay him out of the contingent fund for handling schoolbooks when the district has not adopted the plan of purchasing the books for sale to pupils, and payment under such an arrangement may be restrained at the suit of a taxpayer. *Ries v. Hemmer*, 127–408, 103 N. W. 346.

The provision as to adoption of textbooks by the board of directors merely empowers the board to adopt and purchase, without indicating the manner of doing so, and is subject to the requirement of code § 2828 relating to the purchase of textbooks. *McNees v. School Township*, 133–120, 110 N. W. 325.

SEC. **2828. Bids.** Before purchasing textbooks under the provisions of this chapter, it shall be the duty of the board of directors, or county board of education, to advertise, by publishing a notice, once each week, for three consecutive weeks in one or more newspapers published in the county; said notice shall state the time up to which all bids will be received, the classes and grades for which textbooks and other necessary supplies are to be bought, and the approximate quantity needed; and said board shall award the contract for said textbooks and supplies to any responsible bidder or bidders offering suitable textbooks and supplies at the lowest prices, taking into consideration the quality of material used, illustrations, binding, and all other things that go to make up a desirable textbook; and may, to the end that they may be fully advised, consult the county superintendent, or, in case of city independent districts, with city superintendent or other competent person, with reference to the selection of textbooks; provided that the board may reject any and all bids, or any part thereof, and readvertise therefor as above provided. [31 G. A., ch. 9, § 4; 23 G. A., ch. 24, § 5.]

SEC. 2829. **Change—question submitted.**

The statute prohibits any change in the textbooks adopted by the board of directors except as authorized at a regular meeting of the electors, upon notice of the submission of such proposition. *McNees v. School Township*, 133–120, 110 N. W. 325.

SEC. 2831. **County board of education—question as to county uniformity.** The county superintendent, the county auditor and the members of the board of supervisors shall constitute a county board of education. When petitions shall have been signed by one third the school directors in any county, other than those in cities and towns, and filed in the office of the county superintendent of such county at least thirty days before the annual school elections, asking for a uniform series of textbooks in the county, then such county superintendent shall immediately notify the other members of the county board of education in writing, and within fifteen days after the filing of the petitions said board of education shall meet and provide for submitting to the electors at the next annual meeting the question of county uniformity of school textbooks. [28 G. A., ch. 111, § 1; 23 G. A., ch. 24, §§ 8, 9.]

SEC. 2832. **Selection of books—depositories—distribution—itemized accounts.** Should a majority of the electors voting at such elections favor a uniform series of textbooks for use in said county, then the county board of education shall meet and select the school textbooks for the entire county, and contract for the same under such rules and regulations as the said board of education may adopt. When a list of textbooks has been so selected, they shall be used by all the public schools of said county, except as hereinafter provided, and the board of education may arrange for such depositories as it may deem best, and may pay for said schoolbooks out of the county funds, and sell them to the school districts at the same price as provided for in section twenty-eight hundred twenty-four of this chapter, and the money received from said sales shall be returned to the county funds by said board of education monthly. The boards of school officers, who are hereby made the judges of the school meetings, shall certify to the board of supervisors the full returns of the votes cast at said meetings the next day after the holding of said meetings, who shall, at their next regular meeting, proceed to canvass said votes and declare the result. Unless otherwise ordered by the board of education, the county superintendent shall have charge of such textbooks and of the distribution thereof among the depositories selected by the board; he shall render to the board at each meeting thereof itemized accounts of his doings, and shall be liable on his official bond therefor. [28 G. A., ch. 112, § 1; 23 G. A., ch. 24, § 9.]

SEC. 2834. **Officers not to be agents.**

The statute prohibits any school director from engaging on his own account in the sale of schoolbooks and supplies to pupils, and the prohibition is not limited to directors acting as agents of the board under code § 2824. *State v. Wick*, 130–31, 106 N. W. 268.

CHAPTER 16.

OF THE SCHOOL FUND.

SECTION 2838. **Permanent fund.**

While the school fund belongs in a sense to the state, that portion which is apportioned to a particular county may be referred to as the permanent school fund of that county; and held that a bequest to the permanent school fund of a county specified was not void for uncertainty. *Chapman v. Newell*, 146–415, 125 N. W. 324.

SEC. 2839. **Temporary fund.**

Fines for contempt in violating a liquor injunction are not "collected for violation of the penal laws." *Gunn v. Mahaska County*, 155–527, 136 N. W. 929.

While the board of supervisors has authority to appertion the proceeds of fines after payment into the county treasury, it has no authority to contract for the payment of a portion of such fines to the person who collects them. *Ibid.*

SEC. 2841. **Notice—sale.** When the board of supervisors shall offer for sale the sixteenth section or lands selected in lieu thereof, or any portion of the same, or any part of the five hundred thousand acre grant, the county auditor shall give at least forty days' notice, by written or printed notices posted in five public places in the county, two of which shall be in the township in which the land to be sold is situated, and also publish a notice of said sale, once each week, for four weeks preceding the same in a newspaper published in the county, describing the land to be sold and the time and place of such sale. At such time and place, or at such other time and place as the sale may be adjourned to, he shall offer to the highest bidder, subject to the provisions of this chapter, and sell, either for cash, or one third cash and the balance on a credit not exceeding ten years, with interest on the same at the rate of not less than six per cent. per annum, to be paid at the office of the county treasurer of said county on the first day of January in each year, delinquent interest to bear the same rate as the principal. [31 G. A., ch. 9, § 5; 23 G. A., ch. 23; 18 G. A., ch. 12, § 4; C. '73, § 1846; R. § 1971.]

SEC. 2849. **Loans.** The permanent school fund shall be loaned out by the county auditor, as it comes into the hands of the county treasurer, in sums of five thousand dollars or less to one person or company, in case it is found impracticable to keep the whole amount of funds loaned in sums of five hundred dollars or less to one person or company. In the event it can be kept loaned out in sums of five hundred dollars or less to one person or company, then no loan shall exceed five hundred dollars, nor shall a loan of said fund be made to or be carried by the county auditor, treasurer or member of the board of supervisors. Each loan shall be made for at least one and not more than five years, evidenced by promissory notes bearing not less than five per cent. per annum, payable annually, and delinquent interest to draw the same rate, to be secured by a mortgage on unincumbered real estate, situated in the county in which the loan is made, and appraised, as hereinafter provided, for at least double the sum borrowed; the appraisement to be made by three persons under oath, selected by the county auditor, who shall not in making the valuation take into consideration the buildings upon the lands, for which service each shall be allowed fifty cents, to be paid by the borrower, who shall also pay for recording the mortgage. [35 G. A., ch. 258, § 1.] [28 G. A., ch. 113, § 1; 23 G. A., ch. 23; 19 G. A., ch. 174, § 2; 18 G. A., chs. 1, 2, 6; C. '73, §§ 1861–3; R. §§ 1981–3.]

SEC. 2850. **Applications—taking up incumbrances.** All applications to borrow from the permanent school fund shall be made to the auditor of the county in which the land is situated which it is proposed to mortgage as security, who shall cause the proper appraisement to be made, and, if satisfactory, shall examine any abstract of title which the proposed borrower may submit, or he may cause an abstract to be prepared at such proposed borrower's expense. If the title is found to be perfect, and the lands unincumbered, he shall certify this fact and submit the application and all the papers connected therewith to the board of supervisors at its next meeting, regular or called, at which meeting the loan shall be approved

or disapproved. If the application is accepted, the auditor shall complete the contract by taking a note payable to the county, and a mortgage upon the lands securing the same, and certify the same to the treasurer, who shall pay over to the borrower the amount named in the note, less a fee of two dollars to be paid to the auditor for his services in addition to his salary. The board may reject the application for any good cause. And if it shall happen that a loan is made upon real estate which is in fact incumbered other than for taxes, the board of supervisors may, when necessary for the safety of the loan, appropriate out of any school fund on hand, if such incumbrance does not exceed one half of the real value of the lands, so much as may be needed to take up and purchase the same, and may also at any meeting, by resolution, assign without recourse, upon payment of the amount due, any school fund note and mortgage to one holding a subsequent lien upon the mortgaged real estate. [32 G. A., ch. 151, § 4; C. '73, §§ 1864, 1868–9, 1875; R. § 1984.]

SEC. **2853. Payments—accounts—settlements.**

Failure of the county auditor to report a foreclosure sale to the state auditor, or to keep the account of the school funds in a separate book, or withholding the proceeds of the sale for a time before turning them over to the county treasurer, will not impair the title acquired under the deed in the foreclosure proceeding. *Mahaska County v. Bennett*, 150–216, 129 N. W. 838.

SEC. **2855. Lands bid in — losses — interest — rents.** That section twenty-eight hundred fifty-five of the code supplement, [1902] relating to the permanent school fund, be and the same is hereby repealed and the following enacted in lieu thereof:

"When lands have been bid in by the county for the state under foreclosure of school fund mortgages and the time for redemption has expired a sheriff's deed shall be issued to the state for the use and benefit of the permanent school fund. The county auditor shall thereupon notify the auditor of state who shall give the county credit for the amount of principal in the original notes remaining unpaid. All lands hereafter acquired by the state under foreclosure proceedings shall be resold within two years from date of foreclosure and all such lands heretofore acquired shall be resold on or before January first, nineteen hundred and nine. Such lands shall be appraised, advertised and sold in the manner provided for the appraisement, advertisement and sale of the sixteenth section or lands selected in lieu thereof. When a resale is made the county auditor shall notify the auditor of state, who shall thereupon charge the county with the full amount of the resale, except that when the lands are sold for more than the unpaid portion of the principal, the excess shall be applied to reimburse the county for the costs of foreclosure and the interest paid by the county to the state by reason of default of payment of same by the makers of the notes, previous to the time when the right of redemption has expired, not, however, to exceed three years. Any excess over and above the amount of the unpaid portion of the principal, costs of foreclosure and interest on the principal as above provided, shall inure to the state and be credited to the permanent school fund account. If the lands shall be sold for a less amount than the unpaid portion of the principal, the loss shall be sustained by the county and the board of supervisors shall at once order the amount of such loss transferred from the general fund of the county to the permanent school fund account. County auditors shall, on or before the first day of January of each year, report to the auditor of state the amount of all sales and resales made during the year previous, of the sixteenth section, five hundred thousand acres grant, escheat estates, and lands taken under fore-

closure of school fund mortgages, and the auditor of state shall charge the same to the counties with interest from the date of such sale or resale to January first, at the rate of four and one-half per cent. per annum. The auditor of state shall, also, on the first day of January, charge to each county having permanent school funds under its control, interest thereon at the rate of four and one-half per cent. per annum for the preceding year, or such part thereof as such funds shall have been in the control of the county, which shall be taken as the whole amount of interest due from each county. All interest collected above the four and one-half per cent. charged by the state shall be transferred to the general county fund. If any county fails or refuses to collect the amount of interest due the state, the deficiency shall be paid to the state from the general county fund. Any county delinquent in the payment of interest due the state shall be charged one per cent. per month on the amount delinquent until paid. County auditors shall, upon the first day of January of each year, report to the auditor of state the amount of rents collected during the preceding year on unsold school lands and lands taken under foreclosure of school fund mortgages then in the hands of the county treasurer, and the auditor of state shall include the amount so reported in his semiannual apportionment of interest." [32 G. A., ch. 151, § 1; 28 G. A., ch. 113, § 2; 23 G. A., ch. 23, § 3; 18 G. A., ch. 12, § 3; C. '73, §§ 1881–2, 1884.]

CHAPTER 17.

OF THE STATE LIBRARY AND HISTORICAL COLLECTIONS.

SECTION **2868. Associate libraries.**

[§§ 2868, 2871, 2872, 2873 and 2874 of the code are alluded to in the title of ch. 173, 29 G. A., as being repealed, but no reference to said sections is made in the body of the act. EDITOR.]

SEC. **2869. Reports of associate libraries—repealed.** [29 G. A., ch. 173, § 8.]

[See § 2869-a.]

SEC. **2869-a. Repeal.** That section twenty-eight hundred sixty-nine of the code and chapter one hundred forty-eight of the acts of the twenty-seventh general assembly, be and the same are hereby repealed. [29 G. A., ch. 173, § 8; 28 G. A., ch. 145, § 1; 27 G. A., ch. 148, § 1.]

SEC. **2871. Instructions.**

[See editorial note at § 2868.]

SEC. **2872. Privileges forfeited.**

[See editorial note at § 2868.]

SEC. **2873. Records, reports and regulations.**

[See editorial note at § 2868.]

SEC. **2874. Loans to colleges or associations.**

[See editorial note at § 2868.]

SEC. **2881. Compensation of librarian—assistants—repeal.** Section twenty-eight hundred eighty-one of the code and section twenty-eight hundred eighty-one-f of the supplement to the code [1902] and section six of chapter one hundred fourteen of the acts of the twenty-eighth general assembly are hereby repealed. [32 G. A., ch. 156, § 1; 28 G. A., ch. 115, § 1; 28 G. A., ch. 114, § 6.]

[See § 2881-f. EDITOR.]

CHAPTER 17-A.

CONSOLIDATION OF THE MISCELLANEOUS PORTION OF STATE LIBRARY WITH THE HISTORICAL DEPARTMENT.

SECTION **2881-a. Authorized—board of trustees.** That the board of trustees of the Iowa state library and the board of trustees of the Iowa historical department be and the same are hereby empowered and directed to consolidate the miscellaneous portion of the Iowa state library (exclusive of the law section), or so much thereof as shall be regarded by said board as advisable, with the historical department; the aforesaid consolidation to take effect on the first day of January, nineteen hundred and one, or at any such later date as said trustees may direct; and that on and after January first, nineteen hundred and one, the board of trustees of the Iowa state library and the board of trustees of the Iowa state historical department shall cease to exist as such, and the aforesaid boards shall, by this act, become the board of trustees of the state library and the historical department of Iowa, and the newly constituted board shall thereafter be charged with all the duties and responsibilities imposed upon the boards aforementioned and possess all the powers thereof. [28 G. A., ch. 114, § 1.]

SEC. **2881-b. State librarian—curator—assistant librarian—reports.** That after such consolidation the state librarian shall have general charge of the historical department and of the consolidated and law libraries. The curator of the museum and art gallery shall have charge of the museum, the art gallery, the newspapers, and historical periodicals. The assistant to librarian shall have charge of the law library, under the direction of the state librarian. The above officers shall serve out the terms for which they shall have been appointed, at the expiration of which their successors shall be appointed by the board of trustees, and shall hold their respective offices for the term of six years. The state librarian shall submit to the governor biennially a report giving the history of said consolidated libraries for the preceding two years, accompanied by a like report by the curator of the museum and art gallery. [28 G. A., ch. 114, § 2.]

SEC. **2881-c. Furniture and fixtures.** The executive council is authorized to procure the furniture and fixtures made necessary by such consolidation and pay for the same out of any money in the state treasury not otherwise appropriated. [28 G. A., ch. 114, § 3.]

SEC. **2881-d. Assignment of rooms.** The board of trustees shall have the control of the respective departments above named, and shall assign rooms to be occupied by each of said officers. [28 G. A., ch. 114, § 4.]

SEC. **2881-e. Appropriations.** That section twenty-eight hundred eighty-one-e of the supplement to the code, 1907, be and the same is hereby repealed and the following enacted in lieu thereof:

"There shall be annually appropriated from any money in the state treasury not otherwise appropriated the sum of six thousand dollars for the use of the law department and legislative reference bureau; six thousand dollars for the use of the miscellaneous department, and six thousand dollars for the historical department, the money to be expended under the direction of the board of trustees of the state library and historical department." [34 G. A., ch. 147, § 1.] [31 G. A., ch. 143; 28 G. A., ch. 114, § 5.]

SEC. **2881-f. State librarian—curator—law librarian—salaries.** That section twenty-eight hundred eighty-one-f of the supplement to the

code, 1907, be and the same is hereby repealed and the following enacted in lieu thereof:

"From and after the taking effect of this act the salary of the state librarian shall be the sum of twenty-four hundred dollars per annum; of the curator of the museum and art gallery, the sum of eighteen hundred dollars per annum; and [of] the law librarian, the sum of eighteen hundred dollars per annum." [34 G. A., ch. 147, § 2.] [32 G. A., ch. 156, § 2; 28 G. A., ch. 114, § 6.]

SEC. **2881-g. Other assistants—salaries.** That section twenty-eight hundred eighty-one-g of the supplement to the code, 1907, be and the same is hereby repealed and the following enacted in lieu thereof:

"As assistants (in addition to the curator of the museum and art gallery and the law librarian), the state librarian may employ one first assistant at an annual salary of eleven hundred dollars; and one second assistant at an annual salary of ten hundred dollars; and one third assistant at an annual salary of nine hundred dollars." [34 G. A., ch. 147, § 3.] [32 G. A., ch. 156, § 3.]

SEC. **2881-h. Bonds.** The state librarian shall give bond in the sum of five thousand dollars, and the curator of the museum and art gallery and the assistant to librarian shall each give bond in the sum of one thousand dollars, conditioned upon the faithful performance of their respective duties and a full and accurate accounting of all moneys coming into their hands in virtue of their respective offices. Said bonds shall be approved by the board of trustees of the state library and historical department. [32 G. A., ch. 156, § 4.]

SEC. **2881-i. Salaries—how paid.** The salaries provided for in this act shall be paid in monthly installments out of any money in the state treasury not otherwise appropriated. [32 G. A., ch. 156, § 5.]

SEC. **2881-j. Custody of public archives.** That for the care and preservation of the public archives the state library and historical department of Iowa are hereby given the custody of all the original public documents, papers, letters, records and other official manuscripts of the state executive and administrative departments, offices or officers, councils, boards, bureaus and commissions, ten years after the date or current use of such public documents, papers, letters, records or other official manuscripts. Provided that the executive council shall have the power and authority to order the transfer of such records or any part thereof at any time prior to the expiration of the limit of ten years hereinbefore provided or to retain the same in the respective offices beyond such limit according as in the judgment of the council the public interest or convenience may require. [31 G. A., ch. 142, § 1.]

SEC. **2881-k. Transfer and delivery of public archives.** That section two of said act be repealed and the following enacted in lieu thereof:

"That the several executive and administrative departments, officers or offices, councils, boards, bureaus and commissioners are hereby authorized to transfer and deliver to the executive council for arrangement, classification, labeling, filing and calendaring, and then to the state library and historical department for preservation, such of the public archives as are designated in section one of this act except such as in the judgment of the executive council should be longer retained in the respective offices." [32 G. A., ch. 157, § 1; 31 G. A., ch. 142, § 2.]

[The title of this act refers to ch. 142 of the laws of the 31 G. A.]

SEC. **2881-l. State library and historical department authorized to receive archives—certification.** That section three of said act is hereby repealed, and the following enacted in lieu thereof:

That the state library and historical department is hereby authorized and directed to receive from the executive council such of the public archives as are designated in section one of this act as rapidly as the same are properly arranged, classified, labeled, filed and calendared. Upon and after said receipt from the executive council of any of such public archives copies thereof may be made, certified and authenticated by the curator of the historical collections in the same manner and with the same validity as the officer or officers from whom they were received. Said curator shall charge and collect for certified copies the same fees as are allowed by law to the secretary of state for certified copies, which fees shall be turned into the state treasury. [34 G. A., ch. 148, § 1.] [32 G. A., ch. 157, § 2; 31 G. A., ch. 142, § 3.]

[The title of this act refers to ch. 142 of the laws of 31 G. A.]

SEC. **2881-m. Hall of public archives.** That for the care and permanent preservation by the state library and historical department of the public archives hereinbefore designated, the executive council is hereby authorized and directed to provide, furnish and equip such room or rooms in the historical memorial and art building (now in process of erection) as may be deemed necessary for the purposes of this act, and the room or rooms thus provided for shall be known as the hall of public archives. [31 G. A., ch. 142, § 4.]

SEC. **2881-n. Appropriation—how expended.** That section five of said act is hereby repealed and the following enacted in lieu thereof:

"That for carrying out the purposes of this act there is hereby appropriated out of any moneys in the state treasury not otherwise appropriated the sum of six thousand dollars annually for two years beginning July first, nineteen hundred and seven, to be expended under the direction of said executive council." [32 G. A., ch. 157, § 3; 31 G. A., ch. 142, § 5.]

[The title of this act refers to ch. 142 of the laws of 31 G. A.]

CHAPTER 18.

OF THE STATE HISTORICAL SOCIETY.

SECTION **2882-a. Annual appropriation—purposes.** That there be and is hereby appropriated to the state historical society of Iowa, out of any money in the state treasury not otherwise appropriated, the sum of seventy-five hundred dollars, annually hereafter as permanent support: For the continued publication of The Iowa Journal of History and Politics; for the continuation of the compilation and publication of the messages and proclamations of the governors of Iowa; for the collection, compilation and publication of documentary materials, relating to the history of Iowa, including such of the archives of the state and territory of Iowa as are of historical importance; for the publication of historical monographs, biographies, essays, lectures, bibliographs and indexes; for the proper maintenance of the library of the society, the collection and purchase of publications bearing upon Iowa and American history, and the proper classifying, cataloging and indexing of such material; for the carrying out

of a systematic and scientific anthropological survey of the state; for conducting public lectures of an historical character; and for meeting the incidental and other necessary expenses incurred in connection with the prosecution of the work of the said state historical society of Iowa, as indicated in this act and title thirteen, chapter eighteen, section twenty-eight hundred eighty-two of the code. [30 G. A., ch. 117, § 1.]

[See §§ 2882-c and 2882-d for additional annual appropriation. EDITOR.]

SEC. **2882-b. How paid.** That the permanent annual appropriation herein provided for shall take the place and be in lieu of all other permanent annual appropriations heretofore made to the state historical society of Iowa, and the same shall be paid in quarterly installments on the order of the board of curators of the said state historical society of Iowa, the first installments to be paid July first, nineteen hundred and four. [30 G. A., ch. 117, § 2.]

SEC. **2882-c. Additional support.** That there is hereby appropriated to the state historical society of Iowa, out of any money in the state treasury not otherwise appropriated, the sum of four thousand dollars annually hereafter as additional permanent support for historical research and publication. [34 G. A., ch. 149, § 1.]

SEC. **2882-d. Quarterly installments.** That the said sum shall be paid in quarterly installments on the order of the board of curators of the said state historical society of Iowa, the first installment to be paid July, nineteen hundred eleven. [34 G. A., ch. 149, § 2.]

CHAPTER 18-A.

LIBRARY COMMISSION AND FREE PUBLIC SCHOOL LIBRARIES.

SECTION **2888-a. State library commission—term—chairman.** The governor shall appoint four persons, at least two of whom shall be women, who, with the state librarian and superintendent of public instruction and president of the state university, shall constitute a state library commission. The first members appointed by the governor shall be appointed for terms of two, three, four and five years from the first day of July, nineteen hundred, and all subsequent appointments shall be for terms of five years, except appointments to fill vacancies. The commission shall annually elect a chairman. [28 G. A., ch. 116, § 1.]

SEC. **2888-b. Repeal.** That sections two, three, four and five of chapter one hundred sixteen, acts of the twenty-eighth general assembly, be and the same are hereby repealed, and that the following be substituted therefor: [29 G. A., ch. 173, § 1; 28 G. A., ch. 116, §§ 2–5.]

SEC. **2888-c. Duties.** The commission shall give advice and counsel to all free and other public libraries, and to all communities which may propose to establish them, as to the best means of establishing and maintaining such libraries, the selection of books, cataloging, and other details of library management. It may print such lists and circulars of information as it shall deem necessary and as approved by the executive council. It may also conduct a summer school of library instruction, a clearing house for periodicals for free gift to local libraries and perform such other public service as may seem to it for the best interests of the state. [29 G. A., ch. 173, § 2.]

SEC. **2888-d. Traveling libraries.** The state library board shall transfer to the Iowa library commission all associate and traveling libraries belonging to the state, and the said library commission is authorized to accept the same; and it shall be the duty of said commission to operate the said associate and traveling libraries, also to properly equip and circulate the books thus acquired, or subsequently purchased to be loaned within the state to libraries, schools, colleges, universities, library associations, farmers' institutes, granges, study clubs, charitable and penal institutions and individuals, free of cost except for transportation, under such conditions and rules as shall protect the interests of the state and best increase the efficiency of the service it is expected to render the public. [29 G. A., ch. 173, § 3.]

SEC. **2888-e. Secretary — assistants — duties — expenses — office.** Said commission shall employ a secretary not of its own number, who shall serve at the will of the commission, and under such conditions as it shall determine. It may also employ such other assistants as shall be requisite in the performance of the work of the commission as set forth in sections two and three, and number of assistants and their salaries and the salary of the secretary shall be fixed by the committee on retrenchment and reform. It shall be the duty of said secretary to keep a record of the proceedings of the commission, to keep accurate accounts of its financial transactions, and to act under the direction of the commission in supervising the work of the traveling libraries, in organizing new libraries and improving those already established, and in general to perform such other duties as may be assigned him by the commission. In addition to their salaries the necessary traveling expenses shall be allowed the secretary and assistants while absent from the office in the service of the commission, the same to be verified and certified and paid in the same manner as other expenses incurred by the commission. [33 G. A., ch. 190, § 1.] [29 G. A., ch. 173, § 4.]

SEC. **2888-f. Biennial report.** The secretary of the commission shall make a full report to the governor on library conditions and progress in Iowa on July first, nineteen hundred and three, with sketches of the free public libraries and illustrations of such library buildings as said commission may deem expedient; two thousand copies of this report shall be printed, one thousand of which shall be bound in cloth; and biennially thereafter a like report shall be made to the governor, two thousand copies of which shall be printed, one thousand of the same to be bound in cloth; these reports to be printed and bound by the state the same as other public documents, and to be distributed under the direction of the commission, and such other printing and binding provided by this act shall be done by the state when allowed by the executive council. [29 G. A., ch. 173, § 5.]

SEC. **2888-g. Reports from libraries.** The commission shall each year obtain from all free public libraries reports showing condition, growth, development and manner of conducting said libraries, and shall obtain reports from other libraries in the state at their discretion, and shall furnish annually to the secretary of state such information for publication in the Iowa official register as may be deemed of public interest. [29 G. A., ch. 173, § 6.]

SEC. **2888-h. Expenses—appropriation.** That section twenty-eight hundred eighty-eight-h [of the supplement to the code, 1907,] be and the same is hereby repealed and the following enacted in lieu thereof:

No member of the commission shall ever receive any compensation for services as a member, but the traveling expenses of members in attending

meetings of the commission, or in visiting or establishing libraries and other incidental and necessary expenses connected with the work of the commission, shall be paid including the necessary expense in the maintenance and extension of the traveling library system, provided that the whole amount of said expense and salaries shall not exceed the sum of eleven thousand dollars in any one year, not more than seventy-six hundred dollars of said sum to be used in the payment of salaries. All bills and accounts incurred by the commission or by its members under the law, and all expenses of the members of the commission, and its secretary and its assistants shall be itemized, verified and certified by the chairman and secretary of the commission, and be audited and allowed by the executive council before being paid. The state auditor shall issue warrants therefor upon the state treasurer; and there is hereby annually appropriated from any funds in the state treasury, not otherwise appropriated, the sum of eleven thousand dollars to carry into effect the provisions of this act, and any balance not expended in any one year may be added by the commission to the expenditure for any ensuing year. [35 G. A., ch. 259, § 1; 33 G. A., ch. 190, § 2.] [29 G. A., ch. 173, § 7.]

PART SECOND.

PRIVATE LAW.

TITLE XIV.

OF RIGHTS OF PROPERTY.

CHAPTER 1.

OF THE RIGHTS OF ALIENS.

SECTION 2889. Nonresident aliens—acquiring and holding real estate.

A right to inherit cannot be derived from a parent who has died a nonresident alien and who would on that account not have been entitled to the property if living. *Meier v. Lee*, 106–303, 76 N. W. 712.

Where nonresident aliens acquired an interest in land in this state in 1860 by descent but remained nonresident until after the enactment of the statute of 1868 removing the disqualification to inherit on that ground, held that by the statute their rights had been forfeited so that the resident heirs had the complete title to the property notwithstanding a treaty between the United States and the country of the residence of such nonresident heirs that its citizens should have a reasonable time in which to sell the land which they would otherwise have been entitled to inherit and withdraw the proceeds. *Ahrens v. Ahrens*, 144–486, 123 N. W. 164.

The supreme court has never had occasion to pass directly upon the question whether under §§ 1908 and 1909 of the code of '73 a nonresident alien may take real estate by mere descent. *Hughes v. Wyatt*, 146–392, 125 N. W. 334.

Alienage of those who are heirs of a deceased owner of property according to the rules of descent does not render others lawful heirs who would have been heirs if the alien heirs had been dead. *Hanson v Gallagher*, 154–192, 134 N. W. 421.

One who cannot take as heir by descent on account of alienage is not a legal heir within the language of a will. *Mitchell v. Vest*, 157– —, 136 N. W. 1054.

SEC. **2889-a. Real property.** That all corporations organized under the laws of any foreign country, and corporations organized under the laws of any state of the United States, one half of whose stock is owned and controlled by nonresident aliens, shall have the right to own, hold, and dispose of any real property owned or held by any such corporations on the fourth day of July, eighteen hundred eighty-eight, or any real property acquired by any such corporations under the provisions of section six of chapter eighty-five of the laws of the twenty-second general assembly, or

section twenty-eight hundred ninety of the code. Provided, however, that any such corporation shall sell or dispose of any such property now owned by it within ten years from the taking effect of this act, and in default of such sale or disposition the provisions of sections twenty-eight hundred ninety-one, twenty-eight hundred ninety-two and twenty-eight hundred ninety-three of the code shall be applied thereto. [28 G. A., ch. 117, § 1.]

SEC. **2889-b. Bona fide contract.** A bona fide contract for the sale of any such lands owned by any such corporation shall be held and considered as a sale within the provisions of the preceding section, and a good and valid deed of conveyance may be made by such corporation at any time upon the fulfillment of such contract by the purchaser of any such lands. [28 G. A., ch. 117, § 2.]

SEC. **2889-c. Sales, contracts, deeds, and conveyances legalized.** All sales, contracts, deeds, or conveyances of lands owned by any such corporation on the fourth day of July, eighteen hundred eighty-eight, or acquired by any such corporation under the provisions of section six of chapter eighty-five of the laws of the twenty-second general assembly or section twenty-eight hundred ninety of the code, bearing date on or after the fourth day of July, eighteen hundred eighty-eight, are hereby legalized and rendered of full force and effect, according to their terms, in so far as their validity or the validity of the titles conveyed thereby may be affected by chapter eighty-five of the laws of the twenty-second general assembly, or any amendments thereto, or by chapter one, title fourteen, of the code. [28 G. A., ch. 117, § 3.]

CHAPTER 2-A.

OF SALE OF ABANDONED RIVER CHANNELS, SAND BARS OR ISLANDS—BOUNDARY COMMISSION.

SECTION **2900-a1. Repeal.** That chapter one hundred eighty-five of the acts of the thirtieth general assembly be and the same is hereby repealed and the following enacted in lieu thereof: [31 G. A., ch. 212, § 1.]

SEC. **2900-a2. Sale authorized.** That all land between high-water mark and the center of the former channel of any navigable stream, where such channel has been abandoned, so that it is no longer capable of use, and is not likely again to be used for the purposes of navigation, and all land within such abandoned river channels, and all bars or islands in the channels of navigable streams not heretofore surveyed or platted by the United States or the state of Iowa, and all within the jurisdiction of the state of Iowa shall be sold and disposed of in the manner hereinafter provided. [31 G. A., ch. 212, § 1.]

The statutory provision as to surveying abandoned river channels has no application to the portion of a channel which is beyond the boundaries of the state. *Coulthard v. McIntosh*, 143–389, 122 N. W. 233.

SEC. **2900-a3. Written applications—by whom made.** It shall be the duty of the county auditor to file written application with the secretary of state, asking that certain land located within the county be surveyed, appraised and sold, whenever he is satisfied that such land is of the character contemplated by section one of this act. If the county auditor fails or neglects to make such application, then any person desiring to purchase such land may file a written application with the secretary of state, asking

that the said land be surveyed, appraised and sold. The said application whether made by the county auditor or by a person desiring to purchase the land, shall contain an accurate description thereof, stating whether the land is abandoned river channel, or land within such abandoned river channel, or an island or a sand bar in a navigable stream, and giving the number of township and range in which it is located, and the section numbers if possible, and also the estimated acreage. [31 G. A., ch. 212, § 2.]

SEC. **2900-a4. Survey.** Upon receiving such application, it shall be the duty of the secretary of state to order a complete survey of such land to be made by the county surveyor of the county wherein the land is situated, and in case of the refusal or inability of such county surveyor to make such survey then the secretary of state shall appoint some other competent surveyor to make such survey. When such survey is made, a full report thereof, with field notes, shall be filed with the clerk of the state land office, which report and field notes shall constitute the official survey of such land. [31 G. A., ch. 212, § 3.]

SEC. **2900-a5. Appraisement.** Upon the filing of such report, with the accompanying field notes, the secretary of state shall thereupon appoint a commission of three disinterested freeholders of the county wherein the land is situated, to view the land and make appraisement of the value thereof, which appraisement shall be returned and filed with the clerk of the state land office in the office of the secretary of state. The secretary of state, if he deems it necessary, may either go in person or send the clerk of the state land office into the county to make proper selection of the said commissioners, and the necessary expenses of such trip shall be paid in the manner hereinbefore provided. [31 G. A., ch. 212, § 4.]

SEC. **2900-a6. Fees.** The surveyor making such survey shall be entitled to receive the sum of five dollars per day for his services as such surveyor and such additional amount as may be agreed upon and necessary for the services of chainmen and other attendants and other necessary expenses; the commissioners, for their services in making such appraisement shall each be entitled to receive five dollars per day, for the actual time employed. [31 G. A., ch. 212, § 5.]

SEC. **2900-a7. Sale—how effected—rights of bona fide occupants.** Such lands shall be sold in the following manner: Any person who has in fact lived upon any such land and occupied the same, as a home, continuously for a period of three or more years immediately prior to the time of the appraisement thereof, and such occupancy has been in good faith for the purpose of procuring title thereto whenever by law such title could be vested in him by purchase from the proper authority, or any person who has acquired possession of such land by inheritance, or by purchase made in good faith from a former occupant, or occupants, whose occupancy dates back over a period of three years prior to the date of appraisement of the land, shall have first right to purchase such land at the appraised value; provided such bona fide occupant shall file his application for the purchase thereof at the appraised value with the secretary of state within sixty days after the day the appraisement is made, and shall accompany such application with affidavits showing proof of such bona fide occupancy. If no application has been filed with such bona fide occupant within the sixty-day period above provided, then the secretary of state shall advertise the sale of such land once each week for four consecutive weeks in two newspapers of general circulation published in the county wherein the land is situated, and proof of publication shall be filed with the secretary of state. The sale shall be made upon written bids addressed to the secretary of

state and the advertisements shall fix the time when such bids will be received and opened. All bids shall be opened by the secretary of state or by the clerk of the state land office at the time fixed, and the land thereupon may be sold to the highest bidder and at not less than the appraised value. [31 G. A., ch. 212, § 6.]

SEC. **2900-a8. Lease authorized—lands readvertised—sale.** If no application is filed for the purchase of the land within the sixty-day period by a bona fide occupant, and if no bids are received for the purchase thereof, on or before the date of the sale as advertised, then the secretary of state is authorized to lease the land for a period of from one to five years, upon as favorable terms as he can obtain. At the expiration of such lease he shall readvertise the land for sale in the manner provided in section six hereof. If no bids for the purchase of the land are received on the date of the second advertised sale, then the secretary of state shall submit the matter to the executive council, and they may either order the land reappraised in the manner provided in section four hereof, and then advertised and sold in the manner provided in section six hereof, or if they deem it advisable, they may authorize the secretary of state to sell the land for less than the appraised value. In such event the secretary of state shall readvertise the land for sale in the manner provided in section six hereof, and such advertisement shall also state that the land will be sold to the highest bidder without restrictions as to the appraised value. [31 G. A., ch. 212, § 7.]

SEC. **2900-a9. Deed or patent.** When, upon full compliance with the conditions of this act, any person shall become entitled to a deed or patent for any land, a deed or patent shall thereupon be executed and delivered to such person by the governor, on behalf of the state, duly attested with the seal of the state attached thereto, which deed shall, in addition to the usual formalities, also recite the name of the party making application to have the land surveyed, appraised and sold, the date and the amount of the appraisement, the name of the party making final payment and entitled to a deed therefor, whether as bona fide occupant or as highest bidder, and also that such deed is given for the purpose of conveying such title and interest in the land as the state may at the time own and possess, and has the right to convey. A record of such conveyance shall be made and kept by the clerk of the state land office of the secretary of state. [31 G. A., ch. 212, § 8.]

SEC. **2900-a10. Previous survey.** Whenever any such land shall be found to have been previously surveyed under and by virtue of any order of a court of record, and the record of such survey has been duly made and preserved, then and in that event, in the discretion of the secretary of state, a duly certified transcript of such record, together with the field notes accompanying the same, if obtainable, may be filed with the clerk of the state land office in the office of secretary of state, and when so filed shall obviate the necessity for any further survey of such land except when such survey becomes necessary for the purpose of execution of conveyance thereof, and the record of such transcript, when filed, shall constitute the official survey of such land. [31 G. A., ch. 212, § 9.]

SEC. **2900-a11. Boundary commission.** If in any proceeding contemplated by the provisions of this act, it shall become necessary to determine the boundary line between the state of Iowa and either of the states adjoining, the matter shall then be at once referred to the executive council, who shall thereupon proceed to confer with the proper authority of such adjoining state, and if the coöperation of the proper authority of

such adjoining state shall be obtained, then the executive council shall appoint a commission of three disinterested, competent persons, who shall, in conjunction with the parties acting for such adjoining state, have authority to ascertain and locate the true boundary line between the state of Iowa and such adjoining state, so far as the particular land under consideration at the time is concerned. The report of the commissioners with a statement of their findings shall be submitted to the executive council, who shall file the same with the clerk of the state land office in the office of the secretary of state. The line so ascertained and located shall constitute the true and permanent boundary line between the state of Iowa and such other state to the extent such line shall be so ascertainable and located. [31 G. A., ch. 212, § 10.]

SEC. 2900-a12. **How constituted—compensation.** The members of the commission shall be selected with reference to their fitness for the duties required and at least one of them shall be a competent surveyor and civil engineer. They shall receive for their services such amount as the executive council may deem reasonable, to be certified by the executive council to the auditor of state, who shall draw his warrant for the amount, and the same shall be paid out of the general fund. [31 G. A., ch. 212, § 11.]

SEC. 2900-a13. **Purchase money refunded on failure of title.** If the grantee of the state, or his successors, administrators, or assigns, shall be deprived of the land conveyed by the state under this act by the final decree of a court of record for the reason that the conveyance by the state passed no title whatever to the land therein described, because title thereto had previously for any reason been vested in others, then the money so paid the state for the said land shall be refunded by the state to the person or persons entitled thereto, provided the said grantee, or his successors, administrators or assigns, shall file a certified copy of the transcript of the said final decree with the executive council within one year from the date of the issuance of such decree, and shall also file satisfactory proof with the executive council that the action over the title to the land was commenced within ten years from the date of the issuance of patent or deed by the state. The amount of money to be refunded under the provisions of this section shall be certified by the executive council to the auditor of state, who shall draw his warrant therefor, and the same shall be paid out of the general fund. [31 G. A., ch. 212, § 12.]

SEC. 2900-a14. **Sales and leases for cash.** All sales and leases of land under the provisions of this act shall be for cash. All money received for such sales and leases shall be paid into the state treasury by the secretary of state. [31 G. A., ch. 212, § 13.]

SEC. 2900-a15. **Expenses of survey, appraisement and advertising—how paid.** The expenses of the survey and the appraisement, the expenses of the secretary of state or the clerk of the state land office in making the trip into the county to select the commissioners to appraise the land, the expenses of advertising and readvertising for sale of the land, and the expenses of reappraising whenever such reappraisement is deemed necessary, shall be certified by the secretary of state to the auditor of state, who shall draw his warrant for the amount, and the same shall be paid out of the general fund. [31 G. A., ch. 212, § 14.]

SEC. 2900-a16. **Lands in possession of person or corporation for ten or more years—how sold.** Provided, however, if any lands in the present or in any former channel of any navigable river, or island therein, or any lands formed by accretion or avulsion in consequence of the changes of the channel of any such river, have been for ten years or more in the

possession of any person, company or corporation, or of his or its grantors or predecessors in interest under a bona fide claim of ownership, and the person, company or corporation so in possession, or his or its grantors or predecessors in interest, have paid state or county taxes upon said lands for a period of five years, and have in good faith and under bona fide claim of title made valuable improvements thereon, and also in any other case where, in the judgment of the executive council, the person in possession of any land subject to the provisions of this act, has, in equity and good conscience, a substantial interest therein, then the said lands shall be sold to the person, company or corporation so in possession thereof as hereinafter provided. [31 G. A., ch. 212, § 15.]

SEC. **2900-a17. Notice — action to determine title and value — patent.** When any person, company or corporation so in possession of any such lands shall give to the secretary of state written notice of his or its claim, or whenever the executive council shall deem it advisable, it shall be the duty of the attorney-general to bring an action in equity, in the district court of the county in which said lands are situated, against the party in possession thereof to determine the title of the state to such lands, and the value thereof, exclusive of improvements made thereon by the occupant or by his or its grantors or predecessors in interest. If the person, company or corporation in possession of such land shall, after the court has determined the value thereof as herein provided, tender to the secretary of state the amount adjudged to be the value of said lands, exclusive of improvements made thereon by the occupant or by his or its grantors or predecessors in interest, a deed or patent of such land shall be executed by the governor, attested by the secretary of state, and delivered to the person, company or corporation making such tender, as provided by law. If the person, company or corporation so in possession shall fail to pay to the state the amount so adjudged within six months after the final determination of the action so brought by the state, then said lands shall be subject to the other provisions of this act. [31 G. A., ch. 212, § 16.]

SEC. **2900-a18. Applications under former law — deposit money refunded.** All applications for the purchase of any such lands, filed under the provisions of chapter one hundred eighty-five of the acts of the thirtieth general assembly, shall, if the applicants so desire, stand as applications under this act, and such land shall, unless the same fall within the provisions of sections fifteen and sixteen hereof, be appraised and sold as herein provided. If the land described in any application is covered by the provisions of sections fifteen and sixteen of this act, and notice thereof is given to the secretary of state as provided in section sixteen hereof, no deed or patent of such land, or any part thereof, shall be executed or issued until the title thereto shall have been established by the court as herein provided. If the party making such application, or his assignee, does not desire to prosecute his application, or if he does not purchase the land under this act, then all of the money deposited by him with the secretary of state under the provisions of chapter one hundred eighty-five of the acts of the thirtieth general assembly shall be repaid to said applicant by the secretary of state; and if any part of the money so deposited has been expended by the secretary of state, then the amount so expended shall be certified by the secretary of state to the auditor of state, who shall draw his warrant upon the general fund in favor of the person entitled thereto. [31 G. A., ch. 212, § 17.]

CHAPTER 2-B.

OF MEANDERED LAKES AND LAKE BEDS.

SECTION **2900-a19. Survey and sale authorized—canals.** The executive council of the state is hereby authorized and empowered to survey the meandered lakes and lake beds within this state, and sell the same as hereinafter provided, and to determine what lakes shall be maintained as the property of the state and what meandered lake beds belonging to the state may be drained, improved, demised or sold, and to grant authority to construct, equip and maintain canals between any of such lakes so maintained, where the public convenience requires it, said grant to be for such time and upon such terms as it may determine. [32 G. A., ch. 196; 30 G. A., ch. 186, § 1.]

The purchaser of a lake bed from the state may be assessed for the benefits accruing to his property included within a drainage district. *Jackson v. Board of Supervisors*, 140 N. W. 849.

SEC. **2900-a20. Signed statements—survey—report.** Upon the presentation to the executive council of a statement signed by not less than fifty freeholders, twenty of whom shall be actual residents of the township or townships in which said lake or lake beds are situated, of any county that any meandered lake or lake bed in such county is detrimental to the public health or the general welfare of the citizens of the county, and that it is unwise to maintain such meandered lake or lake bed as a permanent body of water, and that the interest of the state will be subserved by draining and improving such lake bed, the governor shall, within thirty days after the receipt of such statement, appoint a competent engineer who shall at once examine the situation and condition of such lake or lake bed, make a survey and plat thereof, and ascertain whether its location is such that it can be drained and improved, and make a full report to the executive council of the area and depth of water in the lake and of its general physical condition, which report shall be accompanied by his plat, field notes and profile of his survey. [30 G. A., ch. 186, § 2.]

SEC. **2900-a21. Hearing—commissioner—notice.** Upon receipt of the report of the engineer, the executive council shall determine whether such lake or lake bed shall be maintained and preserved as the property of the state, or whether the same shall be drained, improved and the land included within the meander lines thereof sold in the manner hereinafter specified; and to that end they may hear evidence upon any question involved in such determination at such time and place within the county, or within the counties if more than one, as may be fixed by the council, and may appoint a commissioner to take evidence in the county or counties, if more than one, in which the lake or lake bed is located, or at such other place or places within the state as may be directed by the executive council; and notice of the time and place of hearing by the council or by such commissioner shall be published once each week for four consecutive weeks in some newspaper within the county, or in a newspaper within each of the counties if more than one, where the lake or lake bed is located, the last publication being at least ten days prior to the day fixed for such hearing. The compensation of such commissioner shall be fixed by the executive council, which compensation and the cost of the publication of such notice shall be paid from the state treasury upon the order of the council. [30 G. A., ch. 186, § 3.]

SEC. 2900-a22. **Preservation or sale—drainage.** If the executive council shall determine that such lake or lake bed ought not to be drained, demised or sold, the same shall be kept and maintained as the property of the state for the benefit of the general public. If the executive council shall determine that it is to the interest of the state and the general public that the lake or lake bed, as to which the statement is presented, be drained, improved, demised or sold, it may permit the same to be drained under the provisions of the drainage law of the state, and the land included within the meander lines of such lake, which belongs to the state, shall bear its just proportion of the expense of draining such lake and shall be assessed for such expense in the same manner as the lands of private individuals are permitted to be assessed under the drainage laws of the state. [30 G. A., ch. 186, § 4.]

SEC. 2900-a23. **Power to lease, sell and convey—deed or patent.** Whenever the executive council shall determine that any lake or lake bed within the state should be drained, improved, demised or sold, it shall have the right, either before or after such lake or lake bed is drained, to sell and convey by deed or patent the land lying within the meander lines of such lake or lake bed and which belongs to the state; and express authority is hereby given to the executive council to make such sale or sales for and in behalf of the state and to execute and deliver to the purchaser of such land the necessary deed or patent to insure to him title thereto, which deed or patent shall be executed by the governor in behalf of the state, and have the seal of the state attached thereto. But no sale of any of the lands composing any of the lake beds of the state shall be made by the executive council until a complete survey thereof has been made and the same subdivided to correspond with the government subdivisions of public land. Any land owned by the state of Iowa within the high-water lines of any nonnavigable stream or lake and also any lands within the bed of any lake bed authorized to be drained under the provisions of this chapter may be leased by the executive council in its discretion, until otherwise disposed of, the rental to be paid into the general funds of the state. [35 G. A., ch. 260, § 1.] [30 G. A., ch. 186, § 5.]

SEC. 2900-a24. **Appraisement.** After such lake or lake bed has been surveyed and the land composing the same subdivided as hereinbefore required, and a plat of such survey filed with the secretary of state, and the county auditor of the county in which said lake or lake bed is situated, the lands belonging to the state which lie within the meander lines of the original government survey, and composing the lake beds, shall be appraised by a commission appointed by the governor, consisting of three disinterested freeholders of the state, one of whom shall be a resident of the county in which the land is situated, who shall examine and appraise said land, and return a written report of such appraisement to the governor, which report shall be filed in the office of the secretary of state. [30 G. A., ch. 186, § 6.]

SEC. 2900-a25. **Sale—rights of abutting landowners.** That the law as it appears in section twenty-nine hundred-a twenty-five of the supplement to the code, 1907, be and the same is hereby repealed, and the following enacted in lieu thereof:

"After the report of the appraisers has been received and filed in the office of the secretary of state, the executive council shall offer the land belonging to the state and composing such lake bed, and included in such survey and appraisement, for sale, and the persons owning lands abutting upon such lake bed and contiguous to lands owned by the state therein,

shall have the first right to purchase the lands offered for sale by the state, in an amount sufficient to make the lands owned by them which abut upon the lake or lake bed and are contiguous to lands of the state, conform to the smallest government subdivision of public lands, at the price fixed by the appraisers. The option to purchase by abutting landowners shall terminate ninety days after the date of filing the appraisers' report in the office of the secretary of state. All other lands included in such survey and composing the lake bed belonging to the state, which may be sold under the provisions hereof, shall be sold for the highest price obtainable; but no sale of any of said land shall be made at less than the appraised value thereof, and the land within no lake bed shall be sold, under the provisions of this section, for an amount less than the aggregate expense incurred or authorized by the state for surveying, appraising, draining and other expenses on account of said lake or lake bed." [33 G. A., ch. 191, § 1.] [32 G. A., ch. 197; 30 G. A., ch. 186, § 7.]

SEC. **2900-a26. Cash sales—expenses.** All sales of land under this act, except as otherwise provided in section seven[1] of this act, shall be for cash, and the purchase price thereof shall be paid to the secretary of state and by him paid over to the state treasurer. All expenses of the survey of the lakes and lake beds herein provided for and the appraisement thereof, and all assessments made against the lands belonging to the state for draining such lakes or lake beds, shall be audited by the executive council and by it certified to the auditor of state and paid out of the general fund of the state treasury upon the warrant of the auditor of state. [30 G. A., ch. 186, § 8.]

[[1]See § 2900-a25 herein. EDITOR.]

SEC. **2900-a27. Net proceeds.** After deducting all costs and expenses connected with the survey, appraisement, drainage and sale of said lands, the net proceeds derived from the sale thereof shall be transmitted by the treasurer of state to the county treasurer of the county in which the land is situated, and the county treasurer to whom such proceeds are transmitted shall execute his receipt in duplicate for the same to the treasurer of state, and one of such receipts shall be filed in the office of the county auditor in the county where the land is located. The money received by the county treasurer shall be placed to the credit of the county road fund and expended under the direction of the board of supervisors in the same manner as other road funds. [30 G. A., ch. 186, § 9.]

CHAPTER 2-C.

OF ISLANDS IN THE WATERS OF THE STATE.

SECTION **2900-a28. Sale or lease authorized.** That the executive council of the state be, and it is hereby, authorized and empowered to sell, convey, lease or demise any of the islands belonging to the state which are within the meandered banks of rivers in the state, and to execute and deliver a patent or lease thereof. Provided that nothing in this act shall be construed to apply to islands in the Mississippi or Missouri rivers. [30 G. A., ch. 187, § 1.]

SEC. **2900-a29. Survey—appraisement—sale advertised—written bids.** Before a sale of any island is made under the provisions of sec-

tion one hereof, the executive council shall cause a survey and plat of such island to be made, showing its location and area, and the plat and notes of such survey shall be filed with the secretary of state. The land composing the island shall then be appraised by a commission appointed by the governor, consisting of three disinterested freeholders of the state, who shall report their appraisement to the executive council. The sale of the island shall then be advertised once each week for four consecutive weeks in some newspaper of general circulation published in the county where the island is located, and proof of such publication filed with the executive council. The sale shall be made upon written bids addressed to the executive council of the state, and the advertisement shall fix the time when such bids will be received and opened. All bids shall be opened by the executive council at the time fixed, and the island may thereupon be sold to the highest bidder and at not less than its appraised value. [30 G. A., ch. 187, § 2.]

SEC. **2900-a30. Lease—written bids.** If it shall be deemed expedient to lease any such island, a lease thereof may be made upon written bids addressed to the executive council, and the island proposed to be leased shall be surveyed and platted, and notice of the leasing thereof and of the receiving and opening of bids shall be published, in the manner provided in section two hereof, but no appraisement shall be necessary. Upon the opening of the bids received by the executive council it may make a lease of such island to the highest bidder for such term as is deemed advisable. [30 G. A., ch. 187, § 3.]

SEC. **2900-a31. Sales and leases for cash—expenses.** All sales and leases must be for cash, and the money received therefor shall be paid into the state treasury. All expenses incurred in making the survey, plat, appraisement, sale or lease of any such island shall be certified by the executive council to the auditor of state, who shall draw his warrant upon the state treasury for the amount, and the same shall be paid from the general fund. [30 G. A., ch. 187, § 4.]

SEC. **2900-a32. Patent or lease.** When any sale or lease of any island belonging to the state is made by the executive council as herein provided, the governor shall execute and deliver to the purchaser or lessee a patent or a lease thereof, as the case may be, duly attested by the seal of the state of Iowa. [30 G. A., ch. 187, § 5.]

CHAPTER 3.

OF PERPETUITIES AND GIFTS.

SECTION 2901. Disposition of property.

A railroad lease for a long term of years is not void under the statutory provisions against perpetuities. *Sioux City Terminal R. & W. Co. v. Trust Co.*, 82 Fed. 124; *First Nat. Bank v. Sioux City Terminal R. & W. Co.*, 69 Fed. 441.

A restraint on alienation in violation of the statutory provision is invalid; but the language relied on as imposing such condition will be so construed if possible as to make it consistent with the grant. *Hubbird v. Goin*, 137 Fed. 822.

A lease for any number of years is not in violation of the statute of perpetuities, for the lessor is not thereby precluded from disposing of the property, nor the lessee from assigning the lease, and by uniting in a conveyance the lessor and lessee may convey both the fee and the leasehold interest. *In re Hubbell Trust*, 135–637, 113 N. W. 512.

Where real property is devised in fee simple and without condition, a restraint on alienation thereof is invalid. *In re Estate of Ogle*, 146–33, 124 N. W. 758.

SEC. 2903. Property in trust.

A bequest to the permanent school fund of a particular county held valid. *Chapman v. Newell*, 146–415, 125 N. W. 324.

SEC. **2904-a. Acceptance of gifts, devises, or bequests authorized.** Gifts, devises or bequests of property, real or personal, made to any state institution for purposes not inconsistent with the objects of such institution, may be accepted by its governing board, and such board may exercise such powers with reference to the management, sale, disposition, investment or control of property so given, devised or bequeathed, as may be deemed essential to its preservation and the purposes for which the gift, devise or bequest was made. [31 G. A., ch. 144.]

CHAPTER 4.

OF THE TRANSFER OF PERSONAL PROPERTY.

SECTION 2905. Conditional sales—recording.

Where a cash register was sold with a condition that the title should not pass to the purchaser until payment therefor was made, and there was no recorded instrument evidencing such sale, held that an attachment levied on the register and other property of the purchaser took priority over the title of the seller. *National Cash Register Co. v. Broeksmit*, 103–271, 72 N. W. 526.

A reservation of the title to the property by the vendor without recording is not valid as against a subsequent mortgagee without notice, although the subsequent mortgage is not recorded. *Union Bank v. Creamery Package Mfg. Co.*, 105–136, 74 N. W. 921.

Prior to the enactment of this statutory provision, it was held that an innocent purchaser of the property from one in possession under a contract for conditional sale acquired no title thereto as against the original owner, unless the transaction was fraudulent. And under the statute, if the instrument is duly acknowledged and recorded, the purchaser acquires no title as against the original vendor, although the vendee has made an absolute contract to pay for the property, and has given notes for part of the purchase price. *National Cash Register Co. v. Zangs*, 127–710, 104 N. W. 360.

The instrument should be signed by the vendor or lessor; this is the plain provision of the statute. *National Cash Register Co. v. Schwab*, 111–605, 82 N. W. 1011.

This section refers to sales which are to take effect on a condition to be performed by the vendee, and not to those conditioned on performance of some agreement by the vendor. *Davis Gasoline Engine Works Co. v. McHugh*, 115–415, 88 N. W. 948.

A conditional sale, such as is referred to in this section, involves delivery to the vendee as owner with reservation to the vendor of the title only for the purpose of security. Where the contract provides that there shall be no delivery until payment, the mere fact that the agent of the seller gives possession to the buyer for a temporary purpose does not bring the case within the provisions of the statute. Possession cannot be relied on as sufficient evidence of title. *Gaar v. Nichols*, 115–223, 88 N. W. 382.

To constitute a conditional sale, within the terms of the statute as to recording instruments evidencing such sale, there must be a delivery of possession to the purchaser with the intention of passing immediate ownership, subject only to the reservation of title to the seller as security for the purchase money. If the contract is conditional as to the transfer of ownership to the vendee, so that, on his failure to perform the condition no right as owner has passed to him, and no definite obligation to pay the purchase price has accrued, then the transaction is not a conditional sale, within the meaning of the statute. In such a case the vendee has only an executory and conditional agreement for purchase, and until he exercises his right under such agreement, he remains merely a bailee. *Donnelly v. Mitchell*, 119–432, 93 N. W. 369.

The fact that the purchaser from the conditional vendee is at the time of advancing the money already in possession will not defeat his right to protection as against an unrecorded conditional sale. *Rock Island Plow Co. v. Maynard Sav. Bank*, 123–640, 99 N. W. 298.

The seller of goods under a contract of conditional sale, reserving the title until the goods are paid for, may by interven-

tion reclaim the goods before the performance of the condition from an assignee for the benefit of creditors, without previous demand. *In re Assignment of Wise*, 121–359, 96 N. W. 872.

In such case, if a note has been given to the seller for the purchase price, the value of the goods reclaimed by him should be credited thereon, and the balance may be proved as a claim against the insolvent estate. Under such circumstances the recording of the instrument of conditional sale is immaterial. *Ibid.*

An unrecorded instrument of conditional sale being void as against the creditors of the buyer without notice, the property sold passes to the buyer's trustees in bankruptcy. *In re Tweed*, 131 Fed. 355.

While a general creditor having no lien upon the property is not protected by the recording act, the assignee in bankruptcy may assert the claims of such creditor against the mortgagee. The provisions of the bankrupt act preserve for the equal benefit of all the creditors of the bankrupt the same rights in and to property held by him that any one of them might have acquired therein by purchase from, or seizure and sale under, judicial process against him if bankruptcy proceedings had not ensued. *In re Smith*, 132 Fed. 301.

The seller of personal property under an unrecorded contract of conditional sale cannot, by seizure of the property for non-payment prior to the recording of a mortgage given by the purchaser, put himself into the position of a subsequent purchaser without notice. *Swayne v. Tillotson*, 148–501, 127 N. W. 667.

A trustee in bankruptcy succeeds only to the right of the bankrupt in the property owned or claimed by him at the time of the bankruptcy, and in cases unaffected by fraud, takes subject to the conditions of sale to the bankrupt, although the instrument is not recorded. *In re Hager*, (D. C.) 166 Fed. 972.

The word "creditors" means lien creditors, and knowledge of the unrecorded instrument before a lien is obtained defeats any preferential rights thereunder. *Nauman Co. v. Bradshaw*, (C. C. A.) 193 Fed. 350.

Therefore, an unrecorded instrument of conditional sale is valid as against the trustee in bankruptcy of the conditional vendee. *Ibid.*

Section applied. *Thomson v. Smith*, 111–718, 83 N. W. 789.

Before a subsequent purchaser can be heard to question the validity of an unrecorded instrument of sale, he must show not only that he is a subsequent purchaser but that he became so without notice of the conditional sale. The burden is on him to prove such facts. *Zacharia v. Cohen Co.*, 140–682, 119 N. W. 136.

SEC. 2906. Sales or mortgages—recording.

Change of possession: It is the retention of actual possession by the vendor or mortgagor without the recording of the written instrument evidencing the transaction which renders it invalid as to subsequent levy of attachment or execution, and in case of property not capable of immediate actual delivery the question is not to what extent there has been a manual act of transfer from the vendor to the vendee, but whether, at the time of the levy, the vendor still retains the possession which had previously been in him as owner of the property. *Peycke v. Hazen*, 119–641, 93 N. W. 568.

Where there has been a change of possession a recorded instrument of sale is not necessary to defeat a subsequent levy on the property as belonging to the vendor. *Leader v. Farmers' Loan & Trust Co.*, 144–180, 122 N. W. 833.

Change in possession to constitute such notice as will obviate the necessity of recording must be such as to indicate a change of ownership. *Brown-Camp Hdw. Co. v. Hawthorne*, 154–456, 135 N. W. 75.

Possession in third person: This section does not apply where the property at the time of sale or mortgage is not in the possession of the vendor or mortgagor. Possession may be taken by symbolical delivery, as by the turning over of the key to the premises where the property is kept. *Frank v. Levi*, 110–267, 81 N. W. 459.

Where the vendor of household goods who resided in another state, the bill of sale not being recorded, rented a room in the place in this state where she intended to reside and stored the goods therein, held that the goods were in her possession and therefore subject to attachment by an officer levying execution thereon under a judgment against her, and not in the possession of the person from whom the room was rented so as to render recording unnecessary. *Young v. Evans*, 118–144, 92 N. W. 111.

Fraud: Under the circumstances of a particular case, held that mortgagees used reasonable dispatch in causing their mortgages to be filed for record and that therefore they were not guilty of fraud, although the mortgages were not recorded before credit was extended to the mortgagor. *Spencer Co. v. Papach*, 103–513, 70 N. W. 748, 72 N. W. 665.

Withholding from record does not alone render the mortgage fraudulent, nor is it fraudulent to provide in the mortgage that the mortgagor shall retain possession, sell at retail and keep up the stock. *Ward v. Parker*, 128–124, 103 N. W. 104.

The taking of a mortgage upon property worth much more than the amount

of the debt secured does not of itself render the mortgage void. *Ibid.*

The act of a creditor in withholding from record a chattel mortgage securing his debt, by agreement with the mortgagor, until the bankruptcy of the latter, while it may render the mortgage invalid as a lien as against subsequent creditors without notice, does not of itself affect his right to prove his debt in bankruptcy nor subordinate it to the claims of subsequent creditors. *In re Ewald*, 135 Fed. 168.

Who protected: A mortgagee under a mortgage to secure a preëxisting debt is not protected against one who has an equitable interest or right in the property anterior to the mortgage. *Flannigan v. Althouse*, 56–513, 9 N. W. 381; *Meyer v. Evans*, 66–179, 23 N. W. 386.

Where the mortgagee on the execution of the mortgage to secure an antecedent debt grants an extension of time on the debt secured he becomes entitled to protection under the recording laws. *Union Bank v. Creamery Package Mfg. Co.*, 105–136, 74 N. W. 921.

A person cannot unlawfully seize the mortgaged property and then transform himself into an innocent purchaser thereof by an *ex parte* cancellation of a debt due him from the owner. *Iowa Loan Co. v. Kimball Piano Co.*, 124–150, 99 N. W. 576.

Levy of attachment or execution gives priority over unrecorded chattel mortgages. The rule is otherwise as to real property. *Albia State Bank v. Smith*, 141–255, 119 N. W. 608.

One who acquires a lien on property by an equitable levy under code § 4089 is protected against a prior sale of the property of which he has no notice by record or otherwise. *Rankin v. Schultz*, 141–681, 118 N. W. 383.

The owner of an invalid or unrecorded first mortgage cannot by seizure of the property thereunder put himself in the position of a subsequent purchaser without notice as against an unrecorded second mortgage. *Swayne v. Tillotson*, 148–501, 127 N. W. 667.

As between the parties and against those who are not protected by the recording laws, the property intended to be mortgaged may be identified by parol evidence notwithstanding the description is so imperfect as not to impart record notice. *Ibid.*

An assignee for the benefit of creditors is not a subsequent purchaser entitled to protection against an unrecorded chattel mortgage. *Gluck Co. v. Therme*, 154–201, 134 N. W. 438.

A bill of sale, in effect a mortgage, executed four months before an act of bankruptcy, must be recorded to be effectual as against the trustee in bankruptcy of the vendor. *In re Burlage*, (D. C.) 169 Fed. 1006.

Existing creditors: Failure to record a mortgage will not render it invalid as to a creditor whose claim antedates the giving of the mortgage. *Garner v. Fry*, 104–515, 73 N. W. 1079.

A mortgagee whose mortgage is not recorded until after the death of the mortgagor is postponed to the claims of the prior creditors, and the administrator of the mortgagor in the interest of such creditors whose claims have been filed with him, may subject the property to the payment of such claims in priority to the lien of the mortgagee. *Blackman v. Baxter*, 125–118, 100 N. W. 75.

To entitle a creditor to protection against an unrecorded sale it must appear that he acquired a lien by attachment or execution levy or otherwise without notice of such sale. *Orr v. Kenworthy*, 143–6, 121 N. W. 539.

Notice to the sheriff before levy is sufficient to charge the creditor with knowledge. *Ibid.*

The recording statute has no application where the actual possession passes to the person who claims title under sale. *Ibid.*

Actual notice: Notice to an agent, even though by information brought to his knowledge before the beginning of his agency, will be presumed to have been retained for a reasonable time. *McClelland v. Saul*, 113–208, 84 N. W. 1034.

Priority in recording is not material. The question under the recording act is whether the mortgage prior in time is recorded before rights of others without notice thereof have accrued. *Nicholson v. Aney*, 127–278, 103 N. W. 201.

An attaching creditor taking with actual notice is not protected against an unrecorded mortgage. Notice is sufficient if such as to put a reasonable man upon inquiry which would certainly lead to the knowledge or discovery of the rights of the mortgagee. *Aultman & Taylor Mach. Co. v. Kennedy*, 114–444, 87 N. W. 435.

The burden is on the party claiming as against an unrecorded chattel mortgage to show that he took without notice. *Diemer v. Guernsey*, 112–393, 83 N. W. 1047.

One who takes a mortgage from one in possession acquires priority over a vendee of the property under a prior sale which is not recorded, in the absence of actual notice of such sale. *Martin v. Lesan*, 129–573, 105 N. W. 996.

The burden is upon the vendee in such case to show actual notice to the mortgagee. *Ibid.*

A creditor whose claim antedates the execution of the mortgage must obtain a lien as by attachment or other levy upon the mortgaged property before notice actual or constructive of the mortgage in order to be protected against it on ac-

count of failure to record. *Murphy v. Murphy*, 126–57, 101 N. W. 486.

A mortgagee accepting his mortgage with knowledge of a condition imposed for the benefit of other mortgagees is bound by such condition and cannot question the validity of the prior mortgage. *First National Bank v. Reid*, 122–280, 98 N. W. 107.

Description: A defective description may be cured by a subsequent delivery of the property to the mortgagee as against persons who have not acquired any right or interest before such delivery. *Kelley v. Andrews*, 102–119, 71 N. W. 251.

Where the chattel mortgage described several mares "and all increase of said mares and the increase of the increase," held that such description included future increase of the animals described and not merely the increase in existence at the time of the execution of the mortgage. *Hopkins Fine Stock Co. v. Reid*, 106–78, 75 N. W. 656.

In determining whether particular articles are covered by a chattel mortgage on a stock of goods under the head of furniture and fixtures, the situation of the parties and all the surrounding circumstances may be considered in determining the intent. *Brody v. Chittenden*, 106–524, 76 N. W. 1009.

In such case held that jewelers might be asked as witnesses to state whether regulators were regarded by the trade as part of the stock or as fixtures or as tools. *Ibid.*

The term "furniture" used in a chattel mortgage of a stock of jewelry may cover implements and instruments used in the business. *Ibid.*

For the purpose of sufficiently describing certain animals to be selected from a large number, it is not sufficient to allege merely characteristics common to the animals to be described and others, and if the essential distinction, such as a peculiar mark or brand, is not established, the description is not sufficient. *Packers' National Bank v. Chicago, M. & St. P. R. Co.*, 122–503, 98 N. W. 310.

Therefore held that a general description accompanied with the designation of a particular brand was not sufficient to constitute notice, it appearing that the brand had not been placed upon the animals at the time when it was important for the purchaser to know which animals were covered by such mortgage. *Ibid.*

No sufficient description is afforded by the sweeping statement to the effect that the instrument is intended as a conveyance to the mortgagee of all the property that the mortgagor has, or all that he ever expects to have, and the record of such conveyance does not impart notice to a purchaser of the property. *Farmers' & Merchants' Bank v. Stockdale*, 121–748, 96 N. W. 732.

The description of property in a chattel mortgage to be sufficient as against third persons having constructive notice only must be such as that the property can be identified by reference to the instrument itself, aided by such inquiries as may be indicated or directed thereby. *Ibid.*

Where there is no statement as to possession, ownership or location of the property, but only an enumeration of items, the description is insufficient to impart constructive notice. *Iowa Lumber Co. v. Cassidy*, 107–564, 78 N. W. 210.

Where the mortgage described certain items of property and indicated by its provisions that the mortgagor was the owner of an interest in the property and that it was located in the county where it was recorded, held that the description was sufficient to impart record notice. *Preston v. Caul*, 109–443, 80 N. W. 522.

In order that the record of a chattel mortgage be constructive notice, the description of the property must be sufficiently definite so that one examining the record may be able from such description to ascertain the property with reasonable certainty. *Westinghouse Co. v. McGrath*, 131–226, 108 N. W. 449.

And held that a description which gave only the location of the property as within the county and the name of the owner of the property and its general character, but did not specify the particular location nor the possession of such property, was not sufficient. *Ibid.*

The description in a chattel mortgage of "twenty-five acres of corn hereafter to be grown in Franklin county" held not to be sufficient as against a purchaser without actual notice. *Farmers' & Merchants' Bank v. Stockdale*, 121–748, 96 N. W. 732.

A description in a chattel mortgage of "one hundred and one yearlings and two-year-olds, branded with the letter F on left hip," held sufficient to warrant the introduction of parol evidence to show that the description was used with reference to certain animals intended by the parties to be covered by the mortgage. *Frick v. Fritz*, 115–438, 88 N. W. 961.

Whether or not the instrument on its face contains sufficient description to identify any property is always a question for the court; but whether or not, being sufficient in law, it is sufficient to cover the property in dispute where extrinsic evidence shows some mistake in the description is a question for the jury under proper instructions. *Livingston v. Stevens*, 122–62, 94 N. W. 925.

Whether certain property, corresponding to the description in the mortgage, was intended to be included is for the jury, while it is for the court to say whether the description is sufficient to impart notice of such an intention to third persons. *Chipman v. Weiny*, 112–702, 84 N. W. 905.

The whole description should be considered in determining whether or not a third person aided by the inquiry which the instrument itself suggests would be enabled to identify the property. It is error for the court to instruct that a defect or inaccuracy in the description is immaterial. *Packers' National Bank v. Chicago, M. & St. P. R. Co.*, 114–621, 87 N. W. 653.

If the description of animals covered by chattel mortgage does not point out the particular animals with such definiteness that they may be identified, it will be invalid as to a subsequent mortgagee or purchaser who has no actual knowledge of the property intended to be covered. *Casady v. German Sav. Bank*, 140 N. W. 401.

In such case, the prior mortgagee has no lien upon the funds derived from the sale of the animals intended to be described. *Ibid.*

Priority: Where sale of machinery was made to a tenant on condition that it should be set up on the premises, and a chattel mortgage given for the purchase price when accepted, held that the chattel mortgage took priority over the landlord's lien, although not recorded until some days after the machinery was set up and accepted. *Davis Gasoline Engine Works Co. v. McHugh*, 115–415, 88 N. W. 948.

The rights of a chattel mortgagee without notice of a prior unrecorded mortgage are superior to those of the holder of the prior mortgage, although possession thereunder was taken before the recording of the subsequent mortgage, and the prior mortgagee will not be given preference on the ground that he was a creditor. *Sheets v. Poff*, 123–714, 99 N. W. 573.

Books of account: No record is required of the assignment of books of account which are turned over to the assignee. *Preston v. Peterson*, 107–244, 77 N. W. 864.

Where possession in such case was delivered to the assignee, held that subsequent possession by the assignor for a temporary purpose would not render the sale invalid for want of recording. *Ibid.*

When recording necessary: An unrecorded mortgage is not invalid as between the parties. *Aultman & Taylor Mach. Co. v. Kennedy*, 114–444, 87 N. W. 435.

A contract with reference to a stock of goods which did not provide for any lien thereon or transfer of title thereto, held not to be within the terms of the recording law. *Clement v. Swanson*, 110–106, 81 N W. 233.

An unrecorded assignment of a chattel mortgage will be held invalid as to subsequent purchasers or mortgagees without notice. *Central Trust Co. v. Stepanek*, 138–131, 115 N. W. 891.

Waiver of lien: Parol evidence is competent to establish as against the mortgagee in favor of the purchaser of the mortgaged property a system or course of dealing authorized by the mortgagee inconsistent with the provisions of the mortgage, and waiving the mortgagee's lien. *Livingston v. Stevens*, 122–62, 94 N. W. 925; *Livingston v. Heck*, 122–74, 94 N. W. 1098.

The assignee of an unrecorded mortgage cannot maintain an action for conversion against one claiming under the mortgagor through a sale made in good faith with consent of the mortgagee and without notice, actual or constructive, of the assignment. *Farmer v. Bank of Graettinger*, 130–469, 107 N. W. 170.

Residence: The residence of the mortgagor where the chattel mortgage is to be recorded may be different from his legal domicile. Therefore held that a mortgage given by a railroad contractor on property in his possession in a county where he was at work, and in which he actually resided with his family while engaged in performing his contract, was properly recorded in such county, although his residence there was only for a temporary purpose. *In re Brannock*, 131 Fed. 819.

Recording in another state: Recording of a chattel mortgage in North Dakota, where the mortgagor resides, held to be of no effect with reference to property covered by the mortgage situated in this state. *Aultman & Taylor Mach. Co. v. Kennedy*, 114–444, 87 N. W. 435.

As a general rule the law of the place where the property is situated at the time of the transfer governs the validity of the mortgage under the recording acts. *Ibid.*

Wife joining: A mortgage on one of three teams of horses, any one of which might be claimed as exempt from execution, is valid without the joinder of the wife therein. The acts of the husband in executing the mortgage constitute an election to claim one of the other teams rather than the team mortgaged as exempt. *Grover v. Younie*, 110–446, 81 N. W. 684.

A chattel mortgage on exempt property is not valid unless signed both by the owner and his wife. *Nicholson v. Aney*, 127–278, 103 N. W. 201.

Conceding that a mortgage of exempt property signed by the husband alone may afterwards be ratified and confirmed by the wife, such ratification will not relate back to the prejudice of intervening credits, lien holders or purchasers. *Ibid.*

Whether an assignment of wages exempt from execution for a debt of the assignor must be in writing concurred in and signed by the wife of the assignor under the provision of code § 2906 requiring incumbrances of exempt personal property to be so executed, *quaere*. *Peterson v. Ball*, 121–544, 97 N. W. 79.

An assignment of exempt earnings without the wife's consent is not prohibited by the requirement that she shall join in chattel mortgage of exempt property. *Dowling v. Wood*, 125–244, 101 N. W. 113.

SEC. 2911. Mortgagee entitled to possession.

As the mortgagee does not have legal title to the property mortgaged he does not waive his right to foreclose by levying an attachment on the property. *Stein v. McAuley*, 147–630, 125 N. W. 336.

SEC. **2911-a. Bulk sales of merchandise—notice to creditors.** No person, firm, or corporation engaged in the retail or wholesale business of buying and selling merchandise for profit shall at a single transaction, and not in the regular course of business, sell, assign, or deliver the whole, or a major part of his stock in trade unless he shall, not less than three days previous to such sale, assignment, or delivery, send or cause to be sent to his creditors by registered mail, a notice of his intention to make such transfer, assignment or delivery, which notice shall be in writing describing in general terms the property to be sold, assigned, or delivered, and the parties thereto. [34 G. A., ch. 150, § 1.]

SEC. **2911-b. Violation—presumption of fraud.** All such sales, assignments, or deliveries of commodities which shall be made without the formalities required by the provisions of section one hereof, will be presumed to be fraudulent and void as against all persons who were creditors of the vendor at the time of such transaction. [34 G. A., ch. 150, § 2.]

SEC. **2911-c. Not applicable to certain transfers.** Transfers under this act shall include sales, exchanges and assignments, but nothing in this act shall apply to transfers by or to executors, administrators, receivers, assignees under voluntary assignment for the benefit of the creditors, trustees in bankruptcy or any public officer under judicial process. [34 G. A., ch. 150, § 3.]

CHAPTER 5.

OF REAL ESTATE.

SECTION 2912. Who deemed seized.

The owner of real property is presumed to be in possession thereof until adverse possession has been taken by another. *Britt v. Gordon*, 132–431, 108 N. W. 319.

The devisee of land of which testator shall die seized acquires no interest in land which the testator before his death has contracted to convey, the vendee having taken possession and not being in default. In such case the vendee has the real title and the testator's interest passing to the devisee is personalty only. *In re Estate of Miller*, 142–563, 119 N. W. 977.

SEC. 2913. Estate in fee simple.

A fee may be created without the use of the word "heirs," and where a conveyance was made to the wife without limitation in the granting clause, but with a subsequent condition that the property was for her sole use and that she was not to have the privilege of deeding or mortgaging it, held that the granting clause vested in the wife a fee title, and that the condition was void as a restraint upon alienation. *Teany v. Mains*, 113–53, 84 N. W. 953.

The fact that words of inheritance are not used does not affect the rights of the grantee where the habendum clause expressly describes such right as one which is to exist forever. *Baker v. Kenney*, 145–638, 124 N. W. 901.

It is not necessary in order to convey an estate in fee simple that the word "heirs" appear in the granting clause. *Husted v. Rollins*, 156–546, 137 N. W. 462.

Nevertheless, the absence of words of inheritance may be significant, for although under the following section every conveyance is presumed to pass all the interest of the grantor, it is not therein provided that every conveyance shall create an estate in fee simple. *Ibid.*

SEC. 2914. Conveyance passes grantor's interest.

A remainderman who has a possibility coupled with an interest which may at some future time ripen into an estate, has such interest as will support a conveyance by him to another. *McDonald v. Bayard Sav. Bank*, 123–413, 98 N. W. 1025.

It will be presumed that every conveyance passes all the interest of the grantor therein unless the contrary intent can reasonably be inferred from the terms used. *Husted v. Rollins*, 156–546, 137 N. W. 462.

SEC. 2915. After-acquired interest.

Under a warranty deed a title subsequently acquired by the grantor inures to the grantee. *Hays v. Marsh*, 123–81, 98 N. W. 604.

The grantor subsequently acquiring an outstanding title cannot question the conveyance which purports to convey the entire title to the property. So held where the owner of a life estate gave a mortgage purporting to cover the fee and subsequently by inheritance acquired a fee title to the property. *Whitley v. Johnson*, 135–620, 113 N. W. 550.

The grantor in a deed purporting to convey a fee simple title is estopped from subsequently asserting any interest in the property as heir. *Irish v. Steeves*, 154–286, 134 N. W. 634.

SEC. 2916. Adverse possession.

Possession is not essential to the validity of a lease. *Beck v. Minnesota & Western Grain Co.*, 131–62, 107 N. W. 1032.

SEC. 2917. Future estates.

An estate may be created to begin in the future, and the grant of such an estate, while it passes no present title, does pass a present interest. *Lewis v. Curnutt*, 130–423, 106 N. W. 914.

While estates may be created to commence at a future day, the title is and must be in someone at all times. *Wales v. Sammis*, 120–293, 94 N. W. 840.

Estates may be created by devise to commence at a future day, and a vested remainder may be supported by an estate for years. *Shafer v. Tereso*, 133–342, 110 N. W. 846.

SEC. 2918. Declarations of trust.

Express trusts: An express trust cannot be shown by parol evidence. *Hays v. Marsh*, 123–81, 98 N. W. 604; *Ostenson v. Severson*, 126–197, 101 N. W. 789.

In the absence of documentary evidence of an express trust it cannot be established. *Hoon v. Hoon*, 126–391, 102 N. W. 105.

Deeds which recite consideration as paid cannot be shown by parol to create a trust in favor of the grantor as against the grantee. *Byerly v. Sherman*, 126–447, 102 N. W. 157.

A deed reciting a consideration in hand paid cannot by parol evidence be converted into an instrument creating a trust. *Willis v. Robertson*, 121–380, 96 N. W. 900.

The requirement that an express trust must be evidenced in writing has no reference to trusts in personal property. *In re Estate of Fisher*, 128–18, 102 N. W. 797.

A trust of personal property may be established by parol. *Merrit v. Torrance*, 129–310, 105 N. W. 585.

An agreement by a mortgagee taking title to the property at foreclosure sale that he will reconvey on payment of the amount due under the mortgage amounts to the creation of an express trust which cannot be established by parol. *Donaldson v. Empire Loan & Inv. Co.*, 130–467, 106 N. W. 192.

An agreement to take title by sheriff's deed by way of security for an indebtedness is not an agreement for an express trust which must be in writing, but it gives rise to a resulting or constructive trust. *McElroy v. Allfree*, 131–112, 108 N. W. 116.

Section applied. *Gregory v. Bowlsby*, 115–327, 88 N. W. 822.

If the trustee admits the trust or if the parol trust has been fully carried out and executed the statute does not apply. *Johnston v. Jickling*, 141–444, 119 N. W. 746.

This section does not prevent proof by parol that a conveyance absolute in form was intended between the parties to be a mortgage; and this rule is applicable to one acquiring a legal title from a third person under an arrangement with another who undertakes to pay the purchase price, and for whom the purchase money is advanced by way of a loan. *Jones v. Gillett*, 142–506, 118 N. W. 314, 121 N. W. 5.

Parol evidence is not admissible to impose a trust upon the title to property transferred by a written instrument. *Schurz v. Schurz*, 153–187, 128 N. W. 944, 133 N. W. 683.

It is not essential to the validity of a conveyance in trust that it be acknowledged or recorded, or that it be based upon a consideration. *Schumacher v. Dolan*, 154–207, 134 N. W. 624.

An alleged express oral agreement of the wife to take and hold title to property in trust for the husband is not a trust which arises by operation of law and it is not provable except by writing duly executed. *Mullong v. Schneider*, 155–12, 134 N. W. 957.

Resulting trust: The theory of a resulting trust is that he who supplies the purchase money intends it to be for his own benefit and not for that of another and that the conveyance is taken in the

name of another as a matter of convenience or arrangement between them. If two or more advance the price and the deed is taken in the name of one only, a trust will result in favor of the other for a share proportionate to the part of the price paid. Payment to raise a trust *pro tanto* must be for an aliquot part of the property. The burden being on the party alleging the trust to clearly establish it, the evidence must show that payment for an aliquot part was intended. *Culp v. Price*, 107–133, 77 N. W. 848.

A father paying the purchase price of land, the title being taken in his son's name, has a resulting trust therein unless the money paid is by way of advancement. But before the legal title will be disturbed, the resulting trust must be established by clear and satisfactory evidence, and the presumption that the law raises that the conveyance is by way of advancement must be overcome by proof to the contrary intention. *Ibid.*

The father's testimony as to his intention is competent in such a case as are also his declarations made at the time. The fact that the son has already been provided for and that the father and other children are left unprovided for may also be taken into account. *Ibid.*

Evidence that the consideration for a conveyance was to be furnished after it was delivered will not show a resulting trust. *Burkhardt v. Burkhardt*, 107–369, 77 N. W. 1069.

Where the trustee or other fiduciary buys property in his own name, but with trust funds, a resulting trust arises under the operation or construction of law. *Williams v. Williams*, 108–91, 78 N. W. 792.

Constructive trusts: An express agreement creating a trust cannot be proven by parol evidence, and the breach of an express promise to hold title for another will not constitute fraud on which a court of equity will build up a constructive trust. *Andrew v. Andrew*, 114–524, 87 N. W. 494.

An express trust in real estate cannot be established by parol evidence, and the breach of an express trust created by parol as to real estate will not of itself constitute fraud on which a court of equity will build up a constructive trust. *Heddleston v. Stoner*, 128–525, 105 N. W. 56.

Mere breach of an express promise or refusal on the part of an alleged trustee to execute the trust reposed in him, however reprehensible, will not be sufficient to remove the bar of the statute and allow a trust in realty to be established by parol evidence. *Newis v. Topfer*, 121–433, 96 N. W. 905.

But this rule does not apply where it is made to appear that fraud has entered into the transaction. *Ibid.*

While an express trust cannot be established by oral evidence, it is competent to show fraud in a conveyance by taking advantage of confidential relations existing between members of a family so as to give rise to a constructive trust. *Gregory v. Bowlsby*, 126–588, 102 N. W. 517.

A family arrangement in the settlement of an estate may be established by parol proof to charge the property with a trust in the hands of a member of the family to whom it has been conveyed by other members; but in the absence of confidential relations between the members of the family, it must be made to appear that the grantors were led by fraudulent practices or deception into parting with the title to their respective shares. *Burch v. Nicholson*, 157– —, 137 N. W. 1066.

Further as to parol evidence to establish a trust in land, see notes to code § 4625 in this supplement.

Testamentary transactions: This provision appears to relate to transactions other than those of a testamentary nature. *Moran v. Moran*, 104–216, 73 N. W. 617.

Parol evidence is admissible to affix a trust to an unconditional devise only where it shows that the devisee by fraud induced the testator to make the devise on the representation that the devisee would take in trust for another who was the real object of the bounty. *Ibid.*

SEC. 2919. Conveyances by married women.

This section does not authorize the execution by the wife to the husband of a power of attorney, authorizing him to convey her contingent dower interest in his property. *Sawyer v. Biggart*, 114–489, 87 N. W. 426.

The wife may control or contract with reference to her property in the same manner as other persons, and held that a quitclaim by the wife to the grantee of her husband claiming under a deed in which the wife did not join was effectual to cut off the wife's contingent right of dower. *Fowler v. Chadima*, 134–210, 111 N. W. 808.

SEC. 2921. Covenants.

Neither recitals in the granting clause nor covenants of title are binding upon a husband or wife of the owner joining with such owner in the execution of the deed. *Irish v. Steeves*, 154–286, 134 N. W. 634.

SEC. 2922. Title and possession of mortgagor.

Lawful possession of the premises by the mortgagee can only be obtained by the consent, express or implied, of the mortgagor who is deemed to hold the legal

title. *Boggs v. Douglass*, 105–344, 75 N. W. 185.

The grantor in a conveyance which is found to be a mortgage is entitled to possession and ownership of the crops until the expiration of the statutory period for redemption, after a decree determining the nature of his rights. *Harrington v. Foley*, 108–287, 79 N. W. 64.

In this state a mortgage does not create an estate, but simply a lien or charge upon the land to secure the debt. *Adams v. Holden*, 111–54, 82 N. W. 468.

The fact that the mortgagee collects rents at the request of the mortgagor which he applies to the maintenance of the property and the diminution of the mortgage debt, does not charge him with the debts and liabilities of a mortgagee in possession, if his possession is not under contract with or by the consent of the mortgagor. *Whitley v. Barnett*, 151–487, 131 N. W. 704.

SEC. 2923. Tenancy in common.

Conveyances or devises to two or more create a tenancy in common unless a contrary intent is expressed. *Gilmore v. Jenkins*, 129–686, 106 N. W. 193.

A conveyance to two or more gives rise to a tenancy in common and not to a general tenancy. *Anderson v. Acheson*, 132–744, 110 N. W. 335.

A conveyance to husband and wife creates a tenancy in common. *Bader v. Dyer*, 106–715, 77 N. W. 469.

One of several tenants in common can maintain an action of forcible entry and detainer against a lessee. The possession of one tenant is presumed to be in support of the common title of all. *Willis v. Weeks*, 129–525, 105 N. W. 1012.

Whether the provisions of this section are applicable to transfers of personal property, *quaere*. *Abegg v. Hirst*, 144–196, 122 N. W. 838.

SEC. 2924. Vendor's lien.

The mere taking of a note for the purchase price does not waive the vendor's lien. In order to so operate it must be shown by a clear preponderance of the evidence that such was the express agreement of the vendor. *Zook v. Thompson*, 111–463, 82 N. W. 930.

The vendor executing a voluntary conveyance without any agreement for a consideration, is not entitled to a vendor's lien for the purchase price. *Ostenson v. Severson*, 126–197, 101 N. W. 789.

This section has no reference to one who takes property subject to a vendor's lien. *Owen v. Higgins*, 113–735, 84 N. W. 713.

Under the language of this section as it now stands, the vendor's lien may be enforced against the purchaser of the vendee with notice that the purchase money has not been paid. *Hodgson v. Smith*, 136–515, 114 N. W. 39.

While there is no specific lien until the right of the vendor to the purchase money is judicially established, yet the right to have a lien established is one which may be enforced against the purchaser with notice. *Ibid.*

The vendor has an implied lien on the property sold by him and such lien passes to the assignee of the vendor as an incident to the debt. *State Bank v. Brown*, 142–190, 119 N. W. 81.

SEC. 2924-a. **Rule in Shelley's case abolished.** The rule or principle of the common law known as the Rule in Shelley's Case is hereby abolished and is declared not to be a part of the law of this state. [32 G. A., ch. 159, § 1.]

SEC. 2924-b. **Estate not enlarged.** No express devise, bequest or conveyance of an estate for life or other limited estate in real or personal property shall be enlarged or construed to pass any greater estate to the devisee, legatee, or grantee thereof by reason of any devise, bequest or conveyance to the heirs, heirs of the body, children, or issue of such devisee, legatee or grantee, provided that the passage of this act shall not in any manner or under any circumstances be so construed as to impair or affect the vested rights of any person in or to any lands or estates acquired prior to the taking effect hereof. [32 G. A., ch. 159, § 2.]

SEC. 2924-c. **Registration of farm names—certificate.** Any owner of a farm in the state of Iowa may have the name of his farm, together with a description of his lands to which said name applies, recorded in a register kept for that purpose in the office of the county recorder of the county in which said farm is located, and such recorder shall furnish to such landowner a proper certificate setting forth said name and a descrip-

tion of such lands. That when any name shall have been recorded as the name of any farm in such county, such name shall not be recorded as the name of any other farm in the same county. [34 G. A., ch. 153, § 1.]

SEC **2924-d. Fee.** Any person having the name of his farm recorded as provided in this act shall first pay to the county recorder a fee of one dollar, which fee shall be paid to the county treasurer as other fees are paid to the county treasurer by such recorder. [34 G. A., ch. 153, § 2.]

SEC. **2924-e. Transfer of farm may include name.** When any owner of a farm, the name of which has been recorded as provided in this act, transfers by deed or otherwise, the whole of such farm, such transfer may include the registered name thereof; but if the owner shall transfer only a portion of such farm, then in that event, the registered name thereof shall not be transferred to the purchaser unless so stated in the deed of conveyance. [34 G. A., ch. 153, § 3.]

SEC. **2924-f. Cancellation—fee.** When any owner of a registered farm desires to cancel the registered name thereof, he shall state on the margin of the record of the register of such name the following: "This name is canceled and I hereby release all rights thereunder," which shall be signed by the person canceling such name and attested by the county recorder. That for such latter service the county recorder shall charge a fee of twenty-five cents, which shall be paid to the county treasurer as other fees are paid to the county treasurer by him. [34 G. A., ch. 153, § 4.]

CHAPTER 6.

OF THE CONVEYANCE OF REAL ESTATE.

SECTION 2925. Recording.

Effect of recording: An instrument which is not in fact signed by the grantor nor acknowledged by him is not properly or lawfully recorded and imparts no notice and no one has a right to rely upon the fact that he apparently signed such instrument. *Sherod v. Ewell*, 104–253, 73 N. W. 493.

In searching the records of titles the searcher should go back of the day and hour at which the evidence of title in the holder in question was filed for record and examine the title with reference to any conveyance and incumbrance by such holder after the date of the conveyance under which he holds title. *Higgins v. Dennis*, 104–605, 74 N. W. 9.

Therefore, the searcher of title is charged with notice of an incumbrance recorded on the same day as and prior to the record of the conveyance by which title was acquired by the person executing such incumbrance, provided the incumbrance was executed after the actual execution of the conveyance. *Ibid.*

The law takes no notice of fractions of days with reference to the execution of deeds and mortgages where the order of their execution does not appear. *Ibid.*

The recordation statutes do not apply to the inchoate right of dower. *Smith v. Fuller*, 138–91, 115 N. W. 912.

It is not essential to the validity of a deed as between the parties thereto that it be acknowledged or recorded. *Schumacher v. Dolan*, 154–207, 134 N. W. 624.

Assignments of mortgages: While there is no express provision for recording the assignments of mortgages, an unrecorded assignment will be avoided in favor of subsequent purchasers and existing creditors without notice. *Central Trust Co. v. Stepanek*, 138–131, 115 N. W. 891.

In general the ownership of an outstanding mortgage of record is immaterial for the purpose of charging a subsequent purchaser of the property; but to protect himself against a subsequent wrongful conveyance of the property by the mortgagor to the mortgagee and by the mortgagee to an innocent purchaser without notice of the assignment, the assignee should have his assignment recorded. *James v. Newman*, 147–574, 126 N. W. 781.

Memorandum of assignment on the margin of the record of the mortgage is not sufficient to defeat the rights of such subsequent purchaser. To affect him with notice of such assignment it must be duly acknowledged, recorded and indexed as any other instrument of conveyance. *Ibid.*

While the rights of the mortgagee follow the assignment of the debt secured, the purchaser of paper transferable by indorsement secured by mortgage is not protected by the recording acts. *Bunker v. International Harv. Co.*, 148–708, 127 N. W. 1016.

Subsequent purchasers: An attaching creditor is not a subsequent purchaser for value. An unrecorded deed or other instrument creating a lien will take precedence over a subsequent attachment and a purchaser at judicial sale is bound to take notice of all instruments recorded up to the date of the same. *Rea v. Wilson*, 112–517, 84 N. W. 539.

Even though an unrecorded mortgage by mistake does not describe the land intended to be covered thereby, still the judgment lien is not entitled to priority over the unrecorded mortgage. Such priority accrues only in favor of the purchaser at judicial sale without notice of the mortgage. *Ibid.*

An attaching creditor is not a purchaser, but takes only the interest which his debtor had in the land at the time of attachment. Consequently an unrecorded deed or prior equity takes precedence over his attachment. But a purchaser at judicial or sheriff's sale, whether he be the judgment creditor or a stranger, is a purchaser, and is generally protected from prior unrecorded deeds or equities. *Bush v. Herring*, 113–158, 84 N. W. 1036.

While the recording of a deed is not essential as against an attaching creditor, its delivery is. *Parlin, O. & M. Co. v. Daniels*, 111–640, 82 N. W. 1015.

An execution purchaser of an heir's interest in realty does not acquire priority over the right existing against the heir to deduct advancements from such interest. *Pinckney v. Collie*, 114–441, 87 N. W. 406.

A subsequent purchaser is not bound to look beyond the property index for information as to conveyances, and if the index shows none, there is no constructive notice. *Koch v. West*, 118–468, 92 N. W. 663.

One who pays money for a sheriff's certificate of sale becomes a purchaser entitled to protection under the recording acts. *Ibid.*

Inadequacy of consideration alone is not sufficient to defeat the claim of one who is otherwise entitled to protection as a purchaser. *Ibid.*

The term "subsequent purchasers" is used to describe purchasers claiming under a common grantor. One who has commenced an action affecting the title is not, by reason of the provision of code § 3543 relating to *lis pendens*, entitled to protection as a subsequent purchaser as against an unrecorded deed. *Noyes v. Crawford*, 118–15, 91 N. W. 799.

A judgment creditor is not a purchaser under the recording act. *Foster v. Hobson*, 131–58, 107 N. W. 1101.

The assignee of an ordinary judgment stands, as a rule, in no better position than his assignor with reference to unrecorded instruments. But an assignee of a mortgage which has gone to foreclosure may stand in a better position. *Raymond v. Whitehouse*, 119–132, 93 N. W. 292.

A purchaser from an heir, after a court having jurisdiction has refused probate of a will devising the property purchased to another, takes subject to the subsequent reversal on appeal of the judgment in which probate of the will is refused, and as against the devisee of the will is not a purchaser without notice. *Rine v. Wagner*, 135–626, 113 N. W. 471.

A wife who has taken a conveyance of property from her husband with knowledge of his fraudulent intent, no matter what her purpose, cannot be taken to be a good faith purchaser, and in such case her right is subject to that of creditors. *Carr v. Way*, 141–245, 119 N. W. 700.

A decree establishing the right of a party to subject property to his judgment does not render him a purchaser in such sense as to be protected against a prior mortgage. One who claims protection as a subsequent purchaser of real property must have proceeded further than merely to levy an attachment or execution upon the property. *Albia State Bank v. Smith*, 141–255, 119 N. W. 608.

A person must have become the purchaser of some apparent or real interest of the owner to be protected against the effect of an unrecorded instrument of which he has had no notice. *Witmer v. Shreves*, 141–496, 120 N. W. 86.

In the absence of notice, the person to whom a purchaser, taking by a conveyance blank as to the grantee, subsequently disposes of the land so held, and with whose name the blank is filled, will hold the title against any equities of the grantor arising out of the failure of the first purchaser to perform the agreement of purchase. *Augustine v. Schmitz*, 145–591, 124 N. W. 607.

Even if fraud in the original conveyance is shown, an innocent purchaser from the grantee will be preferred in equity to the grantor. *Ibid.*

Where mortgages are executed on the same day by and to the same parties and filed for record without agreement express or implied as to which is to be superior, the two are to be deemed simultaneous and of equal rank as liens, not only as to the mortgagee but also as to one who claims by assignment of either of such mortgages. *Dahlstrom v. Ablieter*, 156–187, 135 N. W. 567.

A purchaser at an executor's or administrator's sale takes nothing more than the title held by the deceased and is not entitled to protection as a good faith pur-

chaser under the recording acts. *Stephens v. Boyd*, 157– —, 138 N. W. 389.

For valuable consideration: A mortgagee in a mortgage executed to secure a preëxisting debt is not a bona fide purchaser entitled to priority of lien over a prior unrecorded mortgage on the property. *Smith v. Moore*, 112–60, 83 N. W. 813.

The mere fact of failure to record can only be taken advantage of by a creditor who has changed position or extended credit on the strength of apparent ownership in the grantor. *Atkinson v. McNider*, 130–281, 105 N. W. 504.

Without notice: Although one who takes by quitclaim deed is not an innocent purchaser and is charged with notice of equities, yet one who takes from such purchaser by warranty deed for value is not affected by outstanding equities of which he had no notice. *Hannan v. Seidentopf*, 113–658, 86 N. W. 44.

The burden of proof is upon the purchaser claiming in hostility to an unrecorded deed to show that he was a purchaser for value without notice. *Ibid.*

Possession by a tenant is notice, not only of his own rights, but of the rights of the landlord. *Ibid.*

One who acquires title to property is bound to know not only the rights of those in possession, but also the fact of such possession. *Ibid.*

A claim of a tenant in common for contribution on account of expenses with reference to the common property is not chargeable against a purchaser of the cotenant's interest without notice, unless by reason of the possession of the tenant who has incurred such expense, notice is implied. *Rippe v. Badger*, 125–725, 101 N. W. 642.

By acquiescence and silent admission the mortgagee whose mortgage is not recorded tacitly represents to anyone acquiring an interest in the property that the mortgagor is the owner of the title, free from incumbrance, and a subsequent purchaser for a consideration does not have the burden of proving want of actual notice Under such circumstances it is for the mortgagee to show notice to the subsequent purchaser of the prior unrecorded mortgage. *Walter v. Brown*, 115–360, 88 N. W. 832.

The rule that a person holding a conveyance by quitclaim is bound to take notice of defects in his grantor's title does not apply to a purchaser in good faith from one who takes by conveyance in fraud of creditors. *Klay, Admr., v. McKellar*, 122–163, 97 N. W. 1091.

SEC. 2926. Acknowledgment.

The unsupported testimony of the person whose acknowledgment is duly certified by a proper officer, that no such acknowledgment was made, is not sufficient to overcome the presumption in favor of the certificate. *Swett v. Large*, 122–267, 97 N. W. 1104.

Where the grantee takes with record notice of a prior conveyance which he insists was, in fact, only a mortgage, he takes subject to whatever rights in fact passed to the grantee in such prior conveyance, but he is not thereby charged with notice of the unrecorded assignment of the rights of such grantee to another. *Lindberg v. Thomas*, 137–48, 114 N. W. 562.

In view of the provisions of the recording acts which authorize a vendee to rely upon the public records without production of the grantor's deeds, the creation of an equitable mortgage by deposit of title deeds is not recognized in this state. But as between parties having knowledge, a lien may be created by the deposit of title deeds under an agreement that the person with whom they are deposited shall hold them as security. *In re Assignment of Snyder*, 138–553, 114 N. W. 615.

A description in a prior mortgage will be sufficient to put a subsequent purchaser of property on inquiry if it is such as to point out to him, by application to existing facts and conditions which are ascertainable on reasonable inquiry, the specific tract intended. *Albia State Bank v. Smith*, 141–255, 119 N. W. 608.

A subsequent purchaser is bound with knowledge of facts as to which he is put on inquiry by the records. *Ibid.*

An instrument properly made of record is notice to the world not only of the facts and claims therein expressly set forth but also of all other material facts which an inquiry thereby reasonably suggested would have developed, and such notice is not affected or avoided by variations in names which do not mislead a subsequent purchaser or are of such character as ought not to mislead a purchaser of ordinary prudence and intelligence. *Loser v. Plainfield Sav. Bank*, 149–672, 128 N. W. 1101.

Subsequent purchasers are charged with notice of recitals in a properly recorded lease which creates an incumbrance in favor of the landlord. *Maine v. Constantine*, 157– —, 138 N. W. 702.

Constructive notice of a contract creating a lien on the property operates only against a subsequent purchaser in favor of the beneficiary of such contract. It does not charge such subsequent purchaser with notice that he cannot rely upon a covenant of warranty. *Schimmelpfenning v. Brunk*, 153–177, 132 N. W. 838.

Under the evidence in a particular case, held that one claiming under a deed was charged with notice of a prior conflicting interest. *John v Penegar*, 139 N. W. 915.

SEC. 2927. **Transfer and index books.**

The statute makes the transfer book conclusive and it is not necessary to refer to other books where information might be had as to interest of other persons in the property. *Berger v. Tracy*, 135–597, 113 N. W. 465.

SEC. 2930. **Entries of transfers—certificate of council's approval of plats or additions.** That section twenty-nine hundred thirty, supplement to the code, 1907, be and the same is hereby repealed and the following is enacted in lieu thereof:

"Whenever a deed of unconditional conveyance of real estate or transcript as provided in section forty-two hundred fifty-nine of the supplement to the code, 1907, is presented, the auditor shall enter in the index book, in alphabetical order, the name of the grantee, and opposite thereto the number of the page of the transfer book on which such transfer is made; and upon the transfer book he shall enter in the proper columns the name of the grantee, the grantor, date and character of the instrument, the description of the real estate, and the number or letter of the plat on which the same is marked; provided, however, no conveyances or plats of additions to any city or town or subdivisions of any part or parcels of lands lying within or adjacent to any city or town in which streets and alleys and other public grounds are sought to be dedicated to public use, or other conveyances in which streets and alleys are sought to be conveyed to such city or town, shall be so entered, unless such conveyances, plats or other instruments have endorsed thereon the approval of the council of such city or town, the certificate of such approval to be made by the city clerk." [35 G. A., ch. 263, § 1.] [27 G. A., ch. 106, § 2; C. '73, § 1951.]

SEC. 2935. **Indexes.** That section twenty-nine hundred thirty-five of the code be and the same is hereby repealed and the following enacted in lieu thereof:

The recorder must keep index books, the pages of which are so divided as to show in parallel columns:

1. Each grantor;
2. Each grantee;
3. The time when the instrument was filed;
4. The date of the instrument;
5. The nature of the instrument;
6. The book and page where the record thereof may be found;
7. The description of the real estate conveyed.

Separate index books shall be kept for mortgages and satisfactions or releases of same, one for those containing descriptions of lots, and one for those containing lands; and separate books for other conveyances of real estate, one for lots, and one for lands. Also he shall keep an index book for powers of attorney and affidavits as provided for in section twenty-nine hundred fifty-seven of the code; all of above indexes to be arranged alphabetically in accordance with section twenty-nine hundred thirty-seven and indexed inversely in name of grantee, and in case of affidavits each and every affidavit filed for record shall be indexed in appropriately ruled columns as follows:

Affidavit.	Concerning Whom.	Concerning Lands in.							Remarks.
		Lot	Blk.	Addition	Town	Sec.	Twp	Rng.	

Affiant.	Date of Filing.					Date of Instrument.			Where Recorded.	
				Hour						
	Month	Day	Year	A. M.	P. M.	Month	Day	Year	Book	Page

[32 G. A., ch. 158; C. '73, § 1943; R. § 2222; C. '51, § 1213.]

SEC. 2936. **Indorsement—entries.**

A subsequent purchaser is not bound to look beyond the property index for information as to conveyances, and if the index shows none, there is no constructive notice. *Koch v. West*, 118–468, 92 N. W. 663.

In order to impart constructive notice to third parties of any instrument of transfer by one person to another, the statute contemplates and requires that it be properly acknowledged, recorded and indexed. Therefore an assignment of a mortgage noted on the margin of the record of such mortgage does not constitute constructive notice to a subsequent purchaser from the mortgagee who has taken a conveyance from the mortgagor that such conveyance is in fraud of the rights of an assignee whose assignment is not duly acknowledged and indexed. *James v. Newman*, 147–574, 126 N. W. 781.

The index gives to the investigator of a title a double check or protection against prior liens,—one by tracing the succession of grantors and grantees or mortgagors and mortgagees by name, and another by the description of the property which appears to have been conveyed or mortgaged. If the name of the mortgagor or mortgagee described be such as to suggest any reasonable possibility of his identity with the person who is tendering another conveyance or mortgage of the same property, the investigator, as a reasonably prudent man, is thereby put on inquiry and bound by notice of every fact which that inquiry, pursued with reasonable diligence, would have brought to his attention. *Loser v. Plainfield Sav. Bank*, 149–672, 128 N. W. 1101.

SEC. 2938. **How recorded.**

In matters relating to the record of title one may rely upon the public records as written, and the doctrine of *idem sonans* is not applicable where the initial letters which govern the indexing are not the same; but that doctrine may be relied on to overcome a difference of spelling in other portions of the name. *Boyd v. Boyd*, 128–699, 104 N. W. 798.

SEC. 2938-a. **Transcript of instruments—certified transcript may be recorded same as original.** Any person interested therein may procure from any recorder in this state a transcript of any instrument affecting real estate which is of record in his office. Such transcript shall be certified by the recorder, and the clerk of the district court shall certify under the seal of his office to the signature of such recorder and that he is such officer. A transcript of the record of any instrument affecting real estate, certified as herein provided, shall be entitled to record in the office of the recorder of any other county in this state in which is situated any

of the real estate affected by such instrument. The effect of the recording of such transcript shall be the same as the recording of the original instrument. [35 G. A., ch. 262, § 1.]

SEC. **2938-b. Legalizing release and satisfaction of mortgages.** That any release or satisfaction of any mortgage or trust deed or of any instrument in writing creating a lien upon real estate where such release or satisfaction has been recorded in the recorder's office of the county in this state, or upon the margin of the record where such original instrument was recorded and which release or satisfaction was made by any individual, association, copartnership, assignee, corporation or by a resident or foreign executor, administrator, referee, receiver, trustee, guardian or commissioner and which release or satisfaction was executed, filed and recorded prior to January first, nineteen hundred and two, be and the same is hereby legalized, declared valid, legal and binding and of full force and effect, any defects in the execution, acknowledgment, recording, filing or otherwise of such releases or satisfactions to the contrary notwithstanding. [35 G. A., ch. 264, § 1.]

SEC. **2938-c. Not applicable to pending actions.** This act shall not affect the rights of parties in any action or suit now pending in any court in this state, nor be applied to or affect any release or satisfaction that has heretofore been passed upon by any court of this state and determined unauthorized, insufficient or invalid. [35 G. A., ch. 264, § 2.]

SEC. **2941. Town lots.** The recorder shall index and record all deeds, mortgages and other instruments affecting lots in cities, towns or villages, the plats whereof are recorded, in separate books from those in which other conveyances of real estate are recorded. Where any instrument contains a description of both land, and lots in cities, towns or villages, the plats whereof are recorded, he shall record such instruments in but one record and charge but one fee, but shall index in both land and town lot indexes. [31 G. A., ch. 145; C. '73, § 1947; R. § 2241.]

SEC. **2942. Acknowledgment of conveyances or incumbrances.** The acknowledgment of any deed, conveyance or other instrument in writing by which real estate in this state shall be conveyed or incumbered, if made within this state, must be before some court having a seal, or some judge or clerk thereof, or some county auditor or his deputy, or justice of the peace within the county, or notary public within the county of his appointment or in an adjoining county in which he has filed with the clerk of the district court a certified copy of his certificate of appointment. And each of the officers above named is authorized to take and certify acknowledgements of all written instruments, authorized or required by law to be acknowledged. [27 G. A., ch. 96, § 1; 25 G. A., ch. 52; 22 G. A., ch. 99; C. '73, § 1955; R. § 2226; C. '51, § 1217.]

What sufficient: Under statutory provisions prior to the present code, an acknowledgment by a deputy clerk of the district court was valid. *Hilpire v. Claude*, 109–159, 80 N. W. 332.

One having an interest, direct or contingent, in a conveyance, or its subject matter, cannot take and certify an acknowledgment, and the record of an instrument so acknowledged does not impart notice to third persons of the mortgagee's interest thereunder. But the mere fact that one is an officer of a corporation, or an agent of a copartnership, does not disqualify him from taking an acknowledgment of an instrument made to his principal. *Bardsley v. German-American Bank*, 113–216, 84 N. W. 1041.

Neither party to the conveyance can take his own acknowledgment of it before himself so as to entitle it to be recorded. *Blackman v. Henderson*, 116–578, 87 N. W. 655.

It is not competent for the cashier of a private bank as a notary public to acknowledge a mortgage executed to the bank. *Farmers' & Merchants' Bank v. Stockdale*, 121–748, 96 N. W. 732.

An interested party cannot as notary or magistrate take the acknowledgment of the grantor to a conveyance. *Empire Real Est. & Mtg. Co. v. Beechley*, 137–7, 114 N. W. 556.

The authentication of the notary's seal to the certificate of acknowledgment is just as essential as his signature, and when the certificate lacks this the instrument cannot properly be recorded. *Koch v. West*, 118–468, 92 N. W. 663.

If the certificate of acknowledgment is false or untrue and a subsequent purchaser takes title without knowledge and without being legally charged with notice of the instrument acknowledged, one who is thus defeated in his rights by the falsity of the acknowledgment is entitled to recover against the notary on his bond. *Wilson v. Gribben*, 152–379, 132 N. W. 849.

Legalizing acts: In a legalizing act declaring valid instruments defectively acknowledged but duly recorded, held that the words "duly recorded" meant "actually recorded." *Bresser v. Saarman*, 112–720, 84 N. W. 920.

Such a legalizing act, relating in general to the recording of instruments defectively acknowledged, held applicable to an instrument of adoption. *Ibid.*

An act legalizing the recording of conveyances defectively acknowledged is not effective as against a purchaser in good faith without notice before the taking effect of the act. *Blackman v. Henderson*, 116–578, 87 N. W. 655.

Defects in the acknowledgment are cured by a subsequent legalizing act. Therefore held that a city plat defectively acknowledged became effectual upon the adoption of a subsequent legalizing act and that from the time the legalizing act took effect the plat was acknowledged and recorded as required by law. *Parriott v. Hampton*, 134–157, 111 N. W. 440.

SEC. **2942-a. Acknowledgments legalized — deeds — mortgages — stockholder or officer of corporation.** That the acknowledgments of all deeds, mortgages, or other instruments in writing heretofore taken or certified, and which instruments have been recorded in the recorder's office of any county of this state, including acknowledgments of instruments made by any private or other corporation, or to which such corporation was a party, or under which such corporation was a beneficiary, and which have been acknowledged before or certified by any notary public who was at the time of such acknowledgment or certifying a stockholder or officer in such corporation, be and the same are hereby declared to be legal and valid official acts of such notaries public, and to entitle such instruments to be recorded, anything in the laws of the state of Iowa in regard to acknowledgments to the contrary notwithstanding. [34 G. A., ch. 151, § 1.] [31 G. A., ch. 146, § 1; 26 G. A., Ext. Ses., ch. 23, § 1.]

SEC. **2942-b. Not applicable to pending litigation.** This act shall not affect the rights of parties in any action or suit now pending in any court of this state. [34 G. A., ch. 151, § 2.] [26 G. A., Ext. Ses., ch. 23, § 2.]

SEC. **2942-c. Acknowledgments legalized — under provisions of code of 1873.** That all acknowledgments of instruments in writing taken and certified according to the provisions and form prescribed by the code of 1873, which were taken and certified after the twenty-ninth day of September, eighteen hundred ninety-seven, and prior to the passage of this act, by officers having authority under the provisions of the code of 1873 to take and certify acknowledgments, are here declared to be legal and valid, and of the same force and effect as though the same were taken and certified according to the form and provisions of the code; and as though the officers taking and certifying the same were authorized to take and certify acknowledgments. [27 G. A., ch. 165, § 1.]

When one pays a valuable consideration for a sheriff's certificate of sale he acquires such vested right as to protect him against an instrument defectively recorded, notwithstanding a legalizing act subsequently passed. *Koch v. West*, 118–468, 92 N. W. 663.

SEC. **2942-d. Acknowledgments legalized—interested stockholders of corporations.** That all deeds and conveyances of lands within this state heretofore executed but which have been acknowledged or proved

according to and in compliance with the laws of this state before a notary public or other official authorized by law to take acknowledgments who was, at the time of such acknowledgment, an officer or stockholder of a corporation interested in any such deed or conveyance, or otherwise interested therein, are, if otherwise valid, hereby declared effectual and valid in law to all intents and purposes as though acknowledged or proved before an officer not interested therein; and if heretofore recorded in the respective counties in which such lands may be, the records thereof are hereby confirmed and declared effectual and valid in law to all intents and purposes as though said deeds and conveyances, so acknowledged or proved and recorded, had (prior to being recorded) been acknowledged or proved before an officer having no interest therein. [27 G. A., ch. 166, § 1.]

SEC. **2942-e. Acknowledgments legalized—defective in form—unqualified official.** That the acknowledgments of all deeds, mortgages or other instruments in writing, taken and certified previous to the passage of this act, and which have been duly recorded in the proper counties in this state, and which are defective only in the form of the certificate of the officer taking the same, or by reason of such acknowledgment having been made before an official not qualified to take the same, but who was at the time qualified to take acknowledgments generally, be and are hereby declared to be as legal and valid for all purposes as if the form of the certificate had been made in accordance with law, and the official taking such acknowledgments duly qualified therefor. [29 G. A., ch. 249, § 1.]

SEC. **2942-f. Conveyances legalized—dower—power of attorney to spouse.** No conveyance of real estate heretofore made, wherein the husband or wife conveyed or contracted to convey the inchoate right of dower to the other spouse, acting as the attorney in fact, by virtue of a power of attorney executed by such spouse, such power of attorney not having been executed as a part of a contract of separation, shall be held invalid as contravening the provisions of section thirty-one hundred fifty-four of the code, but all such conveyances are hereby legalized and made effective. [30 G. A., ch. 118; 29 G. A., ch. 237, § 1.]

SEC. **2942-g. Acknowledgments legalized — deeds — mortgages — stockholder or officer of corporation.** [31 G. A., ch. 146, § 1.]

[See § 2942-a which is exactly the same provision. EDITOR.]

SEC. **2942-h. Acknowledgments legalized—seal not affixed.** All deeds, mortgages, or other instruments in writing, for the conveyance of lands which have heretofore been made and executed, and the officer taking the acknowledgment has not affixed his seal to the acknowledgment, such acknowledgment shall, nevertheless, be good and valid in law and equity, anything in any law heretofore passed to the contrary notwithstanding. [31 G. A., ch. 146, § 2.]

SEC. **2942-i. Not applicable to pending litigation.** This act shall not affect the rights of parties in any action or suit now pending in any court of this state. [31 G. A., ch. 146, § 3.]

SEC. **2942-j. Conveyances legalized — administrators, trustees, guardians or referees—defective proceedings—prior to 1890.** That chapter one hundred ninety-two of the acts of the thirty-third general assembly be repealed and the following enacted in lieu thereof:

"In all cases where, prior to the year A. D. eighteen hundred ninety, an executor, administrator, trustee, guardian, referee or commissioner, duly appointed and qualified, and acting as such in this or any other state, has conveyed in such trust capacity, real estate lying in this state, and such conveyance has been of record since prior to the first day of January, A. D.

eighteen hundred ninety, in the county where the real estate so conveyed is located, and the possession of said real estate since said date has rested in the grantee thereunder, or parties claiming by, through or under him, such conveyance shall not be held void or insufficient by reason of the fact that due and legal notice of all proceedings with reference to the making of any such conveyance was not served upon all interested or necessary parties, or that such executor, administrator, trustee, guardian, referee, or commissioner is not shown to have been duly authorized by an order of court to make and execute such conveyance, or that a bond was not given therefor; or that no report of the sale was made; or such sale or deed of conveyance was not approved by order of court, or that any such foreign executor, administrator, trustee, guardian, referee, or commissioner was not appointed or qualified in the state of Iowa, prior to the making of such conveyance, and all such conveyances are hereby legalized and declared valid, legal and binding and of full force and effect." [34 G. A., ch. 152, § 1; 33 G. A., ch. 192, § 1.] [32 G. A., ch. 248.]

SEC. **2942-k. Acknowledgments and affidavits legalized—mayors and notaries public.**

WHEREAS certain mayors, under section six hundred ninety-one of the code of 1897, have taken the acknowledgments of written instruments and administered oaths in proceedings not connected with the administration of their offices; and,

WHEREAS certain notaries public, whose commissions expired July fourth, nineteen hundred and six, and who continued to act as such notaries public and who have since qualified as notaries public, desire to have their acts as such notaries public legalized. Now, therefore, be it enacted by the general assembly of the state of Iowa:

All acknowledgments and taking of affidavits made by the mayors and notaries public, as described in the preamble hereof, be and the same are hereby legalized and made of full effect, the same as though said mayors and notaries public had been originally empowered to take said acknowledgments and administer said oaths. [32 G. A., ch. 249.]

SEC. **2942-l. Official acts of notaries public legalized.** That all of the official acts of all notaries public holding their office during the term ending July fourth, nineteen hundred and three, who continued to act as such notaries public after July fourth, nineteen hundred and three, before qualifying as such, but have since qualified as provided by law, be and the same are hereby legalized and made valid to the same extent as though they had become duly qualified to act as notaries public immediately upon the expiration of the term ending July fourth, nineteen hundred and three. Provided, however, that nothing in this act shall affect any pending litigation. [31 G. A., ch. 223, § 1.]

[The above did not appear in the prior supplement but is placed here in order that all general legalizing acts since the code may be shown. EDITOR.]

SEC. **2943. Out of state.** When made out of the state but within the United States, it shall be before a judge of some court of record, or officer holding the seal thereof, or some commissioner appointed by the governor of this state to take the acknowledgment of deeds, or some notary public or justice of the peace; and when made before a judge, or justice of the peace, a certificate, under the official seal of the clerk or other proper certifying officer of a court of record of the county or district, or of the secretary of state of the state or territory within which such acknowledgment was taken, under the seal of his office, of the official character of said judge, or justice, and of the genuineness of his signature, shall accompany said certificate of acknowledgment. [27 G. A., ch. 97, § 1; C. '73, § 1956; R. § 2245.]

SEC. 2943-a. **Notarial seals of nonresidents.** That the notarial seal which purports to have been affixed to any instrument in writing, by any notary public residing elsewhere than in the state of Iowa, shall be prima-facie evidence that the words thereon engraved conform to the requirements of the law of the place where such certificate purports to have been made. [28 G. A., ch. 118, § 1.]

SEC. 2948. **Certificate of acknowledgment.**

The requirement of this section as to stating the full title of the person before whom the acknowledgment is made is not applicable to acknowledgments of other instruments with reference to which there is no such specific requirement, and in the acknowledgment of articles of incorporation it is sufficient that the venue is stated at the beginning of the certificate, and the notary subscribes as a "notary public" without specifically reciting that he is a notary public in and for said county, it being presumed that an officer acts only within the limits of his authority. *Smith v. Sherman*, 113–601, 85 N. W. 747.

The fact that the certificate of acknowledgment is left blank as to the name of the party who makes the acknowledgment does not render such certificate invalid. *Tennis v. Gifford*, 133–372, 110 N. W. 586.

SEC. 2957. **Power of attorney—recording—revocation.**

The statutory provision authorizing the recording of affidavits explaining defects in a chain of title does not enable one claiming title by adverse possession to make out a title of record on which an abstract showing good title can be founded. *Fagan v. Hook*, 134–381, 105 N. W. 155, 111 N. W. 981.

Affidavits are admissible to identify the land referred to in the provisions of a will. *Hantz v. May*, 137–267, 114 N. W. 1042.

A showing as to descent of property to heirs and that the debts of the estate of a deceased owner have all been paid may be made by affidavits for the purpose of making out a clear title taken by descent. *Prichard v. Mulhall*, 140–1, 118 N. W. 43.

SEC. 2958. **Forms of conveyances.**

In the absence of warranty or of fraud inducing the conveyance there is no liability of the grantor for failure of title. *Harrison v. Palo Alto County*, 104–383, 73 N. W. 872.

The omission of words of inheritance does not warrant the limitation of the right conveyed to less than a right in perpetuity. *Baker v. Kenney*, 145–638, 124 N. W. 901.

SEC. 2963-a. **Acknowledgments legalized—instruments recorded prior to 1890.** That all instruments in writing affecting the title to real estate located within the state of Iowa which have been on record since prior to the first day of January, A. D. eighteen hundred ninety, in the county where the real estate is located, and the possession of said real estate since said date has rested in the grantee thereunder, or parties claiming by, through or under him, such instruments shall not be held insufficient by reason of the fact that they were not acknowledged, nor by reason of any defect in the certificate of acknowledgment, and all such instruments in writing are hereby legalized and declared valid, legal and binding and of full force and effect, the same as if properly acknowledged. [35 G. A., ch. 265, § 1.]

SEC. 2963-b. **Not applicable to pending litigation.** This act shall not affect the rights of parties in any way to suits now pending in any court of this state. [35 G. A., ch. 265, § 2.]

SEC. 2963-c. **Conveyances legalized—defective execution—tax deeds—sheriffs' deeds—instruments recorded prior to 1890.** That any deed of conveyance, or other instrument purporting to convey real estate within the state of Iowa, where such deed or instrument has been recorded in the office of the recorder of any county wherein such real estate is situated, and which said deed or instrument was executed by a county treasurer under a tax sale, a sheriff under execution sale, or by a resident or foreign executor, administrator, referee, receiver, trustee, guardian, commissioner, individual, copartnership, association or corporation,

and was executed and recorded prior to the first day of January A. D. eighteen hundred ninety, and where the grantee or grantees named in such deed or conveyance, or other instrument, his, her, their or its grantees, heirs or devisees, by direct line of title or conveyance have been in the actual, open adverse possession of such premises since said date, be and the same is hereby legalized, declared valid, legal, and binding, and of full force and effect, notwithstanding any defects in the execution of said deed or instrument. [35 G. A., ch. 261, § 1.]

SEC. **2963-d. Not applicable to pending actions.** This act shall not affect the rights of the parties in any action or suit now pending in any court of this state, or instituted or commenced on or before the first day of September, nineteen hundred thirteen, nor be applied to or affect any conveyance that has heretofore been passed upon by any court of this state and determined insufficient or invalid. [35 G. A., ch. 261, § 2.]

SEC. **2963-e. Conveyances by heirs or spouse of deceased prior to 1900—conclusive evidence of right to convey.** That all conveyances of real estate executed prior to January first, nineteen hundred, wherein the grantor or grantors described herself, himself or themselves as the surviving spouse, heir at law, heirs at law, surviving spouse and heir at law, or surviving spouse and heirs at law of some person deceased in whom the record title or ownership of said real estate previously vested, shall be conclusive evidence of the facts purported to be so recited as far as they relate to the right of the grantor or grantors to convey, and said conveyance or the records thereof shall be conclusive evidence of the facts purported to be recited so far as they relate to the right of said grantor or grantors to convey and the said conveyance or the records thereof shall be conclusive evidence of his, her or their rights to convey the entire estate, title or interest of such purported deceased person as fully as though the record title of said grantor or grantors had been established by due probate proceedings in the county where the real estate is situated; provided, however, that where any such conveyance in express terms purports to convey less than the entire estate or a limited estate, the recitals above referred to shall be conclusive evidence of the facts purported to be recited so far as they relate to the right of said grantor or grantors to convey and said conveyance or the records thereof shall be conclusive evidence of his, her or their right to convey that portion, title or interest which said conveyance purports to convey as fully as though the record title of said grantor or grantors had been established by due probate proceedings in the county where the real estate is located. [35 G. A., ch. 272, § 1.]

SEC. **2963-f. Judgment or decree quieting title legalized—defects prior to 1900.** No existing judgment or decree quieting title to real estate as against defects arising prior to January first, nineteen hundred, and purporting to sustain the record title shall be held ineffectual because of the failure to properly set out in the petition or notice the derivation or devolution of the interest of the unknown defendants or on account of the failure of the record to show that such notice was approved by the court or that the same was published as directed by the court or because of the failure of the record to show that an affidavit was filed by plaintiff showing that personal service could not be made on any defendant in the state of Iowa, or because of the failure of defense by a guardian *ad litem* for any defendant under legal disability, or where there was more than one tract of real estate described in the same petition and decree, or where the plaintiffs have no joint or common interest in the property or defects of title or because of failure to comply with any other provision of law, but

all such decrees are hereby made legal and effectual the same as if all provisions of law had been complied with in obtaining them. [35 G. A., ch. 272, § 2.]

SEC. **2963-g. Same—limitation of action.** No action shall be brought to set aside a judgment or decree quieting title to real estate unless the same shall be commenced within ten years from and after the rendition thereof. [35 G. A., ch. 272, § 3.]

SEC. **2963-h. Sheriffs' deeds prior to 1900 legalized.** No foreclosure proceeding or sale of real estate on execution prior to January first, nineteen hundred, wherein a sheriff's deed was executed and which purports to sustain the record title shall be held ineffectual on account of the failure of the record to show that any of the steps in obtaining said judgments or in the sale of said property were complied with, that such proceedings are hereby legalized and made valid as if the record showed that all the provisions of the law had been complied with. [35 G. A., ch. 272, § 4.]

SEC. **2963-i. Affidavits of defects prior to 1900 conclusive evidence—later affidavits prima-facie evidence.** Affidavits on record in the office of any county recorder at the time of taking effect of this act explaining any defect in the chain of title to real estate arising prior to January first, nineteen hundred, or the records thereof made under section twenty-nine hundred fifty-seven of the code shall be conclusive evidence of the facts purported to be stated therein in all actions involving the title to said real estate and affidavits thereafter made and recorded as provided in section twenty-nine hundred fifty-seven of the code shall be prima-facie evidence of the facts therein contained for three years next succeeding the recording thereof and thereafter the same shall be conclusive evidence of the facts therein contained. [35 G. A., ch. 272, § 5.]

SEC. **2963-j. Contract or bond for deed prior to 1900—deemed abandoned.** In all cases where the record shows that a contract or bond for a deed has been given prior to January first, nineteen hundred, and the record discloses no performance of the same and that more than ten years have elapsed since the contract by its terms was to be performed, that such contract shall be deemed abandoned and of no effect and the land freed from any lien or defect on account of such contract. [35 G. A., ch. 272, § 6.]

SEC. **2963-k. Conveyances prior to 1900—Christian names and initials—conclusive evidence.** In the proof of title to real estate derived from deeds or other conveyances or instruments affecting real estate, executed prior to January first, nineteen hundred, wherein there is a difference between the Christian name, names, initial or initials in which title is taken, and the Christian name, names, initial or initials of the grantor or grantors in a succeeding conveyance, the surname in both instances being written the same or sounding the same, such conveyances or the records thereof shall be conclusive evidence that the same surname refers to the same person in the several conveyances and instruments. [35 G. A., ch. 272, § 7.]

SEC. **2963-l. Conveyances legalized—by foreign administrators, trustees, guardians or commissioners prior to 1900.** In all cases where, prior to the year A. D. nineteen hundred, an executor, administrator, trustee, guardian, referee or commissioner, acting as such in this or any state, has conveyed in such trust capacity real estate lying in this state and such conveyance has been of record since prior to the first day of January, A. D. nineteen hundred, in the county where the real estate so conveyed is located and which conveyance purports to sustain the title in the present

record owner or owners thereof, such conveyance shall not be held void or insufficient by reason of the fact that due and legal notice of all proceedings with reference to the making of any such conveyance was not served upon all interested or necessary parties or that such executor, administrator, trustee, guardian, referee or commissioner[1] is not shown to have been duly authorized by an order of court to make and execute such conveyance, that a bond was not given therefor, or that no report of the sale was made; or such sale or deed of conveyance was not approved by order of court or that any such foreign executor, administrator, trustee, guardian, referee or commissioner was not appointed or qualified in the state of Iowa prior to the making of such conveyance or that the record thereof fails to disclose compliance with any other provisions of law, and all such conveyances are hereby legalized and declared valid, legal and binding and of full force and effect. [35 G. A., ch. 272, § 8.]

[1]"commissioners" in enrolled bill. EDITOR.]

SEC. **2963-m. Judgments or decrees respecting wills legalized after ten years.** No judgment or decree purporting to set aside any will, or the provisions of any will, or to place any construction upon any will or terms of any will, or to aid in carrying out the provisions of any will and no contract or agreement purporting to be a settlement of any suit or action to set aside any will or the terms of any will or to place any construction upon any will or any of the terms thereof shall be held ineffectual, void or insufficient because the records fail to show proper service of notice on all parties interested, that persons under disability affected by the action were not properly served with notice or represented by guardian or guardian *ad litem,* either in suit, action or in a settlement thereof, that all persons interested participated in the settlement, or that any other provisions of law had been complied with which are necessary to make a valid decree, judgment or settlement, provided more than ten years have elapsed since the judgment, decree, contract or agreement was filed, entered or placed on record in the county where the real estate affected thereby is situated. And said decree, judgment, contract or agreement shall be conclusive evidence of the right, title or interest it purports to establish or adjudicate in so far as it affects the title to such real estate, and said proceedings therein are hereby made legal and effectual the same as though all provisions of law had been complied with in the obtaining of said decree, judgment or execution of said contract or agreement; and that any judgment, decree, contract or agreement such as above described which is now of record less than ten years in the county in which the real estate is situated, shall, at the expiration of ten years from date of filing, entering or recording thereof, have the same force and effect as is above given to those now in effect more than ten years. [35 G. A., ch. 272, § 9.]

SEC. **2963-n. Assignment of original entry or certificate of entry —deemed conveyance.** That in the event the record title to any parcel of real estate discloses that the original entry, certificate of entry, receipt or duplicate thereof has been assigned, that prior to such assignment or thereafter, the United States or state issued a patent or conveyance to the assignor, that no deed of conveyance appears on record from the original entryman or assignor to the assignee, that the present record owner holds title by, through or under such assignment, such assignment shall have the same force and effect as a deed of conveyance and shall be conclusively presumed to carry all right, title, and interest of the patentee of said real estate, the same as though a deed of conveyance had been subsequently

executed by the patentee or assignor to a subsequent grantor. [35 G. A., ch. 272, § 10.]

SEC. 2963-o. **Tax sales prior to 1895—proceedings legalized.** No sale of real property for taxes made prior to January first, eighteen hundred ninety-five, wherein the tax deed was executed and which deed purports to sustain the record title, shall be held ineffectual on account of the failure of the record to show that any of the steps in the sale and deeding of said property were complied with; that said proceedings are hereby legalized and made valid and effectual as if the record showed that all the provisions of law had been complied with. [35 G. A., ch. 272, § 11.]

[For § 12 of this act see § 3295-b. EDITOR.]

SEC. 2963-p. **Rights terminated by this act—limitation of action.** Any grantee, grantor, surviving spouse, heirs, legatees, devisees, assignees, assignors, personal representative or any other person or persons having or claiming any right, title or interest in any real estate, which right, title or interest may be terminated, divested or cut off by the terms of this act, or whose right, title or interest this act purports to terminate, divest or cut off, but for any reason it would not be thereby terminated, divested or cut off, shall have one year from and after the taking effect of this act in which to commence actions to establish any right, title or interest claimed. But after one year from the taking effect of this act no action shall be maintained and in all matters of evidence made conclusive by this act shall, in actions commenced under this section, be presumptive evidence.[1] [35 G. A., ch. 272, § 13.]

[1]This sentence conforms with the enrolled bill but manifestly is incomplete. EDITOR.]

SEC. 2963-q. **Limitations of actions by minors and insane not applicable.** That the provisions of section thirty-four hundred fifty-three of the code extending the period of limitations in favor of minors and insane persons shall not be applicable to any of the provisions of this act. [35 G. A., ch. 272, § 14.]

SEC. 2963-r. **Not applicable to pending litigation.** This act shall not affect pending litigation. [35 G. A., ch. 272, § 15.]

SEC. 2963-s. **Sheriff's deed executed by deputy and recorded prior to 1885 legalized.** That all conveyances executed prior to the year eighteen hundred eighty-five in the state of Iowa by deputy sheriffs, wherein such deputy sheriff executed a sheriff's deed to real estate in the state of Iowa, and which conveyances have been of record in the office of the county recorder of the county wherein the real estate is located since prior to the first day of January, eighteen hundred eighty-five, be and the same are hereby legalized and made of full force and effect, the same as though deputy sheriffs had been originally empowered and authorized to execute sheriff's deeds. [34 G. A., ch. 226, § 1.]

SEC. 2963-t. **Not applicable to pending litigation.** This act shall not affect any pending litigation. [34 G. A., ch. 226, § 2.]

SEC. 2963-u. **Assignment of mortgage or lien on margin of record—deemed same as separate instrument—evidence.** In any case where an assignment of a mortgage or other recorded lien on real estate has heretofore been made by written assignment thereof on the margin of the record where such mortgage or other lien is recorded or entered, such assignment shall be deemed to have passed all the right, title and interest therein which the assignor at the time had, with like force and effect as if such assignment had been made by separate instrument duly acknowledged and

recorded, and any such assignment, or a duly authenticated copy thereof when accompanied by a duly authenticated copy of the record of the instrument or lien it purports to assign, shall be admissible in evidence as is provided by law for the admission of the records of deeds and mortgages. [34 G. A., ch. 227, § 1.]

CHAPTER 7.

OF OCCUPYING CLAIMANTS.

SECTION 2964. Proceedings.

This section has no application where the action is purely personal, seeking only a money judgment and not attempting to disturb either title to or possession of real property. *Central Trust Co. v. Hubinger*, 87 Fed. 3.

Loss or surrender of possession terminates the right to be regarded as an occupying claimant and to have relief as such under these statutory provisions. *Lindt v. Uihlein*, 116–48, 89 N. W. 214.

An occupying claimant is entitled to have his petition considered and passed upon in the usual method before being put out of possession. *Jefferson v. Rust*, 155–133, 135 N. W. 613.

An occupying claimant is practically the owner of his improvements and not a mere trespasser. It does not necessarily follow therefore that because a portion of a building of one owner is on land belonging to another, the former is not the owner even of such portion as is on the other's land, for the purpose of establishing a right of recovery for destruction of the building by fire. *Petty v. Minneapolis & St. L. R. Co.*, 136 N. W. 1044.

SEC. 2966. Payment—tenants in common.

After the amount of the interest of the claimant has been established, it is optional with the owner of the property to pay the amount of such claim or take the property. Therefore the attorney for such claimant has no lien upon the interest which he seeks to have established in his client. *McCormick v. Dumbarton Realty Co.*, 156–692, 137 N. W. 943.

SEC. 2967. Color of title.

One who acquires title to real property in consideration of the illegal sale of intoxicating liquors, in violation of code § 2423, and whose title is declared void on that account, cannot assert the rights of an occupying claimant with reference to improvements placed by him upon the premises. *Lindt v. Uihlein*, 116–48, 89 N. W. 214.

The statutory provisions as to occupying claimants furnish a special remedy, and one who seeks to avail himself of those provisions must bring himself within the statute and pursue the course indicated. *Ibid.*

The proceeding contemplated does not involve recovery of a personal judgment against the landowner, but is in the nature of the assertion of a lien on the property by the party in possession, accompanied by the right to retain such possession until the lien is satisfied. *Ibid.*

CHAPTER 8.

OF THE HOMESTEAD.

SECTION 2972. Exempt.

In general: Statutes are to be liberally construed in favor of homestead rights. *Merchants' Nat. Bank v. Eyre*, 107–13, 77 N. W. 498; *Edmonds v. Davis*, 122–561, 98 N. W. 375.

Application of property to the payment of debts should be so made as to preserve, so far as possible, the homestead of the debtor. *Shaffer v. Chernyk*, 130–686, 107 N. W. 801.

The homestead exemption is not merely for the benefit of the husband or wife alone but for the family of which they are a part. The statute clothes the family homestead with absolute exemption from the claims of creditors save only as

such exemption may be specifically limited by statute as is done under code §§ 2974-2976 and such provisions constitute and include every statutory exception to the exempt character of the homestead so long as the owner lives and does not abandon it. *Swisher v. Swisher*, 157–55, 137 N. W. 1076.

In what property: A leasehold interest may be sufficient to support a homestead right. *White v. Danforth*, 122–403, 98 N. W. 136; *In re Estate of Ring*, 132–216, 109 N. W. 710.

A homestead right may exist as to property held by an equitable title as effectually as though it were held by a legal title. *Foster v. Rice*, 126–190, 101 N. W. 771.

An existing homestead right is not lost and a new one created by a conveyance absolute in form, but which is in fact a mortgage only. *Ibid.*

Matured crops raised on the homestead are not within the statutory exemption. (Affirming S. C., 142 Fed. 620.) *In re Sullivan*, 148 Fed. 815.

Evidence in a particular case held not sufficient to show that certain property claimed as a homestead was exempt because the money used in its purchase was obtained from the sale of a former homestead. *Johnson County Sav. Bank v. Carroll*, 109–564, 80 N. W. 683.

Purchase money: The homestead is not exempt from a claim for the purchase money. *Clifton Land Co. v. Davenport*, 130–94, 106 N. W. 365.

Disposal of homestead: The owner may dispose of the homestead without regard to the claims of creditors as to which the homestead is exempt. *Dettmer v. Behrens*, 106–585, 76 N. W. 853.

A mortgagor may convey the homestead to a mortgagee who has a lien on the homestead and other property, without giving to a junior lienholder on such other property the right to have the senior mortgage first satisfied out of the homestead. The homestead may be conveyed free from claims of creditors which are not liens thereon. *Bankers' Life Assn. v. Engelson*, 148–594, 126 N. W. 951.

The owner of the title to the homestead has a right to convey it to his wife free from any claim of creditors. *In re Estate of Crocker, Jamison v. Crocker*, 148–104, 126 N. W. 962.

Where the wife became the owner of the homestead by decree of court in a divorce proceeding before a judgment against the husband had become a lien by reason of his abandonment, held that such judgment could not become a lien subsequently on the sale of the homestead by the wife. *Vittengl v. Vittengl*, 156–41, 135 N. W. 63.

The owner may devise the homestead owned by him to his wife free from his debts and by accepting such devise she does not subject it, to any extent, to the satisfaction of such debts save as is expressly provided by statute. *Swisher v. Swisher*, 157–55, 137 N. W. 1076.

Rights of spouse: Both husband and wife are entitled to live upon and enjoy the homestead. But so long as the wife of the owner chooses to live elsewhere, she is not entitled to any benefit from it and the owner is entitled to have the full right to farm and cultivate it so long as he continues to live upon and occupy it as a homestead. *Ehrck v. Ehrck*, 106–614, 76 N. W. 793.

Failure to make the wife a party defendant in proceedings to foreclose a mortgage executed prior to the marriage will not entitle the wife to relief in an independent action. Her rights in the homestead are not in any way superior to the lien of such a mortgage. *Browneller v. Wells*, 109–230, 80 N. W. 351.

The husband is presumed to be the head of the family and the homestead premises to be under his control, although the legal title is in the wife. *Burch v. Lowary*, 131–719, 109 N. W. 282.

Where the wife is in possession of the homestead under an independent right and not subject to the control of her husband, her right cannot be taken away by an unauthorized act of her husband. *King v. Bolt*, 151–1, 130 N. W. 818.

When the husband or wife holding the title to the homestead is adjudged bankrupt, the other may have such homestead set apart, even if not claimed by the bankrupt. The owner cannot waive the homestead right of the other. *In re Maxson*, (D. C.) 170 Fed. 356.

Trustee in bankruptcy: A trustee in bankruptcy may maintain an action to require the setting off of the homestead of the bankrupt and subjecting the remainder of his property to the payment of claims of creditors. *Duffield v. Dosh*, 124–286, 99 N. W. 1074.

An insolvent debtor cannot use nonexempt assets for the purchase of a homestead and thus put it beyond the reach of the trustee in bankruptcy. *Clarke v. Sherman*, 128–353, 103 N. W. 982.

SEC. 2973. Family defined.

After the death of both the father and mother, the children or any number of them continuing to reside on the homestead property as members of the same family constitute a family, entitled to the homestead exemption. *In re Rafferty*, 112 Fed. 512.

To constitute one or more persons with another living together in the same house a family, it must appear that they are

being supported by that other in whole or in part, and are dependent upon him therefor, and that he is under a natural or moral obligation to render such support. But the fact that the person thus dependent for support is an adult son does not prevent his being a member of the family of his mother. *Sheehy v. Scott*, 128–551, 104 N. W. 1139.

The homestead statutes should be liberally construed, but to entitle the occupancy by a widow or widower to the homestead protection there must be a natural or moral obligation of support, and a condition of dependence and actual support between such occupant and some person or persons residing with him or her on his premises is sufficient. Therefore, held that a widower occupying premises and having residing with him an adult daughter was entitled to a homestead in such premises. *Fox v. Waterloo Nat. Bank*, 126–481, 102 N. W. 424.

Under this section as it stood in the code of '73, which did not include the provision as to a party to whom the homestead is adjudged in a decree of divorce, held that such person did not have the homestead right while continuing to occupy the premises. *Clemans v. Penfield*, 111–511, 82 N. W. 947.

The provision as to cases of divorce is intended to apply to cases wherein the title to the homestead is in one of the parties to the divorce proceeding, and the court deems it proper to assign the homestead to the other so that the decree is the basis upon which the right to occupy the premises after the divorce is founded. *In re Pope*, 98 Fed. 722.

Where a married woman, after her adjudication as a bankrupt, was granted a divorce and awarded the homestead and the custody of a child, held that the homestead could not be subjected to the payment of her debts in the bankruptcy proceeding. *In re Le Claire*, 124 Fed. 654.

The provision that the divorced husband or wife to whom the homestead is awarded in the decree is entitled to retain it as exempt during continual personal occupancy was first inserted in the code of 1897; whether it is retroactive, *quaere*. *Fox v. Waterloo Nat. Bank*, 126–481, 102 N. W. 424.

The primary object of the exemption is the protection of the family, and as a general rule, when the family ceases to exist the exemption also ceases. Therefore, held that where a widow with children acquired a homestead, her homestead rights in the premises terminated when the children ceased to reside with her. The exception as to continuance of the homestead right to the survivor remaining in possession of a homestead acquired during the existence of the marriage does not apply to such a case. *Fullerton v. Sherrill*, 114–511, 87 N. W. 419.

A woman who has procured a decree of dissolution of a pretended marriage is not under this section entitled to homestead rights. *Floyd County v. Wolfe*, 138–749, 117 N. W. 32.

Where a widower acquired property and occupied it as a home with his three children, one of whom was a minor, held that his homestead right was established and under the evidence had not been abandoned by temporary absence. *Tyrell v. Shannon*, 147–184, 123 N. W. 325.

The clear intention of the statute is to continue the homestead right in case of divorce to whichever party is finally found to be entitled to the property. *Roberts v. Playle*, 150–279, 129 N. W. 945.

SEC. 2974. Conveyance or incumbrance.

In general: The homestead right is a favorite of the law, and the purpose of the statute is to require the utmost solemnity in the matter of its alienation. Such alienation must be by one instrument in the execution of which the husband and wife concur. Such conveyance cannot be effected by the action of the husband alone signing the instrument in his own right and under a power of attorney for his wife. *Keeline v. Clark*, 132–360, 106 N. W. 257.

Actual occupation by the family of the owner is sufficient declaration of the homestead character of the premises so that conveyance thereof can only be made by joint action of husband and wife. *Hostetler v. Eddy*, 128–401, 104 N. W. 485.

As by code § 3157 conveyances between husband and wife are authorized, such a conveyance by one to the other of the homestead will be valid, although not executed by both. *Beedy v. Finney*, 118–276, 91 N. W. 1069.

It seems that a sale by the husband alone of the fee title to the homestead, in which he reserves the right to use and occupy the property during the life of himself and wife, is valid and binding. *Allbright v. Hannah*, 103–98, 72 N. W. 421.

An agreement by the holder of the title as to the disposition to be made of the property after the homestead right in the premises has terminated is valid without the joinder of the wife. *Reilly v. Reilly*, 135–440, 110 N. W. 445.

The owner of the homestead may grant an easement therein without joinder by the husband or wife of such owner. *Stokes v. Maxson*, 113–122, 84 N. W. 949.

One who has acquired a homestead in premises for which he has a contract of purchase cannot transfer his rights under such contract without joinder of his wife in a joint written instrument and a subsequent acceptance of a lease of the property from one purchasing the legal title thereto subject to the contract will not

enlarge the rights of creditors nor constitute an abandonment of the homestead. *Duffield v. Dosh*, 124–286, 99 N. W. 1074.

A husband having title to the homestead may convey an easement therein without the wife joining. *Maxwell v. McCall*, 145–687, 124 N. W. 760.

A transaction between a husband and wife by which she joins in a conveyance of the homestead on condition of receiving other property in exchange which is to constitute a homestead, is not fraudulent as to creditors. *First Nat. Bank v. Eichmeier*, 153–154, 133 N. W. 454.

In the absence of fraud or unfair dealing, antenuptial contracts cutting off a prospective homestead right are valid. And the owner may make conveyance without joinder of the spouse of property which, but for the antenuptial contract, would have been subject to homestead rights. *Weis v. Bach*, 146–320, 125 N. W. 211.

An antenuptial contract is not effectual so far as it includes a waiver of homestead rights, but after the death of her husband, and after accepting the provisions of his will, she may be estopped by the antenuptial contract from objecting to his disposition of the homestead. *In re Adams' Estate*, 140 N. W. 872.

Conveyance void: Failure of the wife to join in a conveyance of the homestead renders the conveyance invalid for any purpose. *Goodwin v. Goodwin*, 113–319, 85 N. W. 31.

Where persons have been living together as husband and wife under a claimed marriage which is invalid because the pretended husband has a former wife living undivorced, of which fact the pretended wife has no knowledge, a conveyance by the pretended husband of premises owned by him and used by the two as a home will not be invalid on account of failure of the pretended wife to join therein. *Ibid.*

A mortgage on the homestead in which the wife does not join is void, and the purchaser of the premises under foreclosure of such mortgage acquires no right thereto. *Way v. Scott*, 118–197, 91 N. W. 1034.

Where the wife, joining with her husband in a mortgage of the homestead as additional security for notes of the husband, was fraudulently misled by the creditor as to the extent of the liability thus assumed, held that she was entitled to relief. *Lingenfelter v. Bowman*, 156–649, 137 N. W. 946.

Contract to convey: Where, under a contract by the husband, having the legal title to convey the homestead, possession is given to the purchaser, such contract is binding upon the wife upon the theory that by giving possession to the purchaser there is an abandonment of the homestead right. But in the absence of such delivery of possession as to constitute an abandonment, the contract of the husband without the assent of the wife is of no validity and the contract cannot be ratified so as to constitute an effectual conveyance save by the execution of a joint instrument in substantial compliance with the statute. *Alvis v. Alvis*, 123–546, 99 N. W. 166.

To constitute a valid conveyance there must be the concurrence of each with the knowledge of the other. *Ibid.*

The husband and wife must join in the execution of an instrument containing a granting clause applicable to each. It is not sufficient that one of them signs and acknowledges an instrument purporting to convey only the title of the other. *Ibid.*

A parol agreement to convey is not binding even though based upon good consideration and the payment of the consideration does not operate to create a trust in the homestead property in favor of the person making payment. *Ibid.*

A contract to convey a homestead in which the wife does not join is void as to both husband and wife, and no action for specific performance or for damages will lie as against either. *Hostetler v. Eddy*, 128–401, 104 N. W. 485.

No action for damages for breach of contract to convey a homestead, the wife not having joined in such contract, can be maintained as against the husband. *Wheelock v. Countryman*, 133–289, 110 N. W. 598.

A contract to convey the homestead is void if not signed by both husband and wife. *Ibid.*

An oral contract of husband and wife to convey the homestead, under which the grantee takes and holds possession, is effectual to pass title. *Caldwell v. Drummond*, 127–134, 102 N. W. 842.

Where husband and wife join in a contract to convey the homestead and the wife agrees that upon the performance of the contract she will execute a conveyance, relinquishing her statutory rights in and to the land, the contract may be enforced as against her. *Cone v. Cone*, 118–458, 92 N. W. 665.

Foreclosure may be had on a bond for a deed although the premises have been occupied as a homestead and the wife has not joined in the contract. *Clifton Land Co. v. Davenport*, 130–94, 106 N. W. 365.

Where the husband has received money under a contract to convey the homestead in which the wife does not join, an action may be maintained against him to recover the amount so paid. *DeKalb v. Hingston*, 104–23, 73 N. W. 350.

The statute does not require that the husband and wife sign the instrument at the same time; and where it appeared that when the instrument was executed by the husband, the wife was willing to sign it and that she did join with the husband in the execution of a deed tendered in the performance of the contract but it was objected to, the statute was sufficiently com-

plied with. *Luttschwager v. Fank*, 151–55, 130 N. W. 170.

Ratification: Where a contract to convey the homestead was consented to by the wife, but the written contract was not signed by her until some time after its execution by her husband, and she then united with her husband in the execution of a deed in pursuance of the terms of the contract, held that there was such ratification of the contract by the wife that a suit for specific performance could be based thereon. *Epperly v. Ferguson*, 118–47, 91 N. W. 816.

While the wife may ratify a sale of the homestead by her husband in which she has not joined, she cannot do so after the rights of third parties have intervened and her ratification would prejudice such rights. *Stickley v. Widle*, 122–400, 98 N. W. 135.

If the wife joins in a contract to convey the homestead after its execution by the husband and before the time for performance by delivery of a deed, and joins with her husband in executing the deed which is tendered in performance of the contract, the vendee cannot rely upon the invalidity of the contract as excusing performance on his part. *Kettering v. Eastlack*, 130–498, 107 N. W. 177.

Estoppel: The husband or wife of the owner may by conduct be estopped from setting up a homestead right as against one taking possession and making improvements under an oral contract of which the husband or wife has knowledge. *Eastwood v. Crane*, 125–707, 101 N. W. 481.

Other property included: A deed covering other property together with the homestead may be valid as to the property not included in the homestead. *Pryne v. Pryne*, 116–82, 89 N. W. 108.

Where the owner of premises, a portion of which is used as a homestead, contracts to sell a part thereof, not including the improvements, and leaving enough property in extent and value to constitute the full homestead exemption, such contract is not invalid because of the failure of the husband or wife to join therein, though the portion sold might have been included in the homestead, had the owner elected to do so. The owner may select the homestead without the consent of the husband or wife. *Hall v. Gottsche*, 114–147, 86 N. W. 257.

Prior to the adoption of the provision it was held that a contract by the husband to convey land including the homestead would not be specifically enforced in the whole or in part. *Ormsby v. Graham*, 123–202, 98 N. W. 724.

Under the last clause of this section, which is first found in the present code, the vendee under a contract to convey premises including a homestead may enforce his contract as to the portion not embraced in the homestead, the price to be paid being abated by deduction of the value of the portion embraced in the homestead. *Townsend v. Blanchard*, 117–36, 90 N. W. 519.

Where the vendee under contract to convey premises including the homestead, in which the wife has not joined, makes no demand for a conveyance of the portion not included in the homestead, he cannot recover damages in an action for a breach of the entire contract on account of the failure of the vendor to convey the portion not included within the homestead. *Lamb v. Cooper*, 150–18, 129 N. W. 323.

SEC. 2976. Liable for debts antedating purchase—by written contract.

Debts prior to acquisition: Where it is claimed that the homestead is liable for money borrowed to be used in paying therefor, it is not enough to show that the borrowed money was so used, but in order to confer a right to the lien it must also appear that it was a part of the contract that this should be done. *Johnson County Sav. Bank v. Carroll*, 109-564, 80 N. W. 683.

To render the homestead liable for money borrowed to pay the purchase price it must appear that the indebtedness was incurred at the time the homestead right attached. *Ibid.*

Where at the time the homestead was taken possession of the indebtedness which was subsequently attempted to be enforced against it had not been incurred, held that the homestead was not liable for such indebtedness. *Ibid.*

The previously contracted debt for which a homestead may be sold on execution is one which has become a fixed obligation enforceable prior to the acquisition of the homestead. *Anderson v. Kyle*, 126–666, 102 N. W. 527.

In a particular case, held that the evidence did not show that a note was executed in renewal of a prior note antedating the homestead so as to make the indebtedness a claim against the homestead. *In re Gardner's Estate*, 103–738, 72 N. W. 652.

The owner may make expenditures on the homestead and improvements thereto necessary to its preservation and suitableness for homestead occupation, and the expenditures therefor are protected as a part of the homestead right, even as against indebtedness contracted before the making of the improvements, though after the acquisition of the homestead *Ebersole v. Moot*, 112–596, 84 N. W. 696.

The homestead law has always received liberal construction in favor of the home-

stead occupant out of consideration of public policy and the very humane and beneficent purpose that inspired the enactment of the law. *Ibid.*

As against a judgment on a note dated subsequent to the acquisition of the homestead, the homestead is, *prima facie*, exempt. And where it was contended that the note was executed for a debt previously existing, by reason of conversion by the owner of the homestead of money belonging to the payee of the note, held that the burden was on the payee of the note not only to show conversion, but that it occurred before the acquisition of the homestead. *Walker v. Walker*, 117–609, 91 N. W. 908.

Where husband and wife occupied as a homestead property acquired by the husband with pension money and conveyed to the wife at his direction, held that the title in the wife was subject to sale for her antecedent debts. *Whinery v. McLeod*, 127–11, 102 N. W. 132.

As the homestead is liable for preëxisting debts, an insolvent debtor cannot use nonexempt property for the acquisition of a homestead which will be preserved to him in bankruptcy proceedings. *Clarke v. Sherman*, 128–353, 103 N. W. 982.

A homestead acquired with the husband's pension money, title being taken in the wife, is subject to the antecedent debts of the wife if she is in fact the owner of the property. *Ratliff v. Elwell*, 141–312, 119 N. W. 740.

The liability of the homestead for debts contracted prior to its acquisition does not destroy its homestead character in a proceeding of bankruptcy. The creditor entitled to subject the homestead to the payment of his claim must do so by the proper proceeding in the state court. *In re Maxon*, (D. C.) 170 Fed. 356.

Exhausting other property: It is not necessary to provide in a decree of foreclosure that the other real property covered by the lien shall be exhausted before resorting to the homestead. The statutes relating to homesteads make ample provision for the protection of homestead rights from sale on execution until other property of the judgment debtor is exhausted. *Kilmer v. Gallaher*, 107–676, 78 N. W. 685.

One who buys premises not constituting the homestead and assumes the payment of a mortgage covering such premises and also the homestead, cannot afterwards enforce the mortgage as against the homestead. *Moore v. Olive*, 114–650, 87 N. W. 720.

The homestead is only secondarily liable for incumbrances to which it is subject with other property. *Bissell v. Bissell*, 120–127, 94 N. W. 465.

Where the entire property to be sold by the sheriff is included within the homestead right, there is no occasion for setting off or reserving from the sale any portion as constituting the homestead; and if the property is subject to execution sale, a sale in gross may be proper. *Edinger v. Bain*, 125–391, 98 N. W. 568, 101 N. W. 119.

The homestead exemption takes precedence of a claim of a surety to have the homestead subjected to the payment of a debt secured by mortgage covering such homestead and also property of the surety. But where the mortgage was to secure the repayment of money advanced to extinguish a debt for the purchase of the homestead, held that the homestead should be first exhausted before resorting to the property of the surety. *Guiher v. Huffman*, 136–509, 109 N. W. 469.

As the homestead is to be subjected to mortgage claims thereon only to the extent of the deficiency remaining after subjecting to the payment of such liens all other property covered by such mortgages, the homestead in the hands of the grantee of a mortgagor cannot be subjected primarily to the satisfaction of the mortgage in order to preserve other property covered by the mortgage for the satisfaction of mortgages on such other property exclusively. *Bankers Life Assn. v. Engelson*, 148–594, 126 N. W. 951.

The fact that in a bankruptcy proceeding the mortgage covering the homestead and other property is held to be invalid as against other creditors does not prevent the mortgagee from enforcing the mortgage to its full extent against the homestead, all the other property having been exhausted in the bankruptcy proceeding for the benefit of the mortgagee *pro rata* with other creditors. *Huttig Mfg. Co. v. Burhans*, 148–657, 127 N. W. 991.

The provision that the homestead shall only be liable for a deficiency remaining after exhausting all other property is mandatory, and is applied in a bankruptcy proceeding in the marshaling of liens between different mortgages, some of which include the homestead, while others do not. Failure of the debtor to insist on the statute is immaterial. *Century Savings Bank v. Moody*, (C. C. A.) 204 Fed. 963.

Lien of judgments: A judgment becoming a lien upon premises before the occupancy of such premises as a homestead may be enforced and the grantee does not have priority over the judgment lien. *Therme v. Bethenoid*, 106–697, 77 N. W. 497.

SEC. 2977. What constitutes.

Separate tracts: The homestead must embrace the house used as a home, and none other can be selected, but if there are two so used, either may be retained. *Knorr v. Lohr*, 108–181, 78 N. W. 904.

Under the provisions of the code of '73,

a homestead might consist of lots or tracts not contiguous, but in such case it must be shown that such lots or tracts were habitually and in good faith used as a part of the same homestead. *Kelley v. Williams*, 110–153, 81 N. W. 230.

While the homestead may consist of one or more contiguous lots or tracts, yet by changing the actual place of residence to other premises, a lot which had previously been a part of the homestead by contiguity may cease to be homestead property. *White v. Danforth*, 122–403, 98 N. W. 136.

The homestead may be selected at any time before judicial sale, and no portion of the tract from which it may be selected is to be regarded as relinquished from the homestead rights, so long as the ownership and occupancy of the person claiming a homestead continues. *Lutz v. Ristine*, 136–684, 112 N. W. 818.

Abandonment: An oral contract for the sale of the homestead, followed by possession taken thereunder, amounts to an abandonment of the homestead. *Allbright v. Hannah*, 103–98, 72 N. W. 421.

The homestead right is purely statutory, and for the benefit of the family, and it may be waived or abandoned. The right of occupancy as a homestead does not affect the legal title, and when such right ceases by the death of the occupant, title descends to the issue of the owner, unless otherwise directed by will. *Reilly v. Reilly*, 135–440, 110 N. W. 445.

The question of the existence of a homestead right does not rest merely in intention. It arises from the fact of occupancy as a home and ends only with abandonment in fact. *Hostetler v. Eddy*, 128–401, 104 N. W. 485.

An intention by the occupant of premises formed before his marriage to abandon the same as his residence is immaterial with reference to a homestead right arising on subsequent marriage. *Ibid.*

One who conveys his homestead loses the homestead right although he afterwards acquires title to the property. *Jasper County v. Sparham*, 125–464, 101 N. W. 134.

While there may be a homestead right in premises held under a contract to convey, yet where husband and wife consented that the vendor should treat the contract as forfeited by reason of provisions therein for forfeiture on nonpayment of the purchase price, and the husband accepted a lease of the premises under which husband and wife continued to occupy, held that the homestead right under the contract was abandoned. *Anderson v. Cosman*, 103–266, 72 N. W. 523.

Whether absence from the homestead shall be deemed an abandonment, or to have been with *animus revertendi*, depends on the facts of each particular case. *Wapello County v. Brady*, 118–482, 92 N. W. 717.

Occupancy of other property which could be claimed as a homestead is a strong circumstance tending to show an abandonment of the previous homestead. *Ibid.*

The owner of the homestead cannot have the option of choosing between two homes when either is seized by creditors. One or the other must be shown to have had that character prior to such seizure. *Ibid.*

When only verbal evidence of the *animus revertendi* is relied upon, the temptation opened to the witnesses interested is such as to call for careful scrutiny. *Ibid.*

After selecting and occupying a new homestead, the owner cannot claim the old homestead as exempt while being held for exchange or sale. *Stickley v. Widle*, 122–400, 98 N. W. 135.

When a person removes from his homestead for a temporary cause with the definite and settled purpose of returning, and that purpose is continuously held in good faith, there is no abandonment of the homestead right. *Maguire v. Hanson*, 105–215, 74 N. W. 776.

To constitute a homestead it is not sufficient that the claimant is supported by the cultivation and use of the property. Actual occupation of the premises as a home for the owner and his family is required, excepting in a few cases, where a temporary absence from the home for authorized purposes will not affect its homestead character, or where the proceeds of one homestead are invested in property to be used for another homestead, in which case a reasonable time is allowed in which to make a change. But a mere intent to erect upon a lot or tract of land a house to be occupied as a home at some indefinite time is not sufficient to give the property the homestead character. *Ibid.*

Where there is no dwelling house to be occupied, the premises cannot constitute a homestead. *Blue v. Heilprin*, 105–608, 75 N. W. 642.

Where the homestead was abandoned by the owner without intention to return thereto, and two days later he made a conveyance of the premises, held that the purchaser did not acquire the property free from debts which would have attached to it had it not been a homestead. *Chambers v. Jackson*, 106–6, 75 N. W. 663.

Removal from the homestead with intention to return only in a contingency which the owner wishes to avoid, as for instance if he intends "to go back to the place provided he cannot sell it," will constitute an abandonment. *Conway v. Nichols*, 106–358, 76 N. W. 681.

Where the evidence shows an intent to return, the period of absence alone being conditional, there is no abandonment. *Rand*

Lumber Co. v. Atkins, 116–242, 89 N. W. 1104.

A temporary removal from the premises with the intent of returning does not constitute an abandonment of the homestead. *Lutz v. Ristine*, 136–684, 112 N. W. 818.

A temporary removal from the homestead and renting it to third parties will not be deemed an abandonment if the party having the homestead right intends to return and resume the occupancy thereof. *In re Pope*, 98 Fed. 722.

Although the husband who has a legal title to the homestead abandons it, nevertheless the wife is entitled to the same right therein until cut off by proper proceedings, and the fact that she is in an insane asylum will not deprive her of such homestead right. *Way v. Scott*, 118–197, 91 N. W. 1034.

Where the homestead character of the land is established, the burden of proof to show that it is liable for debts by reason of abandonment is upon the person making such claim. *Robinson v. Charleton*, 104–296, 73 N. W. 616.

Mere absence from the alleged homestead for more than four years with no definite time for returning, without other evidence of abandonment, is not sufficient to show that the homestead has, in fact, been abandoned. *Boyer v. Dague*, 154–67, 134 N. W. 542.

Where the widow having a right of occupancy of the homestead for life intermarries with the resident of another state and goes to reside with him in such other state, she thereby loses her right of occupancy by abandonment, and her subsequent return and reoccupancy of the property will not clothe her anew with the rights that she has thus abandoned. *Anderson v. Blakesly*, 155–430, 136 N. W. 210.

In order to preserve the homestead character in the absence of actual occupancy there must be a continuing, definite and fixed purpose to return. When such purpose ceases, the abandonment becomes complete. *Vittengl v. Vittengl*, 156–41, 135 N. W. 63.

A contract of sale of the homestead premises entered into by the owner when not in actual occupancy is inconsistent with a definite and fixed purpose to return; but such sale may be shown to have been with the intention of acquiring a new homestead. *Ibid.*

The facts in a particular case considered as tending to show an abandonment of the homestead. *Hoger v. Hart*, 140 N. W. 356.

Use: Where it appears that a room is used as a place of residence the owner should not be deprived of his statutory exemption because in the prosecution of his ordinary business the front windows and a portion of the room are devoted to that business. *Edmonds v. Davis*, 122–561, 98 N. W. 375.

Mere intention to occupy as a homestead in the future does not impress premises with the character of a homestead. *White v. Danforth*, 122–403, 98 N. W. 136.

Merely sleeping in a roofless house as a matter of convenience is not alone sufficient occupancy of the premises to constitute them a homestead. *Gaston v. Horn*, 157– —, 138 N. W. 925.

SEC. **2978. Extent—dwelling—appurtenances—value.** If within a city or town plat, it must not exceed one-half acre in extent, otherwise it must not contain in the aggregate more than forty acres, but if, in either case, its value is less than five hundred dollars, it may be enlarged until it reaches that amount. It must not embrace more than one dwelling house, or any other buildings except such as are properly appurtenant thereto, but a shop or other building situated thereon, actually used and occupied by the owner in the prosecution of his ordinary business, and not exceeding three hundred dollars in value, is appurtenant thereto. [28 G. A., ch. 119, § 1; C. '73, §§ 1996–7; R. §§ 2284–5; C. '51, §§ 1252–3.]

So far as this section restricts the extent of a homestead within a town plat, it is not applicable to homesteads already existing. *Sayers v. Childers*, 112–677, 84 N. W. 938.

The homestead is limited to one-half acre only when within a city or town plat. The fact that it is within the corporate limits of a city, if not within a platted portion thereof, does not bring it within such limitation as to extent. *Foster v. Rice*, 126–190, 101 N. W. 771.

To limit the homestead to one-half acre, under the provisions of § 1996, code of '73, differing in language from this section, it was necessary that it lie not only within the limits of the municipality, but within a platted portion thereof, and held that such limitation did not apply where a tract of land not within the municipality was platted, and then the municipality was extended to include it. *Parrott v. Thiel*, 117–392, 90 N. W. 745.

The owner of a homestead is allowed but one shop or other building in which to prosecute his ordinary business. *Shaffer v. Chernyk*, 130–686, 107 N. W. 801.

The homestead being limited to forty acres, if the tract in which the homestead right exists exceeds forty acres in extent,

the balance descends on the death of the owner like any other property, subject to the debts of the owner. *Porter v. Perkins*, 125–55, 99 N. W. 160.

The forty acres which may be claimed exempt as a homestead may be selected from any greater number of acres occupied by the owner, the only condition being that the tract selected shall include that forty of the whole on which is situated the house used by the owner as a home. *Lutz v. Ristine*, 136–684, 112 N. W. 818.

SEC. 2979. **Selecting — platting — notice to plat and record.** The owner, husband or wife, may select the homestead and cause it to be platted, but a failure to do so shall not render the same liable when it otherwise would not be, and a selection by the owner shall control. When selected, it shall be marked off by permanent, visible monuments, and the description thereof shall give the direction and distance of the starting point from some corner of the dwelling, which description, with the plat, shall be filed and recorded by the recorder of the proper county in the homestead book, which shall be, as nearly as may be, in the form of the record books for deeds, with an index kept in the same manner. Should the homestead not be platted and recorded at the time levy is made upon real property in which a homestead is included the officer having the execution shall give notice in writing to said owner, and the husband or wife of such owner, if found within the county to plat and record the same within ten days after service thereof; after which time said officer shall cause said homestead to be platted and recorded as above, and the expense thereof shall be added to the costs in the case. [27 G. A., ch. 98, § 1; C. '73, §§ 1998–9; R. §§ 2286–7; C. '51, §§ 1254–5.]

Where a tract of eighty acres was occupied as a homestead, and a contract to convey forty acres of it was made to a son-in-law of the owner on condition that he should build a house and live thereon, which he did, held that such contract constituted an election to regard the other forty acres of the tract as a homestead and was an abandonment of any homestead right in the tract referred to. *Allbright v. Hannah*, 103–98, 72 N. W. 421.

The selection of the homestead by the owner must control. *Ehrck v. Ehrck*, 106–614, 76 N. W. 793.

The owner may select the homestead without the consent of the husband or wife, and by a conveyance, incumbrance or contract may limit the selection by excluding from the homestead a portion of premises which might be included therein, but not necessary to its existence to the full extent allowed by law. *Hall v. Gottsche*, 114–147, 86 N. W. 257.

Where the owners gave notice to the sheriff as to the portion of the premises claimed as a homestead and he offers the portion not included before selling the whole, the sale is not void, although the sheriff does not plat the homestead as here required. *Ackerman v. Hendricks*, 117–106, 90 N. W. 522.

Where the portions of the premises not included within the homestead were offered in forty-acre tracts without bids being made, held that the sheriff was not bound to offer the entire portion of the premises not included within the homestead before proceeding to sell the entire premises. *Ibid.*

An execution sale of any portion of the premises which the owner might have claimed as his homestead is not valid without a platting of the homestead either by the owner or the officer making the sale. *Lutz v. Ristine*, 136–684, 112 N. W. 818.

The provisions as to platting are directory only, and the failure to plat does not defeat the exemption of the proceeds in the hands of the heir. *In re Eash*, (D. C.) 157 Fed. 996.

SEC. 2981. **Changes.**

The proceeds of the homestead, held by the owner for the purpose of investment in another homestead, are exempt to him under the bankrupt law. *In re Johnson*, 118 Fed. 312.

The proceeds of a homestead are only exempt for a reasonable time, during which they are held for the purpose of investing them in another homestead, and held that where one had sold his homestead in another state and brought the proceeds with him to this state in the shape of notes and mortgages, not being entitled under the circumstances to acquire a homestead in this state, the proceeds of the former homestead were subject to the claims of creditors. *Campbell v. Campbell*, 129–317, 105 N. W. 583.

What will be a reasonable time during which the homestead may be held for the purpose of exchanging it or selling it and investing the proceeds in another home,

must depend on the facts of each particular case. *Robinson v. Charleton*, 104–296, 73 N. W. 616.

The owner of the homestead may convert it into money and hold the proceeds exempt for the purpose of procuring a new homestead, and with such proceeds may procure other property to be conveyed to his wife, although exceeding in extent that which he might retain as a homestead. The homestead being exempt from claims of creditors, no fraud upon creditors is committed if it is exchanged for other property which is taken in the name of the wife. *Richards v. Orr*, 118–724, 92 N. W. 655.

While the right of homestead will not attach to vacant land acquired by purchase, independently of a change of homestead, it will attach to vacant land taken in exchange for the homestead, or bought with the proceeds of the homestead, when held in good faith for use as a home. *Blue v. Heilprin*, 105–608, 75 N. W. 642.

The property acquired for a new homestead will not be exempt from antecedent debts except to the extent in value of the old homestead. *Ibid.*

A lot purchased with money previously realized by the execution of a mortgage on the homestead is not exempt under this section. *Boettger v. Galloway*, 115–353, 88 N. W. 831.

Creditors are not prejudiced by the exchange of a homestead which is exempt from their claims for another homestead of greater value, being entitled to subject the new homestead to the extent of the increased value to the payment of the owner's debts. *Shaffer v. Chernyk*, 130–686, 107 N. W. 801.

The creditors are not entitled to subject the homestead to the extent to which it has been improved after the creation of the owner's obligations to them where such improvement does not result in substantial increase in value, but consists only in rendering the premises more convenient and suitable for homestead occupation. *Ibid.*

Where the widow claims one third of the proceeds of her husband's estate sold for the purpose of paying debts, she cannot hold it as exempt for investment in a new homestead even though the property sold includes the homestead of her husband. *Edinger v. Bain*, 125–391, 98 N. W. 568, 101 N. W. 119.

One who selects a new homestead, retaining the old homestead for purpose of exchange or sale, thereby abandons the homestead exemption as to such old homestead. *Stickley v. Widle*, 122–400, 98 N. W. 135.

The owner who is not in the actual occupancy of premises as a homestead, but has a purpose to resume such occupancy, may show that a contract of sale is with the intention of acquiring a new homestead. *Vittengl v. Vittengl*, 156–41, 135 N. W. 63.

This section has no application where the question is as to when the homestead character first attached to premises in view of the nature of the occupancy thereof. *Gaston v. Horn*, 157– —, 138 N. W. 925.

The proceeds of the sale of a homestead are not exempt from execution unless the sale is for the purpose of procuring a new homestead and the burden of proof is upon the party claiming the exemption to show an intention to reinvest in another homestead. *Clay County v. Meyers*, 140 N. W. 889.

Where the owner of the homestead has invested the proceeds of the sale thereof in property situated in another state, he cannot afterwards claim an exemption in property acquired in this state by exchange for such property in another state. *Dickinson v. Johnson*, 142 N. W. 407.

SEC. 2985. Occupancy by surviving spouse—descent.

Election by widow: Where it does not appear that the widow has elected to take a homestead right in lieu of dower, the presumption is that she takes the dower right. *Peebles v. Bunting*, 103–489, 73 N. W. 882.

The fact that the widow continues to reside upon a portion of the land belonging to her husband does not constitute an election to occupy the homestead for life in lieu of dower, where it does not appear that the premises occupied by her constituted the homestead of her husband at the time of his death. *Ibid.*

If the widow elects to take one third in fee she cannot assert any homestead right in the portion thus set apart to her. *Edinger v. Bain*, 125–391, 98 N. W. 568, 101 N. W. 119.

The right to the distributive share is primary, and an election is necessary in order to retain the homestead for life. *Wold v. Berkholtz*, 105–370, 75 N. W. 329.

Continuance in possession for more than ten years, but under an arrangement by which the wife was asserting her right to a distributive share and not a claim to the homestead, held not sufficient to show an election of the homestead right. *Ibid.*

The primary right of the widow is the distributive share, and unless she does something which in law amounts to an election to take the homestead in lieu thereof, the court will award her the distributive share provided by statute. Occupancy for less than a year before commencing proceedings to recover her distributive share held not to bar her right. *In re Estate of Lund*, 107–264, 77 N. W. 1048.

The answer of the widow setting up the homestead character of the premises in

another case in which she was not called upon to make an election between occupancy of the homestead and a distributive share held not to bar her right to the distributive share. The mere contention of the widow that she has elected to take the homestead, made before the time when she is required to make the election, will not deprive her of her distributive share. *Ibid.*

The primary right of the surviving spouse is to the distributive share. An election is called for when such survivor desires to take the homestead right. In a particular case held that the occupancy of the homestead was not such as to show an election to retain it in lieu of dower. The presumption of election to take the homestead, which might arise from continuance of occupancy, may be rebutted otherwise than by the actual setting apart of the distributive share. *McDonald v. Young*, 109–704, 81 N. W. 155.

The election of the surviving husband or wife to take the homestead in lieu of a distributive share may be found from occupancy alone, or from other testimony tending to show such purpose. *Deere v. Meyer*, 131–172, 108 N. W. 236.

There is no presumption that the continued occupancy of the homestead is by virtue of an election to retain the homestead for life, unless it appears that such occupancy is inconsistent with any other right to thus occupy. *Percifield v. Aumick*, 116–383, 89 N. W. 1101.

Long continued occupancy by a widow of her husband's homestead raises a presumption of her election to take a life interest therein rather than a distributive share of the estate, and such possession is not adverse to the heirs. *Huit v. Huit*, 122–338, 98 N. W. 123.

As to election between homestead and distributive share, see also notes in this supplement to code, § 3377.

The right of the survivor to elect to take the homestead for life is personal and the exercise of such right cannot be complained of by creditors, nor set aside on their application. *Piekenbrock v. Knoer*, 136–534, 114 N. W. 200.

The right to thus occupy the homestead is not a right which may be sold under execution. *Ibid.*

Upon the death of the husband the widow is entitled to possession and occupation of the homestead until it is otherwise disposed of according to law, and the probate of the will of the husband making other disposition of the homestead does not deprive her of that right. *Fehd v. Oskaloosa*, 139–621, 117 N. W. 989.

Under the facts of a particular case, held that retention of possession of the homestead by the widow for two and one-half years, without administration and without written notice upon her by the heirs requiring her to elect, was sufficient to show an election to retain the homestead for life in lieu of dower. *Stoddard v. Kendall*, 140–688, 119 N. W. 138.

While continued possession of the homestead by the widow is evidence tending to show an election to take homestead rights instead of a distributive share, it is not conclusive; and if the testimony as a whole makes it reasonably clear that while remaining in possession she continues to assert an interest in the title as distinguished from the mere right of life occupancy and use, the presumption or inference derived from the fact of continued possession is overcome. *Gray v. Wright*, 142–225, 119 N. W. 612.

The right of the widow in the homestead, title to which was in her deceased husband, is lost by abandonment and the person entitled to the fee of the property can at once proceed to enforce his right to its use and enjoyment unincumbered by any homestead claim. *Anderson v. Blakesly*, 155–430, 136 N. W. 210.

This section has special reference to cases where the spouse holding title to the homestead dies without a will, while §§ 2987 and 3270 deal more particularly with cases where the situation is affected by the existence of a will. *Swisher v. Swisher*, 157–55, 137 N. W. 1076.

Descent—exemption: The taking of a distributive share in the estate devests the homestead right, and the widow does not hold the distributive share thus taken exempt from liability for her debts. *Benjamin v. Doerscher*, 105–391, 75 N. W. 330.

The fact that the widow proposes to invest the proceeds of such distributive share in a new homestead will not exempt such proceeds from liability. *Ibid.*

On the death of the owner, the homestead passes to the widow and she is entitled to use and occupy it at least for one year. *In re Estate of Ring*, 132–216, 109 N. W. 710.

If there be no survivor of husband or wife the homestead is to descend to the issue of either according to the rules of descent and is to be held by the issue exempt from the antecedent debts of their parents and their own. *Fox v. Waterloo Nat. Bank*, 126–481, 102 N. W. 424.

The right of heirs to inherit the homestead free from liability for the debts of the ancestor is not dependent on any homestead right in them. If the widow continues to occupy the homestead for life the debts of the deceased owner cannot be enforced against it either as to her or as to the heirs. But if she takes a one third in fee, then so far as this one third does not include the homestead, or a portion of it, the homestead or the portion of it not so included descends to the heirs in fee free from the debts of the owner. *Porter v. Perkins*, 125–55, 99 N. W. 160.

Any attempted change in boundary by the surviving husband or wife after the death of the owner will not affect the in-

terest of the heirs therein and is thus declared to be exempt from liability for debts of the owner. *Ibid.*

An existing obligation of the heir is an indebtedness in such sense that the heir takes the homestead exempt therefrom. *Merchants' Nat. Bank v. Eyre*, 107–13, 77 N. W. 498.

Where the testator devised all his property to his widow for life, with the stipulation that after her death whatever remained should be divided among certain, but not all, of his children, held that the share of the proceeds of the homestead received by each child was not exempt from execution under this section. *First Nat. Bank v. Willie*, 115–77, 87 N. W. 734.

The proceeds of a voluntary sale by an heir of his interest in his ancestor's homestead, in the absence of a showing of intention to reinvest such proceeds in another homestead, are not exempt from execution for his debts. *Kinzer v. Stephens*, 121–347, 96 N. W. 858.

The homestead exemption, being in derogation of common law, does not inure to the benefit of the heirs to whom the homestead descends, except as provided by statute. *Beatty v. Wardell*, 130–651, 105 N. W. 357.

Devisees of the homestead taking otherwise than in accordance with the law of descent do not hold the homestead exempt from their antecedent debts. *Rice v. Burkhart*, 130–520, 107 N. W. 308.

Where the owner of the homestead dies, leaving no surviving husband or wife, the heir is entitled to have his portion of the proceeds of the homestead set off for him in bankruptcy proceedings as exempt, unless such exemption has been waived. *In re Eash*, (D. C.) 157 Fed. 996.

Estoppel: Adjudication in a proceeding to which the wife is a party, that the property in which she claims an interest did not constitute a homestead, will estop her from asserting a homestead right in her interest therein. *Atlee v. Bullard*, 123–274, 98 N. W. 889.

On the death of those entitled to occupy the premises as a homestead, the title descends to the issue of the owner according to the statutory rules of descent unless otherwise directed by will, and the owner may make such disposition of the title, subject to the right of occupancy as a homestead, as he sees fit. *Reilly v. Reilly*, 135–440, 110 N. W. 445.

SEC. 2986. Sale for debts.

The only statutory authority for subjecting the homestead of a deceased person to the payment of general creditors is where the deceased leaves no surviving spouse and there is a failure of issue. *Swisher v. Swisher*, 157–55, 137 N. W. 1076.

SEC. 2987. Devise.

On the death of the owner, the homestead remains exempt from being taken for the debts of the owner save as by statute provided. *Swisher v. Swisher*, 157–55, 137 N. W. 1076.

This section does no more than provide that, subject to the claims of a surviving spouse, a homestead may be devised like other real estate, and such devise does not affect the exempted character of the property. *Ibid.*

CHAPTER 9.

OF LANDLORD AND TENANT.

SECTION 2988. Apportionment of rent.

This section relates to an apportionment of rent between the executor and the reversioner pro rata as to time and with reference to rent not accrued, that is, not due at the time of the death of the life tenant. *Gudgel v. Southerland*, 117–309, 90 N. W. 623.

SEC. 2991. Tenant at will—notice to quit.

One in possession with the assent of the owner, in the absence of further proof, is presumed to be a tenant at will. *Fischer v. Johnson*, 106–181, 76 N. W. 658.

One who goes into possession simply of the real estate of another is presumed to be a tenant in the absence of any proof to rebut such presumption. *Heddleston v. Stoner*, 128–525, 105 N. W. 56.

Where a tenant continues to occupy the premises with the assent of the landlord, such occupancy will be deemed to have been under the terms and conditions of the lease creating the tenancy. *Kennedy v. Iowa State Ins. Co.*, 119–29, 91 N. W. 831.

A tenant holding over after the expiration of his term is presumed to do so as

tenant at will, and not under a covenant for renewal, unless the circumstances indicate an affirmative election to renew, rather than to hold as tenant at will. *Andrews v. Marshall Creamery Co.*, 118–595, 92 N. W. 706.

The thirty days' notice in writing to terminate a tenancy at will is not required where the tenant does not occupy the premises with the assent of the landlord after the termination of the written lease. *McClelland v. Wiggins*, 109–673, 81 N. W. 156.

While at common law a tenancy from year to year might be implied from a holding over under a written lease which had expired, held that the provision of this section as to termination of a tenancy at will is applicable in such case, and while the tenant was bound to make payments according to the provisions of the written lease, the landlord did not have a lien for a longer time than that required for the termination of the tenancy by notice. *German State Bank v. Herron*, 111–25, 82 N. W. 430.

Under an executed contract of sale entitling the purchaser to possession, a notice to quit to a tenant in possession may properly be given by the purchaser. *Willis v. Weeks*, 129–525, 105 N. W. 1012.

The parties to a tenancy may by mutual consent terminate the same at pleasure, and consent may be implied from conduct. If the lessor, with knowledge of the assignment of the lease, so deals with the parties that his consent to the assignment may properly be implied, it is sufficient to terminate the liability of the assignor. *Brayton v. Boomer*, 131–28, 107 N. W. 1099.

Without regard to the remedy provided by forcible entry and detainer, the landlord may maintain an action in a proper case for recovery of possession. *Denecke v. Miller*, 142–486, 119 N. W. 380.

One who acquires title to land on the death of the owner, with knowledge that the land is in the possession of a tenant whose tenancy expires on the death of such previous owner, has the election to allow him to remain as tenant at will or by proper steps to oust him from such possession. If the tenant is allowed to remain for thirty days the owner is not entitled to his remedy to recover possession nor to an action for forcible entry and detainer without thirty days' notice to quit, or if the land be agricultural land, until March first following. *Hall v. Henninger*, 145–230, 121 N. W. 6.

Such owner cannot deprive the tenant of his possession without the statutory notice by instituting an action in equity for injunction. *Ibid.*

In the absence of any express agreement as to the time when rent should be paid, the termination of the term gives the landlord only the right to make demand for payment and does not fix the time of performance. *Warner v. Shaffer*, 152–565, 132 N. W. 964.

The duration of a tenancy at will at any moment is the period in which it may be terminated on notice. *Wixom v. Hoar*, 139 N. W. 890.

One in possession with the consent of the owner is presumptively a tenant at will, but he may show that he is a tenant for years. *Halligan v. Frey*, 141 N. W. 944.

SEC. 2992. Landlord's lien.

Rent payable: When no time for payment of rent is fixed, it is not payable until the end of the term. *Ingram v. Dailey*, 123–188, 98 N. W. 627.

Nature and extent: The lien attaches to crops grown upon the leased premises, whether they are exempt from execution or not. The provision that the lien does not apply to property exempt from execution relates only to "any other personal property of the tenant which has been used on the premises during the term." *Hipsley v. Price*, 104–282, 73 N. W. 584.

The lien commences as soon as the property intended to be kept on the premises as a part of the business of the tenant is brought thereon, and attaches to the property so brought as security for the payment of the rent for the entire term. *Des Moines Nat. Bank v. Council Bluffs Sav. Bank*, 150 Fed. 301.

Where the tenant, who subsequently became a bankrupt, retained possession after the termination of the lease under a contract to purchase, held that the landlord thereafter had no lien on the tenant's personal property for subsequently accruing rent on nonperformance of the contract of sale, which was enforceable against the bankrupt's assets. *Ibid.*

Where the landlord seeks to establish a lien as to property owned by the lessee and used on the demised premises, the burden is not on him to show also that such property is not exempt from execution for the debts of the tenant, the grantee of such property relying upon the exemption. *Hays v. Berry*, 104–455, 73 N. W. 1028.

The lien attaches for the rent of the entire term, although it can only be enforced for the rent due, but as to the entire rent provided for by the lease the indebtedness is absolute, though not yet due. *Brown v. Cairns*, 107–727, 77 N. W. 478.

The fact that the landlord reserves the right to sell the entire premises, or a part thereof, with the condition that the rent shall be abated accordingly, does not prevent the entire rent being an indebtedness when the lease is entered into. *Ibid.*

A landlord cannot assert a lien for other indebtedness than that arising from the renting of the premises for the time cov-

ered by the lease, and if he attempts to do so in such a way as to render it impracticable to determine what amount is due for the leased premises, he forfeits his entire lien. *First Nat. Bank v. Flynn*, 117–493, 91 N. W. 784.

The landlord has no right to the possession of the tenant's property under his lien until some part of the rent is actually due. *Hilman v. Brigham*, 117–70, 90 N. W. 491.

The lien for rent under an occupancy at will resulting from possession after the termination of a written lease attaches only for the length of time necessary to end a tenancy by notice, and not for an entire year, although the tenant has been holding over for more than a year, and the landlord's lien in such case is therefore inferior to a chattel mortgage executed on the tenant's property after the termination of the written lease and prior to the accrual of the rent for which the landlord's lien is claimed. *German State Bank v. Herron*, 111–25, 82 N. W. 430.

The landlord having a lien on the tenant's property may sue for its conversion. *Church v. Bloom*, 111–319, 82 N. W. 794.

The landlord will not be estopped from asserting his lien as against a purchaser from the tenant by reason of having previously failed to object to similar sales during the existence of prior leases, at least without knowledge of such previous sales being brought home to him. *Ibid.*

The landlord following the proceeds of the property on which he has a lien is confined to his remedy against the person receiving such proceeds and cannot recover for conversion as against one for whose benefit as surety such proceeds have been used. *Overholser v. Christensen*, 133–129, 110 N. W. 321.

The landlord may by his conduct estop himself by relying on his lien as against a purchaser from the tenant, but to constitute such estoppel it must appear that the purchaser has by payment, or otherwise, put himself in such a position as to suffer damage or injury from the action of the landlord in attempting to enforce his lien. *Gardner v. Roach*, 111–413, 82 N. W. 897.

The individual property of one member of a firm, which property is used and kept on the leased premises, is not subject to a landlord's lien for rent due from the firm. The lien and the remedy given the landlord are purely statutory, and the landlord must avail himself of them just as they are given. *Ward v. Walker*, 111–611, 82 N. W. 1028.

Creditors claiming a lien upon a stock of goods of the tenant by a bill of sale and who do not take possession of the stock under such sale, are not personally liable to the landlord for rent as to which he has a lien on such stock. *Hartwig v. Iles*, 131–501, 109 N. W. 18.

The landlord's lien does not include the right to possession of personal property as against either the tenant or one claiming through him, and he cannot maintain replevin against an attaching creditor. *Remington Typewriter Co. v. McArthur*, 145–57, 123 N. W. 760.

The lien for rent attaches, as between landlord and tenant, under a tenancy at will, and in case of the bankruptcy of the tenant, the landlord has a preferred claim, under such lien, against the bankrupt's goods not exempt from execution. *In re Hersey*, (D. C.) 171 Fed. 1001.

A claim for rent accruing after the bankruptcy of the lessee, under a lease authorizing the lessor to reënter on default of rent and to recover possession by statutory action, is not a "debt absolutely owing" to the lessor at the time of such bankruptcy, and the lessor is not entitled to a lien for the rent thus to accrue. *In re Abrams*, (D. C.) 200 Fed. 1005.

Priority: A purchaser from the tenant of property used on the premises during the term takes subject to the lien of the landlord and cannot claim protection as a purchaser without notice. *Hays v. Berry*, 104–455, 73 N. W. 1028.

One purchasing products of the farm from a subtenant takes subject to the landlord's lien against the original tenant. *Beck v. Minnesota & Western Grain Co.*, 131–62, 107 N. W. 1032.

Demand by the landlord against such purchaser is necessary before maintaining action against him for conversion. But such demand may be made by an agent. *Ibid.*

The period within which suit must be brought to enforce the landlord's lien as against a purchaser from the subtenant is to be determined by the terms of the landlord's contract with the original tenant. *Ibid.*

Where, in a proceeding to enforce a landlord's lien by attachment, employes of the tenant properly file their claims, under the provisions of code § 4022, such claims take priority over the landlord's lien. *Stuart v. Twining*, 112–154, 83 N. W. 891.

Where exempt property covered by a chattel mortgage was left on the premises by the tenant at the end of his term, held that the landlord acquired no lien thereon as against the mortgagee. *Bacon v. Carr*, 112–193, 83 N. W. 957.

A valid mortgage on personal property of a tenant, executed before the commencement of the term, creates a lien superior to that of the landlord. *Gasnick v. Steffensen*, 112–688, 84 N. W. 945.

Where a chattel mortgage on the property of the tenant is foreclosed, the landlord's lien may be satisfied out of the proceeds of the sale. *Dowie v. Christen*, 115–364, 88 N. W. 830.

Where machinery was sold to the tenant and set up on the premises under an

agreement that a chattel mortgage should be executed for the purchase price when the machinery was set up and accepted, held that such chattel mortgage took priority over the landlord's lien. *Davis Gasoline Engine Works Co. v. McHugh*, 115–415, 88 N. W. 948.

A purchase money mortgage given by a tenant as a part of the transaction for purchase by him of property taken onto the leased premises, is a prior lien to the landlord's claim for future accruing rent. *Arnold v. Hewitt*, 128–671, 104 N. W. 843.

Injunction: A landlord is entitled to an injunction to restrain the removal from the premises of property thereon to the prejudice of his lien, without a showing that the tenant is insolvent. *Wallin v. Murphy*, 117–640, 91 N. W. 930.

The landlord is entitled to an injunction to protect his lien only as against some threatened interference therewith which impairs his security. *Stoaks v. Stoaks*, 146–61, 124 N. W. 757.

Attachment: Where rent has accrued, the landlord may resort to his remedy by attachment, following the procedure prescribed for ordinary attachments, and is not liable for wrongfully suing out an attachment, even though by reason of a counterclaim, which is subsequently pleaded, no judgment for rent is secured. *Smeaton v. Cole*, 120–368, 94 N. W. 909.

In an action to enforce the landlord's lien by attachment, the tenant cannot interpose by way of counterclaim a claim for wrongful and malicious suing out of attachment. *Ingram v. Dailey*, 123–188, 98 N. W. 627.

The remedy by attachment is not compulsory. The landlord does not owe the tenant the duty of enforcing his lien against any specific portion of the property subject thereto nor does he deprive himself of the right to enforce his lien against property on which there is a junior incumbrance by omitting to enforce it against property not subject to such incumbrance. The doctrine of marshaling assets has no application in such case. *Citizens Savings Bank v. Wood*, 134–232, 111 N. W. 929.

Although the lien of the landlord is prior to the lien of a subsequent attachment as to property not exempt from execution, yet if the attachment claim can be satisfied without impairing the security of the landlord under his lien the court may properly order the sale of the property under the attachment notwithstanding the intervention of the landlord, asserting his lien. *Stoaks v. Stoaks*, 146–61, 124 N. W. 757.

In an attachment proceeding to enforce the landlord's lien, labor claims as provided in code § 4022 take priority over the landlord's lien. *Snyder v. Carson*, 155–552, 136 N. W. 653.

Waiver: If the landlord takes a mortgage on the property as a security for rent and other indebtedness, he waives his statutory lien for rent, and will not be entitled to enforce such lien against the property in the hands of the tenant's trustee in bankruptcy. *In re Wolf*, 98 Fed. 74.

But the fact that there is a stipulation in the lease giving the landlord a lien in the nature of a mortgage upon exempt property of the tenant as security for the rent will not constitute a waiver of the statutory lien. *Ladner v. Balsley*, 103–674, 72 N. W. 787.

While the landlord may enforce his lien as against a purchaser from the tenant without notice, yet this right may be waived by an agent having apparent authority to represent him with reference to his interest in the property. *Fishbaugh v. Spunaugle*, 118–337, 92 N. W. 58.

No consideration for such waiver is necessary to support it as to a third party who acts in reliance thereon. *Ibid.*

SEC. 2993. Attachment.

The landlord's lien gives a right to the landlord to resort to appropriate proceedings to the property of the tenant subject to such lien to satisfy his demand for rent due, but the landlord is not bound to resort to an attachment for the preservation or enforcement of his lien. *Staber v. Collins*, 124–543, 100 N. W. 527.

No attachment can issue for the enforcement of the landlord's lien for rent not due. *Gray v. Bremer*, 122–110, 97 N. W. 991.

Where the landlord has several distinct causes of action against his tenant, only one of which is for rent, and he has blended his claims into one, he thereby waives the right to attachment. *Ladner v. Balsley*, 103–674, 72 N. W. 787.

While another action cannot be joined in a petition to enforce a landlord's lien for rent, yet where the tenant interposes a counterclaim, plaintiff may in reply set up other demands against the tenant which could not have been joined with the original cause of action. *Illsly v. Grayson*, 105–685, 75 N. W. 518.

A counterclaim for wrongful and malicious suing out of a landlord's attachment cannot be interposed in the action in which the attachment is sought. *Ingram v. Dailey*, 123–188, 98 N. W. 627.

One who takes a mortgage on chattel property which is subject to a landlord's lien may take possession of the property under his mortgage so long as the landlord has not proceeded to enforce his lien by attachment of the property, but such attachment entitles the landlord to possession as against such mortgagee and he may under the attachment proceedings

seize the property although the mortgagee has taken possession under the mortgage. *Brody v. Cohen*, 106–309, 76 N. W. 682.

An allegation that the sale of property by a tenant was fraudulent is immaterial, inasmuch as even a bona fide sale would not defeat the lien of the landlord's attachment. The landlord is not entitled to remedy by landlord's attachment as to property not subject to the landlord's lien. *Hillman v. Brigham*, 110–220, 81 N. W. 451.

Actual damages suffered by reason of the levy of a landlord's writ of attachment sued out when nothing is owing as rent may be recovered as against the landlord suing out the attachment. *Sigler v. Murphy*, 107–128, 77 N. W. 577.

The limitation of the lien which is sought to be enforced is applicable to an action for damages against a third party for the appropriation of the property which is subject to the lien. The action by the landlord against the purchaser of the property from the tenant is regarded as a method of enforcement of the landlord's lien. *Boyd v. Stipp*, 151–276, 131 N. W. 22.

CHAPTER 10.

OF WALLS IN COMMON.

SECTION 2994. Resting wall on neighbor's land.

The terms "wall in common" and "party wall" are used synonymously, and neither term is of particular value in determining the meaning of the statutes relating to party walls. The words "party wall" may mean a wall of which the adjoining owners are tenants in common, and the words "wall in common" may mean a wall possessed in severalty by such owners. Primarily either term means a wall for the common benefit and convenience of both tenements which it separates. *Lederer v. Colonial Investment Co.*, 130–157, 106 N. W. 357.

The statutory provisions as a whole are not to be construed so as to entitle either of the adjoining owners to extend his joists or timbers into the common wall beyond its center. *Ibid.*

Where the entire party wall erected by one owner is covered by and contributes to the support of a building subsequently erected by the adjoining owner, the latter is bound to pay for his share of the wall erected by the former. *Monroe Lodge v. Albia State Bank*, 112–487, 84 N. W. 682.

Where the first owner builds his wall of the material and dimensions required by the statute, and sufficient to carry his own and a similar building that may be erected by the adjoining proprietor, he is entitled to compensation for the share of the wall so erected, even though a cheaper wall would have been sufficient for the purpose of the adjoining owner. *Ibid.*

The fact that the wall stands on the boundary line between owners is of itself sufficient to put all parties on inquiry as to the rights of the respective owners, and neither is required to notify the grantees of the other that he claims an interest in the wall. *Howell v. Goss*, 128–569, 105 N. W. 61.

When a party wall is destroyed as the natural result of the action of the elements, and without fault of one owner, he is under no obligation to contribute to the rebuilding of the wall. There is no implication of a mutual easement of perpetual support applicable to future structures. *Jackson v. Bruns*, 129–616, 106 N. W. 1.

Under the provision that an adjoining owner may have the wall erected on the boundary line made a party wall by paying half of the present value, the right to an accounting for the use of such party wall accrues at the time such use commences. *Pier v. Salot*, 134–357, 111 N. W. 989.

Where one owning a building sells to an adjoining owner the right to use the wall of such building as a party wall, it is to be presumed that the grantor acquiesced in the wall as the boundary line between the two premises. *Younker v. White*, 136–23, 111 N. W. 824.

The burden of a party wall resting in part on the property of an owner who does not make use thereof is one imposed by law for the general public benefit and incident to the ownership of the property. It is not an incumbrance but a public burden subject to which the owner acquires his rights. *Percival v. Colonial Inv. Co.*, 140–275, 115 N. W. 941.

The building of a wall on the boundary line is not only indicative of the intent to hold title at least to the center of the wall, but, when erected without complaint of the owner, is strong evidence that it was on the true line. *Capital City Inv. Co. v. Burnham*, 143–134, 121 N. W. 708.

SEC. 2995. Contribution by adjoining owner.

It is one half of the appraised value of the wall at the time the adjoining proprietor uses it that is to be charged to him, not its value to him, but its value as a common wall. Ordinarily such value is arrived at by ascertaining the reasonable cost of the wall and deducting for any depreciation that may have occurred before the same is used by the contiguous owner. *Monroe Lodge v. Albia State Bank*, 112–487, 84 N. W. 682.

SEC. 2996. Openings—presumption.

This section does not prohibit the construction of a party wall with a view to an opening therein in the future. *Schoemaker v. Wallace*, 154–236, 134 N. W. 740.

SEC. 2997. Repairs—expense apportioned.

Where the wall is torn down and rebuilt by one of the owners, not because of its defective condition, but in order to extend it to a greater height, the other owner is not bound to contribute to the expense unless he makes use of the additional height to his own advantage. *Howell v. Goss*, 128–569, 105 N. W. 61.

SEC. 2998. Beams, joists and flues.

The right to build a wall in part upon adjoining property and the right of the adjoining owner to make it a wall in common by paying a portion of the value thereof are both acquired by statute and cannot be controlled by contract. If the adjoining owner does not request flues to be constructed for his use he cannot insist upon using the flues which the builder of the wall has provided for his own use. *Koolbeck v. Baughn*, 126–194, 101 N. W. 860.

Neither owner has the right to so weaken the wall as to render it insufficient or unsafe for the other's use. *Lederer v. Colonial Investment Co.*, 130–157, 106 N. W. 357.

SEC. 2999. Height of wall—rebuilding.

Neither of the adjoining owners has a right to extend his joists or timbers beyond the center line of the common wall. *Lederer v. Colonial Investment Co.*, 130–157, 106 N. W. 357.

Where only one of the joint owners desires to add to the height of his building, and to do this it is necessary to rebuild and enlarge the existing wall, he must do this at his own expense; but if the other joint owner subsequently desires to use the added portion of the new wall he must pay his fair proportion of the entire cost of raising and repairing. *Howell v. Goss*, 128–569, 105 N. W. 61.

SEC. 3000. Paying for share of adjoining wall.

An adjoining proprietor may make a wall built entirely on the other party's lands a wall in common, by complying with the statutory provisions. *Lederer v. Colonial Investment Co.*, 130–157, 106 N. W. 357.

The grantee who first avails himself of the benefit of a party wall becomes bound to pay his share to the owner who has erected the wall, and there is no liability of the covenanting grantor who has made no use of the wall to pay the expense, either to the adjoining owner or to the grantee who has first availed himself of such benefit. *Percival v. Colonial Inv. Co.*, 140–275, 115 N. W. 941.

A wall in common standing partly on the premises of a grantor for which payment must be made by the owner of the premises before he may avail himself of its benefits, but which has not been so used by the grantor as that he becomes liable to pay for his share thereof, does not constitute an incumbrance. *Ibid.*

SEC. 3001. Openings—fixtures.

The adjoining owner who subsequently asserts the right to use the party wall on payment of a portion of the cost, cannot make use of the flues which were not constructed at his request and the use of which will be detrimental to the owner who first constructed the wall. *Koolbeck v. Baughn*, 126–194, 101 N. W. 860.

This section recognizes the right of the adjoining owner to make openings in the party wall upon taking the necessary precautions. *Schoemaker v. Wallace*, 154–236, 134 N. W. 740.

SEC. 3002. Disputes—delay—bonds.

Where the parties have been unable to agree upon the value of the wall and a bond has been filed as provided in this section, one party cannot maintain an action by injunction to restrain the adjoining owner from constructing a building on his lot. *Schoemaker v. Wallace*, 154–236, 134 N. W. 740.

CHAPTER 11.

OF EASEMENTS IN REAL ESTATE.

SECTION 3004. Adverse possession—use.

This section relates to titles by prescription, and not to those by dedication. *Hanger v. Des Moines*, 109–480, 80 N. W. 549.

The adverse possession of an easement cannot be predicated on proof merely of use. It must be established by evidence independent of use that the party claimed the easement as a right. *Brown v. Peck*, 125–624, 101 N. W. 443.

The fact of adverse possession must be established by evidence distinct from and independent of the use of the easement, and it must also appear that the person against whom the claim is made had express notice thereof. *Friday v. Henah*, 113–425, 85 N. W. 768.

The mere use of a right of way over another's land with knowledge thereof on the part of the latter, but without claim of right or title, is insufficient to establish a right of way by prescription. *McBride v. Bair*, 134–661, 112 N. W. 169.

The provision of this section does not prevent parol evidence of an intent by the grantor to create an easement and knowledge of such intent by the grantee. *O'Reagan v. Duggan*, 117–612, 91 N. W. 909.

The provisions of this section are not applicable to cases where dedication is claimed, and the use of the property may be shown as indicating such dedication. *Dodge v. Hart*, 113–685, 83 N. W. 1063.

To establish a highway by prescription the use must be general, uninterrupted and continuous for the full period of the statutory limitation, and something more than user must be shown. *Davis v. Bonaparte*, 137–196, 114 N. W. 896.

By dedication or prescription the public acquires its rights subject to such use as the property is being put to at the time. *Ibid.*

The mere use of a way by the public, however long continued, cannot be construed as adverse to the owner of the title. *O'Malley v. Dillenbeck Lumber Co.*, 141–186, 119 N. W. 601.

TITLE XV.

OF TRADE AND COMMERCE.

CHAPTER 1.

OF WEIGHTS, MEASURES AND INSPECTION.

SECTION 3009. **Standard—repealed.** [35 G. A., ch. 266, § 20.]
[See § 3009-t. EDITOR.]

SEC. 3009-a. **Dairy and food commissioner—duties—chief inspector of weights and measures—salary—expenses.** The state dairy and food commissioner is hereby charged with the duty of carrying into effect the provisions of this act and wherever the word "commissioner" is used, in this act, it shall refer to the dairy and food commissioner. The commissioner shall appoint a chief inspector of weights and measures upon approval of the executive council. The chief inspector of weights and measures shall receive a salary of not to exceed eighteen hundred dollars per annum. His salary shall be paid in the same manner as the salaries of other state officers. All inspectors shall be allowed the expenses necessarily incurred by them in the discharge of their duties. All accounts shall be itemized and sworn to and when approved by the commissioner and the executive council, shall be paid by warrant of the auditor upon the treasurer out of a sum appropriated for carrying on the work of the dairy and food commissioner. The chief inspector and all inspectors appointed under this act shall perform such duties as may be assigned by the commissioner. [35 G. A., ch. 266, § 1.]

SEC. 3009-b. **State sealer of weights and measures—custodian state standards—seal—duties—assistance by state university.** The commissioner shall appoint an employe of the dairy and food commission to be state sealer of weights and measures. The state sealer shall take charge of the standards of the state, causing them to be kept at the capitol in a fireproof building belonging to the state, from which they shall not be removed except for repairs or for certification, and take all other necessary precautions for their safe keeping. He shall maintain the state standards in good order, and shall submit them once in ten years to the national bureau of standards for certification. He shall keep a seal which shall be so formed as to impress the letters "Iowa" upon the weights and measures sealed by him. He shall have and keep a general supervision of the weights and measures, and the weighing and measuring devices of the state in use in the state. He shall, upon a written request of any citizen, firm or corporation, city, town or county, or educational institution of the state, test or calibrate weights, measures, weighing or measuring devices, and instruments or apparatus used as standards in this state. It is hereby made the duty of the department of physics at the state university of Iowa upon the request of the commissioner to assist the commissioner, the state sealer and all inspectors, in all such matters as may require the facilities of

that laboratory or technical knowledge relating to physical measurements. [35 G. A., ch. 266, § 2.]

SEC. **3009-c. Standards shall conform to those of U. S. government.** The standard weights and measures received from the United States under a resolution of congress and approved June fourteenth, eighteen hundred thirty-six, and such new weights, measures, and other apparatus in addition thereto or in renewal thereof, and such as shall be made under the direction of the commissioner in conformity therewith and certified to by the national bureau of standards, shall be the state standards. [35 G. A., ch. 266, § 3.]

SEC. **3009-d. Standard measures of length and surface.** The units or standard measures of length and surface from which all other measures of extension, whether lineal, superficial or solid, shall be derived and ascertained, are the standards of length designated in this act. For measures of cloth and other commodities commonly sold by the yard, the yard may be divided into halves, quarters, eighths, and sixteenths. The rod, pole, or perch contains five and one-half yards; the mile, one thousand seven hundred sixty yards. A chain for measuring land is twenty-two yards long and is divided into one hundred equal parts called links. The acre for land[1] measure shall be measured horizontally and contain ten square chains, equivalent in area to a rectangle sixteen rods in length and ten rods in breadth; six hundred forty acres being contained in a square mile. [35 G. A., ch. 266, § 4.]

[1]"long" in enrolled bill. EDITOR.]

SEC. **3009-e. Standards of weight.** The units or standards of weight, from which all other weights shall be derived and ascertained, shall be the standard weights designated in this act. The hundred-weight consists of one hundred avoirdupois pounds and twenty hundred-weight are a ton. Whenever, hereafter, in this act, the word "pound" is used, it shall mean the avoirdupois pound unless otherwise distinctly specified. [35 G. A., ch. 266, § 5.]

SEC. **3009-f. Standards for commodities not liquid.** The units or standards or measure of capacity for commodities not liquids, from which all other measures shall be derived and ascertained, shall be the standards for such commodities designated in this act. The peck, half-peck, quarter-peck, quart, pint, and half-pint, measures for measuring commodities which are not liquids, shall be derived from the half-bushel by successively dividing the cubic inch capacity of that measure by two. [35 G. A., ch. 266, § 6.]

SEC. **3009-g. Liquid measures.** The units or standards of measure of capacity for liquids, from which all other measures shall be derived and ascertained, shall be the standard liquid measures designated in this act. The gallon shall be divided by continual division by the number two, so as to make half-gallons, quarts, pints, half-pints and gills. [35 G. A., ch. 266, § 7.]

SEC. **3009-h. Bushel measured by avoirdupois weight.** Wherever any of the articles or commodities mentioned in this section shall be sold by the bushel or fractional part thereof, and no special agreement shall be made in writing, the measure thereof shall be ascertained by avoirdupois weight, and shall be computed as follows:

Apples ..... forty-eight pounds;
Apples, dried ..... twenty-four pounds;
Alfalfa seed ..... sixty pounds;

Barley ..... forty-eight pounds;
Beans, green, unshelled ..... fifty-six pounds;
Beans, dried ..... sixty pounds;
Beans, Lima ..... fifty-six pounds;
Beets ..... fifty-six pounds;
Blue grass seed ..... fourteen pounds;
Bran ..... twenty pounds;
Bromus inermis ..... fourteen pounds;
Broom corn seed ..... fifty pounds;
Buckwheat ..... forty-eight pounds;
Carrots ..... fifty pounds;
Castor beans, shelled ..... fifty pounds;
Charcoal ..... twenty pounds;
Cherries ..... forty pounds;
Clover seed ..... sixty pounds;
Coal ..... eighty pounds;
Coke ..... forty pounds;
Corn on the cob, (field) ..... seventy pounds;
Corn in the ear, unhusked (field) ..... seventy-five pounds;
Corn, shelled, (field) ..... fifty-six pounds;
Corn meal ..... forty-eight pounds;
Cucumbers ..... forty-eight pounds;
Emmer ..... forty pounds;
Flaxseed ..... fifty-six pounds;
Grapes, with stems ..... forty pounds;
Hemp seed ..... forty-four pounds;
Hickory nuts, hulled ..... fifty pounds;
Hungarian grass seed ..... fifty pounds;
Kaffir corn ..... fifty-six pounds;
Lime ..... eighty pounds;
Millet seed ..... fifty pounds;
Oats ..... thirty-two pounds;
Onions ..... fifty-two pounds;
Onion top sets ..... twenty-eight pounds;
Onion bottom sets ..... thirty-two pounds;
Orchard grass seed ..... fourteen pounds;
Osage orange seed ..... thirty-two pounds;
Parsnips ..... forty-five pounds;
Peaches ..... forty-eight pounds;
Peaches, dried ..... thirty-three pounds;
Peanuts ..... twenty-two pounds;
Pears ..... forty-five pounds;
Peas, green, unshelled ..... fifty pounds;
Peas, dried ..... sixty pounds;
Plums ..... forty-eight pounds;
Popcorn on the ear ..... seventy pounds;
Popcorn, shelled ..... fifty-six pounds;
Potatoes ..... sixty pounds;
Quinces ..... forty-eight pounds;
Rape seed ..... fifty pounds;
Redtop seed ..... fourteen pounds;
Rutabagas ..... sixty pounds;
Rye ..... fifty-six pounds;
Salt ..... eighty pounds;

Sand .....one hundred thirty pounds;
Shorts .....twenty pounds;
Sorghum saccharatum seed .....fifty pounds;
Spelt .....forty pounds;
Sweet corn .....fifty pounds;
Sweet potatoes .....fifty pounds;
Timothy seed .....forty-five pounds;
Tomatoes .....fifty pounds;
Turnips .....fifty-five pounds;
Walnuts, hulled .....fifty pounds;
Wheat .....sixty pounds;
All root crops not specified above.....fifty pounds.

[35 G. A., ch. 266, § 8.] [31 G. A., ch. 147, §§ 1, 2; 29 G. A., ch. 129, § 1; 18 G. A., ch. 21; 17 G. A., ch. 42; 16 G. A., chs. 52, 89; C. '73, § 2049; R. §§ 1788, 1781–4; C. '51, § 940.]

SEC. **3009-i. Small fruit—onion sets—capacity of boxes.** All sales of blackberries, blueberries, cranberries, currants, gooseberries, raspberries, cherries, strawberries, and similar berries, also onion sets, in packages of one peck or less, may be sold by the quart, pint, or half-pint, dry measure; and all berry boxes sold, used, or offered for sale, within the state shall be of an interior capacity of not less than one quart, pint, or half-pint, dry measure. Any berry boxes or measures not conforming to this section shall be confiscated by the inspector. The provisions of this section shall not be applicable until October first, nineteen hundred thirteen. [35 G. A., ch. 266, § 9.]

SEC. **3009-j. Violations—exceptions permitted—written statement of weight and price—bottomless measures.** All dry commodities, weighing ten ounces or more, except drugs, section comb honey and those specified in section nine, shall be bought or sold only by standard weight or numerical count, lineal measure or surface measure, except where parties otherwise agree in writing. Whenever any product is sold and the selling price is determined other than by numerical count, lineal or surface measure, and the product does not have the net weight plainly written, stamped or printed thereon, the seller shall at the time of delivery, upon the request of the purchaser, furnish a plainly written or printed statement showing the name of the article sold, the quantity in net weight thereof, and the price paid for each item. Any person, firm or corporation, who sells, barters or trades, a less weight or amount to a purchaser than that which is asked for or agreed upon, of any article or commodity, shall be deemed guilty of a misdemeanor and shall be punished as herein provided. Provided, however, that reasonable variations shall be permitted, and tolerances and exemptions as to small packages shall be established, by rules and regulations made by the state dairy and food commissioner. The use of bottomless measures is hereby declared a violation of this act, unless they conform in shape to the United States standard measure. [35 G. A., ch. 266, § 10.]

SEC. **3009-k. Milk bottles—capacity—how marked.** Bottles used for the sale of milk and cream shall be of a capacity of one half-gallon, three pints, one quart, one pint, one half-pint, one gill, filled full to the bottom of the lip. Bottles or jars used for the sale of milk shall have clearly blown or otherwise permanently marked in the side of the bottle, the capacity of the bottle, and, on the bottom of the bottle, the name, initials, or trade-mark of the manufacturer, and designating number, which designating number shall be different for each manufacturer and may be

used in identifying bottles. The designating number shall be furnished by the commissioner on request. The state sealer shall not be required to seal bottles or jars for milk or cream, marked as in this section provided, but[1] the inspectors shall from time to time make tests of individual bottles in use, in order to ascertain whether the above provisions are being complied with. [35 G. A., ch. 266, § 11.]

[1"by" in enrolled bill. EDITOR.]

SEC. 3009-l. **Coal—charcoal—coke—sale and delivery tickets.** It shall be unlawful to sell or offer to sell in this state any coal, charcoal, or coke in any other manner than by weight. No person, firm or corporation shall deliver any coal, charcoal, or coke, without each such delivery being accompanied by a delivery ticket and a duplicate thereof, on each of which shall be in ink or other indelible substance, distinctly expressed in pounds, the gross weight of the load, the tare of the delivering vehicle, and the net amount in weight of coal, charcoal or coke contained in the cart, wagon, or other vehicle used in such deliveries, with the name of the purchaser thereof and the name of the dealer from whom purchased. One of these tickets shall be surrendered by the person in charge of the load to the inspector upon demand, for his inspection, and a ticket or weight slip issued by the inspector, when the inspector desires to retain the original, shall be delivered to said purchaser of said coal, charcoal, or coke, or his agent or representative, at the time of the delivery of the fuel; and the other ticket shall be retained by the seller of the fuel. When the buyer carries away the purchase, a delivery ticket, showing the actual number of pounds delivered must be given to the purchaser at the time delivery is made. The commissioner or any of his assistants, or inspectors, are hereby empowered to compel the party or parties having charge of such coal, charcoal or coke to bring same on demand to a scale designated by the said commissioner or his assistant or inspector and weighed for the purpose of proving the true net weight of the article or commodity. [35 G. A., ch. 266, § 12.]

SEC. 3009-m. **Slot or automatic weighing devices—license tag and fee.** It shall be unlawful for any person, firm or corporation by himself, or as the officer, servant, agent, or employe of any person, firm or corporation to operate or use or display for use any scale or scales, known as money in the slot or automatic scale or scales or any weighing device, apparatus, or machine, which is used or intended for use to determine the weight of[1] any person or persons, where compensation is derived, or any public or custom scale for which a fee is charged or accepted for weighing, unless said scale or device is licensed by the commissioner. Upon payment of the license fee of three dollars, the commissioner shall issue a metal license tag bearing the words "Licensed by the Dairy and Food Commissioner, State of Iowa, No.....," each tag to be numbered consecutively and bear the year for which license is valid. The tag shall be displayed prominently on the front of the weighing device. Absence of the license tag shall be prima-facie evidence that the weighing device is being operated contrary to law. No license shall be issued until the annual fee of three dollars is paid to the commissioner for each scale or weighing device operated or used. Any person desiring to secure said license shall make application therefor upon blanks to be furnished by the commissioner. The commissioner may withhold or revoke any license for cause. All licenses issued under this act shall expire December thirty-first, nineteen hundred fourteen, and on December thirty-first of each year thereafter.

All license and inspection fees collected under this act shall be paid into the state treasury by the commissioner. [35 G. A., ch. 266, § 13.]

["or" in enrolled bill. EDITOR.]

SEC. 3009-n. **Inspection of scales, weights and measures—jurisdiction—fee.** The commissioner and his assistants are each hereby empowered and it is hereby made their duty to make an inspection of scales, weights and measures wherever the same are kept for use in connection with the sale of merchandise or other commodities sold by weight or measurement, or where the price to be paid for producing or manufacturing any article or commodity is based upon the weight or measurement thereof, within this state. The commissioner and his assistants may, for the enforcement of this act and in the performance of their official duties, with or without formal warrant, enter or go in or upon any stand, place, building or premises; or may stop vendor, peddler, junk dealer, coal wagon, ice wagon, or any dealer whatsoever, for the purpose of making the proper tests. An inspection fee of five dollars shall be charged the person owning or operating the scales so inspected, but he shall not be required to pay more than two inspection fees in any one year. Whenever such inspection shall be made upon the complaint of any person other than the owner of the scale and upon examination the scale is found by the inspector to be in proper condition for weighing, the inspection fee of five dollars shall be paid by the person making complaint. Provided, however, no inspection fee shall be charged for the inspection of any scale of[1] less than two thousand pounds capacity. [35 G. A., ch. 266, § 14.]

["for" in enrolled bill. EDITOR.]
[See also § 3029-a. EDITOR.]

SEC. 3009-o. **Upon complaint.** Whenever complaint shall be made to the commissioner that any false or incorrect scales, weights or measures are being made use of by any person, firm or corporation in the purchase or sale of merchandise or other commodities or in weighing any article or commodity, the piece price paid for producing which is determined by weight or measure, it shall be his duty to cause the same to be inspected as soon as the duties of his office will permit, and he shall make such other inspection of weights and measures as in his judgment is necessary or proper to be made. [35 G. A., ch. 266, § 15.]

[See also § 3029-b. EDITOR.]

SEC. 3009-p. **Possession of false scales or measures—penalty.** If any person engaged in the purchase or sale of merchandise or other commodities by weight or measurement or in the employment of labor where the price thereof is to be determined by weight or measurement of the articles or thing upon which such labor is bestowed, be found having in his place of business any scales, weights, measures or other apparatus for determining the quantity of any commodity, which do[1] not conform to the standards of weight and measurement of this state, [he] shall be guilty of a misdemeanor and upon conviction shall be punished as provided in this chapter. [35 G. A., ch. 266, § 16.]

["does" in enrolled bill. EDITOR.]
[See also § 3029-c. EDITOR.]

SEC. 3009-q. **Confiscation—condemnation.** The inspector may confiscate and seize without warrant any incorrect scales, weights or measures or any weighing apparatus or part thereof which do[1] not conform to the

state standards or upon which the license fee has not been paid. If any weighing or measuring apparatus or part thereof be found out of order the same may be tagged by the inspector "Condemned until repaired" which tag shall not be altered or removed until said apparatus is properly repaired. [35 G. A., ch. 266, § 17.]

["does" in enrolled bill. EDITOR.]

SEC. **3009-r. Violation—penalty.** Any person, firm or corporation, or agent thereof, who refuses to comply on demand, with any of the requirements of this act or who shall violate any of its provisions, or who shall obstruct or hinder the commissioner, or any of his assistants, in the discharge of any duty imposed by this act, shall be guilty of a misdemeanor, and upon conviction thereof, shall be punished by a fine of not less than five dollars nor more than one hundred dollars, or by imprisonment in the county jail not to exceed thirty days or by both such fine and imprisonment, at the discretion of the court. [35 G. A., ch. 266, § 18.]

[See also § 3029-c. EDITOR.]

SEC. **3009-s. Report in printed bulletins.** The commissioner may from time to time make a report in the printed bulletins issued by the dairy and food commission, of the work undertaken and accomplished under this act, together with such general information as may be deemed suitable. [35 G. A., ch. 266, § 19.]

SEC. **3009-t. Repeal.** That sections three thousand and nine, three thousand and ten, three thousand and eleven, three thousand and twelve, three thousand and thirteen, three thousand and fourteen, three thousand and fifteen, three thousand and nineteen, three thousand and twenty, three thousand and twenty-one, three thousand and thirty-four, three thousand and thirty-five, and five thousand and forty-four of the code and section three thousand and sixteen of the supplement to the code, [1907] be and they are hereby repealed. [35 G. A., ch. 266, § 20.]

SEC. **3010. Length and surface—repealed.** [35 G. A., ch. 266, § 20.]
[See § 3009-t. EDITOR.]

SEC. **3011. Land measure—repealed.** [35 G. A., ch. 266, § 20.]
[See § 3009-t. EDITOR.]

SEC. **3012. Weight—repealed.** [35 G. A., ch. 266, § 20.]
[See § 3009-t. EDITOR.]

SEC. **3013. Liquids—repealed.** [35 G. A., ch. 266, § 20.]
[See § 3009-t. EDITOR.]

SEC. **3014. Substances not liquids—repealed.** [35 G. A., ch. 266, § 20.]
[See § 3009-t. EDITOR.]

SEC. **3015. Contracts—construction—repealed.** [35 G. A., ch. 266, § 20.]
[See § 3009-t. EDITOR.]

SEC. **3016. Bushel by weight—repealed.** [35 G. A., ch. 266, § 20.]
[See § 3009-t. EDITOR.]

SEC. **3019. Superintendent—repealed.** [35 G. A., ch. 266, § 20.]
[See § 3009-t. EDITOR.]

SEC. **3020. Duties—original standards—repealed.** [35 G. A., ch. 266, § 20.]
[See § 3009-t. EDITOR.]

SEC. 3021. **Delivery to successor—repealed.** [35 G. A., ch. 266, § 20.]
[See § 3009-t. EDITOR.]

SEC. 3029-a. **Inspection of scales, weights and measures.** That the state food and dairy commissioner and his assistants are each hereby empowered and it is hereby made their duty to make an inspection of scales, weights and measures wherever the same are kept for use in connection with the sale of merchandise or other commodities sold by weight or measurement, or where the price to be paid for producing or manufacturing any article or commodity is based upon the weight or measurement thereof, within this state, and he is hereby authorized and directed to procure from the state superintendent of weights and measures such standards of weights and measures as may be necessary to enable him and his assistants to perform the duties conferred upon them by this act. [34 G. A., ch. 154, § 1.]

[See also § 3009-n. EDITOR.]

SEC. 3029-b. **Upon complaint.** Whenever complaint shall be made to the state food and dairy commissioner that any false or incorrect scales, weights or measures are being made use of by any person, firm or corporation in the purchase or sale of merchandise or other commodities or in weighing any article or commodity, the piece price paid for producing which is determined by weight or measure, it shall be his duty to cause the same to be inspected as soon as the duties of his office will permit, and he shall make such other inspection of weights and measures as in his judgment is necessary or proper to be made. [34 G. A., ch. 154, § 2.]

[See also § 3009-o. EDITOR.]

SEC. 3029-c. **Violation—penalty.** If any person engaged in the purchase or sale of merchandise or other commodities by weight or measurement or in the employment of labor where the price thereof is to be determined by weight or measurement of the articles or thing upon which such labor is bestowed, as specified in section one of this act, be found having in his place of business any scales, weights, measures or other apparatus for determining the quantity of any commodity, which do[1] not conform to the standards of weight and measurement of this state, [he] shall be guilty of a misdemeanor and for the first offense shall be fined not less than ten nor more than one hundred dollars, and for each subsequent offense, not exceeding five hundred dollars, or imprisonment in the county jail not exceeding ninety days. [34 G. A., ch. 154, § 3.]

[1"does" in enrolled bill. EDITOR.]
[See also §§ 3009-p, 3009-r. EDITOR.]

SEC. 3029-d. **Expense of procuring standards—how paid.** The state food and dairy commissioner shall pay from the appropriations for his office, any and all expense incurred in procuring the necessary standards from the state superintendent of weights and measures. [34 G. A., ch. 154, § 4.]

SEC. 3034. **Compensation of superintendent—repealed.** [35 G. A., ch. 266, § 20.]

[See § 3009-t. EDITOR.]

SEC. 3035. **Compensation of sealer—repealed.** [35 G. A., ch. 266, § 20.]

[See § 3009-t. EDITOR.]

CHAPTER 2.

OF MONEY OF ACCOUNT AND INTEREST.

SECTION 3038. Rate of interest.

In the absence of contract to the contrary, money, after the same becomes due, bears interest at the legal rate. *Kellenberger v. Oskaloosa Nat. B., L. & I. Assn.*, 129–582, 105 N. W. 836.

A judgment may provide for interest on costs and attorney's fees as well as on the principal sum for which the judgment is rendered. *Hoyt v. Beach*, 104–257, 73 N. W. 492.

In recovering judgment under a policy of accident insurance providing for the payment of a fixed sum in the event of a specified loss, and also a weekly indemnity during disability, held that judgment should not include any allowance of interest on the amount which it should be found the company was liable to pay. *Hart v. National Masonic Acc. Assn.*, 105–717, 75 N. W. 508.

Where treble damages are allowed to be recovered by way of penalty they should not be increased by adding interest on the amount of the recovery. *Blair v. Sioux City & P. R. Co.*, 109–369, 80 N. W. 673.

Where a claim is for unliquidated damages, interest may be taken into account as an element of damage in arriving at the sum which will be a just and lawful compensation for the injury sustained. *Christie v. Iowa Life Ins. Co.*, 111–177, 82 N. W. 499.

Interest may be allowed on unliquidated claims wherever it appears that the damage was complete at a given time and in such case it may be proper to instruct that such interest may be allowed. *Collins v. Gleason Coal Co.*, 140–114, 115 N. W. 497, 118 N. W. 36.

Where the instructions are such as to exclude the allowance of interest by the jury the court may add interest to the amount found by the jury as damages. *Ibid.*

It is erroneous for the court to direct the jury in an action to recover damages for personal injuries, that they shall allow interest upon the amount of damages awarded. *Jacobson v. United States Gypsum Co.*, 150–330, 130 N. W. 122.

Interest does not accrue on a continuous open account without any settlement or balance being ascertained. *McFarland v. McCormick*, 114–368, 86 N. W. 369.

The receipt of a bank pass book, showing balance due, without objection to charges therein, amounts to an account stated. *Schoonover v. Osborne*, 108–453, 79 N. W. 263.

Where defendant pleaded an open account as a counterclaim in an action on a note, held that the items of the account should be credited on the note as of their respective dates, so as to obviate the accrual of interest on the note for the time during which the account would not bear interest. *Tuttle v. Bisbee*, 144–53, 120 N. W. 699.

In an action for money due by express contract, interest should be allowed from the time the money was due and not from a date six months after due, as in case of an open account. *Enslow v. Ennis*, 155–266, 135 N. W. 1105.

In an action on an administrator's bond the sureties are liable for interest from the time the administrator fails to account in accordance with the order of the court. *Ellyson v. Lord*, 124–125, 99 N. W. 582.

SEC. 3039. On judgments and decrees.

The rate of interest named in a contract applies after maturity as well as before without express stipulation to that effect, but a provision for semiannual rests is not applicable to interest thus allowed after the maturity of the contract in the absence of express agreement. *Rew v. Independent School District*, 125–28, 98 N. W. 802.

SEC. 3040. Illegal rate prohibited.

Where the agent of the lender, under the authority of his principal, receives for the benefit of the principal commission in addition to the lawful rate of interest, the contract is usurious. *McNeely v. Ford*, 103–508, 72 N. W. 672.

Payment by the borrower of the necessary expenses of making the loan in addition to lawful interest will not constitute usury. *Iowa Sav. & L. Assn. v. Heidt*, 107–297, 77 N. W. 1050.

Whether or not the contract is usurious does not depend upon the form the transaction is made to assume. Courts always look beyond the mere form and search diligently for the substance and intent, and where the lender was to have the legal rate of interest for the money loaned, and in addition thereto one half the discount which the borrower was able to secure on paying another debt by the use of the money borrowed, held that the contract was usurious. *Weaver v. Burnett*, 110–567, 81 N. W. 771.

Where renewal notes are given for the same debt, usury in the first or any intermediate note may be pleaded as against the last note. *Polk County Sav. Bank v. Harding*, 113–511, 85 N. W. 775.

Where on the renewal of a loan there is no express agreement or suggestion of any kind that the transaction is to be a settlement or composition of the borrower's claim for usury, but the net result of the transaction is to perpetuate the usurious nature of the contract, the right of the borrower to plead usury is not cut off. *Hyland v. Phoenix Loan Assn.*, 118–401, 92 N. W. 63.

Any consideration exacted by the agent of the lender in excess of eight per cent. interest renders the contract usurious. *Griswold v. Dugane*, 148–504, 127 N. W. 664.

In case of fraudulent attempt to evade the usury laws, parol evidence is admissible to vary the terms of a written contract. *France v. Munro*, 138–1, 115 N. W. 577.

SEC. 3041. Usury—penalty.

The defense of usury is personal to the debtor and cannot be maintained by a stranger to the contract. *Pardoe v. Iowa State Nat. Bank*, 106–345, 76 N. W. 800.

Accordingly held that the right of action given against a national bank to recover usury paid and the penalty thereon (U. S. Rev. Stat. §§ 5197, 5198) was not available except to a party who had personally or out of his own means paid usurious interest. *Ibid.*

The plea of usury cannot be interposed by one who is neither a party to the contract nor authorized by the debtor to avail himself of such plea. *Bacon v. Iowa Savings & Loan Assn.*, 121–449, 96 N. W. 977.

The defense of usury can be pleaded only by the borrower. Therefore the creditors of a bankrupt cannot set up the defense of usury against the claim of another creditor. *In re Worth*, 130 Fed. 927.

The defense of usury is as available to the debtor's trustee in bankruptcy as to the debtor himself. *In re Stern*, 144 Fed. 956.

Interest which has not been paid but only contracted for (covered for instance by notes not yet paid) cannot be recovered. *Talbot v. First Nat. Bank*, 106–361, 76 N. W. 726.

SEC. 3042. Assignee.

The assignee whose right is saved to plead usury under this section is one who takes in good faith and holds with no knowledge of the taint. *Spinney v. Miller*, 114–210, 86 N. W. 317.

CHAPTER 3.

OF NOTES AND BILLS.

SECTION 3043. Promissory notes negotiable—repealed. [29 G. A., ch. 130, § 197.]

[See § 3060-a.]

The assignment of a negotiable instrument not transferable by delivery does not make the assignee a holder in due course who is entitled to take free from defenses available against the assignor. *Hecker v. Boylan*, 126–162, 101 N. W. 755.

An indorser is a party to the instrument indorsed in such sense that he may be joined with the maker in an action thereon. *Darling v. Blazek*, 142–355, 120 N. W. 961.

SEC. 3044. Assignment of nonnegotiable instruments.

The assignee gains no better rights by reason of the assignment than his assignor had at the time the assignment was made. *Miller Brewing Co. v. Hansen*, 104–307, 73 N. W. 827.

The assignee of a contract has no greater rights under the assignment than his assignor would have had if he had brought the action in his own name and right. *Quarton v. American Law Book Co.*, 143–517, 121 N. W. 1009.

Personal contracts executory in their nature and involving relations of trust and confidence are not assignable by one party to the contract without the consent of the other. *Davis v. Bremer County Farmers' Mut. F. Ins. Assn.*, 154–326, 134 N. W. 860; *Bartling v. German Mut. L. & T. Ins. Co.*, 154–335, 134 N. W. 864.

SEC. 3045. Payable in money or labor—duebills—repealed. [29 G. A., ch. 130, § 197.]

[See § 3060-a.]

SEC. 3046. When assignment prohibited.

This section does not apply where plaintiff is not in possession of the note on which suit is brought and the burden is upon him to show that it was transferred by the indorser while the owner thereof with intent to transfer title. *Moehn v. Moehn*, 105–710, 75 N. W. 521.

One who purchases a note and mortgage after maturity takes the same subject to all defenses or counterclaims of the mortgagor held against the mortgagee existing before notice of the transfer. While it is a general rule that the assignee of a mortgage securing paper overdue takes subject to all equities between the original parties, this rule does not apply to latent equities of third parties. *Gibson v. McIntire*, 110–417, 81 N. W. 699.

A verbal assignment of a chose in action is valid. *Seymour v. Aultman*, 109–297, 80 N. W. 401.

The assignee is subject to all defenses which would have been available against the assignor. *Thomassen v. De Goey*, 133–278, 110 N. W. 581.

A certificate of a mutual benefit association cannot be transferred to a creditor so as to give him a right to the benefit fund if it is expressly provided in the certificate that it shall be nonassignable. *Crocker v. Hogin*, 103–243, 72 N. W. 411.

A cause of action arising under a policy of insurance is assignable after it has accrued. *McCombs v. Travelers' Ins. Co.*, 141 N. W. 327.

A policy in a mutual fire insurance association is not assignable before loss without the consent of the association. *Davis v. Bremer County Farmers' Mut. F. Ins. Assn.*, 154–326, 134 N. W. 860; *Bartling v. German Mut. L. & T. Ins. Co.*, 154–335, 134 N. W. 864.

Section applied. *Spinney v. Miller*, 114–210, 86 N. W. 317.

SEC. 3047. Open account assignable. An open account of sums of money due on contract may be assigned, and the assignee will have a right of action thereon in his own name, subject to such defenses and counterclaims as are allowed against the instruments mentioned in the preceding section, before notice of such assignment is given to the debtor in writing by the assignee. But no sale or assignment, by the head of a family, of wages, whether the same be exempt from execution or not, shall be of any validity whatever unless the same be evidenced by a written instrument, and if married, unless the husband and wife sign and acknowledge the same joint instrument before an officer authorized to take acknowledgments; and assignments of wages shall have priority and precedence in the order in which notice in writing of such assignments shall be given to the employer, and not otherwise. [31 G. A., ch. 148; 20 G. A., ch. 183, § 2; C. '73, § 2087; R. § 1799; C. '51, § 952.]

These provisions are not applicable to the assignment of a chose in action. See code §§ 3443, 3461. *Peterson v. Ball*, 121–544, 97 N. W. 79.

This section as amended does not give precedence to a garnishment notice over a previous assignment of which the plaintiff had no knowledge. It is sufficient to protect the assignee if the garnishee has notice of the assignment in time to interpose that fact in his answer. *Steltzer v. Condon*, 139–754, 118 N. W. 39.

SEC. 3049. Blank indorsement by one not party—repealed. [29 G. A., ch. 130, § 197.]

[See § 3060-a.]

A note bearing a blank indorsement by one not a party is notice to anyone discounting it that the indorser is presumably an accommodation indorser, without consideration, and hence a mere guarantor. This presumption can, however, be rebutted. *Lyon v. First Nat. Bank*, 85 Fed. 120.

SEC. 3050. Grace—notice—repealed. [29 G. A., ch. 130, § 197.]

[See § 3060-a.]

SEC. 3051. What entitled to grace—repealed. [29 G. A., ch. 130, § 197.]

[See § 3060-a.]

Under code § 3051 grace was allowed only on negotiable paper. *Kilmer v. Gallaher*, 116–666, 88 N. W. 959.

Days of grace are now abolished by the negotiable instruments act. See supp. § 3060-a85.

SEC. **3052. Demand—repealed.** [29 G. A., ch. 130, § 197.]

[See § 3060-a.]

SEC. **3053. Holidays.** The first day of the week, called Sunday, the first day of January, the twelfth day of February, the twenty-second day of February, the thirtieth day of May, the fourth day of July, the first Monday in September, the twenty-fifth day of December, the day of general election, and any day appointed or recommended by the governor of this state or by the president of the United States as a day of fasting or thanksgiving, shall be regarded as holidays for all purposes relating to the presentation for payment or acceptance, and for the protesting and giving notice of the dishonor of bills of exchange, drafts, bank checks, orders and promissory notes, and any blank or mercantile paper falling due on any of the days above named shall be considered as falling due on the succeeding business day. [33 G. A., ch. 193, § 1.] [23 G. A., ch. 45; 18 G. A., ch. 31; C. '73, § 2094.]

Sunday or any other day mentioned by this section as a holiday should not be excluded in estimating the three days within which a motion for new trial is to be filed. *German Sav. Bank v. Cady*, 114–228, 86 N. W. 277.

The days enumerated in this section as holidays with reference to presentation and dishonor of negotiable paper are also holidays within the provisions of code § 2448, par. 9, forbidding sales of intoxicating liquors to be made on any legal holiday. See also code § 3541, relating to appearance in an action. *Brennan v. Roberts*, 125–615, 101 N. W. 460.

SEC. **3054. Notice of protest—repealed.** [29 G. A., ch. 130, § 197.]

[See § 3060-a.]

Although the statute permits notice by mail to indorsers, the law requires presentment and demand in person, and letters written to the maker before the day of maturity demanding payment will not constitute sufficient demand to hold an indorser. *Closz v. Miracle*, 103–198, 72 N. W. 502.

SEC. **3055. Damages—exchange—repealed.** [29 G. A., ch. 130, § 197.]

[See § 3060-a.]

SEC. **3056. When demand necessary.**

This provision has no reference to the question as to admissibility of parol evidence to fix the time for performance of such contract. *Ingram v. Dailey*, 123–188, 98 N. W. 627.

In an action for failure to deliver property in compliance with a contract providing for payment to be made in property, demand for the property must be proved. *Newburn v. Hyde*, 132–88, 107 N. W. 604.

A stipulation in a mortgage to keep the premises insured is not a promise to pay property in such sense that demand is essential to constitute a breach of the condition. *Moore v. Crandall*, 146–25, 124 N. W. 812.

A demand for rent is necessary where no time is fixed in the contract for its payment. *Warner v. Shaffer*, 152–565, 132 N. W. 964.

SEC. **3060-a. Repeal.** The following enumerated sections of title fifteen, chapter three, of the code are hereby repealed: Sections three thousand and forty-three, three thousand and forty-five, three thousand and forty-nine, three thousand and fifty, three thousand and fifty-one, three thousand and fifty-two, three thousand and fifty-four, and three thousand and fifty-five. [29 G. A., ch. 130, § 197.]

CHAPTER 3-A.

OF NEGOTIABLE INSTRUMENTS.

FORM AND INTERPRETATION.

SECTION **3060-a1. Form of negotiable instrument.** An instrument to be negotiable must conform to the following requirements:

1. It must be in writing and signed by the maker or drawer.
2. Must contain an unconditional promise or order to pay a sum certain in money.
3. Must be payable on demand or at a fixed or determinable future time.
4. Must be payable to the order of a specified person or to bearer; and,
5. Where the instrument is addressed to a drawee, he must be named or otherwise indicated therein with reasonable certainty. [29 G. A., ch. 130, § 1.]

Iowa: A certificate of deposit, payable on a day certain in the future, is negotiable. *Bean v. Briggs*, 1–488; likewise municipal bonds, *Callahan v. Brown*, 31–333; *Clapp v. Cedar County*, 5–15; *Griffith v. Burden*, 35–138; but a land warrant is not, *Fort v. Wilson*, 3–153; nor a school order, *Nat. State Bk. v. Ind. Dist.*, 39–490; *Shepard v. Dist. Twp.*, 22–595; *Clark v. Des Moines*, 19–199.

(1) *Other states:* The writing may be in pencil. *Brown v. Butchers' Bank*, 6 Hill, 443.

(2) See § 3060-a3.

May designate particular kind of money. See § 3060-a6, subdivision 5.

(Code § 3045, which permitted the instrument to be made payable in money or labor, is repealed.)

(3) As to when it is payable on demand, see § 3060-a7. When at a future time, see § 3060-a4.

(4) As to when it is payable to order, see § 3060-a8.

For additional citation of authorities see Crawford's Annotated Neg. Inst. Law (3 Ed.), § 20.

(5) See § 3060-a126.

SEC. **3060-a2. Certainty as to sum—what constitutes.** The sum payable is a sum certain within the meaning of this act although it is to be paid:

1. With interest; or
2. By stated installments; or
3. By stated installments, with a provision that upon default in payment of any installment, the whole shall become due; or
4. With exchange, whether at a fixed rate or at the current rate; or
5. With costs of collection or an attorney's fee, in case payment shall not be made at maturity. [29 G. A., ch. 130, § 2.]

(2) *Other states: Markey v. Corey*, 108 Mich. 184; *Wright v. Irwin*, 33 Mich. 32.

(4) *Iowa:* This changes the rule in Iowa. *Culbertson v. Nelson*, 93–187.

Other states: In support of the rule adopted by the act, see *Second Nat. Bk. v. Basuier*, 65 Fed. 58; *Hastings v. Thompson*, 54 Minn. 184; *Flagg v. School Dist.*, 4 N. D. 30.

(5) *Iowa:* See *Bank v. Marsh*, 89–273; *Sperry v. Horr*, 32–184. Amount is not rendered uncertain by stipulation that it may be reduced by showing overcharge. *Green v. Austin*, 7–521.

Other states: The rule adopted by the act is sustained by a great weight of authority outside of the decisions of this state. For some of them, supporting the rule, see *Bank v. Sutton Mfg. Co.*, 6 U. S. App. 312, 331; *Dorsey v. Wolff*, 142 Ill. 589; *Stoneman v. Pyle*, 35 Ind. 103; *Heard v. Dubuque Bk.*, 8 Neb. 10; *Stark v. Olson*, 44 Neb. 646.

For other authorities see Crawford's Annotated Neg. Inst. Law (3 Ed.), § 21.

An instrument is not rendered nonnegotiable by being made payable in "New York or Chicago Exchange." *Security Trust Co. v. Des Moines County*, (C. C.) 198 Fed. 331.

SEC. 3060-a3. **When promise is unconditional.** An unqualified order or promise to pay is unconditional within the meaning of this act, though coupled with:

1. An indication of a particular fund out of which reimbursement is to be made, or a particular account to be debited with the amount; or

2. A statement of the transaction which gives rise to the instrument. But an order or promise to pay out of a particular fund is not unconditional. [29 G. A., ch. 130, § 3.]

(1) For authorities see Crawford's Annotated Neg. Inst. Law (3 Ed.), § 22.

(2) *Iowa:* Changes the rule in Iowa. *Charlton v. Reed*, 61–166; *Knepper v. Chase*, 7–145. See *Miller v. Poage*, 56–96.

Other states: In *Mott v. Havana Nat. Bk.*, 22 Hun. 354, it is held that the clause, "in part payment for a portable engine, which engine shall be and remain the property of the owner of this note until the amount hereby secured is paid" did not destroy its negotiable character. The same as to a note containing provision "given in consideration of a certain patent right." *Hereth v. Meyer*, 33 Ind. 511.

For additional citation of authorities see Crawford's Annotated Neg. Inst. Law (3 Ed.), § 22.

A provision in an insurance premium note that in case of the death of the insured before its maturity, the amount thereof with interest shall be deducted from the amount payable under the policy, held not to render the note nonnegotiable. *Union Bank v. Spies*, 151–178, 130 N. W. 928.

SEC. 3060-a4. **Determinable future time—what constitutes.** An instrument is payable at a determinable future time, within the meaning of this act, which is expressed to be payable:

1. At a fixed period after date or sight; or

2. On or before a fixed or determinable future time specified therein; or

3. On or at[1] a fixed period after the occurrence of a specified event, which is certain to happen, though the time of happening be uncertain.

An instrument payable upon a contingency is not negotiable, and the happening of the event does not cure the defect. [29 G. A., ch. 130, § 4.]

[1"before" in prior supplement; "at" in the enrolled bill and the New York act. EDITOR.]

(2) *Other states:* See *Mattison v. Marks*, 31 Mich. 421; *Buchanan v. Wren (Tex.)*, 30 S. W. 1077; *Albertson v. Laughlin*, 173 Pa. St. 525.

(3) *Iowa:* A note is not negotiable if made to mature when convenient. *Works v. Hershey*, 35–340; or at the option of the maker, *Woodbury v. Roberts*, 58–348.

Other states: A note payable in a certain number of days after the death of the maker, or upon demand after the death of the maker, is a good promissory note, because the event is sure to happen. *Carnwright v. Gray*, 127 N. Y. 92; *Hegeman v. Moon*, 131 N. Y. 462; *Shaw v. Camp*, 160 Ill. 425. But one payable when, or in a certain number of days after, "A shall become of age" is not negotiable, because uncertain as to whether A will live so long. *Goss v. Nelson*, 1 Burr, 226. Likewise one payable when a certain ship shall arrive. *Coolidge v. Ruggles*, 15 Mass. 387.

For other authorities see Crawford's Annotated Neg. Inst. Law (3 Ed.), § 23.

(4) *Iowa:* No time of payment being specified, it is presumptively payable on demand. *Bank v. Price*, 52–570.

The provisions of this section recognize the right of the parties to an instrument to contract for their mutual benefit so that if the contract made is certainly to be performed at some definite time in the future its negotiability is not destroyed. The contingency which will render a note nonnegotiable under the last clause of this section clearly means an event which may or may not happen. *State Bank v. Bilstad*, 136 N. W. 204.

A note given in connection with a chattel mortgage securing it which provides that the whole amount shall become due in case of the removal of the property from the county without the consent of the mortgagee or in case the mortgagee deems himself insecure, is an instrument payable on a contingency and is not negotiable. *Iowa National Bank v. Carter*, 144–715, 123 N. W. 237.

SEC. 3060-a5. **Additional provisions not affecting negotiability.** An instrument which contains an order or promise to do an act in addition to the payment of money is not negotiable. But the negotiable character of an instrument otherwise negotiable is not affected by a provision which:

1. Authorizes the sale of collateral securities in case the instrument be not paid at maturity; or
2. Authorizes a confession of judgment if the instrument be not paid at maturity; or
3. Waives the benefit of any law intended for the advantage or protection of the obligor; or
4. Gives the holder an election to require something to be done in lieu of payment of money.

But nothing in this section shall validate any provision or stipulation otherwise illegal. [29 G. A., ch. 130, § 5.]

(1) *Iowa:* Coupling mortgage with a negotiable note, authorizing mortgagee to take possession of chattel, but not to sell until after maturity of note, does not destroy negotiability. *Bank v. Taylor*, 67–572; distinguishing *Smith v. Marlin*, 59–645, holding provision by which debt was liable to be diminished before maturity destroyed negotiability.

Other states: A mere statement that collateral security has been deposited for the performance of the promise contained in the note does not affect its negotiability. *Wise v. Charlton*, 4 A. & E. 486; *Fancourt v. Thorne*, 9 Q. B. 312. And so with a provision authorizing sale of collateral if note be dishonored. *Perry v. Bigelow*, 128 Mass. 129; *Towne v. Rice*, 122 Mass. 67; *Biegler v. Merchants' L. & T. C.*, 62 Ill. App. 560. The contrary is held as to this clause, "given as collateral security with agreement." *Costello v. Crowell*, 127 Mass. 293.

(2) *Iowa:* Provision authorizing attorney to confess judgment is illegal and no part of note, and therefore does not destroy negotiability. *Tolman v. Janson*, 106–455.

This provision meets the requirements of some of the states where judgment notes are in use.

(3) *Other states:* This provision is designed to meet the practice in some states of inserting waiver of the benefits of homestead and exemption laws. See *Zimmerman v. Anderson*, 67 Pa. St. 421.

(4) *Other states:* If the obligation to the maker to pay in money is certain, the right of the holder to elect to take payment in something other than money will not destroy its negotiable character. *Hodges v. Shuler*, 22 N. Y. 114.

See notes Crawford's Annotated Neg. Inst. Law (3 Ed.), § 24.

An insurance premium note may be made payable, in the event of the death of the insured, out of the insurance, without affecting its negotiability. *Union Bank v. Spies*, 151–178, 130 N. W. 928.

SEC. 3060-a6. **Omissions — seal — particular money.** The validity and negotiable character of an instrument are not affected by the fact that:

1. It is not dated; or
2. Does not specify the value given, or that any value has been given therefor; or
3. Does not specify the place where it is drawn or the place where it is payable; or
4. Bears a seal; or
5. Designates a particular kind of current money in which payment is to be made.

But nothing in this section shall alter or repeal any statute requiring in certain cases the nature of the consideration to be stated in the instrument. [29 G. A., ch. 130, § 6.]

(1) *Other states:* See § 3060-a17, subdiv. 3. True date may be shown by parol evidence between the immediate parties. *Bigge v. Piper*, 86 Tenn., 589.

(2) *Other states:* "Value received" not necessary. Daniel on Neg. Insts., § 108.

(3) See §§ 3060-a3, 3060-a28, 3060-a77.

(4) *Iowa:* See *Temple v. Hayes*, Morris, 9.

Other states: Corporate seal does not destroy negotiable character. *Chase Nat. Bk. v. Faurot*, 149 N. Y. 532; *Weeks v. Esler*, 143 N. Y. 374. Same as to municipal bonds. *Bank v. Village of Rome*, 19 N. Y. 20; *Mercer County v. Hacket*, 1 Wall, 83.

For other authorities see Crawford's Annotated Neg. Inst. Law (3 Ed.), § 25, note (d).

(5) *Iowa:* Note made payable in property destroys negotiability. *McCartney v. Smalley*, 11–85. So with one payable in currency. *Rindskoff v. Barrett*, 11–172; otherwise if shown that money was intended and so understood. *Haddock v. Wood*, 46–433; see *Culbertson v. Nelson*, 93–187.

Other states: A note made payable in gold coin is negotiable. *Chrysler v. Griswold*, 43 N. Y. 209. So one payable "in bank notes current in the city of New York." *Keith v. Jones*, 9 Johns, 120. One payable "in current funds at Pittsburg" held not negotiable. *Wright v. Hart's Admr.*, 44 Pa. St. 454.

For other authorities see Crawford's Annotated Neg. Inst. Law (3 Ed.), § 25, note (e).

A check payable in current funds is not a negotiable instrument. *Dille v. White*, 132–327, 109 N. W. 909.

SEC. 3060-a7. **When payable on demand.** An instrument is payable on demand:

1. Where it is expressed to be payable on demand, or at sight, or on presentation; or
2. In which no time for payment is expressed.

Where an instrument is issued, accepted or indorsed when overdue, it is, as regards the person so issuing, accepting or indorsing it, payable on demand. [29 G. A., ch. 130, § 7.]

(1) For the distinctions between instruments payable on demand and those payable at sight, see Daniel on Neg. Insts., §§ 617–619, and authorities there cited.

See notes to Crawford's Annotated Neg. Inst. Law (3 Ed.), § 26, note (a).

(2) *Iowa:* A negotiable note transferred by indorsement after maturity is, as regards the person so issuing, accepting or indorsing, payable on demand and must be presented to all the makers in person, or at their usual places of residence or business within a reasonable time after transfer, and notice of nonpayment immediately given to bind the indorser. *Graul v. Strutzel*, 53–712; *McKewer v. Kirtland*, 33–348; *Pryor v. Bowman*, 38–92; *Blake v. McMillen*, 33–150; *Bank v. Orvis*, 40–332; *Closz & Mickelson v. Miracle*, 103–198.

A draft or bill in which no time of payment is mentioned is, under the statutes, drawn payable on demand just as effectually as though the words "payable on demand" had been incorporated into it. *Blank v. Price*, 52–570.

Other states: As bearing on the text, see *Messmore v. Morrison*, 172 Pa. St. 300; *James v. Brown*, 11 Ohio St. 601; *Libby v. Mekelborg*, 28 Minn. 38; *Roberts v. Snow*, 28 Neb. 425.

For other authorities see Crawford's Annotated Neg. Inst. Law (3 Ed.), § 26, note (b).

For other authorities relating to instruments issued, accepted or indorsed after maturity, see Crawford's Annotated Neg. Inst. Law (3 Ed.), § 26, note (c).

An ordinary bank certificate of deposit is an instrument payable on demand. *Anderson v. First Nat. Bank*, 144–251, 122 N. W. 918.

SEC. 3060-a8. **When payable to order.** The instrument is payable to order where it is drawn payable to the order of a specified person or to him or his order. It may be drawn payable to the order of:

1. A payee who is not maker, drawer or drawee; or
2. The drawer or maker; or
3. The drawee; or
4. Two or more payees jointly; or
5. One or some of several payees; or
6. The holder of an office for the time being.

Where the instrument is payable to order, the payee must be named or otherwise indicated therein with reasonable certainty. [29 G. A., ch. 130, § 8.]

Other states: The first clause of this section states the rule of the law merchant requiring the word "order" or other word of similar import to render the instrument negotiable. *Smith v. Kendall*, 6 T. R. 123; *Carnwright v. Gray*, 127 N. Y. 92.

See Crawford's Annotated Neg. Inst. Law (3 Ed.), § 27, note (a).

(2) See § 3060-a184. A note payable to the order of the maker requires the maker's indorsement to complete the same.

(5) For illustration see Crawford's Annotated Neg. Inst. Law (3 Ed.), § 27, note (c).

(6) *Iowa:* A collateral agreement referred to in an indorsement and specified therein does not destroy negotiability. *Leland v. Parriott*, 35–454; the words "et al. or order" following name of payee destroy negotiability. *Gordon v. Anderson*, 83–224.

Other states: A note payable to certain persons as trustees of an incorporated association, *or their successors in office*, is negotiable. *Davis v. Gore*, 6 N. Y. 124. If the identity of the payee can be ascertained with certainty it is sufficient, though not designated by name. *United States v. White*, 2 Hill, 59; *Blackman v. Lehman*, 63 Ala. 547.

Where an instrument is made payable to either one of two payees, its indorsement by either one of the payees named therein will pass title. *Union Bank v. Spies*, 151–178, 130 N. W. 928.

SEC. 3060-a9. **When payable to bearer.** The instrument is payable to bearer:

1. When it is expressed to be so payable; or
2. When it is payable to a person named therein or bearer; or
3. When it is payable to the order of a fictitious or nonexisting person, and such fact was known to the person making it so payable; or
4. When the name of the payee does not purport to be the name of any person; or
5. When the only or last indorsement is an indorsement in blank. [29 G. A., ch. 130, § 9.]

(2) *Iowa:* A note payable to "the bearer, M. C. Murdough," is not negotiable. *Warren v. Scott*, 32–22.

See § 3060-a30.

(3) For a discussion and a criticism of the authorities bearing upon this division of the section by Mr. Crawford, the author of the original negotiable instruments law, see Crawford's Annotated Neg. Inst. Law (3 Ed.), § 28, note (b).

(4) *Other states:* A check payable to "cash" or to "sundries." *Willets v. Phoenix Bank*, 2 Duer, 121; *Mechanics' Bank v. Stratton*, 2 Keyes, 365.

SEC. 3060-a10. **Terms—when sufficient.** The negotiable instrument need not follow the language of this act, but any terms are sufficient which clearly indicate an intention to conform to the requirements thereof.[1] [29 G. A., ch. 130, § 10.]

[1]The word "thereof" doubtless should be "hereof" to conform with the New York act, but it is "thereof" in the enrolled bill. EDITOR.]

Other states: It is not necessary that the instrument be written in the English language but it may be in a foreign language. *Debebian v. Gala*, 64 Md. 262, 265; and may be in pencil as well as in ink. *Brown v. Butchers' Bank*, 6 Hill, 443. For rule governing construction of ambiguous instruments, see § 3060-a17.

SEC. 3060-a11. **Date—presumption as to.** When the instrument or an acceptance or any indorsement thereon is dated, such date is deemed *prima facie* to be the true date of the making, drawing, acceptance or indorsement, as the case may be. [29 G. A., ch. 130, § 11.]

Other states: Mistake in date may be shown between the immediate parties. *Cowing v. Altman*, 71 N. Y. 441. Where date is an impossible one, the law will adopt the nearest date. If dated Sept. 31, true date will be deemed to be Sept. 30. *Wagner v. Kenner*, 2 Rob. (La.) 120.

SEC. 3060-a12. **Antedated and postdated.** The instrument is not invalid for the reason only that it is antedated or postdated, provided this is not done for an illegal or fraudulent purpose. The person to whom an instrument so dated is delivered acquires the title thereto as of the date of delivery. [29 G. A., ch. 130, § 12.]

Other states: A postdated bill or check may be negotiated before the day of its date. *Brewster v. McCardle*, 8 Wend. 478.

For other authorities see Crawford's Annotated Neg. Inst. Law (3 Ed.), § 31.

SEC. 3060-a13. **When date may be inserted.** When an instrument expressed to be payable at a fixed period after date is issued undated, or where the acceptance of an instrument payable at a fixed period after sight is undated, any holder may insert therein the true date of issue or acceptance, and the instrument shall be payable accordingly. The insertion of a wrong date does not avoid the instrument in the hands of a subsequent holder in due course; but as to him, the date so inserted is to be regarded as the true date. [29 G. A., ch. 130, § 13.]

Other states: See the following section; also see *Redlich v. Doll*, 54 N. Y. 238.
For other authorities see Crawford's Annotated Neg. Inst. Law (3 Ed.), § 32, note (b).

SEC. 3060-a14. **Blanks—when may be filled.** Where the instrument is wanting in any material particular, the person in possession thereof has a prima-facie authority to complete it by filling up the blanks therein. And a signature on a blank paper delivered by the person making the signature in order that the paper may be converted into a negotiable instrument operates as a prima-facie authority to fill it up as such for any amount. In order, however, that any such instrument when completed may be enforced against any person who became a party thereto prior to its completion, it must be filled up strictly in accordance with the authority given and within a reasonable time. But if any such instrument, after completion, is negotiated to a holder in due course it is valid and effectual for all purposes in his hands, and he may enforce it as if it had been filled up strictly in accordance with the authority given and within a reasonable time. [29 G. A., ch. 130, § 14.]

Other states: The leading authority upon the right of a person in possession to fill blanks when necessary to complete the instrument in a material particular is *Russell v. Langstaffe*, 2 Doug. 514. See *Androscoggin Bank v. Kimball*, 10 Cush. 373. If blank space is left for name of payee holder may fill with his own name. *Boyd v. McCann*, 10 Md. 118. The authority to *complete* the instrument, however, will not authorize the insertion of matter not essential to its completeness. *Weyerhauser v. Dunn*, 100 N. Y. 150.

The rule contained in the second clause of the section operates only where the instrument has been *delivered;* see the following section. As to rights of bona fide holder for value of such an instrument filled up contrary to agreement, see *Redlich v. Doll*, 54 N. Y. 234, 238.

For other authorities and a discussion of the rules adopted by this section, see Crawford's Annotated Neg. Inst. Law (3 Ed.), § 33, notes (a), (b), (c) and (d).

Where one person signs a note in blank and delivers it to another for a specific purpose and the person to whom it is delivered with authority to fill the blanks for a specified amount fills out the blanks for an unauthorized amount and uses the instrument for an unauthorized purpose, the person whose name is inserted as payee is not a holder in due course and cannot recover against the original signer. *Vander Ploeg v. Van Zuuk*, 135–350, 112 N. W. 807.

The designation of a place of payment is a matter material to the note and the holder has authority under this section to fill in a blank left for such designation. *Johnston v. Hoover*, 139–143, 117 N. W. 277.

SEC. 3060-a15. **Incomplete instrument not delivered.** Where an incomplete instrument has not been delivered it will not, if completed and negotiated, without authority, be a valid contract in the hands of any holder, as against any person whose signature was placed thereon before delivery. [29 G. A., ch. 130, § 15.]

Iowa: Delivery to payee by third party without authority is not binding. *Ware v. Smith*, 62–159; but delivery by third party in violation of agreement is not a defense as against an innocent purchaser. *Graff v. Logue*, 61–704.

Other states: The instrument must be complete and perfect when issued, or there must be authority reposed in someone to supply the part required to complete it afterwards. *Sedgwick v. McKim*, 53 N. Y. 307, 313; *Davis Sewing Mach. Co. v. Best*, 105 N. Y. 59, 67.

For other authorities see Crawford's Annotated Neg. Inst. Law (3 Ed.), § 34.

SEC. **3060-a16. Delivery—when effectual—when presumed.** Every contract on a negotiable instrument is incomplete and revocable until delivery of the instrument for the purpose of giving effect thereto. As between immediate parties, and as regards a remote party other than a holder in due course, the delivery, in order to be effectual, must be made either by or under the authority of the party making, drawing, accepting or indorsing, as the case may be; and in such case the delivery may be shown to have been conditional or for a special purpose only, and not for the purpose of transferring the property in the instrument. But where the instrument is in the hands of a holder in due course, a valid delivery thereof by all parties prior to him so as to make them liable to him, is conclusively presumed. And where the instrument is no longer in the possession of a party whose signature appears thereon, a valid and intentional delivery by him is presumed until the contrary is proved. [29 G. A., ch. 130, § 16.]

Iowa: An alteration made after execution, before delivery without knowledge of surety, discharges surety from liability upon the note. *Marsh v. Griffin*, 42–403.

Other states: Delivery according to the purpose and intent of the parties is essential to its existence. *Burson v. Huntington*, 21 Mich. 416.

For other authorities see Crawford's Annotated Neg. Inst. Law (3 Ed.), § 35, notes (c) and (d).

SEC. **3060-a17. Construction where instrument is ambiguous.** Where the language of the instrument is ambiguous, or there are omissions therein, the following rules of construction apply:

1. Where the sum payable is expressed in words and also in figures and there is a discrepancy between the two, the sum denoted by the words is the sum payable; but if the words are ambiguous or uncertain, references may be had to the figures to fix the amount.
2. Where the instrument provides for the payment of interest, without specifying the date from which interest is to run, the interest runs from the date of the instrument, and if the instrument is undated, from the issue thereof.
3. Where the instrument is not dated, it will be considered to be dated as of the time it was issued.
4. Where there is conflict between the written and printed provisions of the instrument, the written provisions prevail.
5. Where the instrument is so ambiguous that there is doubt whether it is a bill or a note, the holder may treat it as either, at his election.
6. Where a signature is so placed upon the instrument that it is not clear in what capacity the person making the same intended to sign, he is to be deemed an indorser.
7. Where an instrument containing the words "I promise to pay," is signed by two or more persons, they are deemed to be jointly and severally liable thereon. [29 G. A., ch. 130, § 17.]

(1) *Iowa:* No recovery at law can be had on a note which fails to state, in the body of it, the amount for which it is given. Marginal figures are no part of it, but a mere memorandum. *Hollen v. Davis*, 59–444.

Other states: Marginal figures are regarded as mere memoranda and no part of the instrument. *Smith v. Smith*, 1 R. I. 388.

(3) *Other states: Kingsley v. Sampson*, 100 Ill. 54.

(4) *Other states:* But this rule does not permit of the rejection of any of the printed matter which, by any reasonable construction, may be reconciled with the written part. *Miller v. Hannibal & St. J. R. R. Co.*, 90 N. Y. 430.

For other authorities see Crawford's Annotated Neg. Inst. Law (3 Ed.), § 36, note (c).

(5) *Other states: Heise v. Bumpass*, 40 Ark. 547.

For illustrations and other authorities, see Crawford's Annotated Neg. Inst. Law (3 Ed.), § 36, note (d).

(6) For rule as to irregular indorsers, see § 3060-a64.
(7) *Other states: Monson v. Drakeley*, 40 Conn. 559; *Dart v. Sherwood*, 7 Wis. 523.

Parol evidence tending to vary the liability of the blank indorser so as to render him liable as guarantor and relieve the holder of the obligation to make demand and give notice of dishonor, is not admissible. *Porter v. Moles*, 151–279, 131 N. W. 23.

SEC. **3060-a18. Liability of person signing in trade or assumed name.** No person is liable on the instrument whose signature does not appear thereon, except as herein otherwise expressly provided. But one who signs in a trade or assumed name will be liable to the same extent as if he had signed in his own name. [29 G. A., ch. 130, § 18.]

Other states: Presumption is that party takes instrument on the credit of the parties whose names appear thereon. *Briggs v. Partridge*, 64 N. Y. 363. A person may become a party to a bill or note by any mark or designation he chooses to adopt, provided it be used as a substitute for his name and he intends to be bound by it. *DeWitt v. Walton*, 9 N. Y. 574. See Crawford's Annotated Neg. Inst. Law (3 Ed.), § 37, where other authorities are cited.

SEC. **3060-a19. Signature by agent—authority—how shown.** The signature of any party may be made by a duly authorized agent. No particular form of appointment is necessary for this purpose; and the authority of the agent may be established as in other cases of agency. [29 G. A., ch. 130, § 19.]

See *Conroe v. Case*, 74 Wis. 85. As to ratification of unauthorized signature see *Bartlett v. Tucker*, 104 Mass. 336; *Paul v. Berry*, 78 Ill. 158; *Bank v. Marine Bank*, 16 Wis. 120.

SEC. **3060-a20. Liability of person signing as agent, etc.** Where the instrument contains, or a person adds to his signature, words indicating that he signs for or on behalf of the principal, or in a representative capacity, he is not liable on the instrument if he was duly authorized; but the mere addition of [1] words describing him as an agent, or as filling a representative character without disclosing his principal, does not exempt him from personal liability. [29 G. A., ch. 130, § 20.]

[1]The word "the" appears here in the prior supplement but is not in the enrolled bill or the New York act. EDITOR.]

Iowa: For the rule in Iowa in cases where the makers attempt to sign in representative capacity, merely adding, however, after their own signature, the words "President," "Secretary," "Trustee," etc., see the following cases: *Wing v. Glick*, 4–73; *Am. Ins. Co. v. Stratton*, 59–697; *Scraper Co. v. Tuttle*, 61–423; *Lewis v. Tilton*, 64–220; *Hefner v. Brownell*, 70–591; *McCandless v. Belle Plaine Canning Co.*, 78–162; *Lee v. Percival*, 85–639; *Matthews v. Dubuque Mattress Co.*, 87–246; *Day v. Ramsdell*, 90–731; *Savings Bank & Trust Co. v. Swan*, 100–718.

Other states: But if the principal is plainly disclosed in the body of the instrument, one signing in a representative capacity, or as agent, is not personally liable. *Whitney v. Inhabitants of Stow*, 111 Mass. 368; *Haskell v. Cornish*, 13 Cal. 45; *Little v. Bailey*, 87 Ill. 239. And this would seem to be the rule adopted by this section of the act.

See Crawford's Annotated Neg. Inst. Law (3 Ed.), § 39, and notes thereto. See also Neg. Inst. Law, by Selover, § 24, and authorities cited.

Mr. Crawford, the author of the original draft of the act, in a note to § 39 of his work, says:

"In the original draft submitted to the Conference of Commissioners on Uniformity of Laws this section read as follows: 'Where a person adds to his signature words indicating that he signs for or on behalf of a principal, or in a representative capacity, he is not liable on the instrument; but the mere addition of words describing him as an agent, or as filling a representative character, does not exempt him from personal liability. In determining whether a signature is that of the principal or of the agent by whose hand it is written, that construction is to be adopted which is most favorable to the validity of the instrument.' This is the English rule, and was the rule in New York prior to the statute. Under that rule a person signing for or on behalf of a principal was not liable *on the instrument*, notwithstanding he had no authority to bind his principal. There was an implied warranty on his part that he possessed such authority,

and if he did not, he became liable upon such warranty for the damages resulting from the breach. *Miller v. Reynolds*, 92 Hun, 400. But no action could be maintained against him on the instrument, when by its terms it did not purport to bind him. And his liability upon the implied warranty did not accompany the transfer of the instrument, unless the claim founded upon the warranty was also assigned to the person to whom the instrument was transferred. *(Id.)* The effect of the section, as it now stands, is, probably, to permit the holder to sue the agent on the instrument, if he was not duly authorized to sign the same on behalf of the principal."

The addition of descriptive words to the name of the signer of an instrument does not relieve such signer of personal liability. *Schumacher v. Dolan*, 154–207, 134 N. W. 624.

SEC. **3060-a21. Signature by procuration—effect of.** A signature by "procuration" operates as notice that the agent has but a limited authority to sign, and the principal is bound only in case the agent in so signing acted within the actual limits of his authority. [29 G. A., ch. 130, § 21.]

See notes to Crawford's Annotated Neg. Inst. Law (3 Ed.), § 40.

SEC. **3060-a22. Effect of indorsement by infant or corporation.** The indorsement or assignment of the instrument by a corporation or by an infant passes the property therein, notwithstanding that from want of capacity the corporation or infant may incur[1] no liability thereon. [29 G. A., ch. 130, § 22.]

["occur" in the prior supplement but "incur" in the enrolled bill and the New York act. EDITOR.]

For authorities see Crawford's Annotated Neg. Inst. Law (3 Ed.), § 41, notes (a) and (b).

SEC. **3060-a23. Forged signature—effect of.** Where a signature is forged or made without the authority of the person whose signature it purports to be, it is wholly inoperative, and no right to retain the instrument, or to give a discharge therefor, or to enforce payment thereof against any party thereto, can be acquired through or under such signature, unless the party against whom it is sought to enforce such right is precluded from setting up the forgery or want of authority. [29 G. A., ch. 130, § 23.]

Other states: Buckley v. Sec. Nat. Bk. of Jersey City, 35 N. J. Law, 400; *Whiteford v. Monroe*, 17 Md. 135.

In the absence of an estoppel or of an adoption or ratification of the signature, no rights can be acquired by a bona fide or other holder under a forged signature, against the person whose name is forged. *Mersman v. Werges*, 3 Fed. 378; *Butler v. Carns*, 37 Wis. 61; *Bank v. Adams*, 91 Ind. 280; *Bank v. Crafts*, 4 Allen, 447; *Wellington v. Jackson*, 121 Mass. 157.

See also Crawford's Annotated Neg. Inst. Law (3 Ed.), § 42, note (b).

Proof of one forged signature to a note does not in all cases have the effect of rendering the instrument void as to those whose signatures thereto are found to be genuine. If the addition of a forged signature does not constitute a material alteration of the instrument, recovery thereon may be had against those whose signatures are genuine. *Beem v. Farrell*, 135–670, 113 N. W. 509.

The fact that the instrument is a forgery as to the maker does not defeat the liability of the indorser to the indorsee. *State v. Corning Sav. Bank*, 139–338, 115 N. W. 937.

If the holder has been misled to his prejudice by the conduct of the person whose name has been forged, the latter will be estopped from alleging that the note was a forgery. *First State Bank v. Williams*, 143–177, 121 N. W. 702.

If a payee surrenders a note signed by a principal and surety to the principal in consideration of a note on which the surety's name is forged, the surrender of the original note is equivalent to a declaration that it has been paid and satisfied; and if the fact of such surrender comes to the knowledge of the surety and in reliance thereon, he is lulled into security and the principal becomes insolvent before demand is made on the surety for payment of the original note, such note cannot be enforced against such surety. *Reints v. Uhlenhopp*, 149–284, 128 N. W. 400.

If the note is, in fact, surrendered to the principal marked paid, this is a declaration by the creditor that it is paid and an authorization to the principal to so state to the surety. In order that the surety may be released, it is not necessary that the canceled note be, in fact, exhibited to the surety. *Ibid.*

CONSIDERATION OF NEGOTIABLE INSTRUMENTS.

SEC. **3060-a24. Presumption of consideration.** Every negotiable instrument is deemed *prima facie* to have been issued for a valuable consideration, and every person whose signature appears thereon to have become a party thereto for value. [29 G. A., ch. 130, § 24.]

Iowa: A blank indorsement by a person not the payee or indorsee thereof imports a sufficient consideration to sustain his contract of guaranty. *Veach v. Thompson*, 15–380.

See code § 3069. *Jones v. Berryhill*, 25–289; *Bank v. Hurford & Bro.*, 29–579.

For other authorities see Crawford's Annotated Neg. Inst. Law (3 Ed.), § 50, note (a).

See also Neg. Inst. Law by Selover, §§ 87, 117, 145, 150 and 179, and authorities there cited.

SEC. **3060-a25. Consideration—what constitutes.** Value is any consideration sufficient to support a simple contract. An antecedent or pre-existing debt constitutes value, and is deemed such, whether the instrument is payable on demand or at a future time. [29 G. A., ch. 130, § 25.]

Iowa: An antecedent indebtedness is a sufficient consideration and a bona fide holder for value before maturity of such a note is protected against latent equities. *Robinson v. Lair*, 31–9.

Other states: Railroad Co. v. Nat. Bank, 102 U. S. 14; *Swift v. Tyson*, 16 Pet. 1. These cases support the rule that a bona fide holder taking a negotiable instrument in payment of, or as security for, an antecedent debt is a holder for a valuable consideration, entitled to protection against all the equities between the antecedent parties. See also *Bank v. Morse*, 163 Mass. 381; *Roberts v. Hall*, 37 Conn. 205; *Harold v. Kays*, 64 Mich. 439; *Spencer v. Sloan*, 108 Ind. 183.

For other authorities and a discussion of the rule adopted by the act, giving the states in which the rule is changed, see notes to § 51 of Crawford's Annotated Neg. Inst. Law (3 Ed.).

A transferee of a note who takes it as collateral in lieu of other collateral surrendered becomes a holder for value. *Voss v. Chamberlain*, 139–569, 117 N. W. 269.

The surrender of a note to the maker who claims it to be a forgery is a sufficient consideration by way of compromise for a new note of a different amount. *First State Bank v. Williams*, 143–177, 121 N. W. 702.

One is not protected as a holder for value where the debt on account of which the note was given was created after the holder had notice of the defense to the instrument. *Iowa Nat. Bank v. Carter*, 144–715, 123 N. W. 237.

A bank taking by indorsement a note as security for a debt is a holder for value. *State Bank v. Bilstad*, 136 N. W. 204.

SEC. **3060-a26. What constitutes holder for value.** Where value has at any time been given for the instrument, the holder is deemed a holder for value in respect to all parties who became such prior to that time. [29 G. A., ch. 130, § 26.]

In a note to the section of the New York act, the author of the act says: "If a party become a bona fide holder for value of a bill before its acceptance, it is not essential to his right to enforce it against a subsequent acceptor that an additional consideration should proceed from him to the drawee. The bill itself implies a representation by the drawer that the drawee is already in receipt of funds to pay, and his contract is that the drawee shall accept and pay according to the terms of the draft. The drawee can, of course, upon presentment, refuse to accept, and in that event, the only recourse of the holder is against the prior parties thereto; but in case the drawee does accept the bill, he becomes primarily liable for its payment, not only to the indorsees, but also to the drawer himself." Citing *Heuertematte v. Morris*, 101 N. Y. 70.

SEC. **3060-a27. When lien on instrument constitutes holder for value.** Where the holder has a lien on the instrument, arising either from contract or by implication of law, he is deemed a holder for value to the extent of his lien. [29 G. A., ch. 130, § 27.]

Other states: Continental Nat. Bk. v. Bell, 125 N. Y. 38, 42; *Rogers v. Squires*, 98 N. Y. 49.

For other authorities see Crawford's Annotated Neg. Inst. Law (3 Ed.), § 53.

SEC. **3060-a28. Effect of want of consideration.** Absence or[1] failure of consideration is[2] matter of defense as against any person not a holder in due course, and partial failure of consideration is a defense *pro tanto*, whether the failure is an ascertained and liquidated amount or otherwise. [29 G. A., ch. 130, § 28.]

[1,2]"Absence of failure of consideration is a matter of defense * * *" in the prior supplement. "Absence 'of' failure" follows the enrolled bill, but "is 'a' matter" seems to have been an error. EDITOR.]

Other states: While the note itself is prima-facie evidence of consideration, still as between the immediate parties, it is competent to show want or failure thereof. *Corlies v. Howe*, 11 Gray, 125; *Breneman v. Furniss*, 90 Pa. St. 186. But burden of proof is on party alleging. *Jennison v. Stafford*, 1 Cush. 168. Failure of consideration does not affect the negotiability of the instrument. *Dingman v. Amsink*, 77 Pa. St. 114. The defense of want of consideration is governed by the *lex loci*. *Herdic v. Roessler*, 109 N. Y. 127, 133, 134. As to the matter of defense for partial failure of consideration, see *Black v. Rigway*, 131 Mass. 80.

See Daniel on Neg. Insts., § 210.

For other authorities see Crawford's Annotated Neg. Inst. Law (3 Ed.), § 54, notes (a), (b) and (c).

As to when one is a holder in due course, see §§ 3060-a26–3060-a29.

SEC. **3060-a29. Liability of accommodation party.** An accommodation party is one who has signed the instrument as maker, drawer, acceptor, or indorser, without receiving value therefor, and for the purpose of lending his name to some other person. Such a person is liable on the instrument to a holder for value, notwithstanding such holder at the time of taking the instrument knew him to be only an accommodation party. [29 G. A., ch. 130, § 29.]

Other states: The maker of an accommodation note lends his credit without instructions as to the manner of its use. *Lenheim v. Wilmarding*, 55 Pa. St. 73. He cannot set up want of consideration. *Carpenter v. Bank*, 106 Pa. St. 170–172. In respect to third persons, he is held to the character which he has assumed. *Stephen v. Bank*, 88 Pa. St. 157, 162–63. A mutual exchange of notes will not make them accommodation notes. *Rice v. Grange*, 131 N. Y. 149; *Woman v. Frost*, 52 N. Y. 422. But he may retract his indorsement, if he is an accommodation indorser, at any time before the paper is negotiated. *Berkely v. Tinsley*, 88 Va. 1001, 1004. The provision of the statute probably does not apply to corporations, which as a general rule are without power to bind themselves as accommodation parties. *Bank v. Atkinson*, 55 Fed. 465; *Bank v. Bank*, 13 N. Y. 309; *Bank v. Globe Works*, 101 Mass. 57.

For other authorities see Crawford's Annotated Neg. Inst. Law (3 Ed.), § 55, notes (a) and (b).

NEGOTIATION.

SEC. **3060-a30. What constitutes negotiation.** An instrument is negotiated when it is transferred from one person to another in such manner as to constitute the transferee the holder thereof.[1] If payable to bearer, it is negotiated by delivery; if payable to order, it is negotiated by the indorsement of the holder, completed by delivery. [29 G. A., ch. 130, § 30.]

[1]A period does not appear here in the enrolled bill but does in the New York act. A period seems necessary to convey the meaning which was evidently intended. EDITOR.]

Iowa: A note made payable to bearer is negotiable by delivery and needs no indorsement. *Elliott v. Corbin*, 4–564; *Shelton v. Sherfey*, 3 G. Gr. 108. A note payable to J. S. or order, and endorsed by payee to S. T. or bearer, becomes, in the hands of subsequent holders, the same as a note payable to bearer. (*Id.*) A note payable to order cannot be transferred by mere delivery, but should be indorsed by the payee or sued in his name or the name of his legal representative. *Dawson v. Jewett*, 4 G. Gr. 157.

See *Pearson v. Cummings*, 28–344. A provision that a note is negotiable and payable at a certain place designated, does not affect its negotiability nor prevent its negotiability elsewhere. *Schoharie Co. Bk. v. Bevard*, 51–257. Wrongful, unauthorized indorsement confers no rights upon transferee. *Thorpe v. Dickey*, 51–676.

As to what instruments are payable to bearer, see § 3060-a9. As to what instruments are payable to order, see § 3060-a8.

Other states: Indorsement is usually made by writing name on the back of the instrument, but the place is not essential. *Haines v. Dubois*, 29 N. J. Law, 259. Indorsement alone without delivery conveys no title. *Dann v. Norris*, 24 Conn. 337; *Middleton v. Griffith*, 57 N. J. Law, 442.

For citation of other authorities, see Crawford's Annotated Neg. Inst. Law (3 Ed.), § 60.

SEC. 3060-a31. **Indorsement—how made.** The indorsement must be written on the instrument itself or upon a paper attached thereto. The signature of the indorser, without additional words, is a sufficient indorsement. [29 G. A., ch. 130, § 31.]

Iowa: The assignee of a promissory note, under a transfer made in the body of a separate instrument, executed for an independent purpose, is not the holder of a legal title, discharged of prior equities, within the meaning of the law merchant. *Franklin v. Twogood*, 18–515. A holder of negotiable paper, to be protected against equities existing between the original parties, must have acquired it by indorsement before maturity. A transfer, except by indorsement, even before maturity, carries no such consequences. *Grimm v. Warner*, 45–106. The prevailing rule in this state is, that indorsements of negotiable paper shall be made thereon under the hand of the indorser. *Bettis v. Bristol*, 56–41. An assignee, as distinguished from an indorsee, acquires no greater rights than the assignor had. *Johnson v. Walker*, 60–315.

Other states: Crosby v. Roub, 16 Wis. 616; *Folger v. Chase*, 18 Pick. 63; *French v. Turner*, 15 Ind. 59.

For citation of other authorities, see Crawford's Annotated Neg. Inst. Law (3 Ed.), § 61, notes (a) and (b).

SEC. 3060-a32. **Indorsement must be of entire instrument.** The indorsement must be an indorsement of the entire instrument. An indorsement which purports to transfer to the indorsee a part only of the amount payable, or which purports to transfer the instrument to two or more indorsees severally, does not operate as a negotiation of the instrument. But where the instrument has been paid in part, it may be indorsed as to the residue. [29 G. A., ch. 130, § 32.]

Iowa: Prior to the act, an assignee of a note might sue in his own name, although only part of the amount was assigned to him. *Cochran v. Glover*, Morris, 151.

Other states: Lindsay v. Price, 33 Tex. 282. Indorsement of a partial payment on the instrument does not render it nonnegotiable. *Smith v. Shippey*, 182 Pa. St. 24.

SEC. 3060-a33. **Kinds of indorsement.** An indorsement may be either in blank or special; and it may also be either restrictive or qualified, or conditional. [29 G. A., ch. 130, § 33.]

Other states: As to what is a special indorsement, see *Rice v. Stearns*, 3 Mass. 225; *Reamer v. Bell*, 79 Pa. St. 292. A blank indorsement may be converted into a special or full indorsement by the holder. See § 3060-a35. As to what are restrictive indorsements, see *Power v. Finnie*, 4 Call (Va.), 411; *White v. Nat. Bank*, 102 U. S. 658; *Hook v. Pratt*, 78 N. Y. 371.

SEC. 3060-a34. **Special indorsement—indorsement in blank.** A special indorsement specifies the person to whom or to whose order the instrument is to be payable; and the indorsement of such indorsee is necessary to the further negotiation of the instrument. An indorsement in blank specifies no indorsee, and an instrument so indorsed is payable to bearer, and may be negotiated by delivery. [29 G. A., ch. 130, § 34.]

The signing of a guaranty of payment, combined with waiver of demand, notice and protest, constitutes the signers of such an indorsement who are payees of the note indorsers and not guarantors. *Voss v. Chamberlain*, 139–569, 117 N. W. 269.

SEC. 3060-a35. **Blank indorsement—how changed to special indorsement.** The holder may convert a blank indorsement into a special indorsement by writing over the signature of the indorser in blank any

contract consistent with the character of the indorsement. [29 G. A., ch. 130, § 35.]

Iowa: The holder of a note indorsed in blank may fill up the blank indorsement to himself, and thus recover as indorsee thereunder. *Leland v. Parriott*, 35–454. It then becomes a contract duly signed by the indorser. *Bernard v. Barry*, 1 G. Gr. 388; but the indorser of a note in blank cannot be bound by a contract of guaranty written over his indorsement. *Belden v. Hann*, 61–42.

Other states: Beckwith v. Angell, 6 Conn. 317.

SEC. 3060-a36. **When indorsement restrictive.** An indorsement is restrictive which either:

1. Prohibits the further negotiation of the instrument; or
2. Constitutes the indorsee the agent of the indorser; or
3. Vests the title in the indorsee in trust for or to the use of some other person. But the mere absence of words implying power to negotiate does not make an indorsement restrictive. [29 G. A., ch. 130, § 36.]

Other states: Commercial Nat. Bk. v. Armstrong, 148 U. S. 50; *Nat. Butchers' & Drovers' Bk. v. Hubbell*, 117 N. Y. 384; *Freeman's Bk. v. Nat. Tube Works*, 151 Mass. 413; *Commercial Nat. Bk. v. Hamilton Nat. Bk.*, 42 Fed. 880; *Bank of Metropolis v. First Nat. Bk. of Jersey City*, 19 Fed. 658.

For other authorities, see Crawford's Annotated Neg. Inst. Law (3 Ed.), § 66.

SEC. 3060-a37. **Effect of restrictive indorsement—rights of indorsee.** A restrictive indorsement confers upon the indorsee the right:

1. To receive payment of the instrument.
2. To bring any action thereon that the indorser could bring.
3. To transfer his rights as such indorsee, where the form of the indorsement authorizes him to do so.

But all subsequent indorsees acquire only the title of the first indorsee under the restrictive indorsement. [29 G. A., ch. 130, § 37.]

(2) *Other states:* The holder of negotiable paper may sue in his own name, though but an agent for others. *Ward v. Tyler*, 52 Pa. St. 393. The right of a bank to sue in its own name on paper indorsed to it "for collection" is sustained by *Wintermute v. Torrent*, 83 Mich. 555; *Regina Flour Mill Co. v. Holmes*, 156 Mass. 11; *Spofford v. Norton*, 126 Mass. 333. *Contra; Rock County Nat. Bk. v. Hollister*, 21 Minn. 385.

For other authorities see Crawford's Annotated Neg. Inst. Law (3 Ed.), § 67.

SEC. 3060-a38. **Qualified indorsement.** A qualified indorsement constitutes the indorser a mere assignor of the title to the instrument. It may be made by adding to the indorser's signature the words "without recourse" or any words of similar import. Such an indorsement does not impair the negotiable character of the instrument. [29 G. A., ch. 130, § 38.]

Iowa: But an indorsement without recourse, as when transferred by delivery only, makes the transferer liable upon implied warranty only to the extent that the paper so transferred is genuine and not forged or fictitious; that it is of the kind or description which it purports to be; that the transferer has done nothing and will do nothing to prevent its collection; that the parties to the instrument are *sui juris*, and capable of contracting; that it has not been paid, and that he has practiced no fraud upon the transferee in the matter of said transfer. *Watson v. Cheshire*, 18–202; *Allen v. Pegram*, 16–163; *Miller v. Dugan*, 36–433; but such indorser is liable if he knew at the time of transfer that the note was worthless. *Brown v. Zachary*, 102–433.

Other states: An indorsement may be qualified by adding the words "without recourse" or similar words. *Grant v. Fleming*, 46 Pa. St. 140. A qualified indorsement, however, does not put the transferee on inquiry as to the equities between the original parties. *Bisbing v. Graham*, 14 Pa. St. 14.

See Crawford's Annotated Neg. Inst. Law (3 Ed.), § 68.

SEC. 3060-a39. **Conditional indorsement.** Where an indorsement is conditional, a party required to pay the instrument may disregard the condition, and make payment to the indorsee or his transferee, whether

the conditions have been fulfilled or not. But any person to whom an instrument so indorsed is negotiated, will hold the same, or the proceeds thereof, subject to the rights of the person indorsing conditionally. [29 G. A., ch. 130, § 39.]

For note discussing this section and authorities, see Crawford's Annotated Neg. Inst. Law (3 Ed.), § 69.

SEC. 3060-a40. **Indorsement of instrument payable to bearer.** Where an instrument, payable to bearer, is indorsed specially, it may nevertheless be further negotiated by delivery; but the person indorsing specially is liable as indorser to only such holders as[1] make title through his indorsement. [29 G. A., ch. 130, § 40.]

[1]Followed by word "to" in the enrolled bill and prior supplement but not in the New York act. Manifestly the insertion of the word in the enrolled bill was unintentional. EDITOR.]

See Daniel on Neg. Insts., §§ 663-a, 696.

SEC. 3060-a41. **Indorsement where payable to two or more persons.** Where an instrument is payable to the order of two or more payees or indorsees[1] who are not partners, all must indorse unless the one indorsing has authority to indorse for the others. [29 G. A., ch. 130, § 41.]

[1"indorsers" in prior supplements but "indorsees" in the enrolled bill and New York act. EDITOR.]

Other states: Rhyner v. Feickert, 92 Ill. 305. A partner may indorse for the firm. *Childress v. Emory*, 8 Wheat. 642.

An instrument payable to one of two payees does not fall within the provisions of this section and an indorsement by one of such alternative payees is sufficient. *Union Bank v. Spies*, 151–178, 130 N. W. 928.

SEC. 3060-a42. **Effect of instrument drawn or indorsed to a person as cashier.** Where an instrument is drawn or indorsed to a person, as "cashier" or other fiscal officer of a bank or corporation, it is deemed *prima facie* to be payable to the bank or corporation of which he is such officer; and may be negotiated by either the indorsement of the bank or corporation, or the indorsement of the officer. [29 G. A., ch. 130, § 42.]

Other states: The rule stated in the text is supported by the following authorities: *Bank v. Muskingum Bank*, 29 N. Y. 619; *Bank v. Hall*, 44 N. Y. 395; *Folger v. Chase*, 18 Pick. 63. The extension of the rule to fiscal officers was deemed wise by the commissioners. See statement of Mr. Crawford in his work, Crawford's Annotated Neg. Inst. Law (3 Ed.), § 72.

In an action on a certificate of deposit made payable to the cashier of the bank issuing the certificate named as such and indorsed by him as cashier to the plaintiff, parol evidence is admissible to show that such person was the cashier of the defendant bank when such indorsement was made, and that he was acting in that capacity in transferring the certificate. *Johnson v. Buffalo Center State Bank*, 134–731, 112 N. W. 165.

In such an action it is not competent for the defendant to show that the cashier was making use of his official title and authority in his own individual interest. *Ibid.*

The fact that the certificate thus issued and indorsed bore eight per cent. interest and that the plaintiff to whom it was indorsed transferred it instead of presenting it for payment, held insufficient to impute notice that it was not negotiated in the regular course of business. *Ibid.*

Where an instrument is drawn or indorsed to a person as cashier or president of a bank it is *prima facie* payable to the bank, and may be negotiated by either the indorsement of the bank or the indorsement of the officer. *Griffin v. Erskine*, 131–444, 109 N. W. 13.

SEC. 3060-a43. **Indorsement where name is misspelled, et cetera.** Where the name[1] of a payee or indorsee is wrongly designated or mis-

spelled, he may indorse the instrument as therein described adding, if he thinks fit, his proper signature. [29 G. A., ch. 130, § 43.]

["names" in enrolled bill, but manifestly an error. EDITOR.]

Other states: Thus one who, while carrying on business on his own account in the name of a company, receives a note payable to the order of the company in the course of such business, may transfer the note by indorsing it in his own name. *Bryant v. Eastman*, 7 Cush. 111.

SEC. **3060-a44. Indorsement in representative capacity.** Where any person is under obligation to indorse in a representative capacity, he may indorse in such terms as to negative personal liability. [29 G. A., ch. 130, § 44.]

Other states: As to liability of executors and administrators who accept or indorse, see *Schmittler v. Simon*, 101 N. Y. 554.

SEC. **3060-a45. Time of indorsement—presumption.** Except where an indorsement bears date after the maturity of the instrument, every negotiation is deemed *prima facie* to have been effected before the instrument was overdue. [29 G. A., ch. 130, § 45.]

Other states: Mason v. Noonan, 7 Wis. 609. See § 3060-a52.
See also Crawford's Annotated Neg. Inst. Law (3 Ed.), § 75.

SEC. **3060-a46. Place of indorsement—presumption.** Except where the contrary appears every indorsement is presumed *prima facie* to have been made at the place where the instrument is dated. [29 G. A., ch. 130, § 46.]

Other states: An indorsement in Massachusetts of a note executed and payable in New York is a Massachusetts contract and governed by the law of that state. *Glidden v. Chamberlain*, 167 Mass. 486.
See Crawford's Annotated Neg. Inst. Law (3 Ed.), § 76.

SEC. **3060-a47. Continuation of negotiable character.** An instrument negotiable in its origin continues to be negotiable until it has been restrictively indorsed or discharged by payment or otherwise. [29 G. A., ch. 130, § 47.]

Other states: The law is well settled that a note or bill negotiable in form is negotiable as well after as before it becomes due. *Nat. Bk. v. Texas*, 20 Wall. 72; *French v. Jarvis*, 29 Conn. 347. But by indorsement after maturity, the instrument becomes according to legal effect, payable on demand, so far as the indorser is concerned; and presentment for payment must be made within a reasonable time, and due notice of dishonor given the indorser. *Berry v. Robinson*, 9 Johns, 121; *Van Hoosen v. Van Alstyne*, 3 Wend. 79; *Patterson v. Todd*, 18 Pa. St. 426.
Other authorities are cited in Crawford's Annotated Neg. Inst. Law (3 Ed.), § 77. See §§ 3060-a119 to 3060-a125.

SEC. **3060-a48. Striking out indorsement.** The owner may at any time strike out any indorsement which is not necessary to his title. The indorser whose indorsement is struck out, and all indorsers subsequent to him, are thereby relieved from liability on the instrument. [29 G. A., ch. 130, § 48.]

Iowa: The holder of a negotiable note is presumed to have the beneficial interest in it and being the payee, may strike out any indorsement on it. *Gordon v. Pitt*, 3-385. The possession of a note by plaintiff, the payee thereof, is presumed to be rightful, and the erasure of an indorsement thereon will be deemed to have been made by due authority. *Goddard v. Cunningham*, 6-400; to the same effect, *Palmer v. State Bank*, 19-112. See also *Veach v. Thompson*, 15-380.
Other states: The holder may strike out all intervening indorsements and aver that the first blank indorser indorsed immediately to himself. Byles on Bills, 149; *Preston v. Mann*, 25 Conn. 127. This may be done at the trial and after the plaintiff has finished his case. *Vanarsdale v. Hax*, 107 Fed. 878.
Other authorities are cited in Crawford's Annotated Neg. Inst. Law (3 Ed.), § 78.

SEC. 3060-a49. **Transfer without indorsement—effect of.** Where the holder of an instrument payable to his order transfers it for value without indorsing it, the transfer vests in the transferee such title as the transferee had therein, and the transferee acquires, in addition, the right to have the indorsement of the transferer. But for the purpose of determining whether the transferee is a holder in due course, the negotiation takes effect as of the time when the indorsement is actually made. [29 G. A., ch. 130, § 49.]

Iowa: A transferer by delivery for value of a note impliedly warrants it to have received no material alteration prior to such transfer. *Snyder v. Reno*, 38–329; see *Miller v. Dugan*, 36–433.

Other states: See *Simpson v. Hall*, 47 Conn. 417; *Bank v. Bingham*, 118 N. Y. 349. See note to Crawford's Annotated Neg. Inst. Law (3 Ed.), § 79.

SEC. 3060-a50. **When prior party may negotiate instrument.** Where an instrument is negotiated back to a prior party, such party may, subject to the provisions of this act, reissue and further negotiate the same, but he is not entitled to enforce payment thereof against any intervening party to whom he was personally liable. [29 G. A., ch. 130, § 50.]

Iowa: The signer of a note as security, who subsequently takes it up, may reissue the note as often as he takes it up. *Wilkerson v. Daniels*, 1 G. Gr. 180. An accommodation note, having once been discounted and taken up by accommodated party, does not become void, but may be transferred to a third party before maturity, discharged of equities existing between original parties, notwithstanding second indorser's knowledge of its character, and that it has once been indorsed and taken up. *Washington Bank v. Crum*, 15–53.

Other states: See *Scott v. First Nat. Bank*, 71 Ind. 445.

RIGHTS OF HOLDER.

SEC. 3060-a51. **Right of holder to sue—payment.** The holder of a negotiable instrument may sue thereon in his own name and payment to him in due course discharges the instrument. [29 G. A., ch. 130, § 51.]

Other states: This rule holds good even when restrictively indorsed. See § 3060-a37. Where plaintiff is the payee the production of the paper is sufficient. *Williams v. Holt*, 170 Mass. 351.

For other authorities see Crawford's Annotated Neg. Inst. Law (3 Ed.), § 90.

SEC. 3060-a52. **What constitutes a holder in due course.** A holder in due course is a holder who has taken the instrument under the following conditions:

1. That the instrument is complete and regular upon its face.
2. That he became the holder of it before it was overdue, and without notice that it had been previously dishonored, if such was the fact.
3. That he took it in good faith and for value.
4. That at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it. [29 G. A., ch. 130, § 52.]

(1) *Other states:* To determine the character of an indorsee as a bona fide holder for value without notice, the point of time at which he parts with his money is the important fact. If the paper was then on its face irregular—out of the usual course of business—the effect of that knowledge on the indorsee could not be prevented by subsequently putting it in regular shape. *Losee v. Bissell*, 76 Pa. St. 459, 462.

As to incomplete instruments and authority to fill up blanks therein, see § 3060-a14, *supra*.

(2) *Iowa:* A transfer by indorsement is presumed to have been for a valuable consideration and before maturity. *Rea v. Owens*, 37–262. An assignee of a note and mortgage who takes without notice subsequent to an agreement for extension, and subsequent to the original date of maturity, takes it "after due" in such sense that he acquires no right which his assignor could not have claimed and enforced. *Duncan v. Finn*, 79–658.

Other states: *Marsh v. Marshall*, 53 Pa. St. 396. A promissory note matures when, by its terms, the principal becomes due; and one who purchases it in good faith, for value, before maturity, is within the protection of the law merchant, although interest is overdue at the time of such purchase. *Kelly v. Whitney*, 45 Wis. 110. But see *Hart v. Stickney*, 41 Wis. 630; *Newell v. Gregg*, 51 Barb. 253. But a note payable in installments is overdue when the first installment is overdue and unpaid, and one who takes it afterwards takes it subject to all equities between the original parties. *Vinton v. King*, 4 Allen, 562. A transfer upon the day of maturity is before the instrument is overdue; for the principal debtor has the whole of that day in which to pay. *Continental Nat. Bank v. Townsend*, 87 N. Y. 8. But see *Sargent v. Southgate*, 5 Pick. 312; *Pine v. Smith*, 11 Gray, 38. A check deposited with a bank on the day of its date cannot be considered overdue when so deposited. *Bank v. Manson*, 168 Mass. 425.

(3) *Iowa:* A holder of a note as collateral security for an antecedent indebtedness, and with no extension of time, is not a holder for value. *Noteboom v. Watkins*, 103–580; neither is one a bona fide holder who received it as further security for a preëxisting debt without giving any new consideration or incurring any additional responsibility. *Bank v. Hall*, 106–540. See *Johnson v. Barney*, 1–531; *Stotts v. Byers*, 17–303. That a promissory note was obtained by fraud will not affect the right of a bona fide holder thereof to whom it was indorsed before maturity, nor that such holder purchased it for a considerably less amount than its face. *Sully v. Goldsmith*, 32–397.

Other states: See *Steckel v. Steckel*, 28 Pa. St. 233, 235. As to what constitutes value, see § 3060-a25, *supra*.

(4) *Iowa:* A bona fide holder of a note made payable to a fictitious payee may recover of the maker. *Lane v. Krekle*, 22–399. One not a bona fide holder for value before maturity, but merely holding for the payee and not in his own right, is not protected. *Bank v. McNulty*, 36–229; nor is an assignee in insolvency. *Roberts v. Corbin*, 26–315; and one who holds under a transfer made in the body of a separate instrument executed for an independent purpose is not the holder of a legal title discharged of prior equities, within the meaning of the law merchant. *Franklin v. Truegood*, 18–515. But the holder of a note under purchase at judicial sale and without a notice is a bona fide purchaser. *Allison & Crane v. King*, 21–302.

Other states: As to what constitutes notice, see § 3060-a56, *infra*.

For other authorities under each of these propositions, see Crawford's Annotated Neg. Inst. Law (3 Ed.), § 91.

One whose name is inserted in a blank instrument as payee without authority of the original signer is not a holder in due course. A holder in due course is one to whom the instrument is transferred after it has become effectual as a negotiable instrument. *Vander Ploeg v. Van Zuuk*, 135–350, 112 N. W. 807.

Bad faith in the holder is not proven by evidence of negligence or of circumstances which would put an ordinarily prudent man on inquiry; but such evidence may be sufficient to take the case to the jury on the question as to a good faith purchase. Positive testimony that a purchase or transfer was in due course does not necessarily destroy the force and effect of facts and circumstances tending to show otherwise. *Montrose Sav. Bank v. Claussen*, 137–73, 114 N. W. 547.

A holder who takes by way of security for a preëxisting debt becomes a holder for value. *Voss v. Chamberlain*, 139–569, 117 N. W. 269.

Where it appears from the instrument itself that there has been an extension of time of payment, the note is not dishonored by failure to pay at the original date of maturity and a purchaser before the time of payment as extended and without notice is protected. *Conkling v. Young*, 141–676, 120 N. W. 353.

Even a thief of negotiable paper transferable by delivery may give an innocent purchaser a good title as against the true owner. *Irwin v. Deming*, 142–299, 120 N. W. 645.

Where a defense is shown which would be good against the payee, the burden of proof is on the holder to show that he acquired the instrument in due course of business. *Iowa National Bank v. Carter*, 144–715, 123 N. W. 237.

To justify the court in directing a verdict in favor of the holder as against a defense to the instrument, the showing of the *bona fides* of the holder must not only be without substantial evidence tending to impeach it, but it must be so clear and unequivocal as to leave no room for difference of opinion concerning it among fair-minded men. *Arnd v. Aylesworth*, 145–185, 123 N. W. 1000.

Under the evidence in a particular case, held that the plaintiff was properly found not to be a holder in due course and not entitled to protection against equities in favor of the maker of the instrument. *Hoyt v. Starr*, 150–616, 130 N. W. 161.

A bank taking a note by indorsement as security for a debt is a holder in due course. *State Bank v. Bilstad*, 136 N. W. 204.

SEC. **3060-a53. When person not deemed holder in due course.** Where an instrument payable on demand is negotiated an unreasonable length of time after its issue, the holder is not deemed a holder in due course. [29 G. A., ch. 130, § 53.]

Other states: As to what constitutes reasonable time, see § 3060-a193. No absolute measure can be fixed. A day or two, *Field v. Nickerson*, 13 Mass. 131, 137; seven days, *Thurston v. McKenn*, 6 Mass. 428; and even a month, *Ranger v. Corey*, 1 Metc. 369, is not too long; while eight months, *Bank v. Jenness*, 2 Metc. 288; *Ayres v. Hutchins*, 4 Mass. 370; three months and a half, *Stevens v. Brice*, 21 Pick. 193; and even two months and a half, *Losee v. Durkin*, 7 J. R. 70, have been deemed sufficient to discredit a note.

See Crawford's Annotated Neg. Inst. Law (3 Ed.), § 92.

SEC. **3060-a54. Notice before full amount paid.** Where the transferee receives notice of any infirmity in the instrument or defect in the title of the person negotiating the same before he has paid the full amount agreed to be paid therefor, he will be deemed a holder in due course only to the extent of the amount theretofore paid by him. [29 G. A., ch. 130, § 54.]

Other states: Dresser v. Missouri, etc. R. R. Construction Co., 93 U. S. 93.

SEC. **3060-a55. When title defective.** The title of a person who negotiates an instrument is defective within the meaning of this act when he obtained the instrument, or any signature thereto, by fraud, duress, or force and fear, or other unlawful means, or for an illegal consideration, or when he negotiates it in breach of faith, or under such circumstances as amount to a fraud. [29 G. A., ch. 130, § 55.]

Other states: Commercial paper executed under duress is void, even though there may be some consideration to support it. *Magoon v. Reber*, 76 Wis. 392. The fraud in putting the paper in circulation must be a fraud against the defendant. *Kinney v. Kruse*, 28 Wis. 189.

For other authorities see note to Crawford's Annoted Neg. Inst. Law (3 Ed.), § 94.

There may be duress of goods or duress of person affecting the validity of a negotiable instrument; and in neither case is the display of firearms necessary to the establishment of the charge. *Callendar Sav. Bank v. Loos*, 142–1, 120 N. W. 317.

SEC. **3060-a56. What constitutes notice of defect.** To constitute notice of an infirmity in the instrument or defect in the title of the person negotiating the same, the person to whom it is negotiated must have had actual knowledge of the infirmity or defect, or knowledge of such facts that his action in taking the instrument amounted to bad faith. [29 G. A., ch. 130, § 56.]

Iowa: Certain facts held not to constitute notice of infirmity. *Pond v. Agricultural Works*, 50–596; the rule stated to be that the circumstances coming to the knowledge of the purchaser before the purchase must be such as to require that he shall in good faith inquire as to the validity of the note, and it is only where the failure to inquire evinces actual bad faith that such notice is sufficient. *Merrill v. Hole*, 85–66; *Cook v. Weirman*, 51–561; *Lake v. Reed*, 29–258. Circumstances and inference therefrom may be sufficient to charge purchaser with notice. *Trustee, etc. v. Hill*, 12–462; *Hoffman v. Leibfarth*, 51–711. See *Hawkins v. Wilson*, 71–762. Knowledge of the transferer is not imputable or chargeable to the purchaser. *Stutzman v. Payne*, 23–17.

Other states: In a note to the corresponding section Mr. Crawford says: "The holder is not bound at his peril to be on the alert for circumstances which might possibly excite the suspicion of wary vigilance; he does not owe to the party who puts the paper afloat the duty of active inquiry in order to avert the imputation of bad faith. The rights of the holder are to be determined by the simple test of honesty and good faith, and not by a speculative issue as to his diligence or negligence. The holder's rights cannot be defeated without proof of actual notice of the defect in title or bad faith on his part evidenced by circumstances. Though he may have been negligent in taking the paper, and omitted precautions which a prudent man would have taken, nevertheless, unless he acted *mala fide*, his title, according to settled doctrines, will prevail. *Cheever v. Pittsburgh, Shenango & Lake Erie R. R. Co.*, 150 N. Y. 59, 65;

Bank v. New York Belting, etc. Co., 148 N. Y. 705; *Knox v. Eden Musee Am. Co.*, 148 N. Y. 454; *Bank v. Diefendorf*, 123 N Y. 202; *Vosburgh v. Diefendorf*, 119 N. Y. 357; *Jarvis v. Manhattan Beach Co.*, 148 N. Y. 652; *Murray v. Lardner*, 2 Wall. 110; *Swift v. Smith*, 102 U. S. 442; *Belmont v. Hoge*, 35 N. Y. 65; *Welsh v. Sage*, 47 N. Y. 143; *Bank v. Young*, 41 N. J. Eq. 531; *Bank v. Bank*, 48 N. J. Law, 513; *Phelan v. Moss*, 67 Pa. St. 59; *Moorehead v. Gilmore*, 77 Pa. St. 118; *Bank v. Morgan*, 165 Pa. St. 199. While gross carelessness will not, as a matter of law, defeat title in purchaser for value, it may constitute evidence of bad faith. *Bank v. Diefendorf*, 123 N. Y. 191. The payment of value is a circumstance to be taken into account with other facts in determining the good faith of the purchaser, but it is not conclusive. *Cunningham v. Scott*, 90 Hun. 410, 411. The mere fact that the holder for value of a promissory note made by a third party receives it from a person engaged in the note-brokerage business, as collateral security for a loan to such broker, is not sufficient to raise a doubt as to the authority of the broker to so deal with the note. *Bank v. New York Belting, etc. Co.*, 148 N. Y. 698. And a bank has a right to assume, as to notes offered to it, whether for discount or as collateral security, by a customer who has an account with it, and who is in the habit of borrowing money from it, that the customer is acting in good faith, and within his lawful rights. *(Id.)*

"The fraudulent misappropriation by the broker of the proceeds of the discount is not sufficient to put the holder to the proof of his *bona fides*. *Sloan v. The Union Banking Co.*, 67 Pa. St. 470.

"One who receives the notes of a corporation from one of its officers in payment of, or as security for, a personal debt of such officer, does so at his peril. *Prima facie* the act is unlawful, and, unless actually authorized, the purchaser will be deemed to have taken them with notice of the rights of the corporation. *Wilson v. Metropolitan Ry. Co.*, 120 N. Y. 145, 150. And where the maker of a note which is payable to his order and purports to be indorsed by a corporation, procures it to be discounted for his own benefit, this of itself, if unexplained, is notice that the indorsement is not made in the usual course of business, but is for the accommodation of the maker. *Bank v. German-Am. Mut. Warehousing & Security Co.*, 116 N. Y. 281."

As the holder has the burden of proving that he received the paper without notice of defects, if the facts shown have any fair tendency to establish bad faith on the part of the holder, then the question as to whether he is a holder in good faith is for the jury. *McNight v. Parsons*, 136–390, 113 N. W. 858.

This provision simply puts in statutory form a rule of the common law previously recognized. Mere ground of suspicion as to possible defects in the title of the indorser, or of the existence of defenses, is not sufficient to show that the holder is not entitled to protection; but if negligence on the part of the holder in failing to make inquiries as to title or defenses is marked or of gross character, it may be sufficient to sustain a finding of bad faith. *Arnd v. Aylesworth*, 145–185, 123 N. W. 1000.

If there is evidence of bad faith the burden is on the holder to establish his good faith. Mere denial by the holder as a witness of notice of defects of title, uncontradicted by any other witness, may not be sufficient to justify a directed verdict in his favor. *Ibid.*

SEC. **3060-a57. Rights of holder in due course.** A holder in due course holds the instrument free from any defect of title of prior parties, and free from defenses available to prior parties among themselves, and may enforce payment of the instrument for the full amount thereof against all parties liable thereon. [29 G. A., ch. 130, § 57.]

Iowa: That defendants were accommodation makers is no defense to an action by an indorsee, though received by plaintiff with knowledge of that fact, if note was taken in good faith for value in the usual course of business. *Winters v. Home Ins. Co.*, 30–172; nor is the rule changed by the fact that it was negotiated by one of the makers, the real debtor instead of the payee. *(Id.)* In the absence of statutes permitting same, fraud cannot be set up against a note in the hands of an innocent purchaser. *Temple v. Hayes & Hendershott*, Morris, 9; *Lake v. Reed*, 29–258; *Lehman v. Press*, 106–389; *Wright, Dryden & Co. v. Flynn*, 33–159. Duress not a defense against a bona fide holder for value. *Veach v. Thomson*, 15–380. Latent infirmities no defense against bona fide holder. *Gage v. Sharp*, 24–15. County bonds issued without authority are invalid in hands of purchaser. *Hull & Argalls v. County of Marshall*, 12–142. Forgery, in its execution, renders paper invalid even in the hands of an innocent holder for value before maturity. *Caulkins v. Whisler*, 29–495; *First Nat. Bk. v. Zeins*, 93–140.

Other states: In a case construing this section of the negotiable instruments law it has been held that under this law a bona fide holder may enforce a promissory note against the maker, even though the note was given for a gambling debt, and that this statute has repealed the English statutes which were formerly in force in the District

of Columbia. In the opinion Alvey, C. J., says: "We know, moreover, that the great and leading object of the act, not only with Congress, but also with the large number of the principal commercial states of the Union that have adopted it, has been to establish a uniform system of law to govern negotiable instruments wherever they might circulate or be negotiated. It was not only uniformity of rules and principles that was designed, but to embody in a codified form, as fully as possible, all the law upon the subject, to avoid conflict of decisions, and the effect of mere local laws and usages that have heretofore prevailed. The great object sought to be accomplished by the enactment of the statute, was to free the negotiable instrument, as far as possible, from all latent or local infirmities that would otherwise inhere in it to the prejudice and disappointment of innocent holders as against all parties to the instrument professedly bound thereby. This clearly could not be effected so long as the instrument was rendered absolutely null and void by local statutes, as against the original maker or acceptor, as is the case by the operation, indeed, by the express provision, of the statutes of Charles and Anne." *Wirt v. Stubblefield*, 17 App. Cas. D. C. 283.

See *Cromwell v. County of Sac*, 96 U. S. 60.

For other authorities see Crawford's Annotated Neg. Inst. Law (3 Ed.), § 96.

The title of the holder is not dependent on the person from whom the instrument is obtained, providing he is a holder in good faith before maturity and for value. *Voss v. Chamberlain*, 139–569, 117 N. W. 269.

In a controversy between an indorser and transferee of a note as to the right of the transferee to recover as a bona fide holder for value, the amount of the consideration is immaterial. Code § 3070 has no application in such a case. *Ibid.*

The indorsee of a negotiable instrument without notice or knowledge that it has been given in a gambling transaction is protected as a bona fide holder. *Kushner v. Abbott*, 156–598, 137 N. W. 913.

SEC. 3060-a58. **When subject to original defenses.** In the hands of any holder other than a holder in due course, a negotiable instrument is subject to the same defenses as if it were nonnegotiable. But a holder who derives his title through a holder in due course, and who is not himself a party to any fraud or illegality affecting the instrument, has all the rights of such former holder in respect of all parties prior to the latter. [29 G. A., ch. 130, § 58.]

Mr. Crawford says in a note to § 97 of his work: "It was not deemed expedient to make provision as to what equities the transferee will be subject to; for the matter may be affected by the statutes of the various states relating to set-off and counterclaim. In an act designed to be uniform in the various states, no more can be done than fix the rights of holders in due course. On the question whether only such equities may be asserted as attach to the paper, or whether equities arising out of collateral matters may also be asserted, the decisions are conflicting. In England it was decided in *Burroughs v. Moss*, 10 Barn. & Cress. 558, that the indorsee of an overdue bill is liable to such equities only as attach on the bill or note itself, and not to claims arising out of collateral matters, such as a general set-off is. This is a leading case, and has since been uniformly followed in that country."

Other states: See also *Long v. Rhawn*, 75 Pa. St. 128; *Young v. Shriner*, 80 Pa. St. 463; *Robinson v. Lymon*, 10 Conn. 31. A person to whom the instrument is transferred as a gift takes it subject to all the equities then existing between the original parties, but not subject to those which arise thereafter. *Bank v. Wood*, 128 N. Y. 35; *Baxter v. Little*, 6 Met. 7.

Negotiability is not necessary to the validity of a promissory note, and the mere fact that it is negotiable in form does not, as between the maker and payee, deprive the former of any defense that he would otherwise have. *Fullerton Lumber Co. v. Snouffer*, 139–176, 117 N. W. 50.

SEC. 3060-a59. **Who deemed holder in due course.** Every holder is deemed *prima facie* to be a holder in due course; but when it is shown that the title of any person who has negotiated the instrument was defective, the burden is on the holder to prove that he or some person under whom he claims acquired the title as a holder in due course. But the last mentioned rule does not apply in favor of a party who became bound on the instrument prior to the acquisition of such defective title. [29 G. A., ch. 130, § 59.]

Other states: The presumption is that the indorsee of negotiable paper receives it bona fide and for value. *Gray's Admr. v. Bank*, 29 Pa. St. 365. The holder may make out his title by presumption until it is impeached by evidence showing that the paper had a fraudulent or illegal inception. This being done, however, it devolves upon him to show the circumstances under which it came into his possession, and that he has acted in good faith. *Bank v. Diefendorf*, 123 N. Y. 191; *Joy v. Diefendorf*, 130 N. Y. 6; *Sullivan v. Langley*, 120 Mass. 437; *Bank v. Iron Works*, 159 Mass. 158; *Hutchinson v. Boggs & Kirk*, 28 Pa. St. 294; and other authorities cited in Crawford's Annotated Neg. Inst. Law (3 Ed.), § 98.

One claiming to be the holder in due course and protected against the defense of fraud in the execution of the instrument has the burden of proving that he acquired title as such holder in due course, *i. e.*, in good faith and for value, without notice. *Keegan v. Rock*, 128–39, 102 N. W. 805.

By this statute the title of any person who negotiates an instrument in breach of faith or under circumstances amounting to fraud is defective, and the burden is cast upon the holder to show that he or some person through whom he claims acquired the paper innocently. *McNight v. Parsons*, 136–390, 113 N. W. 858.

The burden is on the holder to prove that he or some other person under whom he claims acquired the title as a holder in due course. *Hawkins v. Young*, 137–281, 114 N. W. 1041.

Until the defendant offers evidence of fraud, the plaintiff is under no obligation to negative it or to assume the burden of proving that he is a holder in good faith and without notice. *Cox v. Cline*, 139–128, 117 N. W. 48.

As against the defense by the maker that the instrument was negotiated through fraud, the holder must affirmatively establish that he or some person under whom he claims acquired the title as a holder in due course. *Voss v. Chamberlain*, 139–569, 117 N. W. 269.

Where it appears that the instrument is tainted with fraud in its inception, the presumption of good faith which ordinarily attaches to a purchase of negotiable paper before due no longer obtains, and the burden is on the owner to show the receipt of the paper in due course and without notice of defenses. *City Nat. Bank v. Jordan*, 139–499, 117 N. W. 758.

If a note is given for an illegal consideration the burden shifts to the plaintiff to prove that he is the holder in due course. *O'Conner v. Kleiman*, 143–435, 121 N. W. 1088.

Where it appears that the maker has a defense as against the payee, the burden is upon one claiming as bona fide holder to prove that he is a holder for value and without notice. *Iowa Nat. Bank v. Carter*, 144–715, 123 N. W. 237.

Where a defense to the note as against the payee is shown, the burden is on the holder claiming to be a purchaser in good faith for value without notice to show these facts and his own testimony with reference thereto is not conclusive as against circumstances indicating bad faith or notice. *Arnd v. Aylesworth*, 145–185, 123 N. W. 1000.

LIABILITIES OF PARTIES.

SEC. 3060-a60. **Liability of maker.** The maker of a negotiable instrument by making it engages that he will pay it according to its tenor, and admits the existence of the payee and his then capacity to indorse. [29 G. A., ch. 130, § 60.]

Other states: The fact that the holder had other collateral securities for the same debt more than sufficient to cover it, from which, however, the debt had not been realized, is not a ground of defense on the part of the maker. *Lord v. Bank*, 20 Pa. St. 384.

SEC. 3060-a61. **Liability of drawer.** The drawer by drawing the instrument admits the existence of the payee and his then capacity to indorse, and engages that on due presentment the instrument will be accepted or paid, or both, according to its tenor, and that if it be dishonored, and the necessary proceedings on dishonor be duly taken, he will pay the amount thereof to the holder, or to any subsequent indorser who may be compelled to pay it. But the drawer may insert in the instrument an express stipulation negativing or limiting his own liability to the holder. [29 G. A., ch. 130, § 61.]

Other states: The transmission of a draft by mail by payee and his failure to discover its loss for six months discharges drawer. *Bank v. Farnsworth* (N. D.), 72 N. W. 901. But a knowledge of the facts and a new promise to pay by drawer waive his right to a discharge. *Id.*

SEC. 3060-a62. **Liability of acceptor.** The acceptor by accepting the instrument engages that he will pay it according to the tenor of his acceptance, and admits:

1. The existence of the drawer, the genuineness of his signature, and his capacity and authority to draw the instrument; and
2. The existence of the payee and his then capacity to indorse. [29 G. A., ch. 130, § 62.]

(1) *Other states:* The discounting of a bill by the drawee who has not accepted it is neither payment nor a promise to pay according to its tenor and effect, but puts him in the position of an indorsee for value, with the right of action against drawer and indorser. *Swope v. Ross*, 40 Pa. St. 186; *Bank v. Bank*, 46 N. Y. 77; *Bank v. Bank*, 59 N. Y. 67; *Bank v. Bank*, 10 Wheat., 333.

Numerous other authorities are cited by Mr. Crawford in his work on the Negotiable Inst. Law (3 Ed.), § 112.

SEC. 3060-a63. **When person deemed indorser.** A person placing his signature upon an instrument otherwise than as maker, drawer or acceptor is deemed to be an indorser, unless he clearly indicates by appropriate words his intention to be bound in some other capacity. [29 G. A., ch. 130, § 63.]

See § 3060-a17, subdiv. 6, *supra*.

The liability of a blank indorser cannot be varied by parol evidence. *Porter v. Moles*, 151–279, 131 N. W. 23.

SEC. 3060-a64. **Liability of irregular indorser.** Where a person, not otherwise a party to an instrument, places thereon his signature in blank before delivery, he is liable as indorser in accordance with the following rules:

1. If the instrument is payable to the order of a third person, he is liable to the payee and to all subsequent parties.
2. If the instrument is payable to the order of the maker or drawer, or is payable to bearer, he is liable to all parties subsequent to the maker or drawer.
3. If he signs for the accommodation of the payee, he is liable to all parties subsequent to the payee. [29 G. A., ch. 130, § 64.]

Other states: This section is intended to cover irregular indorsements. The decisions upon this subject are very conflicting. In some jurisdictions the person placing his signature on the back of a note before the payee has indorsed it was deemed a joint maker. *Good v. Martin*, 95 U. S. 93. In other jurisdictions he was regarded as a guarantor and in still others an indorser.

For a discussion of the question and citation of additional authorities, see Crawford's Annotated Neg. Inst. Law (3 Ed.), § 114.

SEC. 3060-a65. **Warranty where negotiation by delivery, et cetera.** Every person negotiating an instrument by delivery or by a qualified indorsement, warrants:

1. That the instrument is genuine and in all respects what it purports to be.
2. That he has a good title to it.
3. That all prior parties had capacity to contract.
4. That he has no knowledge of any fact which would impair the validity of the instrument or render it valueless.

But when the negotiation is by delivery only, the warranty extends in favor of no holder other than the immediate transferee. The provisions of subdivision three of this section do not apply to persons negotiating public or corporate securities, other than bills and notes. [29 G. A., ch. 130, § 65.]

Other states: This, of course, refers only to the implied warranty. An express warranty may be so framed as to exclude all other warranties which would otherwise be implied by the law. *Giffert v. West*, 37 Wis. 115.

(1) *Other states: Littauer v. Goldman*, 72 N. Y. 506; *Herrick v. Whitney*, 15 Johns, 240; *Coolidge v. Brigham*, 5 Metc. 68; *McConeghy v. Kirk*, 68 Pa. St. 200; *Bank v. Caverly*, 7 Gray, 216, 220. See the following section.

As to implied warranty as to the identity of the thing sold, see *Meyer v. Richards*, 163 U. S. 385.

(2) *Other states: Meriden Nat. Bk. v. Gallaudet*, 120 N. Y. 298, 303.

(3) *Other states:* One who indorses a promissory note, purporting to be executed by a firm, thereby impliedly contracts that the note was made by the firm in whose name it is executed, and he cannot dispute the fact in an action upon the indorsement. *Dalrymple v. Hillenbrand*, 62 N. Y. 5. And a second indorser cannot dispute the legal capacity of the payee to indorse on the ground that she was a married woman. *Bank v. Caverly*, 7 Gray, 216, 217. And one indorsing a note of a corporation admits its capacity to execute the note. *Glidden v. Chamberlain*, 167 Mass. 486.

(4) *Other states:* As to implied warranty that the note is unpaid, see *Daskman v. Ullman*, 74 Wis. 474. Where an instrument void for usury is transferred without indorsement or representation as to its legality, action cannot be sustained against the vendor without alleging and proving scienter. *Littauer v. Goldman*, 72 N. Y. 506; *Meyer v. Richards*, 163 U. S. 385.

Otis v. Cullum, 92 U. S. 448, is an action against the vendor of municipal bonds payable to bearer, afterward held void because the legislature had no power to pass the acts under which they were issued. It was held no recovery could be had in the absence of an express warranty.

For other authorities see Crawford's Annotated Neg. Inst. Law (3 Ed.), § 115.

The statutory provision as to the warranty implied in negotiating an instrument by delivery or qualified indorsement has no application where the question is as to whether the instrument has been accepted in satisfaction of an indebtedness. *Dille v. White*, 132–327, 109 N. W. 909.

By the indorsement of negotiable paper the indorser warrants that the instrument is genuine and what it purports to be, that he has good title, and that the amount called for will be paid, and further, that, if dishonored, upon proper proceedings being taken he will pay the amount called for to the indorsee. *State v. Corning Sav. Bank*, 139–338, 115 N. W. 937.

Under an indorsement without recourse, the warranty is that the paper is genuine and that the indorser has title. *Ibid.*

SEC. **3060-a66. Liability of general indorser.** Every indorser who indorses without qualification, warrants to all subsequent holders in due course:

1. The[1] matters and things mentioned in subdivisions one, two and three of the next preceding section; and

2. That the instrument is at the time of his indorsement valid and subsisting. And, in addition, he engages that on due presentment, it shall be accepted or paid, or both, as the case may be, according to its tenor, and that if it be dishonored, and the necessary proceedings on dishonor be duly taken, he will pay the amount thereof to the holder, or to any subsequent indorser who may be compelled to pay it. [29 G. A., ch. 130, § 66.]

[1"That" in the prior supplement. "The" in the enrolled bill and New York act. EDITOR.]

(1) *Other states: United States v. American Exchange Nat. Bk.*, 70 Fed. 232.

(2) *Other states:* Parol evidence of an agreement which would vary the legal liability of the indorser under his indorsement is inadmissible. *Eaton v. McMahon*, 42 Wis. 484. And while there has been some conflict in the decisions, the sounder doctrine puts all indorsements on substantially the same footing. The contract by a blank indorsement is fixed by law, and should not be rendered uncertain by parol, any more than when written out in full. *Charles v. Denis*, 42 Wis. 56, 58. This is the rule adopted in the statute, which makes the indorser's obligation absolute.

Other authorities are to be found in note to § 116, Crawford's Annotated Neg. Inst. Law (3 Ed.).

There is no authority for holding the blank indorser of a nonnegotiable note liable thereon except in accordance with the terms of the instrument as to the amount to be paid and conditions on which it is to be paid. *Allison v. Hollembeak*, 138–479, 114 N. W. 1059.

When notified of the dishonor of the note, it is the indorser's duty to pay and he cannot complain that, by failure to sue

the maker, the holder has prejudiced the rights of the indorser. *Darling v. Blazek*, 142–355, 120 N. W. 961.

Parol evidence is not admissible to vary the liability of a blank indorser. *Porter v. Moles*, 151–279, 131 N. W. 23.

Further as to liability of indorser, see notes to preceding section.

SEC. **3060-a67. Liability of indorser where paper negotiable by delivery.** Where a person places his indorsement on an instrument negotiable by delivery he incurs all the liabilities of an indorser. [29 G. A., ch. 130, § 67.]

Other states: The holder of paper payable to bearer and indorsed may sue upon it as bearer or indorsee at his election. Daniel on Neg. Insts., § 663-a; 3 Kent's Comm. 44.

Formerly in some states a note payable to a designated payee or bearer could not be negotiated except by the indorsement of such person. See *Garvin v. Wiswell*, 83 Ill. 218; *Blackman v. Lehman*, 63 Ala. 547.

SEC. **3060-a68. Order in which indorsers are liable.** As respects one another, indorsers are liable *prima facie* in the order in which they indorse; but evidence is admissible to show that as between or among themselves they have agreed otherwise. Joint payees or joint indorsees who indorse are deemed to indorse jointly and severally. [29 G. A., ch. 130, § 68.]

Other states: This rule is general and applies to accommodation indorsers as well as to others. Such indorsements import, not a joint, but a several and successive liability, each indorser being responsible to all who succeed him. *Easterly v. Barber*, 66 N. Y. 433; *Kelly v. Borroughs*, 102 N. Y. 93; *McCarty v. Roots*, 21 How. (U. S.), 432; *Shaw v. Knox*, 98 Mass. 214; *Howe v. Merrill*, 15 Cush. 88; *Russ v. Sadler*, 197 Pa. St. 51.

See Crawford's Annotated Neg. Inst. Law (3 Ed.), § 118.

SEC. **3060-a69. Liability of agent or broker.** Where a broker or other agent negotiates an instrument without indorsement, he incurs all the liabilities prescribed by section sixty-five of this act, unless he discloses the name of his principal, and the fact that he is acting only as agent. [29 G. A., ch. 130, § 69.]

Other states: Meriden Nat. Bk. v. Gallaudet, 120 N. Y. 289; *Cabot Bk. v. Morton*, 4 Gray, 156; *Worthington v. Cowles*, 12 Mass. 30.

PRESENTMENT FOR PAYMENT.

SEC. **3060-a70. Effect of want of demand on principal debtor.** Presentment for payment is not necessary in order to charge the person primarily on the instrument; but if the instrument is, by its terms, payable at a special place, and he is able and willing to pay it there at maturity, such ability and willingness are equivalent to a tender of payment upon his part. But, except as herein otherwise provided, presentment for payment is necessary in order to charge the drawer and indorsers. [29 G. A., ch. 130, § 70.]

Iowa: The failure of the plaintiff to demand payment at the specified place will not excuse the defendant or maker from providing for its payment. *Myers v. Byington*, 34–205; *Games v. Manning*, 2 G. Gr. 251; *Barker v. Brink*, 4 G. Gr. 59. To charge an indorser, presentment, demand and notice must be given and shown by affirmative proof. *Bank of Red Oak v. Orvis*, 40–332. If there are joint makers, presentment and demand must be made upon all. *Id.* In absence of notice of dishonor, the institution of suit against makers is not sufficient to charge indorser. *Keater & Skinner v. Hock, Musser & Co.*, 11–536. In case of transfer after maturity, demand and notice must be given within reasonable time to charge indorser. *Jones v. Middleton*, 29–188; *Pryor v. Bowman*, 38–92.

Other states: As to there being no necessity for presentment to charge person primarily liable, see *Howard v. Boorman*, 17 Wis. 459; *Hills v. Place*, 48 N. Y. 520.

The rule adopted generally in the United States is that where a note is made payable at a particular bank or place, or a bill of exchange is drawn or accepted payable in

like manner, it is not necessary in order to recover of the maker or acceptor to aver or prove presentment or demand of payment at such place on the day the instrument became due or afterward. The only consequence of a failure to make such presentment is that the maker or acceptor, if he was ready at the time and place to make the payment, may plead the matter in bar of damages and costs. *Parker v. Stroud*, 98 N. Y. 379, 384; *Cox v. Nat. Bk.*, 100 U. S. 713.

A draft drawn in another state, by one residing there, upon a party residing in this state, legal questions in reference to presentation and demand are to be determined by the laws of this state. *Sylvester v. Crohan*, 138 N. Y. 494; *Bank v. Lacomb*, 84 N. Y. 367.

SEC. 3060-a71. **Presentment where instrument is not payable on demand.** Where the instrument is not payable on demand, presentment must be made on the day it falls due. Where it is payable on demand, presentment must be made within a reasonable time after its issue, except that in the case of a bill of exchange, presentment for payment will be sufficient if made within a reasonable time after the last negotiation thereof. [29 G. A., ch. 130, § 71.]

Iowa: Protest and notice of dishonor given on the day following expiration of days of grace too late to charge indorser. *Barker & Griffith v. Webster & Wells*, 10–593. A presentment for payment before the last day of grace is premature, the note not being due until then. *Edgar v. Greer*, 8–394.

As to date of maturity, see § 3060-a85.

For citation of authorities under this section, see Crawford's Annotated Neg. Inst. Law (3 Ed.), § 131.

While the court may sometimes determine the reasonableness or unreasonableness of delay in presentment of a negotiable instrument as a matter of law, the question is ordinarily one of fact. If the drawer knows that the payee desires to make use of the draft for a particular purpose involving some delay in presentation for payment, he cannot complain of the delay reasonably contemplated. *West Branch State Bank v. Haines*, 135–313, 112 N. W. 552.

Where the draft passes through the hands of several indorsees, no one of whom is guilty of unreasonable delay, the fact that it is not presented within the time allowed for presentation by the original payee does not defeat recovery against the drawer. *Ibid.*

Where a bank check has been transferred, demand of payment is within a reasonable time if made through an intermediate bank, according to a general custom with reference to the collection of checks on small banks through other banks. *Plover Savings Bank v. Moodie*, 135–685, 110 N. W. 29, 113 N. W. 476.

Whether the provisions of § 3060-a186 exclude bank checks from the provisions of this section, *quaere. Ibid.*

In order to charge the indorser of a bank certificate of deposit, presentment must be made within a reasonable time after it is issued. *Anderson v. First Nat. Bank*, 144–251, 122 N. W. 918.

SEC. 3060-a72. **What constitutes a sufficient presentment.** Presentment for payment, to be sufficient, must be made:

1. By the holder, or by some person authorized to receive payment on his behalf.
2. At a reasonable hour on a business day.
3. At a proper place as herein defined.
4. To the person primarily liable on the instrument, or if he is absent or inaccessible, to any person found at the place where the presentment is made. [29 G. A., ch. 130, § 72.]

(1) *Iowa:* Agent under parol authority may make demand. *Bank v. McLeran*, 26–306.

Other states: As to when possession of a negotiable instrument is sufficient evidence of a right to present and demand payment, see *Shedd v. Brett*, 1 Pick. 401. And payment to such person will always be valid unless he is known to the payer to have acquired possession wrongfully. Daniel on Neg. Insts., § 574.

(2) *Other states:* Except in cases where the instrument is payable at a bank, the holder has the whole day in which to present the same, the only limitation being that he must present it at a reasonable hour, and this may depend upon the circumstances of the case. *Bank v. Burton*, 58 N. Y. 430; *Farnsworth v. Allen*, 4 Gray, 453.

(3) See the following section.
(4) *Iowa:* Presentment for payment must be made to all the makers in person or at their usual places of residence or business. *Graul v. Strutzel*, 53–712; *Closz v. Miracle*, 103–198.
Crawford's Annotated Neg. Inst. Law (3 Ed.), § 132.

SEC. **3060-a73. Place of presentment.** Presentment for payment is made at the proper place:
1. Where a place of payment is specified in the instrument and it is there presented.
2. Where no place of payment is specified and the address of the person to make payment is given in the instrument and it is there presented.
3. Where no place of payment is specified and no address is given and the instrument is presented at the usual place of business or residence of the person to make payment.
4. In any other case if presented to the person to make payment wherever he can be found, or if presented at his last known place of business or residence. [29 G. A., ch. 130, § 73.]

(3) *Iowa:* A demand made at a maker's residence, if he has no place of business, when he is not at home, is sufficient. *Bank v. Orvis*, 42–691.
Other states: Gates v. Beecher, 60 N. Y. 518, 522. Presentment at the maker's usual place of business during business hours, there being no one there to answer, is a sufficient demand to charge the indorser. *Baumgardner v. Reeves*, 35 Pa. St. 250; *Wallace v. Crilly*, 46 Wis. 577. When addressed to the drawee at a particular house and accepted generally by him, see *Pierce v. Struthers*, 27 Pa. St. 249, 254; *Struthers v. Blake*, 30 Pa. St. 139.
For other authorities see Crawford's Annotated Neg. Inst. Law (3 Ed.), § 133.

SEC. **3060-a74. Instrument must be exhibited.** The instrument must be exhibited to the person from whom payment is demanded, and when it is paid must be delivered up to the party paying it. [29 G. A., ch. 130, § 74.]

Iowa: Presentment to the maker personally or at his place of permanent residence or business is necessary to charge an indorser. *Bank v. Green, Thomas & Co.*, 11–476.
Other states: Ocean Nat. Bk. v. Fant, 50 N. Y. 474, 476; *Musson v. Lake*, 4 How. 262; *Freeman v. Boynton*, 7 Mass. 483.
See Crawford's Annotated Neg. Inst. Law (3 Ed.), § 134.

SEC. **3060-a75. Presentment where instrument payable at bank.** Where the instrument is payable at a bank, presentment for payment must be made during banking hours, unless the person to make payment has no funds there to meet it at any time during the day, in which case presentment at any hour before the bank is closed on that day is sufficient. [29 G. A., ch. 130, § 75.]

Other states: Salt Springs Nat. Bk. v. Burton, 58 N. Y. 430; *Reed v. Wilson*, 41 N. J. Law, 29; *Shepard v. Chamberlain*, 8 Gray, 225. There seems to be a conflict of authorities as to the precise time as to when suit may be brought on a dishonored note payable at a bank. See *Church v. Clark*, 21 Pick. 309; *Blackman v. Nearing*, 43 Conn. 60; *Humphreys v. Sutcliffe*, 192 Pa. St. 336.
See Crawford's Annotated Neg. Inst. Law (3 Ed.), § 135.

SEC. **3060-a76. Presentment where principal debtor is dead.** Where the person primarily liable on the instrument is dead, and no place of payment is specified, presentment for payment must be made to his personal representative, if such there be, and if with the exercise of reasonable diligence he can be found. [29 G. A., ch. 130, § 76.]

Iowa: In case of partners, after dissolution of the firm, see *Mt. Pleasant Branch of State Bk. v. McLeran*, 26–306.
Other states: But there must be competent and legal proof of his death. *Weems v. Farmers' Bk.*, 15 Md. 231.

SEC. 3060-a77. **Presentment to persons liable as partners.** Where the persons primarily liable on the instrument are liable as partners, and no place of payment is specified, presentment for payment may be made to any one of them, even though there has been a dissolution of the firm. [29 G. A., ch. 130, § 77.]

Iowa: In case of partners after dissolution of the firm, see *Mt. Pleasant Branch of State Bank v. McLeran*, 26–306.
Other states: Gates v. Beecher, 60 N. Y. 518; *Bank v. Hunt*, 2 Hill, 635.

SEC. 3060-a78. **Presentment to joint debtors.** Where there are several persons, not partners, primarily liable on the instrument, and no place of payment is specified, presentment must be made to them all. [29 G. A., ch. 130, § 78.]

Iowa: That presentment and demand must be made upon all the makers, see *Bank v. Orvis*, 40–332; *Graul v. Strutzel*, 53–712; *Closz v. Miracle*, 103–198.
Other states: Gates v. Beecher, 60 N. Y. 518; *Arnold v. Dresser*, 8 Allen, 435. In some cases this might be impracticable, but such cases are covered by § 3060-a82, *infra*.

SEC. 3060-a79. **When presentment not required to charge the drawer.** Presentment for payment is not required in order to charge the drawer where he has no right to expect or require that the drawee or acceptor will pay the instrument. [29 G. A., ch. 130, § 79.]

Iowa: Kimball v. Bryan, 56–632.
Other states: Presentment is not dispensed with merely because the drawer has no funds in the hands of the drawee. *Life Ins. Co. v. Pendleton*, 112 U. S. 708; *Dickens v. Beal*, 10 Pet. 572.

Presentment for payment is not required to charge the drawer where he has no right to expect or require the drawee to pay the draft. *West Branch State Bank v. Haines*, 135–313, 112 N. W. 552.

SEC. 3060-a80. **When presentment not required to charge the indorser.** Presentment for payment is not required in order to charge an indorser where the instrument was made or accepted for his accommodation, and he has no reason to expect that the instrument will be paid if presented. [29 G. A., ch. 130, § 80.]

SEC. 3060-a81. **When delay in making the presentment is excused.** Delay in making presentment for payment is excused when the delay is caused by circumstances beyond the control of the holder, and not imputable to his default, misconduct or negligence. When the cause of delay ceases to operate, presentment must be made with reasonable diligence. [29 G. A., ch. 130, § 81.]

Other states: Windham Bk. v. Norton, 22 Conn. 213. In case of sickness of holder see *Wilson v. Senier*, 14 Wis. 380. If the facts are not disputed, the question of due diligence is one of law for the court; otherwise for the jury. *Belden v. Lamb*, 17 Conn. 451.

SEC. 3060-a82. **When presentment may be dispensed with.** Presentment for payment is dispensed with:

1. Where after the exercise of reasonable diligence presentment as required by this act cannot be made.
2. Where the drawee is a fictitious person.
3. By waiver of presentment, express or implied. [29 G. A., ch. 130, § 82.]

(1) *Iowa:* Demand of payment is unnecessary to charge indorser if the maker of the note has removed from the state before its maturity. *Whitely v. Allen*, 56–224. While the removal of the maker from the state dispenses with demand, notice of that fact and the fact of nonpayment must still be given the indorser in order to charge him. *Leonard v. Olson*, 99–162. Mere insolvency of maker will not excuse demand on him in order to charge indorser. *Id.*

(3) *Iowa:* A promise to pay after maturity by an indorser with knowledge that note has not been presented and protested, will operate as a waiver of these requirements. *Hughes v. Bowen*, 15–446; *Campbell v. Varney*, 12–13; *Lomax v. Smyth & Co.*, 50–223. Certain facts considered and held not to be a waiver of demand. *Freeman v. O'Brien*, 38–406. Written promises to pay if maker does not, made by indorser after maturity and with knowledge of protest for nonpayment, amounts to waiver and renders him liable. *Davis v. Miller*, 88–114. An indorser in blank is bound, however, by waiver of presentation, protest and notice of nonpayment contained in the body of the note, distinguishing. *Davis v. Miller, supra.*

Other states: Burden is on plaintiff to show due diligence. *Eaton v. McMahon*, 42 Wis. 484. It is the holder's duty to give the notary information as to the residence of the drawer and indorser. *Smith v. Fisher*, 24 Pa. St. 222. Presentment is not dispensed with by the insolvency of the maker or drawee. *Reinke v. Wright* (Wis.), 67 N. W. 737; *Bensonhurst v. Wilby*, 45 Ohio St. 340. As to when waiver may be made, see *Power v. Mitchell*, 7 Wis. 161. Waiver may result from implication and usage or from any understanding between the parties which is of a character to satisfy the mind that a waiver is intended. *Cady v. Bradshaw*, 116 N. Y. 188–191.

For a citation of other authorities, see Crawford's Annotated Neg. Inst. Law (3 Ed.), § 142.

SEC. **3060-a83. When instrument is dishonored by nonpayment.** The instrument is dishonored by nonpayment when:

1. It is duly presented for payment and payment is refused or cannot be obtained; or

2. Presentment is excused and the instrument is overdue and unpaid. [29 G. A., ch. 130, § 83.]

SEC. **3060-a84. Liability of person secondarily liable, when instrument is dishonored.** Subject to the provisions of this act, when the instrument is dishonored by nonpayment, an immediate right of recourse to all parties secondarily liable thereon, accrues to the holder. [29 G. A., ch. 130, § 84.]

Other states: The indorser's liability having been fixed by demand and notice of dishonor, he becomes an independent and principal debtor and does not stand in the capacity of a mere surety. *First Nat. Bk. v. Wood*, 71 N. Y. 405, 411.

Other authorities are cited in Crawford's Annotated Neg. Inst. Law (3 Ed.), § 144.

SEC. **3060-a85. Time of maturity.** Every negotiable instrument is payable at the time fixed therein without grace. When the day of maturity falls upon Sunday, or a holiday, the instrument is payable on the next succeeding business day. Instruments falling due on Saturday are to be presented for payment on the next succeeding business day, except that instruments payable on demand may, at the option of the holder, be presented for payment before twelve o'clock noon on Saturday, when that entire day is not a holiday. [29 G. A., ch. 130, § 85.]

SEC. **3060-a86. Time—how computed.** Where the instrument is payable at a fixed period after date, after sight, or after the happening of a specified event, the time of payment is determined by excluding the day from which the time is to begin to run, and by including the date of payment. [29 G. A., ch. 130, § 86.]

SEC. **3060-a87. Rule where instrument payable at bank.** Where the instrument is made payable at a bank it is equivalent to an order to the bank to pay the same for the account of the principal debtor thereon. [29 G. A., ch. 130, § 87.]

Other states: There has been some conflict in the decisions as to the authority of a bank to pay a note or acceptance made payable there. The rule adopted in the statute is the one sustained by the weight of authority; and is also the rule which is most convenient in practice. It is supported by the following decisions: *Bank v. Bank*, 46 N. Y. 82; *Bank v. Hughes*, 17 Wend. 94; *Bank v. Henninger*, 105 Pa. St. 496; *Bedford Bk. v. Acoarn*, 125 Ind. 582.

The authorities holding the contrary are cited in Crawford's Annotated Neg. Inst. Law (3 Ed.), § 147.

SEC. **3060-a88. What constitutes payment in due course.** Payment is made in due course when it is made at or after maturity of the instrument to the holder thereof in good faith and without notice that his title is defective. [29 G. A., ch. 130, § 88.]

Other states: Payment before the day of maturity is a defense which binds only the party receiving payment and those who stand in his shoes. *Watson v. Wyman*, 161 Mass. 96, 99.

For other authorities see Crawford's Annotated Neg. Inst. Law (3 Ed.), § 148.

NOTICE OF DISHONOR.

SEC. **3060-a89. To whom notice of dishonor must be given.** Except as herein otherwise provided, when a negotiable instrument has been dishonored by nonacceptance or nonpayment, notice of dishonor must be given to the drawer and to each indorser, and any drawer or indorser to whom such notice is not given is discharged. [29 G. A., ch. 130, § 89.]

Iowa: Where there are several indorsers of a note, the holder may elect to hold any one or all of the prior indorsers. To hold all liable he must give all notice of protest; otherwise it is only necessary to give those whom he wishes to hold notice. Likewise an indorser thus notified, in order to charge his prior indorsers must give them notice; but when an indorser receives notice of nonpayment and protest either from a subsequent indorser or from the holder of the note, it inures to the benefit of all subsequent indorsees. *Hamilton v. Veach*, 19–419.

Other states: That this rule does not apply to guarantors, see *Brown v. Curtiss*, 2 N. Y. 225; *Allen v. Rightmere*, 20 Johns. 365; *Roberts v. Hawkins*, 70 Mich. 566.

SEC. **3060-a90. By whom given.** The notice may be given by or on behalf of the holder, or by or on behalf of any party to the instrument who might be compelled to pay it to the holder, and who, upon taking it up, would have a right to reimbursement from the party to whom the notice is given. [29 G. A., ch. 130, § 90.]

Iowa: Notices of protest to several indorsers residing in the same town may be mailed to one, and will be sufficient to charge them all with notice, provided the party to whom they are sent shall again mail to the proper parties. *Van Brunt v. Vaughn*, 47–145. See *First Nat. Bk. v. Farneman*, 93–161.

Other states: That notice cannot be given by a stranger, see *Lawrence v. Miller*, 16 N. Y. 235, 237; *Chanoine v. Fowler*, 3 Wend. 173. A drawee who refuses acceptance cannot give notice. *Stanton v. Blossom*, 14 Mass. 116.

SEC. **3060-a91. Notice given by agent.** Notice of dishonor may be given by an agent either in his own name or in the name of any party entitled to give notice, whether that party be his principal or not. [29 G. A., ch. 130, § 91.]

Other states: Drexler v. McGlynn, 99 Cal. 143. A notice made out by a notary public who signed by mistake the maker's name instead of his own, without authority of the maker, is insufficient. *Cabot Bk. v. Warner*, 92 Mass. 522. Banks as agents for collection have authority to receive and transmit notices on behalf of the owners of the paper. *West River Bk. v. Taylor*, 34 N. Y. 128, 130; *Colt v. Noble*, 5 Mass. 167. An agent in giving notice represents and acts on behalf of his principal, and this, though he may be a notary acting in his official character. *Lawrence v. Miller*, 16 N. Y. 235, 238.

SEC. **3060-a92. Effect of notice given on behalf of holder.** Where notice is given by or on behalf of the holder, it inures for the benefit of all subsequent holders and all prior parties who have a right of recourse against the party to whom it is given. [29 G. A., ch. 130, § 92.]

Other states: A holder is not bound to give notice to any one but his immediate indorser. *West River Bank v. Taylor*, 34 N. Y. 128, 131; *Linn v. Horton*, 17 Wis. 150, 153.

SEC. **3060-a93. Effect where notice is given by party entitled thereto.** Where notice is given by or on behalf of a party entitled to give

notice, it inures for the benefit of the holder and all parties subsequent to the party to whom the notice is given. [29 G. A., ch. 130, § 93.]

SEC. **3060-a94. When agent may give notice.** Where the instrument has been dishonored in the hands of an agent, he may either himself give notice to the parties liable thereon, or he may give notice to his principal. If he gives notice to his principal, he must do so within the same time as if he were the holder, and the principal, upon receipt of such notice, has himself the same time for giving notice as if the agent had been an independent holder. [29 G. A., ch. 130, § 94.]

Other states: Rosson v. Carroll, 90 Tenn. 90.

SEC. **3060-a95. When notice is sufficient.** A written notice need not be signed, and an insufficient written notice may be supplemented and validated by verbal communication. A misdescription of the instrument does not vitiate unless the party to whom the notice is given is in fact misled thereby. [29 G. A., ch. 130, § 95.]

Other states: Kilgore v. Bulkley, 14 Conn. 362; *Tobey v. Lenning*, 14 Pa. St. 483; *Aiken v. Marine Bk.*, 16 Wis. 679.

SEC. **3060-a96. Form of notice.** The notice may be in writing or merely oral and may be given in any terms which sufficiently identify the instrument and indicate that it has been dishonored by nonacceptance or nonpayment. It may in all cases be given by delivering it personally or through the mails. [29 G. A., ch. 130, § 96.]

Iowa: Notice of nonpayment may be verbal as well as in writing. *First Nat. Bk. v. Ryerson*, 23–508. Certificate of notary which fails to show that the residences of the several parties were at the places where the notices were addressed to them, held sufficient. *Fuller & Warren v. Dingman*, 41–506. Certificate of protest considered and held sufficient. *Jones v. Berryhill*, 25–289.

Other states: Brewster v. Arnold, 1 Wis. 264. A notice which omits an essential feature of the note or misdescribes it, is an imperfect one, but not necessarily invalid. It is invalid only where it fails to give that particular information which it would have given but for its particular imperfection; and even in case the notice in itself be defective, if, from evidence *aliunde* of the attendant circumstances, it is apparent that the indorser was not deceived or misled as to the identity of the dishonored instrument, he will be charged. *Hodges v. Schuyler*, 22 N. Y. 114; *Artisans' Bk. v. Backus*, 36 N. Y. 106; *Gill v. Palmer*, 29 Conn. 57. To render the notice defective it must fail to convey sufficient knowledge to disclose the identity of the particular instrument dishonored. *Mills v. Bank of U. S.*, 11 Wheat. 431; *Bank of Alexandria v. Swaim*, 9 Pet. 33.

For numerous other authorities see Crawford's Annotated Neg. Inst. Law (3 Ed.), § 167.

SEC. **3060-a97. To whom notice may be given.** Notice of dishonor may be given either to the party himself or to his agent in that behalf. [29 G. A., ch. 130, § 97.]

Other states: Fassin v. Hubbard, 55 N. Y. 465, 471; *Bank v. Butler Colliery Co.*, 51 Hun. 63, 68.

SEC. **3060-a98. Notice where party is dead.** Where any party is dead, and his death is known to the party giving notice, the notice must be given to a personal representative, if there be one, and if with reasonable diligence, he can be found. If there be no personal representative, notice may be sent to the last residence or[1] last place of business of the deceased. [29 G. A., ch. 130, § 98.]

[1"at" in prior supplement. Changed to conform with enrolled bill and the New York act. EDITOR.]

Other states: Shoenberger's Executor v. Lancaster Sav. Institution, 28 Pa. St. 459; *Massachusetts Bk. v. Oliver*, 10 Cush. 557; *Goodnow v. Warren*, 122 Mass. 82.

SEC. 3060-a99. **Notice to partners.** Where the parties to be notified are partners, notice to any one partner is notice to the firm, even though there has been a dissolution. [29 G. A., ch. 130, § 99.]

Other states: Where partners give a promissory note with one of them as maker and the other as indorser, the latter is not liable on his indorsement unless he be duly notified of the dishonor of the note. *Foland v. Boyd*, 23 Pa. St. 476; *Hubbard v. Matthews*, 54 N. Y. 43, 50.

SEC. 3060-a100. **Notice to persons jointly liable.** Notice to joint parties who are not partners must be given to each of them, unless one of them has authority to receive such notice for the others. [29 G. A., ch. 130, § 100.]

Other states: Shepard v. Hawley, 1 Conn. 367; *Boyd v. Orton*, 16 Wis. 495.
For distinction between parties who are partners and joint parties who are not partners, see *Gates v. Beecher*, 60 N. Y. 518, 526.

SEC. 3060-a101. **Notice to bankrupt.** Where a party has been adjudged a bankrupt or an insolvent, or has made an assignment for the benefit of creditors, notice may be given either to the party himself or to his trustee or assignee. [29 G. A., ch. 130, § 101.]

Other states: Where the indorser has made a voluntary assignment for the benefit of creditors, notice to the assignee would bind the indorser and his estate. *Callahan v. Kentucky Bank*, 82 Ky. 231. To the same effect: *American Nat. Bk. v. Junk Bros.*, 94 Tenn. 634. *Contra: House v. Vinton*, 43 Ohio St. 346.

SEC. 3060-a102. **Time within which notice must be given.** Notice may be given as soon as the instrument is dishonored, and unless delay is excused as hereinafter provided, must be given within the times fixed by this act. [29 G. A., ch. 130, § 102.]

Other states: That the holder need not wait until the close of business hours, but may send notice at once, see *Bank of Alexandria v. Swaim*, 9 Pet. 33; *Lenox v. Roberts*, 2 Wheat. 373; *Whitwell v. Brigham*, 19 Pick. 117.
For other authorities see Crawford's Annotated Neg. Inst. Law (3 Ed.), § 173.

Waiver of notice of dishonor may be implied from the declarations or acts of the indorser, made with knowledge of the situation and his rights. *Porter v. Moles*, 151–279, 131 N. W. 23.

SEC. 3060-a103. **Where parties reside in same place.** Where the person giving and the person to receive notice reside in same place, notice must be given within the following times:

1. If given at the place of business of the person to receive notice, it must be given before the close of business hours on the day following.
2. If given at his residence, it must be given before the usual hours of rest on the day following.
3. If sent by mail, it must be deposited in the post office in time to reach him in the usual course on the day following. [29 G. A., ch. 130, § 103.]

Other states: Adams v. Wright, 14 Wis. 408; Daniel on Neg. Insts., § 1038; *Phelps v. Stocking*, 21 Neb. 444.
See also Crawford's Annotated Neg. Inst. Law (3 Ed.), § 174.

The fixed rules of the negotiable instruments act relating to notice of dishonor are not applicable to presentment for payment of a bank check. *Plover Savings Bank v. Moodie*, 135–685, 110 N. W. 29, 113 N. W. 476.

It is not universally true that, even where the facts shown in evidence are without dispute, the question whether the presentment was in reasonable time is for the court. *Citizens' Bank v. First Nat. Bank*, 135–605, 113 N. W. 481.

SEC. 3060-a104. **Where parties reside in different places.** Where the person giving and the person to receive notice reside in different places, the notice must be given within the following times:

1. If sent by mail, it must be deposited in the post office in time to go by mail the day following the day of dishonor, or if there be no mail at a convenient hour on that day, by the next mail thereafter.

2. If given otherwise than through the post office, then within the time that notice would have been received in due course of mail, if it had been deposited in the post office within the time specified in the last subdivision. [29 G. A., ch. 130, § 104.]

Other states: *Stephenson v. Dickson*, 24 Pa. St. 148; *Whitwell v. Johnson*, 17 Mass. 449. In *Smith v. Poillon*, 87 N. Y. 590, 597, it is said: "From a careful examination of all these authorities and many others, it is clear that the law is not precisely settled. It appears that at first it was supposed to be necessary that notice of dishonor should be given by the next post after dishonor, on the same day, if there was one. That rule was found inconveniently stringent, and then it was held that when the parties lived in different places between which there was a mail, the notice could be posted on the next day after the dishonor or notice of dishonor. Some of the authorities hold that the party required to give the notice may have the whole of the next day. Some of them hold that when there are several mails on the next day, it is sufficient to send the notice by any post of that day. Other authorities lay down the rule, in general terms, that the notice must be posted by the first practical and convenient mail of the next day; and that rule seems to be supported by the most authority in this state. What is a practical and convenient mail depends upon circumstances. It may be controlled by the usages of business and the customs of the people at the place of mailing, and the condition, situation and business engagements of the person required to give the notice. The rule should have a reasonable application in every case, and whether sufficient diligence has been used to mail the notice, the facts being undisputed, is a question of law."

See Crawford's Annotated Neg. Inst. Law (3 Ed.), § 175.

SEC. **3060-a105. When sender deemed to have given due notice.** Where notice of dishonor is duly addressed and deposited in the post office, the sender is deemed to have given due notice, notwithstanding any miscarriage in the mails. [29 G. A., ch. 130, § 105.]

Other states: See *Windham Bk. v. Norton*, 22 Conn. 213; *Cook v. Foraker*, 193 Pa. St. 461.

SEC. **3060-a106. Deposit in post office—what constitutes.** Notice is deemed to have been deposited in the post office when deposited in any branch post office or in any letter box under the control of the post-office department. [29 G. A., ch. 130, § 106.]

Other states: See *Pearce v. Langfit*, 101 Pa. St. 507; *Johnson v. Brown*, 154 Mass. 105.

SEC. **3060-a107. Notice to antecedent[1] party—time of.** Where a party receives notice of dishonor, he has, after the receipt of such notice, the same time for giving notice to antecedent parties that the holder has after the dishonor. [29 G. A., ch. 130, § 107.]

[[1]The catchword is "subsequent" in the prior supplement and also in the New York act which Mr. Crawford says was an error in engrossing. This is very manifest. EDITOR.]

Other states: *Shelburne Falls Nat. Bk. v. Townsley*, 102 Mass. 177; *Seaton v. Scovill*, 18 Kans. 435; *Linn v. Horton*, 17 Wis. 150.

SEC. **3060-a108. Where notice must be sent.** Where a party has added an address to his signature, notice of dishonor must be sent to that address; but if he has[1] not given such address, then the notice must be sent as follows:

1. Either to the post office nearest to his place of residence, or to the post office where he is accustomed to receive his letters; or

2. If he lives in one place, and have his place of business in another, notice may be sent to either place; or

3. If he is sojourning in another place, notice may be sent to the place where he is sojourning. But where the notice is actually received by the party within the time specified in this act, it will be sufficient, though not sent in accordance with the requirements of this section. [29 G. A., ch. 130, § 108.]

["is" in enrolled bill, which is manifestly erroneous. It appears as "has" in the New York act. EDITOR.]

Other states: That notice must be sent to the address given, see *Bartlett v. Robinson*, 39 N. Y. 187.

(1) *Iowa:* A notice of presentment, nonpayment and protest, to charge indorser, must be sent him at his proper post office, and when sent to wrong post office, held insufficient. *Northwestern Coal Co. v. Bowman & Co.*, 69–150; but where notice is addressed to indorser at his former postoffice, but which had been discontinued and business transferred to another, held sufficient. *Bank v. Owen*, 23–185.

Other states: Bank of Columbia v. Lawrence, 1 Pet. 578; *Nat. Bk. v. Cade*, 73 Mich. 449.

(2) *Other states: Bank of U. S. v. Carneal*, 2 Pet. 549; *Bank v. Marsh*, 7 N. Y. 481.

For citation of other authorities see Crawford's Annotated Neg. Inst. Law (3 Ed.), § 179.

SEC. 3060-a109. **Waiver of notice.** Notice of dishonor may be waived, either before the time of giving notice has arrived, or after the omission to give due notice, and the waiver may be express[1] or implied. [29 G. A., ch. 130, § 109.]

["expressed" in the prior supplements. The change made here conforms with the enrolled bill and the New York act. EDITOR.]

Other states: See *Ross v. Hurd*, 71 N. Y. 14, 18; *Low v. Howard*, 10 Cush. 159. But it must appear that the indorser had knowledge of the fact that the holder was in default. *Thornton v. Wynn*, 12 Wheat. 183; *Schierl v. Baumel*, 75 Wis. 75. And in Massachusetts it is held that knowledge on the part of the indorser that demand upon the maker has not been made, is material, and must be proved, notwithstanding the fact that he knew that the note had not been paid and that notice of nonpayment had not been given, and was aware that he was discharged from all liability. *Parks v. Smith*, 155 Mass. 26, 33.

For a citation of other authorities see Crawford's Annotated Neg. Inst. Law (3 Ed.), § 180.

SEC. 3060-a110. **Whom affected by waiver.** Where the waiver is embodied in the instrument itself, it is binding upon all parties; but where it is written above the signature of an indorser, it binds him only. [29 G. A., ch. 130, § 110.]

Iowa: A waiver of presentation, protest and notice of nonpayment contained in the body of the note is binding on one who indorses in blank. *Phillips v. Dippo*, 93–35; *Bank v. Sigstadt*, 96–491; *Bank v. Wilka*, 102–315.

Other states: Lowry v. Steele, 27 Ind. 168; *Bryant v. Taylor*, 19 Minn. 396. Where written above the signature, see *Woodman v. Thurston*, 8 Cush. 157.

SEC. 3060-a111. **Waiver of protest.** A waiver of protest, whether in the case of a foreign bill of exchange or other negotiable instrument, is deemed to be a waiver not only of a formal protest, but also of a presentment and notice of dishonor. [29 G. A., ch. 130, § 111.]

Other states: Annville Nat. Bk. v. Kettering, 106 Pa. St. 531; *Brewster v. Arnold*, 1 Wis. 264. In construing an allegation in a pleading that the instrument was duly protested, it will not be held to comprehend an averment that notice of dishonor was given to the indorser. *Cook v. Warren*, 88 N. Y. 37.

SEC. 3060-a112. **When notice is dispensed with.** Notice of dishonor is dispensed with when, after the exercise of reasonable diligence, it cannot be given to or does not reach the parties sought to be charged. [29 G. A., ch. 130, § 112.]

Other states: Hobbs v. Straine, 149 Mass. 212.

For citation of authorities see Crawford's Annotated Neg. Inst. Law (3 Ed.), § 183.

SEC. 3060-a113. **Delay in giving notice—how excused.** Delay in giving notice of dishonor is excused when the delay is caused by circumstances beyond the control of the holder and not imputable to his default, misconduct or negligence. When the cause of delay ceases to operate, notice must be given with reasonable diligence. [29 G. A., ch. 130, § 113.]

Other states: Martin v. Ingersoll, 8 Pick. 1.

SEC. 3060-a114. **When notice need not be given to drawer.** Notice of dishonor is not required to be given to the drawer in either of the following cases:

1. Where the drawer and drawee are the same person.
2. Where the drawee is a fictitious person or a person not having capacity to contract.
3. Where the drawer is the person to whom the instrument is presented for payment.
4. Where the drawer has no right to expect or require that the drawee or acceptor will honor the instrument.
5. Where the drawer has countermanded payment. [29 G. A., ch. 130, § 114.]

(1) *Other states:* Where all members of the firm are members of the house which drew the bill, notice is not required to render the firm liable. *West Branch Bk. v. Fulner*, 3 Pa. St. 399.

(4) *Other states: Life Ins. Co. v. Pendleton*, 112 U. S. 708; *Wollenweber v. Ketterlinn*, 17 Pa. St. 389.

SEC. 3060-a115. **When notice need not be given to indorser.** Notice of dishonor is not required to be given to an indorser in either of the following cases:

1. Where the drawee is a fictitious person or a person not having capacity to contract and the indorser was aware of the fact at the time he indorsed the instrument.
2. Where the indorser is the person to whom the instrument is presented for payment.
3. Where the instrument was made or accepted for his accommodation. [29 G. A., ch. 130, § 115.]

(2) *Other states: In re Swift*, 106 Fed. 65, is a case arising under this statute.

(3) *Iowa:* Possession by an indorser of a note at maturity waives demand and notice. *Lomax v. Smyth*, 50–223.

Other states: French v. Bank of Columbia, 4 Cranch, 141; *Blenderman v. Price*, 50 N. J. L. 296.

SEC. 3060-a116. **Notice of nonpayment where acceptance refused.** Where due notice of dishonor by nonacceptance has been given, notice of a subsequent dishonor by nonpayment is not necessary, unless in the meantime the instrument has been accepted. [29 G. A., ch. 130, § 116.]

See Crawford's Annotated Neg. Inst. Law (3 Ed.), § 187.

SEC. 3060-a117. **Effect of omission to give notice of nonacceptance.** An omission to give notice of dishonor by nonacceptance does not prejudice the rights of a holder in due course subsequent to the omission. [29 G. A., ch. 130, § 117.]

SEC. 3060-a118. **When protest need not be made—when must be made.** Where any negotiable instrument has been dishonored it may be protested for nonacceptance or nonpayment as the case may be; but protest is not required, except in the case of foreign bills of exchange. [29 G. A., ch. 130, § 118.]

Iowa: Unless the specified place of payment be at a bank, a deposit of money at such place to meet the note will not be a payment, the holder not being required to

make presentment at that place. *Callanan v. Williams*, 71–363; *Englert v. White*, 92–97; *Klindt v. Higgins*, 95–529; *Baumgartner v. Peterson*, 93–572.

The rule is probably otherwise where the specified place of payment is at a bank. *Bank v. Ingerson*, 105–349. Payment to payee, who is a trustee, before maturity, with knowledge of assignment, is not a satisfaction of the indebtedness, and such payment will not protect the maker. *Livermore v. Maxwell*, 87–705. Payment to an agent not in possession of the instrument is done at the peril of the payer; so, too, is payment before maturity, the paper remaining outstanding. *Security Co. v. Graybeal*, 85–543; *U. S. Bank v. Burson*, 90–191. Where note is payable at a specified place, maker can only exonerate himself from payment of interest by showing that he had funds at the place for the discharge of the note. *Robinson v. Lair*, 31–9. Presumption of ownership arises from the possession of a note after maturity. *Graff v. Adams*, 100–481; *Stoddard v. Burton*, 41–582; and payment of a note before maturity, made payable "on or before" to the holder thereof will be upheld. *Stoddard v. Burton, supra.*

Other states: Bay v. Church, 15 Conn. 129; *Legg v. Vinal*, 165 Mass. 555; *Stephenson v. Dickson*, 24 Pa. St. 148.

DISCHARGE OF NEGOTIABLE INSTRUMENTS.

SEC. **3060-a119. How instrument discharged.**[1] A negotiable instrument is discharged:

1. By payment in due course by or on behalf of the principal debtor.
2. By payment in due course by the party accommodated, where the instrument is made or accepted for accommodation.
3. By the intentional cancellation thereof by the holder.
4. By any other act which will discharge a simple contract for the payment of money.
5. When the principal debtor becomes the holder of the instrument at or after maturity in his own right. [29 G. A., ch. 130, § 119.]

[1]These catchwords are not exactly like the New York act but are as Mr. Crawford says they should be. EDITOR.]

(1) *Other states:* Possession of a bill by the acceptor after it has been in circulation, is prima-facie evidence that it has been paid by him. *Baring v. Clark*, 19 Pick. 220. So the possession of a promissory note by the maker. *Bank v. Harris*, 7 Wash. 139; *Madison Square Bk. v. Pierce*, 137 N. Y. 444.

For citation of other authorities see Crawford's Annotated Neg. Inst. Law (3 Ed.), § 200.

SEC. **3060-a120. When persons secondarily liable on—discharged.** A person secondarily liable on the instrument is discharged:

1. By an act which discharges the instrument.
2. By the intentional cancellation of his signature by the holder.
3. By the discharge of a prior party.
4. By the valid tender of payment made a prior party.
5. By a release of the principal debtor, unless the holder's right of recourse against the party secondarily liable is expressly reserved.
6. By an agreement binding upon the holder to extend the time of payment, or to postpone the holder's right to enforce the instrument, unless made with the assent of the party secondarily liable, or unless the right of recourse against such party is expressly reserved. [29 G. A., ch. 130, § 120.]

(3) *Other states: Shutts v. Fingar*, 100 N. Y. 539; *Couch v. Waring*, 9 Conn. 261; *Gennis v. Weighley*, 114 Pa. St. 194.

(5) *Other states:* By an express reservation of the holder's rights against the drawer or indorser, their rights against the maker or acceptor are reserved by implication. *Gloucester Bk. v. Worcester*, 10 Pick. 528; *Tombeckbe Bk. v. Stratton*, 7 Wend. 429.

(6) For authorities under this head see Crawford's Annotated Neg. Inst. Law (3 Ed.), § 201.

The provisions of this section are not applicable in an action between parties to the instrument when said action does not involve rights of ownership in due course. *Fullerton Lumber Co. v. Snouffer*, 139–176, 117 N. W. 50.

SEC. 3060-a121. **Right of party who discharges instrument.** Where the instrument is paid by a party secondarily liable thereon, it is not discharged; but the party so paying it is remitted to his former rights as regards all prior parties, and he may strike out his own and all subsequent indorsements, and again negotiate the instrument, except:

1. Where it is payable to the order of a third person, and has been paid by the drawer; and
2. Where it was made or accepted for accommodation, and has been paid by the party accommodated. [29 G. A., ch. 130, § 121.]

(2) *Iowa:* Maker is not released by extension given to the indorser or the taking of security from the indorser. *Whiting v. Western Stage Co.*, 20–554.

For a citation of authorities to this section see Crawford's Annotated Neg. Inst. Law (3 Ed.), § 202.

SEC. 3060-a122. **Renunciation by holder.** The holder may expressly renounce his rights against any party to the instrument before, at or after its maturity. An absolute and unconditional renunciation of his rights against the principal debtor made at or after the maturity of the instrument discharges the instrument. But a renunciation does not affect the rights of a holder in due course without notice. A renunciation must be in writing, unless the instrument is delivered up to the person primarily liable thereon. [29 G. A., ch. 130, § 122.]

SEC. 3060-a123. **Cancellation—unintentional—burden of proof.** A cancellation made unintentionally, or under a mistake, or without the authority of the holder, is inoperative; but where an instrument or any signature thereon appears to have been canceled, the burden of proof lies on the party who alleges that the cancellation was made unintentionally, or under a mistake or without authority. [29 G. A., ch. 130, § 123.]

SEC. 3060-a124. **Alteration of instrument—effect of.** Where a negotiable instrument is materially altered without the assent of all parties liable thereon, it is avoided, except as against a party who has himself made, authorized or assented to the alteration and subsequent indorsers. But when an instrument has been materially altered and is in the hands of a holder in[1] due course, not a party to the alteration, he may enforce payment thereof[2] according to its original tenor. [29 G. A., ch. 130, § 124.]

[1"If," 2"thereon" in the prior supplements. The above changes conform with the enrolled bill and the New York act. EDITOR.]

Iowa: The severance of one portion of a contract, which leaves one portion in the form of a negotiable promissory note, signed by one of the parties, constitutes such a material alteration that recovery cannot be had on the note, even in the hands of a bona fide purchaser for value before maturity, unless the maker is chargeable with gross negligence in its execution. *Scofield v. Ford*, 56–370. Proof of material alteration since acceptance by drawee casts the burden upon the holder of showing purchase in good faith without notice of alteration. *Smith v. Eals*, 81–235; *Conger v. Crabtree*, 88–536. See *Nat. Bk. v. Zeims*, 93–140.

Other states: See *Jeffrey v. Rosenfeld* (Mass.), 61 N. E. 49, where the effect of this provision was discussed, but not decided. The burden of explaining an apparent alteration is upon the party producing the paper. *Town of Solon v. Williamsburgh Sav. Bk.*, 114 N. Y. 122, 135; *Simpson v. Davis*, 119 Mass. 269; *Gettysburg Nat. Bk. v. Chisolm*, 169 Pa. St. 564.

For other authorities see Crawford's Annotated Neg. Inst. Law (3 Ed.), § 205.

SEC. 3060-a125. **What constitutes a material alteration.** Any alteration which changes:

1. The date.
2. The sum payable, either for principal or interest.
3. The time or place of payment.
4. The number or the relations of the parties.
5. The medium or currency in which payment is to be made.

Or which adds a place of payment where no place of payment is specified, or any other change or addition which alters the effect of the instrument in any respect, is a material alteration. [29 G. A., ch. 130, § 125.]

(1) *Other states: National Ulster Co. Bk. v. Madden*, 114 N. Y. 280; *Crawford v. West Side Bk.*, 100 N. Y. 50, 56; *Wood v. Steele*, 6 Wall. 80; *Newman v. King* (Ohio), 43 N. E. 683.

(2) *Other states: Gettysburg Nat. Bk. v. Chisolm*, 169 Pa. St. 564.

(3) *Other states: Rogers v. Vosburgh*, 87 N. Y. 208; *Weyman v. Yeomans*, 84 Ill. 403.

(5) *Other states: Angle v. Ins. Co.*, 92 U. S. 330.

For a citation of other authorities see Crawford's Annotated Neg. Inst. Law (3 Ed.), § 206.

Where a blank is left for the designation of place of payment, the filling of such blank by the payee or other holder is authorized by § 3060-a14, and does not constitute an alteration. *Johnston v. Hoover*, 139–143, 117 N. W. 277.

BILLS OF EXCHANGE—FORM AND INTERPRETATION.

SEC. **3060-a126. Bill of exchange defined.** A bill of exchange is an unconditional order in writing addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand, or at a fixed or determinable future time, a sum certain in money to order or to bearer. [29 G. A., ch. 130, § 126.]

Other states: Jarvis v. Wilson, 46 Conn. 91.

SEC. **3060-a127. Bill not an assignment of funds in hands of drawee.** A bill of itself does not operate as an assignment of the funds in the hands of the drawee available for the payment thereof, and the drawee is not liable on the bill unless and until he accepts the same. [29 G. A., ch. 130, § 127.]

Other states: Harris v. Clark, 3 N. Y. 93; *Mandeville v. Welch*, 5 Wheat, 286; *Brill v. Tuttle*, 81 N. Y. 454; *Throop Grain Cleaner Co. v. Smith*, 110 N. Y. 83.

SEC. **3060-a128. Bill addressed to more than one drawee.** A bill may be addressed to two or more drawees jointly, whether they are partners or not; but not to two or more drawees in the alternative or in succession. [29 G. A., ch. 130, § 128.]

SEC. **3060-a129. Inland and foreign bills of exchange.** An inland bill of exchange is a bill which is, or on its face purports to be, both drawn and payable within this state. Any other bill is a foreign bill. Unless the contrary appears on the face of the bill, the holder may treat it as an inland bill. [29 G. A., ch. 130, § 129.]

Other states: Commercial Bk. of Ky. v. Varnum, 49 N. Y. 269; *Life Ins. Co. v. Pendleton*, 112 U. S. 696; *Armstrong v. Am. Exch. Nat. Bk.*, 133 U. S. 433; *Phoenix Bk. v. Hussey*, 12 Pick. 483.

SEC. **3060-a130. When bill may be treated as promissory note.** Where in a bill [the] drawer and drawee are the same person, or where the drawee is a fictitious person, or a person not having capacity to contract, the holder may treat the instrument, at his option, either as a bill of exchange or a promissory note. [29 G. A., ch. 130, § 130.]

See § 3060-a17.

SEC. **3060-a131. Referee in case of need.** The drawer of a bill and any indorser may insert thereon[1] the name of a person to whom the holder may resort in case of need, that is to say, in case the bill is dishonored by nonacceptance or nonpayment. Such person is called the referee in case

of need. It is in the option of the holder to resort to the referee in case of need or not, as he may see fit. [29 G. A., ch. 130, § 131.]

[1According to Mr. Crawford this word should have been "therein." EDITOR.]
The usual form is: "In case of need, apply to Messrs. C and D, at E." Chitty on Bills, 165.

ACCEPTANCE OF BILLS OF EXCHANGE.

SEC. **3060-a132. Acceptance—how made, et cetera.** The acceptance of a bill is the signification by the drawee of his assent to the order of the drawer. The acceptance must be in writing and signed by the drawee. It must not express that the drawee will perform his promise by any other means than the payment of money. [31 G. A., ch. 149; 29 G. A., ch. 130, § 132.]

Iowa: A conditional acceptance cannot be held to charge an indorsee of the bill before maturity with equities arising out of original transaction between drawer and acceptor. *Merritt v. Nihart*, 11–57. Evidence tending to show either an express or implied promise of acceptance held admissible. *Smith v. Clark & Whiting*, 12–32.

Other states: This contract is regarded as a new contract. *Superior City v. Ripley*, 138 U. S. 93. The usual mode of making an acceptance is by writing the word "accepted" and subscribing the drawee's name. Byles on Bills, 190. Acceptance by telegraph may be made by the party and such an acceptance is within the terms of the statute requiring acceptances to be in writing. *North Atchison Bk. v. Garretson*, 51 Fed. 167. But to require the acceptance to be on the instrument itself would preclude the giving of an acceptance by telegraph.

SEC. **3060-a133. Holder entitled to acceptance on face of bill.** The holder of a bill presenting the same for acceptance may require that the acceptance be written on the bill, and if such request is refused, may treat the bill as dishonored. [29 G. A., ch. 130, § 133.]

SEC. **3060-a134. Acceptance by separate instrument.** Where an acceptance is written on a paper other than the bill itself, it does not bind the acceptor except in favor of a person to whom it is shown and who, on the faith thereof, receives the bill for value. [29 G. A., ch. 130, § 134.]

SEC. **3060-a135. Promise to accept—when equivalent to acceptance.** An unconditional promise in writing to accept a bill before it is drawn is deemed an actual acceptance in favor of every person who, upon the faith thereof, receives the bill for value. [29 G. A., ch. 130, § 135.]

Other states: An absolute authority to draw is equivalent to an unconditional promise to pay. *Ruiz v. Renauld*, 100 N. Y. 256; *Merchants Bk. v. Griswold*, 72 N. Y. 472, 479. At common law an oral promise was sufficient. *Scudder v. Union Nat. Bk.*, 91 U. S. 406.

For a citation of other authorities see Crawford's Annotated Neg. Inst. Law (3 Ed.), § 223.

SEC. **3060-a136. Time allowed drawee to accept.** The drawee is allowed twenty-four hours after presentment[1] in which to decide whether or not he will accept the bill; but the acceptance, if given, dates as of the day of presentation. [29 G. A., ch. 130, § 136.]

[1"presentation" in prior supplement. Changed here to conform with the enrolled bill and the New York act. EDITOR.]

SEC. **3060-a137. Liability of drawee retaining or destroying bill.** Where a drawee to whom a bill is delivered for acceptance destroys the same, or refuses within twenty-four hours after such delivery, or within such other period as the holder may allow, to return the bill accepted or nonaccepted to the holder, he will be deemed to have accepted the same. [29 G. A., ch. 130, § 137.]

Other states: Matteson v. Moulton, 79 N. Y. 627.

SEC. 3060-a138. **Acceptance of incomplete bill.** A bill may be accepted before it has been signed by the drawer,[1] or while otherwise incomplete, or when it is overdue, or after it has been dishonored by a previous refusal to accept, or by nonpayment. But when a bill payable after sight is dishonored by nonacceptance and the drawee subsequently accepts it, the holder, in the absence of any different agreement, is entitled to have the bill accepted as of the date of the first presentment. [29 G. A., ch. 130, § 138.]

[1"drawee" in prior supplement. Changed here to conform with the enrolled bill and the New York act. EDITOR.]

SEC. 3060-a139. **Kinds of acceptance.** An acceptance is either general or qualified. A general acceptance assents without qualification to the order of the drawer. A qualified acceptance in express terms varies the effect of the bill as drawn. [29 G. A., ch. 130, § 139.]

SEC. 3060-a140. **What constitutes a general acceptance.** An acceptance to pay at a particular place is a general acceptance unless it expressly states that the bill is to be paid there only and not elsewhere. [29 G. A., ch. 130, § 140.]

Other states: *Wallace v. McConnell*, 13 Pet. 136. See note to § 3060-a70.

SEC. 3060-a141. **Qualified acceptance.** An acceptance is qualified, which is:

1. Conditional, that is to say, which makes payment by the acceptor dependent on the fulfillment of a condition therein stated.
2. Partial, that is to say, an acceptance to pay part only of the amount for which the bill is drawn.
3. Local, that is to say, an acceptance to pay only at a particular place.
4. Qualified as to time.
5. The acceptance of some one or more of the drawees, but not of all. [29 G. A., ch. 130, § 141.]

(1) *Other states:* Such an acceptance does not become due until the happening of the contingency upon which the bill is accepted. *Brockway v. Allen*, 17 Wend. 40; *Newhall v. Clark*, 3 Cush. 376.

SEC. 3060-a142. **Rights of parties to qualified acceptance.** The holder may refuse to take a qualified acceptance, and if he does not obtain an unqualified acceptance, he may treat the bill as dishonored by nonacceptance. Where a qualified acceptance is taken, the drawer and indorsers are discharged from liability on the bill, unless they have expressly or impliedly authorized the holder to take a qualified acceptance, or subsequently assent thereto. When the drawer or an indorser receives notices of a qualified acceptance, he must within a reasonable time express his dissent to the holder, or he will be deemed to have assented thereto. [29 G. A., ch. 130, § 142.]

Other states: *Walker v. N. Y. St. Bk.*, 9 N. Y. 582.

PRESENTMENT OF BILLS OF EXCHANGE FOR ACCEPTANCE.

SEC. 3060-a143. **When presentment for acceptance must be made.** Presentment for[1] acceptance must be made:

1. When the bill is payable after sight, or in any other case where presentment for acceptance is necessary in order to fix the maturity of the instrument; or
2. Where the bill expressly stipulates that it shall be presented for acceptance; or

3. Where the bill is drawn payable elsewhere than at the residence or place of business of the drawee.

In no other case is presentment for acceptance necessary in order to render any party to the bill liable. [29 G. A., ch. 130, § 143.]

["of" in prior supplements. The change here conforms with the enrolled bill and the New York act. EDITOR.]

Other states: Allen v. Suydam, 17 Wend. 368. A bill payable at a fixed period from its date may be presented for acceptance at any time. *Bachellor v. Priest*, 12 Pick. 399; *Oxford Bk. v. Davis*, 4 Cush. 188.

SEC. **3060-a144. When failure to present releases drawer and indorser.** Except as herein otherwise provided, the holder of a bill which is required by the next preceding section to be presented for acceptance must either present it for acceptance or negotiate it within a reasonable time. If he fail to do so, the drawer and all indorsers are discharged. [29 G. A., ch. 130, § 144.]

Other states: Robinson v. Ames, 20 Johns. 146; *Prescott Bk. v. Coverly*, 7 Gray, 217; *Walsh v. Dort*, 23 Wis. 334.

SEC. **3060-a145. Presentment—how made.** Presentment for acceptance must be made by or on behalf of the holder at a reasonable hour, on a business day and before the bill is overdue, to the drawee[1] or some person authorized to accept or refuse acceptance on his behalf; and:

1. Where a bill is addressed to two or more drawees who are not partners, presentment must be made to them all, unless one has authority to accept or refuse acceptance for all, in which case presentment may be made to him only.

2. Where the drawee is dead, presentment may be made to his personal representative.

3. Where the drawee has been adjudged a bankrupt or an insolvent or has made an assignment for the benefit of creditors, presentment may be made to him or to his trustee or assignee. [29 G. A., ch. 130, § 145.]

["drawer" in enrolled bill which was an error occurring also in the original New York act but which was corrected by laws N. Y. 1898 ch. 336 to read as set forth in the above section. EDITOR.]

The holder may require agent to show authority. Daniel on Neg. Insts., § 487.

(1) *Other states: Smith v. Melton*, 133 Mass. 369.

SEC. **3060-a146. On what days presentment may be made.** A bill may be presented for acceptance on any day on which negotiable instruments may be presented for payment under the provisions of sections seventy-two and eighty-five of this act. When Saturday is not otherwise a holiday, presentment for acceptance may be made before twelve o'clock noon on that day. [29 G. A., ch. 130, § 146.]

SEC. **3060-a147. Presentment where time is insufficient.** Where the holder of a bill drawn payable elsewhere than at the place of business or the residence of the drawee has not time with the exercise of reasonable diligence to present the bill for acceptance before presenting it for payment on the day that it falls due, the delay caused by presenting the bill for acceptance before presenting it for payment is excused and does not discharge the drawers and indorsers. [29 G. A., ch. 130, § 147.]

SEC. **3060-a148. Where presentment is excused.** Presentment for acceptance is excused and a bill may be treated as dishonored by non-acceptance, in either of the following cases:

1. Where the drawee is dead, or has absconded, or is a fictitious person or a person not having capacity to contract by bill.

2. Where after the exercise of reasonable diligence, presentment cannot be made.

3. Where although presentment has been irregular, acceptance has been refused on some ground. [29 G. A., ch. 130, § 148.]

Other states: Schmittler v. Simon, 101 N. Y. 554.

SEC. **3060-a149. When dishonored by nonacceptance.** A bill is dishonored by nonacceptance:

1. When it is duly presented for acceptance and such an acceptance as is prescribed by this act is refused or cannot be obtained; or

2. When a presentment for acceptance is excused and the bill is not accepted. [29 G. A., ch. 130, § 149.]

SEC. **3060-a150. Duty of holder where bill is not accepted.** Where a bill is duly presented for acceptance and is not accepted within the prescribed time, the person presenting it must treat the bill as dishonored by nonacceptance or he loses the right of recourse against the drawer and indorsers. [29 G. A., ch. 130, § 150.]

SEC. **3060-a151. Rights of holders where bill is not accepted.** When a bill is dishonored by nonacceptance, an immediate right of recourse against the drawers and indorsers accrues to the holder and no presentment for payment is necessary. [29 G. A., ch. 130, § 151.]

PROTEST OF BILLS OF EXCHANGE.

SEC. **3060-a152. In what cases protest necessary.** Where a foreign bill appearing on its face to be such is dishonored by nonacceptance, it must be duly protested for nonacceptance, and where such a bill which has not previously been dishonored by nonacceptance is dishonored by nonpayment, it must be duly protested for nonpayment. If it is not so protested, the drawer and indorsers are discharged. Where a bill does not appear on its face to be a foreign bill, protest thereof in case of dishonor is unnecessary. [29 G. A., ch. 130, § 152.]

Other states: Commercial Bank v. Varnum, 49 N. Y. 269, 275; *Dennistoun v. Stuart*, 17 How. (U. S.) 606; *Bank v. Hussey*, 12 Pick. 483.

See Byles on Bills, 256.

SEC. **3060-a153. Protest—how made.** The protest must be annexed to the bill, or must contain a copy thereof, and must be under the hand and seal of the notary making it, and must specify:

1. The time and place of presentment.
2. The fact that presentment was made and the manner thereof.
3. The cause or reason for protesting the bill.
4. The demand made and the answer given, if any, or the fact that the drawee or acceptor could not be found. [29 G. A., ch. 130, § 153.]

[For its competency as evidence of what it recites see § 4624 of the code. EDITOR.]

Iowa: The certificate of protest is only evidence of notice when it recites that notice was given. *Sather v. Rogers*, 10–231; *Thorp v. Craig*, 10–461. It is only evidence of the facts therein recited, and where it shows that the notice was directed to the indorser at a particular place it will not be presumed that such place was the residence of such indorser. *Bradshaw v. Hedge*, 10–402. But a certificate of protest stating that the notary notified the indorsers is sufficient although it does not show that the residence of the several parties are at the places to which the notices were addressed. *Fuller v. Dingham*, 41–506. It is not necessary to annex to, or set out in, the notary's certificate, the notice referred to therein, nor need the certificate, in words, formally refer to the seal. *Jones v. Berryhill*, 25–289. If the certificate states that notices of protest properly addressed were deposited in the post office, it will be presumed that the postage was prepaid. *Brooks v. Day*, 11–46.

When the certificate of protest states that the notary notified the proper parties in a certain manner, the credit due the certificate will generate the presumption that the mode adopted accomplished the result certified to, unless it affirmatively appear that the method adopted could not have done so; but if the notary only certifies as to the steps taken, then, to make out a prima-facie case, it must further appear that such steps would effectuate notice. *Wamsley v. Rivers*, 34–463. The fact that the certificate is dated at a time subsequent to that of the dishonor and protest will not render it incompetent. *Chatham Bank v. Allison*, 15–357.

The protest of a notary is not receivable without his seal, but such defect may be cured by the affixing of the seal by the notary at the trial. *Rindskoff v. Malone*, 9–540.

The certificate of a notary public as to the protest of a bill or note is not admissible against defendant in a criminal case, as he is entitled to be confronted with the witnesses against him. *State v. Reidel*, 26–430.

Other states: Signature of notary may be printed. *Bank of Cooperstown v. Woods*, 28 N. Y. 561.

(1) *Other states: Duckert v. Von Lilienthal*, 11 Wis. 56.

(4) *Other states:* Notarial certificate of protest is competent without further proof. *Porter v. Judson*, 1 Gray, 175; *Pierce v. Indseth*, 106 U. S. 546. And the different states of the Union are deemed foreign to each other so that the notarial certificate of protest under seal is good on mere production. *Townsley v. Sumrall*, 2 Pet. 170; *Halliday v. McDougall*, 20 Wend. 81; *Johnson v. Brown*, 154 Mass. 105, 106.

For a citation of other authorities see Crawford's Annotated Neg. Inst. Law, (3 Ed.), § 261.

SEC. 3060-a154. **Protest—by whom made.** Protest may be made by:

1. A notary public; or
2. By any reputable resident of the place where the bill is dishonored, in the presence of two or more credible witnesses. [29 G. A., ch. 130, § 154.]

Other states: Notary must make presentment and demand in person. *Commercial Bk. v. Varnum*, 49 N. Y. 269, 275; *Ocean Nat. Bk. v. Williams*, 102 Mass. 141. Notary who is an officer of a bank may legally protest paper belonging to the bank. *Nelson v. First Nat. Bk.*, 69 Fed. 798, 16 C. C. A. 425.

SEC. 3060-a155. **Protest—when to be made.** When a bill is protested, such protest must be made on the day of its dishonor, unless delay is excused as herein provided. When a bill has been duly noted, the protest may be subsequently extended as of the date of the noting. [29 G. A., ch. 130, § 155.]

See Byles on Bills, 257.

SEC. 3060-a156. **Protest—where made.** A bill must be protested at the place where it is dishonored, except that when a bill drawn payable at the place of business or residence of some person other than the drawee, has been dishonored by nonacceptance, it must be protested for nonpayment at the place where it is expressed to be payable; and no other presentment for payment to, or demand on, the drawee is necessary. [29 G. A., ch. 130, § 156.]

See Daniel on Neg. Insts., § 935; and Byles on Bills, 257.

SEC. 3060-a157. **Protest both for nonacceptance and nonpayment.** A bill which has been protested for nonacceptance may be subsequently protested for nonpayment. [29 G. A., ch. 130, § 157.]

See Daniel on Neg. Insts., § 1464.

SEC. 3060-a158. **Protest before maturity where acceptor insolvent.** Where the acceptor has been adjudged a bankrupt or an insolvent or has made an assignment for the benefit of creditors, before the bill matures, the holder may cause the bill to be protested for better security against the drawer and indorsers. [29 G. A., ch. 130, § 158.]

SEC. **3060-a159. Where protest dispensed with.** Protest is dispensed with by any circumstances which would dispense with notice of dishonor. Delay in noting or protesting is excused when delay is caused by circumstances beyond the control of the holder and not imputable to his default, misconduct or negligence. When the cause of delay ceases to operate, the bill must be noted or protested with reasonable diligence. [29 G. A., ch. 130, § 159.]

SEC. **3060-a160. Protest where bill is lost, et cetera.** Where a bill is lost or destroyed, or is wrongfully[1] detained from the person entitled to hold it, protest may be made on a copy or written particulars thereof. [29 G. A., ch. 130, § 160.]

[1"wrongly" in enrolled bill, but "wrongfully" in prior supplements and in the New York act. EDITOR.]

ACCEPTANCE OF BILLS OF EXCHANGE FOR HONOR.

SEC. **3060-a161. When bill may be accepted for honor.** Where a bill of exchange has been protested for dishonor by nonacceptance, or protested for better security, and is not overdue, any person not being a party already liable thereon, may, with the consent of the holder, intervene and accept the bill *supra* protest for the honor of any[1] party liable thereon or for the honor of the person for whose account the bill is drawn. The acceptance for honor may be for part only of the sum for which the bill is drawn, and where there has been an acceptance for honor for one party, there may be a further acceptance by a different person for the honor of another party. [29 G. A., ch. 130, § 161.]

[1"the" in the prior supplement. The change here conforms with the enrolled bill and the New York act. EDITOR.]

See Byles on Bills, 262–266.

SEC. **3060-a162. Acceptance for honor—how made.** An acceptance for honor supra protest must be in writing and indicate that it is an acceptance for honor, and must be signed by the acceptor for honor. [29 G. A., ch. 130, § 162.]

SEC. **3060-a163. When deemed to be an acceptance for honor of the drawer.** Where an acceptance for honor does not expressly state for whose honor it is made, it is deemed to be an acceptance for the honor of the drawer. [29 G. A., ch. 130, § 163.]

SEC. **3060-a164. Liability of acceptor for honor.** The acceptor for honor is liable to the holder and to all parties to the bill subsequent to the party for whose honor he has accepted. [29 G. A., ch. 130, § 164.]

Other states: Baring v. Clark, 19 Pick. 220.

SEC. **3060-a165. Agreement of acceptor for honor.** The acceptor for honor by such acceptance engages that he will on due presentment pay the bill according to the terms of his acceptance, provided it shall not have been paid by the drawee, and provided also that it shall have been duly presented for payment and protested for nonpayment and notice of dishonor given to him. [29 G. A., ch. 130, § 165.]

SEC. **3060-a166. Maturity of bill payable after sight—accepted for honor.** When a bill payable after sight is accepted for honor its maturity is calculated from the date of the noting for nonacceptance and not from the date of the acceptance for honor. [29 G. A., ch. 130, § 166.]

SEC. **3060-a167. Protest of bill accepted for honor, et cetera.** Where a dishonored bill has been accepted for honor supra protest or contains a reference in case of need, it must be protested for nonpayment

before it is presented for payment to the acceptor for honor or referee in case of need. [29 G. A., ch. 130, § 167.]

SEC. **3060-a168. Presentment for payment to acceptor for honor—how made.** Presentment for payment to the acceptor for honor must be made as follows:

1. If it is to be presented in the place where the protest for nonpayment was made, it must be presented not later than the day following its maturity.

2. If it is to be presented in some other place than the place where it was protested, then it must be forwarded within the time specified in section one hundred and four. [29 G. A., ch. 130, § 168.]

See Byles on Bills, 263.

SEC. **3060-a169. When delay in making presentment is excused.** The provisions of section eighty-one apply where there is delay in making presentment to the acceptor for honor or referee in case of need. [29 G. A., ch. 130, § 169.]

SEC. **3060-a170. Dishonor of bill by acceptor for honor.** When the bill is dishonored by the acceptor for honor it must be protested for nonpayment by him. [29 G. A., ch. 130, § 170.]

PAYMENT OF BILLS OF EXCHANGE FOR HONOR.

SEC. **3060-a171. Who may make payment for honor.** Where a bill has been protested for nonpayment, any person may intervene and pay it *supra* protest for the honor of any person liable thereon or for the honor of the person for whose account it was drawn. [29 G. A., ch. 130, § 171.]

See Daniel on Neg. Insts., § 1254; Byles on Bills, 267–269.

SEC. **3060-a172. Payment for honor—how made.** The payment for honor *supra* protest in order to operate as such and not as a mere voluntary payment must be attested by a notarial act of honor which may be appended to the protest or form an extension to it. [29 G. A., ch. 130, § 172.]

See Daniel on Neg. Insts., § 1258; Byles on Bills, 267; *Konig v. Bayard*, 1 Pet. 250.

SEC. **3060-a173. Declaration before payment for honor.** The notarial act of honor must be founded on a declaration made by the payer for honor or by his agent in that behalf declaring his intention to pay the bill for honor and for whose honor he pays. [29 G. A., ch. 130, § 173.]

SEC. **3060-a174. Preference of parties offering to pay for honor.** Where two or more persons offer to pay a bill for the honor of different parties, the person whose payment will discharge most parties to the bill is to be given the preference. [29 G. A., ch. 130, § 174.]

SEC. **3060-a175. Effect on subsequent parties where bill is paid for honor.** Where a bill has been paid for honor all parties subsequent to the party for whose honor it is paid are discharged, but the payer for honor is subrogated for, and succeeds to, both the rights and duties of the holder as regards the party for whose honor he pays and all parties liable to the latter. [29 G. A., ch. 130, § 175.]

See Daniel on Neg. Insts., § 1255.

SEC. **3060-a176. Where holder refuses to receive payment supra protest.** Where the holder of a bill refuses to receive payment supra protest, he loses his right of recourse against any party who would have been discharged by such payment. [29 G. A., ch. 130, § 176.]

SEC. **3060-a177. Rights of payer for honor.** The payer for honor on paying to the holder the amount of the bill and the notarial expenses incidental to its dishonor, is entitled to receive both the bill itself and the protest. [29 G. A., ch. 130, § 177.]

BILLS IN A SET.

SEC. **3060-a178. Bills in sets constitute one bill.** Where a bill is drawn in a set, each part of the set being numbered and containing a reference to the other parts, the whole of the parts constitute one bill. [29 G. A., ch. 130, § 178.]

See Daniel on Neg. Insts., § 113; Byles on Bills, 387; *Durkin v. Cranston*, 7 Johns, 442.

SEC. **3060-a179. Rights of holders where different parts are negotiated.** Where two or more parts of a set are negotiated to different holders in due course, the holder whose title first accrues is as between such holders the true owner of the bill. But nothing in this section affects the rights of a person who in due course accepts or pays the part first presented to him. [29 G. A., ch. 130, § 179.]

Other states: Walsh v. Blatchley, 6 Wis. 422; Byles on Bills, 389.

SEC. **3060-a180. Liability of holder who indorses two or more parts of a set to different persons.** Where the holder of a set indorses two or more parts to different persons he is liable on every such part, and every indorser subsequent to him is liable on the part he has himself indorsed, as if such parts were separate bills. [29 G. A., ch. 130, § 180.]

See Byles on Bills, 389.

SEC. **3060-a181. Acceptance of bills drawn in sets.** The acceptance may be written on any part and it must be written on one part only. If the drawee accepts more than one part, and such accepted parts are negotiated to different holders in due course, he is liable on every such part as if it were a separate bill. [29 G. A., ch. 130, § 181.]

Other states: Dounes & Co. v. Church, 13 Pet. 205; *Walsh v. Blatchley*, 6 Wis. 422.

SEC. **3060-a182. Payment by acceptor of bills drawn in sets.** When the acceptor of a bill drawn in a set pays it without requiring the part bearing his acceptance to be delivered up to him, and that part at maturity is outstanding in the hands of a holder in due course, he is liable to the holder thereon. [29 G. A., ch. 130, § 182.]

See Byles on Bills, 389.

SEC. **3060-a183. Effect of discharging one of a set.** Except as herein otherwise provided where any one part of a bill drawn in a set is discharged by payment or otherwise, the whole bill is discharged. [29 G. A., ch. 130, § 183.]

PROMISSORY NOTES AND CHECKS.

SEC. **3060-a184. Promissory note defined.** A negotiable promissory note within the meaning of this act is an unconditional promise in writing made by one person to another, signed by the maker engaging to pay on demand or at a fixed or determinable future time, a sum certain in money to order or to bearer. Where a note is drawn to the maker's own order, it is not complete until indorsed by him. [29 G. A., ch. 130, § 184.]

Other states: Curran v. Witter, 68 Wis. 16. A note payable to the order of the maker is a negotiable one. *Miller v. Weeks*, 22 Pa. St. 89.

A note payable to the maker's own order and not indorsed by him is not negotiable, but it does not follow that such a note transferred by him to another for valuable consideration is void or unenforceable. *Unterharnscheidt v. Missouri State L. Ins. Co.*, 138 N. W. 459.

SEC. 3060-a185. **Check defined.** A check is a bill of exchange drawn on a bank payable on demand. Except as herein otherwise provided, the provisions of this act[1] applicable to a bill of exchange payable on demand apply to a check. [29 G. A., ch. 130, § 185.]

[1]The word "are" follows the word "act" in the enrolled bill, evidently erroneously. It does not appear in the New York act. EDITOR.]

Iowa: N. W. Coal Co. v. Bowman, 69–152.

Other states: One of the characteristics which distinguishes a check from a bill of exchange is that a check is always drawn on a bank or banker. *Harris v. Clark*, 3 N. Y. 93, 115; *Bull v. Bank of Kasson*, 123 U. S. 105; *Rogers v. Durant*, 140 U. S. 298; *Ridgeley Bk. v. Patton*, 109 Ill. 484; *Harrison v. Nicollet Nat. Bk.*, 41 Minn. 489.

That a draft upon a bank not payable immediately is a bill of exchange, see *Bowen v. Newell*, 8 N. Y. 190; *Harrison v. Nicollet Nat. Bk.*, 41 Minn. 488.

For other authorities see Crawford's Annotated Neg. Inst. Law (3 Ed.), § 321.

An ordinary bank check is classed as a bill of exchange, payable on demand. *Plover Savings Bank v. Moodie*, 135–685, 110 N. W. 29, 113 N. W. 476.

SEC. 3060-a186. **Within what time a check must be presented.** A check must be presented for payment within a reasonable time after its issue, or the drawer will be discharged from liability thereon to the extent of the loss caused by the delay. [29 G. A., ch. 130, § 186.]

Other states: See *Industrial Bk. of Chicago v. Bowes*, 165 Ill. 70. For instances of unreasonable delay, see *Gifford v. Hardell*, 88 Wis. 538; *First Nat. Bk. v. Miller*, 43 Neb. 791; *Grange v. Reigh*, 93 Wis. 552; *Western Wheeled Scraper Co. v. Sadilek*, 50 Neb. 105; *Holmes v. Roe*, 62 Mich. 199. For a discussion of the question as to whether or not the death of the drawer operates as a revocation of the authority to pay a check, see Crawford's Annotated Neg. Inst. Law (3 Ed.), § 322.

Although the specific provision as to presentment of checks for payment excludes the more general provision with regard to presentment of bills of exchange payable on demand, yet the provisions in other sections of the negotiable instruments act with reference to reasonable time, making it dependent to some extent on usage, are applicable also to the presentment of checks. *Plover Savings Bank v. Moodie*, 135–685, 110 N. W. 29, 113 N. W. 476.

Whether the provision of this section relating to presentation of checks excludes such instruments from the provisions of § 3060-a71, *quaere*. *Ibid.*

SEC. 3060-a187. **Certification of check—effect of.** Where a check is certified by the bank on which it is drawn, the certification is equivalent to an acceptance. [29 G. A., ch. 130, § 187.]

Other states: Merchants' Bk. v. State Bk., 10 Wall. 604; *Cooke v. State Nat. Bk.*, 52 N. Y. 96.

SEC. 3060-a188. **Effect where the holder of check procures it to be certified.** Where the holder of a check procures it to be accepted or certified, the drawer and all indorsers are discharged from liability thereon. [29 G. A., ch. 130, § 188.]

Other states: Minot v. Russ, 156 Mass. 458; *Metropolitan Bk. v. Jones*, 137 Ill. 634; *Meridian Nat. Bk. v. First Nat. Bk.* (Ind.), 33 N. E. 247.

SEC. 3060-a189. **Check not an assignment—when bank liable.**[1] A check of itself does not operate as an assignment of any part of the funds to the credit of the drawer with the bank, and the bank is not liable to the holder, unless and until it accepts or certifies the check. [29 G. A., ch. 130, § 189.]

[1]These catchwords do not follow the New York act. They are suggested in Mr. Crawford's work. EDITOR.]

Other states: Bank v. Millard, 10 Wall. 152; *Bank v. Schuler*, 120 U. S. 511; *Florence Mills Co. v. Brown*, 124 U. S. 385.

For the citation of numerous other authorities supporting the rule adopted by the text, see Crawford's Annotated Neg. Inst. Law (3 Ed.), § 325.

The holder of an unaccepted check may bring action thereon in his own name against the bank. (Following earlier cases, but not referring to this section.) *Bloom v. Winthrop State Bank*, 121–101, 96 N. W. 733.

As against such right of action the bank may offset a note held by it against the deposit of the drawer of the check. *Ibid.*

This section was undoubtedly enacted for the purpose of protecting banks from loss which might be occasioned by the double payment of checks on general deposits and its intent and purpose is to protect banks only when they are acting in good faith and not to protect any particular persons in the collection of their debts to the exclusion of others who are equally as much entitled to protection. *Hove v. Stanhope State Bank*, 138–39, 115 N. W. 476.

Where parties are properly in court in an equitable action, one holding assignment of a fund by check or general deposit will be protected as against subsequent claimants. *Ibid.*

Where a special deposit has been made in a bank to meet checks already drawn upon it, a creditor of the depositor cannot by garnishment acquire a right to such fund as against the holders of the checks. *Dolph v. Cross*, 153–289, 133 N. W. 669.

GENERAL PROVISIONS.

SEC. 3060-a190. **Short title.** This act shall be known as the Negotiable Instruments Law. [29 G. A., ch. 130, § 190.]

See Crawford's Annotated Neg. Inst. Law (3 Ed.), § 1.

SEC. 3060-a191. **Definitions and meaning of terms.** In this act, unless the context otherwise requires:

"Acceptance" means an acceptance completed[1] by delivery or notification.

"Action" includes counterclaim and set-off.

"Bank" includes any person or association of persons carrying on the business of banking, whether incorporated or not.

"Bearer" means the person in possession of a bill or note which is payable to bearer.

"Bill" means bill of exchange, and "note" means negotiable promissory note.

"Delivery" means transfer of possession, actual or constructive, from one person to another.

"Holder" means the payee or indorsee of a bill or note, who is in possession of it, or the bearer thereof.

"Indorsement" means an indorsement completed by delivery.

"Instrument" means negotiable instrument.

"Issue" means the first delivery of the instrument, complete in form, to a person who takes it as a holder.

"Person" includes a body of persons, whether incorporated or not.

"Value" means valuable consideration.

"Written" includes printed, and "writing" includes print. [29 G. A., ch. 130, § 191.]

[1"completely" in enrolled bill. The corresponding word in the New York act is "completed." EDITOR.]

SEC. 3060-a192. **Person primarily liable on instrument.** The person "primarily" liable on an instrument is the person who by the terms of the instrument is absolutely required to pay the same. All other parties are "secondarily" liable. [29 G. A., ch. 130, § 192.]

See Crawford's Annotated Neg. Inst. Law (3 Ed.), § 3.

Where the rights of the owner in due course are not involved, this section has no application. *Fullerton Lumber Co. v. Snouffer*, 139–176, 117 N. W. 50.

SEC. 3060-a193. **Reasonable time—what constitutes.** In determining what is a "reasonable time" or an "unreasonable time" regard is to be had to the nature of the instrument, the usage of trade or business (if any) with respect to such instruments, and the facts of the particular case. [29 G. A., ch. 130, § 193.]

Iowa: Northwestern Coal Co. v. Bowman, 69–153.

The usage of trade or business with respect to the presentation of bank checks for payment is to be taken into account in determining whether such presentation is within a reasonable time. *Plover Savings Bank v. Moodie*, 135–685, 110 N. W. 29, 113 N. W. 476.

In determining the time for presentment of a bank certificate of deposit in order to hold the indorser, reasonable regard must be had not only to the nature of the instrument but also to the facts of the particular case. *Anderson v. First Nat. Bank*, 144–251, 122 N. W. 918.

SEC. 3060-a194. **Time—how computed—when last day falls on holiday.** When the day, or last day, for doing an act herein required or permitted to be done falls on Sunday or on a holiday, the act may be done on the next succeeding secular or business day. [29 G. A., ch. 130, § 194.]

SEC. 3060-a195. **Application of chapter.** The provisions of this act do not apply to negotiable instruments made and delivered prior to the passage hereof. [29 G. A., ch. 130, § 195.]

SEC. 3060-a196. **Law merchant—when governs.** In any case not provided for in this act, the rules of the law merchant shall govern. [29 G. A., ch. 130, § 196.]

Other states: Prescott Bk. v. Coverly, 7 Gray, 217.
See note in Crawford's Annotated Neg. Inst. Law (3 Ed.), § 7.
[§ 197 of the act is § 3060-a, supra. As the entire section relates only to the repeal of certain sections of the code, relating to bills and notes, it was deemed best to insert it in advance of the other sections of the act.]

SEC. 3060-a198. **Days of grace—demand made on.** A demand made on any one of the three days following the day of maturity of the instrument, except on Sunday or a holiday, shall be as effectual as though made on the day on which demand may be made under the provisions of this act, and the provisions of this act as to notice of nonpayment, nonacceptance, and as to protest shall be applicable with reference to such demand as though the demand were made in accordance with the terms of this act; but the provisions of this section shall not be construed as authorizing demand on any day after the third day from that on which the instrument falls due according to its face. [29 G. A., ch. 130, § 198.]

[§§ 3050 and 3051 of the code, relating to grace, are repealed by § 3060-a, supra. The repeal of the statute allowing grace, while the above section permitting demand to be made on any of the three days following the maturity of the paper, for the purpose of fixing the liability of indorsers, would seem to make the instrument mature at different dates, as regards the maker and indorser, or indorsers, under some circumstances. This question might become important in bringing action against all parties under § 3465 of the code.—ED. Supp. '02.]

SEC. 3060-a199. **Indemnifying bond to protect payer.** That whenever a note, bond, bill of exchange, certificate of deposit, check or other evidence of indebtedness shall have been lost, stolen or destroyed, and the owner thereof desires payment to be made by the person, firm or corporation issuing the same, he shall execute and deliver if demanded to such person, firm or corporation, a good and sufficient bond agreeing to indemnify and save harmless the payer thereof. [31 G. A., ch. 150, § 1.]

SEC. 3060-a200. **Indemnifying bond to protect defendants.** When an action is brought on a lost note, bond, bill of exchange, draft, certifi-

cate of deposit, or other evidence of indebtedness, upon demand of any defendant therein, a good and sufficient bond shall be given to indemnify and save harmless the defendants in said cause. [31 G. A., ch. 150, § 2.]

CHAPTER 4.

OF TENDER.

SECTION 3061. Offer in writing.

A tender in writing is as effectual as an actual personal tender. *Shay v. Callanan*, 124–370, 100 N. W. 55.

Where a sufficient tender is made to authorize the rescission of a contract, such right to rescission is not lost by a failure to keep the tender good as required by the statutory provision relating to written tenders. *Wisconsin Lumber Co. v. Greene & Western Tel. Co.*, 127–350, 101 N. W. 742.

While an offer of performance in general terms may be sufficient in equity, yet if the party making such tender specifies the exact sum offered he is bound to specify a sum sufficient to discharge the obligation of which performance is tendered. *Wood v. Howland*, 127–394, 101 N. W. 756.

SEC. 3062. When not accepted.

Where a party attempts to rescind a contract made by his agent, which he claims to have been without authority, he must offer to return any money received by the agent in pursuance of such contract and such offer to return must be made to the opposite party in person; and it is not sufficient to notify him that it is held subject to his order at another place. *National Imp. & Const. Co. v. Maiken*, 103–118, 72 N. W. 431.

A tender which is kept good relieves the debtor from liability to pay interest on the amount so tendered. *Metropolitan Nat. Bank v. Commercial State Bank*, 104–682, 74 N. W. 26.

Where one party proposes to pay to the other the amount of a claim, and is advised by the latter that it will not be accepted, such offer amounts to a tender, although the money is not at the time produced, if the person making the offer could and would have produced it had the other party been willing to accept. *Steckel v. Standley*, 107–694, 77 N. W. 489.

Tender in a law action must be kept good by deposit of the money in court *West. v. Farmers' Mut. Ins. Co.*, 117–147, 90 N. W. 523.

An offer to deliver, with ability to do so, which is met with a demand for a largely increased sum, releases the person making the tender from the necessity of producing the money in order to constitute a good tender. *Porter v. Farmers & Merchants Sav. Bank*, 143–629, 120 N. W. 633.

SEC. 3063. Receipt—objection.

The provision that the person to whom a tender is made must at the time make any objections which he may have to the money, etc., tendered, refers to the character or kind of money and not to the amount, and does not prevent him from afterwards insisting that the amount was not sufficient. *McWhirter v. Crawford*, 104–550, 72 N. W. 505, 73 N. W. 1021.

One who makes a tender may not couple it with a demand for a receipt in full for the claim. *West v. Farmers' Mut. Ins. Co.*, 117–147, 90 N. W. 523.

A tender by transmitting a draft for the amount is as effectual as a personal tender in currency, if no objection is made thereto. *Shay v. Callanan*, 124–370, 100 N. W. 55.

CHAPTER 5.

OF SURETIES.

SECTION 3064. May require creditor to sue.

In the absence of any special statute requiring a creditor to proceed against the principal debtor or any act of the creditor releasing the lien held by him the surety is not relieved by a failure of the creditor to enforce his claim against the debtor. *Whitehouse v. American Surety Co.*, 117–328, 90 N. W. 727.

CHAPTER 6.

OF PRIVATE SEALS.

SECTION 3068. **Abolished—use of seal adopted by corporation—release of incumbrance.** Section three thousand and sixty-eight of the code is hereby repealed and the following enacted in lieu thereof:

"The use of private seals in written contracts, or other instruments in writing, by individuals, firms, or corporations that have not adopted a corporate seal, is hereby abolished; and the addition of a seal to any such instrument shall not affect its character or validity in any respect; but in the execution of any written instrument conveying, incumbering or affecting real estate by a corporation that has adopted a corporate seal, the seal of such corporation shall be attached or affixed to such written instrument, or if the corporation has not adopted a corporate seal such fact shall be stated in such written instrument, except that it shall not hereafter be necessary to attach or affix the corporate seal to any release or satisfaction of any mortgage, judgment or other lien, that is made or entered by any corporation on the page or pages of the official record where any such lien appears recorded or entered, but the officer executing such release or satisfaction shall therein certify that same is executed with authority of the board of directors of such corporation, and the county recorder or deputy shall attach thereto a statement showing the relation such officer then bears to the corporation." [33 G. A., ch. 194, § 1.] [C. '73, § 2112; R. § 1823; C. '51, § 974.]

Notwithstanding the statutory provision abolishing the effect of a sealed instrument at common law, a release under seal of one joint tort feasor is a release as to all; but parol testimony is permissible to show that the release was of one not in fact liable, and did not constitute a satisfaction of the liability. *Ryan v. Becker*, 136 N. W. 273, 111 N. W. 426.

SEC. 3068-a. **Certain corporation instruments prior to 1909 legalized.** All instruments in writing executed by any corporation prior to July fourth, nineteen hundred and nine, conveying, encumbering, or affecting real estate, including releases, satisfaction of mortgages, judgments, or any other liens by entry of such release or satisfaction upon the page or pages where such lien appears recorded or entered, where the corporate seal of such corporation has not been affixed or attached thereto, and which are otherwise legally and properly executed, are hereby declared legal, valid and binding, the same as though the corporate seal had been attached or affixed thereto; provided this act shall not abate, or in any manner affect actions pending prior to the taking effect hereof. [34 G. A., ch. 225, § 1.]

[Substantially the same provision as the above was enacted by 33 G. A. (S. F. No. 397) and the records show that said S. F. No. 397 passed both houses and was sent to the governor on April 8, 1909. Same did not appear in 33 G. A. session laws and the enrolled bill cannot be found. EDITOR.]

SEC. 3069. **Consideration implied.**

The statutory provision that contracts in writing, signed by the parties to be bound, import a consideration was enacted for the purpose of giving to instruments in writing the same effect as instruments under seal had under the common law, and not to supply proof that the contract was based upon a particular consideration. No particular consideration is presumed, and where a wife sues her husband under a contract made during coverture, which would be valid only so far as it affected her separate property, the burden is upon the wife to show that the contract was with reference to such separate property. *Heacock v. Heacock*, 108–540, 79 N. W. 353.

Under the provisions of this section the burden is upon the defendant in an action

on a promissory note to show that the note was without consideration. *Luke v. Koenen*, 120–103, 94 N. W. 278.

Where an agreement is reduced to writing, the writing of itself imports a consideration. *Cone v. Cone*, 118–458, 92 N. W. 665.

The provision that all contracts in writing signed by the party to be bound shall import a consideration, has no application to a case where the consideration is recited in the instrument and it is shown that the consideration thus recited does not exist. An express consideration clearly named in a written contract cannot be altered by parol. *Lane v. Richards*, 119–24, 91 N. W. 786.

A written contract implies a consideration for its execution. This rule is applicable to a contract of indemnity. *Kenigsberg v. Reininger*, 141 N. W. 407.

SEC. 3070. Failure of—fraud.

While a consideration is presumed in a written contract, it is competent to show that in fact the instrument was without consideration, and parol evidence is competent for that purpose. Want or failure, in whole or in part, of the consideration of a written contract may be shown as a defense, entire or partial as the case may be, except in the case of negotiable paper. *Beaty v. Carr*, 109–183, 80 N. W. 326.

Want or failure, in whole or in part, of the consideration of a written instrument may be shown as a defense, total or partial, as the case may be. *Oakland Cemetery Assn. v. Lakins*, 126–121, 101 N. W. 778.

Want or failure of consideration in whole or in part may be shown by parol, but must be pleaded. *Mosnat v. Uchtyil*, 129–274, 105 N. W. 519.

As against the express recital of consideration in a written instrument, parol evidence is not admissible to show a different consideration from that expressed. *Ibid.*

Under the statutory provision that if in an action on negotiable paper by a holder for value before maturity and in good faith, it appears that the instrument was procured by fraud upon the maker, the holder shall recover as against the maker no greater sum than he has paid therefor, held that a purchaser of negotiable school bonds acquiring the same after maturity and after the statutory provision had taken effect, from one who became the holder thereof before maturity in good faith and for value, and before the taking effect of the statute, was not subject to the statutory limitation as to the amount of recovery. (Reversing S. C., 132 Fed. 514.) *Gamble v. Rural Ind. School Dist.*, 146 Fed. 113.

An assignee of a note, although not a good faith holder in the usual course of business, may recover whatever his assignor would have been entitled to under a suit upon the note. *Arnd v. Aylesworth*, 136–297, 111 N. W. 407.

Partial failure of consideration may be pleaded as a defense to a note in the hands of a purchaser with notice. *City Deposit Bank v. Green*, 138–156, 115 N. W. 893.

Where the controversy is not between the maker and the holder with reference to any defense on the part of the maker, this section has no application. *Voss v. Chamberlain*, 139–569, 117 N. W. 269.

The effect of this and the preceding section is to put the burden upon the defendant of both pleading and proving a want or failure of consideration for a written contract. *Gould v. Gunn*, 140 N. W. 380.

One taking commercial paper without notice, in payment of a debt, can only recover the amount of such debt from the maker if the paper was procured by fraud. *Scherer v. Everest*, (C. C. A.) 168 Fed. 822.

Section applied. *Plano Mfg. Co. v. Farrell*, 110–577, 81 N. W. 772.

CHAPTER 7.

OF ASSIGNMENTS FOR CREDITORS.

SECTION 3071. Must be without preferences.

What valid: Where a general assignment is made, and as a part of the same transaction and for the purpose of giving a preference, a mortgage is executed by the same party, the assignment and mortgage will both be void. *Groetzinger v. Wyman*, 105–574, 75 N. W. 512.

Mortgages made to the creditors, not with the intention of disposing of the mortgagor's business, but in the hope of being able to continue the business, do not constitute an assignment and therefore are not necessarily fraudulent because of preferences thereby given. *Ibid.*

A debtor has a legal right to prefer some creditors to others, if he sees fit. *Steinke v. Yetzer*, 108–512, 79 N. W. 286.

In a particular case held that chattel

mortgages executed separately and prior to the time of making a general assignment and without intention at the time to make such assignment were valid. *Diemer v. Guernsey*, 112–393, 83 N. W. 1047.

A chattel mortgage given by an insolvent to secure one creditor in preference to others is not rendered invalid by a failure to record it, unless the withholding it from record was by reason of agreement, or resulted in some prejudice to other creditors. *Deland v. Miller & Cheney Bank*, 119–368, 93 N. W. 304.

An insolvent corporation may make payment of its debts or give property in security thereof, just as a natural person may do, and may prefer one of its creditors over another. *First Nat. Bank v. Garretson*, 107–196, 77 N. W. 856.

Intention: One who takes a mortgage in good faith to secure a valid indebtedness is not affected by the intention of the debtor to make an assignment. *Ibid; Manton v. Seiberling*, 107–534, 78 N. W. 194; *Groetzinger v. Wyman*, 105–574, 75 N. W. 512.

One who takes security from an insolvent for a debt, with knowledge of the insolvency, is not to be deprived of the advantage thus secured, unless he took such security with intent to hinder, delay or defraud other creditors. *Deland v. Miller & Cheney Bank*, 119–368, 93 N. W. 304.

A mortgagee who takes a mortgage without knowledge of an intent to make an assignment for the benefit of creditors is protected. *Mills v. Miller*, 109–688, 81 N. W. 169.

The burden is on the creditor attacking the mortgage to show that at the time it was executed there was also an intent to make a general assignment. *Ibid.*

Several mortgages are not to be taken together as constituting a general assignment where they do not include all the property of the debtor. *Ibid.*

Where a mortgage is executed in pursuance of a prior agreement to give security, and comes to the knowledge of the mortgagee before the assignee under the assignment has accepted the trust, the mortgage will be valid. *Ibid.*

Aside from the provisions of the national bankruptcy law a creditor acting in good faith can take security from his debtor even though he knows there are other creditors and that the effect of his action will be to defeat them. But under the bankrupt law knowledge of such fact will render the preference fraudulent. *Boudinot v. Hamann*, 117–22, 90 N. W. 497.

Partial assignments: The statutory provision as to assignment for benefit of creditors does not prevent partial assignments with preferences or sales or mortgages of any or all of the party's property in payment or security of indebtedness. *Rothschild v. Hasbrouck*, 72 Fed. 813.

An assignment of substantially all a debtor's property to be applied in satisfaction of his debts, by settlement and composition with creditors, is in effect an assignment for the benefit of creditors. *In re Hersey*, (D. C.) 171 Fed. 998.

Conditions: As an assignment would be subject to all prior valid liens, it is not invalidated by a provision that it is subject to a particular lien described, and such a provision does not estop the assignee from asserting the fraudulent character of the lien thus recognized. *Ringen Stove Co. v. Bowers*, 109–175, 80 N. W. 318.

What law governs: In proceedings under an assignment for benefit of creditors the validity of a mortgage to a creditor executed in another state upon real estate situated in this state, will be determined by the laws of this state. *Manton v. Seiberling*, 107–534, 78 N. W. 194.

Effect of bankrupt law: State insolvent laws are not suspended by the enactment of the national bankruptcy act. *In re Scholtz*, 106 Fed. 834.

SEC. 3072. How made—inventory—effect—recording.

The purchaser from an assignee cannot claim title to property which never passed through the hands of the assignee, and which was not intended to be covered by the instrument of assignment. *Gevers v. Farmer*, 109–468, 80 N. W. 535.

Where an assignment was made by one partner, and the other partner was within reach so that he might be consulted, held that the assignment did not become effectual until confirmed by such other partner. *Mills v. Miller*, 109–688, 81 N. W. 169.

Where the assignee took possession of notes and book accounts belonging to the debtor firm, and was garnished therefor under an attachment issued at the suit of creditors, before the assignment which had been executed by one partner only had become valid by confirmation by the other partner, held that the garnishment took priority over the assignment. *Ibid.*

The assignee stands in the shoes of the insolvent as to liability with reference to contracts made by him. *In re Assignment of Jenks*, 129–139, 105 N. W. 396.

The assignee acquires no better title to the property than the assignor had, and one who has sold goods to the insolvent, retaining title until the goods have been paid for, may by intervention in the assignment proceeding assert his title to the goods as against the assignee. *In re Assignment of Wise*, 121–359, 96 N. W. 872.

The inventory is not conclusive as to the property passing by the assignment. *Turrill v. McCarthy*, 114–681, 87 N. W. 667.

An assignee for the benefit of creditors is not a purchaser in such sense as to be

entitled to protection against a prior unrecorded chattel mortgage. *Gluck Co. v. Therme*, 154–201, 134 N. W. 438.

An assignee for the benefit of creditors takes a cause of action in favor of the assignor subject to the contingencies which attach to it in the hands of the assignor. Therefore held that a contractor having a claim against a public corporation for an improvement could not, by an assignment for the benefit of creditors, cut off the right of a subcontractor to avail himself of statutory provisions against such public corporation for the payment of his claim. *Wackerbarth & Blamer Co. v. Independent School Dist.*, 157– —, 138 N. W. 470.

SEC. 3074. **Notice.** The assignee shall forthwith give notice of such assignment by publication in some newspaper in the county, which shall be continued, once each week, at least six weeks, and forthwith send a notice by mail to each creditor of whom he shall be informed, directed to his usual place of residence, requiring him to present to him within three months thereafter his claims under oath. [30 G. A., ch. 2, § 8; C. '73, § 2119; R. § 1829.]

SEC. 3075. **Claims filed.**

Where the creditor having security files his claim with the assignee, he is entitled to dividends only on that portion of his claim which is not satisfied by resorting to the security. He is subject to the equitable rule that where one creditor has security on two funds, on one of which other creditors have security, the former must first exhaust the fund on which he has an exclusive claim before resorting to that which is subject to the claims of other creditors. Therefore, where a creditor having security on property of the insolvent received payment on his claim from the proceeds of such property, held that he could only participate in dividends on the basis of the balance of his claim. *Doolittle v. Smith*, 104–403, 73 N. W. 867.

It is optional with the mortgagee whether he will enforce his lien against the property or file his claim with the assignee, but if he chooses the latter remedy he cannot thereafter foreclose his mortgage and is deemed to have waived his right to do so. *Garner v. Fry*, 104–515, 73 N. W. 1079.

Sale by an assignee under assignment for the benefit of creditors of goods which are subject to chattel mortgage does not defeat the lien of the mortgagee. *In re Windhorst*, 107–58, 77 N. W. 513.

SEC. 3077. **Claims contested.**

Where the assignee seeks to enforce a claim belonging to the insolvent estate the debtor may set off any claim he has against the estate. *Little v. Sturgis*, 127–298, 103 N. W. 205.

A creditor who has filed his claim and received a dividend thereon may afterwards proceed to enforce payment of the balance against the debtor by judgment or other lawful means. *Ibid.*

SEC. 3078. **Priority of taxes.**

The assignee for the benefit of creditors cannot complain of a tax regularly levied on the insolvent's property on the ground that the insolvent failed to claim an offset for indebtedness. *Carpenter v. Jones County*, 130–494, 107 N. W. 435.

SEC. 3080. **Settlement.**

Where an assignee does not include in his report a considerable amount of money received from the sale of goods under the assignment, and there is a discrepancy between the inventory and the property accounted for, he should not be discharged until such discrepancy in his account is adjusted. A creditor entitled to share in the distribution of the proceeds of the estate may file exceptions to the assignee's report and be heard thereon. *In re Assignment of Mansfield*, 113–104, 84 N. W. 967.

The mere failure of the assignee to keep a complete and satisfactory system of accounts does not necessarily debar him from being allowed a reasonable compensation for his services. *Merrit v. Torrance*, 129–310, 105 N. W. 585.

The assignee for the benefit of creditors is an officer of the court and may apply thereto for any order which should be made in the administration of his trust. *Cuddy v. Becker*, 146–250, 124 N. W. 1071.

If the court finds that the property is not sufficient in value to satisfy a previous mortgage it may order such property turned over to the mortgagee. *Ibid.*

The assignee, though designated by the assignor, acts under the supervision of the court, and the property, upon the due execution of the assignment, passes into the custody of the court. *Mahaska County State Bank v. Brown*, 141 N. W. 459.

SEC. 3084. Sale of property.

The order of sale should be entered of record, but a deed executed by the assignee without notice or order of court is not absolutely void, but will at least pass the naked legal title. *Bristol Sav. Bank v. Judd*, 116–26, 89 N. W. 93.

The assignee has the same rights and remedies relating to the estate as were possessed by the assignor, and may maintain action on an attachment bond given in favor of the assignor, either by original suit or by intervention in an action already brought against the assignor. *Ringen Stove Co. v. Bowers*, 109–175, 80 N. W. 318.

CHAPTER 8.

OF MECHANICS' LIENS.

SECTION 3089. Who may have lien.

Under contract with owner: Material furnished for improvements on land under a contract with one who is not the owner thereof and a bare licensee, does not entitle the person furnishing the material under such contract to a lien on the land nor upon the improvements, which became the property of the owner of the land when made. *Hoag v. Hay*, 103–291, 72 N. W. 525.

Where a party is led to believe that one has a title or interest to which a mechanic's lien will attach, and he has no such title, but obtains it while the contract is being performed, the lien attaches thereto. *Floete v. Brown*, 104–154, 73 N. W. 483.

An owner of a limited estate erecting buildings on the land in pursuance of his interest therein has such an interest that a mechanic's lien may attach thereto. *Smith v. St. Paul F. & M. Ins. Co.*, 106–225, 76 N. W. 676.

Where premises were sold with an agreement on the part of the grantor to make improvements thereon which were subsequently made under a contract with him, held that the person making such improvements had not a mechanic's lien on the premises as against the grantee. *Des Moines Sav. Bank v. Goode*, 106–568, 76 N. W. 825.

An equitable title to real property held by contract for a deed is a title to which a mechanic's lien will attach. *Sheppard v. Messenger*, 107–717, 77 N. W. 515.

The statutory definition of the term "owner" (see code § 3096) extends it so as to include persons who would not ordinarily be held to come within its meaning. The term includes a vendee who acts as agent of the vendor, in a certain sense, in putting improvements on the premises. *Janes v. Osborne*, 108–409, 79 N. W. 143.

A property owner who contracts with the builder to furnish labor and material at reasonable prices for making certain improvements constitutes the builder his agent and authorizes him to contract for labor and material for such owner. *Mineah v. Stotts*, 130–530, 107 N. W. 425.

An essential predicate for a lien is a contract with the owner or his agent under which the materials or machinery are to be furnished. *Webster City Steel Rad. Co. v. Chamberlin*, 137–717, 115 N. W. 504.

A tenant in common cannot impose a lien on the interest of his coöwner. *Cooper v. Brown*, 143–482, 122 N. W. 144.

If the plaintiff relies upon an express contract for the making of the improvements, he must show substantial compliance therewith; if he seeks to recover upon a *quantum meruit*, he can only recover for benefits conferred. *Keys v. Garben*, 149–394, 128 N. W. 337.

Improvements on wife's land: Where a wife knows that improvements are being placed on her property under a contract with her husband, but protests against such improvements, her property is not subject to lien therefor. *James v. Dalbey*, 107–463, 78 N. W. 51.

For what improvements or materials: Where a lien is claimed under a contract involving matters for which a lien is not allowed, and it is not possible to determine under the contract what amount is due for matters for which a lien may be had, no lien whatever can be established. *Peatman v. Centerville Light, H. & P. Co.*, 105–1, 74 N. W. 689.

A well, designed, sunk and completed for permanent use on the premises, is an improvement for which a mechanic's lien may be had. *Hoppes v. Baie*, 105–648, 75 N. W. 495.

Lumber furnished, not merely for the purposes of replacing worn out parts of a building, but for the improvement of the building, will furnish the basis for a mechanic's lien. *National L. Ins. Co. v. Ayres*, 111–200, 82 N. W. 607.

It is the furnishing of material for a building which entitles a party to a lien and its actual use in the construction

thereof need not be shown. *Frudden Lumber Co. v. Kinnan*, 117–93, 90 N. W. 515.

It seems that by agreement charges for drayage may be a proper item in the account on which a lien is asked. *Page v. Grant*, 127–249, 103 N. W. 124.

Material furnished to supply the loss of other material which has been incorporated into the building and before the building has been accepted by the owner is properly included in the statement for a lien. *Nancolas v. Hitaffer*, 136–341, 112 N. W. 382.

Subcontractor: The subcontractor must have furnished material for the particular building in order to entitle him to a lien thereon, but it is not necessary that the material shall have been actually used in the building. *Hobson v. Townsend*, 126–453, 102 N. W. 413.

A materialman does not have the right to a mechanic's lien for material and appliances furnished the contractor to enable him to carry on his work but not actually used in the completion of the improvement. *Empire State Surety Co. v. Des Moines*, 152–531, 131 N. W. 870, 132 N. W. 837.

SEC. 3090. Extent of lien—leasehold interest.

Consent of the landlord that the tenant shall erect a building on the leased premises does not subject the landlord to the lien for material furnished. *Oregon Lumber Co. v. Beckleen*, 130–42, 106 N. W. 260.

SEC. 3092. Filing statement.

What statement sufficient: Where materials are furnished from time to time under separate and distinct contracts, the charges therefor cannot be treated as items of a continuous open running account and as furnished under an entire contract. *Hoag v. Hay*, 103–291, 72 N. W. 525.

An unintentional mistake in the statement which has caused no injury to anyone will not defeat a mechanic's lien. *St. Croix Lumber Co. v. Davis*, 105–27, 74 N. W. 756.

The fact that the statement as filed is for a greater sum than due will not defeat the right to a lien where such discrepancy is the result of an honest mistake which is not prejudicial. *Simonson Bros. Mfg. Co. v. Citizens' State Bank*, 105–264, 74 N. W. 905.

In the absence of any showing of bad faith it should not be held that the matter included in the statement of one or more items for which no lien can be had operates to invalidate an otherwise enforceable lien. *Palmer v. McGinness*, 127–118, 102 N. W. 802.

The fact that items are included in the statement for which a lien cannot properly be claimed will not defeat the right to a lien unless it be shown that the claimant was knowingly attempting by false charges to subject the property to an improper burden. *Nancolas v. Hitaffer*, 136–341, 112 N. W. 382.

Where the statement shows the essential facts, the lien will not be defeated by want of technical accuracy as to the time when the labor was performed or the material furnished. *Johnson v. Otto*, 105–605, 75 N. W. 492.

Where the statement for a mechanic's lien shows that a lien is claimed and is sufficiently definite as to the items for which the claim is made, it will not be defeated by indefiniteness as to the dates of items of materials and labor furnished and performed. *Eggert v. Snoke*, 122–582, 98 N. W. 372.

If the statement as a whole is just and true, the fact that the whole or part of the bill contracted for is furnished at an agreed price for a lot of items and it so shows instead of giving the price of each one separately, will not defeat the lien. *Queal v. Stradley*, 117–748, 90 N. W. 588.

As against the owner the filing of an insufficient statement or the failure to file any statement will not defeat the lien. *Hoppes v. Baie*, 105–648, 75 N. W. 495; *Ewing v. Stockwell*, 106–26, 75 N. W. 657.

The omission from the statement of credits to which the owner is entitled, if unintentional and without any purpose to defraud, will not defeat the lien. *Ewing v. Stockwell*, 106–26, 75 N. W. 657.

An honest mistake in making up the account will not deprive the claimant of the lien. *Green Bay Lumber Co. v. Thomas*, 106–420, 76 N. W. 749.

Delay of the subcontractor to file statement of his lien cannot affect his right to priority over the lien of another subcontractor whose statement is not filed and notice thereof given until after the filing of the statement of the first subcontractor. *Lindsay & Phelps Co. v. Zoeckler*, 128–558, 104 N. W. 802.

The fact that the contractor gives an order to one subcontractor on the owner for the amount of his bill does not operate as an equitable assignment of the contractor's claim which is to be treated as a payment in determining the amount in the hand of the owner when the statement of another subcontractor is filed. *Ibid.*

Material furnished for necessary repairs while the building is still in the process of construction and not accepted by the owner is proper to be included in the statement of the lien and in determining the date of the last item for the purpose of ascertaining whether the statement is

filed within the statutory period. *Nancolas v. Hitaffer*, 136–341, 112 N. W. 382.

The affidavit for a mechanic's lien, setting forth the date of the contract for the material and labor and of furnishing the same, is admissible in evidence in an action to foreclose the lien and is to be considered in determining the priority of the lien over a conveyance of the property. *Joyce Co. v. Carroll Light, H. & P. Co.*, 153–372, 133 N. W. 785.

A statement by a subcontractor or a materialman is not conclusive as against him and parol evidence is admissible to show the actual facts as to the dates on which work was performed or material furnished. *Empire State Surety Co. v. Des Moines*, 152–531, 131 N. W. 870, 132 N. W. 837.

Application of payments: Change in the application of payments will not be permitted to be made between the owner and the contractor when the effect will be to prejudice the interest of the subcontractor. *Green Bay Lumber Co. v. Thomas*, 106–420, 76 N. W. 749.

Verification: A statement not verified does not impart notice of a claim; and held that a verification signed in a firm name was not sufficient. *McGillivary v. Case*, 107–17, 77 N. W. 483.

The verification of a statement before the deputy clerk is sufficient without the official seal of the clerk being attached where it is filed in the office of the clerk. *Wheelock v. Hull*, 124–752, 100 N. W. 863.

Failure to file: The filing of the statement is not essential to the creation of the mechanic's lien, but only to preserve it against purchasers or incumbrancers in good faith without notice, whose rights accrue after the expiration of the time fixed for filing the statement. *Peatman v. Centerville Light, H. & P. Co.*, 105–1, 74 N. W. 689.

One claiming under a mortgage executed after expiration of the time for filing statement is not chargeable with notice of the claim. *McGillivary v. Case*, 107–17, 77 N. W. 483.

Where the improvements were such that any person examining the building within the ninety days allowed for filing a lien would have been aware of them, held that they furnished sufficient foundation for a mechanic's lien. *National L. Ins. Co. v. Ayres*, 111–200, 82 N. W. 607.

Where lumber was furnished on two distinct occasions for successive improvements, held that the materialman could not assert a claim for the first lot of lumber furnished under his lien for the second, which was furnished more than ninety days after the first improvement. *Ibid.*

Until something is done looking towards the establishment of the lien, an assignment of the debt does not operate as a transfer of such lien. *Kent v. Muscatine, N. & S. R. Co.*, 115–383, 88 N. W. 935.

A conveyance of the premises expressly subject to any claim for a mechanic's lien does not defeat the right to such lien. *Eggert v. Snoke*, 122–582, 98 N. W. 372.

SEC. 3093. **Subcontractor's lien—liability of owner to original contractor—discharge of lien.** That section three thousand and ninety-three of the code be and the same is hereby repealed and the following enacted in lieu thereof:

"No owner of any building or structure upon which a subcontractor's mechanics' lien may be filed under the provisions of section three thousand and ninety-two of the code shall be liable to an action by the original contractor for compensation for work done or materials, machinery or fixtures furnished for any building, structure or other improvement upon land until the expiration of thirty days from the completion of said building, structure or improvement, unless the original contractor shall furnish to the owner of said building, structure or improvement receipts and waivers of claims for mechanics' liens, signed by all persons who performed any labor or furnished any material, machinery or fixtures for said building, structure or improvement, provided there be such persons, or unless the original contractor shall furnish to the owner a good and sufficient bond to be approved by said owner, conditioned that said owner shall be held harmless from any loss which he may sustain by reason of the filing of subcontractor's mechanics' liens. Should the owner pay to the original contractor any part of the contract price of such building, structure or improvement before the lapse of the thirty days allowed by law for the filing of subcontractor's mechanics' liens, he will still be liable to said subcontractor for the full value of any material, machinery or fixtures furnished, or labor performed upon said building, structure or im-

provement, provided said subcontractor file his mechanics' lien within the time provided by law for the filing of subcontractor's mechanics' liens. The lien of a subcontractor may be vacated and discharged at any time by the owner, principal contractor or intermediate subcontractor filing with the clerk of the district court of the county in which the property is located a sufficient bond in twice the amount of the sum for which the claim for the lien is filed, with surety or sureties, to be approved by the clerk of the district court in which said lien is filed, conditioned for the payment of any sum for which the claimant may obtain judgment upon the demand for which such statement or account has been filed. Nothing in this act shall be construed to require the owner to pay a greater amount or at an earlier date than is provided in his contract with the principal contractor, unless said owner pays a part or all of the contract price to the original contractor before the expiration of the thirty days allowed by law for the filing of subcontractor's mechanics' lien." [35 G. A., ch. 267, § 1.] [16 G. A., ch. 100, § 7; 15 G. A., ch. 49; C. '73, § 2131.]

Liability of owner: An owner who agrees with the contractor to pay subcontractors and materialmen becomes personally liable to them for material used in the building. *Shorthill Co. v. Bartlett*, 131–259, 108 N. W. 308.

After the contractor abandons the work and compels the owner to complete the job the latter may pay for the work done out of any balance remaining due to the contractor, and the contractor cannot by giving an order on the owner create a claim against the owner upon the balance remaining out of the contract price which the owner is entitled to use in completing the contract. *Page v. Grant*, 127–249, 103 N. W. 124.

Where the owner makes payments to the contractor without regard to the terms of his contract and without withholding amounts which he is authorized to withhold by the terms of the contract, he renders himself liable to persons who furnish materials for the carrying out of the contract. *Queal v. Stradley*, 117–748, 90 N. W. 588.

Actual notice to owner: Where the owner has knowledge of the claims of a subcontractor, he should hold back from the principal contractor enough to pay the subcontractor's claim. *Simonson Bros. Mfg. Co. v. Citizens' State Bank*, 105–264, 74 N. W. 905.

The absconding of the principal contractor will not prevent the subcontractor from enforcing his claims against the property. A personal judgment against the principal contractor is not essential to the enforcement of such lien. The proceedings may properly be *in rem* where no personal judgment is sought. *Ibid.*

Where the owner knew that the subcontractor was furnishing the material and knew that his bill therefor had not been paid, held that the owner could not by settlement with the contractor cut off the rights of the subcontractor, especially where the payment was made in disregard of the terms of the contract. *Green Bay Lumber Co. v. Thomas*, 106–154, 76 N. W. 651.

But a subcontractor is not entitled to enforce his lien so far as payment has been made by the owner upon the strength of his statements and agreements. Under such circumstances the subcontractor is estopped from insisting upon repayment of the amount so paid. *Ibid.*

Where a subcontractor perfects his lien within the time required by law, and the owner has knowledge that the subcontractor is furnishing material for which he has not been paid, the owner is not justified in paying other subcontractors until the time has expired for the filing of liens. *Green Bay Lumber Co. v. Adams*, 107–672, 78 N. W. 699.

Payments made to the contractor in accordance with the terms of the contract will not constitute a defense against the claims of a subcontractor if the owner was aware of the existence of the subcontractor's claims at the time of making such payment. *Chicago Lumber & Coal Co. v. Garmer*, 132–282, 109 N. W. 780.

Whether knowledge of the architect will constitute notice to the owner of the existence of subcontractor's claims depends upon the terms of the contract. *Ibid.*

The owner knowing that a subcontractor or materialman is furnishing material and labor for the building which is necessary for its completion is bound to withhold payments from the contractors until the claims for material and labor are determined. But if the subcontractor fails to preserve the right to a lien and accepts an order on the owner, he abandons his claim against the property so far as it is necessary to satisfy the claims of other lien holders. *Wheelock v. Hull*, 124–752, 100 N. W. 863.

The owner is not justified in paying the principal contractor even in strict accordance with the terms of the contract, if he has knowledge that subcontractors are

furnishing material for the building which has not been paid for. *Page v. Grant*, 127–249, 103 N. W. 124.

The owner cannot with knowledge that material or labor has been furnished by a subcontractor make settlement with the contractor and pay out reserve funds held in his hands to meet other claims for which no lien has been filed. *Nancolas v. Hitaffer*, 136–341, 112 N. W. 382.

The owner cannot, by using such reserve funds in completing the building after it has collapsed defeat the claims of a subcontractor for material and labor furnished before such collapse. *Ibid.*

If the owner after due notice still holds in his hands money enough out of the contract price to complete the building and pay the claim of the subcontractor he cannot disregard such claim and pay to the contractor the amount due him under his contract. *Frudden Lumber Co. v. Kinnan*, 117–93, 90 N. W. 515.

Where the owner is fully informed of the nature of the subcontractor's claim, by the bringing of suit, and is still indebted to the principal contractor beyond the amount of the subcontractor's claim, the failure of the subcontractor to file a claim is immaterial. *Johnson v. Des Moines, I. F. & N. R. Co.*, 129–281, 105 N. W. 509.

Owners estopped: Where the owner had stated to the subcontractor before the furnishing of material that nothing was to be paid to the contractor on the building until its completion, held that the owner was thereby estopped, in an action by the subcontractor to enforce his lien, to say that the contract was otherwise than as he had stated as to payments. *Rath v. Orr*, 119–511, 93 N. W. 489.

Service of notice: An objection that the notice is not such as contemplated by the statute does not raise a question as to the service of such notice. *Page v. Grant*, 127–249, 103 N. W. 124.

Priority: It is not necessary for the subcontractor to file a statement of his lien in order to preserve his claim as against an order given by the contractor to another subcontractor upon the owner. *Lindsay & Phelps Co. v. Zoeckler*, 128–558, 104 N. W. 802.

For what material: The burden is upon the subcontractor before he can avail himself of the benefits of the provisions in his favor to show that the labor or material furnished by him was actually for the improvement against which the lien is claimed. And if as to that matter he is deceived by the contractor without the fault of the owner, he is not entitled to a lien as against the owner. *Hobson v. Townsend*, 126–453, 102 N. W. 413.

A subcontractor has a lien for material furnished for a building although as a matter of fact it is not used in the construction of such building but for another structure. *Page v. Grant*, 127–249, 103 N. W. 124.

The subcontractor's lien attaches to money due the contractor for extras, although the amount provided for under the contract as originally made has been fully paid. *Shope v. Mitchell*, 116–636, 88 N. W. 813.

The subcontractor's lien may properly cover material supplied to the contractor to replace other material lost or destroyed during the construction of the building. *Nancolas v. Hitaffer*, 136–341, 112 N. W. 382.

Waiver of lien: The giving to a subcontractor of an order for the amount of his claim, which is received by him, and the acceptance of such order by the drawee, amounting to only a recognition of a statement of the amount due, held not to deprive a subcontractor of his right to a lien. *Beach v. Wakefield*, 107–567, 76 N. W. 688, 78 N. W. 197.

Terms of contract: The subcontractor is bound to know the terms of the contract between the principal contractor and the owner, whether they are written or oral, and if the owner complies with the terms of such contract in good faith, and without knowledge or notice, which would require him to make inquiries as to the claims of the subcontractor, he will not be required to make a second payment. *Iowa Stone Co. v. Crissman*, 112–122, 83 N. W. 794.

SEC. 3094. Subcontractor's claim after thirty days.

A subcontractor failing to file his claim for a lien until after the expiration of thirty days is entitled only to such lien as to the amount unpaid on the contract when his statement is filed, without regard to the knowledge on the part of the owner before paying the contractor that material and labor had been furnished by the subcontractor. *Empire Portland Cement Co. v. Payne*, 128–730, 105 N. W. 331.

A subcontractor's claim, though not filed within the time specified by statute, takes priority over the claims of another subcontractor subsequently filed. *Lindsay & Phelps Co. v. Zoeckler*, 128–558, 104 N. W. 802.

SEC. 3095. Priority.

Lien covers entire property: The right to a mechanic's lien for work done upon a railroad dates from the beginning of the improvement, and is against the whole road. *Beach v. Wakefield*, 107–567, 76 N. W. 688, 78 N. W. 197.

A railroad depot may be an integral part of the construction of the road. *Ibid.*

Leasehold interest: A lessee taking his lease after the time when a statement should be filed and when no statement is already filed, and without actual notice of the mechanic's lien, has priority thereto, and the assignee of such lessee is entitled to the same priority, even though at the time of taking the assignment he has notice of the lien. *Floete v. Brown*, 104–154, 73 N. W. 483.

Judgment under a mechanic's lien will take priority over a landlord's lien for rent, but under particular circumstances, held that by reason of a contract by which the lessor was to advance the money to pay off improvements the mechanic's lien was not effectual as against him. *Keys v. Whitlock Mfg. Co.*, 105–742, 75 N. W. 658.

Other subcontractors: The priority as between subcontractors is not affected by the fact that the contractor has given to one of them an order on the owner for the amount of his claim. *Lindsay & Phelps Co. v. Zoeckler*, 128–558, 104 N. W. 802.

Mortgages and other liens: A lien takes priority over any claim under an earlier mortgage which is satisfied on the record when the lien is filed. *Sioux City Electrical Supply Co. v. Sioux City, etc., Electric R. Co.*, 106–573, 76 N. W. 838.

Where, by agreement between vendor and vendee, improvements were placed on the premises, held that a mechanic's lien for such improvements took priority over the vendor's lien for the purchase price. *Janes v. Osborne*, 108–409, 79 N. W. 143.

A mechanic's lien holder does not have priority over the claims of laborers under code § 4019, even though the mechanic's lien antedates the laborers' claims. *Haw v. Burch*, 110–234, 81 N. W. 460.

The provision as to priority of the subcontractor over a garnishment of the owner has no application to a materialman's claim against a public corporation under code § 3102. *Swearingen Lumber Co. v. Washington School Township*, 125–283, 99 N. W. 730.

Lien upon improvements: Under prior statutes held that the holder of a mechanic's lien for material furnished for an independent building took priority as to such building over a prior mortgage on the premises on which the building was erected, provided that it should be found by the court that the building could be removed without material injury to the security of an earlier lien holder; but where no such finding was made the land must be sold and the proceeds applied first in payment of prior incumbrances. *Tower v. Moore*, 104–345, 73 N. W. 823.

Where the building or other improvement becomes a part of the real estate so that it may not be separately sold and removed, prior mortgagees or lien holders are entitled to priority over subsequent lien holders for improvements or independent structures to the extent of such prior liens. *Leach v. Minick*, 106–437, 76 N. W. 751.

SEC. 3096. Definition of "owner."

The statute extends the definition of the term "owner" so as to include persons whose relation to the property is such that they would not ordinarily be held to come within the meaning of the term. *Janes v. Osborne*, 108–409, 79 N. W. 143. And see notes to code § 3089 in this supplement.

The term "owner" within the language of the mechanics' liens law is applicable to one having less than an absolute and unqualified title to the property. *Getchell & Martin Lumber & Mfg. Co. v. Peterson*, 124–599, 100 N. W. 550.

An owner within the meaning of the statute is any person for whose benefit any building, erection or other improvement is made. *Webster City Steel Rad. Co. v. Chamberlin*, 137–717, 115 N. W. 504.

SEC. 3098. Action to enforce lien.

It is not necessary to introduce any proof of the making and filing of the statement for lien of a subcontractor as against the contractor where the latter has admitted the filing of such statement and set out a copy thereof as a part of his pleading. The statement itself, however, is the best evidence. *Wheelock v. Hull*, 124–752, 100 N. W. 863.

In an action to enforce the lien of a subcontractor for an unliquidated demand, the principal contractor is a necessary party. *Ibid.*

The provision that action on a bond given in lieu of a mechanic's lien may be brought in the county where the property is situated is applicable to an action by a subcontractor against a public corporation on a bond given by the contractor to hold the public corporation harmless against claims of subcontractors. *Thompson v. Stephens*, 131–51, 107 N. W. 1095.

SEC. 3099. Demand for bringing suit—assignment.

A mechanic's lien may be assigned prior to the filing of the statement. *Peatman v. Centerville Light, H. & P. Co.*, 105–1, 74 N. W. 689.

But until something is done looking to the establishment of the lien, an assignment of the debt does not transfer any lien. *Kent v. Muscatine, N. & S. R. Co.*, 115–383, 88 N. W. 935.

Where one furnishes money to be applied in payment of the purchase price of the property by taking up mechanic's liens of record thereon, under an express agreement that said liens are not to be canceled by the holders thereof, but to be assigned and held for the benefit of the purchaser, he is entitled to subrogation to the claims of the mechanic's lien holders. *National L. Ins. Co. v. Ayres*, 111–200, 82 N. W. 607.

SEC. 3102. Public buildings or bridges—claim of subcontractor.

Where a school district in making a contract for the erection of a schoolhouse reserved the right to withhold payments from the principal contractor so long as the subcontractors were unpaid, held that as against the assignees of the contractor the district might maintain an action for distribution of the fund due the contractor among the subcontractors in proportion to their claims. *Independent Sch. Dist. v. Mardis*, 106–295, 76 N. W. 794.

Under such contract held that the claims which might be satisfied out of the fund were not limited to those which might be established under this section. (20 G. A., ch. 179.) *Ibid.*

A claim for money borrowed from a contractor and used in payment for labor and material is not a claim to be protected under such contract. *Ibid.*

In the case of a county building, the public officer to whom the claim should be submitted is the auditor and not the chairman of the building committee of the board of supervisors. *Green Bay Lumber Co. v. Thomas*, 106–420, 76 N. W. 749.

Where the subcontractor filed his itemized and sworn statement with the treasurer of a school district and served written notice of such filing upon the president and secretary of such district, held that he had taken the necessary steps to perfect his claim, the treasurer being the officer through whom payment was to be made. *Wackerbarth & Blamer Co. v. Independent School Dist.*, 157– —, 138 N. W. 470.

The act of the principal contractor in making a general assignment for the benefit of creditors does not defeat the right of the subcontractor to avail himself of his statutory privilege. *Ibid.*

When the subcontractor avails himself of the provisions of the statute and complies with its formal requirements, a personal liability is created against the public corporation to the extent of the money then in its hands, preference being given to subcontractors in the order of their filing. *Ibid.*

Under the evidence in a particular case, held that a subcontractor might have relief under this statute, although as to prior work he was given security by the assignment of certificates which he had surrendered. *Iowa Brick Co. v. Des Moines*, 111–272, 82 N. W. 922.

The statutory provision in behalf of subcontractors furnishing material or labor for the construction of a public building is to be strictly construed, and the filing of an itemized statement as specified by the statute is essential to the establishment of such claim against a public corporation. *Penn v. Northern Building Co.*, 140 Fed. 973.

The statute is intended to provide for one who furnishes labor or materials to a contractor upon a public work a remedy having some analogy to a mechanic's lien but it does not create a lien. It only provides that by taking the proper steps within due time the claimant may be substituted for the contractor and recover from the municipal corporation to the extent of the contractor's just demand, if there be found in the hands of the corporation any moneys due him. If the contractor has already been paid all that he is entitled to receive under his contract, the person furnishing labor or materials to him for the improvement has no redress against the corporation. *Modern Steel Structural Co. v. Van Buren County*, 126–606, 102 N. W. 536.

The subcontractor who intends to assert a claim under the statute must take notice of the terms and conditions of the principal contract. If the materials furnished are not such as called for by the contract and the contractor could not recover on account thereof, the subcontractor is in no better situation. *Ibid.*

If on account of fraud the contractor is without lawful claim against the corporation the contract which has been violated by the contractor cannot be effectual for the benefit of the subcontractor. *Ibid.*

A subcontractor furnishing material for a public building acquires no lien on the building or on the money which becomes due from the public corporation to the contractor. But such subcontractor having served notice of his claim upon the corporation may sue on the contractor's bond given to relieve the corporation from liability as to the distribution of the money due the contractor, and such action may be maintained in the county where the contract was to be performed, although the contractor and the sureties on his bond are residents of another county. *Thompson v. Stephens*, 131–51, 107 N. W. 1095.

No liens or claims can be asserted against a school district for material and labor furnished by a subcontractor in the construction of a schoolhouse and a bond in which the contractor obligates himself to deliver such schoolhouse free from liens or claims of any kind and to discharge any liens or claims against the building or which may be claimed against the district does not render the bondsmen liable

for subcontractors' claims. *Green Bay Lumber Co. v. Independent School District*, 121–663, 97 N. W. 72.

This statute does not create a lien in favor of a laborer or materialman upon the funds due to the principal contractor nor is any lien created on the building or improvement itself. *Whitehouse v. American Surety Co.*, 117–328, 90 N. W. 727.

Therefore a laborer or materialman who is protected by a bond given by the contractor to the public corporation to secure it against the claims of such persons does not release the surety on such bond by failing to pursue his remedy against the fund due the contractor in the hands of the corporation. *Ibid; Read v. American Surety Co.*, 117–10, 90 N. W. 590.

This statute does not create any lien as against a public corporation constructing a work of public improvement in favor of a subcontractor or materialman. It merely provides a method by which the subcontractor or materialman may acquire a right to be paid by the public corporation out of such portion of the contract price as has not been paid to the contractor in accordance with the terms of the contract. The public corporation is under no obligation to protect the subcontractor or materialman until such a statement as is required by statute is filed within the time specified. *Empire State Surety Co. v. Des Moines*, 152–531, 131 N. W. 870, 132 N. W. 837.

This statute does not provide for a lien and no duty or obligation arises on the public corporation to protect the interests of a subcontractor unless an itemized sworn statement has been filed as required. *Independent School Dist. v. Hall*, 140 N. W. 855.

By failing to avail himself of the statutory provisions a subcontractor or materialman waives all rights which he would otherwise have to the fund. *Ibid.*

A contractor's bond given to secure a public corporation against claims by materialmen and laborers inures to the benefit of those who furnish material and labor in carrying out such contract. *Hipwell v. National Surety Co.*, 130–656, 105 N. W. 318.

Subcontractors are not bound to perfect their claims against funds in the hands of the officers of the public corporation, but may rely directly on the security afforded by the bond. *Ibid.*

An assignee of the contract takes subject to the obligation of the contractor's bond to discharge the claim for such material and labor. *Ibid.*

Where a surety company becomes bound by its contract to pay claims of subcontractors and materialmen, no action of the municipal corporation taken after the accruing of such claims will release the surety from liability. *Empire State Surety Co. v. Des Moines*, 152–531, 131 N. W. 870, 132 N. W. 837.

Garnishment of a public corporation for funds due the contractor which is effected prior to service of a notice of a claim for material furnished, is a good defense to recovery against the corporation on such claim. The claim of the materialman against the corporation is personal and is not a lien on the property. *Swearingen Lumber Co. v. Washington School Township*, 125–283, 99 N. W. 730.

The municipal corporation, against which a claim is made for labor performed or material furnished for the contractor, is entitled to protection so far as it has relied upon the provisions of the contract made for its benefit and acted in accordance therewith. Until a claim is filed the corporation owes no duty to the subcontractors and the provisions of the mechanics' lien law for the benefit of such persons are not applicable. *Green Bay Lumber Co. v. Independent School Dist.*, 125–227, 101 N. W. 84.

If the corporation has in good faith paid out money on certificates of work done, the correctness of such certificates can only be impeached for fraud or mistake, and even in such case no liability of the corporation would attach in favor of the subcontractor unless it appears that the actual cost of the work was in fact less than the amount given in the certificate on which the corporation has acted. *Ibid.*

Under a provision in the contract that on abandonment of the work by the contractor the corporation may take possession of all materials on the ground and apply them to finishing the work, the corporation is not bound to pay the materialman for materials furnished by him to the contractor and which have thus been appropriated. *Ibid.*

In an action by a materialman to enforce a claim against a corporation to which the contractor is a party, the materialman is entitled to a judgment against the contractor for any indebtedness due. *Ibid.*

A materialman is not protected under this statute as to material furnished the contractor to enable him to carry on his work but not actually used in the completion of the improvement. *Empire State Surety Co. v. Des Moines*, 152–531, 131 N. W. 870, 132 N. W. 837.

SEC. 3103. Adjudication of claims.

The unsuccessful party in a trial such as is provided for under this statute is required to pay an attorney's fees for the purpose of indemnifying the public corporation for the expense it is compelled to incur to protect itself. But where the claimant by bringing suit has secured the payment of a portion of his claim and then voluntarily dismissed his action before trial, he is not liable for attorney's

fees. *Fisher v. Independent School Dist.*, 154–125, 134 N. W. 545.

This section provides a means by which any party interested may procure an adjudication of the rights of parties claiming, under the preceding section, the fund therein referred to. The bringing of such an action is not an admission of any right to or in the fund on the part of contractors or subcontractors. *Independent School Dist. v. Hall*, 140 N. W. 855.

SEC. 3104. Release of claim.

A bond given by the contractor to hold the public corporation harmless from claims of subcontractors may be sued on by a subcontractor entitled to a lien in the county in which the work is done, although the contractor and his sureties are residents of another county. *Thompson v. Stephens*, 131–51, 107 N. W. 1095.

SEC. 3105. Liens of miners.

The lien of a miner provided for by this section is not limited to property of the operator of the mine which might be removed, or to improvements which he has made, but extends to the premises on which the mine is situated, and which have been leased for mining purposes, to the extent at least that the value of the property has been increased by the improvements made thereon by the mining lessee. *Mitchell v. Burwell*, 110–10, 81 N. W. 193.

The lessor cannot deduct from the value of such improvements, as a claim prior to that of the laborer, the amount due to such lessor for royalties. *Ibid.*

A laborer's lien does not attach to the property of the owner in favor of the employes of an operating lessee of the mine. *Caster v. McClellan*, 132–502, 109 N. W. 1020.

CHAPTER 9.

OF LIMITED PARTNERSHIP.

SECTION 3106. Authorized.

A contract by which a person contributed a specified sum to the common stock of a business, without any right to share in the profits, nor any responsibility for the losses, but with an agreement to have a per cent. of the sum invested payable annually and in any event, held not to constitute such a person either a general or a limited partner. *Richardson v. Carlton*, 109–515, 80 N. W. 532.

SEC. 3109. **Publication.** Upon filing the certificate and affidavit, a notice containing all the facts set out in the certificate shall be published, once each week, for[1] six weeks in two newspapers in the senatorial district in which the business is to be conducted, to be designated by the clerk of the court of the county in which such certificate is filed, proof of which publication may be made by the publishers in the same manner as original notices in ordinary actions, and filed with said clerk, which, when thus made, shall be presumptive evidence of the facts therein contained. If the required publication is not made, the partnership shall be general. [30 G. A., ch. 2, § 9; 19 G. A., ch. 8; C. '73, §§ 2155–6; R. §§ 1882–3.]

[1]The amendment by 30 G. A., ch. 2, § 9, provided for the insertion of the words "once each week for", after the word "published"; but the word "for" already appeared in the code section at this place. EDITOR.]

CHAPTER 10.

OF WAREHOUSEMEN, CARRIERS, HOTEL KEEPERS, LIVERY STABLE KEEPERS, AND HERDERS.

SECTION 3127. Damages.

This section refers to a wilful departure from duty by the warehouseman, and not to a mere failure to observe legal requirements in attempting to enforce his lien. *Jeffries v. Snyder*, 110–359, 81 N. W. 678.

SEC. 3129. **Certificate as evidence—lien—repeal.** Section thirty-one hundred twenty-nine of the code is hereby repealed. [32 G. A., ch. 160, § 60.]

SEC. 3130. **Unclaimed property—lien for charges.**

The warehouseman is not obliged to take any steps towards selling the goods, but if he does it is imperative that he observe the statutory requirements. The procedure provided for is not a privilege, but a duty of the warehouseman in case he undertakes to sell stored property. *Jeffries v. Snyder*, 110–359, 81 N. W. 678.

SEC. 3131. **Sale—notice.** If the property remains unclaimed and the charges unpaid, the person in possession, if the probable value does not exceed one hundred dollars, shall advertise the same for fourteen days, by posting notices in five of the most public places in the city or locality where said property is held, giving such description as will indicate what is to be sold; if the goods exceed the probable value of one hundred dollars, the length of notice shall be four weeks, and there shall be a publication thereof, once each week, for the same length of time in some newspaper of general circulation in the locality where the property is held, if there be one, and, if not, then in the next nearest newspaper published in that neighborhood, at the end of which period, if the property is still unclaimed or charges unpaid, it may be sold by him at public auction, between the hours of ten o'clock a. m. and four o'clock p. m., for the highest price the same will bring, which sale may be continued from day to day, by public announcement to that effect at the time of the adjournment, until all the property is sold; and from the proceeds thereof all charges, costs and expenses of the sale shall be paid, which sale shall be conducted after the manner of sheriff's sales, and like costs taxed for like services. [30 G. A., ch. 2, § 10; C. '73, § 2179.]

It is for the jury to say whether the value of the goods exceeds one hundred dollars, and if so, whether the warehouseman knew this fact or in the exercise of reasonable care should have known it, and whether the notices required were posted according to law and actual notice was given to the owner. *Jeffries v. Snyder*, 110–359, 81 N. W. 678.

SEC. 3136. **Cannot limit liability.**

As applicable under this section, see notes to code § 2074 in this supplement, relating to railroads.

SEC. 3137. **Liens of livery stable keepers, etc.**

The agistor's lien does not take priority over the lien of a prior recorded chattel mortgage, unless the mortgagee has consented to the agistment. *Beh v. Moore*, 124–564, 100 N. W. 502.

A livery man is not a common carrier and is not bound to let his horses to everyone who seeks to hire them. *Valentine v. Echling*, 155–138, 135 N. W. 621.

SEC. 3138. **Hotel and innkeepers—liability—lien—satisfaction by sale—proceeds—deposit of surplus.** Keepers of hotels, inns and eating houses and steamboat owners, who shall provide and keep therein a good and sufficient vault or safe for the deposit of money, jewels and other valuables, and shall provide a safe and commodious place for the baggage, clothing and other property belonging to their guests and patrons, and keep posted up in a conspicuous place in the office or other public room, and in the guests' apartments therein, printed notices, stating that such places for safe deposit are provided for the use and accommodation of the inmates thereof, shall not be liable for the loss of any money, jewels, valuables, baggage or other property not deposited with them, unless such loss shall occur through the fault or negligence of such landlord or keeper, or steamboat owner, his agent, servant or employe, but nothing herein con-

tained shall apply to such reasonable amount of money, nor to such jewels, baggage, valuables or other property as is usual, fit and proper for any such guests to have and retain in their apartments or about their persons. Hotel, inn, rooming house or eating house keepers shall have a lien upon, and may take and retain possession of, all baggage and other property belonging to or under the control of their guests or patrons, which may be in such hotel, inn, rooming house or eating house, for the value of their accommodations and keep, and for all money paid for or advanced to, and for such extras and other things as shall be furnished such guest or patron, and such property so retained shall not be exempt from attachment or execution to the amount of the reasonable charges of such hotel, inn, rooming house or eating house keeper, against such guest or patron, and the costs of enforcing the lien thereon. The innkeeper or hotel keeper shall retain such baggage and other property upon which he has a lien for a period of ninety days, at the expiration of which time, if such lien is not satisfied, he may sell such baggage and other property at public auction after giving ten days' notice of the time and place of sale in a newspaper of general circulation in the county where the inn or hotel is situated, and also by mailing a copy of such notice addressed to said guest or boarder at the place of residence registered by him in the register of such inn or hotel. After satisfying the lien and any costs that may accrue, any residue remaining shall, on demand within six months, be paid to such guest or boarder, and if not so demanded within six months from date of such sale, such residue shall be deposited by such innkeeper or hotel keeper with the treasurer of the county in which the inn or hotel is situated, together with a statement of the innkeeper's claim and the costs of enforcing same, a copy of the published notice, and the amounts received for the goods sold at said sale; said residue shall by said county treasurer be credited to the general revenue fund of said county, subject to a right of said guest or boarder, or his representative, to reclaim at any time within three years of the date of deposit with the said treasurer. [35 G. A., ch. 268, § 1; 33 G. A., ch. 195, § 1.] [28 G. A., ch. 120, §§ 1, 2; 18 G. A., ch. 181.]

This section gives to the innkeeper a lien, not only upon the property in fact belonging to the guest and brought by him to the hotel or inn, but likewise upon property placed therein which was under the guest's control. Therefore, held that the innkeeper's lien attached to sample goods carried by a traveling salesman, though the innkeeper had knowledge when receiving the salesman that the goods belonged to his employer. *Brown Shoe Co. v. Hunt*, 103–586, 72 N. W. 765.

CHAPTER 10-A.

OF WAREHOUSEMEN AND WAREHOUSE RECEIPTS.

SECTION **3138-a1. Who may issue receipts.** Warehouse receipts may be issued by any warehouseman. [32 G. A., ch. 160, § 1.]

SEC. **3138-a2. Form of receipts—essential terms.** Warehouse receipts need not be in any particular form, but every such receipt must embody within its written or printed terms—

(a) The location of the warehouse where the goods are stored;

(b) The date of issue of the receipt;

(c) The consecutive number of the receipt;

(d) A statement whether the goods received will be delivered to the bearer, to a specified person, or to a specified person or his order;

(e) The rate of storage charges;

(f) A description of the goods or of the packages containing them;

(g) The signature of the warehouseman, which may be made by his authorized agent;

(h) If the receipt is issued for goods of which the warehouseman is owner, either solely or jointly or in common with others, the fact of such ownership; and

(i) A statement of the amount of advances made and of liabilities incurred for which the warehouseman claims a lien. If the precise amount of such advances made or of such liabilities incurred is, at the time of the issue of the receipt, unknown to the warehouseman or to his agent who issues it, a statement of the fact that advances have been made or liabilities incurred and the purpose thereof is sufficient.

A warehouseman shall be liable to any person injured thereby, for all damages caused by the omission from a negotiable receipt of any of the terms herein required. [32 G. A., ch. 160, § 2.]

SEC. **3138-a3. What terms may be inserted.** A warehouseman may insert in a receipt, issued by him, any other terms and conditions, provided that such terms and conditions shall not—

(a) Be contrary to the provisions of this act;

(b) In any wise impair his obligation to exercise that degree of care in the safe-keeping of the goods entrusted to him which a reasonably careful man would exercise in regard to similar goods of his own. [32 G. A., ch. 160, § 3.]

SEC. **3138-a4. Nonnegotiable receipt defined.** A receipt in which it is stated that the goods received will be delivered to the depositor, or to any other specified person, is a nonnegotiable receipt. [32 G. A., ch. 160, § 4.]

SEC. **3138-a5. Negotiable receipt defined.** A receipt in which it is stated that the goods received will be delivered to the bearer, or to the order of any person named in such receipt, is a negotiable receipt. No provision shall be inserted in a negotiable receipt that it is nonnegotiable. Such provisions, if inserted, shall be void. [32 G. A., ch. 160, § 5.]

SEC. **3138-a6. Duplicate receipts must be so marked.** When more than one negotiable receipt is issued for the same goods, the word "duplicate" shall be plainly placed upon the face of every such receipt, except the one first issued. A warehouseman shall be liable for all damage caused by his failure so to do to anyone who purchased the subsequent receipt for value supposing it to be an original, even though the purchase be after the delivery of the goods by the warehouseman to the holder of the original receipt. [32 G. A., ch. 160, § 6.]

SEC. **3138-a7. Failure to mark "not negotiable."** A nonnegotiable receipt shall have plainly placed upon its face by the warehouseman issuing it "nonnegotiable," or "not negotiable." In case of the warehouseman's failure so to do, a holder of the receipt who purchased it for value supposing it to be negotiable, may, at his option, treat such receipt as imposing upon the warehouseman the same liabilities he would have incurred had the receipt been negotiable. This section shall not apply, however, to letters, memoranda, or written acknowledgments of an informal character. [32 G. A., ch. 160, § 7.]

SEC. **3138-a8. Obligation of warehouseman to deliver.** A warehouseman, in the absence of some lawful excuse provided by this act, is bound to deliver the goods upon a demand made either by the holder of a

receipt for the goods or by the depositor, if such demand is accompanied with—

(a) An offer to satisfy the warehouseman's lien;

(b) An offer to surrender the receipt if negotiable, with such indorsements as would be necessary for the negotiation of the receipt; and

(c) A readiness and willingness to sign, when the goods are delivered, an acknowledgment that they have been delivered, if such signature is requested by the warehouseman.

In case the warehouseman refuses or fails to deliver the goods in compliance with a demand by the holder or depositor so accompanied, the burden shall be upon the warehouseman to establish the existence of a lawful excuse for such refusal. [32 G. A., ch. 160, § 8.]

SEC. **3138-a9. Justification of warehouseman delivering.** A warehouseman is justified in delivering the goods, subject to the provisions of the three following sections, to one who is—

(a) The person lawfully entitled to the possession of the goods, or his agent;

(b) A person who is either himself entitled to delivery by the terms of a nonnegotiable receipt issued for the goods, or who has written authority from the person so entitled either indorsed upon the receipt or written upon another paper; or

(c) A person in possession of a negotiable receipt by the terms of which the goods are deliverable to him or order or to bearer, or which has been indorsed to him or in blank by the person to whom delivery was promised by the terms of the receipt or by his mediate or immediate indorsee. [32 G. A., ch. 160, § 9.]

SEC. **3138-a10. Warehouseman's liability for misdelivery.** Where a warehouseman delivers the goods to one who is not in fact lawfully entitled to the possession of them, the warehouseman shall be liable as for conversion to all having a right of property or possession in the goods if he delivered the goods otherwise than as authorized by subdivisions (b) and (c) of the preceding section and though he delivered the goods as authorized by said subdivisions he shall be so liable, if prior to such delivery he had either—

(a) Been requested, by or on behalf of the person lawfully entitled to a right of property or possession in the goods, not to make such delivery; or

(b) Had information that the delivery about to be made was to one not lawfully entitled to the possession of the goods. [32 G. A., ch. 160, § 10.]

SEC. **3138-a11. Negotiable receipt must be canceled when goods delivered.** Except as provided in section thirty-six, where a warehouseman delivers goods for which he had issued a negotiable receipt, the negotiation of which would transfer the right to the possession of the goods, and fails to take up and cancel the receipt, he shall be liable to anyone who purchases for value in good faith such receipt, for failure to deliver goods to him, whether such purchaser acquired title to the receipt before or after the delivery of the goods by the warehouseman. [32 G. A., ch. 160, § 11.]

SEC. **3138-a12. Negotiable receipt must be canceled or marked when part of goods delivered.** Except as provided in section thirty-six, where a warehouseman delivers part of the goods for which he had issued a negotiable receipt and fails either to take up and cancel such receipt, or to place plainly upon it a statement of what goods or packages have been delivered, he shall be liable, to anyone who purchases for value in good faith such receipt, for failure to deliver all the goods specified in the re-

ceipt, whether such purchaser acquired title to the receipt before or after the delivery of any portion of the goods by the warehouseman. [32 G. A., ch. 160, § 12.]

SEC. 3138-a13. **Altered receipts.** The alteration of a receipt shall not excuse the warehouseman who issued it from any liability if such alteration was—

(a) Immaterial,
(b) Authorized, or
(c) Made without fraudulent intent.

If the alteration was authorized, the warehouseman shall be liable according to the terms of the receipt as altered. If the alteration was unauthorized, but made without fraudulent intent, the warehouseman shall be liable according to the terms of the receipt, as they were before alteration. Material and fraudulent alteration of a receipt shall not excuse the warehouseman who issued it from liability to deliver, according to the terms of the receipt as originally issued, the goods for which it was issued, but shall excuse him from any other liability to the person who made the alteration and to any person who took with notice of the alteration. Any purchaser of the receipt for value without notice of the alteration shall acquire the same rights against the warehouseman which such purchaser would have acquired if the receipt had not been altered at the time of the purchase. [32 G. A., ch. 160, § 13.]

SEC. 3138-a14. **Lost or destroyed receipts.** Where a negotiable receipt has been lost or destroyed, a court of competent jurisdiction may order the delivery of the goods upon satisfactory proof of such loss or destruction and upon the giving of a bond with sufficient sureties to be approved by the court to protect the warehouseman from any liability or expense, which he or any person injured by such delivery may incur by reason of the original receipt remaining outstanding. The court may also in its discretion order the payment of the warehouseman's reasonable costs and counsel fees. The delivery of the goods under an order of the court as provided in this section, shall not relieve the warehouseman from liability to a person to whom the negotiable receipt has been or shall be negotiated for value without notice of the proceedings or of the delivery of the goods. [32 G. A., ch. 160, § 14.]

SEC. 3138-a15. **Effect of duplicate receipt.** A receipt upon the face of which the word "duplicate" is plainly placed is a representation and warranty by the warehouseman that such receipt is an accurate copy of an original receipt properly issued and uncanceled at the date of the issue of the duplicate, but shall impose upon him no other liability. [32 G. A., ch. 160, § 15.]

SEC. 3138-a16. **Warehouseman cannot set up title in himself.** No title or right to the possession of the goods, on the part of the warehouseman, unless such title or right is derived directly or indirectly from a transfer made by the depositor at the time of or subsequent to the deposit for storage, or from the warehouseman's lien, shall excuse the warehouseman from liability for refusing to deliver the goods according to the terms of the receipt. [32 G. A., ch. 160, § 16.]

SEC. 3138-a17. **Interpleader of adverse claimants.** If more than one person claims the title or possession of the goods, the warehouseman may, either as a defense to an action brought against him for nondelivery of the goods, or as an original suit, whichever is appropriate, require all known claimants to interplead. [32 G. A., ch. 160, § 17.]

SEC. **3138-a18. Warehouseman has reasonable time to determine validity of claims.** If someone other than the depositor or person claiming under him has a claim to the title or possession of the goods, and the warehouseman has information of such claim, the warehouseman shall be excused from liability for refusing to deliver the goods, either to the depositor or person claiming under him or to adverse claimant, until the warehouseman has had a reasonable time to ascertain the validity of the adverse claim or to bring legal proceedings to compel all claimants to interplead. [32 G. A., ch. 160, § 18.]

SEC. **3138-a19. Adverse title no defense—exceptions.** Except as provided in the two preceding sections and in sections nine and thirty-six, no right or title of a third person shall be a defense to an action brought by the depositor or person claiming under him against the warehouseman for failure to deliver the goods according to the terms of the receipt. [32 G. A., ch. 160, § 19.]

SEC. **3138-a20. Liability for nonexistence or misdescription of goods.** A warehouseman shall be liable to the holder of a receipt for damages caused by the nonexistence of the goods or by the failure of the goods to correspond with the description thereof in the receipt at the time of its issue. If, however, the goods are described in a receipt merely by a statement of marks or labels upon them, or upon packages containing them, or by a statement that the goods are said to be goods of a certain kind, or that packages containing the goods are said to contain goods of a certain kind, or by words of like purport, such statements, if true, shall not make liable the warehouseman issuing the receipt, although the goods are not of the kind which the marks or labels upon them indicate or of the kind they were said to be by the depositor. [32 G. A., ch. 160, § 20.]

SEC. **3138-a21. Liability for care of goods.** A warehouseman shall be liable for any loss or injury to the goods caused by his failure to exercise such care in regard to them as a reasonably careful owner of similar goods would exercise, but he shall not be liable, in the absence of an agreement to the contrary, for any loss or injury to the goods which could not have been avoided by the exercise of such care. [32 G. A., ch. 160, § 21.]

SEC. **3138-a22. Goods must be kept separate.** Except as provided in the following section, a warehouseman shall keep the goods so far separate from goods of other depositors, and from other goods of the same depositor for which a separate receipt has been issued, as to permit at all times the identification and redelivery of the goods deposited. [32 G. A., ch. 160, § 22.]

SEC. **3138-a23. Fungible goods may be commingled, if warehouseman authorized.** If authorized by agreement or by custom, a warehouseman may mingle fungible goods with other goods of the same kind and grade. In such case the various depositors of the mingled goods shall own the entire mass in common, and each depositor shall be entitled to such portion thereof as the amount deposited by him bears to the whole. [32 G. A., ch. 160, § 23.]

SEC. **3138-a24. Liability of warehouseman to depositors of commingled goods.** The warehouseman shall be severally liable to each depositor for the care and redelivery of his share of such mass to the same extent and under the same circumstances as if the goods had been kept separate. [32 G. A., ch. 160, § 24.]

SEC. **3138-a25. Attachment or levy upon goods for which a negotiable receipt has been issued.** If goods are delivered to a warehouseman by the owner or by a person whose act in conveying the title to them

to a purchaser in good faith for value would bind the owner, and a negotiable receipt is issued for them, they cannot thereafter, while in the possession of the warehouseman, be attached by garnishing or otherwise, or be levied upon under an execution, unless the receipt be first surrendered to the warehouseman, or its negotiation enjoined. The warehouseman shall in no case be compelled to deliver up the actual possession of the goods until the receipt is surrendered to him or impounded by the court. [32 G. A., ch. 160, § 25.]

SEC. **3138-a26. Creditors' remedies to reach negotiable receipts.** A creditor whose debtor is the owner of a negotiable receipt shall be entitled to such aid from courts of appropriate jurisdiction, by injunction and otherwise, in attaching such receipt or in satisfying the claim by means thereof as is allowed at law or in equity, in regard to property which cannot readily be attached or levied upon by ordinary legal process. [32 G. A., ch. 160, § 26.]

SEC. **3138-a27. What claims included in warehouseman's lien.** Subject to the provisions of section thirty, a warehouseman shall have a lien on goods deposited or on the proceeds thereof in his hands, for all lawful charges for storage and preservation of the goods; also for all lawful claims for money advanced, interest, insurance, transportation, labor, weighing, coopering and other charges and expenses in relation to such goods; also for all reasonable charges and expenses for notice, and advertisements of sale, and for sale of the goods where default has been made in satisfying the warehouseman's lien. [32 G. A., ch. 160, § 27.]

SEC. **3138-a28. Against what property lien may be enforced.** Subject to the provisions of section thirty, a warehouseman's lien may be enforced—

(a) Against all goods, whenever deposited, belonging to the person who is liable as debtor for the claims in regard to which the lien is asserted; and

(b) Against all goods belonging to others which have been deposited at any time by the person who is liable as debtor for the claims in regard to which the lien is asserted, if such person has been so intrusted with the possession of the goods that a pledge of the same by him at the time of the deposit to one who took the goods in good faith for value would have been valid. [32 G. A., ch. 160, § 28.]

SEC. **3138-a29. How lien may be lost.** A warehouseman loses his lien upon goods—

(a) By surrendering possession thereof; or

(b) By refusing to deliver the goods when a demand is made with which he is bound to comply under the provisions of this act. [32 G. A., ch. 160, § 29.]

SEC. **3138-a30. Negotiable receipt must state charges for which lien is claimed.** If a negotiable receipt is issued for goods, the warehouseman shall have no lien thereon, except for charges for storage of those goods subsequent to the date of the receipt, unless the receipt expressly enumerates other charges for which a lien is claimed. In such case there shall be a lien for the charges enumerated so far as they are within the terms of section twenty-seven, although the amount of the charges so enumerated is not stated in the receipt. [32 G. A., ch. 160, § 30.]

SEC. **3138-a31. Warehouseman need not deliver until lien is satisfied.** A warehouseman having a lien valid against the person demanding the goods may refuse to deliver the goods to him until the lien is satisfied. [32 G. A., ch. 160, § 31.]

SEC. **3138-a32. Warehouseman's lien does not preclude other remedies.** Whether a warehouseman has or has not a lien upon the goods, he is entitled to all remedies allowed by law to a creditor against his debtor, for the collection from the depositor of all charges and advances which the depositor has expressly or impliedly contracted with the warehouseman to pay. [32 G. A., ch. 160, § 32.]

SEC. **3138-a33. Satisfaction of lien by sale.** A warehouseman's lien for a claim which has become due may be satisfied as follows:

The warehouseman shall give a written notice to the person on whose account the goods are held, and to any other person known by the warehouseman to claim an interest in the goods. Such notice shall be given by delivery in person or by registered letter addressed to the last known place of business or abode of the person to be notified. The notice shall contain—

(a) An itemized statement of the warehouseman's claim, showing the sum due at the time of the notice and the date or dates when it became due;

(b) A brief description of the goods against which the lien exists;

(c) A demand that the amount of the claim as stated in the notice, and of such further claim as shall accrue, shall be paid on or before a day mentioned, not less than ten days from the delivery of the notice if it is personally delivered, or from the time when the notice should reach its destination, according to the due course of post, if the notice is sent by mail; and

(d) A statement that unless the claim is paid within the time specified the goods will be advertised for sale and sold by auction at a specified time and place.

In accordance with the terms of a notice so given, a sale of the goods by auction may be had to satisfy any valid claim of the warehouseman for which he has a lien on the goods. The sale shall be had in the place where the lien was acquired, or, if such place is manifestly unsuitable for the purpose, at the nearest suitable place. After the time for the payment of the claim specified in the notice to the depositor has elapsed, an advertisement of the sale, describing the goods to be sold, and stating the name of the owner or person on whose account the goods are held, and the time and place of the sale, shall be published once a week for two consecutive weeks in a newspaper published in the place where such sale is to be held. The sale shall not be held less than fifteen days from the time of the first publication. If there is no newspaper published in such place, the advertisement shall be posted at least ten days before such sale in not less than six conspicuous places therein. From the proceeds of such sale the warehouseman shall satisfy his lien, including the reasonable charges of notice, advertisement, and sale. The balance, if any, of such proceeds shall be held by the warehouseman, and delivered on demand to the person to whom he would have been bound to deliver or justified in delivering the goods. At any time before the goods are so sold any person claiming a right of property or possession therein may pay the warehouseman the amount necessary to satisfy his lien and to pay the reasonable expenses and liabilities incurred in serving notices and advertising and preparing for the sale up to the time of such payment. The warehouseman shall deliver the goods to the person making such payment if he is a person entitled, under the provisions of this act, to the possession of the goods on payment of charges thereon. Otherwise the warehouseman shall retain possession of the goods according to the terms of the original contract of deposit. [32 G. A., ch. 160, § 33.]

SEC. **3138-a34. Perishable and hazardous goods.** If goods are of a perishable nature, or by keeping will deteriorate greatly in value, or by their odor, leakage, inflammability, or explosive nature, will be liable to injure other property, the warehouseman may give such notice to the owner, or to the person in whose name the goods are stored, as is reasonable and possible under the circumstances, to satisfy the lien upon such goods and to remove them from the warehouse, and in the event of the failure of such person to satisfy the lien and to remove the goods within the time so specified, the warehouseman may sell the goods at public or private sale without advertising. If the warehouseman, after a reasonable effort, is unable to sell such goods, he may dispose of them in a lawful manner, and shall incur no liability by reason thereof. The proceeds of any sale made under the terms of this section shall be disposed of in the same way as the proceeds of sales made under the terms of the preceding section. [32 G. A., ch. 160, § 34.]

SEC. **3138-a35. Other methods of enforcing liens.** The remedy for enforcing a lien herein provided does not preclude any other remedies allowed by law for the enforcement of a lien against personal property nor bar the right to recover so much of the warehouseman's claim as shall not be paid by the proceeds of the sale of the property. [32 G. A., ch. 160, § 35.]

SEC. **3138-a36. Effect of sale.** After the goods have been lawfully sold to satisfy a warehouseman's lien, or have been lawfully sold or disposed of because of their perishable or hazardous nature, the warehouseman shall not thereafter be liable for failure to deliver the goods to the depositor, or owner of the goods, or to a holder of the receipt given for the goods when they were deposited, even if such receipt be negotiable. [32 G. A., ch. 160, § 36.]

SEC. **3138-a37. Negotiation of negotiable receipts by delivery.** A negotiable receipt may be negotiated by delivery—

(a) Where, by the terms of the receipt, the warehouseman undertakes to deliver the goods to the bearer; or

(b) Where, by the terms of the receipt, the warehouseman undertakes to deliver the goods to the order of a specified person, and such person or a subsequent indorsee of the receipt has indorsed it in blank or to bearer.

Where, by the terms of a negotiable receipt, the goods are deliverable to bearer or where a negotiable receipt has been indorsed in blank or to bearer, any holder may indorse the same to himself or to any other specified person, and in such case the receipt shall thereafter be negotiated only by the indorsement of such indorsee. [32 G. A., ch. 160, § 37.]

SEC. **3138-a38. Negotiation of negotiable receipts by indorsement.** A negotiable receipt may be negotiated by the indorsement of the person to whose order the goods are, by the terms of the receipt, deliverable. Such indorsement may be in blank, to bearer or to a specified person. If indorsed to a specified person, it may be again negotiated by the indorsement of such person in blank, to bearer or to another specified person. Subsequent negotiation may be made in like manner. [32 G. A., ch. 160, § 38.]

SEC. **3138-a39. Transfer of receipts.** A receipt which is not in such form that it can be negotiated by delivery may be transferred by the holder by delivery to a purchaser or donee. A nonnegotiable receipt cannot be negotiated, and the indorsement of such a receipt gives the transferee no additional right. [32 G. A., ch. 160, § 39.]

SEC. **3138-a40. Who may negotiate a receipt.** A negotiable receipt may be negotiated—

(a) By the owner thereof; or

(b) By any person to whom the possession or custody of the receipt has been entrusted by the owner, if, by the terms of the receipt, the warehouseman undertakes to deliver the goods to the order of the person to whom the possession or custody of the receipt has been entrusted, or if, at the time of such entrusting, the receipt is in such form that it may be negotiated by delivery. [32 G. A., ch. 160, § 40.]

SEC. **3138-a41. Rights of persons to whom receipt has been negotiated.** A person to whom a negotiable receipt has been duly negotiated acquires[1] thereby—

(a) Such title to the goods as the person negotiating the receipt to him had or had ability to convey to a purchaser in good faith for value, and also such title to the goods as the depositor or person to whose order the goods were to be delivered by the terms of the receipt had or had ability to convey to a purchaser in good faith for value; and

(b) The direct obligation of the warehouseman to hold possession of the goods for him according to the terms of the receipt as fully as if the warehouseman had contracted directly with him. [32 G. A., ch. 160, § 41.]

[1]"requires" in 32 G. A. session laws. EDITOR.]

SEC. **3138-a42. Rights of persons to whom receipt has been transferred.** A person to whom a receipt has been transferred but not negotiated, acquires thereby, as against the transferor, the title to the goods, subject to the terms of any agreement with the transferor. If the receipt is nonnegotiable such person also acquires the right to notify the warehouseman of the transfer to him of such receipt, and thereby to acquire the direct obligation of the warehouseman to hold possession of the goods for him according to the terms of the receipt. Prior to the notification of the warehouseman by the transferor or transferee of a nonnegotiable receipt, the title of the transferee to the goods and the right to acquire the obligation of the warehouseman may be defeated by the levy of an attachment or execution upon the goods by a creditor of the transferor, or by a notification to the warehouseman by the transferor or by a subsequent purchaser from the transferor of a subsequent sale of the goods by the transferor. [32 G. A., ch. 160, § 42.]

SEC. **3138-a43. Transfer of negotiable receipt without indorsement.** Where a negotiable receipt is transferred for value by delivery, and the indorsement of the transferor is essential for negotiation, the transferee acquires a right against the transferor to compel him to indorse the receipt, unless a contrary intention appears. The negotiation shall take effect as of the time when the indorsement is actually made. [32 G. A., ch. 160, § 43.]

SEC. **3138-a44. Warranties on sale of receipt.** A person who for value negotiates or transfers a receipt by indorsement or delivery, including one who assigns for value a claim secured by a receipt, unless a contrary intention appears, warrants—

(a) That the receipt is genuine;

(b) That he has a legal right to negotiate or transfer it;

(c) That he has knowledge of no fact which would impair the validity or worth of the receipt; and

(d) That he has a right to transfer the title to the goods, and that the goods are merchantable or fit for a particular purpose whenever such warranties would have been implied, if the contract of the parties had

been to transfer without a receipt the goods represented thereby. [32 G. A., ch. 160, § 44.]

SEC. **3138-a45. Indorser not a guarantor.** The indorsement of a receipt shall not make the indorser liable for any failure on the part of the warehouseman or previous indorsers of the receipt to fulfill their respective obligations. [32 G. A., ch. 160, § 45.]

SEC. **3138-a46. No warranty implied from accepting payment of debt.** A mortgagee, pledgee or holder for security of a receipt who, in good faith, demands or receives payment of the debt for which such receipt is security, whether from a party to a draft drawn for such debt or from any other person, shall not by so doing be deemed to represent or to warrant the genuineness of such receipt or the quality or quantity of the goods therein described. [32 G. A., ch. 160, § 46.]

SEC. **3138-a47. When negotiation not impaired by fraud, mistake or duress.** The validity of the negotiation of a receipt is not impaired by the fact that such negotiation was a breach of duty on the part of the person making the negotiation, or by the fact that the owner of the receipt was induced by fraud, mistake, or duress to entrust the possession or custody of the receipt to such person, if the person to whom the receipt was negotiated, or a person to whom the receipt was subsequently negotiated, paid value therefor, without notice of the breach of duty, or fraud, mistake, or duress. [32 G. A., ch. 160, § 47.]

SEC. **3138-a48. Subsequent negotiation.** Where a person having sold, mortgaged, or pledged goods which are in a warehouse and for which a negotiable receipt has been issued, or having sold, mortgaged, or pledged the negotiable receipt representing such goods, continues in possession of the negotiable receipt, the subsequent negotiation thereof by that person under any sale, or other disposition thereof to any person receiving the same in good faith, for value and without notice of the previous sale, mortgage or pledge, shall have the same effect as if the first purchaser of the goods or receipt had expressly authorized the subsequent negotiation. [32 G. A., ch. 160, § 48.]

SEC. **3138-a49. Negotiation defeats vendor's lien.** Where a negotiable receipt has been issued for goods, no seller's lien or right of stoppage *in transitu* shall defeat the rights of any purchaser for value in good faith to whom such receipt has been negotiated, whether such negotiation be prior or subsequent to the notification to the warehouseman who issued such receipt of the seller's claim to a lien or right of stoppage *in transitu.* Nor shall the warehouseman be obliged to deliver or justified in delivering the goods to an unpaid seller unless the receipt is first surrendered for cancellation. [32 G. A., ch. 160, § 49.]

SEC. **3138-a50. Issue of receipt for goods not received.** A warehouseman or any officer, agent, or servant of a warehouseman, who issues or aids in issuing a receipt knowing that the goods for which such receipt is issued have not been actually received by such warehouseman, or are not under his actual control at the time of issuing such receipt, shall be guilty of felony, and upon conviction shall be punished for each offense by imprisonment in the penitentiary not exceeding five years, or by a fine not exceeding five thousand dollars, or by both. [32 G. A., ch. 160, § 50.]

SEC. **3138-a51. Issue of receipt containing false statement.** A warehouseman, or any officer, agent or servant of a warehouseman, who fraudulently issues or aids in fraudulently issuing a receipt for goods, knowing that it contains any false statement, shall be guilty of a misdemeanor, and upon conviction shall be punished for each offense by imprisonment in the county jail not exceeding one year, or by a fine not exceeding one thousand dollars, or by both. [32 G. A., ch. 160, § 51.]

SEC. 3138-a52. **Issue of duplicate receipts not so marked.** A warehouseman, or any officer, agent or servant of a warehouseman, who issues or aids in issuing a duplicate or additional negotiable receipt for goods, knowing that a former negotiable receipt for the same goods or any part of them is outstanding and uncanceled, without plainly placing upon the face thereof the word "duplicate," except in the case of a lost or destroyed receipt after proceedings as provided for in section fourteen, shall be guilty of a felony, and upon conviction shall be punished for each offense by imprisonment in the penitentiary not exceeding five years, or by a fine not exceeding five thousand dollars, or by both. [32 G. A., ch. 160, § 52.]

SEC. 3138-a53. **Issue for warehouseman's goods of receipts which do not state that fact.** Where there are deposited with or held by a warehouseman goods of which he is owner, either solely or jointly or in common with others, such warehouseman, or any of his officers, agents, or servants who, knowing this ownership, issues or aids in issuing a negotiable receipt for such goods which does not state such ownership, shall be guilty of a misdemeanor, and upon conviction shall be punished for each offense by imprisonment in the county jail not exceeding one year, or by a fine not exceeding one thousand dollars, or by both. [32 G. A., ch. 160, § 53.]

SEC. 3138-a54. **Delivery of goods without obtaining negotiable receipt.** A warehouseman, or any officer, agent, or servant of a warehouseman who delivers goods out of the possession of such warehouseman, knowing that a negotiable receipt, the negotiating of which would transfer the right to the possession of such goods, is outstanding and uncanceled, without obtaining the possession of such receipt at or before the time of such delivery, shall, except in the cases provided for in sections fourteen and thirty-six, be found guilty of a misdemeanor and on conviction shall be punished for each offense by imprisonment in the county jail not exceeding one year, or by a fine not exceeding one thousand dollars, or by both. [32 G. A., ch. 160, § 54.]

SEC. 3138-a55. **Negotiation of receipt for mortgaged goods.** Any person who deposits goods to which he has no title, or upon which there is a lien or mortgage, and who takes for such goods a negotiable receipt which he afterwards negotiates for value with intent to deceive and without disclosing his want of title or the existence of the lien or mortgage, shall be guilty of a misdemeanor, and upon conviction shall be punished for each offense by imprisonment in the county jail not exceeding one year, or by a fine not exceeding one thousand dollars, or by both. [32 G. A., ch. 160, § 55.]

SEC. 3138-a56. **When rules of common law still applicable.** In any case not provided for in this act, the rules of law and equity, including the law merchant, and in particular the rules relating to the law of principal and agent and to the effect of fraud, misrepresentation, duress or coercion, mistake, bankruptcy, or other invalidating cause, shall govern. [32 G. A., ch. 160, § 56.]

SEC. 3138-a57. **Interpretation shall give effect to purpose of uniformity.** This act shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it. [32 G. A., ch. 160, § 57.]

SEC. 3138-a58. **Definitions.** In this act, unless the context or subject matter otherwise requires—

"Action" includes the counterclaim, set-off, and suit in equity.

"Delivery" means voluntary transfer of possession from one person to another.

"Fungible goods" means goods of which any receipt is, from its nature or by mercantile custom, treated as the equivalent of any other unit.

"Goods" means chattels or merchandise in storage, or which has been or is about to be stored.

"Holder of a receipt" means a person who has both actual possession of such receipt and a right of property therein.

"Order" means an order by indorsement on the receipt.

"Owner" does not include mortgagee or pledgee.

"Person" includes a corporation or partnership or two or more persons having a joint or common interest.

To "purchase" includes to take as mortgagee or as pledgee.

"Purchaser" includes mortgagee and pledgee.

"Receipt" means a warehouse receipt.

"Value" is any consideration sufficient to support a simple contract. An antecedent or preëxisting obligation, whether for money or not, constitutes value where a receipt is taken either in satisfaction thereof or as security therefor.

"Warehouseman" means a person lawfully engaged in the business of storing goods for profit.

A thing is done "in good faith" within the meaning of this act, when it is in fact done honestly whether it be done negligently or not. [32 G. A., ch. 160, § 58.]

SEC. **3138-a59. Not applicable to existing receipts.** The provisions of this act do not apply to receipts made and delivered prior to the taking effect of this act. [32 G. A., ch. 160, § 59.]

CHAPTER 10-B.

OF UNIFORM BILLS OF LADING.

SECTION **3138-b. Bills of lading.** Bills of lading issued by any common carrier shall be governed by this act. [34 G. A., ch. 155, § 1.]

SEC. **3138-b1. Terms to be embodied in bill.** Every bill must embody within its written or printed terms—

(a) The date of its issue,

(b) The name of the person from whom the goods have been received,

(c) The place where the goods have been received,

(d) The place to which the goods are to be transported,

(e) A statement whether the goods received will be delivered to a specified person, or to the order of a specified person,

(f) A description of the goods or of the packages containing them which may, however, be in such general terms as are referred to in section twenty-three, and

(g) The signature of the carrier.

A negotiable bill shall have the words "order of" printed thereon immediately before the name of the person upon whose order the goods received are deliverable.

A carrier shall be liable to any person injured thereby for the damage caused by the omission from a negotiable bill of any of the provisions required in this section. [34 G. A., ch. 155, § 2.]

SEC. 3138-b2. **Certain terms may be inserted.** A carrier may insert in a bill, issued by him, any other terms and conditions, provided that such terms and conditions shall not—

(a) Be contrary to law or public policy, or

(b) In any wise impair his obligation to exercise at least that degree of care in the transportation and safe-keeping of the goods intrusted to him which a reasonably careful man would exercise in regard to similar goods of his own. [34 G. A., ch. 155, § 3.]

SEC. 3138-b3. **Nonnegotiable or straight bill.** A bill in which it is stated that the goods are consigned or destined to a specified person, is a nonnegotiable or straight bill. [34 G. A., ch. 155, § 4.]

SEC. 3138-b4. **Negotiable or order bill.** A bill in which it is stated that the goods are consigned or destined to the order of any person named in such bill, is a negotiable or order bill. Any provision in such a bill that it is nonnegotiable shall not affect its negotiability within the meaning of this act. [34 G. A., ch. 155, § 5.]

SEC. 3138-b5. **Negotiable bills not to be issued in parts or sets—liability for violation.** Negotiable bills issued in this state for the transportation of goods to any place in the United States on the continent of North America, except Alaska, shall not be issued in parts or sets. If so issued the carrier issuing them shall be liable for failure to deliver the goods described therein to any one who purchases a part for value in good faith, even though the purchase be after the delivery of the goods by the carrier to a holder of one of the other parts. [34 G. A., ch. 155, § 6.]

SEC. 3138-b6. **Duplicate bills to be so marked—liability for violation.** When more than one negotiable bill is issued in this state for the same goods to be transported to any place in the United States on the continent of North America, except Alaska, the word "duplicate" or some other word or words indicating that the document is not an original bill shall be placed plainly upon the face of every such bill, except the one first issued. A carrier shall be liable for the damage caused by his failure so to do to anyone who has purchased the bill for value in good faith as an original, even though the purchase be after the delivery of the goods by the carrier to the holder of the original bill. [34 G. A., ch. 155, § 7.]

SEC. 3138-b7. **Nonnegotiable bill to be so marked.** A nonnegotiable bill shall have placed plainly upon its face by the carrier issuing it "nonnegotiable" or "not negotiable." This section shall not apply, however, to memoranda or acknowledgments of an informal character. [34 G. A., ch. 155, § 8.]

SEC. 3138-b8. **Insertion of name of person to be notified not to limit negotiability.** The insertion in a negotiable bill of the name of a person to be notified of the arrival of goods shall not limit the negotiability of the bill, or constitute notice to a purchaser thereof of any rights or equities of such person in the goods. [34 G. A., ch. 155, § 9.]

SEC. 3138-b9. **Waiver of objections to terms—estoppel.** Except as otherwise provided in this act, where a consignor receives[1] a bill and makes no objection to its terms or conditions at the time he receives it, neither the consignor nor any person who accepts delivery of the goods, nor any person who seeks to enforce any provision of the bill, shall be allowed to deny that he is bound by such terms and conditions, so far as they are not contrary to law or public policy. [34 G. A., ch. 155, § 10.]

[1"received" in enrolled bill. EDITOR.]

SEC. **3138-b10. Delivery of goods by carrier—refusal—burden of proof.** A carrier, in the absence of some lawful excuse, is bound to deliver goods upon a demand made either by the consignee named in the bill for the goods, or if the bill is negotiable, by the holder thereof, if such demand is accompanied by—

(a) An offer in good faith to satisfy the carrier's lawful lien upon the goods,

(b) An offer in good faith to surrender, properly indorsed, the bill which was issued for the goods, if the bill is negotiable, and

(c) A readiness and willingness to sign, when the goods are delivered, an acknowledgment that they have been delivered, if such signature is requested by the carrier.

In case the carrier refuses or fails to deliver the goods in compliance with a demand by the consignee or holder so accompanied, the burden shall be upon the carrier to establish the existence of a lawful excuse for such refusal or failure. [34 G. A., ch. 155, § 11.]

SEC. **3138-b11. Carrier justified in delivering goods to certain persons.** A carrier is justified, subject to the provisions of the three following sections, in delivering goods to one who is—

(a) A person lawfully entitled to the possession of the goods, or

(b) The consignee named in a nonnegotiable bill for the goods, or

(c) A person in possession of a negotiable bill for the goods by the terms of which the goods are deliverable to his order, or which has been indorsed to him or in blank by the consignee or by the mediate or immediate indorsee of the consignee. [34 G. A., ch. 155, § 12.]

SEC. **3138-b12. Liability of carrier in certain cases.** Where a carrier delivers goods to one who is not lawfully entitled to the possession of them the carrier shall be liable to anyone having a right of property or possession in the goods if he delivered the goods otherwise than as authorized by subdivisions (b) and (c) of the preceding section; and, though he delivered the goods as authorized by either of said subdivisions, he shall be so liable if prior to such delivery he—

(a) Had been requested, by or on behalf of a person having a right of property or possession in the goods, not to make such delivery, or

(b) Had information at the time of the delivery that it was to a person not lawfully entitled to the possession of the goods.

A request or information to be effective within the meaning of this section must be given to an officer or agent of the carrier, the actual or apparent scope of whose duties includes action upon such a request or information, and must be given in time to enable the officer or agent to whom it is given, acting with reasonable diligence, to stop delivery of the goods. [34 G. A., ch. 155, § 13.]

SEC. **3138-b13. Failure of carrier to cancel negotiable bill—liability.** Except as provided in section twenty-seven, and except when compelled by legal process, if a carrier delivers goods for which a negotiable bill had been issued, the negotiation of which would transfer the right to the possession of the goods, and fails to take up and cancel the bill, such carrier shall be liable for failure to deliver the goods to anyone who for value and in good faith purchases such bill, whether such purchaser acquired title to the bill before or after the delivery of the goods by the carrier, and notwithstanding delivery was made to the person entitled thereto. [34 G. A., ch. 155, § 14.]

SEC. **3138-b14. Same—delivery of part of goods.** Except as provided in section twenty-seven, and except when compelled by legal process,

if a carrier delivers part of the goods for which a negotiable bill had been issued and fails either—

(a) To take up and cancel the bill, or

(b) To place plainly upon it a statement that a portion of the goods has been delivered, with a description, which may be in general terms, either of the goods or packages that have been so delivered or of the goods or packages which still remain in the carrier's possession, he shall be liable for failure to deliver all the goods specified in the bill, to anyone who for value and in good faith purchases it, whether such purchaser acquired title to it before or after the delivery of any portion of the goods by the carrier, and notwithstanding such delivery was made to the person entitled thereto. [34 G. A., ch. 155, § 15.]

SEC. **3138-b15. Alterations without authority void.** Any alteration, addition or erasure in a bill after its issue without authority from the carrier issuing the same either in writing or noted on the bill shall be void, whatever be the nature and purpose of the change, and the bill shall be enforceable according to its original tenor. [34 G. A., ch. 155, § 16.]

SEC. **3138-b16. Lost or destroyed negotiable bill—court may order delivery—bond—liability.** Where a negotiable bill has been lost or destroyed, a court of competent jurisdiction may order the delivery of the goods upon satisfactory proof of such loss or destruction and upon the giving of a bond with sufficient surety to be approved by the court to protect the carrier or any person injured by such delivery from any liability or loss, incurred by reason of the original bill remaining outstanding. The court may also in its discretion order the payment of the carrier's reasonable costs and counsel fees. The delivery of the goods under an order of the court as provided in this section, shall not relieve the carrier from liability to a person to whom the negotiable bill has been or shall be negotiated for value without notice of the proceedings or of the delivery of the goods. [34 G. A., ch. 155, § 17.]

SEC. **3138-b17. Liability on duplicate bills.** A bill upon the face of which the word "duplicate" or some other word or words indicating that the document is not an original bill is placed plainly shall impose upon the carrier issuing the same the liability of one who represents and warrants that such bill is an accurate copy of an original bill properly issued, but no other liability. [34 G. A., ch. 155, § 18.]

SEC. **3138-b18. Assertion of title by carrier—liability for refusal to deliver.** No title to goods or right to their possession, asserted by a carrier for his own benefit, shall excuse him from liability for refusing to deliver the goods according to the terms of a bill issued for them, unless such title or right is derived directly or indirectly from a transfer made by the consignor or consignee after the shipment, or from the carrier's lien. [34 G. A., ch. 155, § 19.]

SEC. **3138-b19. Claimants required to interplead.** If more than one person claims the title or possession of goods, the carrier may require all known claimants to interplead, either as a defense to an action brought against him for nondelivery of the goods, or as an original suit, whichever is appropriate. [34 G. A., ch. 155, § 20.]

SEC. **3138-b20. Disputed title or possession—delivery—liability for refusal to deliver excused—limitation.** If someone other than the consignee or person in possession of the bill, has a claim to the title or possession of the goods, and the carrier has information of such claim, the carrier shall be excused from liability for refusing to deliver the goods either to the consignee or person in possession of the bill, or to the ad-

verse claimant, until the carrier has had a reasonable time to ascertain the validity of the adverse claim or to bring legal proceedings to compel all claimants to interplead. [34 G. A., ch. 155, § 21.]

SEC. **3138-b21. Right or title of third person no defense to failure to deliver—exceptions.** Except as provided in the two preceding sections and in section twelve, no right or title of a third person unless enforced by legal process shall be a defense to an action brought by the consignee of a nonnegotiable bill or by the holder of a negotiable bill against the carrier for failure to deliver the goods on demand. [34 G. A., ch. 155, § 22.]

SEC. **3138-b22. General liability of carrier.** If a bill of lading has been issued by a carrier or on his behalf by an agent or employe the scope of whose actual or apparent authority includes the issuing of bills of lading, the carrier shall be liable to—

(a) The consignee named in a nonnegotiable bill, or

(b) The holder of a negotiable bill, who has given value in good faith relying upon the description therein of the goods, for damages caused by the nonreceipt by the carrier or a connecting carrier of all or part of the goods or their failure to correspond with the description thereof in the bill at the time of its issue.

If, however, the goods are described in the bill merely by a statement of marks or labels upon them or upon packages containing them, or by a statement that the goods are said to be goods of a certain kind or quantity, or in a certain condition, or it is stated in the bill that packages are said to contain goods of a certain kind or quantity or in a certain condition, or that the contents or the condition of contents of packages are unknown, or words of like purport are contained in the bill, such statements, if true, shall not make liable the carrier issuing the bill, although the goods are not of the kind or quantity or in the condition which the marks or labels upon them indicate, or of the kind or quantity or in the condition they were said to be by the consignor. The carrier may, also, by inserting in the bill the words "shipper's load and count" or other words of like purport, indicate that the goods were loaded by the shipper and the description of them made by him; and if such statement be true, the carrier shall not be liable for damages caused by the improper loading or by the nonreceipt or by the misdescription of the goods described in the bill. [34 G. A., ch. 155, § 23.]

SEC. **3138-b23. Attachment—surrender of bill—negotiation enjoined.** If goods are delivered to a carrier by the owner or by a person whose act in conveying the title to them to a purchaser for value in good faith would bind the owner and a negotiable bill is issued for them, they cannot thereafter, while in the possession of the carrier, be attached by garnishment or otherwise, or be levied upon under an execution, unless the bill be first surrendered to the carrier or its negotiation enjoined. The carrier shall in no such case be compelled to deliver the actual possession of the goods until the bill is surrendered to him or impounded by the court. [34 G. A., ch. 155, § 24.]

SEC. **3138-b24. Rights of creditor.** A creditor whose debtor is the owner of a negotiable bill shall be entitled to such aid from courts of appropriate jurisdiction by injunction and otherwise in attaching such bill, or in satisfying the claim by means thereof as is allowed at law or in equity in regard to property which cannot readily be attached or levied upon by ordinary legal process. [34 G. A., ch. 155, § 25.]

SEC. **3138-b25. Carrier's lien for certain charges.** If a negotiable bill is issued the carrier shall have no lien on the goods therein mentioned, except for charges on those goods for freight, storage, demurrage and terminal charges, and expenses necessary for the preservation of the goods or incident to their transportation subsequent to the date of the bill, unless the bill expressly enumerates other charges for which a lien is claimed. In such case there shall also be a lien for the charges enumerated so far as they are allowed by law and the contract between the consignor and the carrier. [34 G. A., ch. 155, § 26.]

SEC. **3138-b26. Release from liability to deliver when goods are sold to satisfy lien—unclaimed, perishable or hazardous goods.** After goods have been lawfully sold to satisfy a carrier's lien, or because they have not been claimed, or because they are perishable or hazardous, the carrier shall not thereafter be liable for failure to deliver the goods to the consignee or owner of the goods, or to a holder of the bill given for the goods when they were shipped, even if such bill be negotiable. [34 G. A., ch. 155, § 27.]

SEC. **3138-b27. Negotiation by delivery.** A negotiable bill may be negotiated by delivery where, by the terms of the bill, the carrier undertakes to deliver the goods to the order of a specified person, and such person or a subsequent indorsee of the bill has indorsed it in blank. [34 G. A., ch. 155, § 28.]

SEC. **3138-b28. Negotiation by indorsement.** A negotiable bill may be negotiated by the indorsement of the person to whose order the goods are deliverable by the tenor of the bill. Such indorsement may be in blank or to a specified person. If indorsed to a specified person, it may be negotiated again by the indorsement of such person in blank or to another specified person. Subsequent negotiation may be made in like manner. [34 G. A., ch. 155, § 29.]

SEC. **3138-b29. Transfer by delivery—indorsement of nonnegotiable bill.** A bill may be transferred by the holder by delivery, accompanied with an agreement, express or implied, to transfer the title to the bill or to the goods represented thereby. A nonnegotiable bill cannot be negotiated, and the indorsement of such a bill gives the transferee no additional right. [34 G. A., ch. 155, § 30.]

SEC. **3138-b30. Negotiation by person in possession of bill.** A negotiable bill may be negotiated by any person in possession of the same, however such possession may have been acquired if, by the terms of the bill, the carrier undertakes to deliver the goods to the order of such person, or if at the time of negotiation the bill is in such form that it may be negotiated by delivery. [34 G. A., ch. 155, § 31.]

SEC. **3138-b31. Rights acquired by negotiation.** A person to whom a negotiable bill has been duly negotiated acquires thereby—

(a) Such title to the goods as the person negotiating the bill to him had or had ability to convey to a purchaser in good faith for value, and also such title to the goods as the consignee and consignor had or had power to convey to a purchaser in good faith for value, and

(b) The direct obligation of the carrier to hold possession of the goods for him according to the terms of the bill as fully as if the carrier had contracted directly with him. [34 G. A., ch. 155, § 32.]

SEC. **3138-b32. Rights acquired by transfer—garnishment, attachment or execution—notice.** A person to whom a bill has been transferred but not negotiated acquires thereby as against the transferor, the title to the goods, subject to the terms of any agreement with the

transferor. If the bill is nonnegotiable, such person also acquires the right to notify the carrier of the transfer to him of such bill, and thereby to become the direct obligee of whatever obligations the carrier owed to the transferor of the bill immediately before the notification. Prior to the notification of the carrier by the transferor or transferee of a nonnegotiable bill, the title of the transferee to the goods and the right to acquire the obligation of the carrier may be defeated by garnishment or by attachment or execution upon the goods by a creditor of the transferor, or by a notification to the carrier by the transferor or a subsequent purchaser from the transferor of a subsequent sale of the goods by the transferor. A carrier has not received notification within the meaning of this section unless an officer or agent of the carrier, the actual or apparent scope of whose duties includes action upon such notification, has been notified; and no notification shall be effective until the officer or agent to whom it is given has had time with the exercise of reasonable diligence to communicate with the agent or agents having actual possession or control of the goods. [34 G. A., ch. 155, § 33.]

SEC. **3138-b33. Right of transferee to compel indorsement.** Where a negotiable bill is transferred for value by delivery, and the indorsement of the transferor is essential for negotiation, the transferee acquires a right against the transferor to compel him to indorse the bill, unless a contrary intention appears. The negotiation shall take effect as of the time when the indorsement is actually made. This obligation may be specifically enforced. [34 G. A., ch. 155, § 34.]

SEC. **3138-b34. Warranties of transferor.** A person who negotiates or transfers for value a bill by indorsement or delivery, including one who assigns for value a claim secured by a bill, unless a contrary intention appears, warrants—

(a) That the bill is genuine,

(b) That he has a legal right to transfer it,

(c) That he has knowledge of no fact which would impair the validity or worth of the bill, and

(d) That he has a right to transfer the title to the goods, and that the goods are merchantable or fit for a particular purpose whenever such warranties would have been implied, if the contract of the parties had been to transfer without a bill the goods represented thereby.

In the case of an assignment of a claim secured by a bill, the liability of the assignor shall not exceed the amount of the claim. [34 G. A., ch. 155, § 35.]

SEC. **3138-b35. Liability of indorser limited.** The indorsement of a bill shall not make the indorser liable for any failure on the part of the carrier or previous indorsers of the bill to fulfill their respective obligations. [34 G. A., ch. 155, § 36.]

SEC. **3138-b36. Holder of bill for security does not warrant genuineness.** A mortgagee or pledgee, or other holder of a bill for security who in good faith demands or receives payment of the debt for which such bill is security, whether from a party to a draft drawn for such debt or from any other person, shall not be deemed by so doing to represent or to warrant the genuineness of such bill or the quantity or quality of the goods therein described. [34 G. A., ch. 155, § 37.]

SEC. **3138-b37. Validity of negotiation—not impaired by certain facts.** The validity of the negotiation of a bill is not impaired by the fact that such negotiation was a breach of duty on the part of the person making the negotiation, or by the fact that the owner of the bill was deprived

of the possession of the same by fraud, accident, mistake, duress or conversion, if the person to whom the bill was negotiated, or a person to whom the bill was subsequently negotiated, gave value therefor, in good faith, without notice of the breach of duty, or fraud, accident, mistake, duress or conversion. [34 G. A., ch. 155, § 38.]

SEC. **3138-b38. Holder in good faith after subsequent negotiation.** Where a person having sold, mortgaged, or pledged goods which are in a carrier's possession and for which a negotiable bill has been issued, or having sold, mortgaged, or pledged the negotiable bill representing such goods, continues in possession of the negotiable bill, the subsequent negotiation thereof by that person under any sale, pledge, or other disposition thereof to any person receiving the same in good faith, for value and without notice of the previous sale, shall have the same effect as if the first purchaser of the goods or bill had expressly authorized the subsequent negotiation. [34 G. A., ch. 155, § 39.]

SEC. **3138-b39. Right to possession of goods—how indicated.** Where goods are shipped by the consignor in accordance with a contract or order for their purchase, the form in which the bill is taken by the consignor shall indicate the transfer or retention of the property or right to the possession of the goods as follows:

(a) Where by the bill the goods are deliverable to the buyer or to his agent, or to the order of the buyer or of his agent, the consignor thereby transfers the property in the goods to the buyer.

(b) Where by the bill the goods are deliverable to the seller or to his agent, or to the order of the seller or of his agent, the seller thereby reserves the property in the goods. But if, except for the form of the bill, the property would have passed to the buyer on shipment of the goods, the seller's property in the goods shall be deemed to be only for the purpose of securing performance by the buyer of his obligation under the contract.

(c) Where by the bill the goods are deliverable to the order of the buyer or of his agent, but possession of the bill is retained by the seller or his agent, the seller thereby reserves a right to the possession of the goods, as against the buyer.

(d) Where the seller draws on the buyer for the price and transmits the draft and bill together to the buyer to secure acceptance or payment of the draft, the buyer is bound to return the bill if he does not honor the draft, and if he wrongfully retains the bill he acquires no added right thereby. If, however, the bill provides that the goods are deliverable to the buyer, or to the order of the buyer, or is indorsed in blank or to the buyer by the consignee named therein, one who purchases in good faith, for value, the bill or goods from the buyer, shall obtain the title to the goods, although the draft has not been honored, if such purchaser has received delivery of the bill indorsed by the consignee named therein, or of the goods, without notice of the facts making the transfer wrongful. [34 G. A., ch. 155, § 40.]

SEC. **3138-b40. Assumptions of buyer.** Where the seller of goods draws on the buyer for the price of the goods and transmits the draft and a bill of lading for the goods either directly to the buyer or through a bank or other agency, unless a different intention on the part of the seller appears, the buyer and all other parties interested shall be justified in assuming:

(a) If the draft is by its terms or legal effect payable on demand or presentation or at sight, or not more than three days thereafter (whether such three days be termed days of grace or not), that the seller intended

to require payment of the draft before the buyer should be entitled to receive or retain the bill.

(b) If the draft is by its terms payable on time, extending beyond three days after demand, presentation or sight (whether such three days be termed days of grace or not), that the seller intended to require acceptance, but not payment of the draft before the buyer should be entitled to receive or retain the bill.

The provisions of this section are applicable whether by the terms of the bill the goods are consigned to the seller, or to his order, or to the buyer, or to his order, or to a third person, or to his order. [34 G. A., ch. 155, § 41.]

SEC. **3138-b41. Rights of purchaser for value in good faith not to be defeated.** Where a negotiable bill has been issued for goods, no seller's lien or right of stoppage *in transitu* shall defeat the rights of any purchaser for value in good faith to whom such bill has been negotiated, whether such negotiation be prior or subsequent to the notification to the carrier who issued such bill of the seller's claim to a lien or right of stoppage *in transitu*. Nor shall the carrier be obliged to deliver or justified in delivering the goods to an unpaid seller unless such bill is first surrendered for cancellation. [34 G. A., ch. 155, § 42.]

SEC. **3138-b42. Rights or remedies of mortgage or lien holder.** Except as provided in section forty-two, nothing in this act shall limit the rights and remedies of a mortgagee or lien holder whose mortgage or lien on goods would be valid, apart from this act, as against one who for value and in good faith purchased from the owner, immediately prior to the time of their delivery to the carrier, the goods which are subject to the mortgage or lien and obtained possession of them. [34 G. A., ch. 155, § 43.]

SEC. **3138-b43. Issuance of bill when goods not received by carrier—penalty.** Any officer, agent, or servant of a carrier, who with intent to defraud issues or aids in issuing a bill knowing that all or any part of the goods for which such bill is issued have not been received by such carrier, or by an agent of such carrier or by a connecting carrier, or are not under the carrier's control at the time of issuing such bill, shall be guilty of a crime, and upon conviction shall be punished for each offense by imprisonment not exceeding five years, or by a fine not exceeding five thousand dollars, or by both. [34 G. A., ch. 155, § 44.]

SEC. **3138-b44. False statement—penalty.** Any officer, agent, or servant of a carrier, who with intent to defraud issues or aids in issuing a bill for goods knowing that it contains any false statement, shall be guilty of a crime, and upon conviction shall be punished for each offense by imprisonment not exceeding one year, or by a fine not exceeding one thousand dollars, or by both. [34 G. A., ch. 155, § 45.]

SEC. **3138-b45. Fraudulent duplicate negotiable bill—penalty.** Any officer, agent, or servant of a carrier, who with intent to defraud issues or aids in issuing a duplicate or additional negotiable bill for goods in violation of the provisions of section seven, knowing that a former negotiable bill for the same goods or any part of them is outstanding and uncanceled, shall be guilty of a crime, and upon conviction shall be punished for each offense by imprisonment not exceeding five years, or by a fine not exceeding five thousand dollars, or by both. [34 G. A., ch. 155, § 46.]

SEC. **3138-b46. Shipping goods without title—penalty for negotiation of bill.** Any person who ships goods to which he has not a title, or upon which there is a lien or mortgage, and who takes for such goods

a negotiable bill which he afterwards negotiates for value with intent to deceive and without disclosing his want of title or the existence of the lien or mortgage, shall be guilty of a crime, and upon conviction shall be punished for each offense by imprisonment not exceeding one year, or by a fine not exceeding one thousand dollars, or by both. [34 G. A., ch. 155, § 47.]

SEC. **3138-b47. Negotiating bill with intent to deceive—penalty.** Any person who with intent to deceive negotiates or transfers for value a bill knowing that any or all of the goods which by the terms of such bill appear to have been received for transportation by the carrier which issued the bill, are not in the possession or control of such carrier, or of a connecting carrier, without disclosing this fact, shall be guilty of a crime, and upon conviction shall be punished for each offense by imprisonment not exceeding five years, or by a fine not exceeding five thousand dollars, or by both. [34 G. A., ch. 155, § 48.]

SEC. **3138-b48. Securing issuance of bill with intent to defraud—penalty.** Any person who with intent to defraud secures the issue by a carrier of a bill knowing that at the time of such issue, any or all of the goods described in such bill as received for transportation have not been received by such carrier, or an agent of such carrier or a connecting carrier, or are not under the carrier's control, by inducing an officer, agent, or servant of such carrier falsely to believe that such goods have been received by such carrier, or are under its control, shall be guilty of a crime, and upon conviction shall be punished for each offense by imprisonment not exceeding five years, or by a fine not exceeding five thousand dollars, or by both. [34 G. A., ch. 155, § 49.]

SEC. **3138-b49. Issuing nonnegotiable bill not so marked—penalty.** Any person who with intent to defraud issues or aids in issuing a nonnegotiable bill without the words "not negotiable" placed plainly upon the face thereof, shall be guilty of a crime, and upon conviction shall be punished for each offense by imprisonment not exceeding five years or by a fine not exceeding five thousand dollars, or by both. [34 G. A., ch. 155, § 50.]

SEC. **3138-b50. Rules of law and equity to govern in cases not provided for.** In any case not provided for in this act, the rules of law and equity including the law merchant, and in particular the rules relating to the law of principal and agent, executors, administrators and trustees, and to the effect of fraud, misrepresentation, duress or coercion, accident, mistake, bankruptcy, or other invalidating cause, shall govern. [34 G. A., ch. 155, § 51.]

SEC. **3138-b51. Interpretation and construction.** This act shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it. [34 G. A., ch. 155, § 52.]

SEC. **3138-b52. Terms defined.** (1) In this act, unless the context or subject matter otherwise requires—

"Action" includes counterclaim, set-off, and suit in equity.

"Bill" means bill of lading.

"Consignee" means the person named in the bill as the person to whom delivery of the goods is to be made.

"Consignor" means the person named in the bill as the person from whom the goods have been received for shipment.

"Goods" means merchandise or chattels in course of transportation, or which have been or are about to be transported.

"Holder" of a bill means a person who has both actual possession of such bill and a right of property therein.

"Order" means an order by indorsement on the bill.

"Owner" does not include mortgagee or pledgee.

"Person" includes a corporation or partnership or two or more persons having a joint or common interest.

To "purchase" includes to take as mortgagee and to take as pledgee.

"Purchaser" includes mortgagee and pledgee.

"Value" is any consideration sufficient to support a simple contract. An antecedent or preëxisting obligation, whether for money or not, constitutes value where a bill is taken either in satisfaction thereof or as security therefor.

(2) A thing is done "in good faith," within the meaning of this act, when it is in fact done honestly, whether it be done negligently or not. [34 G. A., ch. 155, § 53.]

SEC. **3138-b53. When not applicable.** The provisions of this act do not apply to bills made and delivered prior to the taking effect thereof. [34 G. A., ch. 155, § 54.]

SEC. **3138-b54. Acts in conflict repealed.** All acts or parts of acts inconsistent with this act are hereby repealed. [34 G. A., ch. 155, § 55.]

SEC. **3138-b55. In effect.** This act shall take effect on the fourth day of July, nineteen hundred eleven. [34 G. A., ch. 155, § 56.]

SEC. **3138-b56. How cited.** This act may be cited as the Uniform Bills of Lading Act. [34 G. A., ch. 155, § 57.]

CHAPTER 10-C.

OF THE TRADE-MARK FOR IOWA-MANUFACTURED PRODUCTS.

SECTION **3138-c. Iowa state manufacturers' association — conditions of recognition under this act.** Whenever the organization now existing in the state of Iowa, and known as the Iowa state manufacturers' association shall have filed with the secretary of state of Iowa verified proofs of its organization and the name of its president, vice president, secretary and treasurer, and that it has one hundred bona fide members, such association shall be recognized as the Iowa state manufacturers' association, and be entitled to the benefits of this act. [34 G. A., ch. 156, § 1.]

SEC. **3138-c1. Trade-mark "Made in Iowa"—registration.** For the purpose of aiding in the promotion and development of manufacturing in Iowa, such association may adopt a label or trade-mark bearing the words "Made in Iowa," together with any other appropriate design or inscription, and this label or trade-mark shall be registered in the office of the secretary of state of Iowa. Said association shall have the right to register or file such label or trade-mark under the laws of the United States or any foreign country which permits such registration, making such registration as an association or through an individual for the use and benefit of the association. [34 G. A., ch. 156, § 2.]

SEC. **3138-c2. Board of awards — uniform regulations — powers.** The said association shall by its articles of association provide for the election or appointment of a board of not less than fifteen manufacturers, who are residents of Iowa, which board shall be known as a board of awards. The said board of awards shall then establish uniform regulations and

shall then grant to any manufacturer in the state of Iowa, who conforms to such regulations, the right to use said label or trade-mark. In making such regulations the said board of awards may make requirements as to good quality of such products, both as to materials and workmanship, and it may also fix a charge to be paid by such manufacturer for the use of such label. Upon failure to comply with any requirements established by the board of awards such privilege may be by them revoked. It being the purpose of this act to make the said label or trade-mark stand for Iowa-made goods, and also for goods of quality and merit. [34 G. A., ch. 156, § 3.]

SEC. **3138-c3. Use of trade-mark without permission—penalty.** No person, firm or corporation shall use the said label or trade-mark or advertise the same, or attach, or stamp the same upon any article or product except under permission obtained in accordance with the provisions of this act. Any person or persons who shall use the said label or trade-mark except as herein authorized shall be guilty of a misdemeanor. [34 G. A., ch. 156, § 4.]

SEC. **3138-c4. Moneys collected—how expended.** All moneys collected by the said association under the provisions of this act shall be expended by the said association in advertising and promoting the sale of Iowa-made goods bearing the said label or trade-mark in the state of Iowa. [34 G. A., ch. 156, § 5.]

SEC. **3138-c5. "Manufacturer" defined.** Where the word "manufacturer" is used in this act it shall be construed to mean any person, firm, or corporation engaged in manufacturing in the state of Iowa. [34 G. A., ch. 156, § 6.]

TITLE XVI.

OF THE DOMESTIC RELATIONS.

CHAPTER 1.

OF MARRIAGE.

SECTION 3139. Contract.

No particular form or ceremony is necessary. All that is required is that the minds of the parties meet in mutual consent; but neither the intention to marry nor consent to such marriage can be inferred from cohabitation alone. *Brisbin v. Huntington*, 128–166, 103 N. W. 144.

A mere contract to marry does not constitute even a common-law marriage. The present agreement to be husband and wife must be followed by cohabitation as such. A written contract of marriage for the purpose of avoiding prosecution for illicit relations is not sufficient to constitute a marriage. *Pegg v. Pegg*, 138–572, 115 N. W. 1027.

If for any reason one or both of the parties to a marriage be incapable of giving the consent necessary to constitute a contract, the marriage is invalid, although in the interests of good order the courts are authorized to assume jurisdiction to decree an annulment. But such annulment is not necessary to preserve to the parties to such marriage all the rights of unmarried persons. *Floyd County v. Wolfe*, 138–749, 117 N. W. 32.

While cohabitation and the reputed relation of husband and wife may be shown as tending to give color to the relation of the parties and the recognition each by the other of the existence of a marriage between them, the fundamental question in determining whether such relation constitutes a common-law marriage is whether the minds of the parties have met in mutual consent to the status of marriage. Neither such intent nor consent can be inferred from cohabitation alone, and reputation is of no significance save as it has a bearing on the question of intent. *In re Boyington's Estate, Jones v. Williams*, 157– —, 137 N. W. 949.

A divided reputation in this respect has no probative force. *Ibid.*

Where cohabitation is in its beginning illicit, affirmative proof of a subsequent present intention to change that relation into the legitimate relation of husband and wife is essential to establish a common-law marriage. *Ibid.*

In law, marriage is a civil contract requiring the consent of parties capable of entering into other contracts, except as otherwise declared. The law of marriage, in so far as property interests are concerned, is founded on business principles in which the utmost good faith is required from all parties and the least fraud in connection therewith is the subject of judicial cognizance. *Beach v. Beach*, 141 N. W. 921.

A woman who is deceived into entering into a void marriage with a man already married may maintain an action against him for such deceit. *Ibid.*

But in an action brought by a married woman against the mother of her husband for fraudulent representations made before marriage as to his financial ability and his ownership of specific lands, held that it was error to give to the plaintiff the full one third of the market value of the land which had been falsely and fraudulently represented as belonging to him. *Ibid.*

The intent with which the misrepresentations are made being the material element in such a case, the defendant should be permitted to testify as to such intent. *Ibid.*

SEC. 3141. License—consent of parent. Previous to the solemnization of any marriage, a license for that purpose must be obtained from the clerk of the district court of the county wherein the marriage is to be solemnized. Such license must not be granted in any case where either party is under the age necessary to render the marriage valid, nor where either party is a minor, without the previous consent of the parents, or

the survivor if one be dead, or the guardian of such minor if both parents are dead, nor where either party is disqualified from making any other civil contract, nor where the parties are first cousins. [33 G. A., ch. 196, § 1.] [C. '73, §§ 2187–8; R. §§ 2517–18; C. '51, §§ 1465–6.]

SEC. 3145. Who may solemnize.

Although the mayor of a city may not have the authority to perform the marriage ceremony outside the limits of his jurisdiction, a marriage solemnized by him with the consent of the parties beyond his jurisdiction is valid under code §3147. *State v. McKay*, 122–658, 98 N. W. 510.

A mere contract of marriage no matter how formal does not in itself constitute the solemnization of marriage. *Pegg v. Pegg*, 138–572, 115 N. W. 1027.

SEC. 3146. **Certificate—return—record.** After the marriage has been solemnized, the officiating minister or magistrate shall give each of the parties a certificate, and make return thereof within fifteen days to the clerk of the district court, who shall record the same in the book required to be kept in the chapter relating to the state board of health. [35 G. A., ch. 269, § 1.] [C. '73, §§ 2194, 2197; R. §§ 2525, 2528; C. '51, §§ 1473, 1476.]

The law will presume a legal marriage in the absence of other evidence where it is shown that the parties have held themselves out to the world as husband and wife and have lived and cohabited together as such. *State v. Rocker*, 130–239, 106 N. W. 645.

When the relation is once shown to exist it will be presumed to have continued in the absence of evidence of a dissolution by death or divorce. *Ibid.*

Record evidence of marriage is not necessary, and it may be proved by any kind of evidence, whether direct or circumstantial. *Casley v. Mitchell*, 121–96, 96 N. W. 725.

A parish register is competent evidence of a marriage. *Ibid.*

Proof of the last marriage alone makes out a prima-facie case as to its validity, and to overcome such prima-facie case proof of a former marriage is required, and also evidence from which it may be concluded that it had not been dissolved by death or divorce. *In re Estate of Colton*, 129–542, 105 N. W. 1008.

SEC. 3147. **Forfeiture.** Marriages solemnized, with the consent of parties, in any other manner than as herein prescribed, are valid; but the parties thereto, and all persons aiding or abetting them, shall forfeit to the school fund the sum of fifty dollars each; but this shall not apply to the person conducting the marriage ceremony, if within fifteen days thereafter he makes the required return to the clerk of the district court. [35 G. A., ch. 269, § 2.] [C. '73, §§ 2195–6; R. §§ 2526–7; C. '51, §§ 1474–5.]

A marriage solemnized by one of the officers named in code § 3145, but outside of his jurisdiction, will be valid under the provisions of this section. *State v. McKay*, 122–658, 98 N. W. 510.

SEC. 3150. Issue legitimatized.

Only by the subsequent marriage of the parents can an illegitimate child ever become legitimate. Such recognition of an illegitimate child as will enable him to inherit does not render him legitimate. *Brisbin v. Huntington*, 128–166, 103 N. W. 144.

SEC. 3151. Void marriages.

Cohabitation and repute, continuing after a prior husband is presumed by the length of his absence to be dead, constitute evidence of a lawful marriage. *Smith v. Fuller*, 138–91, 115 N. W. 912.

As to whether this section is applicable to the marriage in this state of a person who is prohibited by the statute of another state from remarrying on account of a decree of divorce, held that continuance in cohabitation under such marriage in this state after the expiration of the period of prohibition under the laws of the other state rendered the marriage valid. *Lee v. Lee*, 150–611, 130 N. W. 128.

CHAPTER 2.

OF HUSBAND AND WIFE.

SECTION 3153. Property rights of married women.

Although the family resides on premises owned by the wife and occupied as a homestead, the husband is presumed to be the head of the family. *Burch v. Lowary*, 131–719, 109 N. W. 282.

Property not specifically mentioned in a decree for divorce remains the property of the spouse to whom it previously belonged. *Cole v. Cole*, 139–609, 117 N. W. 988.

A married woman has full power to dispose of her separate estate by gift, sale or will. *Vosburg v. Mallory*, 155–165, 135 N. W. 577.

SEC. 3154. Interest of either spouse in other's property.

Husband and wife cannot enter into written contracts with each other in reference to the disposition of their property unless in pursuance of and in accordance with a valid contract entered into before marriage. *Frazer v. Andrews*, 134–621, 112 N. W. 92.

The contingent interest of the wife in her husband's property cannot be made the subject of contract as between them. *Sharff v. Hayes*, 132–609, 110 N. W. 24.

A contract by the husband to pay the wife a consideration for joining in a conveyance to cut off her dower right is invalid in view of the provisions of this section. *Miller v. Miller*, 104–186, 73 N. W. 484.

A contract between the wife and the husband for the payment to the wife of a share of the proceeds of property sold, on condition that she will join in the conveyance of the property for the purpose of releasing her dower interest, is not valid. *Garner v. Fry*, 104–515, 73 N. W. 1079.

But if a portion of the proceeds is immediately given to the wife it will be valid as a gift and may be afterward properly treated as her property. *Ibid.*

Either party may elect whether he or she will join in a conveyance, but cannot use the right for purposes of speculation or oppression. *Ibid.*

A contract between husband and wife as to the interest of the husband in the wife's property on her decease, is invalid, not only as to real property, but also as to personalty. *Poole v. Burnham*, 105–620, 75 N. W. 474.

Such contract is invalid as to property subsequently acquired. *Ibid.*

While the wife cannot convey her contingent right of dower to her husband, she may by quitclaim to her husband's grantee cut off her contingent rights in the property. *Fowler v. Chadima*, 134–210, 111 N. W. 808.

A power of attorney given by a wife to her husband, authorizing him to relinquish her right of dower in the husband's real property, is of no validity. *Sawyer v. Biggart*, 114–489, 87 N. W. 426.

Nor will the wife be bound by ratification of a conveyance to which her name is signed by the husband under such power of attorney. *Ibid.*

The provision that neither husband nor wife has such an interest in the property of the other that it can be the subject of contract between them is in effect a statute of descent and distribution, and an agreement of the wife upon separation to release for a consideration all interest in her husband's property is void, and will not preclude her from claiming her distributive share, although the agreement, made in another jurisdiction, was valid and enforceable where made. *Caruth v. Caruth*, 128–121, 103 N. W. 103.

This provision renders any contract invalid by which the wife releases to the husband her interest in his land, but it has no application to a property interest which husband or wife may have in the land of the other based upon contracts with third persons, or derived from sources other than the marriage relation. *Baird v. Connell*, 121–278, 96 N. W. 863.

Separation agreements are generally regarded as invalid so far as they relate to the future; but they have often been recognized and enforced so far as they relate to maintenance or other collateral engagements. *Ibid.*

An agreement of separation will be considered as rescinded if the parties afterwards cohabit as husband and wife; but such an agreement is only thus rescinded in so far as the consideration therefor consists in the arrangement that they shall live apart; there may be other conditions based on independent considerations which are not annulled by the resumption of conjugal relations. *Ibid.*

A contract between husband and wife as to the interest which the wife shall have in the husband's property, made in consideration of the abandonment by the wife of meritorious proceedings for divorce and the resumption of marital relations, is valid. *Fisher v. Koontz*, 110–498, 80 N. W. 551.

An antenuptial contract by which the prospective wife's inchoate distributive share in the husband's estate is surrendered will be valid. Therefore a postnuptial contract between the husband and

wife with reference to the effect which shall be given to such antenuptial contract as to the interest which the wife shall acquire in the husband's property is valid. *Ibid.*

The courts will rigidly scrutinize a contract apparently unjust or unreasonable in its terms, and especially where it operates to deprive a wife of her interest in the husband's estate without provision for her in the event she survive him. In such a case the burden is upon the husband or those representing him to show that the contract was fairly procured in order to have it upheld. *Ibid.*

A contract between husband and wife in settlement of a suit for separate maintenance, by which she relinquishes all claims to his estate, except as provided for in such contract, is not effectual to defeat the wife's contingent right of dower in the husband's property subsequently conveyed. *Newberry v. Newberry*, 114–704, 87 N. W. 658.

This section prohibits the making of an interest which one spouse has in the land of the other the subject of contract between them, but they may contract with reference to an interest owned by one in the land of the other which does not grow out of the marital relation. *Pieper v. Pieper*, 145–373, 124 N. W. 181.

Husband and wife may freely deal with each other concerning the property of each, although the real or remote result of their dealing may be the loss of an inchoate right. *Baker v. Syfritt*, 147–49, 125 N. W. 998.

This statutory provision simply denies either husband or wife the right to contract with the other with regard to the dower interest which each has in the other's property; but where husband and wife living apart had made a division of their property by the execution of blank deeds relinquishing dower, held that each was estopped to assert title as against the grantee of the dower interest of the other. *Manatt v. Griffith*, 147–707, 124 N. W. 753.

A contract between a husband and wife evidently made for the purpose of depriving the wife of her distributive share is not valid. *Pickler v. Wise*, 152–644, 132 N. W. 815.

This section relates to descent and distribution, and a contract between husband and wife with reference to her interest in his estate is of no validity. The provision is not limited to contracts which are without consideration. *In re Estate of Kennedy*, 154–460, 135 N. W. 53.

The language of the legalizing act, 29 G. A., ch. 237, validating conveyances wherein the husband or wife has conveyed or contracted to convey the inchoate right of the other spouse, acting as attorney in fact by virtue of a power of attorney executed by each spouse, did not validate a conveyance in which one spouse acted under power of attorney executed by the other spouse who had attempted to authorize such conveyance. The legalizing act relates to a joint instrument purporting to involve mutual benefits and obligations. *Swartz v. Andrews*, 137–261, 114 N. W. 888.

SEC. 3155. Remedy by one against the other.

An agreement by the husband for a consideration proceeding from his wife's parents that he would reimburse the wife to the extent of the money and property which were advanced to him by her parents, gives to the wife a valid claim against her husband in satisfaction of which he may transfer property to her free from claims of his creditors. *Clark v. Ford*, 126–460, 102 N. W. 421.

A wife may maintain an action against her husband on a note for money loaned by her to him out of her separate estate. *In re Estate of Deaner*, 126–701, 102 N. W. 825.

The time within which such an action may be maintained by the wife is governed by the general provisions of the statute of limitations. *Ibid.*

The money thus received by the husband cannot be regarded as held by him in trust in the absence of a showing of such agreement on his part. *Ibid.*

A contract by the husband and wife by which it is agreed that the wife shall have a one-half interest in all property, real and personal, thereafter coming into their possession in consideration for money advanced to the husband from the wife's separate estate, may be enforced by her. *McElhaney v. McElhaney*, 125–279, 101 N. W. 90.

The legal fiction of the oneness of husband and wife has not been entirely effaced. All disabilities which the common law imposed upon husband and wife by reason of the marriage status still exist, except in so far as they have been modified or changed by express statutory enactment. *Heacock v. Heacock*, 108–540, 79 N. W. 353.

Therefore, held that a wife cannot sue a husband on his personal contract made during coverture. *Ibid.*

As express authority is given for a suit by the wife against her husband to recover her property, or any right growing out of the same, she might sue her husband with reference to property rights arising out of a partnership entered into between them. *Hoaglin v. Henderson*, 119–720, 94 N. W. 247.

Even before the enactment of the code of 1873, the wife had the right to sue her husband for a debt due to her. *Rice v. Crozier*, 139–629, 117 N. W. 984.

SEC. 3156. Husband not liable for wife's torts.

In an action against the parents of the husband for alienation of his affections, held that the father was not liable for improper influence exercised by the mother although it was in the father's presence and not objected to by him. *Heisler v. Heisler*, 151–503, 131 N. W. 676.

SEC. 3157. Conveyances to each other valid.

A postnuptial contract with reference to the wife's inchoate distributive share of the husband's estate which she would have been entitled to but for an antenuptial contract releasing such interest, may be valid. The hands of the husband and wife are not to be tied up forever by an understanding entered into before learning fully of the mutual trust and confidence engendered by and essential to well-being in the marriage relation. *Fisher v. Koontz*, 110–498, 80 N. W. 551.

A conveyance, transfer or lien executed by either husband or wife to or in favor of the other, is valid as to any interest which the one may have in the property of the other based upon contracts with third persons or derived from sources other than the marriage relation. *Baird v. Connell*, 121–278, 96 N. W. 863.

Conveyances between husband and wife will be valid, although the premises constitute the homestead, notwithstanding the general provisions of code § 2974 requiring that both join in a conveyance or incumbrance of the homestead. *Beedy v. Finney*, 118–276, 91 N. W. 1069.

The mere relationship of husband and wife is not enough to raise a presumption of undue influence in a conveyance of property by the one to the other. *Stiles v. Breed*, 151–86, 130 N. W. 376.

The wife cannot by conveyance to her husband extinguish her contingent right of dower in his property. See notes in this supplement to code § 3154.

SEC. 3161. Attorney in fact.

The wife cannot give the husband a power of attorney to dispose of her contingent dower interest in his property. *Sawyer v. Biggart*, 114–489, 87 N. W. 426.

And see notes in this supplement to code § 3154.

SEC. 3162. Wages of wife—actions by.

In an action by a married woman for damages resulting from personal injuries, no recovery should be allowed for her loss of time in the absence of evidence that she had any business or employment apart from her husband. *Denton v. Ordway*, 108–487, 79 N. W. 271.

The husband is entitled to the services and earnings of his wife when she is not engaged in business on her own account, and in such case she cannot recover in her own name under implied contract for services rendered to a third person in furnishing him board and lodging. *McClintic v. McClintic*, 111–615, 82 N. W. 1017.

But she may recover for board furnished under an express contract. *Lindsey v. Lindsey*, 116–480, 89 N. W. 1096.

Where by consent of the husband the wife keeps boarders on her own account and receives the board money and invests the fund thus accumulated in property in her own name, such property is exempt from any claim on the part of her husband's creditors. *Ehlers v. Blumer*, 129–168, 105 N. W. 406.

The husband may recover for services rendered by the wife to a third person where it does not appear that the wife rendered such services under any contract of her own or in pursuance of a separate calling. *Broughton v. Nicholson*, 150–119, 129 N. W. 814.

The earnings of the wife made in connection with her husband's property where she has no separate property and is not conducting an independent business, presumptively belong to her husband. *Alexander v. Crosby*, 150–239, 129 N. W. 959.

In an action by the husband as administrator of his deceased wife's estate for damages to such estate resulting from negligence causing her death, proof that the deceased wife was in any way engaged in an independent employment is sufficient to make out a case for the jury. *Myers v. Chicago, B. & Q. R. Co.*, 152–330, 131 N. W. 770.

SEC. 3163. Liability for separate debts.

An attorney acting for the wife in the institution of divorce proceedings in which separate maintenance is asked and in which the husband interposes a cross bill for a divorce, may, on the dismissal of the proceedings, recover fees for his services from the husband if it appears that the services performed were necessary for the protection of the wife in the defense of her good name and reputation. *Read v. Dickinson*, 151–369, 130 N. W. 160.

And see notes to code § 3180 in this supplement.

SEC. 3164. Contracts of wife.

A husband may contribute by his labor and sagacity to the accumulation of property in the name of his wife, without rendering such property subject to his debts. *Deere v. Bonne*, 108–281, 79 N. W. 59.

This provision as to suits by or against a wife on contracts made by or with her has reference to contracts with persons other than her husband, and does not authorize a suit by a wife against the husband on a contract entered into between them during coverture, not relating to her separate property. *Heacock v. Heacock*, 108–540, 79 N. W. 353.

Common-law rules with reference to the oneness of husband and wife still so far exist that any capacity of a married woman to contract is regarded as exceptional, and the grounds therefor must be both alleged and proved by one seeking to recover. *Ibid.*

The wife, although not engaged in an occupation independent of her husband, may contract for furnishing board and maintain an action in her own name on such contract. *Lindsey v. Lindsey*, 116–480, 89 N. W. 1096.

A married woman having authority in this state to acquire, own and dispose of property and to make contracts and incur liabilities, may enter into a valid contract of partnership with her husband. *Hoaglin v. Henderson*, 119–720, 94 N. W. 247.

The keeping of boarders may be an independent occupation in which a married woman may engage on her own account. *Bartholomew v. Adams*, 143–354, 121 N. W. 1026.

SEC. 3165. Family expenses.

That the law as it appears in section thirty-one hundred sixty-five of the code be and the same is hereby repealed and the following enacted in lieu thereof:

"The reasonable and necessary expenses of the family and the education of the children are chargeable upon the property of both husband and wife, or either of them, and in relation thereto they may be sued jointly or separately." [35 G. A., ch. 271, § 1.] [C. '73, § 2214; R. § 2507; C. '51, § 1455.]

A diamond shirt stud worn by the husband for personal use and adornment is an expense of the family for which the wife may be liable. *Neasham v. McNair*, 103–695, 72 N. W. 773.

The cost of feed for a horse used by the husband in his business and not by the family does not constitute a family expense chargeable to the wife. Generally speaking, the thing for which the expense is incurred which may be charged to the wife must be used or kept for use in the family. *Martin v. Vertres*, 130–175, 106 N. W. 516.

The wife does not become liable under this section for the support of her husband in an insane hospital, under the provisions of code § 2297. *Blackhawk County v. Scott*, 111–190, 82 N. W. 492.

A creditor who has obtained judgment against the husband for family expenses may, in an equitable action, subject the property of the wife to the payment thereof without first recovering judgment at law against her. *Boss v. Jordan*, 118–204, 89 N. W. 1070, 92 N. W. 111.

In a suit to subject the property of the wife to the payment of a judgment against her husband for family expenses, the rights of one who purchased such property after the suit may be declared subject to plaintiff's claim. *Ibid.*

A note given by the husband for family expenses is not conclusive on the wife, either as to the existence of the debt or as to the amount thereof. The husband may as against the wife extend the time of payment or change the form of indebtedness, but cannot create as binding on the wife an indebtedness which does not exist. *McCartney & Sons Co. v. Carter*, 129–20, 105 N. W. 339.

Where the husband drives the wife from the home in which she has an equal right of possession with him, he impliedly obligates himself to pay for her support regardless of the cause of such expulsion. *Baker v. Oughton*, 130–35, 106 N. W. 272.

The wife is not chargeable with the expense of her husband's board while absent from the family home in contemplation of separation. *Vose v. Myott*, 141–506, 120 N. W. 58.

Aside from a question of family expense, as such, the wife is under no legal liability for her husband's support. *Ibid.*

The only criterion which the statute furnishes is that the account must be for items of goods furnished for and on account of the family. No limitation is put on the expense and it need not appear that it be for "necessaries." *McDaniels v. McClure*, 142–370, 120 N. W. 1031.

The expense for hospital and medical attendance on account of the sickness of either husband or wife constitutes a family expense. *In re Estate of Skillman*, 146–601, 125 N. W. 343.

The purchase of intoxicating liquors, unless it may be for strictly medicinal purposes, does not constitute a family expense although they are used by both husband and wife. *O'Neil v. Cardina*, 140 N. W. 196.

Neither husband nor wife is liable for the debts or liabilities of the other except as provided in this section. Indebtedness here provided for constitutes an obligation of both. *In re Adams' Estate*, 140 N. W. 872.

SEC. 3166. Removal from homestead—custody of children.

The wife is entitled to necessaries after being driven from the home by her husband, regardless of the cause of the expulsion. *Baker v. Oughton*, 130–35, 106 N. W. 272.

When the husband seeks to secure the return of his wife after she has left home on the ground of alleged improper conduct, the offer of reconciliation must be unconditional. *Ibid.*

SEC. 3167. **Insanity of either spouse—conveyance of property.** That section thirty-one hundred sixty-seven of the code be and the same is hereby repealed and there is hereby enacted in lieu thereof the following:

"Where either the husband or wife is insane and incapable of executing a deed or mortgage relinquishing, conveying or incumbering his or her right to the real property of the other, the other may petition the district court of the county of his or her residence or the county where the real estate to be conveyed or incumbered is situated, setting forth the facts and praying for an order authorizing the applicant or some other person to execute a deed or mortgage and relinquish or incumber the interest of the insane person in said real estate." [30 G. A., ch. 119, § 1; C. '73, § 2216; R. § 1500.]

SEC. 3169. **Decree.** That section thirty-one hundred sixty-nine of the code be and the same is hereby repealed and there is hereby enacted in lieu thereof the following:

"Upon the hearing of the petition the court, if satisfied that it is made in good faith by the petitioner and he is a proper person to exercise the power and make the conveyance or mortgage and it is necessary and proper, shall enter a decree authorizing the execution of the conveyance or mortgage for and in the name of such husband or wife by such person as the court may appoint." [30 G. A., ch. 119, § 2; C. '73, § 2218; R. § 1502.]

CHAPTER 3.

OF DIVORCE, ANNULLING MARRIAGES AND ALIMONY.

SECTION 3171. Jurisdiction.

Where a decree of divorce was rendered on a notice by publication which gave the name of defendant with a spelling not the same, nor indicating the same pronunciation as that of defendant's true name, held that there was no presumption in favor of the validity of such decree. *Hubner v. Reickhoff*, 103–368, 72 N. W. 540.

Mere length of time during which a person has lived in a particular locality is not controlling in determining the length of residence. Intention is the controlling consideration. *Sylvester v. Sylvester*, 109–401, 80 N. W. 547.

The general rule that the domicile of the husband is the domicile of the wife does not apply in proceedings for divorce. *Ibid.*

A decree procured by one not in good faith a resident of this state is of no validity. *Lawrence v. Nelson*, 113–277, 85 N. W. 84.

A proceeding for divorce so far as it affects the marital status of the parties is *quasi in rem* so that the decree is valid on service by publication. But as to alimony and the costs such a proceeding is *in personam* and not binding on the defendant who has not appeared nor been served with process in the state and has no property therein. *Rea v. Rea*, 123–241, 98 N. W. 787; *Johnson v. Matthews*, 124–255, 99 N. W. 1064.

A decree of divorce fraudulently obtained as a result of an action brought in a state of which the plaintiff is a nonresident and against a nonresident defendant not served within the jurisdiction and not appearing, is void and subject to

collateral attack in any court wherein such pretended adjudication is pleaded. *Beeman v. Kitzman*, 124–86, 99 N. W. 171.

While proceedings for divorce or claims for alimony are abated by the death of either party, yet one who claims a property interest affected by such decree may question it on the ground of fraud, even after the death of one or both of the parties to the decree. *Wood v. Wood*, 136–128, 113 N. W. 492.

The provision as to jurisdiction by publication in divorce cases has no application in a proceeding for annulment of a marriage. *Bisby v. Mould*, 138–15, 115 N. W. 489.

Where the defendant served with notice by publication is actually residing in another state, the sufficiency of such service cannot be defeated by proof of a statement of an intention to return to reside in the state. *Lewis v. Lewis*, 138–593, 116 N. W. 698.

The court is without jurisdiction unless one of the parties resides in the county; but if the plaintiff is a resident of the county, jurisdiction of the subject matter is conferred on the district court in that county and the statutes relating to its exercise are to be interpreted and construed as others which relate to procedure and the failure of the petition to specify the township of his residence does not defeat the jurisdiction of the court. *Gelwicks v. Gelwicks*, 142 N. W. 409.

As the jurisdiction of the legislature to grant divorces is denied by the constitution, art. 3, § 27, such jurisdiction is vested generally in the courts. *Ibid.*

SEC. 3172. Petition.

Whether a decree of divorce rendered on a petition which does not allege that the application is in good faith and for the purpose set forth therein would be void as without jurisdiction, *quaere;* but such defect in the petition does not render void an order for the payment of temporary alimony. *Mengel v. Mengel*, 145–737, 120 N. W. 72, 122 N. W. 899.

In the absence of any claim of fraud or collusion, failure of the petition to allege the residence of the parties will not render the decree void, it appearing that defendant was in fact a resident of the county and personally served with notice in response to which there was an appearance in the case. *Richardson v. King*, 157– —, 135 N. W. 640.

Courts very properly manifest great reluctance in setting aside decrees of divorce after a second marriage of one of the parties has taken place, and will not do so save upon the most satisfactory showing. *Ibid.*

Neither a suit for a divorce nor to annul a marriage will lie after death of one of the parties. *Ibid.*

A decree of divorce is not subject to collateral attack for a defect in the proceedings unless it is such as to render the decree absolutely void. *Ibid.*

Failure of the petition to allege the township of plaintiff's residence is not a jurisdictional defect. *Gelwicks v. Gelwicks*, 142 N. W. 409.

SEC. 3173. Verification—evidence—hearing.

The court should be prompt to denounce collusion between parties in an action to secure a decree of divorce, but in a particular case held that the evidence did not show such collusion as to authorize the court to refuse to hear a case submitted on petition and cross-petition. *Blinn v. Blinn*, 113–83, 84 N. W. 957.

The testimony of the complaining party with reference to the grounds of divorce must be corroborated by other evidence. *Shors v. Shors*, 133–22, 110 N. W. 16.

Where the husband procured a decree of divorce from his wife by fraud, held that after his death the wife might maintain an action to set the decree aside in order to be entitled as his widow to draw a pension from the federal government. *Lawrence v. Nelson*, 113–277, 85 N. W. 84.

In a case involving property rights, the presumption arising from a pretended marriage will not be sufficient to overthrow the presumption of the continuing validity of a former marriage, in the absence of any other evidence of a divorce. *Goodwin v. Goodwin*, 113–319, 85 N. W. 31.

A divorce will not be presumed in order to sustain the validity of a subsequent marriage where the evidence affirmatively shows no record of such proceeding in the county in which it should have been instituted, and no grounds therefor. *In re Estate of Colton*, 129–542, 105 N. W. 1008.

The requirement that the petition be verified is not jurisdictional. *Richardson v. King*, 157– —, 135 N. W. 640.

SEC. 3174. Causes.

Adultery: A husband cannot have a divorce on account of the adultery of the wife with a third person who has such connection at the instigation of the husband for the purpose of securing evidence with a view to a divorce. *May v. May*, 108–1, 78 N. W. 703.

Under the evidence in a particular case, held that although the husband had declared his preference for the society of

another woman to that of his wife, there was no evidence of illicit relations such as to sustain a divorce on the ground of adultery. *Craig v. Craig*, 129–192, 105 N. W. 446.

Mere ground of suspicion is not sufficient to justify a divorce on the ground of adultery. *Snuoffer v. Snouffer*, 150–58, 129 N. W. 326.

A wife who suspects her husband of having adulterous relations may take measures to secure proof of such relations without being guilty of connivance which will defeat her action for divorce on that ground. *Engle v. Engle*, 153–285, 133 N. W. 654.

As to sufficiency of evidence in particular cases to establish adultery see *Bizer v. Bizer*, 110–248, 81 N. W. 465; *Wells v. Wells*, 116–59, 89 N. W. 98.

Desertion: Four elements are essential to constitute such desertion as will be sufficient ground for a divorce: (1) the cessation of the marriage relation; (2) the intent to desert; (3) the continuance of the desertion during the statutory period; and (4) the absence of consent or misconduct of the deserted party. Separation does not constitute desertion unless accompanied with the intent to cease to live together as husband and wife, and on the part of the spouse charged with desertion such intent must be shown to have been wrongful, *i. e.*, in disregard of the marital obligations. *Kupka v. Kupka*, 132–191, 109 N. W. 610.

The husband cannot accept the departure of his wife from the home as a desertion and demand a divorce on that ground when he refuses to invite her to return, makes no effort to induce her to resume her place in his house and rejects her overtures for reconciliation. Even though she be originally in fault in leaving him, he cannot shut the door against her return and then make her continued absence the ground of a charge of desertion. *McElhaney v. McElhaney*, 125–333, 101 N. W. 93.

A cessation of intercourse alone will not authorize a divorce. There must be an abandonment of all marital duties and complete separation to constitute desertion under the statute. *Pfannebecker v. Pfannebecker*, 133–425, 110 N. W. 618.

Under the evidence in a particular case held that desertion as a ground of divorce in an action by the wife against her husband was sufficiently established. *Walker v Walker*, 127–77, 102 N. W. 435.

Even though at the time the wife abandons her husband she is in such mental condition as to not understand the nature of her act, yet if after recovering consciousness she refuses to return, a desertion is made out. *Seeds v. Seeds*, 139-717, 117 N. W. 1069.

The party at fault in the original separation desiring to resume proper marital relations within two years so as to prevent the desertion from becoming a statutory ground for divorce must make a good faith offer to return without other conditions than those incident to the proper treatment of each other as husband and wife. The party not in fault need not solicit the return of the other who has left the home without good cause. It is sufficient to make out desertion in such case that such party has not refused an unconditional offer to return. *Ibid.*

Mere refusal to cohabit while continuing to live with the husband does not constitute desertion. *Snouffer v. Snouffer*, 150–58, 129 N. W. 326.

A qualified and conditional offer after desertion to resume marital relations does not prevent the allowance of a divorce on the ground of such desertion. *Bohanan v. Bohanan*, 150–182, 129 N. W. 819.

Where the husband has deserted his wife and remained separated from her for the statutory period, she is entitled to a divorce unless he can show that during such statutory period he endeavored in good faith to secure her return without imposing on such return improper qualifications and conditions. *Arment v. Arment*, 154–573, 134 N. W. 616.

Where without good cause the wife abandons the husband and remains separated from him for the statutory period, the husband is entitled to a divorce on the ground of desertion. *Coffin v. Coffin*, 155–574, 136 N. W. 539.

Habitual drunkenness: Occasional acts of intoxication are not sufficient to make one an habitual drunkard. There must be an involuntary tendency to become intoxicated as often as the temptation is presented, which comes from a fixed habit acquired from frequent and excessive indulgence. *Bizer v. Bizer*, 110–248, 81 N. W. 465.

Cruel and inhuman treatment: Divorce will only be granted on statutory grounds; and cruel and inhuman treatment will be a sufficient ground only where it is such as to endanger life. Whether a particular act or course of mistreatment is cruel and inhuman, and if so whether it is such as to endanger life, must be determined from the facts of each case, such as the temperament, disposition and mental and physical condition of the complaining party. *Blair v. Blair*, 106–269, 76 N. W. 700.

There may be cruel and inhuman treatment which will be a ground for divorce, although the life of the wife has not been imperiled by physical acts of violence. *Berry v. Berry*, 115–543, 88 N. W. 1075.

Inhuman treatment which would warrant a divorce must be such as to endanger life, and it must be treatment which has not been provoked or caused by the fault of the complaining party. *Shors v. Shors*, 133–22, 110 N. W. 16.

Unfounded charges by the husband against the wife of lewdness, unchastity and adultery may constitute such inhuman treatment as to endanger the life, although no physical injury be inflicted. Treatment which affects the mind to such a degree as to destroy health or endanger life is a cause for divorce. *Ibid.*

Cruelty provoked by the wrongful acts or unreasonable conduct of the wife will not entitle her to a divorce. *May v. May*, 108–1, 78 N. W. 703.

A divorce on the ground of cruel and inhuman treatment may be granted to the wife on account of conduct of the husband such as would tend to break down her nervous system and permanently impair her health. *Shook v. Shook*, 114–592, 87 N. W. 680.

Repeated false assertions by a husband in the presence of his family and to others that his wife is unchaste are calculated to impair her health and endanger life and may justify a divorce. *Turner v. Turner*, 122–113, 97 N. W. 997.

Accusations of infidelity by the wife against the husband do not in themselves constitute such cruel and inhuman treatment as to be likely to impair the health of the husband, and do not therefore constitute grounds for divorce. *Pfannebecker v. Pfannebecker*, 133–425, 110 N. W. 618.

Statements by the husband to the wife that he has lost his affection for her and prefers another woman to her may constitute such cruel and inhuman treatment as to authorize a divorce. *Craig v. Craig*, 129–192, 105 N. W. 446.

Where the evidence discloses a long continued course of ill treatment, even though with slight physical violence which would be likely to impair health and imperil the life of the wife, she is entitled to a divorce. *Hullinger v. Hullinger*, 133–269, 110 N. W. 470.

Incompatibility of temper is no ground for divorce; and while the courts cannot compel husband and wife to live together, they can make it so difficult to obtain a divorce as to encourage another effort at observance of the matrimonial vows. *Olson v. Olson*, 130–353, 106 N. W. 758.

In determining the existence of cruelty and inhumanity sufficient to justify a divorce of the wife from the husband on that ground, the general treatment accorded the wife by the husband should be considered; and if upon the whole record it appears that the life and health of the wife have been endangered by ill treatment, be it nothing more than abusive, insulting, profane and vulgar language, lack of affection or failure to furnish the necessaries of life, a divorce should be granted. *Rader v. Rader*, 136–223, 113 N. W. 817.

It is not necessary that blows be struck or that there be physical violence to entitle a wife to a divorce on the ground of cruel and inhuman treatment. Other things are quite as harmful to health and life as bodily assault. *Luettjohann v. Luettjohann*, 147–286, 126 N. W. 172.

Reprehensible conduct towards the wife seriously affecting her nervous condition and which, if continued, would endanger her life, would be sufficient to support a decree of divorce on the ground of cruel and inhuman treatment. *Martin v. Martin*, 150–223, 129 N. W. 816.

In view of the fact that the supreme court was not in as good position to weigh the testimony as to cruel and inhuman treatment as was the trial court by reason of the presence of the parties before it, held that it would not interfere with the findings of the lower court granting the divorce. *Evans v. Evans*, 140 N. W. 801.

As to sufficiency of evidence in particular cases to show such cruel and inhuman treatment as to authorize the granting of a divorce, see *Schaffer v. Schaffer*, 106–492, 76 N. W. 738; *Sylvester v. Sylvester*, 109–401, 80 N. W. 547; *Wells v. Wells*, 116–59, 89 N. W. 98; *Luick v. Luick*, 132–302, 109 N. W. 783; *Caldwell v. Caldwell*, 141–192, 119 N. W. 599; *Snouffer v. Snouffer*, 150–58, 129 N. W. 326; *Parsons v. Parsons*, 152–68, 131 N. W. 17; *Felkner v. Felkner*, 153–56, 133 N. W. 341; *Coffin v. Coffin*, 155–574, 136 N. W. 539; *Barr v. Barr*, 157–153, 138 N. W. 379; *Goeldner v. Goeldner*, 139 N. W. 889; *Harris v. Harris*, 139 N. W. 896.

Condonation: The wife, by continuing to live and cohabit with the husband, condones any previous acts of his which would have entitled her to a divorce. *May v. May*, 108–1, 78 N. W. 703.

A condonation based on the condition of future good conduct is destroyed as a ground of defense if the improper conduct which has been condoned is subsequently repeated. *Shors v. Shors*, 133–22, 110 N. W. 16.

Condonation is always conditional on the fact that the party forgiven will thereafter abstain from the commission of like offenses, and when the condition is broken the original cause of complaint revives. *Craig v. Craig*, 129–192, 105 N. W. 446.

Contract to procure: A contract having for its object the securing of the dissolution of the marriage contract as to one of the parties is against public policy and void, and one who renders services under such a contract cannot recover under *quantum meruit*. *Barngrover v. Pettigrew*, 128–533, 104 N. W. 904.

SEC. 3175. Husband from wife.

A husband may obtain a divorce from his wife because of her pregnancy by another before marriage, though the husband had also had intercourse with her before marriage, he having been induced by the wife to believe that her pregnancy had re-

sulted from intercourse with him. *Wallace v. Wallace*, 137–37, 114 N. W. 527.

But declarations of the wife as to paternity of a child born within wedlock to show such child to be the result of intercourse with another than her husband are not admissible. *Ibid.*

SEC. 3177. Maintenance during litigation.

The statute does not expressly or by implication provide that temporary alimony shall be allowed only after answer. *Hamilton v. Hamilton*, 129–628, 106 N. W. 5.

The appearance of the defendant to object to the granting of temporary alimony constitutes an appearance to the action giving the court jurisdiction. *Ibid.*

After a trial on the merits and a judgment denying plaintiff a divorce, the court has no power to make an allowance to plaintiff of suit money. *Wald v. Wald*, 124–183, 99 N. W. 720.

A judge as such has no power to allow temporary alimony. The statute expressly limits this power to the court itself. *Mengel v. Mengel*, 157– —, 138 N. W. 495.

An allowance of suit money for appeal to the supreme court should be made on application to that court, and not by the district court after the case has been appealed. *Shors v. Shors*, 133–22, 110 N. W. 16.

The defendant should not be deprived of his right to defend the action because of his failure to comply with an order for the payment of temporary alimony, where there is no other showing than that on which the allowance of temporary alimony was made. *Hancock v. Hancock*, 134–475, 109 N. W. 1009.

The rules as to allowance of suit money are the same in a proceeding for separate maintenance as in a suit for divorce. *Ibid.*

An attorney's lien does not attach to an allowance for suit money. *Hubbard v. Ellithorpe*, 135–259, 112 N. W. 796.

The court may award suit money and attorney's fees pending the litigation, but after the petition of the wife for divorce has been dismissed in a trial on the merits, her attorney cannot recover attorney's fees from the husband. *Stockman v. Whitmore*, 140–378, 118 N. W. 403.

At a subsequent term, after the ruling on a motion as to temporary alimony and suit money, the court may, pending the proceeding, reopen the matter of such allowance on a new motion. *Ricard v. Ricard*, 143–182, 121 N. W. 525.

The court is acting within its jurisdiction in making an order for temporary alimony, though the petition may be insufficient in its allegations to warrant the granting of the relief asked. *Mengel v. Mengel*, 145–737, 120 N. W. 72, 122 N. W. 899.

In a proceeding for separate maintenance, there may be an intermediate allowance for suit money and for temporary support. *Harlow v. Harlow*, 150–173, 129 N. W. 833.

An allowance of temporary alimony will not be set aside on appeal on the ground that pending the appeal the wife to whom a divorce had been granted has remarried. *Arment v. Arment*, 154–573, 134 N. W. 616.

The court has power to make subsequent changes in an order for temporary alimony. *Mengel v. Mengel*, 157– —, 138 N. W. 495.

The court has inherent power to make an allowance to a wife of suit money for the purpose of resisting an appeal taken by her husband from an award of temporary alimony. But such allowance should be made in the court to which the appeal is taken. *Ibid.*

To justify the reversal of an allowance of suit money, it must be shown that the trial court had no power or authority to grant it. *Ibid.*

In an action for separate maintenance, the allowance of temporary alimony is largely a matter of discretion in the trial court. *Eastman v. Eastman*, 140 N. W. 400.

Although the court will look to the pleadings to ascertain if a meritorious claim is alleged and require a sufficient showing of facts to indicate that the allegations of the petition are made in apparent good faith, and may also inquire into the financial resources of the respective parties, it will not undertake on a preliminary motion for temporary allowance of separate maintenance and suit money to investigate and pass upon the merits of the controversy. *Ibid.*

SEC. 3180. Alimony—custody of children—changes.

Allowance of alimony: The court is not limited to a fixed allowance or proportion of the estate of the defendant which shall be given to the injured party as permanent alimony or for separate maintenance; such sum should be allowed by the court as is just in the light of all the facts before it. *Goldie v. Goldie*, 123–175, 98 N. W. 630, 99 N. W. 707.

An alternative decree giving to the successful plaintiff an option of receiving a lump sum less the aggregate of the sum paid by way of annual payments, on failure or refusal of the defendant to make the annual payments provided for, is not necessarily erroneous. *Ibid.*

Under our practice the property rights of the husband and wife in the property owned by each are ascertained in a divorce proceeding, and final distribution is made

in order that the parties may forever remain independent of each other, and in making the allowance of alimony the court must estimate the property of both parties and adjudicate the claims that each has against the other. But the interests of either in the property of the other depending not on the marriage relation, but on contracts with third persons, or acquisition from sources other than the marriage relation are not necessarily involved. *Baird v. Connell*, 121–278, 96 N. W. 863.

Where a divorce was granted to the wife, held that, although under the circumstances a provision for alimony to the husband was not improper, the amount of such allowance was excessive. *McDonald v. McDonald*, 117–307, 90 N. W. 603.

On appeal from allowance of alimony it will be presumed that the appellant was guilty of misconduct justifying the decree of divorce, no appeal having been taken. *Graves v. Graves*, 138–17, 115 N. W. 488.

An agreement as to the amount of alimony, procured through imposition, and providing for a grossly inadequate allowance, will be disregarded. *Parsons v. Parsons*, 152–68, 131 N. W. 17.

In a particular case held that the wife to whom a divorce is granted should be allowed by way of alimony one half of the property accumulated by her husband and herself during their marriage relation. *Vey v. Vey*, 150–166, 129 N. W. 801.

Even where the wife is granted a decree of divorce from her husband and shows a meritorious claim for alimony, it is not proper to award her alimony in such measure as to dissipate practically the entire estate of the husband not accumulated by their joint efforts. *Daly v. Daly*, 154–486, 131 N. W. 758.

Where both husband and wife had by their labors contributed to the acquisition of property, title to which was in common, held that an allowance to the wife on divorce of substantially half the property in value with a further allowance for the support of the children was reasonable. *Hartl v. Hartl*, 155–329, 135 N. W. 1007.

Provisions as to alimony in particular cases sustained. *Casey v. Casey*, 116–655, 88 N. W. 937; *Halley v. Halley*, 130–683, 107 N. W. 807; *Luick v. Luick*, 132–302, 109 N. W. 783.

As to amount of alimony proper under the facts of particular cases, see *Martin v. Martin*, 150–223, 129 N. W. 816; *Arment v. Arment*, 154–573, 134 N. W. 616; *Evans v. Evans*, 140 N. W. 801.

Separate maintenance: A suit for separate maintenance cannot be sustained except for a cause which would warrant a decree of divorce. *Shors v. Shors*, 133–22, 110 N. W. 16.

While as a general rule a decree for separate maintenance will not be granted to a wife unless the husband's conduct has been such as to justify a divorce, it is also true that when a husband deserts or abandons his wife without just cause, he may be compelled to support her although the full period of two years necessary to secure a divorce has not elapsed. *Russell v. Russell*, 150–137, 129 N. W. 835; *Harlow v. Harlow*, 150–173, 129 N. W. 833.

Attorney's fees: In a decree for a divorce allowing the recovery of a specific sum against the defendant by way of alimony, the defendant appealing may be required in the supreme court on affirmance of decree to pay an additional sum by way of attorney's fees in the supreme court. *Goldie v. Goldie*, 123–175, 98 N. W. 630, 99 N. W. 707.

In an action for divorce by the wife in which alimony is allowed to her, the money or property thus given is subject to the lien of her attorney for fees. *Hubbard v. Ellithorpe*, 135–259, 112 N. W. 796.

In such case the wife cannot defeat the lien of her attorneys on an allegation of their negligence in not securing larger allowance in her favor, without showing such negligence on their part as would release her from primary liability to them for the payment of their fees. *Ibid.*

A contract with reference to procuring a divorce, or to facilitate its procurement, is void as against public policy; and where an attorney contracted with his client for a lump sum to be paid, out of which alimony for the client's wife was to be satfied by settlement with her and the balance was to be retained by the attorney, held that the contract was invalid. *Donaldson v. Eaton*, 136–650, 114 N. W. 19.

After the wife's petition for divorce has been dismissed on trial, the attorneys for the wife cannot recover fees for their services from the husband. *Stockman v. Whitmore*, 140–378, 118 N. W. 403; *Gordon v. Brackey*, 143–102, 120 N. W. 83.

Where the wife instituted an action for separate maintenance and the husband filed a cross bill for divorce, charging improper conduct, and the entire proceeding was then by agreement dismissed, held that the attorneys for the wife could recover fees from the husband as for necessaries furnished the wife, it appearing that the services were furnished in good faith in defending against the cross bill. *Read v. Dickinson*, 151–369, 130 N. W. 160.

Allowance of alimony in a particular case held not excessive; but in view of the allowance of attorney's fees by the trial court, held that under the circumstances no additional allowance on appeal would be made. *Barr v. Barr*, 157–153, 138 N. W. 379.

Custody and support of children: Where the wife, suing for divorce and alimony, was denied divorce but given the custody of a child and an allowance for its support, held that such allowance was without authority, as there appeared to be no reason why the child should not remain

with and receive support from the father. *Garrett v. Garrett*, 114–439, 87 N. W. 282.

Where the wife, suing for divorce, is given the custody of the children it is not improper to award such alimony as will enable her to properly clothe, maintain and educate them. *Walker v. Walker*, 127–77, 102 N. W. 435.

In determining the reasonableness of a decree providing that the divorced husband may have the custody of the child only at stated periods, and with their consent, it is proper to take into account their dislike for the father. *Hullinger v. Hullinger*, 133–269, 110 N. W. 470.

Upon a divorce the custody of the children will be given to the mother when she is not the offending party and upon a showing that she is able to furnish them with a comfortable home, support and education. *Caldwell v. Caldwell*, 141–192, 119 N. W. 599.

Where by decree of divorce, the mother was awarded the custody of a child and the father prohibited from visiting such child except on payment of costs of the proceeding and the allowance for the child's support, held that the father failing to comply with the conditions could not recover damages against the parent of the mother with whom she resided for maliciously denying him the privilege of attending the child's funeral. *Rader v. Davis*, 154–306, 134 N. W. 849.

Effect of decree: A divorce and decree of alimony against the father does not terminate his obligation as a parent to further contribute to the support of his child. *Foote v. De Poy*, 126–366, 102 N. W. 112.

Where the wife was induced to go to a foreign country to visit relatives for the purpose of enabling the husband fraudulently to obtain a divorce against her by default, held that a court of equity had jurisdiction to set aside such divorce as fraudulently procured. *Tollefson v. Tollefson*, 137–151, 114 N. W. 631.

Where it was provided in a decree of divorce that a portion of the proceeds to be derived from an action by the husband for personal injury should be paid to the wife when the recovery should be secured, of which decree the defendant in the action had notice, held that such defendant could not, by settlement, relieve himself from the lien provided for in the decree. *Kithcart v. Kithcart*, 145–549, 124 N. W. 305.

The property rights of both parties are settled and adjudged by the decree in the divorce proceeding, and the party to whom the homestead is awarded by the decree has a continuing right of homestead under the provisions of code § 2973. *Roberts v. Playle*, 150–279, 129 N. W. 945.

Subsequent change: A decree requiring the defendant to contribute to the support of the minor children, the custody of whom is awarded to the plaintiff, may be modified so as to require a larger payment on a showing of increased financial ability of the defendant and increased necessities in support of the children on the part of the plaintiff. *Ostheimer v. Ostheimer*, 125–523, 101 N. W. 275.

The original decree is conclusive upon the parties as to their then circumstances, and the power to make changes in the decree is not a power to grant a new trial, or retry the same case, but only to adapt the decree to the newer circumstances of the parties. *Ferguson v. Ferguson*, 111–158, 82 N. W. 490.

The original decree is conclusive upon the parties upon the facts and circumstances then existing or which might have been proved. Fraud and false swearing in procuring the original decree is not sufficient ground for modification thereof, there being no evidence of change in the conditions or circumstances affecting the parties, unless the fraud be such as to require the setting aside of the original decree on that ground. *Graves v. Graves*, 132–199, 109 N. W. 707.

An order respecting the custody of children made in a decree of divorce is conclusive until it is subsequently made to appear that by reason of some changed circumstances or conditions the enforcement of the order would result in positive wrong or injustice. *Crockett v. Crockett*, 132–388, 106 N. W. 944.

The decree as to custody of children cannot be changed in the absence of a showing of circumstances making a change expedient. *Youde v. Youde*, 136–719, 114 N. W. 190.

While it is proper for a court to recognize stipulations of the parties as to alimony and custody of the children, it is not deprived of jurisdiction to modify the decree on proof of a substantial change of the conditions. *Slattery v. Slattery*, 139–419, 116 N. W. 608.

Where the custody of a child was awarded to the father as plaintiff, held that the change of circumstances of the mother as defendant, rendering her better able to care for the child, such change being principally in the fact that she had remarried, was not such as to require a modification of the decree. *Daniels v. Daniels*, 145–422, 124 N. W. 169.

Where a divorce has been granted and custody of a child awarded with alimony, such decree is final as to the alimony to be paid so long as the circumstances remain the same, and a supplemental proceeding for additional alimony cannot be maintained without showing a change of circumstances requiring an additional allowance. But held in a particular case that there had been such change of circumstances in the case of the wife to whom custody of the child and alimony had been awarded as to justify the allowance of

additional alimony. *Peitzman v. Peitzman*, 147–704, 125 N. W. 218.

Generally speaking there can be modification of the provisions of the decree only where there has been a change in the circumstances or conditions of the parties. *Lindquist v. Lindquist*, 148–259, 126 N. W. 1109.

The alimony allowed where custody of the children is awarded to the successful party will be presumed to have been fixed with reference to the obligation thus assumed to support such children, and a change in the provisions of the decree in this respect will not be granted save on a showing of a change in the conditions existing at the time the decree was rendered. *Kinney v. Kinney*, 150–225, 129 N. W. 826.

A valid remarriage of one of the divorced parties does not constitute such change of circumstances as to authorize a modification of the decree as to the custody of the child. *Dudley v. Dudley*, 151–142, 130 N. W. 785.

Where the decree awards custody of children to the plaintiff and provides for periodical payments of alimony, the subsequent maturity of the children and inability of the defendant to longer make payments of the alimony adjudged may warrant a modification of the decree. *Holm v. Holm*, 151–159, 130 N. W. 912.

Setting aside decree: Where it appears that the testimony on which a decree for alimony in a proceeding for divorce, rendered on service by publication, was false and untrue, the decree should be set aside. *Klaes v. Klaes*, 103–689, 72 N. W. 777.

And held that an attorney who was to receive a share of the judgment in such a case for his services was not an innocent purchaser of property awarded to the plaintiff in such a decree except to the extent to which he had actually made advances of money for expenses. *Ibid.*

Enforcement: The wife, suing for divorce, may resort to proper proceedings to subject to the payment of her alimony property of the husband in which she has inchoate right of dower and to prevent a conveyance by him in fraud of her rights. *Walker v. Walker*, 127–77, 102 N. W. 435.

Defendant a nonresident: Where alimony has been granted in a suit for a divorce against a nonresident, an *ex parte* divorce fraudulently obtained by such nonresident in another jurisdiction will not bar the alimony awarded. *Goldie v. Goldie*, 123–175, 98 N. W. 630, 99 N. W. 707.

On service by publication: While a decree for alimony in a divorce proceeding where service is by publication only is not binding on defendant as a personal judgment, it may be enforced as to his property within the state. *Rea v. Rea*, 123–241, 98 N. W. 787.

As to a nonresident without property in this state served by publication and not appearing, a judgment for alimony and costs is without validity. *Johnson v. Matthews*, 124–255, 99 N. W. 1064.

Such a void judgment cannot be vitalized by an order confirming it in a proceeding to subject property of the defendant to the satisfaction thereof. *Ibid.*

SEC. 3181. Forfeiture of rights. When a divorce is decreed the guilty party forfeits all rights acquired by marriage. In every case in which a divorce is decreed, neither party shall marry again within a year from the date of the filing of said decree unless permission to do so is granted by the court in such decree; provided, however, that nothing herein contained shall prevent the persons divorced from remarrying each other. Any person marrying contrary to the provisions of this act shall be deemed guilty of a misdemeanor and punished accordingly. [32 G. A., ch. 161; C. '73, § 2230; C. '51, § 1486.]

The guilty party forfeits all rights acquired by marriage, and this applies to the contingent dower interest in land conveyed either before or after divorce. *Pollock v. Milburn*, 112–528, 84 N. W. 521.

The husband against whom a decree of divorce has been granted cannot afterwards maintain an action for alienation of his wife's affections. The right to maintain such action is one "acquired by the marriage." *Hamilton v. McNeill*, 150–470, 129 N. W. 480.

The decree in such case is conclusive that the husband was at fault, although the defendant in the action was not a party to the proceeding for a divorce. *Ibid.*

Whether the same rules are applicable in an action for criminal conversation, *quaere*. *Ibid.*

The period of one year provided for in the statute is applicable only to those cases where the decree of divorce does not provide otherwise and without deciding the effect of a similar limitation in a divorce granted in another state having a similar statute as applied to the marriage of a person divorced in such state, held that such marriage in this state was not invalid under the provisions of code § 3151. *Lee v. Lee*, 150–611, 130 N. W. 128.

The statutory provision against the remarriage of a divorced person within a specified limited time is not applicable to a marriage consummated in another state. *Dudley v. Dudley*, 151–142, 130 N. W. 785.

SEC. 3182. Annulling illegal marriages—causes.

There are no provisions for service by publication in an act to annul a marriage. *Bisby v. Mould*, 138–15, 115 N. W. 489.

A woman who has procured a decree of annulment of marriage is not entitled to a homestead right under the provisions of code § 2973 relating to persons divorced. *Floyd County v. Wolfe*, 138–749, 117 N. W. 32.

The relationship between the parties which will render the marriage invalid is defined by code § 4936, prescribing a punishment for incest. And held that under that section a marriage between a man and the daughter of his deceased wife by a former marriage was not invalid. *Back v. Back*, 148–223, 125 N. W. 1009.

SEC. 3183. Petition.

Under this section the provisions relating to alimony and suit money in divorce cases are applicable in cases for annulment of marriage. *Ricard v. Ricard*, 143–182, 121 N. W. 525.

SEC. 3187. Alimony.

Temporary alimony and suit money may be awarded in an action for the annulment of a marriage. *Ricard v. Ricard*, 143–182, 121 N. W. 525.

SEC. 3187-a. Decrees annulling marriages when service by publication—legalized. That all decrees of the courts of this state made and entered of record in actions brought to annul a marriage and in which cases the service of the original notice was made by publication in the manner provided by law for actions for divorce, be and the same are hereby legalized and validated as fully and to the same extent as if the statute at the time such suit was instituted had provided for service of the original notice by publication in the time and manner aforesaid. [35 G. A., ch. 270, § 1.]

CHAPTER 4.

OF MINORS.

SECTION 3188. Majority.

A male becomes an adult at the age of twenty-one years, but the meaning of the term "adult" is to be determined by the laws of the country with reference to which that term is used. *Banco De Sonora v. Bankers' Mut. Casualty Co.*, 124–576, 100 N. W. 532.

Although a minor attains his majority by marriage, nevertheless in a prosecution for sale of liquor to a minor, proof that he had not attained the age of majority is sufficient *prima facie* to establish such unlawful sale without proof that he had not attained majority by marriage. *State v. Mulhern*, 130–46, 106 N. W. 267.

SEC. 3189. Contracts—disaffirmance.

A minor may relieve himself from legal liability under his contract by a timely disaffirmance and a return or offer to return of the consideration received, and such disaffirmance relieves him from liability upon a note given by him in connection with such contract, even in the hands of an innocent purchaser. *Seeley v. Seeley-Howe-LeVan Co.*, 128–294, 103 N. W. 961.

Such disaffirmance does not, however, release the obligation of the surety on such contract. *Ibid.*

The minor may disaffirm before he attains the age of majority, but he is only required by statute to restore the money or property which he has received by virtue of the contract which remains within his control after attaining majority. *Beickler v. Guenther*, 121–419, 96 N. W. 895.

Where a minor elected to disaffirm a rescission of a contract for the purchase of land which the vendor had disabled himself from performing, held that the minor might recover the market value of the land at the time of such disaffirmance, less the amount owing on the contract of purchase, with interest on the difference. *Ibid.*

There is a secondary liability of a minor for necessaries furnished to him, such as physicians' services, notwithstanding the

primary liability of his parents therefor. *Andrews v. Chicago, G. W. R. Co.*, 129–162, 105 N. W. 404.

A minor is only permitted to contract for necessaries because otherwise he might suffer for want of them, and he is not bound by the terms of an express contract for necessaries, but only for their reasonable value. Therefore the minor may disaffirm an unexecuted contract for necessaries. *Wallin v. Highland Park College*, 127–131, 102 N. W. 839.

A minor cannot be held liable for breach of promise, but may be held for seduction. *Wise v. Schloesser*, 111–16, 82 N. W. 439.

Although a minor cannot make a valid contract of marriage, nevertheless a promise of marriage by the defendant, a minor, may be shown in an action to recover damages for seduction. *Hawk v. Harris*, 112–543, 84 N. W. 664.

SEC. 3190. Misrepresentations—engaging in business.

If a minor engages in business as a merchant, and parties subsequently assume that he is of full age and deal with him in that belief, no inquiry or representation being made as to his minority, he becomes absolutely liable for the debts contracted in such business, and he may be adjudged a bankrupt on his own petition, though still an infant. *In re Brice*, 93 Fed. 942.

Occasional transaction of business which is usually transacted by an adult does not constitute the engaging in business contemplated by the statute as estopping a minor from disaffirmance of his contracts. *Beickler v. Guenther*, 121–419, 96 N. W. 895.

A minor is bound by his contracts, regardless of whether he is under guardianship, unless he disaffirms within a reasonable time after having attained his majority. But he cannot disaffirm if, by reason of misrepresentation of his age or having engaged in business as an adult, the other contracting party had good reason to believe him capable of contracting; and the question whether the other party had good reason to believe the minor an adult capable of contracting necessarily must depend on the circumstances of each particular case. *First Nat. Bank v. Casey*, 138 N. W. 897.

In an action against a minor on a contract where the other party contends that he was misled into contracting with the minor as an adult, the appearance of the minor in regard to maturity is a proper matter for the jury to consider. *Ibid.*

By interposing the defense during minority, the minor may disaffirm the contract on which he is sued, and need not return the money or property received under the contract if such money or property is not within his control. *Ibid.*

CHAPTER 5.

OF THE GUARDIANSHIP OF PERSONS AND PROPERTY.

SECTION 3192. Natural guardian.

Natural guardian: Parents are the natural guardians of their minor children, and as such may accept the delivery of deeds made to them where the deeds are beneficial in their nature. *Hall v. Cardell*, 111–206, 82 N. W. 503.

On the death of the parents, the grandfather or grandmother when next of kin succeeds to the natural guardianship and cannot be deprived of the rights incident thereto by a deed of adoption approved in an *ex parte* proceeding by the clerk of court on application of a collateral relative. *Holmes v. Derrig*, 127–625, 103 N. W. 973.

An acceptance by a collateral relative of the custody of the child in pursuance of the request of the deceased parent and a reasonable observance of the duty assumed by such acceptance are circumstances of much weight as between claimants otherwise equal in right as to the custody of the child, but are not in all circumstances controlling factors in the situation. *Ibid.*

A judgment rendered against a minor without appointment of or defense by a guardian is not void, but at most irregular. *Reints v. Engle*, 130–726, 107 N. W. 947. And see notes to § 3482.

While the parent is the natural guardian of the person of the minor child, he is not by virtue of that fact, the guardian of the child's property qualified to make defense for him in an action. *State v. Stark*, 149–749, 129 N. W. 331.

Custody of child: The parent's right to the custody of the child, while recognized and allowed strong weight, is not absolute, and will not be enforced against the serious interest of the child. The child's vital welfare, present and future,

is not sacrificed to the parent's claim. *Hadley v. Forrest*, 112–125, 83 N. W. 822.

The right of the parent to the custody of his child should be denied with much hesitancy, and only upon satisfactory proof of a legal surrender thereof or unequivocal showing that the interest of the child demands such interposition by the court. *Dunkin v. Seifert*, 123–64, 98 N. W. 558.

The fact that one who has had the custody of a child is better able to give it the comforts and luxuries of life than the father who is surrendering or abandoning his legal right will not be a controlling consideration as against the claim of the father for its custody. *Ibid.*

While the best interest of the child should always be accepted as a matter of controlling importance in determining the right to its custody, yet this question is a relative one and can never be wholly divorced from the question of the rights and interests of the parents or those standing in *loco parentis*. The affection for the child of one who has had its custody will not necessarily outweigh other considerations in determining the right to future custody. *Miller v. Miller*, 123–165, 98 N. W. 631.

The parent may lawfully be deprived of the custody of his minor child and still be liable for its support. *Guthrie County v. Conrad*, 133–171, 110 N. W. 454.

One who takes and raises a child to which he has no relationship and which he does not adopt does not become liable for medical services rendered to such child without his request. *Holmes v. McKim*, 109–245, 80 N. W. 329.

The father has the primary right to the guardianship of his minor children as against all persons save the mother, and his right should be sustained by the court as against any other person than the mother claiming such custody, unless he is found to be an unsuitable person and the adverse claimant a suitable person so that the interests of the minor require that the natural and statutory right of the father should be disregarded. *Brem v. Swander*, 153–669, 132 N. W. 829.

The surviving parent has not the absolute right to the custody of the child as against the best interests of the child. *Hall v. Wintermute*, 154–520, 134 N. W. 425.

Under the circumstances of a particular case, held that the father of a child was not entitled to its custody as against the rights of the grandparent with whom she had been living separate from the father, and to whom the child had been intrusted, it appearing on the record that the father was at fault with reference to the separation. *Ibid.*

Where the father and mother are equally entitled to the possession of their minor child, the father does not commit the crime of kidnaping by taking possession of the child from the mother, pending a suit by her for a divorce and before any order affecting the custody of the child is made; nor is a person who assists the father under such circumstances guilty of the crime. *State v. Dewey*, 155–469, 136 N. W. 533.

Agreement as to custody: When a parent has voluntarily parted with the custody of his child and seeks to recover it from those who have had such custody by his consent, the welfare or wishes of the child will be consulted and, other things being equal, this consideration will be controlling. *McDonald v. Stitt*, 118–199, 91 N. W. 1031.

Where a mother had turned her child over, when only a few days old, to be disposed of to any proper person who would take it, and the child had been taken and kept for several years by one who had the right to believe that the parent would assert no further claims to the child, held that in an action by the mother against such person to recover possession, the interest of the child would be considered, and, under the facts in the particular case, held that the action of the lower court in denying the custody to the mother would be sustained. *Ibid.*

The mother, equally with the father, is entitled to exercise the authority of disciplining the child, and may delegate this authority to another. Therefore held that a child of eight years of age had no right of action against an aunt for corporal punishment administered under authority given to the aunt by the mother. *Rowe v. Rugg*, 117–606, 91 N. W. 903.

A parent may confer upon some other person the legal right to the custody of a minor child, but such an arrangement contemplating permanent custody will not be binding unless this is the intention of the parent. *Miller v. Miller*, 123–165, 98 N. W. 631.

The parent does not permanently forfeit his right to regain the custody of his child by an arrangement under which the child is to live with and be cared for by another for an annual consideration. The rights of the parent are not to be interfered with except under imperative necessity for the welfare of the child, growing out of gross misconduct of the parent. *Van Auken v. Wieman*, 128–476, 104 N. W. 464.

Generally speaking, the natural parents are entitled to the care, custody and control of their minor children; but they may by agreement or conduct deprive themselves of this natural right and confer it upon others, and when the scales are equally balanced, the courts are reluctant to make a change. The interests of the child are paramount. *Smidt v. Benenga*, 140–399, 118 N. W. 439.

Habeas corpus: In a *habeas corpus* proceeding brought by one claiming to be

the guardian against one claiming to be the parent by adoption, the court may inquire not only into the legality of the adoption, but also to the best interests of the child. But the custody of the adopted parent, when found to be legal, will not be interfered with unless the best interests of the child require it. *Smiley v. McIntosh*, 129–337, 105 N. W. 577.

The issues in a *habeas corpus* proceeding for the custody of a child are not triable *de novo* on appeal, and if there is evidence to support the finding of the trial court, the supreme court will not reverse. *Dunkin v. Seifert*, 123–64, 98 N. W. 558.

Services: Clothing furnished by the father to a minor child remains the property of the father, and he may recover for injury thereto. He may also recover for any loss of services or for medical attendance occasioned directly by the wrongful acts of another with reference to the child. *Shoemaker v. Jackson*, 128–488, 104 N. W. 503.

Emancipation: The father's emancipation of his minor son may be in writing or parol, and may be proven by circumstantial evidence or implied from conduct. The mere fact that the son continues to make his home with the father and to assist him is not controlling in determining the question of emancipation. *Bristor v. Chicago & N. W. R. Co.*, 128–479, 104 N. W. 487.

Emancipation means the voluntary freeing of the child so that he may manage and control his own time and affairs. *Guthrie County v. Conrad*, 133–171, 110 N. W. 454.

Where a son during infancy was allowed to manage his business in his own name, and to pay over his earnings to his mother, there was sufficient evidence of an emancipation by the father. *Jacobs v. Jacobs*, 130–10, 104 N. W. 489.

A mutual understanding between parent and child is sufficient to constitute emancipation, and such understanding may arise by implication from the acts and conduct of the parties. *Kubic v. Zemke*, 105–269, 74 N. W. 748.

If, however, the parent still claims the right to the child's services during minority, whether he exercises the right to have them or not, there is no such emancipation as to free the parent from the obligation the law creates to pay the necessary support furnished to the child by a third party. *Ibid.*

SEC. 3193. Surviving parent guardian of the person.

The right of the guardian to the custody of the ward may be interfered with by the court in the interests of the ward at least to the extent of making some other temporary disposition of such custody than that which would result from the fact of appointment alone. *Smith v. Haas*, 132–493, 109 N. W. 1075.

The appointment of another guardian on the tender of resignation of an existing guardian amounts to an acceptance of such resignation, and the failure of the guardian appointed to qualify does not restore the previous guardianship. *Smiley v. McIntosh*, 129–337, 105 N. W. 577.

SEC. 3194. Of property.

Under the corresponding section of the code of '73 which excepted property derived from either parent, held that property having its source and origin in the parents, as well as that descended from or through them, was intended. *Ringstad v. Hanson*, 150–324, 130 N. W. 145.

SEC. 3197. Bond and oath.

A court of equity has jurisdiction to set aside a settlement and release of the guardian and his sureties on account of fraud in procuring the settlement. *Witt v. Day*, 112–110, 83 N. W. 797.

Under the circumstances of a particular case, held that the bondsmen in making settlement with the ward after attaining majority had not exercised the good faith required, and that the settlement should be set aside. *Ibid.*

Trial of a claim filed in a guardianship proceeding is not required to be by jury. *In re Guardianship of Buck*, 140–355, 118 N. W. 530.

The court of the county of the minor's domicile has jurisdiction to appoint a guardian. *Smidt v. Benenga*, 140–399, 118 N. W. 439.

SEC. 3198. Removal—new bond.

In a proceeding to determine the right of a guardian to the custody of the ward, the court may remove such guardian as an unfit person and substitute another in his place. *Smith v. Haas*, 132–493, 109 N. W. 1075.

A contract for pecuniary consideration to resign the position of guardian is void as against public policy. *Aughey v. Windrem*, 137–315, 114 N. W. 1047.

SEC. 3200. Duties.

Powers: The guardian cannot excuse an unauthorized act on the ground that it was under the advice of a judge given orally outside of court. *In re Guardianship of Kimble*, 127–665, 103 N. W. 1009.

The signing of a contract by the guardian for the ward under the direction of the probate court makes the contract as binding and conclusive with reference to the ward as though the ward had been an adult and executed such contract in person. *In re Harker's Estate*, 113–584, 85 N. W. 786.

A guardian cannot loan the money of his ward, lease his land or invest his funds without an order of court. Such transactions are invalid, or at least voidable, until approved. *Easton v. Somerville*, 111–164, 82 N. W. 475.

Without direction of court, the guardian has no authority to loan his ward's money, and should keep the money and property of the ward separate from his own, and make investment thereof under the court's direction, as guardian only, and not in his own name. *McIntire v. Bailey*, 133–418, 110 N. W. 588.

While guardians are authorized to employ counsel for their wards, such employment must be under order of court entered on the record. *In re Manning Estate*, 134–165, 111 N. W. 409.

A guardian cannot dispose of his ward's property or change the investment thereof, except in pursuance of authority given by the court. *McCutchen v. Roush*, 139–351, 115 N. W. 903.

Authority may be given the guardian to make purchases of real estate with the funds of the ward and for his benefit, and the guardian should not be liable for mere errors of judgment in doing so where he has acted honestly and faithfully and in the exercise of the care and discretion which men of ordinary prudence and intelligence exercise in their own affairs. *In re Estate of Wisner*, 145–151, 123 N. W. 978.

On death of ward: After the death of the ward, the guardian still holds funds in his hands for the ward's administrator, and not for his heirs, and cannot be summoned as garnishee by judgment creditors of such heirs. *Pugh v. Jones*, 134–746, 112 N. W. 225.

Allowance for support: While in general a parent, or one standing *in loco parentis* to the ward, is not entitled to an allowance out of the ward's estate for support of the child, yet there may be circumstances under which such allowance is proper. *In re Carter*, 120–215, 94 N. W. 488.

While application for such allowance should be made to the probate court before any indebtedness therefor is contracted, yet, even though such application is not made until after the support has been furnished, if the claim therefor is reasonable and just, it may be allowed and payment ordered, the propriety of the allowance being passed upon when it is asked, and when such allowance is made the action of the probate court will be presumed to be correct, and will be sustained unless fraud is shown. *Ibid.*

But in a particular case held that the circumstances showed fraud and collusion on the part of the guardian in securing an allowance to the parent for the guardian's own personal advantage. *Ibid.*

Settlement: The court cannot in a guardianship proceeding settle the estate of the deceased ward, nor determine who is entitled to the proceeds of such estate, the heirs of the deceased ward not being parties to the proceeding. Nor is it competent to compel the heirs to become parties to a settlement of the guardianship. *In re Guardianship of Lindsay*, 132–119, 109 N. W. 473.

It is no defense to a guardian in a proceeding to require a settlement of his deceased ward's estate that by agreement of heirs or other persons having an interest in the estate the guardian is entitled to the proceeds of such estate. *Ibid.*

A settlement between the guardian and the ward made out of court should be closely scanned, and approval thereof should be withheld where it is made to appear that such settlement is clearly against the interests of the ward. *In re Guardianship of Holscher*, 127–369, 101 N. W. 759.

One who accepts the trust incident to guardianship should be held responsible for a fair and faithful exercise of his trust. *Ibid.*

The burden is upon the guardian claiming a settlement out of court with the ward after becoming of age, to establish the fact of such settlement. *Robb's Estate v. Robb*, 134–195, 111 N. W. 803.

The fact that the guardian has in a voluntary petition in bankruptcy stated indebtedness to his ward as among his liabilities does not estop him when called upon to account as guardian from denying the correctness of such statement with the explanation that the discharge of liability prior to bankruptcy had been questioned by the ward so as to give rise to an obligation of contingent liability. *Ibid.*

Under the facts of a particular case, held that there was such admission by the guardian of receipt of money of the ward as to render him liable to account therefor. *In re Gray*, 120–144, 94 N. W. 451.

Under the provisions of the statute the guardian is not relieved from liability for loss of funds invested, unless he acts under the direction of the court in making such investment. *Van Rees v. Witzenburg*, 112–30, 83 N. W. 787.

Settlements by a guardian with his ward out of court are not favored, and one who relies on such settlement must clearly show that he made full disclosure of everything, and that the ward knew and understood that he was making a full and final settlement. Every reasonable intendment is to be made in favor of the ward. *Ibid.*

In the absence of any actual accounting or settlement, the guardian is not discharged by a written release from the ward, and a discharge pursuant to such release is not an adjudication. Such discharge may be set aside without proof of actual fraud. *Ellis v. Soper*, 111–631, 82 N. W. 1041.

While the mother as guardian may not be bound in all events to support the child out of her own means in the absence of an allowance by the court from the property of the ward in her hands, nevertheless, where she has ample means she should not be allowed to encroach on the estate of the child, though she may set off the support of her child as against a claim for an accounting for interest. *Ibid.*

Defense by: Although the defense for a minor child is made in the trial court by a guardian *ad litem*, the court has authority to appoint a general guardian and direct that he prosecute the appeal in behalf of the minor. *In re Estate of Strang*, 131–583, 106 N. W. 631.

Claims against ward: One who has acquired a lien on the property of the ward by attachment proceedings is not by the subsequent appointment of a guardian compelled to look to the probate court for the enforcement of his rights. *Hawk v. Harris*, 112–543, 84 N. W. 664.

Action by guardian: A guardian suing to set aside a conveyance made by his ward has the burden of proving the ward's legal incapacity. But where the transaction complained of has taken place between persons standing in confidential relations, it will be closely scanned and the burden is on the party claiming the advantage of such transaction to show *bona fides*. *Reese v. Shutte*, 133–681, 108 N. W. 525.

SEC. 3201. Breach of bond—new guardian.

A failure to account to the ward when he reaches his majority is a breach of obligation under the guardian's bond, and a right of action then accrues to the ward, and the statute of limitation begins to run. The running of the statute cannot be postponed by failure of the ward to make demand for an accounting. *Ackerman v. Hilpert*, 108–247, 79 N. W. 90.

Where a guardian makes final report and his liability is adjudicated, such adjudication is binding on his sureties, and they are not entitled to relief on the ground that the guardian, under mistake as to his duties and liabilities, has made a report showing a greater liability than that actually existing. *Steiner v. Lenz*, 110–49, 81 N. W. 190.

SEC. 3202. Non-resident minors.

A guardian may be appointed for the property of a nonresident without judicial determination having been had in a court with jurisdiction of the person of such nonresident of his competency. *Wallace v. Tinney*, 145–478, 122 N. W. 936.

SEC. 3203. Account.

The accounting contemplated by the statute is not for the purpose of adjudicating the correctness of the accounts, but to indicate to the court and those interested the condition of the estate, its liabilities and resources, the propriety of orders for which application may be made and, generally, the care given and required in order to best conserve the interests of the ward. Such reports are *ex parte* and when approved are not to be given greater effect than prima-facie evidence of the accuracy of the account as stated. *In re Guardianship of Kimble*, 127–665, 103 N. W. 1009.

The report of the guardian should show that funds of the ward invested by direction of the court have been invested in his name as guardian and not in his own name, and the requirement as to annual reports should be construed as mandatory, although any reasonable explanation for failure to comply may be accepted by the court, provided the delay in making report is not unreasonable. *McIntire v. Bailey*, 133–418, 110 N. W. 588.

Default in failure to file yearly reports as required by this section will justify a removal; but the trial court is charged with a reasonable discretion as to whether it will, in view of particular circumstances, remove a guardian on that ground. *In re Guardianship of Nelson*, 148–118, 126 N. W. 973.

SEC. 3204. Penalty.

On the failure of the guardian to comply with the statutory requirements as to investment of his ward's funds and report thereof he should be removed, even though his bond is sufficient and the estate has not suffered loss. *McIntire v. Bailey*, 133–418, 110 N. W. 588.

It may be a sufficient ground for removal that a feeling of hostility between the guardian and his ward has arisen and such a situation exists that the guardian cannot properly represent the interests of the ward. *Ibid.*

SEC. 3205. Compensation.

Where the guardian does not do his full duty in notifying his wards of their right to moneys in his hands, and wrongfully mingles the trust fund with his own, he may be charged with interest thereon at six per cent., with annual rests. *Blakeney v. Wyland*, 115–607, 89 N. W. 16.

A guardian should be allowed reasonable attorney's fees actually paid out in defending a claim against his ward's estate. *In re Guardianship of Kimble*, 127–665, 103 N. W. 1009.

A guardian who has had an allowance for the care of a ward cannot, after the ward's death, recover from the estate additional compensation for the same services. *Gibson v. Wild*, 124–152, 99 N. W. 569.

Costs and expenses incurred in the litigation resulting in the appointment of a temporary guardian and attorney's fees contracted by the guardian after appointment to maintain himself as such guardian, are properly allowed out of the estate in the guardianship proceeding, and the guardian should not be required to file his claim for such costs and expenses in a probate proceeding for the administration of the estate of his deceased ward. *In re Estate of Walker*, 150–284, 128 N. W. 376, 129 N. W. 952.

Allowance in a particular case to the guardian and the attorney who represented him in attempting to maintain a guardianship, held to be proper. *In re Deck's Guardianship*, 139 N. W. 550.

While the party instituting an action for the appointment of a guardian may be held liable for attorney's fees in the event that suit fails, yet if he is successful in securing the appointment of a temporary guardian and this is followed by the appointment of a permanent guardian, the expense of the guardianship, including fees to counsel in prosecuting the action to a final conclusion, should ultimately come out of the ward's property and be charged against the funds coming into the guardian's hands. *Ibid.*

In the event of the death of the ward, pending the proceedings, it is proper to allow the expense of the guardianship in that proceeding, instead of requiring that the claim therefor be made against the administrator of the deceased's estate. *Ibid.*

SEC. 3206. Property sold.

Where notice has been served upon the ward and guardian *ad litem* appointed to act in his behalf, an order for the sale of the property is binding. *In re Guardianship of Kimble*, 127–665, 103 N. W. 1009.

In such case it is the duty of the guardian *ad litem* to make defense for the ward and, in submitting the case to the court, to raise every question involving the rights of the person under disability. *Ibid.*

SEC. 3212. Evidence—limitation.

After the time had expired for questioning the regularity of the proceedings for a guardianship sale, the ward who has already attained his majority cannot have relief on account of irregularities therein. *Burch v. Nicholson*, 157– —, 137 N. W. 1066.

DRUNKARDS, SPENDTHRIFTS AND LUNATICS.

SEC. 3219. Guardians of.

The proceeding for the appointment of a guardian is an adversary proceeding and not a proceeding *in rem*. The petitioner is plaintiff, and the person against whom the proceeding is instituted is defendant. A jury trial may be had, and an appeal is authorized. *Brown v. Lambe*, 119–404, 93 N. W. 486.

Jurisdiction in guardianship cases is not made to depend upon a strict construction of the word "inhabitant" as found in the statute. The proceeding may be instituted as to one living or being at the time within the state, regardless of his legal residence. *Ibid.*

The judge of the court in which the proceeding is instituted may appoint a temporary guardian and may in vacation entertain an application to set aside the appointment of such temporary guardian. *Holly v. Holly*, 157– —, 138 N. W. 445.

Where the court had acquired jurisdiction in a guardianship proceeding by reason of the domicile within the county of the insane ward, there is no right during the continuance of the insanity of the ward to have the jurisdiction of the guardianship transferred to another county. *McIntire v. Bailey*, 133–418, 110 N. W. 588.

The legal domicile of a minor child is presumed to be that of the father, regardless of the actual place of residence of such child; and a voluntary change of domicile being impossible on the part of a person of unsound mind, held that a guardian of an insane minor was properly appointed in

the county of the residence of the father and was authorized to institute any action which the ward, if of age and sound mind, might have prosecuted in the county. *Hindorff v. Sovereign Camp W. O. W.*, 150–185, 129 N. W. 831.

An allegation in the petition that the defendant in the proceeding is an inhabitant of the county is not essential to the jurisdiction of the court; and a judgment finding mental incapacity and appointing a guardian presumes a finding that the defendant is such inhabitant. *Raher v. Raher*, 150–511, 129 N. W. 494.

The proceeding is *in personam* and personal service as distinct from service by publication is essential to give the court jurisdiction. Therefore, held that personal service outside the state, although the defendant is a resident of the state, is not sufficient. *Ibid.*

On finding that the person for whom a temporary guardian has been appointed is not a resident of the county, the judge appointing such temporary guardian may, on motion, order his discharge. *Holly v. Holly*, 157– —, 138 N. W. 445.

The court has no jurisdiction to entertain a proceeding for the appointment of a permanent guardian of a nonresident. *Ibid.*

It seems that a person is of unsound mind when so weak and infirm mentally as not to be capable of exercising the judgment necessarily required in the management of his ordinary affairs. *Garretson v. Hubbard*, 110–7, 81 N. W. 174.

Where the person for whom it is sought to have a guardian of property appointed is not shown to be incapable of intelligently managing his property, the fact that it appears that he is a sexual pervert and may commit wrongs such as to render him liable to respond in damages will not be ground for appointing a guardian. *Schick v. Stuhr*, 120–396, 94 N. W. 915.

In determining the question as to whether a guardian should be appointed for a person of unsound mind, the ultimate question as to the extent of the capacity of the one for whom guardianship is sought is for the jury. *McGibbons v. McGibbons*, 119–140, 93 N. W. 55.

Under the facts in a particular case, held that there was not sufficient showing of mental incapacity to authorize the appointment of a guardian. *Alvord v. Alvord*, 109–113, 80 N. W. 306.

In a proceeding to procure the appointment of a guardian for an aged person, held that the evidence was insufficient to show such unsoundness of mind as to authorize such appointment. *Wood v. Wood*, 129–255, 105 N. W. 517.

Under the evidence in a particular case, held that the fact of a conveyance by a woman seventy-three years of age to her eldest son in consideration of his promise to maintain her during her lifetime was not sufficient to authorize the appointment of a guardian for her. *Arment v. Arment*, 134–199, 111 N. W. 812.

Under the evidence in a particular case, held that there was not sufficient proof of mental incompetency to authorize the granting of a guardianship of property. *McDermott v. Rahely*, 146–458, 125 N. W. 219.

A finding in proceedings to appoint a guardian of property that the owner is not incapable of transacting business is admissible in evidence as tending to show that at the time of the previous execution of a will he was not incapacitated by senile dementia, a progressive and incurable disease, from executing such will. *In re Will of Van Houten*, 147–725, 124 N. W. 886.

To authorize the appointment of a guardian for one who is enfeebled by age, his debility must be such as that he cannot intelligently manage his affairs, so that in consequence thereof his estate is liable to suffer loss or waste. *McGuire v. Moorhead*, 151–25, 130 N. W. 140.

One who has insufficient mental capacity for the just protection of his property and whose mental condition is such that he is guided by the will of others rather than his own in the disposition of his property, is properly subject to guardianship. *Lang v. Lang*, 135 N. W. 604, 139 N. W. 567.

Where it was made a condition by a divorced wife of the dismissal of a proceeding brought by her against her former husband to have a guardian appointed for him on the ground of insanity that he should settle property on their child, held that such settlement was invalid whether he was in fact insane or was by duress compelled in escaping an unwarranted proceeding for the appointment of a guardian to make a settlement. *Foote v. De Poy*, 126–366, 102 N. W. 112.

In the absence of any appointment of a temporary guardian pending the proceeding, the person for whom guardianship is asked is presumed competent to transact business until a judgment awarding guardianship is rendered; and one who surrenders property to such person pending the proceeding and with knowledge thereof, is not subsequently accountable to the guardian for such property. *McCoy v. Nuese*, 154–563, 134 N. W. 531.

An adjudication of incompetency in a guardianship proceeding is prima-facie evidence of incapacity to make a will. *In re Cahill's Estate*, 155–340, 136 N. W. 214.

Where the record does not expressly state the ground for the appointment of a guardian, parol testimony is admissible to show the reason therefor. *Ibid.*

The governing principle in the management of the estate of an insane person is the interest of such person and not that of those who may eventually have the right to succeed to such estate. The property of the lunatic may be converted from

realty into personalty, or from personalty into realty, whenever it shall appear to be for the interest of the lunatic, without regard to the contingent interests of real and personal representatives. *Clay County v. Meyers*, 140 N. W. 889.

The court in authorizing the sale of the real property of a lunatic may provide that the proceeds shall be held and treated as exempt realty, until the death of the lunatic, or until such time as that there may be a recovery from the insanity and for a reasonable time thereafter. *Ibid.*

These provisions as to trial have no application to a motion made to a judge in vacation to set aside the appointment of a temporary guardian previously made by him. *Holly v. Holly*, 157– —, 138 N. W. 445.

SEC. 3221. Order of court—power of guardian—repealed. [30 G. A., ch. 80, § 22.]

[See § 2310-a27.]

SEC. 3222. Termination of guardianship.

These provisions as to discharge of a guardian have reference to a permanent guardianship and not to one which is temporary in its nature. A temporary guardian may be discharged without reference to the expiration of the six months referred to in this section. *Holly v. Holly*. 157– —, 138 N. W. 445.

SEC. 3224. Suits by guardian.

In an action brought by the guardian of a minor who was insane in the county of the residence of such minor, held that the location of the beneficiary fund which plaintiff sought to recover was immaterial, the proceeding being *in personam*. *Hindorff v. Sovereign Camp W. O. W.*, 150–185, 129 N. W. 831.

SEC. 3225. Real estate sold—allowance to family. Whenever the sale or mortgage of the real estate of such ward is necessary for his support or for the support of his family or the payment of his debts, or will be for the interest of the estate or his children, the guardian may sell or mortgage the same under like proceedings as required by law to authorize the sale of real estate by the guardian of the minor. The court shall, if necessary, set off to the wife and minor children of the insane person, or to either, sufficient of his property, of such kind as it shall deem appropriate, to support them during the period such person is insane. [29 G. A., ch. 131, § 1; 26 G. A., ch. 54; 22 G. A., ch. 70; C. '73, § 2276; R. § 1453.]

SEC. 3227. When estate is insolvent.

Any control which the probate court acquires over property of the ward by the appointment of the guardian is subject to an attachment on such property already levied in another proceeding. *Hawk v. Harris*, 112–543, 84 N. W. 664.

ABSENTEES.

SEC. 3228-a. Petition for guardianship—notice. When any adult person owning property within the state and whose whereabouts are and have been unknown for a period of three months, and whose property is liable to become injured, lost or damaged by reason of such absence, and when there is no other provision of law, authorizing supervision and control over such property, any citizen of the county in which the property or any part thereof is situated may file a petition under oath in the district court of said county, setting forth the facts of such disappearance; the place where and with whom he last resided; the kind and value of his property; the necessity for care and supervision over the same; and asking that a guardian be appointed to take charge of, preserve and control such property. Whereupon, the court or judge shall prescribe a notice to be given to such absentee and order the same to be published in a newspaper published in said county, to be designated by the court or judge once each week for four successive weeks. Such notice shall also be served on the county attorney of the county and upon all the members of the

family of the absentee residing within the county, for the length of time as is required for the service of original notices. Proof of the publication and service of such notice shall be filed with said cause. [33 G. A., ch. 197, § 1.]

SEC. 3228-b. **Hearing—duty of county attorney—evidence reported.** If at the time stated in such notice for hearing the absentee fails to appear, the court shall hear such petition and the proof offered, and all evidence given at such hearing shall be taken down by the official reporter and a verified transcript thereof filed in said cause, and at every such hearing the county attorney shall be present and represent the interests of the absentee, and shall be allowed reasonable compensation therefor to be fixed by the court. [33 G. A., ch. 197, § 2.]

SEC. 3228-c. **Guardian appointed.** If on such hearing the court is satisfied that the person has disappeared for the length of time herein required and that his whereabouts are unknown to his family or friends and that his property requires supervision and care, it may appoint some suitable person guardian of the estate of such absentee. [33 G. A., ch. 197, § 3.]

SEC. 3228-d. **Qualifications—powers and duties.** The person so appointed to act as such guardian shall qualify in the same manner as is required in the case of other guardians, and shall have the same powers and his duties shall be the same as is provided for guardians of the estates of minors, so far as applicable. [33 G. A., ch. 197, § 4.]

SEC. 3228-e. **Termination of guardianship.** If at any time the absentee shall return and claim his property, he shall file in said court his application to terminate such guardianship and, thereupon, the guardian shall make full and complete settlement with such absentee, and after paying the costs of the proceedings and the necessary expenses of the guardian in executing the trust, shall turn over to such absentee all money and property then in his hands as such guardian taking receipt therefor, and shall make a final report to the court of his doings as such guardian. [33 G. A., ch. 197, § 5.]

SEC. 3228-f. **Costs chargeable to estate.** The estate of such absentee shall be liable for the costs of the proceedings and the necessary expenses incurred by the guardian and allowed by the court. [33 G. A., ch. 197, § 6.]

SEC. 3228-g. **Control of court—removal.** Such guardian shall at all times be under the control and orders of the court and may at any time be removed for any cause making it apparent to the court that said guardianship should be terminated or the trust transferred to another person. [33 G. A., ch. 197, § 7.]

SEC. 3228-h. **Discharge.** When the final report of such guardian shall have been approved by the court he shall be discharged and the proceedings closed or the trust transferred, as the court may determine. [33 G. A., ch. 197, § 8.]

CHAPTER 6.

OF MASTER AND APPRENTICE.

SECTION 3229. **Indenture.**

The parents of a minor have no right to bind him out as an apprentice save during the years of minority. *Walton v. Atchison, T. & S. F. R. Co.*, 131–423, 101 N. W. 506.

SEC. 3241. Complaint against apprentice.

Where the relation of master and servant continues after the majority of the apprentice, the question as to rightful discharge of the servant by the master is not determined by the statutory provisions relating to apprenticeship. *Walton v. Atchison, T. & S. F. R. Co.*, 131–423, 101 N. W. 506.

The parents of a minor have no right to bind him out as an apprentice save during the years of minority. *Ibid.*

Where the relationship of master and servant continues after majority of the apprentice, the master has the right to discharge for breach of conditions in the contract of apprenticeship. *Ibid.*

SEC. 3246. Binding out by order of court.

In the absence of extreme neglect of a natural and legal duty courts will always be slow in refusing recognition to the paramount right of the parent or one who is by nature *in loco parentis*. *Holmes v. Derrig*, 127–625, 103 N. W. 973.

CHAPTER 7.

OF ADOPTION.

SECTION 3251. Consent of parents or officer.

So far as the statutory directions pertain to manifest essentials they are to be strictly construed, but the failure to observe nonessentials or mere matters of detail will not defeat the clear intention of the parties. *Sires v. Melvin*, 135–460, 113 N. W. 106.

Therefore held that an instrument of adoption signed by the mother who was in lawful charge of the child after a divorce granted to her from the father was not invalid because it did not give the name of the father of the child. *Ibid.*

An instrument of adoption consented to by the mayor of the town in which the child resides, instead of by the clerk of the courts of the county, is invalid. *Anderson v. Blakesly*, 155–430, 136 N. W. 210.

But such an instrument otherwise in due form and acted and relied upon by both the foster parents and the child constitutes an enforceable contract by which the child becomes entitled to a share in the property left by the foster parents in the proportion which would have been the child's had the articles of adoption been validly executed and recorded; and such contract right attaches also to the homestead where the widow's right of occupancy has terminated. *Ibid.*

SEC. 3252. Instrument acknowledged and recorded.

A parent may confer upon some other person the legal right to the custody of a minor child although such person does not become the adopted parent; but there must be such intent on the part of the parent as well as an assumption of obligation on the part of the person to whom custody is thus given, and it will be presumed that such surrender of custody is intended to be temporary unless the contrary is made to appear by proof clear, definite and certain. *Miller v. Miller*, 123–165, 98 N. W. 631.

A deed of adoption approved by the clerk of the court on application of a collateral relative in an *ex parte* proceeding is not binding as against the grandparents of the child with whom it was left on the death of its parents. *Holmes v. Derrig*, 127–625, 103 N. W. 973.

Where the father of a child joined in executing an instrument of adoption at a time when there was no legally appointed guardian for the child, held that such instrument of adoption was effectual although there had been a previous guardianship. The adopting parent should not be deprived of the custody of the child in a habeas corpus proceeding unless it appears that the best interests of the child require that its custody be given to some other person. *Smiley v. McIntosh*, 129–337, 105 N. W. 577.

Statutes of adoption are in derogation of the common law and are to be strictly construed. *Bresser v. Saarman*, 112–720, 84 N. W. 920.

The recital that the natural parent fully and voluntarily consents to the adoption of the children by husband and wife named as adopting parents is effectual. *Ibid.*

Where the acknowledgment of an instrument of adoption was by a justice of the peace of another state, without the genuineness of his signature being shown by an accompanying certificate, and the instrument thus defectively acknowledged was recorded, held that the recording thereof was legalized by a subsequent statute curing defects in the recording of instruments defectively acknowledged. *Ibid.*

The instrument of adoption must show

the consent of the parent to the adoption and contain a statement that the child is given to the person adopting as his own child. *Hopkins v. Antrobus*, 120–21, 94 N. W. 251.

To render the instrument of adoption effectual, there must be substantial compliance with all the requirements of the statute on the subject. *Ibid.*

An agreement to adopt, although not executed in conformity with requirements of the statute, may constitute a binding obligation on the part of the adopting parent to confer upon the child attempted to be adopted the rights of inheritance. *Chehak v. Battles*, 133–107, 110 N. W. 330.

The surrender of the custody of the child by its parents to the adopting parents is a sufficient consideration to support an agreement to confer the rights of inheritance. *Ibid.*

Indexing an instrument for the adoption of a minor under the name of the adopting parents, and also that of the adopted child is sufficient. Indexing is not essential to the validity of the instrument, and the omission of the recorder to index it exactly as provided in the statute will not render it invalid. *Hilpire v. Claude*, 109–159, 80 N. W. 332.

Insufficient articles of adoption cannot be relied upon, even under equitable circumstances, for the purpose of escaping the application of the collateral inheritance tax. *Lamb v. Morrow*, 140–89, 117 N. W. 1118.

An agreement to adopt and confer upon the adopted child a right to inherit may be specifically enforced, although not fully executed in accordance with the statutory provisions. *Stiles v. Breed*, 151–86, 130 N. W. 376.

Evidence in a particular case reviewed and held insufficient to establish an agreement on the part of a decedent that the plaintiff, who was not legally adopted by him, should have a portion of his estate on his death. *Finger v. Anken*, 154–507, 131 N. W. 657.

SEC. 3253. **Effect.** Upon the execution, acknowledgment and filing for record of such instrument, the rights, duties and relations between the parent and child by adoption shall be the same that exist by law between parent and child by lawful birth, and the right of inheritance from each other shall be the same as between parent and children born in lawful wedlock. [29 G. A., ch. 132, § 1; C. '73, § 2310; R. § 2603.]

The adoption of a child operates like the subsequent birth of a legitimate child to revoke a will previously executed. It appears to be the legislative intention to place adopted children upon the same level as children of lawful birth. *Hilpire v. Claude*, 109–159, 80 N. W. 332.

The status and relation resulting from adoption are to be determined by the law of the place of the domicile of both parties. *Shick v. Howe*, 137–249, 114 N. W. 916.

The adopted child takes by descent through the foster parent. *Ibid.*

Valid articles of adoption do not in any manner restrict the right of the adopting parent to dispose of his estate by will to the exclusion of the adopted child. *Warden v. Overman*, 155–1, 135 N. W. 649.

On the death of an adopted child, unmarried and without issue (prior to the amendment of this section by 29 G. A., ch. 132), his real property passed to his natural parent and not to the heirs of his deceased parent by adoption. *Baker v. Clowser*, 138 N. W. 837.

The amendment to this section cannot be regarded as a statutory construction of the section as it previously stood. *Ibid.*

The general statutes of inheritance are modified and set aside by statutes regulating the effect of adoption only so far as there is some specific provision in the statutes for adoption inconsistent with the application in such cases of the general inheritance statutes. *Ibid.*

CHAPTER 8.

OF HOMES FOR THE FRIENDLESS.

SECTION 3255. **Powers—repealed.** [29 G. A., ch. 133, § 1.]
[See § 3260-a.]

SEC. 3256. **Surrender of child to—repealed.** [29 G. A., ch. 133, § 1.]
[See § 3260-a.]

SEC. 3257. **Upon complaint—appeal—repealed.** [29 G. A., ch. 133, § 1.]
[See § 3260-a.]

SEC. 3258. **Habeas corpus—repealed.** [29 G. A., ch. 133, § 1.]
[See § 3260-a.]

SEC. 3259. **Guardianship—repealed.** [29 G. A., ch. 133, § 1.]
[See § 3260-a.]

SEC. 3260. **Religious instruction—repealed.** [29 G. A., ch. 133, § 1.]
[See § 3260-a.]

CHAPTER 8-A.

OF THE CARE OF FRIENDLESS CHILDREN AND THE ESTABLISHMENT, REGULATION AND VISITATION OF HOMES FOR.

SECTION 3260-a. **Repeal.** That chapter eight of title sixteen of the code be and the same is hereby repealed, and the following enacted in lieu thereof: [29 G. A., ch. 133, § 1.]

SEC. 3260-b. **Powers of societies.** Any society legally incorporated under the laws of the state of Iowa for the purpose of receiving, caring for, placing out for adoption, or in any way improving the condition of abandoned, abused, illtreated, friendless, or orphan children, may receive, control and dispose of such minor children under the provisions of this act; and such corporation shall be the legal guardian of the persons of all children so surrendered to it, and may exercise all the rights and authority of the parents of such children in regulating the apprenticing and adoption thereof. [29 G. A., ch. 133, § 2.]

SEC. 3260-c. **Surrender of children to.** Children may be surrendered to such society by the father and mother jointly; by either father or mother, when the other is dead, or hopelessly insane, an habitual drunkard, has abandoned his family, is in prison for crime, or is an inmate or keeper of a house of ill fame; by the mother alone if the child is illegitimate and in her care and custody; by any court of record or judge thereof, or any mayor, or justice of the peace in the county of the residence of such children or their parents, upon complaint made and proceedings had thereon as hereinafter provided. [29 G. A., ch. 133, § 3.]

SEC. 3260-d. **Commitment.** Whenever it shall be made to appear to any court, judge, mayor or justice of the peace, as above provided, that any child within its jurisdiction, by reason of orphanage, or neglect, abuse, crime, drunkenness, or gross immorality of one or both of the parents, or other persons having custody of such child, is abandoned, illtreated, or friendless, or in circumstances tending to induce such child to lead a dissolute, immoral or vicious life, then it shall be the duty of such court or magistrate to take such child away from its parents or those having control thereof, and commit it to some society incorporated for that purpose, or to some other person or guardian, as may seem to be for the best interests of such child, and the society or person so adopting shall be required to keep such child, if over seven years of age and under fourteen years of age, in school during the school sessions of the school district in which said child is kept or in some parochial school for like period. [29 G. A., ch. 133, § 4.]

Where the children are produced in court in pursuance of an order, their names and ages ascertained and a finding made justifying their surrender to the home, the mother having appeared in the action, the father who did not have the custody of the children at the time the action was instituted cannot question the validity of the order on account of failure to serve him with notice. *In re Minor Children of East*, 143–370, 122 N. W. 153.

SEC. 3260-e. **Written complaint—appeal.** All proceedings under section four of this chapter shall be by written complaint duly verified, which complaint shall state the cause of action and the relief asked. If it shall appear that such child is in the custody and control of parents, guardians, or other persons, such parents, guardians or other persons shall be served with a copy of said complaint, and such notice of the time and place of the hearing thereof as may be ordered by the court or magistrate by whom the case is to be tried; which notice and copy shall be served in the same manner as is provided in the service of original notices. An appeal may be taken to the district court from the order of a magistrate at any time within twenty days thereafter, in the same manner as appeals are taken from judgments in justice courts, except that no bond shall be required to stay proceedings. [29 G. A., ch. 133, § 5.]

SEC. 3260-f. **Custody of child during trial.** Upon filing of proper complaint, the magistrate may, if thought best, issue a warrant directed to the sheriff or other peace officer, requiring such peace officer forthwith to take into his custody the child described in such complaint, and to retain possession of it subject to the order and direction of the court. [29 G. A., ch. 133, § 6.]

SEC. 3260-g. **Religious faith.** The court or magistrate in committing children shall place them as far as practicable in the care and custody of some individual holding the same religious belief as the parents of said child, or with some association which is controlled by persons of like religious faith as the parents of said child; and when any home or society shall dispose of the custody of any child, it shall be, as far as practicable, to some person of the same religious faith as its parents, unless the parents or former guardian otherwise consent. [29 G. A., ch. 133, § 7.]

SEC. 3260-h. **Habeas corpus.** Upon the hearing of any habeas corpus proceedings for the custody of any such child, if it appears that it has been surrendered to the home under the provisions of this chapter, such fact shall be presumptive evidence that it was done properly and that said home was entitled to the custody and guardianship thereof. [29 G. A., ch. 133, § 8.]

SEC. 3260-i. **Proceedings—county attorney to prosecute—costs.** Proceedings under this act may be brought by any citizen of the state, acting by himself or his attorney. It shall be the duty of the county attorney, when requested, to prepare complaints and prosecute all such cases in behalf of the complainants. Court costs shall be taxed the same as in criminal actions. [29 G. A., ch. 133, § 9.]

SEC. 3260-j. **Board of control to have supervision—annual reports—financial statement.** All associations or societies receiving children under this act shall be under supervision of the board of control of state institutions and shall be subject to visitation by the board of control, its members, or agents, which may require such information and statistics from such associations as the board shall deem necessary, in order to enable it to exercise proper supervision over them. Every such association shall file with the state board of control, during the month of January of each year, an annual written or printed report, which shall include a statement of the number of children cared for during the preceding year, the number of children received for the first time and the number returned from families, the number placed in homes, the number deceased, the number returned to friends, and the number placed in state institutions, the number and names and number of months of each of those attending school; also a financial statement showing the receipts and disbursements

of such association. The statement of the disbursements shall show the amount expended for salaries and other expenses, specifying the same, and the amount expended for lands, buildings, and investments. And no child shall be committed to the care of any association which shall not have filed a satisfactory report for the calendar year last preceding with the state board of control, unless it be a society organized within the current year. [29 G. A., ch. 133, § 10.]

[See also § 2727-a74b. EDITOR.]

SEC. **3260-k. Jurisdiction to revoke.** The district court of any county in which any society or home may be located shall have jurisdiction to revoke the powers herein granted upon a showing that any such society or person has abused the trust imposed in such society or person, or that the welfare of its wards demands that they be taken from the control of such society or person. It shall be the duty of the state board of control to institute such proceedings whenever, in its judgment, they are advisable. [29 G. A., ch. 133, § 11.]

SEC. **3260-l. Associations of other states.** No association which is incorporated under the laws of any other state than the state of Iowa shall place any children in any family home within the boundaries of the state of Iowa, either with or without indentures, or for adoption, unless the said association shall have furnished the state board of control with such guarantee as it may require, including an indemnity bond in favor of the state of Iowa in the penal sum of one thousand dollars, that no child shall be brought into the state of Iowa by such society or its agents, having any contagious or incurable disease, or having any deformity, or being of feeble mind, or of vicious character, and that said association will promptly receive and remove from the state any child brought into the state of Iowa by its agents, which shall become a public charge within the period of five years after being brought into this state. Provided that this act shall not be construed as prohibiting any person residing in Iowa from receiving and adopting into his family any child or children from another state. [29 G. A., ch. 133, § 12.]

SEC. **3260-m. Appropriation.** To provide for the expenses of the inspection herein required, there is hereby appropriated the sum of ten hundred dollars or so much thereof as may be necessary, from any funds of the state treasury not otherwise appropriated. [29 G. A., ch. 133, § 13.]

SEC. **3260-n. Expenses of inspection—appropriation to pay.** That there is hereby appropriated out of any money in the state treasury not otherwise appropriated the sum of two thousand dollars annually for paying the expenses of inspecting county and private institutions in which insane persons are kept as required by sections twenty-seven hundred twenty-seven-a fifty-nine and twenty-seven hundred twenty-seven-a sixty of the supplement to the code, and associations, societies and homes receiving children as contemplated by section thirty-two hundred sixty-j of the supplement to the code [1902]. The expenses specified shall be paid as provided by section twenty-seven hundred twenty-seven-a sixty-one of the supplement to the code [1902]. At the end of each biennial period the board of control of state institutions shall cause to be transferred to the general funds of the treasury any balance of the sums hereby appropriated not required for the payment of the expenses of the period. [31 G. A., ch. 134.]

TITLE XVII.

OF THE ESTATES OF DECEDENTS.

CHAPTER 1.

OF THE PROBATE COURT.

SECTION 3261. Always open—hearing.

No provision is made for a jury trial on an application for an order as to the distribution of the estate. *Duffy v. Duffy*, 114-581, 87 N. W. 500.

An order in a matter of guardianship made by consent of parties in another county, but subsequently entered on the records of the county where the matter is pending, is valid and is binding on the guardian and the sureties on his bond. *Steiner v. Lenz*, 110-49, 81 N. W. 190.

SEC. 3265. Extent of jurisdiction.

If deceased is a resident of the state at the time of his death, jurisdiction over his estate is exclusively in the district court of the county of his residence; if a non-resident of the state, then in the court of any county where there was property of the estate subject to administration. In the latter case the jurisdiction of the court first assuming jurisdiction is exclusive, and in either case the jurisdiction acquired is coëxtensive with the state. *McFarland v. Stewart*, 109-561, 80 N. W. 657.

The court first exercising jurisdiction to appoint an administrator will retain such jurisdiction to the end of the proceeding unless want of jurisdiction appears of record. *Nash v. Sawyer*, 114-742, 87 N. W. 707.

In a proceeding to establish the right to a share in the estate, the amount of indebtedness of the same person to the estate may be adjudicated. *Prouty v. Matheson*, 107-259, 77 N. W. 1039.

The probate court is given jurisdiction over the estates of minors and the control of the guardians appointed by it to have the personal charge of such estates, and in the exercise of this jurisdiction the probate court may apply equitable principles. *Mock v. Chalstrom*, 121-411, 96 N. W. 909.

Although decedent's place of residence is a jurisdictional fact as affecting the right of the probate court to take jurisdiction, it is one of those jurisdictional facts which must be determined by the court from the evidence produced before admitting the will to probate, the determination of which is valid until set aside in some proper manner. *Erwin v. Fillenwarth*, 137 N. W. 502.

SEC. 3268. Clerk to approve. That section thirty-two hundred sixty-eight of the code be and the same is hereby repealed, and the following enacted in lieu thereof:

"The clerk shall approve the bonds of all guardians, executors, administrators and trustees, and during the month of June in each year shall examine into the sufficiency of the sureties, and amount of penalty of all executors', administrators', guardians' and trustees' bonds in force in his office which have been executed more than six months prior thereto, and if he finds the same sufficient, shall note thereon his examination and reapproval, but if he finds the same insufficient, or the sureties shall not requalify on being required by him to do so he shall note his disapproval thereon, notifying the principal thereof by registered letter and place the matter upon the calendar of the court at the next term for the proper order." [33 G. A., ch. 198, § 1.] [21 G. A., ch. 51.]

The court may in the exercise of its authority under this section order a new bond by way of substitution and discharge of the old bond. *Bankers' Surety Co. v. Wyman*, 141-574, 120 N. W. 116.

CHAPTER 2.

OF WILLS AND LETTERS OF ADMINISTRATION.

SECTION 3270. Disposal of property by will.

Nature and operation: A valid testamentary provision is a provision made by will duly executed in substantial conformity to the law. It speaks and is intended to speak from the date of the death of the testator and not earlier. Until that time, the title, legal and equitable, of the property to which the provision relates, remains unchanged in the testator, and he may sell, convey and dispose of the same as fully and completely as if no will had been made by him. No right, title or interest of any kind in the thing devised or bequeathed passes to the devisee or legatee until the death of the testator, and not then if it appears that he has otherwise disposed of such property during his lifetime. *Lewis v. Curnutt*, 130–423, 106 N. W. 914.

A conveyance deposited in the hands of a third person to be delivered to the grantee only upon the death of the grantor, may be operative without the knowledge or express or formal consent or acceptance of the grantee, even though there is a reserved power to recall such conveyance if it is not exercised during the life of the grantor. Such a disposition is not testamentary. *Ibid.*

The characteristic distinction between a will and a trust is that while the former becomes operative only at the death of the testator, a trust passes an interest to the trustees and beneficiary instantly upon the execution and delivery of the writing by which it is created. *Ibid.*

As a will speaks from the death of the testator with respect to the distribution of all his property, both real and personal, any provision for the conversion of real estate into money and the division thereof among specified legatees is rendered ineffectual if the testator himself converts such real property into money before his death, and the proceeds of such property are to be distributed under a residuary clause governing the distribution of personalty. Upon sale of devised real property by the testator, the proceeds of such sale still remaining in his possession at the time of his death are not to be regarded as a substitute for the property itself, unless so directed in the will. *In re Will of Miller*, 128–612, 105 N. W. 105.

The benefit of the rule by which real estate is equitably transmuted into personalty for the purposes of distribution can be asserted by devisees only as to such lands as the testator was seized of at the time the will became effective by his death. *Ibid.*

Specific bequests of real property are ineffectual if at the time of the death of the testator there is no real property with which to discharge or satisfy them in whole or in part. *Ibid.*

A married woman is equally with her husband competent to dispose of her property by will. *Baker v. Syfritt*, 147–49, 125 N. W. 998.

Full power to dispose of property by will is conferred upon all persons, male and female, of full age and sound mind without distinction between the married and unmarried. The subsequent marriage of a woman does not revoke her will already executed. *Hastings v. Day*, 151–39, 130 N. W. 134.

Form and interpretation: No particular form is required for a will. The main object of the court is to learn the intention of the maker. The intention being known, all artificiality of language or looseness of construction must yield to and be governed by it. To ascertain whether the instrument was intended to create a testamentary gift, collateral evidence may be received if the terms of the writing are not clear. *In re Estate of Longer*, 108–34, 78 N. W. 834.

An unconditional devise of all of testator's property to his widow, with full power to sell and convey, vests in the widow a fee title, although the will contains subsequent directions as to the division of the property remaining at her death, or in case of her remarriage. *Hambel v. Hambel*, 109–459, 80 N. W. 528.

An instrument in a particular case in the form of a deed, granting land subject to occupancy and possession of grantor during life, with a provision that it should be of no force until after the death of the grantor, held to be a conveyance, and not an attempted will. *Saunders v. Saunders*, 115–275, 88 N. W. 329.

An instrument which operates to convey a present interest, although possession and enjoyment are reserved during the life of the grantor, may be effective as a conveyance, but if it passes no present interest and is to be operative only upon the grantor's death, then it is testamentary in character and of no effect unless executed with all the formalities of a will. *Tuttle v Raish*, 116–331, 90 N. W. 66.

Therefore, held that an instrument granting an interest in property, which was to vest at the grantor's death without children, and after payment of debts, funeral expenses, etc., was testamentary in character. *Ibid.*

The provision in a will that any legatee contesting the same shall thereby forfeit his right to any portion of the estate and

benefit under the will is valid. *Moran v. Moran*, 144–451, 123 N. W. 202.

The institution of a suit by a legatee in which such legatee asserts in his own right the ownership of property which the testator assumes to own and dispose of by the will, is a contest of the will within such provision. *Ibid.*

A joint or mutual will is not in itself invalid and may properly be probated and enforced as the will of the one first dying, or the separate will of each, or the joint and mutual will of both, according to the terms and provisions therein. *Baker v. Syfritt*, 147–49, 125 N. W. 998.

When such a will is reciprocal merely, its probate as the will of the first deceased is all that is necessary to accomplish the intended purpose. But where the property devised is owned jointly or in common, it is said to be proper to await the death of the survivor and then probate it as the joint will of both. *Ibid.*

Where one maker of such a will dies before a revocation by either and the survivor accepts benefits thereunder, such survivor can no longer revoke, and any attempt to divert the property in any other direction than is indicated by the common or joint devise is nugatory. *Ibid.*

Testamentary capacity: The line between competency and incompetency is always drawn with uncertainty and the findings on that question in most cases are justified only as the best solution of a doubtful problem. *In re Allison's Estate*, 104–130, 73 N. W. 489.

A person may have an insane delusion but still be entirely sane on all other subjects, and capable of making a valid will. *Hardenburgh v. Hardenburgh*, 133–1, 109 N. W. 1014.

Testamentary incapacity does not necessarily require that a person shall actually be insane or of unsound mind. The testator may be incapable of making a valid will on account of weakness of mind not amounting to insanity. *Manatt v. Scott*, 106–203, 76 N. W. 717.

It seems that a person is of unsound mind when so weak and infirm mentally as not to be capable of exercising the judgment necessarily required in the management of his ordinary affairs. *Garretson v. Hubbard*, 110–7, 81 N. W. 174.

Although the testator's mind be clouded, if he is capable of comprehending his property interests and of determining what disposition he desires to make of his property, and of making such disposition, he has testamentary capacity. *In re Evans' Estate*, 114–240, 86 N. W. 283.

A finding that testator was not of sound mind at the time of executing the will was sufficient to sustain the action of the court in refusing to probate the will, the jury having been properly instructed with reference to what is sufficient unsoundness of mind to warrant such a finding. *In re Will of Selleck*, 125–678, 101 N. W. 453.

It is not error to instruct the jury that a person of sound mind—that is, one who has sufficient mental capacity to make a valid will—is one who has full and intelligent knowledge of the act he is engaged in, a full knowledge of the property he possesses, and intelligent perception and understanding of the disposition he desires to make of it and of the persons he desires shall be recipients of his bounty, and a capacity to recollect and comprehend the nature of the claims of those who are excluded from participating in his bounty; but it is not necessary that he should have sufficient capacity to make contracts and do business generally or engage in complex and intricate business matters. *In re Law's Estate*, 157– —, 138 N. W. 531.

Mere weakening of mental power will not render a person incapable of executing a will. So long as he retains mind enough to know and comprehend in a general way the natural objects of his bounty, the nature and extent of his estate and the disposition which he is to make of it, it is not necessary that he should be competent to make contracts or transact business generally. Old age and failure of memory do not of themselves necessarily take away a testator's capacity to make a will, nor will the exclusion of some or all of the testator's legal heirs from the benefits of the will be sufficient evidence of incapacity. *Perkins v. Perkins*, 116–253, 90 N. W. 55.

It is error to instruct as to mental capacity where there is not sufficient evidence to show disability for the making of a will, although evidence of mental incapacity may be competent as bearing on the issue of undue influence. *Lingle v. Lingle*, 121–133, 96 N. W. 708.

To defeat a will on the ground of senile dementia it must appear that the disease had progressed to such a stage that the testator had not the requisite intelligence to comprehend the condition and extent of his property and the persons who would ordinarily be his beneficiaries. *Gates v. Cole*, 137–613, 115 N. W. 236.

The burden of proving such condition of mind is on the contestant; but when once established, the presumption of its continuance arises, which presumption may, however, be overcome by evidence, as to which the proponent has the burden in this respect. *Ibid.*

The knowledge and comprehension which the maker of a will should have as to his estate and the natural claims on him of members of his family and friends are sufficient if it appears that he has the capacity to form a rational judgment of his estate and the manner in which he wishes to dispose of it, although his judgment may in fact be at fault and the will so made may discriminate unjustly be-

tween his children and other beneficiaries. *Hanrahan v. O'Toole*, 139–229, 117 N. W. 675.

Where there is no claim of permanent mental derangement it must be shown that at the time the will was executed the testator had not sufficient mental capacity to make it. *Casad v. Ripley*, 145–544, 124 N. W. 196.

Mere mental weakness not due to mental disease but solely to physical infirmity does not constitute mental unsoundness. *Speer v. Speer*, 146–6, 123 N. W. 176.

Mere weakness of mental power does not render a person incapable of executing a will. It is not necessary that he be competent to make contracts or transact business. Old age and failure of memory do not of themselves take away the testator's capacity to dispose of property. *Ibid.*

Senile dementia being in its nature progressive and incurable, a finding in guardianship proceedings that at a date subsequent to the execution of the will the testator was capable of transacting business tends to negative a claim that he was afflicted with senile dementia when the will was executed. *In re Will of Van Houten*, 147–725, 124 N. W. 886.

Evidence of a great mental shock to period long prior to the execution of the will is admissible, even though he was subsequently released from confinement on account of being cured. Mental diseases are subject to recurrence and it is proper to show the condition of the person's mind whenever it is the subject of judicial inquiry. *Mileham v. Montagne*, 148–476, 125 N. W. 664.

Record evidence of the conduct and business transactions of the testator during a period of time material to the issue in the case, held properly admitted. *Ibid.*

Evidence of a great mental shock to the testator, even though at a time long prior to the execution of the will, held admissible as tending to show impairment of mental capacity at the time the will was executed. *Ibid.*

Testimony relating to transactions long prior to the making of the will and at a time when testator was insane, held admissible although he had subsequently been discharged from the hospital under the belief that he had been restored to sanity. *Ibid.*

An adjudication of incompetency in a guardianship proceeding constitutes primafacie evidence of testator's incapacity to make a will. *In re Cahill's Estate*, 155–340, 136 N. W. 214.

Proof that testator was a believer in spiritualism is not sufficient to show want of testamentary capacity. *In re Will of Dunahugh*, 130–692, 107 N. W. 925.

Evidence in a particular case held insufficient to show lack of testamentary capacity or undue influence. *Arnold v. Livingstone*, 155–601, 134 N. W. 101.

Evidence in a particular case as to mental capacity held sufficient to sustain a verdict admitting the will to probate. *In re Martin's Will*, 142 N. W. 74.

Undue influence, rendering the will invalid, must be such as subjects the will of the testator to that of the person exercising such influence and makes the paper express the purpose of such person rather than that of the testator himself. And such undue influence must be directly connected with the execution of the will and operating at the time it was made. *Perkins v. Perkins*, 116–253, 90 N. W. 55.

Evidence of mental incapacity, although not sufficient to show disability to make a will, may be admissible on the issue of undue influence. *Lingle v. Lingle*, 121–133, 96 N. W. 708.

Where incapacity and undue influence are both relied upon and there is substantial evidence of the testator's unsoundness of mind, any evidence however slight, tending to sustain the issue as to undue influence should be freely admitted. *In re Estate of Glass*, 127–646, 103 N. W. 1013.

Neither advice nor solicitation, however earnest or insistent, will vitiate a will unless it be further shown that the freedom of will of testator was in some way impaired or destroyed thereby. *In re Estate of Townsend*, 128–621, 105 N. W. 110.

In determining whether the will represents the uninfluenced judgment and purpose of testator, or whether it is the result of surrounding influences brought to bear upon him, his physical condition and strength of mind as affected by illness may be taken into account. *In re Wiltsey's Will*, 135–430, 109 N. W. 776.

The obligation which the testator may recognize to dispose of property in accordance with the previously expressed wishes of a deceased spouse, does not render the will invalid, as procured by undue influence. *Henderson v. Jackson*, 138–326, 111 N. W. 821.

Belief in the binding obligation of such a wish does not constitute mental incapacity to execute a will. *Ibid.*

Where it appeared that the provisions in the will were dictated by relatives in attendance on the testator while sick and incapable of forming an independent judgment as to the disposition of his property, held that it should be set aside on the ground of undue influence. *In re Wiltsey's Will*, 135–430, 109 N. W. 776.

To defeat a will on account of undue influence it must appear that the mind of the testator was affected at the very time the will was executed, and to such an extent that the will was the result of such influence. *Gates v. Cole*, 137–613, 115 N. W. 236.

Opportunity and disposition to influence the testator in the making of his will are

not sufficient to establish undue influence. *Ibid; Casad v. Ripley*, 145–544, 124 N. W. 196.

The fact of family relationship or the relationship of confidence and reliance which persons ordinarily repose in acquaintances and friends whose constancy and integrity they have tried will not justify a presumption of undue influence. *Hanrahan v. O'Toole*, 139–229, 117 N. W. 675.

The burden is upon the party alleging undue influence and the burden is not removed by a simple showing of relationship between the testator and the person drawing the will under which he or his children are to be benefited. *Ibid.*

The fact of exercising undue influence must not be left to mere inference from opportunity, interest and mental weakness. *In re Will of Overpeck*, 144–400, 120 N. W. 1044, 122 N. W. 928.

The unreasonableness of the disposition of property may be taken into account in determining unsoundness of mind and proof of mental capacity may be considered in inferring undue influence from circumstances which would not otherwise justify such an inference. *Ibid.*

To be "undue" and thereby to vitiate a testamentary disposition of property, the influence must be of such character and effect as to subject the will of the testator to that of the person exercising it. It must be equivalent to moral coercion and must have been the controlling force inducing the will at the very time it was executed. *Brackey v. Brackey*, 151–99, 130 N. W. 370.

It is not necessary that undue influence be shown by direct evidence; but the circumstances relied upon to establish it will not be sufficient if upon a fair review of the whole case they appear to be equally consistent with the theory of good faith. *Ibid.*

Where a husband caused a will to be prepared for his wife to execute which she refused to do for a considerable time on the ground that it did not make such division of her property as she wished, but she finally yielded to his insistence, held that the finding of a jury that the will was executed under undue influence would not be set aside. *Pickler v. Wise*, 152–644, 132 N. W. 815.

Fraud, duress and undue influence mean substantially the same thing with reference to the procurement of the execution of a will. *Ibid.*

Mere solicitation addressed to a person to persuade or induce him to make a gift or devise of his property is not necessarily undue influence; but where urgent solicitations are brought to bear upon a dying man whose physical strength is spent and who is unable to exercise his powers of judgment, the courts will not hesitate to set aside a will thus secured. *Wiltsey v. Wiltsey*, 153–455, 133 N. W. 665.

Where the physician of the testator is the sole beneficiary in his will and is shown to have been instrumental in procuring the making of it, the burden is upon him to show that it was not procured by undue influence. *Cash v. Dennis*, 139 N. W. 920.

The fact that an attorney consulted as to the drawing of a will suggests a charitable purpose for which provision may be made, does not tend to show undue influence requiring an explanation to establish the good faith of the transaction. *In re Martin's Will*, 142 N. W. 74.

Submitting both questions: Error in submitting the question of undue influence will be without prejudice where the jury makes an express finding of want of mental capacity which is supported by the evidence. *In re Will of Selleck*, 125–678, 101 N. W. 453.

Where the jury in answer to a special interrogatory finds against the contestant on the issue as to undue influence, errors in instructing the jury with reference to such issue will not be ground for reversal of a judgment for contestants on a verdict based on want of mental capacity. *In re Will of Wharton*, 132–714, 109 N. W. 492.

Where the contestants rely upon both undue influence and want of mental capacity, an error in submitting the issue as to want of mental capacity will be without prejudice where it appears by special finding of the jury that the will should be set aside on account of undue influence. *In re Wiltsey's Will*, 135–430, 109 N. W. 776

Where the questions of mental capacity and undue influence are submitted together without a request for special findings, error in submitting the question of undue influence will necessitate a reversal of a judgment on a verdict setting aside the will. *In re Will of Overpeck*, 144–400, 120 N. W. 1044, 122 N. W. 928.

Where the issues as to want of mental capacity and undue influence are both submitted to the jury, and there is a finding for contestants as to each, the fact that there is not sufficient evidence as to undue influence will not defeat the finding as to mental incapacity. *In re Will of Van Houten*, 147–725, 124 N. W. 886.

Burden of proof—presumption: It is not necessary that the original evidence in behalf of proponent show the sanity of the testator. Sanity is presumed until there is evidence to the contrary. *In re Will of Dunahugh*, 130–692, 107 N. W. 925.

It is not necessary in the original evidence in behalf of proponents to introduce witnesses in support of the sanity of testator. *In re Hull's Will*, 117–738, 89 N. W. 979.

Primarily, every person is presumed to be sane until the contrary is proven, and the burden of proof of insanity rests in

the first instance upon the party alleging it. And while it is true, on the other hand, that settled and general unsoundness of mind, when proved, is presumed to continue, nevertheless the court will take notice of the fact that temporary mental aberration is not uncommon, and the causes thereof are numerous, and therefore proof of want of mental capacity immediately following a stroke of apoplexy will not be sufficient to give rise to the presumption of continued mental incapacity at a subsequent time when the will in question was executed. *Kirsher v. Kirsher*, 120–337, 94 N. W. 846.

It is error to instruct that if testator was afflicted with senile dementia the presumption would be that such condition continued up to the time the will was made and that the burden of proof was upon the proponents to show a lucid interval at the time of the execution of the will. Primarily, every person is presumed sane until the contrary is proved, and it is also true that when unsoundness of mind is proved a presumption arises in favor of its continued existence. But the jury should be instructed that they must find a continued mental unsoundness before indulging in the presumption of such condition. *In re Estate of Glass*, 127–646, 103 N. W. 1013.

When the contestant has introduced evidence tending to show that on and prior to the date of the execution of the will the testator was suffering from a disease of the mind of a permanent and progressive nature amounting to unsoundness, the burden as to the evidence shifts to the proponent to establish the mental competency of the testator at the time of the execution of the will. *In re Estate of Jones*, 130–177, 106 N. W. 610.

Mental incapacity having been proven is presumed to continue until a condition of capacity is shown. *In re Will of Knox*, 123–24, 98 N. W. 468.

The presumption of want of capacity arising from the appointment of a guardian may be overcome by evidence as to the condition and acts of the testator at the time of making or revoking the will. *Linkmeyer v. Brandt*, 107–750, 77 N. W. 493.

Evidence in a particular case considered and held to be sufficient to overcome the presumption in favor of sanity or soundness of mind on the part of testator. *Howe v. Richards*, 112–220, 83 N. W. 909.

The burden of proving undue influence and that it operated upon the mind of the testator at the very time that the will was executed to such an extent that the will was the result thereof, is upon the contestant. It is not enough to show that there was an opportunity to exercise the undue influence complained of; there must be evidence that it was exercised and that it was instrumental in procuring the will. *In re Estate of Townsend*, 128–621, 105 N. W. 110.

There must be some showing as to the due execution of the will before contestant is put on his proofs. But this showing may be sufficiently made by the contesting witnesses. The burden of proving want of mental capacity and undue influence is upon the contestants and as a general rule does not shift. *In re Goldthorp's Estate*, 115–430, 88 N. W. 944.

The burden of establishing testator's mental incapacity or the existence of undue influence, for the purpose of defeating the probate of a will, is throughout upon contestant, save when because of the peculiar relations between the testator and beneficiary it is incumbent on the beneficiary to explain such relations in order to overcome the presumption of undue influence arising therefrom. But the inference to be drawn from the instrument itself is never merely to cast the burden upon contestant in ascertaining its validity. *Marshall v. Hanby*, 115–318, 88 N. W. 801.

The burden resting on proponents in the first instance is to show the true execution and attestation of the will. The presumption will be in the first instance that the instrument was read to the testator, or that he was otherwise acquainted with its provisions, and the fact that his eyesight appears to have been bad throws no additional burden on the proponents, in the first instance, although it may be considered by the jury on any issue to which it is pertinent. *Ross v. Ross*, 140–51, 117 N. W. 1105.

The burden is on the contestants to show want of mental capacity. *Convey v. Murphy*, 146–154, 124 N. W. 1073.

The burden of proving mental incapacity is upon the contestants. *In re Walker's Will, Barry v. Walker*, 152–154, 128 N. W. 386.

Evidence: Testimony as to mental condition of testator at a period long subsequent to the execution of the will is competent where it appears that the condition testified to has been continuous. *In re Will of Wharton*, 132–714, 109 N. W. 492.

An obituary notice in which statements are made as to the mental capacity of testator, although published under the sanction of relatives who afterwards contest the will, is not admissible for the purpose of showing mental capacity. *In re Hull's Will*, 117–738, 89 N. W. 979.

A witness, one of the persons unfavorably affected by a will, may testify to the unfriendliness on the part of testator before the execution of the will. *Manatt v. Scott*, 106–203, 76 N. W. 717.

Opinion of witnesses: One who shows an acquaintance with the person whose mental capacity is in question and a familiarity with his conduct, may testify affirmatively that in his opinion such a person was of sound mind, while an opinion that

such person was of unsound mind must be based on facts consisting of particular acts or conduct indicating unsoundness. *In re Hull's Will*, 117–738, 89 N. W. 979.

A witness who has testified as to what he has observed may express an opinion as to the mental capacity of the testator based on such facts. *In re Will of Selleck*, 125–678, 101 N. W. 453.

One who has seen and observed a testator on different occasions during the time it is claimed he was insane, may, after stating the facts connected therewith, be permitted to say that he thought he was not of sound mind. *Kirsher v. Kirsher*, 120–337, 94 N. W. 846.

It is not for a witness, though an expert, to say what will constitute mental capacity. Nor should such expert be allowed to testify as to the effect of mental capacity upon the validity of a will. *Marshall v. Hanby*, 115–318, 88 N. W. 801.

A subscribing witness may state his belief as to the testator's condition of mind without first showing grounds on which that belief is based. *Furlong v. Carraher*, 108–492, 79 N. W. 277; *Hertrich v. Hertrich*, 114–643, 87 N. W. 689.

Subscribing witnesses may give an opinion that the testator was of sound mind without reciting any particular facts or circumstances, but other witnesses acquainted with the testator and in a situation to observe his conduct may do the same thing, and the testimony of the subscribing witnesses in this respect is to be subjected to the same tests as those applicable to other witnesses. *In re Will of Wharton*, 132–714, 109 N. W. 492.

To qualify a nonexpert to give an opinion as to insanity it is only necessary that the circumstances related by the witness as a basis for such opinion tend to indicate unsoundness of mind. *Stutsman v. Sharpless*, 125–335, 101 N. W. 105.

A nonexpert should not be allowed to testify that the testator was capable of making the will in question. But he may be asked as to the testator's capacity at a time prior to the execution of the will. *In re Estate of Glass*, 127–646, 103 N. W. 1013.

It is not proper to ask an expert whether testator was competent to make a will, this being the ultimate fact for the jury to determine. *In re Betts' Estate*, 113–111, 84 N. W. 975.

A question as to actions or appearances indicating mental strength or weakness calls for a fact, not an opinion. *Manatt v. Scott*, 106–203, 76 N. W. 717.

An expert witness may be asked whether in his opinion the testator was capable of transacting ordinary business, and of intelligently disposing of his property. *In re Will of Overpeck*, 144–400, 120 N. W. 1044, 122 N. W. 928.

Where the proponent assumes the burden at the outset and offers affirmative testimony of the testator's mental soundness, he may properly be allowed in the discretion of the court to test the contestant's expert witnesses by propounding hypothetical questions by way of cross-examination. *Brackey v. Brackey*, 151–99, 130 N. W. 370.

Testimony of witnesses as to the fact of the physical and mental condition of testator is competent. *In re Walker's Will, Barry v. Walker*, 152–154, 128 N. W. 386.

Where nonexpert witnesses testify as to unsoundness of mind, the sufficiency of the facts as a basis for such opinion is for the jury and not for the court. *Ibid.*

Testimony of an expert witness as to capacity of the testator at a time prior to the execution of the will, held competent as against objection that it involved the ultimate question to be determined by the jury. *Ibid.*

A nonexpert witness having recited facts as to the conduct of the decedent may be allowed to express an opinion as to whether he was of sound mind. *Erwin v. Fillenwarth*, 137 N. W. 502.

Such a witness may also be asked whether in his opinion the deceased was capable of looking after financial affairs. *Ibid.*

Declarations: To render declarations of the testator admissible on the question of undue influence, there should be independent testimony indicating that such influence has been exerted, and then such declarations are chiefly pertinent as showing the condition of mind of testator to have been such that he was susceptible to the sinister influence and acted in response thereto. *In re Estate of Townsend*, 128–621, 105 N. W. 110.

On the issue of undue influence prior declarations of the testator are not admissible in evidence, nor are his age or the character and extent of his property admissible. *In re Will of Wiltsey*, 122–423, 98 N. W. 294.

On the question of undue influence the contents of a prior will may be shown as indicating the intention of the testator before being subjected to the undue influence relied upon. *In re Will of Selleck*, 125–678, 101 N. W. 453.

Testator's previous declarations are admissible in support of a will which is impeached on the ground of want of mental capacity. *In re Perkins' Estate*, 109–216, 80 N. W. 335.

Also it is proper to permit those contesting the will to show the amount of advancements made to them for the purpose of rebutting evidence of declarations claimed to have been made by testator on the subject tending to support the will. *Ibid.*

For the same purpose entries in deceased's books of account are admissible as tending to show the amount of advancements as bearing on his state of mind with reference to the persons to whom the

advancements appear to have been made. *Ibid.*

Declarations made by testator are admissible as bearing on capacity and undue influence, even though made long after the execution of the will, if they tend to show senile dementia which in its nature is progressive. *Manatt v. Scott*, 106–203, 76 N. W. 717.

Statements or declarations of testator or conduct on his part tending to throw light on his mental condition at the time the will was executed may properly be considered by the jury in connection with other facts and circumstances surrounding or attending the execution of the will. But subsequent declarations as to the wishes of testator with reference to the disposition of his property cannot be considered as tending to show revocation. *Smith v. Ryan*, 136–335, 112 N. W. 8.

Where the probate of a will is contested on the ground of mental incapacity and undue influence, declarations of the proponent and beneficiary, made before the execution of the will, and with reference to the cancellation of a contract, are admissible for the purpose of showing want of mental capacity and liability to undue influences. *Lundy v. Lundy*, 118–445, 92 N. W. 39.

Testimony as to the belief of the testator that the instrument in question was a will is inadmissible. *In re Will of Brown*, 143–649, 120 N. W. 667.

Evidence of declarations by an attesting witness that the testator was mentally unsound at the time the will was executed is not admissible. *Speer v. Speer*, 146–6, 123 N. W. 176.

The declarations of one of the beneficiaries under a will tending to show want of capacity or undue influence are not admissible in an action to set aside the probate of a will to which all the beneficiaries are parties. *James v. Fairall*, 154–253, 134 N. W. 608.

Declarations of a testator made long after the execution of the will are competent for the purpose of showing the signing of the will by such testator and the subsequent witnessing thereof by proper witnesses. *Nixon v. Snellbaker*, 155–390, 136 N. W. 223.

Declarations of one devisee tending to show unsoundness of mind of testator or undue influence are not admissible if there are other devisees, not joint with the declarant, whose interests would be prejudiced by the refusal to probate the will on the grounds which such declarations tend to establish. *Lawless v. Lawless*, 156–184, 135 N. W. 560.

Separate devises to different beneficiaries cannot be treated as so far independent that the declarations of one of such beneficiaries may be treated as defeating the devise to him, allowing the devises to other beneficiaries to stand. *Ibid.*

Declarations of the testator as bearing on her mental capacity made three years after the execution of the instrument, held not admissible. *Wendt v. Foss*, 140 N. W. 881.

Testimony tending to show forgetfulness both of fact and obligation at a time long subsequent to the execution of the will is not admissible. *Ibid.*

Reasonableness of will: While the fact that the will is unreasonable or unjust may be considered in connection with evidence bearing on the condition of testator's mind, it is not alone a ground for refusing probate. *In re Trotter's Will*, 117–417, 90 N. W. 750.

The question whether the will is unnatural and unreasonable may be considered on the issue of testator's mental condition. *Hardenburg v. Hardenburg*, 133–1, 109 N. W. 1014.

The inequalities of a will may be taken into consideration in determining the mental capacity of the testator or whether undue influence has been exercised, but apparent inequality or inequity in the provisions of a will does not alone warrant the presumption of mental incapacity or undue influence. These may be considered only as circumstances in connection with other facts bearing on the condition of the testator's mind. *Manatt v. Scott*, 106–203, 76 N. W. 717.

What is meant by unjust, unreasonable and unnatural provisions of a will is that they are not as persons in like situation and similar relationship ordinarily and usually make them. *Ibid.*

Where testatrix had preferred some of her brothers to her natural heirs, it was held material in looking into the equities of the will to know that in remembering those mentioned she forgot other brothers and sisters in needy circumstances. The fact that the will bestows property on the wealthy and overlooks the claim to bounty of those who are poor in like relationship, is a circumstance suggesting a disordered mind or the working of sinister influences. *Ibid.*

While the justness and reasonableness of the provisions of the will from a moral point of view are entitled to consideration in determining the question of the sanity of the testator, such consideration must be predicated upon facts proven by competent testimony. *In re Will of Knox*, 123–24, 98 N. W. 468.

The unreasonableness of the will is a fact which may be considered on the issue of undue influence; but it is not in itself sufficient to show undue influence. *In re Townsend's Estate*, 122–246, 97 N. W. 1108.

The mere relation of husband and wife, or advice given to the husband by the wife as to the making of the will is not sufficient to give rise to a presumption of undue influence. *Ibid.*

When a will is assailed as being unreasonable or unjust, evidence of the financial condition of those having claims on the bounty of deceased and likely to have been taken into consideration by him, if in a normal condition of mind in executing his will, is admissible. But the rule ought not to be extended so as to include proof of mere expectancies unless of such a nature as likely to have been known and considered by him. *Stutsman v. Sharpless*, 125–335, 101 N. W. 105.

The financial circumstances of the testator and the devisee may be taken into account in determining whether the will is so unreasonable as to indicate a disordered mind or the working of sinister influences. *In re Will of Wharton*, 132–714, 109 N. W. 492.

Mistake of judgment or an unjust conclusion as to the character and merits of testator's children does not invalidate the will if it is the act of a sound mind. *Ross v. Ross*, 140–51, 117 N. W. 1105.

Neither the testator's age nor the character or extent of his property are evidence of unsoundness of mind or undue influence. *Ibid.*

Inequalities in the provisions of the will do not alone warrant the presumption of mental incapacity. *Mileham v. Montagne*. 148–476, 125 N. W. 664.

One who is permanently insane may to all outward appearances act and talk in a most rational manner, although no real abatement of his malady has taken place. *Ibid.*

While the fact that a will is unreasonable or unjust may be considered in connection with evidence bearing on the condition of the testator's mind, it is not in itself a ground for refusing probate. *Sevening v. Smith*, 153–639, 133 N. W. 1081.

No mere weakening of the mental powers will invalidate a will executed in due form, so long as the testator retains mind enough to know and apprehend in a general way the natural objects of his bounty and know the extent of his estate and the distribution he wishes to make of it. *Ibid.*

The fact that the will is unjust to those who are dependent upon the testator's bounty is not, in itself, sufficient to show want of mental capacity or undue influence, but where the provisions of the will are unusual or extraordinary, the fact of mental weakness is to be considered, especially if the relationship of the parties is such as reasonably to warrant the presumption of undue influence. *Cash v. Dennis*. 139 N. W. 920.

Question for jury: Where there is testimony tending to show undue influence and that the condition of testator's mind was such that he might easily have been influenced by the persons whose undue influence is relied upon, the question as to the sufficiency of the evidence should be submitted to the jury. *In re Estate of Jones*, 130–177, 106 N. W. 610.

Where there is evidence as to want of mental capacity, fraud or undue influence on which reasonable minds might differ in their conclusions, the question is for the jury. *James v. Fairall*, 154–253, 134 N. W. 608.

The fact that the effect of a will is to disinherit an heir is a circumstance which may be considered with other testimony as against the validity of the will. *Ibid.*

Where there was a conflict in the evidence as to whether testatrix was practically unconscious and incapable of expressing her wishes at the time the will was signed, held that the question as to whether the instrument was actually directed to be made and assented to and voluntarily signed by the testatrix was for the jury. *In re Hannaher's Will*, 155–73, 135 N. W. 34.

Devise in lieu of dower: Under the provisions of the code of '73, held that the creation of a trust of testator's entire property for the purpose of raising a fund for the widow's support and use during life was inconsistent with the dower right of the widow in the property. *Campbell v. Sankey*, 114–69, 86 N. W. 48.

Under the provisions of the code of '73 the election of the widow to take under the will as against her dower right could only be shown by record, and notice requiring such election must be given to her before any act of election would be effectual. *Byerly v. Sherman*, 126–447, 102 N. W. 157.

The widow's distributive right is an incumbrance upon the real estate as to which the devisees of specific portions of such estate are required to make ratable contribution, in the absence of any provision on the subject in the will. *McGuire v. Luckey*, 129–559, 105 N. W. 1004.

Also held that the devise to a wife of a life estate in all of testator's property in the absence of any restrictive words, was not to be construed as made in lieu of dower. This rule of construction is now changed by the language of this section. *Percifield v. Aumick*, 116–383, 89 N. W. 1101. And see notes to code § 3376 in this supplement.

Where the will gives to the widow the very property real and personal which in the absence of a will she and her children could rightfully hold absolutely, exempt from the claims of creditors, as a homestead, and she accepts the devise, she takes the homestead free from the debts of her deceased husband. *Swisher v. Swisher*, 157–55, 137 N. W. 1076.

Section applied. *Newberry v. Newberry*, 114–704, 87 N. W. 658.

Devises to corporations: The statutory limitation as to devises to corporations does not apply to a devise to an individual in trust for charitable use although the

beneficiary may be a corporation. *Rine v. Wagner*, 135–626, 113 N. W. 471.

A devise in trust to a bishop of the Catholic church is not a devise to a corporation. *Ibid.*

To invalidate a devise under the statute it must appear that it was of more than one fourth of testator's estate. *Ibid.*

Charitable bequests to two or more separate corporations not for pecuniary profit cannot exceed in the aggregate one fourth of the testator's estate. *In re Estate of Ihmes*, 154–20, 134 N. W. 429.

Bequests to separate departments of the work of one corporation not for pecuniary profit are to be construed as bequests to the corporation and not to such departments as separate incorporated associations. *Ibid.*

The design of the statute is to restrain the power of the testator in giving, thereby preventing him from disregarding the just claims of those with natural expectations on his bounty, through pious or philanthropic motives. It does not compel the testator to give his property to his relatives, nor deprive him of the right to give it all to charity during his life. *Ibid.*

SEC. 3271. After-acquired property.

After-acquired property will pass under the terms of a will whenever the intention to so provide is clear and explicit; otherwise it will be treated as intestate property. *Flynn v. Holman*, 119–731, 94 N. W. 447.

The purpose of this section was to extend to real property the rule previously recognized as to personal property, that the will speaks from the time of the death of the testator and not from the date of its execution; and held that a devise of testator's real estate, describing it, "and also including all other real estate now owned by me" covered after-acquired real property, the word "now" having reference to the time of the testator's death. *Luers v. Luers*, 145–600, 124 N. W. 603.

A devise of a share of all property, construed to include after-acquired property, is not a specific devise. *Wilts v. Wilts*, 151–149, 130 N. W. 906.

SEC. 3274. In writing—witnessed—signed.

Where subscribing witnesses are dead or beyond the jurisdiction of the court, proof of their handwriting is a compliance with the law as to proving execution, and where they are beyond the jurisdiction of the court, even though their depositions are taken and introduced, other evidence of the due execution of the will is admissible. *In re Allison's Estate*, 104–130, 73 N. W. 489.

Where the subscribing witnesses are dead, other evidence of the execution of the will is admissible. *Scott v. Hawk*, 105–467, 75 N. W. 368.

Evidence that the deceased, upon examination of the instrument and the signatures thereto, declared it before his death to be his will may be introduced to prove execution in such a case. *Ibid.*

The making of a mark by a testator will satisfy the statutory requirement as to signature, even though the testator is able to write at the time. *Scott v. Hawk*, 107–723, 77 N. W. 467.

If the statute is complied with, nothing more in the execution of the will is necessary. Publication, as such, is not required. *Ibid.*

The testamentary right to dispose of property is regulated by the statute which requires the will to be witnessed in a certain way, and where it does not appear to have been so witnessed, it will not be valid although it is shown that there were other competent witnesses present at the execution. *McCarn v. Rundall*, 111–406, 82 N. W. 924.

If testator asks a person who is competent to be a witness to attest the will and the person thus requested, instead of attesting in the usual way as a witness, affixes a certificate of acknowledgment thereto, the will is sufficiently witnessed by him. *In re Hull's Will*, 117–738, 89 N. W. 979.

The attesting clause is not essential to the sufficiency of the attestation by witnesses, though it may be important in furnishing proof that the testator declared the instrument to be his act and that the witnesses signed it in his presence. If there is an attestation clause showing the requisite facts, signed by two witnesses, this is *prima facie* sufficient, but the proof furnished by such clause is not conclusive. *Ibid.*

It is sufficient that the witness sign in the presence of testator in response to a request of a third person, made by the testator's direction, approved by some sign or act on the part of the testator, and that the signature of the witnesses is with the knowledge of the testator, and in response to such request. Indeed, it is sufficient if the signing is in the presence of testator, with knowledge on his part that the witnesses are signing in response to a request of the third person, he making no objection. *Ibid.*

It is not essential that the witnesses attest with reference to one and the same act or declaration of the testator. *Ibid.*

The burden of proof as to due execution and attestation is on the proponents. *Ibid.*

Questions as to the sufficiency of the attestation are for the jury. *Ibid.*

It is not necessary that the will be read to or by the testator in the presence of the

witnesses. *Smith v. Ryan*, 136–335, 112 N. W. 8.

Where the execution of a will is denied, the burden of proof is upon the proponents to establish the genuineness of the signature by a preponderance of the evidence. *Beebe v. McFaul*, 125–514, 101 N. W. 267.

An instrument of conveyance which is not to take effect by way of passing the title to the property until after the grantor's death is testamentary in character and of no validity unless executed with the formalities of a will. *Wilson v. Carter*, 132–442, 109 N. W. 886.

An instrument which operates to convey a present interest, although possession and enjoyment are reserved during the life of the grantor, may be effective as a conveyance, but if it passes no present interest and is to be operative only on the grantor's death, then it is testamentary in character and of no effect unless executed with all the formalities of a will. *Tuttle v. Raish*, 116–331, 90 N. W. 66.

In a contest on the ground of mental incapacity the declarations of the attesting witness made after the execution of the will that the testator was then mentally incapable of making a will are not admissible. *Speer v. Speer*, 146–6, 123 N. W. 176.

Where a codicil to a second will by which a prior will has been revoked is relied upon as reviving the prior will, it must be duly executed and clearly identified as the will which is thereby revived. *Blackett v. Ziegler*, 153–344, 133 N. W. 901.

Where it is admitted that the will was written and signed by the testator and signed as witnesses by persons competent to witness it, the presumption is conclusive that it was signed by the testator before it was witnessed and that it was executed with all the formality which is required by the statute. There need be no attesting clause, nor is it necessary that the witnesses should see the testator subscribe the will nor that the testator state to the witnesses the character and purpose of the instrument. *Nixon v. Shellbaker*, 155–390, 136 N. W. 223.

SEC. 3276. **Revocation—cancellation.** Wills can only be revoked in whole or in part by being canceled or destroyed by the act or direction of the testator, with the intention of so revoking them, or by the execution of subsequent wills. When done by cancellation, the revocation must be witnessed in the same manner as the making of a new will. [30 G. A., ch. 120, § 3; C. '73, §§ 2329–30; R. §§ 2320–1; C. '51, §§ 1288–9.]

Wills may be revoked either in whole or in part in the manner pointed out by statutory provision. Whether the revocation is entire or partial must depend on the testator's act and intent as gathered from the instrument of revocation itself. The fact that the instrument relied upon as a revocation is called the last will and testament of the testator is not conclusive. If the latter will can be construed with the earlier one so as to prevent partial intestacy the two should be thus construed together if practicable. *Fry v. Fry*, 125–424, 101 N. W. 144.

A later will in which the testator attempts to dispose of his entire estate works a revocation of a former will even though there is no revocation clause in the later instrument. *Schillinger v. Bawek*, 135–131, 112 N. W. 210.

Proof of the execution of a subsequent testamentary instrument is not sufficient of itself to establish a revocation. There must be either an express clause of revocation or an inconsistent disposition of the previously disposed property, and the burden is on the contestant to bring forward the subsequent will and demand probate thereof, supporting such demand by proof which would authorize the admission of the subsequent will to probate. *In re Will of Dunahugh*, 130–692, 107 N. W. 925.

The whole will is not rendered void by an attempt in an unauthorized manner to change one of its provisions. Where the alteration is not attended with the formalities required by statute, it is of no effect, and unless it is impossible to determine what the original will was, it remains the will of the testator. *In re Hull's Will*, 117–738, 89 N. W. 979.

The will and the codicil should be read together, and the law does not favor revocation of the provisions of a prior will by implication only from a subsequent codicil. *Sperry v. Sperry*, 126–503, 102 N. W. 491.

Obliteration of a provision of a will is not to be given the effect of destroying the entire will, and the instrument will be carried out so far as its contents, at the time of execution, can be ascertained. *Richardson v. Baird*, 126–408, 102 N. W. 128.

It appearing that a will conceded to have been executed cannot be found after the death of the testator, the presumption arises that the same was destroyed by him *animo revocandi*, and the burden is upon the party seeking to establish the will to overcome such presumption by evidence strong, positive and free from doubt. *Thomas v. Thomas*, 129–159, 105 N. W. 403.

The adoption of a child in the manner authorized by statute has the same effect as the subsequent birth of a legitimate child in operating to revoke a will previously executed. *Hilpire v. Claude*, 109–159, 80 N. W. 332.

Whether by the insertion in this section of the provision that birth of a legitimate child to the testator before his death will operate as a revocation of his will, it was intended to negative the implied revocation resulting from recognition of an illegitimate child, or to exclude the doctrine that provision made for a legitimate child subsequently born would prevent revocation resulting therefrom, *quaere*. But held that in a particular case the provision made for a child which was subsequently born was so inadequate and uncertain that it would not prevent the birth of such child from operating as a revocation. *Rowe v. Rowe*, 120–17, 94 N. W. 258.

Under the express provision of the statute that the subsequent birth of a legitimate child to the testator before his death operates as a revocation of his will, there is no occasion to apply the general rule of construction that the subsequent birth of a child produces an implied revocation only where no adequate provision therefor has been made. (But now also see 30 G. A., ch. 120.) *Fry v. Fry*, 125–424, 101 N. W. 144.

While a presumption of want of capacity to make a valid revocation may arise from proof that testator was then under guardianship, such presumption may be overcome by evidence. *Linkmeyer v. Brandt*, 107–750, 77 N. W. 493.

A revocation of a will by destruction is effectual, notwithstanding a subsequent will is held invalid for want of mental capacity. *McCarn v. Rundall*, 111–406, 82 N. W. 924.

To defeat the revocation in such case it must appear that there was want of mental capacity at the time of the destruction of the first will. *Ibid.*

Proof of the contents of a destroyed will ought to be of the clearest and most satisfactory character. *Ibid.*

The divorce of a testator after the making of a will does not in itself revoke the will. *In re Estate of Brown*, 139–219, 117 N. W. 260.

A conveyance not testamentary in character is not affected by the subsequent birth of a child. *Lefebure v. Lefebure*, 143–293, 121 N. W. 1025.

Whether in a given case a subsequent will amounts to a revocation of a former will depends on the contents of the subsequent will. *In re Will of Brown*, 143–649, 120 N. W. 667.

The will of a woman executed before marriage is not revoked by subsequent marriage. *Hastings v. Day*, 151–39, 130 N. W. 134.

A will expressly revoked by a subsequent will may be republished or revived by the reëxecution thereof, or by codicil executed in accordance with statutory requirements, showing an intent to revive such previous will. *Blackett v. Ziegler*, 153–344, 133 N. W. 901.

If revocation results from the subsequent execution of an inconsistent will or instrument indicating an intent to revoke the first will, the question whether the destruction of such subsequent will or instrument revives the prior will is one of fact to be determined under all the circumstances of the case, and parol evidence is admissible as tending to show the party's intent in such destruction. *Ibid.*

SEC. 3278. Executors.

The brother of a testator having no interest in the estate other than as devisee cannot object to the confirmation of the executor named in the will without showing that such person is not proper for appointment. *In re Estate of Smale*, 150–391, 130 N. W. 119.

SEC. 3279. **Posthumous children.** Whenever a testator shall have a legitimate child born after the making of a last will, either in the lifetime or after the death of such testator, and shall die leaving such child so after born, unprovided for by any settlement, and neither provided for nor mentioned in such will, every such child shall succeed to, and inherit the same interest in such parent's real and personal estate as though no will had been made, and the said interest shall be taken ratably from the interests of heirs, devisees, and legatees. [30 G. A., ch. 120, § 1; C. '73, §§ 2334–5; R. §§ 2316–17; C. '51, §§ 1284–5.]

[For repeal of original code section see § 3279-b. EDITOR.]

Before the enactment of this section, it was held that the birth of a child to a testator after the making of a will worked a revocation. *Hastings v. Day*, 151–39, 130 N. W. 134.

SEC. 3279-a. **Claims.** All claims which it becomes necessary to satisfy, and all amounts necessary to be paid from the estate of a testator in disregard of or in opposition to the provisions of a will, shall be taken

ratably from the interests of heirs, devisees, and legatees. [30 G. A., ch. 120, § 2.]

SEC. **3279-b. Repeal.** Section thirty-two hundred seventy-nine of the code is hereby repealed. [30 G. A., ch. 120, § 3.]

SEC. **3281. Heirs of devisee.**

The provisions of this section apply as well to a devise to a class as to an individual, but such a statute does not apply where the devise is to a class to be determined only when the will takes effect. *In re Nicholson's Will*, 115–493, 88 N. W. 1064.

It may be provided that in the case of the death of the devisee before the will takes effect, the property so devised shall not go to the devisee's heirs but shall take such other direction as the testator may see fit to prescribe. *Gilbert v. Gilbert*, 127–568, 103 N. W. 789.

In such case as is contemplated in this section the property passes directly from the testator to the heirs of the devisee. *In re Hulett's Estate*, 121–423, 96 N. W. 952.

The devisee takes subject to the payment of debts and the proper costs of administration. Therefore the party who claims by substitution takes subject to the same debts and costs. *In re Estate of Metcalf*, 143–310, 120 N. W. 104.

On the death of a devisee before the death of the testator, his heirs become entitled to the devise, unless a contrary intent appears from the will itself. *In re Estate of Freeman*, 146–38, 124 N. W. 804.

But in a particular case held that under the provisions of a will the shares devised to particular devisees who died before the death of the testator were to be distributed among other devisees who survived the testator. *Ibid.*

Where the terms of the will manifested an intention on the part of the testator that on the death of a devisee named, prior to the death of the testator, the property devised should be otherwise disposed of, held that this statutory provision had no application. *In re Estate of Phelps*, 147–323, 126 N. W. 328.

Where a devisee claims directly under a provision of the will for his benefit as one of the class designated and described by the testator, the provisions of this section have no application. *Anderson v. Wilson*, 155–415, 136 N. W. 134.

SEC. **3283. Probate—jury trial.**

Jurisdiction: A proceeding for the probate of a will is one of which the federal court may take jurisdiction by removal, where the requisite amount is involved and diversity of citizenship exists, as required by the federal constitution and statutes. *Wart v. Wart*, 117 Fed. 766.

While a probate court called upon to admit a will to probate has no occasion to place a construction upon it, nevertheless such court has jurisdiction at some time during the course of administration to interpret, and having been called upon to do so in a proceeding between the proper parties, its determination is conclusive in the adjudication of the subject matter. Therefore if, in a proceeding to probate, the court construes the will as between parties interested, no objection being made to the forum, its judgment cannot be disputed in a subsequent proceeding in equity to set the will aside or construe it. *Niemand v. Seemann*, 136–713, 114 N. W. 48.

Prior will: In the proceeding for the probate of a will the validity of a prior will is not in issue. *Stutsman v. Sharpless*, 125–335, 101 N. W. 105.

Where the probate of a will is contested on the ground of mental incapacity and contestants pray the probate of a prior will, neither will should be admitted to probate until the matter of contest is decided in a proceeding of which all parties interested have notice. *In re Cahill's Estate*, 155–340, 136 N. W. 214.

Contest: The widow has no such interest in the estate as entitles her to contest the probate of a will. *In re Will of Fallon*, 107–120, 77 N. W. 575.

One who would be entitled to share in the property of deceased in the absence of a will may contest the probate of the will and on his death the widow and heirs may be substituted. But if the will which is contested relates only to personal property, the substitution should be of the administrator or executor of the deceased contestant. *In re Will of Wiltsey*, 122–423, 98 N. W. 294.

Executors not otherwise interested in the will cannot protest the probate of a codicil revoking their appointment. Such action is only allowable to one who would have a beneficial interest in the estate if there was no will. *In re Estate of Stewart*, 107–117, 77 N. W. 574.

Anyone interested may propound a will for probate, and notice of the taking of depositions may be given by a proponent to one who has filed objections to the will and who is the chief legatee or beneficiary thereunder. *In re Estate of Jones*, 130–177, 106 N. W. 610.

The judgment of the court in an action by the guardian of an insane person to set aside a contract and conveyance between the ward and a beneficiary is conclusive on the question of the insanity of the ward in a subsequent proceeding to probate the will of such person, proposed

by the same beneficiary claiming under such will, executed at the same time as the contract and conveyance previously in question. *In re Hendershott's Estate*, 134–320, 111 N. W. 969.

Parties in interest may, as between themselves, waive the probate of a will and bind themselves to abide by its provisions. By such agreement, the parties are estopped to insist upon the invalidity of the will for want of probate. *Farwell v. Carpenter*, 142 N. W. 227.

Devisees are entitled to nothing save under the probated will and cannot contest the validity of a probate. *Seery v. Murray*, 107–384, 77 N. W. 1058.

Procedure: A written petition for the probate of a will is not necessary to give the court jurisdiction. *Ibid.*

The question of the sufficiency of the attestation, where there is a conflict in the evidence, is for the jury. *In re Hull's Will*, 117–738, 89 N. W. 979.

There being no controversy as to the execution of the will, the contestant is entitled to the opening and closing on the issues as to mental capacity and undue influence. *In re Will of Wharton*, 132–714, 109 N. W. 492.

No answer or reply on the part of proponents is required in order to raise an issue on the objections filed to the probate of the will. *In re Estate of Jones*, 130–177, 106 N. W. 610.

As the contest of a will is triable before a jury, the supreme court will not on appeal interfere with the verdict if there is evidence in its support. *In re Hannaher's Will*, 155–73, 135 N. W. 34.

Costs: The petitioners for the probate of a will in their own interests and to the end that as beneficiaries named in the instrument they may share in the distribution of the estate are not entitled to have the costs of the proceeding taxed against the estate if the probate of the proposed will is denied. *Beebe v. McFaul*, 125–514, 110 N. W. 267.

Where it appears that the proponent has acted in good faith in proposing the will for probate, he should not be charged with the costs of the contest, although probate of the will is refused. *Lingle v. Lingle*, 121–133, 96 N. W. 708.

There is no impropriety in attempting to uphold what is in good faith believed to be a valid will, and the costs of the contest should not be taxed to the party making such contention, but to the estate of the person whose will is contested. *Kirsher v. Kirsher*, 120–337, 94 N. W. 846.

The costs may properly be taxed to the proponent where the trial is simply a contest between proponent claiming the estate of deceased under the will and contestants claiming it as heirs at law and next of kin, and the probate of the will is denied. *In re Hendershott's Estate*, 134–320, 111 N. W. 969.

Where the executor named contests the will and no one appears as proponent, the widow may act as proponent; and if the contest is successful, she may be allowed out of the estate her reasonable expense and attorney's fees. But if the contest is substantially one of personal interest between the contestant and the widow, the attorney's fees of the widow acting as proponent are not usually allowed out of the estate. *In re Estate of Berry*, 154–301, 134 N. W. 867.

SEC. 3284. **Notice of hearing.** The clerk shall give notice of the time fixed, by publishing a notice, signed by himself and addressed to all whom it may concern, in a daily or weekly newspaper printed in the county where the will is filed, once each week, for three consecutive weeks, the last publication of which shall be at least ten days before the time fixed for such hearing, and the court in its discretion may prescribe a different notice. [30 G. A., ch. 2, § 11; C. '73, § 2341; R. § 2326; C. '51, § 1294.]

SEC. 3287. **Recorded—executor to have copy.** After being proved and allowed, the will, together with the certificate hereinbefore required, shall be recorded in a book kept for that purpose, and the clerk shall cause the same, or an authenticated copy thereof, to be placed in the hands of the executor therein named or otherwise appointed. And whenever it shall appear that the testator died seized of real estate located in a county of this state other than that in which probate is granted, a complete transcript, properly authenticated, and of the record entry of the order of court admitting the will to probate, and if a copy of such will is not contained therein a certified copy of such will, shall be attached thereto and the same shall be filed by the clerk in the office of the clerk of the district court in such other county, who shall cause the same to be entered in the probate docket, and said transcript shall be recorded in full in the book kept for the recording of wills in such county, and when so recorded such

record may be read in evidence in all courts without further proof. The cost of such transcript and of the recording thereof shall be taxed against the estate of the decedent unless administration thereof is closed, in which event it shall be paid by the owner of the real estate involved. [29 G. A., ch. 134, § 1; C. '73, § 2343–4; R. §§ 2327, 2330; C.'51, §§ 1295, 1298.]

SEC. 3290. Vacancies.

This section does not apply to one named as executor in the will but not appointed by the court. *In re Estate of Van Vleck*, 123–89, 98 N. W. 557.

The court is not required to appoint the executor named. *Ibid.*

In the event of a vacancy in the position of executor the court has power to appoint a successor with all the authority of his predecessor and the person thus appointed is entitled to receive from his predecessor all the assets of the estate held by him as executor or administrator as the case may be, including funds which the executor was authorized to hold for a special purpose. The legatees and distributees are not compelled to look to the predecessor for their shares of the estate which have come into his hands. *Ellyson v. Lord*, 124–125, 99 N. W. 582.

SEC. 3291. How filled.

A discretionary power to sell real estate given to the person named as executor by reason of personal trust and confidence cannot be exercised by the administrator with will annexed, but if it appears from the terms of the will that the executor as such and not the person named as executor and thereby made a trustee is charged with the duty of such sale, held that the successor appointed by the court may exercise the power thus conferred. *Ellyson v. Lord*, 124–125, 99 N. W. 582.

SEC. 3293. Trustees to give bond.

While a person designated by the will as executor may be given a personal trust with reference to the disposition of the property of the testator which cannot be exercised by a substituted executor appointed by the court, if it appears that the power given is conferred upon the executor as such, it may be exercised by a successor duly appointed. *Ellyson v. Lord*, 124–125, 99 N. W. 582.

A corporation may be appointed trustee for beneficiaries under the provisions of a will. *State v. Higby Co.*, 130–69, 106 N. W. 382.

The allowance to the trustees of the estate may properly be made chargeable upon the estate itself. *Parkhill v. Doggett*, 150–442, 130 N. W. 411.

The power to remove trustees appointed by will or deed is exercised sparingly by the courts and to justify such action, there must appear the clear necessity to save the trust property. It seems that if a trustee fails to discharge his duties from an honest mistake or a mere misundertanding of them, or from misjudgment, this is no ground for removal unless such failure shows a want of the proper capacity to execute his duties. *Waller v. Hosford*, 152–176, 130 N. W. 1093.

SEC. 3294. Foreign wills—probated in other states.

To justify a finding that the probate of a will in another state was not conclusive in this state on the ground that the court of such other state had not jurisdiction by reason of the nonresidence of the testator, the burden is upon those resisting the validity of the probate proceeding to prove that the testator had not acquired a residence in that state. But under the evidence held that the showing in that respect was sufficient. *Sullivan v. Kenney*, 148–361, 126 N. W. 349.

SEC. 3295-a. Sale of real estate by foreign executors—legalized. All conveyances of real property heretofore executed by executors or trustees under foreign wills and prior to expiration of three months after the recording of a duly authenticated copy of the will, original record of appointment, qualification, and bond, as required by chapter one hundred sixty-two, acts of the eighteenth general assembly, are hereby legalized and declared as valid and effectual in law as though the provisions of said chapter had been strictly followed, provided the proper proof of authority was a matter of record in the office of the clerk of the district court in the county where the real property is situated, at the time the conveyance was executed, or was so made a matter of record prior to the passage of this

act; provided, nothing in this act shall in any manner affect pending litigation. [27 G. A., ch. 182, § 1.]

SEC. **3295-b. Same—prior to 1913.** All conveyances of real property made prior to January first, nineteen hundred thirteen, by executors or trustees under foreign wills and prior to the expiration of three months after the recording of a duly authenticated copy of the will, original record of appointment, qualification and bond, as required by the provisions of section thirty-two hundred ninety-five of the code, are hereby legalized and declared as valid and effective in law as though the provisions of said section had been strictly followed, provided the proper proof of authority was a matter of record in the office of the clerk of the district court in the county where the real property is situated, at the time the conveyance was executed, or was made a matter of record prior to the passage of this act; provided that nothing in this act shall affect pending litigation. [35 G. A., ch. 272, § 12; 34 G. A., ch. 157, § 1.]

SEC. **3295-c. Same.** All conveyances of real property made prior to January first, nineteen hundred thirteen, by executors or trustees under foreign wills and prior to the date upon which such will was admitted to probate in Iowa or prior to the expiration of three months after the recording of a duly authenticated copy of such will, original record of appointment, qualification and bond as required by the provisions of section thirty-two hundred ninety-five of the code, and in which such will was subsequent to said conveyance, probated in Iowa or shall hereafter be probated in Iowa, and in which a duly authenticated copy of the will, original record of appointment, qualification and bond as required by said section thirty-two hundred ninety-five was subsequent to such conveyance, or shall be hereafter made a matter of record as provided in said section thirty-two hundred ninety-five, are hereby legalized and declared as valid and effectual in law and in equity as though such will had been probated in Iowa prior to such conveyance and as though the provisions of said section thirty-two hundred ninety-five had been strictly complied with; provided, nothing in this act shall affect[1] pending litigation. [35 G. A., ch. 273, § 1.]

[1]"effect" in enrolled bill. EDITOR.]

SEC. 3296. Probate conclusive—setting aside.

It is not true that whenever a will has been probated, whether with or without a contest, the order admitting it to probate can only be set aside in an equitable action. *Kirsher v. Kirsher*, 120–337, 94 N. W. 846.

The burden is on the party suing to have probate of the will set aside to show that the instrument was not properly executed. *Smith v. Ryan*, 136–335, 112 N. W. 8.

In an action to set aside the probate of a will, the defendants having by counterclaim or cross-petition asked to have the will confirmed, the court has no jurisdiction on dismissal of the action by plaintiff to proceed with the entry of a decree confirming the will, and thus cutting off a future action to set aside the probate. *Davis v. Preston*, 129–670, 106 N. W. 151.

One who is not made a party to the proceedings to probate a will is not bound by the result of such proceedings. *Busse v. Schaeffer*, 128–319, 103 N. W. 947.

All matters which might properly have been determined in the probate proceedings are adjudicated in the order therein and cannot again be litigated in an equity case. *In re Estate of Brown*, 139–219, 117 N. W. 260.

A will having been once duly admitted to probate, its due execution is presumed and the burden of showing want of testamentary capacity is on those who seek to have the probate set aside. *Convey v. Murphy*, 146–154, 124 N. W. 1073.

The admission of a will to probate without contest is a preliminary order and judgment which effects a prima-facie establishment of the instrument and gives the court and executor authority to proceed with the administration and settlement of the estate, but does not operate to cut off the right of contest in an original action within the statutory period of limitation. *Kelly v. Kelly*, 157– —, 138 N. W. 851.

An order of a probate court admitting a will to probate is effective throughout the state and may not be attacked collaterally. *Erwin v. Fillenwarth*, 137 N. W. 502.

In an action to set aside the probate of a will on the ground of want of mental capacity, the plaintiff cannot rely on want of proper execution of the instrument, such ground not having been raised in his petition. *Wendt v. Foss*, 140 N. W. 881.

The burden of proving that the will admitted to probate was not duly executed is upon the plaintiff. *Ibid.*

SEC. 3297. Administration granted.

The right to administer upon the estate does not give the widow such interest as to entitle her to contest the probate of a will. *In re Will of Fallon*, 107–120, 77 N. W. 575.

Until the will is proven, general administration of the estate of the decedent cannot be granted. *Alice E. Mining Co. v. Blanden*, 136 Fed. 252.

A foreign court acquires no jurisdiction to administer on the estate of a resident of this state. *In re Estate of Williams*, 130–553, 107 N. W. 608.

An administrator appointed in this state cannot by voluntary appearance in a court of another state confer jurisdiction upon the latter court to administer the estate. *Ibid.*

A court of equity may prohibit creditors residing in this state from prosecuting claims against the estate of a resident decedent in the courts of a foreign state. *Ibid.*

Mere nonresidence alone does not disqualify one from being appointed administrator of an estate within this state. The fact of nonresidence is to be considered merely in connection with the ability, character for integrity, etc., of the proposed appointee. *Foley v. Cudahy Packing Co.*, 119–246, 93 N. W. 284.

Where the decedent left surviving him a son, held that the brother of decedent was not next of kin, and administration might properly be given to one recommended by the son. *In re Estate of Weaver*, 140–615, 119 N. W. 69.

While the statute does not specify what estates are subject to administration in the probate court, yet so long as the period for granting administration has not expired the heirs of a deceased person are not entitled of their own right to an interest in the personal property. If there are no debts, administration need not be granted unless the heirs are unable to agree as to the distribution of the property. *In re Estate of Acken*, 144–519, 123 N. W. 187.

Two purposes are to be subserved in granting administration: one to collect the assets and pay the debts, funeral expenses, etc., and the other to collect the assets and make proper distribution thereof to those entitled thereto. *Ibid.*

While intent is not alone sufficient to establish change of residence, yet the intent to remove may be shown as bearing on the question whether a subsequent removal corresponding with such intent was voluntary and constituted a change of residence. *In re Estate of Murray, Scrimgeour v. Chase*, 145–368, 124 N. W. 193.

If there is a removal with definite intention to abandon the former residence, it is immaterial what the intent is as to the length of residence to which the removal relates. *Ibid.*

The brother of testator has not, as such, any ground for objecting to the appointment, as executor, of the person named in the will. *In re Estate of Smale*, 150–391, 130 N. W. 119.

As decedent's widow is entitled to preference in the appointment of an administrator, she can only be removed for cause shown. *Fry v. Fry*, 155–254, 135 N. W. 1095.

SEC. 3299. Special administrators.

A special administrator is without authority to enter into a compromise of a claim under a policy of life insurance. *Rauen v. Prudential Ins. Co.*, 129–725, 106 N. W. 198.

A special administrator has no authority with reference to debts due to the deceased. *Garretson v. Kinkead*, 118–383, 92 N. W. 55.

A special administrator cannot bring action against an administrator previously appointed for conversion of property of the deceased, but the conversion by the administrator must be reached by proceedings relative to his accounting. *Ibid.*

Where the person named in the will as executor procured appointment as temporary administrator, held that the brother of the testator, having no interest in the estate save as devisee, had no ground of complaint. *In re Estate of Smale*, 150–391, 130 N. W. 119.

SEC. 3300. Inventory—preservation of property.

A special administrator has no power to submit a claim against the estate to arbitration. He has nothing to do with the allowance of claims. *Sullivan v. Nicoulin*, 113–76, 84 N. W. 978.

SEC. 3301. Bond—oath.

Failure to give bond as required by statute is not jurisdictional, and the defect may be cured by the giving and approval of a bond after objection on that ground has been raised. *In re Wiltsey's Will*, 135–430, 109 N. W. 776.

Both principal and sureties are estopped from denying the validity of the appointment and insisting that the court had not jurisdiction of the estate. *Nash v. Sawyer*, 114–742, 87 N. W. 707.

Naming a person as executor does not make him executor in fact upon the testator's death, but ordinarily gives him the right only to become such by compliance with the provisions of the statute. *Burlington Prot. Hosp. Assn. v. Gerlinger*, 111–293, 82 N. W. 765.

An additional bond given by order of the court is security with the original bond for the final accounting by the administrator for all funds coming into his hands during the administration, and it is immaterial whether the funds which he fails to account for were received before or after the execution of the bond. *Ellyson v. Lord*, 124–125, 99 N. W. 582.

The sureties are liable for interest from the date of the failure of the administrator to account and if his delinquency exceeds the amount of bond, then the sureties are liable for the principal named in the bond with interest from the date of administrator's failure to account. *Ibid.*

The sureties on the administrator's bond are liable for the proceeds of property directed to be set apart as a special fund and held in trust, until so set apart and invested with the approval of the court. *Ibid.*

Although the court has approved the setting aside of a fund to be held by the executor as trustee for purposes designated by the will, until such funds are actually set aside so as to charge the executor therewith, the liability of sureties on his executor's bond as to the funds thus set aside is not terminated. *Ibid.*

The administrator *de bonis non* is entitled to the custody of funds which have come into the hand of the executor in pursuance of his appointment and the sureties on the bond of the executor are liable in a suit by the administrator *de bonis non*. *Ibid.*

The sufficiency of the bond cannot be questioned in a collateral proceeding. The authority of the court to appoint does not rest upon the bond. *Beresford v. American Coal Co.*, 124–34, 98 N. W. 902.

While there may be successive bonds remaining in full force and effect under which sureties are entitled to contribution, yet where a new bond was required by way of substitution, held that the sureties on such new bond had no right of contribution as against the sureties on the preceding bond. *Bankers' Surety Co. v. Wyman*, 141–574, 120 N. W. 116.

In an action on the bond the courts will not inquire into the justice of a claim passed upon in final settlement of the estate. *Tucker v. Stewart*, 147-294, 126 N. W. 183.

The fact that sureties on the bond have relied upon an order made in final settlement disallowing a claim does not however prevent their being subsequently held liable in an action on the bond after the disallowance of such claim has been in proper proceedings set aside and the claim has been allowed. *Ibid.*

Heirs or legatees discovering fraudulent credits in the final report of an administrator are not required to bring action upon the bond, but they may await the final determination of litigation involving the validity of the claim. *Ibid.*

Moreover, there may be several breaches of the bond growing out of the same transaction. *Ibid.*

The liability of the administrator is at all times the measure of the liability of his sureties, and so long as there remains any duty which the administrator is legally bound to perform, the bond continues as security for the performance of such duty. *Ibid.*

SEC. 3303. Letters.

Administration necessary: In general, the rights of claimants to the property of a deceased person are to be determined through an administration upon his estate, and not in a proceeding for the settlement of the guardianship of such deceased person. *In re Guardianship of Lindsay*, 132–119, 109 N. W. 473.

Appointment of administrator: The validity of the appointment of an administrator can only be raised in a direct proceeding and cannot be collaterally questioned. *Seery v. Murray*, 107–384, 77 N. W. 1058.

The court may appoint an administrator without written application. A petition is not necessary to give the court jurisdiction. *Ibid.*

Powers and liabilities: The executor cannot be said to be interested in the estate and cannot contest the probate of a codicil. *In re Estate of Stewart*, 107–117, 77 N. W. 574.

An administrator may not, in the absence of statutory authority, bind the estate by his contract, even when, in performing the duties of administration, expenses are necessarily incurred for services rendered or purchases made, but parties with whom the administrator deals must look to him personally for compensation, and no action therefor can be

maintained against the estate, though the claim be valid. *Valley Nat. Bank v. Crosby*, 108–651, 79 N. W. 383.

Parties have been permitted to maintain equitable actions on contracts with the administrator directly against the estate where, because of his insolvency, or some other sufficient reason, their remedy against him is inadequate, but this is always based on a *quantum meruit*, or benefit received by the estate. *Ibid.*

An administrator cannot make a binding contract as to the fee to be paid to an attorney for prosecuting a claim for injuries causing the death of deceased. *Rickel v. Chicago, R. I. & P. R. Co.*, 112–148, 83 N. W. 957.

It is doubtful whether an administrator or executor, without the court's approval, has any power to submit controversies as to claims against the estate to arbitration. *Sullivan v. Nicoulin*, 113–76, 84 N. W. 978.

The administrator of an estate may maintain an action against decedent's grantee to set aside a conveyance, if in fraud of decedent's creditors. *Mallow v. Walker*, 115–238, 88 N. W. 452.

An executor may as such properly deposit funds in a bank and the estate will not become a preferred creditor of the bank for the amount of funds thus deposited. *Officer v. Officer*, 120–389, 94 N. W. 947.

Where the will directs the sale of land, without giving discretion to the executor, or authorizing action by his successors, it does not create a trust in the executor, and his authority with reference to the land is terminated by his ceasing to be executor. Especially is this true where the will directs the conversion of land into money for the purpose of distribution. *Boland v. Tiernay*, 118–59, 91 N. W. 836.

Even though the will gives the executor a right to exercise a discretion as to the time or method of sale of the land, yet, if the power to sell is annexed to the office of executor and created to enable the executor to perform the duties imposed upon him by the will, his authority is that of executor only, and not of trustee. *Ibid.*

Where a husband was made his wife's sole legatee, and the executor had authority to carry out a contract of sale of her real property, including the homestead, held that his action as executor in completing such sale would not constitute an election to take under the will so as to preclude him from treating the consideration as proceeds of the homestead and using the same to purchase a new homestead exempt from his debts. *Milner v. Davis*, 120–231, 94 N. W. 511.

Those entitled to share in the distribution of an intestate's estate, in the absence of any indebtedness, may agree to a settlement and distribution without administration, and an administrator subsequently appointed cannot recover the assets from those to whom it has been distributed pursuant to the agreement. *Douglas v. Albrecht*, 130–132, 106 N. W. 354.

An administrator is not held personally liable where he has acted in good faith and with ordinary care and prudence in the management of an estate, and he is not liable for loss or depreciation in the value of the property in the absence of a showing of bad faith or negligence. The administrator is entitled to his expenses in caring for crops, etc., upon leased premises. *In re Estate of Ring*, 132–216, 109 N. W. 710.

Actions against: A judgment against an executor who has been discharged is of no validity unless against him personally. *Applegate v. Applegate*, 107–312, 78 N. W. 34.

An administrator who is entitled to a share in the property of the estate cannot be garnished for such share in order to subject it to the payment of a debt due by him personally. In such case equitable proceedings to subject the property to the payment of his debt may be maintained. *Cassady v. Grimmelman*, 108–695, 77 N. W. 1067.

Even where the executor has power in the absence of an order of court to settle a controversy respecting the property of the estate in his charge, he cannot delegate such power to another. *Williamson v. Robinson*, 134–345, 111 N. W. 1012.

The authorities are in conflict as to whether a contract to relinquish the right to administration of an estate is void. *Aughey v. Windrem*, 137–315, 114 N. W. 1047.

The appointment of an administrator is not subject to collateral attack. *Erwin v Fillenwarth*, 137 N. W. 502.

Where a power of sale is vested in the executor and has been exercised, it is not necessary to set aside the sale for error therein if the rights of the parties can be secured and enforced without doing so by provisions as to distribution of the proceeds. *Blain v. Dean*, 142 N. W. 418.

SEC. 3304. Notice of appointment.

The fact of publication is not in itself sufficient to give rise to the presumption that the proper order or direction was made by the clerk. *McConaughy v. Wilsey*, 115–589, 88 N. W. 1101.

It is not necessary that there be any recorded order of court with reference to publication of notice of the issuance of letters of administration, and an endorsement of such order on the letters, made and signed by the clerk, is sufficient, although the order purports to be the order of the court. *Mosher v. Goodale*, 129–719, 106 N. W. 195.

SEC. 3305. **Limitation.** Administration shall not be originally granted after five years from the death of the decedent, or from the time his death was known, in case he died out of the state. But when personal property belonging to the estate of decedent is discovered after the expiration of said five years, administration may be granted after the five year limit, for the purpose only of making proper disposition and distribution thereof. [33 G. A., ch. 199, § 1.] [C. '73, § 2367; R. § 2357; C. '51, § 1325.]

After the expiration of the five years allowed for granting letters of administration, the personal estate of the decedent, if any, vests absolutely in his heirs. Therefore a mere stranger cannot after this period procure letters of administration to be granted for the purpose of subjecting the realty to the payment of claims. *Cummings v. Lynn*, 121–344, 96 N. W. 857.

Where the decedent does not die out of the state, knowledge of the claimant as to the time of his death is immaterial in determining the time within which administration may be granted. *German v. Heath*, 139–52, 116 N. W. 1051.

SEC. 3306. **Foreign administration.**

Funds which have been sent into the state for investment by an agent and have thus become subject to taxation, as provided in code § 1320, continue to be taxable here until removed from the state in the process of administration. *In re Miller's Estate*, 116–446, 90 N. W. 89.

An administrator appointed in another state may sue in this state for injuries causing the death of the intestate in another state without complying with these provisions, where it appears that no administration has been granted in this state and that by the laws of the state where the injury occurred the administrator is trustee for the widow and children. *Knight v. Moline, E. M. & W. R. Co.*, 140 N. W. 839.

SEC. 3307. **Estates of absentees—letters of administration.** That section thirty-three hundred and seven of the supplement to the code, 1907, be and the same is hereby repealed and the following enacted in lieu thereof:[1]

When a resident of this state owning property therein, or any person who may have been a resident of this state, has acquired or may hereafter acquire property or property rights within the state, absents himself from his usual place of residence and conceals his whereabouts from his family without known cause for a period of seven years or any such person who has gone to parts unknown for a period of ten years, a petition may be filed in the district court of any county where such property or a part thereof is situated, setting forth such facts, by any person entitled to administer upon such absentee's estate if he was known to be dead, and setting forth the names of the persons who would be the legal heirs of the absentee if he were dead, so far as known, and praying for the issuance of letters of administration upon such estate; thereupon, said court shall prescribe a notice addressed to such absentee and heirs named, and order the same to be published in a newspaper published in said county to be designated by the court, once each week for eight consecutive weeks, and which shall be served personally upon all the heirs residing within the state in the manner, and for the length of time as is required for the service of original notices, proof of the publication and service of which in manner and for the time ordered shall, at the expiration of said period be filed with said petition, and thereupon if such absentee fails to appear, the court shall hear the proof presented, and if satisfied of the truth of the facts set forth in the petition concerning the absentee, shall order letters of administration upon the estate of such absentee to issue as though he were known to be dead. The court shall also hear proof and determine who the legal heirs of such absentee are and their respective interests in such estate. [33 G. A., ch. 200, § 1.] [31 G. A., ch. 9, § 9.]

[1]Substitute continues to and including § 3307-b. EDITOR.

The statutory provision for administration on the estate of one who has absented himself from the state for seven years, concealing his whereabouts, is constitutional, and such administration is conclusive, although the supposed decedent is afterwards found to be alive. Therefore, the administrator appointed in such proceeding has authority to receive insurance money under policies in favor of his estate. *New York Life Ins. Co. v. Chittenden*, 134–613, 112 N. W. 96.

SEC. 3307-a. **Sale of property—disposition of proceeds.** The person to whom the administration is granted shall proceed to administer and dispose of the estate in the same manner that administrators are required to dispose of and administer the estates of decedents. In addition thereto, such administrator may, under the orders of the court, sell and dispose of all real estate and other property owned by such absentee, and after the payment of legal costs, expenses and claims, make distribution of the proceeds thereof to the persons entitled thereto. The provisions of law regarding application, notice and manner of sale of real estate for the payment of debts by administrators shall be followed so far as applicable. [33 G. A., ch. 200, § 2.]

SEC. 3307-b. **Rights of absentee barred—conveyance by spouse.** Administration upon the estate of an absentee shall forever bar his or her right of homestead and statutory distributive share or interest in and to any real estate owned or held by the spouse of such absentee, or in which said spouse may have a legal or equitable interest, and a conveyance thereof by such spouse after one year from and after such administration has been granted, shall be free and clear of any claim or right of homestead or statutory distributive share on the part of such absentee. [35 G. A., ch. 274, § 1.]

SEC. 3308. **Releases of liens by foreign administrator, executor or guardian—certificate.** That section thirty-three hundred and eight of the code is hereby repealed and the following enacted in lieu thereof:

"Any administrator, executor or guardian appointed by the courts of any other state or county[1] is authorized to release and discharge of record in any manner and by any instrument authorized by law to the same extent as any such officer appointed under the laws of this state could do, any judgment rendered by the supreme court or by any court of any county where such judgment is a lien on property, or any mortgage or deed of trust given as a mortgage on property within this state belonging to the estate or to the minor or other person represented by him, and may also release and discharge any property in this state from the lien of such judgment, mortgage or deed of trust; but such release shall not be valid or effective unless there is filed either before or after the execution thereof, in the office of the clerk of the district court of the county in this state wherein the property sought to be released is situated, the certificate of the judge or clerk of the proper court, duly attested, that said executor, administrator or guardian was prior to the date of such release or instrument appointed such officer by such court and that, as shown by the records of such court, he had not been discharged before that date; but nothing herein contained shall authorize any administrator, executor or guardian of another state or county[1] to release or discharge any judgment, mortgage or deed of trust in this state while any administrator, executor or guardian of the estate to which such judgment, mortgage or deed of trust belongs, is authorized to act by virtue of appointment, and qualification under the laws thereof." [35 G. A., ch. 275, § 1.] [25 G. A., ch. 51; 21 G. A., ch. 103.]

[1]Evidently should be "country", as in code § 3308. The records show "country" in the original bill and "county" in the enrolled bill. EDITOR.]

SEC. 3308-a. **Releases and discharges of judgments — legalized.** All releases and discharges of judgments, mortgages or deeds of trust affecting[1] property in this state made prior to January first, nineteen hundred and three, by administrators, executors or guardians appointed by the court of any other state or country without complying with the provisions of section thirty-three hundred and eight of the code are hereby legalized and declared as valid and effective in law and in equity as though the provisions of said section had been strictly followed; provided that nothing in this act shall affect[2] pending litigation. [35 G. A., ch. 276, § 1.]

[1,2"effecting" and "effect" in enrolled bill. EDITOR.]

CHAPTER 3.

OF THE SETTLEMENT OF ESTATES.

SECTION 3310. Inventory.

While it is made the duty of the executor under the collateral inheritance law to file an inventory of real and personal property, the state treasurer has no interest to enforce the performance of this duty unless by the provisions of the will some property or interest therein passes to a collateral heir in such way as to become subject to the tax. While it is the duty of the executor to file an inventory of the personal effects of the deceased without regard to any provision of the collateral inheritance tax law, that is not a duty in the performance of which the state treasurer has any interest. *In re Estate of Stone*, 132–136, 109 N. W. 455.

The administrator is entitled to take possession and control of leasehold interests of decedent and crops growing unharvested on his land at the time of his death, especially where his interest therein is a leasehold interest only. *In re Estate of Ring*, 132–216, 109 N. W. 710.

It is the duty of the court to order the filing of an inventory, no matter from what source complaint for failure to do so comes. *In re Estate of Duncanson*, 141–564, 120 N. W. 88.

SEC. 3311. **Appraisement.** All property inventoried by the executor or administrator shall be valued by three appraisers, who shall be appointed immediately on the filing of the inventory unless the court or judge or clerk of the district court in vacation shall by an order entered of record waive the valuation of the property so inventoried. The clerk shall issue to them a notice of their appointment, accompanied by a copy of the inventory returned by the executor or administrator, and they shall qualify by taking an oath faithfully and impartially to make the required valuation, and in making the same they shall fix a value to each item of property separately as it appears in the inventory. If any portion of the decedent's personal property is situated in another county, the same appraisers may serve, or others may be appointed. [33 G. A., ch. 201, § 1.] [C. '73, §§ 2373–4, 2378; R. §§ 2363–4; C. '51, §§ 1331–2.]

SEC. 3312. Exempt personal property.

The widow does not waive her right to exemptions allowed to the husband as head of the family by failure to object to their appraisement as a part of the property of the deceased. *In re Estate of Ring*, 132–216, 109 N. W. 710.

The widow is entitled to have set apart to her as exempt the animals and feed therefor exempted to her deceased husband under code § 4008. *In re Estate of Irwin, Conkey v. Irwin*, 152–323, 131 N. W. 57.

SEC. 3313. Life insurance — damages for death — widow deemed heir.

Insurance: Where the policy or certificate provides for the payment of the insurance money to the "legal heirs" of insured, the amount due in case of loss does not belong to the estate of the decedent, and the administrator of his estate is not

entitled to recover. *Schoep v. Bankers' Alliance Ins. Co.*, 104–354, 73 N. W. 825.

Where the indemnity under a policy of life insurance is expressly made payable to the executors or administrators of the insured, a release given by the widow as special administratrix and in her own right is ineffectual. *Rauen v. Prudential Ins. Co.*, 129–725, 106 N. W. 198.

In the absence of special contract or arrangement with the deceased for the payment of the proceeds of life insurance to his creditors, the widow and heirs are entitled thereto exempt from the debts of the deceased. *In re Estate of Donaldson*, 126–174, 101 N. W. 870.

Damages for wrongful death: The statute allowing recovery in behalf of the estate against one whose wrongful act has caused the death of the intestate does not create a new right of action, but abrogates the common-law rule by which an existing cause of action is terminated on the death of the party entitled to recover. The fact that the persons entitled to participate in the distribution of the estate are nonresident aliens does not prevent the recovery of such damages by the administrator of the estate. *Romano v. Capital City Brick & Pipe Co.*, 125–591, 101 N. W. 437; *Rietveld v. Wabash R. Co.*, 129–249, 105 N. W. 515.

A man's life, health and future prospects are things having pecuniary value to him, and death by the wrongful act of another occasions a pecuniary loss to his estate for which an action will lie in favor of his administrator. Therefore, held that a bequest of all the testator's estate to his wife was held to cover damages which should be recovered by his administrator against one whose wrongful act had caused his death. *In re Estate of Cook*, 126–158, 101 N. W. 747.

The funds coming into the hands of the administrator as the result of a claim for the wrongful death of intestate are to be distributed to the heirs and next of kin free from any claim for debts due to either resident or nonresident creditors. *In re Estate of Williams*, 130–553, 107 N. W. 608.

Money recovered for the death of a person leaving a father and mother, and no wife or child, immediately descends to the father and mother in equal shares, and their interest therein may, after the payment of the judgment into court, be applied in payment of a judgment against them. *Cassady v. Grimmelman*, 108–695, 77 N. W. 1067.

The distribution of damages recovered on account of injuries causing death is to be determined by the law of the place where the injuries complained of were inflicted. *In re Estate of Coe*, 130–307, 106 N. W. 743.

Although code § 2403 forbids the sale of intoxicating liquors to an habitual drunkard or to an intoxicated person, and § 2448 subjects one who makes such sales to forfeiture, the administrator of the estate of one who dies by reason of purchasing and drinking liquor sold to him in violation of these provisions cannot maintain an action against the seller of the liquor to recover for the estate damages for causing the death of the person to whom the liquor was sold. *Bissell v. Starzinger*, 112–266, 83 N. W. 1065.

The cause of action for an injury resulting in death vests in the administrator upon his appointment, in trust for the widow and children where there are no creditors. *Flynn v. Chicago G. W. R. Co.*, 141 N. W. 401.

SEC. 3314. Allowance to widow and children.

The claim of the widow for allowance of support is contingent and uncertain until judicially determined, and her claim thereto abates with her death. *Zunkel v. Colson*, 109–695, 81 N. W. 175.

The provision of this section for allowance to a widow for a year's support is not a mere charity, but should have a liberal construction to promote the purpose of its enactment. Such allowance should be made even though the widow has independent means, if her income is insufficient for her support without resort to the principal fund. *Busby v. Busby*, 120–536, 95 N. W. 191.

The allowance to the widow is not a mere charity, nor is it to be limited to the bare necessities of food, drink and clothing. Whatever is reasonably necessary to keep her for a year in the station in life in which her marriage had placed her, and not out of just proportion to the property left by her husband, is proper. The fact that she has a small estate of her own is no reason for denying such allowance. *Rankin v. Rankin*, 139 N. W. 1079.

The fact that the widow in a proceeding for an allowance lists certain property as belonging to her deceased husband does not estop her from afterwards asserting title thereto. *Matheson v. Matheson*, 139–511, 117 N. W. 755.

An antenuptial contract cutting off the wife's entire prospective interest in her husband's estate does not cut off her right to a widow's allowance under this section. The widow's right to an allowance is in no sense an interest in the estate of her husband. *In re Estate of Miller*, 143–120, 121 N. W. 700.

The allowance to the widow is not defeated by the fact that it is not paid until after the expiration of the year and

until after her death. Any balance remaining unpaid after her death is recoverable by her administrator. *In re Estate of Rice*, 146–48, 124 N. W. 792.

Election to accept the benefit of the provisions of the will does not prevent the widow from having an allowance under this section. The amount of such allowance does not become a part of the estate for distribution, nor is the right to it an interest in the estate. *In re Estate of Hamilton*, 148–127, 126 N. W. 776.

By no provision in an antenuptial contract can the right of the widow to an allowance be relinquished or cut off; but the circumstances, including the provisions of the contract itself, may be taken into account in determining whether an allowance should be made. *In re Estate of Johnson*, 154–118, 134 N. W. 553; *In re Estate of Uker*, 154–428, 134 N. W. 1061.

SEC. 3315. Discovery of assets.

An appeal will lie from an order made under a statutory provision in relation to the examination of one claimed to have in his possession the effects of the deceased, and likewise from an order granting a retrial in such a proceeding. *In re Behren's Estate*, 104–29, 73 N. W. 351.

One who is made defendant in a proceeding for the discovery of property, and after answering takes no further part in the proceedings, is not bound as to any rights he may have in the property by the adjudication of the probate court on an issue not involving such rights. *Milburn v. East*, 128–101, 102 N. W. 1116.

The proceeding contemplated by this question is inquisitorial in its nature and the court or judge is authorized only to determine whether there is any issue of fact as to the possession claimed for the estate. If no such issue is developed, the property should be ordered turned over to the administrator and such an order constitutes an adjudication. *Barto v. Harrison*, 138–413, 116 N. W. 317.

The probate court may determine that the possession of property by a person called on to account therefor after refusal of demand for its delivery is wrongful although it was rightful in its inception. *In re Elliott's Estate*, 140 N. W. 200.

SEC. 3317. Subjecting real estate.

Where the property of deceased does not appear to be sufficient for the payment of his debts, the court or judge may direct the administrator to file a petition in equity to secure to the estate the title of any real estate which in the event of the insufficiency of the personal property may be subjected for the payment of debts. Such an action is to be instituted in the district court of the county in which an equitable action to subject the property of the decedent to the payment of claims against him may be brought under the general statutes relating to the place of bringing action. *Long v. Garey Inv. Co.*, 135–398, 112 N. W. 550.

The fact that a testator has left real property is no ground for granting administration on his estate if it appears that there are no debts to the satisfaction of which such property is to be applied. *In re Estate of Acken*, 144–519, 123 N. W. 187.

SEC. 3322. Sale of personal property.

With reference to the sale of property directed by the testator, the duty of the executor is simply to carry out the provisions of the will, and in respect thereto he is subject at all times to the orders of the court. *In re Estate of Fisher*, 128–626, 104 N. W. 1023.

Notwithstanding the provisions of this section, the administrator may dispose of the assets of the estate, including choses in action, by assignment, but he cannot, by a gratuitous assignment to the widow of a cause of action for injuries resulting in the death of the decedent, deprive the children of their interest in such cause of action. *Flynn v. Chicago G. W. R. Co.*, 141 N. W. 401.

SEC. 3323. Sale of real estate—application.

The order for the sale of real estate standing in the name of the deceased must be obtained in the court granting administration. *Long v. Garey Inv. Co.*, 135–398, 112 N. W. 550.

The heirs not being parties to a proceeding for the allowance of claims, are not bound by such allowance. But the allowance of claims by the probate court is sufficient *prima facie* as against the heirs to authorize an order for the sale of real estate to pay such claims; and it is for the heirs questioning the validity of claims on which it is proposed to make a sale, to introduce some evidence of their invalidity and thus overcome the prima-facie case made by proof of allowance. *Milburn v. East*, 128–101, 102 N. W. 1116.

In the absence of peculiar circumstances excusing delay, the application for sale should be made within the time allowed for filing and allowance of claims; but

where the interest of the deceased in the real estate was not discovered, in the exercise of reasonable diligence, held that it was not error to order a sale more than three years after the appointment of the administrator. *Ibid.*

On an application for sale of real property it may be shown by way of resistance that personal property belonging to the estate is not inventoried and is in the hands of the administrator and would be sufficient to pay the debts without resorting to the real estate. *Duffield v. Walden*, 102–676, 72 N. W. 278.

Although there is no showing as to the disposition of the personalty, an order for the sale of realty, although irregular, will not be void. *Cheney v. McColloch*, 104–249, 73 N. W. 580.

Judgment for the sale of real property on the application of the administrator to pay debts of the estate bars the widow's right to dower in the property sold. *In re Estate of Pennock*, 122–622, 98 N. W. 480.

Consent by the widow to the sale of real property for the payment of debts will estop her from asserting a dower right in the property thus sold. *Ibid.*

Where the real property of the deceased is sold for the payment of debts, the widow takes her one-third interest in the proceeds free from any deduction on account of taxes, repairs or expenses. But in the absence of issue the additional one sixth, which passes to her on that account, is subject to deduction for expenses of administration. *Wild v. Toms*, 123–747, 99 N. W. 700.

Sureties on the executor's bond are liable for the proceeds of the sale of real property in the hands of the executor, although no special bond has been given as required by statute. *Ellyson v. Lord*, 124–125, 99 N. W. 582.

In determining whether there are claims against the estate requiring the sale of real estate, equitable circumstances excusing the filing of such claims within the period prescribed by code § 3349 may be taken into account; but even where peculiar circumstances are shown the application for the order must be within a reasonable time. *In re Estate of Brigham, Corbin v. McAllister*, 144–71, 120 N. W. 1054.

Where the widow, without waiving her right to a distributive share, consents to the sale of the property for the payment of debts, with the understanding that her share is to be set off to her out of the proceeds, such share is not subject to the debts and costs of administration. *Brown v. Brookhart*, 146–79, 124 N. W. 882.

In a proceeding for a sale of real property for the payment of debts the question whether the property constituted a homestead may be considered. *Tyrrell v. Shannon*, 147–184, 123 N. W. 325.

The pendency of a partition suit is not sufficient reason for abating the application to sell real property. *Mullinnix v. Brown*, 151–468, 131 N. W. 671.

The fact that the property cannot be divided is a sufficient reason for not ordering a sale of a part thereof sufficient to to pay the debts. *Ibid.*

Real property may be ordered sold for the purpose of paying an allowance made for a monument and for funeral expenses. *Ibid.*

The real estate of a decedent, or its rents or profits, can only be resorted to for the satisfaction of debts for the payment of which the personal estate is inadequate, and then only on suit brought by the administrator to which the heirs are made parties and of which they have notice. *In re Estate of Pitt*, 153–269, 133 N. W. 660.

A sale of real property should not be ordered until the amount of the decedent's indebtedness has been ascertained. *Rabbett v. Connolly*, 153–607, 133 N. W. 1060.

The application by the administrator for leave to sell real property must be made promptly when it appears that resort to such property will be necessary for the payment of debts. And it will not be allowed after long delay unless the delay be excused by showing of equitable circumstances. *Flora v. Brown*, 140 N. W. 364.

SEC. 3324. Notice.

Estates of decedents—sale of property—notice: Where a creditor of the heir has attached the interest of the heir in real estate, and afterwards recovered judgment on his claim, he is entitled to notice of a proceeding by the administrator for the sale of the property to pay decedent's debts. *Mullin v. White*, 134–681, 112 N. W. 164.

Under such circumstances the judgment creditor who has received no such notice is entitled to attack the sale collaterally in a suit to subject the land to his judgment. *Ibid.*

A lien holder is entitled to notice of the administrator's application for an order to sell. Not having received such notice, his rights are not affected by such sale and the purchaser takes the real estate subject to the rights of the lien holder. *Yoder v. Kalona Sav. Bank*, 142–219, 119 N. W. 147.

Failure to give notice of the application to some party interested, does not render the proceeding entirely void and open to collateral attack at the instance of a party properly served. *Mullinnix v. Brown*, 151–468, 131 N. W. 671.

SEC. 3326. Public or private—notice—credit.

While the administratrix has the right to sell lands of decedent to pay the debts of the estate, she cannot sell to herself either directly or through a medium of a third person. *Walker v. Walker*, 127–77, 102 N. W. 435.

A purchaser at an executor's or administrator's sale to pay debts takes nothing more than the title held by the deceased and is not entitled to protection as a good faith purchaser under the recording acts; nor can he rely upon a warranty either express or implied. *Stephens v. Boyd*, 157– —, 138 N. W. 389.

SEC. 3328. Bond to prevent sale.

This section has no application to an action by an heir to recover property of the estate taken by a devisee. *Seery v. Murray*, 107–384, 77 N. W. 1058.

SEC. 3333. Possession of real property.

In the absence of heirs, the administrator has the right to take possession of the land of the deceased and receive the rents thereof, and the probate court is the proper place for an accounting for such rents. *Smith v. Smith*, 132–700, 109 N. W. 194.

Where an administrator in fact assumes possession and control of the real estate of the deceased, he becomes chargeable as trustee with reference thereto. *Schneider v. Schneider*, 125–1, 98 N. W. 159.

If the administrator, without right to do so, takes possession of real property of the deceased, he is liable individually to the heirs as trustee, but not as administrator. *In re Estate of Pennock*, 122–622, 98 N. W. 480.

An adjudication as to the rights of the administrator to rents and profits of real estate, acting in behalf of the heirs, is not binding as affecting title to the property. *Milburn v. East*, 128–101, 102 N. W. 1116.

An administrator has no claim for injuries done to the land belonging to the deceased, and cannot sue as such for trespass. *Hook v. Garfield Coal Co.*, 112–210, 83 N. W. 963.

The administrator cannot intervene in an attachment proceeding involving the right of decedent to real property. *Sammis v. Hitt*, 112–664, 84 N. W. 945.

If the administrator has any power to borrow money for keeping up the condition of the real property, such power is limited to cases where due notice has been given to those entitled to the estate, and the liability of the estate is limited to the benefits received. *Valley Nat. Bank v. Crosby*, 108–651, 79 N. W. 383.

The administrator purporting to act for the estate or for the heirs has no power to make a dedication of real property for a street. *Davis v. Bonaparte*, 137–196, 114 N. W. 896.

If the administrator takes possession of real property of the deceased, he does so as the official agent of those who have become owners thereof on decedent's death. The devolution by title is not interrupted or affected by such possession. *In re Estate of Pitt*, 153–269, 133 N. W. 660.

Title to real estate passes to the heirs or devisees upon the death of the ancestor or testator; and save only when there is no one entitled thereto present and competent to take possession, the administrator has nothing to do with the real property of the deceased. *Hatton v. Wheaton*, 139 N. W. 1108.

SEC. 3334. Proceeds—account.

Without direction of the court to take charge of the real property of the deceased, the administrator has nothing to do with such property, save where there is no heir present and competent to take possession thereof, and if he does assume control of such property, his possession is that of trustee only. *In re Estate of Pennock*, 122–622, 98 N. W. 480.

SEC. 3336. Provisions of will.

Testator may direct the delivery of a deed after his death on the performance of specific conditions and the delivery of such deed by the executor on performance of the conditions will be sufficient to pass title. So held where a grantee named in a deed had before the death of testator made part payment under a contract to convey. *Dettmer v. Behrens*, 106–585, 76 N. W. 853.

SEC. 3338. Claims—statement—notice—allowance.

The bar of the statute of limitations cannot become effectual during the interval between the death of the debtor and the time when in the ordinary course of administration the claim can be filed against the administrator for allowance. *Alice E. Mining Co. v. Blanden*, 136 Fed. 252.

While a judgment against one who is since deceased may be enforced against the real estate upon which it is a lien without filing it as a claim against the estate, yet

this must be done while the judgment lien exists. *Hansen's Empire Fur Factory v. Teabout*, 104–360, 73 N. W. 875.

Where a claim is filed against an estate and parties jointly liable for its payment are insisting that the estate should pay the whole claim, and that their liability in no event exceeds a portion of the amount claimed, the claim of such persons as against the estate is not one which must be filed within one year. *Pratt v. Fishwild*, 121–642, 96 N. W. 1089.

The mere withdrawal of a claim for the purpose of preparing a petition thereon does not amount to an abandonment of such claim. *Clough v. Ide*, 107–669, 78 N. W. 697.

The probate court has not exclusive jurisdiction of proof of claims against an estate, and judgment in an action in the district court against the administrator, prosecuted without objection, will be a prior adjudication and defeat a subsequent recovery in a probate court. *Ibid.*

In presenting a claim against an estate it is not necessary for the claimant to state its legal capacity to sue as a corporation, and denial of corporate capacity must be specific. *University of Chicago v. Emmert*, 108–500, 79 N. W. 285.

A remedy has sometimes been allowed against the estate on contracts made by the administrator where, by reason of his insolvency, or some other sufficient reason, a remedy against the administrator personally is inadequate, but the allowance is limited to the value accruing to the estate. *Valley Nat. Bank v. Crosby*, 108–651, 79 N. W. 383.

The estate cannot be bound by the contract of the administrator with reference to the attorney fee to be paid to an attorney who prosecutes a claim in behalf of the estate against a railroad company for injuries causing the death of decedent. *Rickel v. Chicago, R. I. & P. R. Co.*, 112–148, 83 N. W. 957.

Services rendered by an adult daughter to her father under an arrangement involving compensation for such services may properly be the subject of a claim against his estate. *Harrison v. Harrison*, 124–525, 100 N. W. 344.

A bank has a valid claim against the estate of a deceased officer for misappropriation of funds of the bank. *McElroy v. Allfree*, 131–518, 108 N. W. 119.

The clerk is expressly directed to enter upon the probate calendar the allowance of claims on the approval thereof by the administrator. *Mosher v. Goodale*, 129–719, 106 N. W. 195.

Receipts given by the claimant to the deceased in which it is specified that the amounts received are in full for services rendered are admissible as tending to throw discredit upon the claimant's testimony as to services for which claim is made which must have antedated the receipts. *Bray v. Bray*, 128–234, 103 N. W. 477.

Provisions as to the form for presenting a claim are directory only and failure to observe them will not defeat the jurisdiction of the court. *Wise v. Outtrim*, 139–192, 117 N. W. 264.

Provisions as to security for costs are not applicable to the prosecution of claims in probate. *Ibid.*

After the expiration of the period of limitations, the claimant may file a pleading setting up his original claim in a more formal manner. *Ibid.*

If the prayer for the allowance of a claim has by mistake stated a sum less than the real amount due it may be corrected by subsequent amendment or supplemental allegation after the time for filing claims of the class to which it pertains has expired. *In re Estate of Blackman*, 143–553, 120 N. W. 664.

The administrator is not necessarily bound to interpose the plea of the statute of limitations against a claim which he believes to be justly due from the estate. *In re Estate of Baumhover*, 151–146, 130 N. W. 817.

Where the probate court has acquired jurisdiction to pass on the validity of a claim, a court of equity has no jurisdiction to interfere on the ground that the claim was fraudulent or unjust. *McIntosh v. Brown*, 139 N. W. 926.

SEC. 3340. **Denial.** All claims filed, and not expressly admitted in writing signed by the executor or administrator, with the approbation of the court, shall be considered as denied, without any pleading on behalf of the estate, but special defenses must be pleaded. The burden of proving that a claim is unpaid shall not be placed upon the party filing a claim against the estate; but the executor or administrator may, on the trial of said cause, subject the claimant to an examination on the question of payment, or consideration, but the estate shall not be concluded or bound thereby. [35 G. A., ch. 277, § 1.] [26 G. A., ch. 75; C. '73, § 2410.]

The burden of proof, if the claim be unpaid, is on the estate. It is not necessary for the claimant to show attempts to collect, nor to show a prima-facie right to recover. *Murphy v. McCarthy*, 108–38, 78 N. W. 819.

The burden is upon the administrator to show a satisfaction of a claim based on a

written instrument purporting to bind deceased. *University of Chicago v. Emmert*, 108–500, 79 N. W. 285.

Prior to the adoption of the present code there was no provision for pleading special defenses to a claim against the estate. *Benton County Sav. Bank v. Strand*, 106–606, 76 N. W. 1001.

The formal rules of pleading relating to allegations and denials are not applicable to the statement and denial of claims against an estate. *Harrison v. Harrison*, 124–525, 100 N. W. 344.

Where in defense to a claim for services rendered to the deceased at his request it is contended that the services were intended and understood to be gratuitous, that fact should be specially pleaded. *Saddler v. Pickard*, 142–691, 121 N. W. 374.

Where an agreement to pay the claimant for services rendered to the deceased is well established and not left to conjecture, the burden of proving nonpayment is not upon the claimant. *Graham v. McKinney*, 147–164, 125 N. W. 840.

It is proper to charge the jury on the trial of a claim against the estate where payment is relied upon, that the burden is upon the administration to establish the alleged payment by preponderance of the evidence. *Sheldon v. Thornburg*, 153–622, 133 N. W. 1076.

SEC. 3341. Hearing—trial by jury.

The county court originally exercised probate jurisdiction without jury trial, except in cases where jury trial was expressly provided for. Such jurisdiction was subsequently transferred to the circuit court and afterwards to the district court, but nothing in the acts changing the forum indicates a legislative purpose to change the mode of trial except in particular cases where jury trial is especially provided for. *Duffield v. Walden*, 102–676, 72 N. W. 278.

An order of court allowing a claim is in the nature of an adjudication and a party is not entitled to have it set aside and to have a retrial as to the validity of the claim as a matter of right, but must show some valid ground for setting it aside. *Hendron v. Kinner*, 110–544, 80 N. W. 419, 81 N. W. 783.

The proceeding as to the allowance of a contested claim is at law. *Mosher v. Goodale*, 129–719, 106 N. W. 195.

The allowance of a claim which is made on behalf of an executor or administrator is not conclusive on the heirs, and the validity of such allowance may subsequently be considered. *McDermott v. McDermott*, 138–351, 116 N. W. 122.

SEC. 3343. Contingent liabilities.

Where the deceased was surety on a bond in which the principal and sureties obligated themselves, and their "heirs, executors and administrators," liability on which bond did not accrue until after the period fixed for filing claims against the estate, held that such liability could be enforced against the estate in the hands of the distributees, although no claim under the bond had been filed within the time for settling the estate. *Security F. Ins. Co. v. Hansen*, 104–264, 73 N. W. 596.

The limitation as to the time for filing a claim is not controlling where the claim is contingent. *Easton v. Somerville*, 111–164, 82 N. W. 475.

Section applied as to contingent claims. *In re Allen's Estate*, 116–697, 88 N. W. 1091.

A contingent liability may be made the basis of a claim. *In re Estate of Skillman*, 146–601, 125 N. W. 343.

Therefore held that the contingent liability of the husband to pay the expenses of the last sickness and funeral of his wife was a claim which could be presented by him for allowance out of the wife's estate. *Ibid.*

Contingent liability on a guarantee bond is a contingent claim such as may be set up against the estate of the person whose obligation is guaranteed. *In re Estate of Mardis*, 148–740, 127 N. W. 1021.

Where such claim is filed an order should be made to protect the contingent right. *Ibid.*

SEC. 3344. Referees.

In view of this provision for reference by a court, it is doubtful whether an administrator or executor, without the court's approval, has any power to submit claims to arbitration. *Sullivan v. Nicoulin*, 113–76, 84 N. W. 978.

SEC. 3345. Actions pending.

The lien of an attachment in an action pending against the husband at the time of his death is subject to the widow's dower right in the property attached and to her right to have such property applied to the payment of an allowance for support which is made to her in the administration of the estate. *Tetzloff v. May*, 151–441, 131 N. W. 647.

SEC. 3346. Executor interested.

Where a temporary administrator was appointed to pass upon claims of the regular administrator against the estate, held that such temporary administrator was in error in allowing more than was claimed. *Rabbett v. Connolly*, 153–607, 133 N. W. 1060.

The approval of the erroneous allowance by a temporary administrator does not constitute such an adjudication as to prevent a setting aside of such allowance on a final settlement with the regular administrator. *Ibid.*

A motion on the final settlement of the case to set aside the allowance thus previously made, held to be a direct attack on the order of allowance. *Ibid.*

The fact that the widow of deceased appointed administrator of his estate procures the appointment of a special administrator to pass upon her claim against the estate is not a ground for her removal. *Fry v. Fry*, 155–254, 135 N. W. 1095.

SEC. 3347. Expenses of funeral—allowance to widow.

Burial expenses are not, strictly speaking, debts due from the deceased, but charges which the law, out of decency, imposes upon his estate. But such charges should be reasonable. A decent burial should comport with the social condition of the deceased and the amount of his fortune. *Foley v. Brocksmit*, 119–457, 93 N. W. 344.

Claims on account of the last sickness and funeral of the deceased are not barred by failure to file within a specified time, and so long as the estate is solvent and unsettled the payment may be insisted upon as against the administrator. *Wolfe v. Knapp*, 127–479, 103 N. W. 369.

A claim for attorney's fees for services rendered the administrator is not a claim against the estate. *Clark v. Sayre*, 122–591, 98 N. W. 484.

The expenses of the last sickness and funeral of a deceased wife are to be paid out of her estate as primarily liable therefor, although there may be a secondary liability on the part of the husband to pay such expense. *In re Estate of Skillman*, 146–601, 125 N. W. 343.

If the husband has already paid such expenses he may have the amount thus paid allowed to him out of the estate of the deceased wife. *Ibid.*

Where the deceased has left no personal estate from which an allowance made to the widow may be paid, real property of the deceased may be resorted to for the payment of such allowance and an attachment in a pending action against the husband is subject to the application of such property to the payment of such allowance. *Tetzloff v. May*, 151–441, 131 N. W. 647.

SEC. 3348. Other demands—order of payment—claims for labor.

Other demands against the estate shall be payable in the following order:

1. Debts entitled to preference under the laws of the United States;
2. Public rates and taxes;
3. Claims filed within six months after the first publication or posting of the notice given by the executors or administrators of their appointment;
4. All other debts;
5. Legacies and the distributive shares, if any.

In payment of claims of the third class all debts owing to employes for labor performed within the ninety days next preceding the death of the decedent, having been filed as by law provided, shall be preferred and paid in full before any other claims of said class are paid. If there is not sufficient property to pay said claims in full the same shall be applied ratably on all such claims. [35 G. A., ch. 278, § 1.] [C. '73, § 2420; R. § 2404; C. '51, § 1372.]

Charges of the last sickness and funeral are not included within the class of claims here enumerated. *Wolfe v. Knapp*, 127–479, 103 N. W. 369.

Until the time for filing claims has expired the court cannot know judicially that there are no claims against the estate. *Seery v. Murray*, 107–384, 77 N. W. 1058.

The filing of a claim is equivalent to the beginning of an action under the statute of limitations. *Van Patten v. Waugh*, 122–302, 98 N. W. 119.

Where the claim as filed was on a promissory note of which the claimant was holder, and an amendment of the claim, so as to show that the claimant was surety for the deceased on the note and had paid it, was filed, held that as the statutory limitation against a claim by the surety against the deceased had run

when the amendment was filed, there could be no recovery. *Ibid.*

Where no other provision is made by will, the debts and charges against the estate of decedent are payable from the personal property of the estate, if it be sufficient for that purpose. *Pitkin v. Peet*, 108–480, 79 N. W. 272.

Under the evidence in a particular case, held that it was a question for the jury to determine whether services rendered to the deceased by a claimant were rendered by her as a member of the family of the deceased. *In re Estate of Bishop*, 130–250, 106 N. W. 637.

The fact that a valid claim, paid by the administrator, was not properly filed, is not ground for disallowance on the administrator's report. *In re Estate of Pennock*, 122–622, 98 N. W. 480.

The executor or administrator takes title to the property of the deceased as trustee for the creditors if the estate is insolvent and may assert the claims of the creditors as against an unrecorded chattel mortgage. *Blackman v. Baxter*, 125–118, 100 N. W. 75.

Fees and costs of administration are to be paid, even though the dividends of creditors filing claims are thereby reduced. *In re Estate of Blackman*, 143–553, 120 N. W. 664.

In the absence of statutory provisions, or provisions in the will directing otherwise, a decedent's property should be applied to the payment of his debts in the following order: first, the unexempted personalty, except specific bequests; second, the realty appropriated by the will for their payment; third, the real estate descended; fourth, real estate specifically devised. *Wilts v. Wilts*, 151–149, 130 N. W. 906.

A devise to the widow of an undivided part of all property is not a specific devise or bequest. *Ibid.*

The provisions of code § 4019 as to priority of claims for labor have no application to the payment of claims against the estate of a decedent. *Moss v. Williams*, 152–686, 133 N. W. 120.

The filing of a claim by a nonresident creditor does not bar his right to maintain a suit thereon in a federal court if the jurisdictional facts exist. *Farmers' Bank v. Wright*, (C. C.) 158 Fed. 841.

SEC. 3349. Limitation.

In general: Until the statutory period for filing claims has commenced to run by reason of giving of notice and has expired without claims being filed, the court cannot know in the settlement of the administrator's accounts that the estate is not indebted. *Ellyson v. Lord*, 124–125, 99 N. W. 582.

Charges of the last sickness and funeral are not barred after one year from the time after notice of the appointment of the administrator. *Wolfe v. Knapp*, 127–479, 103 N. W. 369.

The special limitation as to the filing of claims supersedes the general statute of limitations and stops the running thereof as to such claims. *Alice E. Mining Co. v. Blanden*, 136 Fed. 252.

The publication of notice which starts the running of the period of limitation for the filing of claims is sufficient if made on an order of the clerk, endorsed on the letters of appointment. *Mosher v. Goodale*, 129–719, 106 N. W. 195.

The administrator having a claim against the estate is not excused from filing it within the statutory period. *In re Estate of Ring*, 132–216, 109 N. W. 710.

The burden is upon defendant to establish the bar of the claim by limitation under this section, and for that purpose the proper giving of notice must be established. *McConaughy v. Wilsey*, 115–589, 88 N. W. 1101.

The limitation as to the time for filing a claim is not controlling where the claim is contingent. *Easton v. Somerville*, 111–164, 82 N. W. 475.

Where the date of giving notice does not appear the limitation cannot be applied. *Ibid.*

This section as to time for filing claims applies by analogy to applications for the sale of real estate and even where peculiar circumstances are shown the application for the order must be shown to have been within a reasonable time. *In re Estate of Brigham, Corbin v. McAllister*, 144–71, 120 N. W. 1054.

As a rule, every claimant must file his claim within one year of the time of the first publication of notice and if the claim is not allowed by the executor, he must give notice to the executor of such filing. If the executor is prematurely discharged before the expiration of a year and before notice of a claim is given to such executor, the claimant's remedy is suspended and he should proceed by timely action to have the order of discharge set aside and then file his claim and have it allowed or give notice to the executor. The rule applicable to the general statute of limitations does not apply in such case. *In re Kimball's Estate, Flanigan v. Kimball*, 139 N. W. 456.

The filing of the claim is but a reasonable precaution to fix its status and to save it from the statutory bar. The filing of a claim by a nonresident creditor does not prevent his maintaining an action thereon in the federal courts. *Farmers' Bank v. Wright*, (C. C.) 158 Fed. 841.

Equitable relief: Notice by publication having been duly given, a resident of the state is bound to file his claim within the

statutory period, and will not be entitled to equitable relief merely because he has not had actual notice or has put the claim into the hands of a general collecting agent who has failed to file it within the proper time. *Hawkeye Ins. Co. v. Lisker*, 122–341, 98 N. W. 127.

Equitable relief from the statutory limitation of time for filing claims will not be extended to one who has been negligent in presenting his claim. *Bentley v. Starr*, 123–657, 99 N. W. 555.

One who elects to look to the guardian for payment of a claim against a deceased ward instead of filing such claim against such ward's estate cannot have equitable relief against the bar of the statute. *Ibid.*

The mere promise of an administrator to pay a claim is not sufficient excuse for delay in not filing and serving notice thereof. But it may be sufficient if coupled with a request of the administrator, acted upon by the claimant, that the filing of the claim be postponed. Under the evidence in a particular case, held that there was not such showing of postponement at the request of the administrator as to justify the granting of equitable relief. *Mosher v. Goodale*, 129–719, 106 N. W. 195.

Where the holder of a note against deceased was induced to withhold the filing of his claim by the false and fraudulent representations of the executor that the estate was insolvent, held that equity would permit the filing of the claim notwithstanding the statutory bar had accrued, it appearing that the estate was solvent and still unsettled. *Henry v. Day*, 114–454, 87 N. W. 416.

Where a person having a claim against an estate, consisting of a note in the hands of a bank, directed an officer of the bank to take proper steps to have the claim presented and was afterwards assured by such officer within the time for filing claims that the note had been properly filed, which was not true, and was thereby misled, held that he was entitled to equitable relief, although the estate had been otherwise fully settled and the personal property distributed, it appearing that there was real estate belonging to decedent against which the claim might be enforced. *Manatt v. Reynolds*, 114–688, 87 N. W. 683.

A claim of a municipal corporation against the estate of a deceased person must be filed within the time required by this section and the negligence of the officers of the corporation in failing to file the claim in proper time will not be a ground for equitable relief. *In re Jacob's Estate*, 119–176, 93 N. W. 94.

While notice of the filing of the claim is not essential to its validity, it is essential that notice be given within a year in order that the claim be not barred under the provisions of this section. *Ibid.*

While the fact that the estate remains unsettled may be taken into account with other circumstances in determining whether a claimant shall have relief against the statutory bar, such fact alone will not entitle the claimant to equitable relief. *Ibid.*

The minority of the claimant is not a peculiar circumstance such as to entitle him to equitable relief against the statutory limitation. *Boyle v. Boyle*, 126–167, 101 N. W. 748.

Where the deceased was surety on a bond in which principal and sureties obligated themselves and their "heirs, executors and administrators," liability on which bond did not accrue until after the period fixed for filing claims against the estate, held that such liability could be enforced against the estate in the hands of the distributees, although no claim under the bond had been filed within the time for settling the estate. *Security F. Ins. Co. v. Hansen*, 104–264, 73 N. W. 596.

Equity can afford no relief for failure to file a claim within the required period, on account of carelessness of the claimant. *McDermott v. McDermott*, 138–351, 116 N. W. 122.

This provision as to peculiar circumstances entitling claimant to equitable relief as against the bar of the statute has been held by analogy to apply to applications for the sale of real estate. Even where the peculiar circumstances are shown, the application for the order must be within a reasonable time. *In re Estate of Brigham, Corbin v. McAllister*, 144–71, 120 N. W. 1054.

Where a woman claiming to be the wife of deceased asserted her right to a widow's share in his property and was defeated on the ground that there was no valid marriage, and then filed a claim against the estate of deceased, remaining unsettled, for compensation for services rendered, which claim was made within a reasonable time after the determination of the former litigation, held that the circumstances were such as to constitute a sufficient equitable ground for avoidance of the objection that the claim was not filed in time. *Asher v. Pegg*, 146–541, 123 N. W. 739.

The assertion of the status of wife not made on sufficient ground but not shown to have been in bad faith held not to preclude the subsequent assertion of the right to compensation for services. *Ibid.*

Where the estate remained unsettled and certain items of claim withdrawn on account of the pendency of an action involving the same subject matter were revived within five months after the termination of such action, held that the claimant was entitled to equitable relief as against the statutory bar. *Black v. Miller*, 138 N. W. 535.

Where the executor has been discharged before the expiration of the time within

which claimant may file his claim and give notice thereof, he is entitled to equitable relief. *In re Kimball's Estate, Flanigan v. Kimball*, 139 N. W. 456.

SEC. 3353. Order of payments—dividends.

The property of the estate is bound for the payment of debts so far as it will go. *Blackman v. Baxter*, 125–118, 100 N. W. 75.

SEC. 3354. Incumbrances.

Where the widow, as administratrix of her husband's estate, used funds of the estate to carry out a contract of her deceased husband for the purchase of land in another state which by the law of that state became her sole property, held that she could be required to account to the heirs for such undivided interest in the land as would have passed to them had the land been situated in this state. *In re Estate of Irwin, Conkey v. Irwin*, 152–323, 131 N. W. 57.

SEC. 3355. Specific legacies.

Within the twelve months allowed for filing claims, the executor has no authority without order of court to pay over legacies, whether general or specific. *Montgomery v. Gilbertson*, 134–291, 111 N. W. 694.

CHAPTER 4.

OF THE DESCENT AND DISTRIBUTION OF THE INTESTATE'S PROPERTY.

SECTION 3362. Personal property.

Under our law the right to a distributive share of personalty in the estate of an intestate vests instanter in the heir upon the death of the owner and not from the time of distribution made. Distribution gives to the distributee no new title, but only ascertains the property to which title attaches. *Christe v. Chicago, R. I. & P. R. Co.*, 104–707, 74 N. W. 697.

After the time for administration has expired so that there are no claims of creditors on the property, the heirs of the deceased may maintain an action in their own names for the recovery of the assets of the estate. *Ibid.*

After the expiration of time for granting administration so that claims of creditors are no longer involved, the personal property of a deceased person vests in his heirs and any settlement they have made or may make in regard to the estate will be binding upon them. *Ibid.*

The heir has an interest in the personal estate of his ancestor prior to any distribution by administration, and in the absence of indebtedness of the estate the heirs who are entitled to share in the distribution may by agreement determine the rights to their respective shares, even as against an administrator subsequently appointed. *Douglas v. Albrecht*, 130–132, 106 N. W. 354.

While heirs may by mutual agreement settle the estate of a deceased person and render administration of the estate unnecessary, the guardian of the deceased cannot in a proceeding for the settlement of his guardianship take advantage of an arrangement between him and the prospective heirs of his ward by which on the death of the ward he is to become entitled to the ward's estate. *In re Guardianship of Lindsay*, 132–119, 109 N. W. 473.

The legal representative has the right of possession of all personal property owned by the deceased, and this cannot be limited by contracts of or liens created by the heirs, nor can he be required by the heirs to satisfy the debts of the decedent out of one portion of the personal estate rather than another. *Foss v. Cobler*, 105–728, 75 N. W. 516.

Heirs are not entitled to possession of personal property until through distribution or the expiration of the period of limitation for administration their interest therein has been definitely ascertained. *Ritchie v. Barnes*, 114–67, 86 N. W. 48.

Since the adoption of the code of '73 the husband cannot by will dispose of the distributive share of the widow in personal property. *Poole v. Burnham*, 105–620, 75 N. W. 474.

In determining whether the widow is entitled to her distributive share, a contract of separation between herself and her husband releasing her interest in his property cannot be taken into account, although made in another jurisdiction where it would be valid and enforceable. *Caruth v. Caruth*, 128–121, 103 N. W. 103.

The personal estate of a decedent will be distributed according to the law of his domicile, irrespective of the place of administration. *In re Estate of Titterington*, 130–356, 106 N. W. 761.

A person cannot have two domiciles at the same time, and a domicile once gained remains until a new one is acquired. To effect a change of domicile, there must be actual residence in the new domicile with the intent that the new residence shall constitute his domicile. *Ibid.*

Where no administration has been granted and the time for taking out letters thereof has expired, the personal property of decedent passes to his heirs. *In re Estate of Acken*, 144–519, 123 N. W. 187.

Adult heirs may contract with reference to the distribution of property where the rights of creditors are not involved, but when they are unable to agree as to such distribution administration should be granted unless the time for granting has expired. *Ibid.*

A wife cannot by will deprive her surviving husband of his distributive share in her personal estate. But the surviving husband cannot question the validity of a gift *causa mortis* merely on the ground that it deprives him of his distributive share to which he would otherwise be entitled. *Vosburg v. Mallory*, 155–165, 135 N. W. 577.

SEC. 3364. In kind—proceeds distributed.

Money recovered for the wrongful death of a person leaving a father or mother, and no wife or children may, when paid to the clerk in satisfaction of such judgment, be applied to the satisfaction of judgments against the father and mother. *Cassady v. Grimmelman*, 108–695, 77 N. W. 1067.

The executor may discharge his trust as to the distribution of the estate by making division of shares of stock among those entitled to participate in the distribution. *In re Estate of Fisher*, 128–626, 104 N. W. 1023.

The statutory direction that the executor shall sell property likely to depreciate in value is not applicable unless some permanent loss to the property in whole or in part is to be anticipated. It was not intended thereby to require under penalty of personal liability an immediate sale of all property subject to fluctuations in market value and solely on that ground. *Ibid.*

While the administrator may make distribution of the assets of the estate among those interested when there are no creditors, he cannot, by assignment to the widow of a cause of action for an injury resulting in the death of the decedent, deprive the children of their interest in such cause of action. *Flynn v. Chicago, G. W. R. Co.*, 141 N. W. 401.

SEC. 3366. Share of surviving spouse—dower.

Extent and nature of dower right: The share of the widow cannot be increased beyond a one-third interest in the real estate of which her husband was seized during his lifetime, by reason of any advancements which he may have made to his children by a prior marriage before the marriage to the claimant. *Burgoon v. Whitney*, 121–76, 95 N. W. 229.

Under the statutes in force from 1853 to 1862, the widow's dower was a life interest in one third of the real property of which the husband was seized during coverture. *Bottorff v. Lewis*, 121–27, 95 N. W. 262.

The widow is entitled to her one-third share of the proceeds of her deceased husband's realty, which has been sold by the administrator for the payment of debts, free from deduction for taxes, repairs and expenses. *Wild v. Toms*, 123–747, 99 N. W. 700.

The widow who has one third of the estate of her husband set off to her as her property in fee simple, thereby relinquishes any right of homestead she may have had in the property. The right of homestead can be preserved only by electing to retain the homestead in lieu of a distributive share in fee. *Edinger v. Bain*, 125–391, 98 N. W. 568, 101 N. W. 119.

So held where the widow claimed one third of the proceeds of her husband's estate sold for the purpose of paying debts; and held that no intention to invest her share in the acquisition of a new homestead would exempt such share from liability for her debts. *Ibid.*

A title bond or contract for a deed is sufficient to create in the vendee an equitable estate in which his wife is entitled to dower; but if by assignment of the contract on the part of the husband the rights thereunder are transferred to another, and by him to a third, who has no knowledge of the contingent rights of the wife of the original vendee, she cannot assert her dower interest as against the innocent holder of the contract for value, although she did not join in the assignment. *Hutchinson v. Olberding*, 136–346, 112 N. W. 647.

The dower right, though inchoate pending the life of the husband, is in the nature of a property right, and the wife cannot be divested of it by any act of her husband whether done in good faith or fraud. *Warner v. Norwegian Cemetery Assn.*, 139–115, 117 N. W. 39.

The widow of one who enters land under the timber culture laws of the United States but who has not yet performed the conditions imposed by the statute entitling him to patent, has no dower interest in the land thus entered. In such case the heirs are allowed to succeed to the interest of the entryman and the widow is not in that

sense an heir. *Braun v. Mathieson*, 139–409, 116 N. W. 789.

The spouse succeeding by substitution to an interest in property devised to the deceased, takes subject to debts and costs of administration of the estate of the testator. *In re Estate of Metcalf*, 143–310, 120 N. W. 104.

Rent accruing on the land after the death of the owner is a part of the realty in determining the dower rights of the widow. *Swift v. Flynn*, 145–630, 124 N. W. 626.

The provisions of this section are applicable in determining the widow's right of dower in property of her husband sold for taxes before this section took effect. The inchoate dower right may be affected by subsequent legislation. *Byington v. Carlin*, 146–301, 125 N. W. 233.

It is competent for the legislature to change the statutory provisions as to dower so as to cut off the right of a married woman to redeem the property from a tax sale while her interest remains inchoate. *Ibid.*

Unless the husband has at some time during the marriage relation held a heritable estate, legal or equitable, no right of dower can attach thereto in the wife's favor. *Baker v. Syfritt*, 147–49, 125 N. W. 998.

The statute (code supp. § 3447-b) barring the claim of a spouse not joining in a conveyance with the holder of the legal title, except as the provisions of that section require, is not limited to cases where the grantor held title by deed. *Hutchinson v. Olberding*, 150–604, 130 N. W. 139.

The dower interest of the widow in land, which was subject to a mortgage at the time of coverture and has continued subject to such mortgage until the death of the husband, is to be assigned subject to the mortgage, and the widow is not entitled to have the mortgage satisfied out of the remaining two thirds of the property which passes to heirs. *Snyder v. Richey*, 150–737, 130 N. W. 922.

The wife's inchoate right of dower will be protected in a court of equity, but an action for the value thereof will not lie until the husband's death. *Beach v. Beach*, 141 N. W. 921.

When attaches: Possession of real property adverse as against the husband does not become adverse as against the wife's right of dower until the death of the husband, if the possession is not under a judicial sale or in pursuance of a relinquishment of dower by the wife; and the statute of limitations as against the wife's right to dower under such circumstances does not commence to run until the death of the husband. *Lucas v. Whitacre*, 121–251, 96 N. W. 776.

The dower interest attaches when the title passes from the government, although no patent has issued. *Purcell v. Lang*, 108–198, 78 N. W. 1005.

Relinquishment or conveyance: The widow may relinquish her dower interest by agreement, although not made by way of formal conveyance. *Wright v. Breckenridge*, 125–197, 101 N. W. 111.

The marital interest of one spouse in the property of the other cannot be the subject of contract between them, and a contract or conveyance executed to the wife by the husband in consideration of her release of her contingent dower interest is invalid. As a gift to the wife, such conveyance from an insolvent husband is fraudulent as to creditors. *Sharff v. Hayes*, 132–609, 110 N. W. 24.

By an antenuptial contract fairly entered into, the consideration being that of marriage, the wife may be deprived of her interest in her husband's property, but if the contract operates to deprive the wife of such interest without provision for her in the event she survives her husband, the burden is upon the husband or those representing him to show that the contract was fairly procured. *Fisher v. Koontz*, 110–498, 80 N. W. 551.

An agreement between husband and wife for future separation involving a release by the wife of her contingent dower interest in her husband's land is invalid. *Baird v. Connell*, 121–278, 96 N. W. 863.

While a widow may in equity sell and convey her dower interest before assignment, yet she has no power to execute a mining lease for the premises, or any portion thereof. *Hook v. Garfield Coal Co.*, 112–210, 83 N. W. 963.

Although a married woman cannot bind herself by release to her husband of her contingent interest in his property, yet after conveyance of property by the husband in which the wife has not joined she may by quitclaim to her husband's grantee bar her dower interest. *Fowler v. Chadima*, 134–210, 111 N. W. 808.

The statute of limitations does not begin to run against a wife's right to question the validity of a deed until her dower interest has become vested by the death of her husband. *Wallace v. Wallace*, 137–169, 114 N. W. 913; *Dashner v. Dashner*, 142–348, 120 N. W. 975.

The contingent dower interest of the wife is cut off by the sale of the land for taxes and the execution of a deed in pursuance of such sale. *Lucas v. Purdy*, 142–359, 120 N. W. 1063.

A conveyance made in prospect of marriage if with the knowledge and consent of the prospective wife will cut off any right of dower in such property. *Collins v. Smith*, 144–200, 122 N. W. 839.

Tenants in common: Where husband and wife are owners in common of property, a conveyance by one of them of his share does not cut off the dower interest of the other in the share thus conveyed.

Noecker v. Wallingford, 133–605, 111 N. W. 37.

Estoppel: The fact that the wife who has been abandoned by her husband knows that he has married another woman, who believes her marriage to be lawful and cares for the children of the first marriage, will not estop the first wife from claiming dower in the estate of her husband after his decease. Failure of the first wife to reveal her relationship will not defeat her rights. *Dunn v. Portsmouth Sav. Bank*, 103–538, 72 N. W. 687.

The widow who has joined in a conveyance of land during the lifetime of her husband cannot after his death have such conveyance set aside as fraudulent if she has received and retained the consideration for such conveyance. *Willis v. Robertson*, 121–380, 96 N. W. 900.

In the absence of unreasonable delay or estoppel the widow is not barred from asserting her statutory right to a share in the lands of her husband conveyed by him to an innocent purchaser and as to which she has made no relinquishment. *Beeman v. Kitzman*, 124–86, 99 N. W. 171.

An acceptance by agreement of a sum in lieu of distributive share bars any subsequent claim for dower. *Nesmith v. Platt*, 137–292, 114 N. W. 1053.

A widow is not estopped from asserting dower, under a marriage which she relies upon as valid by reason of the presumptive death of a former husband because of his continued absence. *Smith v. Fuller*, 138–91, 115 N. W. 912.

The widow may by her acts and conduct estop herself from asserting a right to a distributive share in her husband's estate, regardless of any formal election to select such distributive share in lieu of a devise. *Koep v. Koep*, 146–179, 123 N. W. 174.

Where husband and wife living apart entered into an agreement as to division of property in pursuance of which joint deeds, blank as to consideration and grantee, were put into the possession of each, duly signed, and the husband had availed himself of the advantage of the division, held that he was afterwards estopped from questioning the title of the trustee of the wife's land for which deeds had been placed in her possession. *Manatt v. Griffith*, 147–707, 124 N. W. 753.

Judicial sale: The sale of land by a sheriff under a trust deed executed by the husband alone to secure payment of his debt which was made in accordance with the authority contained in the deed, and was valid when made under the provisions of § 2096 of the code of 1851, held to cut off the dower interest of the grantor's widow. *Pierce v. O'Neil*, 132–530, 109 N. W. 1082.

The widow's dower right is barred by a sale of property of the deceased ordered on proper application for the payment of debts of the estate. *In re Estate of Pennock*, 122–622, 98 N. W. 480.

The exception in the statute as to dower in property sold at execution sale has no application as against a widow who claims under a title adverse to that of the party against whom the execution sale was made. *Sherod v. Ewell*, 104–253, 73 N. W. 493.

So long as the wife's interest remains inchoate, a judicial sale in a proceeding against the husband is effectual to cut it off. *Bowden v. Hadley*, 138–711, 116 N. W. 689.

The wife's dower right is not subject to the lien of an attachment in a proceeding against her husband having title to the property in which no judgment has been rendered at the time of his death. *Tetzloff v. May*, 151–441, 131 N. W. 647.

Specific performance: In an action for specific performance of a contract to convey made by the husband as owner, in which his wife has not joined, the purchaser asking specific performance may be allowed to retain one third of the purchase price until it is determined whether the wife outlives the husband, and a lien for the portion of the price thus retained should be created on the property; but the purchaser should not be required to pay interest on the amount thus retained. *Bradford v. Smith*, 123-41, 98 N. W. 377.

Reëntry by the grantor of the husband on failure of a condition precedent or a reconveyance of the husband in satisfaction of a vendor's lien, cuts off the wife's inchoate right of dower. *Sullivan v. Sullivan*, 139–679, 117 N. W. 1086.

In an action by a grantee of the husband to specifically enforce a contract to convey, it is error to decree that a portion of the purchase money equivalent to one third in value of the property be held subject to the possible consummation of the wife's right to dower on the death of her husband, thus limiting her possible dower right to one third in value of the property at the time of the decree. The value of the wife's dower interest is to be determined on the death of the husband with reference to the value of the property at that time, not including, as against the grantee of her husband, any value which had been added by improvements. *Butler v. Butler*, 151–583, 132 N. W. 63.

Widow causing death: Prior to the amendment of code § 3386 by 29 G. A., ch. 135 (see code supp. § 3386), it was held that under that section the widow causing the death of her husband was not thereby precluded from asserting her dower interest in his property. *In re Estate of Kuhn*, 125–449, 101 N. W. 151.

SEC. 3367. Homestead.

As between the dower right and the right to occupy the homestead for life, it will be presumed that the widow is claiming her dower right unless her election to take the homestead right appears, and to show such election to retain the homestead by continuance of occupancy it must appear that the premises occupied were in fact the homestead of the deceased husband. *Peebles v. Bunting*, 103–489, 73 N. W. 882.

Mere delay in setting apart the widow's distributive share will not show an election to retain the homestead in lieu of the distributive share where the circumstances show that the right to the distributive share was being constantly asserted and recognized. *Wold v. Berkholtz*, 105–370, 75 N. W. 329.

The widow may set up the homestead character of premises in which she is entitled to a distributive share without thereby electing to accept occupancy of the homestead in lieu of dower. *In re Estate of Lund*, 107–264, 77 N. W. 1048.

It not appearing that the distributive share set apart to the widow is so selected as to include the homestead, such distributive share is not exempt from her debts contracted prior to the setting apart thereof. *Benjamin v. Doerscher*, 105–391, 75 N. W. 330.

The widow may waive the right of having the homestead included in setting off her distributive share and take her share from a portion of the property which does not include the dwelling house given by law to the homestead; but she cannot dictate a different division or arbitrarily select the particular portion which shall be set off to her, regardless of other interests. *Rice v. Rice*, 147–1, 125 N. W. 826.

Where it is impracticable to make such division of the property as that the dwelling house may be set off at its fair value to the widow or an heir, the court may properly order the property to be sold and the proceeds divided. *Ibid.*

By this section, which is somewhat different in its provision from the corresponding section of the code of '73, the dwelling house is to be included in the share set off to the widow as dower, unless there be sufficient property left to pay the debts of the decedent. *In re Estate of Crocker, Jamison v. Crocker*, 148–104, 126 N. W. 962.

SEC. 3368. Survivor a nonresident.

This section has no application where the grantor is not shown to have been an alien, although his wife was a nonresident alien. *Casley v. Mitchell*, 121–96, 96 N. W. 725.

This provision that the surviving wife or husband of a nonresident alien shall not be entitled to a distributive share in the estate of the deceased as against a purchaser, if at the time of such purchase such survivor was also a nonresident alien, is applicable to residents of another state; but the term "purchaser" is restricted to a purchaser for a consideration. *In re Estate of Kennedy*, 154–460, 135 N. W. 53.

SEC. 3369. Setting off survivor's share.

A widow may have her dower admeasured from land owned by the husband during coverture as to which she has not joined in a conveyance. *Hyatt v. O'Connell*, 130–567, 107 N. W. 599.

The fact that funds derived by the husband from the sale and conveyance of land by him alone have been used in the support of the wife as a member of the family will not estop her from claiming a dower interest in such land. *Ibid.*

The widow's right to recover for rents and profits derived from land thus conveyed by her husband commences with demand for assignment of dower. *Ibid.*

On the death of the widow after she has become entitled to a distributive share, her heirs may have such share set apart. *In re Proctor's Estate*, 103–232, 72 N. W. 516.

The wife's distributive share in real property should be charged with its proportionate share of a mortgage on the entire real estate. *Trego v. Studley*, 106–742, 75 N. W. 179.

The surviving wife is not entitled as against the heirs to have a mortgage, which was on the land at the time of coverture, satisfied exclusively out of the share descending to the heirs. *Snyder v. Richey*, 150–737, 130 N. W. 922.

Unassigned dower interest is not subject to levy under execution. *Brightman v. Morgan*, 111–481, 82 N. W. 954.

Where two or more distinct tracts of land are by the will given to different parties, and the widow has her dower assigned in a lump out of one of them, the person to whom such tract passes by the will has the right of contribution against the person or persons to whom the other tract or tracts pass by the will. *Morey v. Morey*, 113–152, 84 N. W. 1039.

The right of action of the widow to recover her dower interest in premises conveyed by her husband during the coverture, as to which she has not joined in the conveyance, does not accrue so as to set the statute of limitations running until the death of the husband. *Lucas v. White*, 120–735, 95 N. W. 209.

Dower may be assigned by proceedings in equity as well as at law. Such assignment may be made in an equitable action in the nature of a suit for partition. *Beeman v. Kitzman*, 124–86, 99 N. W. 171.

As against a grantee of the husband under a conveyance in which the wife has not joined to relinquish her dower interest, the right of the widow accrues twenty days after the death of the husband, and must be asserted within the statutory period of limitations. *Britt v. Gordon*, 132–431, 108 N. W. 319.

While application for admeasurement of dower must be brought within ten years from the death of the husband, this limitation does not apply to an action in equity to establish a dower right, or for partition of the distributive share. But the general statute of limitations is applicable to any such action. *Ibid.*

The widow is not entitled to the benefit of improvements put upon the land by her husband's grantee or those claiming under him. *Warner v. Norwegian Cemetery Assn.*, 139–115, 117 N. W. 39.

The fact that the widow applies to have dower set off to her does not estop her from afterwards contending that such land actually belongs to her, the allegation of the ownership of the husband having been made by mistake. *Matheson v. Matheson*, 139–511, 117 N. W. 755.

Where the widow, instead of having her share set off to her out of the property, consents to its sale for the payment of debts with the understanding that she is to have her share out of the proceeds, the share to which she is entitled is not subject to the payment of debts and costs of administration. *Brown v. Brookhart*, 146–79, 124 N. W. 882.

The interest of the widow in several tracts may be assigned from so much of one or more tracts as will in fact constitute one third of the whole. *Rice v. Rice*, 147–1, 125 N. W. 826.

Therefore where the husband had conveyed to his children certain parcels of land in which the wife had an inchoate dower interest, held that the widow's share of the real estate taken into account also, in the tracts of land thus conveyed, might be set off out of the land of which her husband died seized. *Ibid.*

SEC. 3376. **Share not affected by will—election—made by court.** The survivor's share cannot be affected by any will of the spouse, unless consent thereto is given within six months after a copy thereof has been served upon the survivor by the other parties interested in the estate, and notice that such survivor is required to elect whether consent thereto will be given, which consent, when given, shall be in open court, or by a writing filed therein, which shall be entered on the proper records thereof; but if at the expiration of six months no such election has been made, it shall be conclusively presumed that such survivor consents to the provisions of the will and elects to take thereunder. But when such surviving spouse is mentally incapable of making such election, the court on petition being filed alleging such disability may set the matter down for hearing at such time and place as it may deem best, and direct what notice thereof shall be given; and at such hearing the court may enter an order electing for such spouse, which shall be the election under this section, of the person under such disability. [30 G. A., ch. 121; C. '73, § 2452; R. § 2435; C. '51, § 1407.]

Devise in lieu of dower: Under the provisions of code of '73 the grant of a life estate to the widow without provision that such grant should be in lieu of dower was not inconsistent with her taking a dower interest in the estate and in such case no election was required. *Sutherland v. Sutherland*, 102–535, 71 N. W. 424; *In re Proctor's Estate*, 103–232, 72 N. W. 516.

Under the provisions of the code of '73 an affirmative act on the widow's part was necessary to deprive her of her distributive share and this affirmative act was required to be evidenced in a stated manner. In the absence of some record of election the fact of election to take under the will could not be shown. *Byerly v. Sherman*, 126–447, 102 N. W. 157.

Under the language of § 2452 of the code of '73, it was held that the acceptance of the provisions of a will did not bar the wife's dower right, unless the will so expressly provided, or there was some necessary inconsistency between the dower right and the provisions of the will. But such rule is changed by the language of § 3270 of the present code. *Kiefer v. Gillett*, 120–107, 94 N. W. 270.

Under the statutory provisions in force before the adoption of this section, held that a provision in the will charging the estate with support of the widow during her life was not inconsistent with her dower interest, and no election between the provisions of the will and dower was required. *Bentley v. Bentley*, 112–625, 84

N. W. 676. See notes to code § 3270 in this supplement.

A widow who has elected to take under the provisions of a will, cannot claim a distributive share under the statute. *In re Will of Wiltsey*, 122–423, 98 N. W. 294.

A widow may take a life estate under a will, and also her distributive share under the law, unless the latter will be so incompatible with the provisions of the will as to disturb, defeat, interrupt or disappoint such provisions. But when the will clearly indicates the intent that the devise to the widow shall be in lieu of her distributive share, she cannot take both, and if she elects to take under the will her declaration that she also claims her distributive share is of no consequence. *Parker v. Parker*, 129–600, 106 N. W. 8.

Under the facts in a particular case held that the provisions of the will, giving a life estate to the widow, were inconsistent with her taking a dower interest. *Ibid.*

Upon renouncing the will the widow becomes entitled to one third in value of the husband's estate, and cannot claim the additional one sixth to which she is entitled by inheritance in the absence of direct heirs, the property having been otherwise disposed of by the will which she renounces. *Wright v. Breckenridge*, 125–197, 101 N. W. 111.

Under prior statutory provisions, held that a will containing a devise to a widow passed title to her subject to be divested or defeated by the election of the widow to take dower in lieu of such devise. *Garrett v. Olford*, 152–265, 132 N. W. 379.

Where by the will the remainder of testator's property is fully disposed of otherwise, the devise of a life estate to the widow is inconsistent with dower. *Mitchell v. Vest*, 157– —, 136 N. W. 1054.

Where the widow in a report as executrix recites the provisions of the will in her behalf and the settlement of the estate in accordance with such provisions, such report duly recorded constitutes a binding election on her part to take under the will. *Ibid.*

Under the provisions of § 2435, revision of 1860, held that in the absence of any allegation of objection on the part of the widow to the provisions of the will in her behalf, it would be presumed to be in lieu of dower. *Van Pappelendam v. Thomas*, 157– —, 137 N. W. 952.

Election: Where the acts of the widow with reference to the property were properly referable to her position as executrix, rather than to any claim of hers under the will, held that they did not show an election to take under the will. *In re Proctor's Estate*, 103–232, 72 N. W. 516.

Where the widow fails to claim her dower right and thereby induces a claimant of the property to treat it as having full title, she is estopped from afterwards asserting her right therein. *Goldizen v. Goldizen*, 107–280, 77 N. W. 1053.

Where the surviving husband failed during his lifetime to make any claim of a distributive share in addition to the devise made to him in the will, and his heir likewise failed to make any such claim through him for ten years and until the property had been improved at considerable expense by those claiming it under the will, held that such heir was estopped from asserting any claim to an interest in a distributive share. *Lewis v. Sherwin*, 129–682, 104 N. W. 511, 106 N. W. 583.

Under the provisions of § 2452 of code of '73, held that an election to accept under the provisions of the will might become effective without being entered of record. *Brighton v. Morgan*, 111–481, 82 N. W. 954.

Where no copy of the will has been served on the widow she is not called upon to elect between the provisions of the will and her statutory right of dower, and acceptance of a benefit under the will does not defeat her dower right. *Newberry v. Newberry*, 114–704, 87 N. W. 658.

In order to estop the widow from claiming under the statute, notwithstanding the terms of the will, there must be a strict compliance with the statutory requirements. *Warner v. Hamill*, 134–279, 111 N. W. 939.

Where a life estate is given to the widow by will with the fee to her children at her death, she takes also her statutory interest as not inconsistent with the will. *Ibid.*

If at the end of six months no election has been made it is to be conclusively presumed that the survivor elects to take under the will. But there can be no election by failure to act where no notice has been served and no consent is entered of record. *Bailey v. Hughes*, 115–304, 88 N. W. 804.

Where the issue is as to whether the widow has elected to take her distributive share as against the provision made for her in the will, it is not competent for a witness to testify as to the contents of the will, nor as to his understanding as to who was to take under the will. *In re Estate of Jones*, 130–177, 106 N. W. 610.

Under § 2452 of the code of '73, the election therein provided for was required in all cases to be made of record in the probate court. This express provision could not be evaded or nullified by the plea of an estoppel. The only possible application of the doctrine of estoppel was in a case where no election was necessary. *Jones v. Jones*, 137–382, 114 N. W. 1066.

On the death of the owner of land the surviving spouse is vested with the right of choice between the distributive share provided by law and the increased or other benefits by will. The choice should be made by such survivor and not by creditors, and the fact that by choosing the

benefit provided by will claims of creditors will be cut off does not prevent the survivor from making such election. *Robertson v. Schard*, 142–500, 119 N. W. 529.

An election to take under the provision of the will simply affirms the presumption existing that the widow will do so. *In re Estate of Hamilton*, 148–127, 126 N. W. 776.

Under the provisions of the code of '73, held that under a will giving the widow a life estate and providing for a sale of the property, an election to accept the provisions of the will was a bar to a claim for dower. *Mohn v. Mohn*, 148–288, 126 N. W. 1127.

Also held that where the widow had been appointed executrix of the will and filed a final report reciting the provisions of the will in her behalf, there was such an election in writing and recorded as to bar her dower right. *Ibid.*

Under § 2452 of the code of '73, the devise to a widow of a life estate was not inconsistent with her claim of dower in the same property, and her acceptance of the provisions of the will was no bar to her claim or that of her heirs to her distributive share. *Archer v. Barnes*, 149–658, 128 N. W. 969.

Provisions in a will inconsistent with dower are not sufficient in themselves to bar the widow's right. It still remains with her to elect whether she will accept such provisions. *Kierulff v. Harlan*, 150–671, 130 N. W. 789.

Although the provisions of the will in behalf of the widow are presumed to have been in lieu of dower, she is entitled to elect between such provisions and her dower right and cannot be put to such election until notice is given her to do so. *Albright v. Albright*, 153–397, 133 N. W. 737.

Under § 2452 of the code of '73, the dower interest of the widow could not be affected by any will of her husband unless she consented thereto within six months after notice and such consent was entered of record. *Irish v. Steeves*, 154–286, 134 N. W. 634.

Under this section a written notice to the widow is intended, but there is no direction that it shall be served in the method provided for the service of an original notice. *Scanlon v. Scanlon*, 154–748, 135 N. W. 634.

It is not required that the notice and proof of service be entered upon the record before the six months' period begins to run. *Ibid.*

It is not necessary that the notice be joined in by all the parties interested in the estate. *Ibid.*

The manner in which the notice and service thereof shall be made to appear of record is not prescribed. *Ibid.*

Under prior statutory provisions, held that enjoyment of a life estate in the entire property of the deceased husband under the provisions of the will was not inconsistent with the claim of a distributive share. *Parker v. Parker*, 155–65, 135 N. W. 71.

The statute does not put any time limit on the widow's right to accept or reject the devise except as found in this section, and she can be compelled to elect only by the notice here provided for and forced to make her election of record. *Arnold v. Livingston*, 139 N. W. 927.

The election of the widow may be shown by express words or by the actual taking of the thing bequeathed, or it may be shown in any other manner that clearly manifests such an election. *Ibid.*

Under the statute as it now stands, if the widow accepts the provisions of the will, it is presumed from the act of acceptance that she elects to take the devise in lieu of her statutory rights; but the widow is not bound to accept the bequest made to her and may reject the same and take her rights under the statute. She cannot take both. *Thorpe v. Lyones*, 142 N. W. 82.

The devise to the wife is presumed to be in lieu of her statutory rights unless it is clearly and explicitly indicated that it is not in lieu of such rights. *Ibid.*

After the widow has notice of the terms of the will she may elect either to take or reject the devise made to her in the will, and such right to elect vests immediately on receiving the notice of the will and its provisions. Until she does elect, the provisions of the will do not affect her statutory rights. *Ibid.*

Upon receiving notice of the will or upon her own motion without notice to do so, she may elect to take the devise made to her or her right under the statute. If she elects to take the devise and does take it she is presumed to have taken it in lieu of all her rights to a distributive share, homestead and exemptions. *Ibid.*

There is no time limit fixed within which the widow is required to make her election, nor does the statute prescribe how the election shall be evidenced. Until she is served with notice requiring her to elect, her failure to make an election does not deprive her of her statutory rights, but if she does not elect within six months after receiving notice as provided by statute, it is conclusively presumed that she consents to the provisions of the will and elects to take thereunder. *Ibid.*

SEC. 3377. Election as between distributive share and occupancy of homestead—mental incapability. Within six months after written notice to the survivor, given by any heir of a deceased intestate, or by the administrator of his estate in case a sale of the real estate is necessary to

pay debts, the survivor may elect to take the distributive share, or the right to occupy the homestead, which election shall be made and entered of record as provided in the preceding section. In case of a failure to make such election, the right to occupy the homestead in lieu of the distributive share shall be waived. But when such surviving spouse is mentally incapable of making such election, the court on petition being filed alleging such disability, may set the matter down for hearing at such time and place as it may deem best, and direct what notice thereof shall be given; and at such hearing the court may enter an order electing for such spouse, which shall be the election, under this section, of the person under such disability; and in case of an election of the distributive share, such distributive share may be set off to such surviving spouse under disability on the petition of the guardian of such spouse and under the provisions for setting off the survivor's share. But this act shall not apply to actions now pending in court. [35 G. A., ch. 279, § 1.] [C. '73, § 2008; R. § 2296; C. '51, § 1264.]

Under the provisions of the code of '73, held that continuous occupancy of the homestead by the widow, where she had a lease of the premises for life from the heirs, did not constitute an election to accept the homestead for life in lieu of dower. The widow's primary right is to a distributive share, and unless she does something which deprives her of that right it will be sustained. *Robson v. Lambertson*, 115–366, 88 N. W. 943. See also, notes to code § 2985 in this supplement.

The right to elect to take a distributive share while occupying the homestead does not continue indefinitely until notice is served by the heirs requiring the election or an election in writing is made. Although no notice is served the widow may bind or estop herself by an election which has not been reduced to writing and filed in court. *Stoddard v. Kendall*, 140–688, 119 N. W. 138.

SEC. 3378. Descent—to children.

The provisions of 27 G. A., ch. 37, are not effectual to legalize an inheritance tax under 26 G. A., ch. 28, as to real property descending to heirs before the curative act took effect. *Herriott v. Potter*, 115–648, 89 N. W. 91.

Rights to property by descent or will may be barred by an estoppel. *McDowell v. McDowell*, 141–286, 119 N. W. 702.

The failure of the father to provide for a child by will or otherwise does not give rise to an action by the child. *Lefebure v. Lefebure*, 143–293, 121 N. W. 1025.

Real property of the deceased descends to his heirs immediately upon his death, subject only to the right of the administrator to resort thereto for the payment of the debts of the deceased. *In re Estate of Pitt*, 153–269, 133 N. W. 660.

SEC. 3379. **Wife and parents.** That section thirty-three hundred seventy-nine of the code be and the same is hereby repealed and the following enacted in lieu thereof:

"If the intestate leaves no issue, the whole of the estate to the amount of seventy-five hundred dollars, after the payment of the debts and expenses of administration, and one half of all of the estate in excess of said seventy-five hundred dollars shall go to the surviving spouse and the other one half of said excess shall go to the parents. If no spouse, the whole shall go to the parents." [35 G. A., ch. 280, § 1.] [C. '73, § 2455; R. § 2495; C. '51, § 1410.]

The one-sixth share which the widow takes as heir in the absence of issue is subject to deduction on account of repairs, taxes and expenses properly paid or incurred in the administration of the estate. *Wild v. Toms*, 123–747, 99 N. W. 700.

Although the surviving wife or husband elects to take a homestead right in lieu of a distributive share, such election does not deprive the survivor of the right to a one-sixth interest as heir in the absence of direct disinheritance. *Hays v. Marsh*, 123–81, 98 N. W. 604.

The interest which the surviving wife takes beyond her dower interest in the absence of children is taken by her as heir. *In re Estate of Kuhn*, 125–449, 101 N. W. 151.

The portion which would pass to the widow in the absence of direct heirs over and above her one-third dower interest cannot be claimed by her under the renunciation of a will which disposes of the entire property, for the will is effectual as to all save her one-third dower interest. *Wright v. Breckenridge*, 125–197, 101 N. W. 111.

It is only in case of failure to devise or bequeath the entire estate over and above the dower or statutory provision for the surviving spouse, that he or she takes anything whatever by way of inheritance. *Hastings v. Day*, 151–39, 130 N. W. 134.

On the death of an heir to one who as husband of the owner of property had acquired a one-third interest therein, held that each of the three heirs of such deceased heir took one third of such one-third interest. *Husted v. Rollins*, 156–546, 137 N. W. 462.

Aside from any specific provision in the statutes relating to adoption, the property of the adopted child passes on his death, unmarried and without issue, to his natural parent rather than to the heirs of his deceased adopting parent. *Baker v. Clowser*, 138 N. W. 837.

SEC. 3381. Heirs of parents.

Descent cannot be claimed through a deceased nonresident alien relative any more than it can through a living relative who cannot inherit on account of being a nonresident alien. *Meier v. Lee*, 106–303, 76 N. W. 712.

Where property is claimed by descent under the provisions of this section through an intervening relative, such descent is mediate and not immediate. *Ibid.*

The provision that descent to collateral heirs is to be determined by assuming that the common ancestor had outlived the intestate and died in the possession of a portion falling to his share is for the purpose only of determining the right of inheritance of such collateral heirs. Such right being ascertained, the descent is direct from decedent to such heirs. *In re Hulett's Estate*, 121–423, 96 N. W. 952.

An adopted child inherits by descent through the foster parent. *Shick v. Howe*, 137–249, 114 N. W. 916.

Further as to inheritance by or from an adopted child, see notes to code § 3253 in this supplement.

SEC. 3381-a. **Parents by adoption—wife.** One half of the estate of any adopted child who shall die intestate and leaving no issue shall descend to the parents by adoption of such child, and the other half to his or her surviving spouse. If one of the parents by adoption be dead, in case there was more than one such parent, the portion which would have gone to such parent shall go to the surviving parent by adoption. If such child leave no surviving spouse, his entire estate shall go to his parents by adoption; or if he leave but one such parent then to such parent. [29 G. A., ch. 136, § 1.]

SEC. 3381-b. **Heirs of parents by adoption.** If the adopted parent or parents, if more than one, be dead, the portion which would have gone to such parent or parents had they or either of them survived the intestate, shall be disposed of in the same manner as if such parent or parents had outlived the intestate and died in possession of such share, and so on through their ascending ancestors. [29 G. A., ch. 136, § 2.]

SEC. 3381-c. **Natural parents.** If heirs are not thus found, the portion thus uninherited shall go to the natural parents of the intestate, and in case of their death then to their heirs under the ordinary rules of descent. [29 G. A., ch. 136, § 3.]

SEC. 3383. Advancements.

An advancement is an irrevocable gift, made by a parent to a child in anticipation of such child's future share of the parental estate. It must be voluntary, and must have been made with the intent on the part of the parent that it shall be taken into account on the settlement of the estate. But where a voluntary gift from parent to child is shown, the rule is that it is presumed to be an advancement, unless paid to or for the child for his education, maintenance or support, or otherwise in the discharge of ordinary parental duties. *Bissell v. Bissell*, 120–127, 94 N. W. 465.

Advancements made by a testator prior to the execution of his will, even designated as such at the time made, are taken to be gifts pure and simple, and cannot be considered in the settlement of the estate under the will, unless such instrument so directs in specific terms. *In re Cumming's Estate*, 120–421, 94 N. W. 1117.

The question of whether a gift of property to an heir is a pure gift or an ad-

vancement depends upon the intent of the donor at the time of the transfer, and this intent may be established by his declarations prior to the time of the transfer, or contemporaneous with it. *Ellis v. Newell*, 120–71, 94 N. W. 463.

But such declarations, like other admissions, are generally regarded as unsatisfactory evidence on account of the ease with which they may be fabricated, the impossibility of contradiction and the consequences which the slightest mistake or failure of memory may produce. *Ibid.*

Subsequent declarations, however, not a part of the *res gestae*, are not admissible to show that the transaction was a gift rather than an advancement. *Ibid.*

Advancements for the purpose of distribution and division are treated as part of the estate, but for no other purpose. The donee cannot be required to refund any portion thereof, nor can it be taken for debts of the estate. *Ibid.*

Book entries of advancements, when shown to have been made by an ancestor, are evidence both of the fact of the advancements and of the intention with which they are given. *Whisler v. Whisler*, 117–712, 89 N. W. 1110.

The value of land given to a prospective heir by way of advancement is to be reckoned as of the date of the death of the intestate owner. *Eastwood v. Crane*, 125–707, 101 N. W. 481.

An advancement to an heir previously given and received constitutes no consideration for a promissory note subsequently given in payment of the property received under such advancement. *Marsh v. Chown*, 104–556, 73 N. W. 1046.

The doctrine as to advancements is applicable only in cases of intestacy. *McCormick v. Hanks*, 105–639, 75 N. W. 494; *In re Estate of Hall*, 132–664, 110 N. W. 148.

The statutory provision as to advancements has no application unless the ancestor dies wholly intestate. The doctrine of advancements rests upon the presumed desire of an ancestor to equalize his estate among his heirs. When he makes a will he thereby expresses his intention in this respect and the presumption does not apply. *Gilmore v. Jenkins*, 129–686, 106 N. W. 193.

Where the father purchases land, the title to which is taken in the son's name, the presumption is in favor of an advancement rather than a resulting trust, until the contrary intention is shown. *Culp v. Price*, 107–133, 77 N. W. 848.

An execution purchaser of an heir's interest in realty does not acquire priority over the right existing against the heir to deduct advancements from such interest. *Pinckney v. Collie*, 114–441, 87 N. W. 406.

An acknowledgment of indebtedness with agreement and promise to pay at the death of the payee, and then to be deducted from the share of the estate of the payee coming to the debtor, is not an advancement, but an acknowledgment of indebtedness, and a devise to such payee does not constitute an extinguishment thereof. *Kinney v. Newbold*, 115–145, 88 N. W. 328.

By arrangement between the owner of property and a son extinguishing indebtedness of the son to his father in consideration of relinquishment by the son of all interest in his estate, the son's indebtedness may be converted into an advancement, and in such case the son will have no interest in the father's estate on his death. *Hickey v. Davidson*, 129–384, 105 N. W. 678.

While interest is not usually to be computed on an advancement, the arrangement for an advancement may include indebtedness with interest accrued at the time. *Ibid.*

An advancement to children, made before remarrying, will not give the second wife of their father a greater interest than a one-third interest in the real property of which he is seized during coverture. *Burgoon v. Whitney*, 121–76, 95 N. W. 229.

The right to treat an indebtedness of the heir to the ancestor as an advancement is not affected by a discharge of the heir in bankruptcy. *In re Estate of Fussell*, 129–498, 105 N. W. 503.

The doctrine as to advancements is not applicable where the prospective heir takes title to property of the ancestor without the knowledge of the latter. *Moore v. Scruggs*, 131–692, 109 N. W. 205.

If a legacy is given by a parent or one standing *in loco parentis* and the testator afterwards makes an advancement or gift of money or property of the same kind to the same beneficiary, the presumption will arise that the gift was intended in satisfaction of or substitution for the prior legacy, and unless this presumption is rebutted, an ademption in full or *pro tanto*, as the gift is equal to or less than the prior benefit, will occur. *Davis v. Close*, 104–261, 73 N. W. 600.

Where the difference between the price paid and the actual value conveyed to an heir is great, the conveyance will be regarded as voluntary to the extent of such difference, and an advancement will be presumed. *Mossestad v. Gunderson*, 140–290, 118 N. W. 374.

In the absence of statute, the rule seems to be well settled that, if the husband conveys property to his wife or purchased real property in her name, he paying the price, or gives to or purchases for her personal property, paying therefor from his funds, the transaction is *prima facie* a gift or transfer for her benefit and she cannot be held to account therefor to him nor, upon his death, to his personal representatives. *In re Estate of Kennedy*, 154–460, 135 N. W. 53.

The doctrine of advancement has no application save in event of intestacy. *Ibid.*

There is no presumption of an advancement where a husband takes his wife's money coming from her father's estate and invests it in property taking the legal title thereto in his own name. *Johnson v. Foust*, 139 N. W. 451.

SEC. 3384. Illegitimate children—inherit from mother.

An illegitimate child inherits from the mother, and the fact of the mother's death before descent will not prevent the child from inheriting her share of the estate which would otherwise have descended to her. *Johnson v. Bodine*, 108–594, 79 N. W. 348.

SEC. 3385. From father.

The recognition required by this section is sufficient if it is extensive, though not universal. The words "general and notorious" should be construed with reference to the circumstances and surroundings of the parties, and held that the evidence in a particular case was sufficient to show such recognition as to entitle an illegitimate son to inherit. *Van Horn v. Van Horn*, 107–247, 77 N. W. 846.

Recognition in another state will entitle an illegitimate son to inherit from his father, although the laws of such state do not provide for such inheritance. *Ibid.*

A statute as to inheritance by illegitimates must, like other statutes in derogation of the common law, be liberally construed with a view to promote its object and assist the party in obtaining justice. *Ibid.*

The burden of proof to establish the parentage and recognition required rests upon the child claiming the right to inherit. *Watson v. Richardson*, 110–673, 80 N. W. 407.

Evidence in a particular case held not sufficient to establish such recognition in writing as to entitle the claimant to inherit. *Ibid.*

Declarations of the putative father are competent to show general or notorious recognition, but such evidence must be carefully scrutinized. In a particular case held that the evidence of such recognition was not sufficient. Evidence of current rumors or reports, where the putative father lived at the time of the birth of the illegitimate child, to the effect that such child belonged to him, is inadmissible to show paternity. *Ibid.*

The recognition contemplated by the statute is not recognition as prospective heir, but recognition as an illegitimate child. If the conditions required by the statute exist at the time of the death of the ancestor the child is entitled to inherit under this section. It is immaterial that the recognition antedated the enactment of the statutory provision authorizing inheritance by illegitimates thus recognized. *Alston v. Alston*, 114–29, 86 N. W. 55.

Evidence in a particular case held sufficient to show such recognition as to entitle an illegitimate son to inherit. *Ibid.*

The right of an illegitimate child, duly recognized, may be interposed in a partition proceeding to which the legitimate heirs of the deceased are parties. *Ibid.*

Declarations in letters to an illegitimate child held to amount to such recognition as to entitle the child to inherit from the person who, by the letters, admitted himself to be her father. *Britt v. Hall*, 116–564, 90 N. W. 340.

In a partition proceeding held that the evidence of recognition was sufficient to entitle the illegitimate child to a share in the estate of her father. *Morgan v. Strand*, 133–299, 110 N. W. 596.

Evidence of recognition in particular cases held not sufficient. *Brown v. Iowa Legion of Honor*, 107–439, 78 N. W. 73; *Markey v. Markey*, 108–373, 79 N. W. 258; *McCorkendale v. McCorkendale*, 111–134, 82 N. W. 754; *Duffy v. Duffy*, 114–581, 87 N. W. 500.

Evidence of rumor or common report of parentage is not admissible to establish the general and notorious recognition required by this section. *Murphy v. Murphy*, 146–255, 125 N. W. 191.

Recognition of relationship which is not general or notorious is not sufficient. *Ibid.*

SEC. 3386. Heir or beneficiary causing death or disability. No person who feloniously takes or causes or procures another so to take the life of another shall inherit from such person, or receive any interest in the estate of the decedent as surviving spouse, or take by devise or legacy from him, any portion of his estate; and no beneficiary of any policy of insurance or certificate of membership issued by any benevolent association or organization, payable upon the death or disability of any person, who in like manner takes or causes or procures to be taken the life upon which such policy or certificate is issued, or who causes or procures a disability of such person, shall take the proceeds of such policy or certificate; but in every instance mentioned in this section, all benefits that would accrue to

any such person upon the death or disability of the person whose life is thus taken or who is thus disabled shall become subject to distribution among the other heirs of such deceased person, according to the foregoing rules of descent and distribution in case of death, and in case of disability the benefits thereunder shall be paid to the disabled person. [29 G. A., ch. 135, § 1.]

Prior to the amendment of this section, held that it did not apply to the widow's dower right. *In re Estate of Kuhn*, 125–449, 101 N. W. 151.

CHAPTER 5.

OF ACCOUNTING AND MISCELLANEOUS PROVISIONS.

SECTION 3394. Report.

The oversight and direction of the settlement of estates is committed to the district court, and its discretion in determining whether the executor shall be required to make final report and close the estate will not in general be interfered with. *Wheeler v. Long*, 128–643, 105 N. W. 161.

Decisions of the court as to intermediate reports are not conclusive, so as to prevent the correction of mistakes therein, when the final report is presented. *In re Estate of Smith*, 133–142, 109 N. W. 196.

The allowance of a claim against the estate by a special administrator in favor of a general administrator, which is approved by the court, cannot be attacked by exception to the final report. *In re Estate of Pennock*, 122–622, 98 N. W. 480.

The administrator may be allowed valid claims paid, although not filed against the estate. *Ibid.*

Where the executor has made use of the funds of the estate in his own business he should account for interest thereon at the rate of six per cent. per annum, with annual rests. *In re Brown's Estate*, 113–351, 85 N. W. 617.

Where the administrator brings the entire fund into court and subjects it to the jurisdiction thereof, the property remains subject to final adjustment and settlement of the estate. Even if mistakes are made in interlocutory orders they are subject to correction at any time before the final settlement. *In re Estate of Metcalf*, 143–310, 120 N. W. 104.

The settlement of the estate should not be postponed beyond the time specified by the statute on account of mere contingencies of the prospective collection of debts due the decedent. *In re Estate of Brigham, Corbin v. McAllister*, 144–71, 120 N. W. 1054.

SEC. 3395. Examination of executor.

As the administrator may be examined under oath and required to account for all property coming into his hands belonging to the estate, the fact that he procures the appointment of a special administrator to pass on his claim against the estate is no ground for his removal. *Fry v. Fry*, 155–254, 135 N. W. 1095.

SEC. 3398. Mistakes corrected.

Mistakes in settlement may be corrected at any time before final settlement, and the provisions of the next section limiting the time within which application may be made to open up accounts settled in the absence of parties in interest, held to have no application to mistake or fraud in the settlement of the administrator's intermediate accounts. *Dorris v. Miller*, 105–564, 75 N. W. 482.

An action in equity may be maintained to correct a final settlement in a probate proceeding which has been entered through mistake. *Tucker v. Stewart*, 121–714, 97 N. W. 148.

Where the administrator, by falsely reporting the assets of the estate in his hands, induces the guardian of minors interested in the distribution of the estate to accept his note without security, and thereby procures his discharge as administrator, such fraudulent settlement may be set aside in an action in equity. *Ibid.*

Even after the report of a special administrator has been accepted, mistakes in the settlement reported by such administrator may be corrected so long as the estate is unsettled and the general administrator is not discharged. *In re Estate of Douglas*, 140–603, 117 N. W. 982.

Even after final settlement and discharge mistakes in the settlement may be corrected by equitable proceedings. *Ibid.*

An erroneous order of allowance of a claim made by the regular administrator and referred to a temporary administrator

may be corrected on final settlement of the estate. *Rabbett v. Connolly*, 153–607, 133 N. W. 1060.

A motion to set aside such improper allowance may be supported by affidavits under the provisions of code § 3833. *Ibid.*

In the absence of any showing of fraud, the discharge of the administrator terminates the power of the court to allow claims or order the sale of real property. *Flora v. Brown*, 140 N. W. 364.

SEC. 3399. Settlement contested.

Where the executor uses money of the estate in acquiring property in his own name, a settlement based on a report in which he claims credit for such property as belonging to the estate should be set aside. *In re Brown's Estate*, 113–351, 85 N. W. 617.

The office of exceptions to executors' reports is not to demand affirmative relief, but to call the attention of the court to errors of omission or commission in the statements of the account. The report and the objections form the issues to be tried and involve no more than the correctness of the account presented by the executor as such. The individual liability of the executor is not involved. *Ibid.*

Intermediate orders are not conclusive in a final contest as to the correctness of the accounts of a trustee. *In re Manning's Estate*, 134–165, 111 N. W. 409.

If money received for the estate is in fact used for its benefit, mismanagement of the affairs of the estate will not defeat the right to recover the money so used, unless the claimant is a party to such mismanagement. *Ibid.*

Mistakes in settlements by administrators may be corrected at any time before final settlement and discharge and the correction may include the allowance of the attorney's fees to the administrator although approved on a prior *ex parte* application. *In re Estate of Sawyer*, 124–485, 100 N. W. 484.

Liability of an administrator for conversion of the property of deceased must be determined in proceedings relating to his accounting, and cannot be made the subject of an action against him by a special administrator subsequently appointed. *Garretson v. Kinkead*, 118–383, 92 N. W. 55.

A claimant is not estopped from questioning the correctness of the report of an executor, or by the acts of attorneys representing such executor, although they may for some purposes also represent the claimant. *In re Cummings' Estate*, 120–421, 94 N. W. 1117.

Where an order has been made for an allowance of support to the widow, and the money has been paid over in accordance with such order, the action of the court should not be questioned, even for fraud, after the lapse of two years or more. *Busby v. Busby*, 120–536, 95 N. W. 191.

Three months are allowed within which to move for the vacation of an order discharging the executor without a charge or proof of fraud or mistake. But to justify an interference with the order of discharge, if it has become final, the fraud or mistake relied upon must be something extrinsic or collateral to the matter tried upon the original hearing, and not a fraud or mistake in the matter on which the judgment was entered or order made. *Bradbury v. Wells*, 138–673, 115 N. W. 880.

An interlocutory order does not amount to an adjudication in such sense that it may not be corrected at any time before final settlement. *In re Estate of Metcalf*, 143–310, 120 N. W. 104.

After determination on an appeal that the widow was entitled to a fund in the hands of the administrator, held that on a remand of the case for decree in harmony with the opinion the right of the widow could not be further questioned on final settlement of the estate. *In re Estate of Cook*, 143–733, 122 N. W. 578.

Although the final judgment as to the validity of a claim is a binding adjudication in an action against the sureties on an administrator's bond, nevertheless so long as any question which can be raised as to the obligation of the administrator to allow or pay such claim is subject to judicial determination, the sureties remain liable for the obligations of the administrator. *Tucker v. Stewart*, 147–294, 126 N. W. 183.

An order of discharge of the administrator obtained by fraud does not relieve the sureties from liability on the bond after such order has been vacated in a proper proceeding. *Ibid.*

The finding of the court as to the facts upon conflicting evidence will not be reversed on appeal, such appeal not being triable *de novo*. *In re Estate of Clark*, 151–511, 131 N. W. 700.

SEC. 3400. Discharge.

The report of the executor should not be approved where it appears that he still has funds to distribute. *Lippert v. Lippert*, 110–550, 81 N. W. 777.

The settlement of the final accounts of an executor and his discharge terminate his power as to real estate which, by the provisions of the will, he is directed to convert into money. Final settlements seldom, if ever, involve the title and right to possession of realty. *Boland v. Tiernay*, 118–59, 91 N. W. 836.

After an administrator has been garnished on a claim against the estate, he cannot secure a discharge without reporting such contingent liability and thus defeat the claim without rendering himself personally liable. *Geiger v. Gaige*, 134–197, 111 N. W. 804.

SEC. 3403. Notice of order—publication. When the court shall make an order affecting an executor or administrator, and it cannot be personally served upon him, service thereof may be made by publication of a notice, stating the substance of such order, in some newspaper published in the county where such order was made, once each week, for four weeks in succession, which publication may be proved as in case of original notice. [31 G. A., ch. 9, § 10; C. '73, §§ 2479–80; R. §§ 2474–5.]

SEC. 3405. Failure to account.

This section imposes a penalty which accrues to the estate immediately upon the default of the executor, and if the probate court has not exonerated the executor for the default he cannot be heard in an action against him on his bond to set up an excuse. *Lippert v. Lippert*, 110–550, 81 N. W. 777.

SEC. 3410. Executors considered as one.

An action may be brought against one or more of joint executors. *Farmers' Bank v. Wright*, (C. C.) 158 Fed. 841.

SEC. 3412. List of heirs—discovery.

The list of heirs filed by the administrator is not binding on any one and is not admissible for the purpose of showing title by descent. *Prichard v. Mulhall*, 140–1, 118 N. W. 43.

Neither the filing of the affidavit provided for in this section nor the examination of the records of the county to ascertain if deceased left real estate, can in any manner affect the transmission of title to the real estate of the deceased. *In re Estate of Pitt*, 153–269, 133 N. W. 660.

An administrator has no occasion to list with the heirs a husband of the daughter of the deceased. *Hatton v. Wheaton*, 139 N. W. 1108.

SEC. 3415. Compensation.

The compensation provided for by statute does not cover services in making investments, passing on the value of securities and transacting like business for deceased, but additional compensation cannot be awarded where there is no evidence offered as to the value of such additional services. *Fitzgerald v. Paisley*, 110–98, 81 N. W. 181.

An allowance to executors of an annual salary for services in addition to the statutory compensation will not be held to include the percentage; and such allowance will be held to apply to past as well as future services, where not otherwise specified, as it is not necessary that such salary be fixed in advance. *Anderson v. Sabin*, 132–507, 109 N. W. 1080.

Compensation received by executors in excess of that fixed by statute will be presumed to be for extraordinary services unless the contrary is shown. *Ibid.*

The statutory allowance of compensation is not intended as a mere bonus or retainer, leaving the administrator at liberty to charge and collect the reasonable value of his services in addition thereto. If anything farther is allowed, it is only for necessary extraordinary expenses and services and on good reasons clearly shown to the court. *In re Estate of Sawyer*, 124–485, 100 N. W. 484.

Attorney's fees incurred by an executor in a proceeding to construe the provisions of the will may properly be allowed out of the funds of the estate, but where the purpose of the application by a devisee to have the will construed is to have his right to a share under the will established, there is no occasion for allowing attorney's fees as against the estate. *In re Nicholson's Will*, 123–630, 99 N. W. 300.

The statute authorizes an allowance to an administrator for his actual, necessary and extraordinary expenses which would include attorney's fees for services rendered the administrator, but the attorney rendering such services has no claim therefor against the estate. *Clark v. Sayre*, 122–591, 98 N. W. 484.

An attorney is not entitled to compensation out of the estate for services rendered to an administrator in an attempt to perpetuate himself as administrator of the estate, the effort to secure such appointment being unsuccessful. *Dorris v. Miller*, 105–564, 75 N. W. 482.

Generally speaking, an executor or administrator is not *prima facie* chargeable with interest during the time the law allows for collecting the estate and settling the accounts, which is usually one year after administration is taken. *Ibid.*

No liability on the part of the adminis-

trator, such as will defeat his right to compensation, attaches by reason of mere mistake of judgment as to the property which he is entitled to control. *In re Estate of Ring*, 132–216, 109 N. W. 710.

It is within the proper discretion of the trial court to make an allowance to an executor for attorney's fees and for making his final report and securing his discharge. And this applies also to a subsequent report and accounting after an order of discharge has been entered. *In re Estate of Hamilton*, 148–127, 126 N. W. 776.

The allowance to an administrator for compensation and attorney's fees is not reviewable *de novo* on appeal. *In re Estate of Baumhover*, 151–146, 130 N. W. 817.

This section does not make obligatory the allowance of attorney's fees even in favor of an executor. And where the widow became the proponent of her husband's will in her own interest, held that it was not necessary to allow her attorney's fees out of the estate. *In re Estate of Berry*, 154–301, 134 N. W. 867.

SEC. 3416. Removal of executor.

The power of the court to remove an administrator is defined by statutory provisions and in general such provisions should be complied with. *Haddick v. District Court*, 141 N. W. 925.

The validity of an order removing the administrator may be tested by certiorari, although there has been a motion in the lower court to set aside such order. *Ibid.*

SEC. 3422. Notice of application for discharge.

There is no provision of statute for notice to other persons than parties interested in the estate of the application of an executor or administrator for discharge. *Potter v. Brentlinger*, 117–536, 91 N. W. 809.

The propriety of refusing to disturb settlements when fraud or mistake is not clearly established is apparent under the present statutory provisions, which require notice to be served on all parties in interest before the allowance of a final accounting or the discharge of the executor or administrator. *Bradbury v. Wells*, 138–673, 115 N. W. 880.

A final order of discharge of an executor should not be made until the expiration of a full year from the time of his appointment, and if there is an order of discharge before the expiration of the year within which claims may be filed, the claimant may have the order set aside and then file his claim and secure the allowance thereof, or serve notice of such claim upon the executor. *In re Kimball's Estate, Flanigan v. Kimball*, 139 N. W. 456.

PART THIRD.

CODE OF CIVIL PRACTICE.

TITLE XVIII.

OF PROCEDURE IN COURTS OF ORIGINAL JURISDICTION.

CHAPTER 1.

OF PRELIMINARY PROVISIONS.

SECTION 3424. Proceedings.

Every proceeding in court is an action, and the word "action" as employed in this section has a technical meaning. *Morris v. Lowry*, 113–544, 85 N. W. 788.

An action is a proceeding in court. The cause of action is the fact or facts that justify it or show the right to maintain it. It is every fact necessary to be proven, if traversed, in order to support the right to a judgment. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved. *Box v. Chicago, R. I. & P. R. Co.*, 107–660, 78 N. W. 694.

SEC. 3425. Civil and special actions.

Unless particularly provided for, a jury is not usually allowed in a special proceeding. *In re Bradley*, 108–476, 79 N. W. 280.

An action of forcible entry and detainer is a special proceeding. *Herkimer v. Keeler*, 109–680, 81 N. W. 178.

The proceeding under code § 3826 to compel an attorney to account is a special proceeding. *Union Bldg. & Sav. Assn. v. Soderquist*, 115–695, 87 N. W. 433.

Where the writ of mandamus is the sole relief sought in an action, it is ordinarily classed as a special proceeding, but still remains triable at law. *Ford v. Manchester*, 136–213, 113 N. W. 846.

An appeal as to county printing (code § 441) is a special proceeding, and, although not triable to a jury, is to be heard as an ordinary action. *In re Cherokee County Printing*, 156–282, 136 N. W. 765.

An action against a common carrier for negligence resulting in injury to live stock during transportation may be brought either in contract or in tort, and the plaintiff may recover the damages sustained. *Gilbert v. Chicago, R. I. & P. R. Co.*, 156–440, 136 N. W. 911.

The provision as to jury trial in ordinary actions is not applicable to special proceedings. *Klopp v. Chicago, M. & St. P. R. Co.*, 156–466, 136 N. W. 906.

SEC. 3426. Form of actions.

The fictions of the common law have been abolished and procedure for actions of right as well as other actions is prescribed by statute. *Bevering v. Smith*, 121–607, 96 N. W. 1110.

The plaintiff is required to make a statement of the facts constituting his cause of action and a demand for the relief to which he considers himself entitled, and the fact that he states two inconsistent

causes of action cannot be made a ground of objection to the judgment rendered if the question is not raised in proper time and manner. *Chicago & N. W. R. Co. v. DeClow*, 124 Fed. 142.

Mandamus is a law remedy and an action or proceeding in which such remedy is sought is a legal and not an equitable proceeding. *Ford v. Manchester*, 136–213, 113 N. W. 846.

All forms of action having been abolished, the pleader need only make a plain statement of the facts without legal conclusions which entitle him to relief. *Boynton v. Salinger*, 147–537, 126 N. W. 369.

SEC. 3427. Equitable proceedings.

One who desires to recover money paid for land, on the ground of fraud or mistake, may tender a reconveyance and bring action at law. He has no occasion for relief in equity. *Watson v. Bartholomew*, 106–576, 76 N. W. 858.

Not every action for an accounting is cognizable in equity. *Citizens' Bank v. Whinery*, 110–390, 81 N. W. 694.

Where there was an agreement that the case should be tried in equity, but the record disclosed subsequent entries showing waiver of a jury, without reference to such agreement, held that it did not sufficiently appear that the case was transferred to the equity docket. *Ibid.*

An instrument absolute in form may be shown to be a mortgage in an action at law as well as in equity, and fraud of this character relied on does not necessitate the transfer of a law action to the equity docket. *Frick v. Kabaker*, 116–494, 90 N. W. 498.

Although equity has general jurisdiction of the settlement of partnership affairs, yet if in a partnership settlement one partner has withheld from the settlement specific money or property, the other partner may sue for his interest therein at law. *Erret v. Pritchard*, 121–496, 96 N. W. 963.

Parties may be tenants in common of mining property without being partners, and in such case an action by one against the other for profits and proceeds is not necessarily an equitable action. *Doyle v. Burns*, 123–488, 99 N. W. 195.

In an action to recover for different items of indebtedness not forming part of a continuous account, it is not necessary to transfer the case to the equity side of the docket. *Mayo v. Halley*, 124–675, 100 N. W. 529.

The equitable action of interpleader may still be maintained although not expressly authorized by the statute save in actions of replevin. (See code § 3487.) *Hoyt v. Gouge*, 125–603, 101 N. W. 464.

An application for admeasurement of dower may be made in a probate proceeding, and when so made is to be determined at law. *Brandes v. Brandes*, 129–351, 105 N. W. 499.

Parties who have voluntarily come into a court of equity cannot complain that they are deprived of a trial by jury. *Slaughter v. McManigal*, 138–643, 116 N. W. 726.

A court of equity has jurisdiction to foreclose a vendor's lien, and where by amendment to a petition the establishment and foreclosure of such lien is asked, the case may properly be transferred to the equity docket. *State Bank v. Brown*, 142–190, 119 N. W. 81.

Courts of equity have jurisdiction to relieve in cases of fraud and in so far as the law affords relief, such jurisdiction is concurrent. But there is a large field where a party is helpless at law and the jurisdiction of equity may be properly said to be exclusive. *Dickinson v. Stevenson*, 142–567, 120 N. W. 324.

If there is evidence showing a party to be entitled to equitable relief not available to him at law, an order transferring the case from the equity to the law docket will be erroneous and sufficient ground for a reversal. *Ibid.*

Where the relief asked is such that equity only can grant it, plaintiff's action should be dismissed if the facts are not such as to entitle him to such relief, although he might be entitled to relief in a proper action at law. *Hall v. Henninger*, 145–230, 121 N. W. 6.

An action to enjoin the enforcement of a judgment and have it held null and void and to have the levy made thereunder released and the sale of property in pursuance of such levy set aside, is wholly equitable. *Mengel v. Mengel*, 145–737, 120 N. W. 72, 122 N. W. 899.

When equity has once obtained jurisdiction of a controversy, it will determine all questions material or necessary to the accomplishment of full and complete justice between the parties, even though in doing so it may be required to pass upon some matters ordinarily cognizable at law. *Reiger v. Turley*, 151–491, 131 N. W. 866.

Conditions may be attached to the relief granted in equity which could not have been enforced at law as a matter of right. *Ibid.*

It is not error to refuse to transfer to the law docket an action brought in equity to set aside a settlement of indebtedness on the ground of fraud, where the determination of the issues involves an examination of mutual accounts of payments and credits. *Farmers' Sav. Bank v. Aldrich*, 153–144, 133 N. W. 383.

The cancellation of a contract can only be procured in equity. *Weseman v. Graham*, 157– —, 138 N. W. 478.

SEC. 3428. Action on note and mortgage.

A general judgment on a note does not merge the mortgage secured thereby. *Smith v. Moore*, 112–60, 83 N. W. 813.

SEC. 3431. Ordinary proceedings.

This section distinguishes the method of trial in ordinary and in equitable proceedings, but does not necessarily imply a jury trial in special proceedings. *In re Bradley*, 108–476, 79 N. W. 280.

Plaintiff who is entitled to maintain an action at common law should not be required to proceed in equity. *Van Norman v. Modern Brotherhood*, 134–575, 111 N. W. 992.

SEC. 3432. Error—effect of.

Forms of action are not controlling, and one who has brought his adversary into court is entitled to any remedy which the court can afford in any form of action, if the defendant makes no objection to the procedure. *Smith v. Haas*, 132–493, 109 N. W. 1075.

If the case when commenced is well founded and presents an issue properly triable in equity, the court will have jurisdiction, although the equitable ground of relief is removed, and the court will retain the case for final judgment. *Heath v. Halfhill*, 106–131, 76 N. W. 522.

An equity action changed by amendment so as to ask only for the recovery of damages at law may still be tried in equity, in the absence of a motion to transfer it to the proper forum. *Lough v. Estherville*, 122–479, 98 N. W. 308.

Where, after the submission of the case on equitable issues, the plaintiff is allowed to amend his petition so as to convert his action into one at law, the submission should be set aside and the case tried by ordinary proceedings. *Hartwig v. Iles*, 131–501, 109 N. W. 18.

The objection that an action commenced in equity is cognizable only at law cannot be raised by demurrer. *McCormick Har. Mach. Co. v. Markert*, 107–340, 78 N. W. 33; *McClure v. Dee*, 115–546, 88 N. W. 1093.

An objection to the form of proceeding cannot be first raised on appeal. *Des Moines Sav. Bank v. Morgan Jewelry Co.*, 123–432, 99 N. W. 121.

The objection that a proceeding should have been in probate instead of in equity is not jurisdictional. *Easton v. Somerville*, 111–164, 82 N. W. 475.

Where no objection is raised to the form of action in the trial court, and the petition discloses and the evidence tends to establish a right in the plaintiff to claim a recovery of the amount sued for, the appellate court is not justified in denying relief because the remedy was not sought in the proper forum. *Blondel v. Ohlman*, 132–257, 109 N. W. 806.

The plaintiff is not entitled to have his action instituted in equity transferred to the law docket on the filing of an amended petition which asks recovery only at law, if the evidence has already been taken by deposition, and the opposite party would be entitled to a continuance if the action were to be tried at law. *Saunders v. Wells*, 135–11, 112 N. W. 205.

Error as to the kind of proceedings adopted does not render a judgment invalid, no request having been made to have the case transferred to the proper docket. *Niemand v. Seemann*, 136–713, 114 N. W. 48.

If a wrong forum is selected, the proper remedy is a motion to transfer. *In re Estate of Douglas*, 140–603, 117 N. W. 982.

The fact that under the allegations of the petition plaintiff is not entitled to equitable relief, but only to relief at law, is not a proper ground for dismissal of the action. *Mudge v. Livermore*, 148–472, 123 N. W. 199.

If a party desires to take advantage of any error in the form of action as adopted, he must do so by motion to transfer, and failure to do so is a waiver of the objection. *Reiger v. Turley*, 151–491, 131 N. W. 866.

This provision has no application to a case where the plaintiff fails to show any cause of action. *Morton v. Woods*, 154–728, 135 N. W. 400.

These provisions obviate the dismissal of a suit in equity when the equities fail. When the equities fail for want of proof and there is enough in the petition to state a cause of action at law, the cause should be transferred to the law side of the calendar and there tried. *Fisher v. Trumbauer*, 138 N. W. 528, 141 N. W. 419.

SEC. 3434. By defendant.

The fact that defendant in an action at law asks an injunction by way of cross action does not require the transfer to the equity docket of a proceeding by motion to dissolve such injunction. *Brody v. Chittenden*, 106–340, 76 N. W. 740.

The action of the court in improperly overruling a motion to change the forum will be a ground for reversal. But where the issues in an action commenced in equity are such as must be tried by the court without a jury in an action at law, a

refusal to sustain a motion to transfer, even though erroneous, will be error without prejudice. *McCormick Har. Mach. Co. v. Markert*, 107–340, 78 N. W. 33.

The plaintiff cannot, after issue joined, be taken against his will out of a forum in which his action was properly brought, when he has done nothing to disqualify himself from proceeding therein. Therefore held that where the action was properly brought in equity to foreclose an attorney's lien, the defendant could not, after filing his answer, by releasing the lien under the provisions of code § 322, insist on the transfer of the case to the law docket. *Crissman v. McDuff*, 114–83, 86 N. W. 50.

Where the action is properly brought in equity, a defendant has no right to trial by jury of a law issue presented by his answer. *Ibid.*

The fact that a petition in mandamus designates the action as at law does not justify the court in ordering the issues submitted to a jury, although no motion is made for transfer to the equity docket. *Klopp v. Chicago, M. & St. P. R. Co.*, 156–466, 136 N. W. 906.

Where plaintiff's suit has been brought in equity, it may be maintained there in the absence of any motion of the defendant to transfer it to the law docket, and the defendant cannot insist on a counterclaim being heard on the law side of the calendar. If the equities alleged in the petition have been proven and relief is denied on some other ground than want of evidence, then the court may retain the cause and dispose of it on the merits even though this may result in awarding a remedy peculiar to law. *Fisher v. Trumbauer*, 138 N. W. 528, 141 N. W. 419.

Where without objection a cause of action at law is joined with a cause of action in equity, the defendant is bound to submit the case on the issues as tendered, but if the relief asked might be properly granted in the equitable action, the plaintiff is not entitled to relief which could only be granted in an action at law. *Watt v. Robbins*, 142 N. W. 387.

SEC. 3435. Equitable issues.

Where the equitable issues are such as to dispose of the entire controversy, it is not error to proceed with the trial of the action as in equity. *Twogood v. Allee*, 125–59, 99 N. W. 288.

The fact of the pendency in the same court of an action at law involving the same subject matter does not prevent the court in an equitable case from determining issues arising in that case. *Clinton v. Shugart*, 126–179, 101 N. W. 785.

In a law action issues cognizable in equity may be transferred to the equity docket, but the issues at law in such case should not be so transferred. *Johnston v. Robuck*, 104–523, 73 N. W. 1062.

Where the trial of the issues at law will practically settle all matters in controversy, such issues should be first tried. *Ibid.*

That the pleadings in an action at law set out facts which, if true, would entitle plaintiff to equitable relief is immaterial so long as such relief is not demanded. *Boyce v. Allen*, 105–249, 74 N. W. 948.

An issue is not equitable within the meaning of the statutory provision as to changing the forum so long as the relief asked or the defenses interposed are not equitable. *Ibid.*

Where an equitable defense is pleaded to a law action, while that issue may be tried by the court, the right of plaintiff to a jury trial on the case he presents is not affected. *Tufts v. Norris*, 115–250, 88 N. W. 367.

Error in transferring the case to the equity docket when the issues are properly determinable at law will not be a ground for reversal if the judgment rendered is such as must necessarily have been rendered under the evidence had the case been allowed to remain on the law docket. *Rattray v. Talcott*, 124–398, 100 N. W. 36.

[Substitute for the paragraph in the code notes to this section which purports to state the case of *Carey v. Gunnison*, 65–702, the following:

If the defense of mistake, which might be interposed in an action at law, involves facts which might also be made the ground for equitable relief, then such facts may be set up in an equitable answer and the issue arising on such answer will be triable to the court. *Carey v. Gunnison*, 65–702, 22 N. W. 934.]

Although a counterclaim presents equitable issues only, if these are such as are fully disposed of by a trial at law on the issues raised by the petition and answer, it is not error to proceed to trial of the issues at law before a hearing on the equitable issues. *Gibson v. Seney*, 138–383, 116 N. W. 325.

Where the decision of the issues in a law action is determinative of those raised in an equitable counterclaim, the motion to transfer to the equity docket may be properly overruled. *Keller v. Harrison*, 139–383, 116 N. W. 327.

Where the plaintiff in an action of replevin alleges unqualified ownership and the defendant's allegation is in effect a negative of such averment, it is error to transfer the case to the equity docket. *Cole v. Cole*, 139–609, 117 N. W. 988.

It is not proper to join an action against an individual in his own right to an action against him as administrator, and the defendant cannot be deprived, by such improper joinder, of his right to have an action at law tried as an ordinary action. *Faville v. Lloyd*, 140–501, 118 N. W. 871.

Where before issues joined the plaintiff's action has been converted into a mere money demand and the issue made thereon is solely one of fact, there can be no reason for depriving either party of the right to have the issue tried at law. *Jamison v. Ranck*, 140–635, 119 N. W. 76.

Error in transferring a cause involving equitable issues to the law calendar will not work a reversal of the judgment, unless, upon a *de novo* consideration of the issues joined and evidence offered in support thereof, it appears that a different result should have been reached. *Irwin v. Deming*, 142–299, 120 N. W. 645.

An insurance company cannot, by pleading fraud in the procurement of the contract and asking its cancellation, deprive the plaintiff of the right to have his cause of action on the policy submitted to a jury. *Biermann v. Guaranty Mut. Life Ins. Co.*, 142–341, 120 N. W. 963.

Although no motion is made to transfer the case to the equity docket, if the answer asks for equitable relief and the right thereto is challenged by the plaintiff the court may grant relief which would be proper only in equity. *Tuttle v. Bisbee*, 144–53, 120 N. W. 699.

The defense of estoppel does not present an equitable issue. *Security Sav. Bank v. Smith*, 144–203, 122 N. W. 825.

Neither estoppel nor laches constitutes an issue exclusively cognizable in a court of equity. *State Sav. Bank v. Miller*, 146–83, 124 N. W. 873.

Where by agreement a cause of action at law and one in equity are consolidated and tried to the court, the defendant cannot complain, not having moved to transfer the case or any issues therein to the law docket. *Sullivan v. Kenney*, 148–361, 126 N. W. 349.

If an action is improperly brought in equity, the party objecting should move to transfer to the law side of the calendar and failure to do so waives objection to the trial of the case in equity. *Cress v. Ivens*, 155–17, 134 N. W. 869.

Where there is a mutual mistake concerning the number of acres in an exchange of land, the remedy available is either at law or in equity as the injured party may elect. In such case plaintiff is entitled to a hearing in equity on the merits of the case even though he is praying for the reformation of the deed to which he is not entitled. *Fisher v. Trumbauer*, 138 N. W. 528, 141 N. W. 419.

Where an action is properly begun at law, it should not be changed to equity on account of the interposition of equitable defenses, counterclaims or cross-petitions. If equitable issues are so raised by the defendant, he may have such issues heard separately, but he is not entitled to have the case transferred to the equity docket. *Eller v. Newell*, 141 N. W. 52.

SEC. 3437. Errors waived.

Where the objection to an equitable action is as to the forum in which it is brought and not to plaintiff's right to maintain it, the failure to move to transfer to the proper docket will be a waiver, but not where the plaintiff could not maintain his action in equity because he has a plain, adequate and speedy remedy at law. Such objection may be urged even for the first time in the supreme court. *McLachlan v. Gray*, 105–259, 74 N. W. 773.

Defendant in an action in which equitable relief is asked may object to the maintenance of the action on the ground that no such relief can properly be given. He is not required to move for a transfer of the case to the law docket on the theory that it is improperly brought in equity, even though damages in an action at law might be recovered for the wrong done. *Cooper v. Cedar Rapids*, 112–367, 83 N. W. 1050.

Where the relief sought in an action might be awarded either at law or in equity, by failing to ask for a transfer of the action to the equity docket, any error in the proceedings of the case on the law docket is waived. No suit is to be dismissed or abated because of an error in the kind of proceedings. *Matthews v. Luers Drug Co.*, 110–231, 81 N. W. 464.

Where a case is tried without objection in equity, it is properly triable *de novo* on appeal. *Clearfield Bank v. Olin*, 112–476, 84 N. W. 508.

No objection being made in the trial court to the forum in which the action is brought, the objection that it should have been in probate instead of in equity cannot be raised on appeal. *Filkins v. Severn*, 127–738, 104 N. W. 346.

Failure to move for the transfer of a case to the proper docket is a waiver of any error as to the forum. This rule is applicable as to proceedings in a probate court with reference to the interpretation of the validity of a will which should properly have been determined in equity. *Niemand v. Seemann*, 136–713, 114 N. W. 48.

Where no objection is made to the forum in the lower court, such objection cannot be raised on appeal. *Wait v. Mystic Workers*, 140–648, 119 N. W. 72.

A party complaining of the action of the court in transferring a case to the equity docket does not waive his right to rely upon such error by proceeding with the trial of the case as transferred. *State Sav. Bank v. Miller*, 146–83, 124 N. W. 873.

Where the only relief sought in the petition is a money judgment, it is error to overrule a motion to transfer from the equity to the law docket. *Miller v. Hawkeye Gold Dredging Co.*, 156–557, 137 N. W. 507.

SEC. 3438. **Uniformity of procedure.**

This section does not necessarily require a jury trial in special proceedings. *In re Bradley*, 108–476, 79 N. W. 280.

Proceedings in an action of forcible entry and detainer are to be governed by the rules applicable to ordinary actions. *Herkimer v. Keeler*, 109–680, 81 N. W. 178.

SEC. 3439. **Actions on judgments.** No action shall be brought upon any judgment against a defendant therein, rendered in any court of record of this state, within fifteen years after the rendition thereof, without leave of the court, or a judge thereof, for good cause shown, and, if the adverse party is a resident of this state, upon reasonable notice of the application therefor to him; nor on a judgment of a justice of the peace in the state within eight years after the same is rendered, unless the docket of the justice or record of such judgment is lost or destroyed; but the time during which an action on a judgment is prohibited by this section shall not be excluded in computing the statutory period of limitation for an action thereon. The provisions of this section shall apply to all judgments rendered after the taking effect of the code of 1873, and prior to the taking effect of the code of 1897, but the time within which an action may be brought on any judgment rendered during said period, which would otherwise be barred by this amendment, is hereby extended one year after the taking effect hereof. [34 G. A., ch. 158, § 1.] [29 G. A., ch. 137, § 1; C. '73, § 2521.]

Such provision in the code of '73 did not operate to extend the statutory period of limitation on judgments rendered before that code took effect. *Wilson v. Tucker*, 105–55, 74 N. W. 908.

The change in the statute made by the addition of the last clause to this section in the present code is not applicable to judgments rendered more than twenty years before the taking effect of the code. *Cassady v. Grimmelman*, 108–695, 77 N. W. 1067.

The change in this section as adopted in the present code is not applicable to judgments already rendered. *Norris v. Tripp*, 111–115, 82 N. W. 610.

The case of *Weiser v. McDowell*, 93–772, is followed with reference to the judgment of a justice of the peace rendered before the taking effect of the code. *Parks v. Norton*, 114–732, 87 N. W. 698.

Unless an action on a judgment of a justice of the peace rendered prior to the taking effect of the code of '97 is brought within the time limited by that code, it must have been brought within one year after the taking effect of 29 G. A., ch. 137. *Haugen v. Oldford*, 129–156, 105 N. W. 393.

The time during which an action may be maintained on a judgment is now limited to the five years intervening between the expiration of the fifteen years from the rendition and the twenty years therefrom when the same is barred, and this change in the statute which reduces the period of limitation as to actions on judgments is not unconstitutional as applied to judgments rendered before the amended statute took effect, as a reasonable time for bringing action on such judgments is preserved. *Wooster v. Bateman*, 126–552, 102 N. W. 521.

The twenty-year limitation is applicable to judgments of justices of the peace rendered prior to the taking effect of this section, if the judgment creditor has had one year after the taking effect of the act of 29 G. A., ch. 137, within which to maintain an action on the judgment. *Miller v. Rosebrook*, 136–158, 113 N. W. 771.

SEC. 3439-a. **Acts in conflict repealed.** All acts and parts of acts inconsistent with this act are hereby repealed. [29 G. A., ch. 137, § 2.]

SEC. 3440. **Judgments not annulled in equity.**

A court of equity cannot modify a judgment rendered in an action by ordinary proceedings. *Hornish v. Ringen Stove Co.*, 116–1, 89 N. W. 95.

This section was evidently intended to apply only to parties or privies to the judgment and not to strangers. *Stewart Lumber Co. v. Downs*, 142–420, 120 N. W. 1067.

A defendant should not be allowed in equity to attack a judgment on account of a defense to the cause of action which might have been interposed in the action in which the judgment was recovered. *Ulber v. Dunn*, 143–260, 119 N. W. 269.

As to injunction to restrain the enforcement of a judgment on the ground of fraud, see code § 4364.

SEC. 3441. Discovery.

Statutory provisions for requiring answers under oath from the opposite party are a substitute for the equitable action for discovery. *Beem v. Farrell*, 135–670, 113 N. W. 509.

SEC. 3443. Actions survive.

This section does not create a new cause of action for an injury causing death, but only provides that the cause of action of the party who dies shall pass to the administrator as assets of the estate. *Sachs v. Sioux City*, 109–224, 80 N. W. 336.

An action for an injury causing death may be brought by the administrator of the deceased without regard to whether the person entitled to the estate of the deceased is a nonresident alien. *Romano v. Capital City Brick & Pipe Co.*, 125–591, 101 N. W. 437; *Rietveld v. Wabash R. Co.*, 129–249, 105 N. W. 515.

The right of action for an injury causing death accrues to the estate, and the wife cannot maintain in her own name an action for damages sustained by her by reason of injuries resulting in the death of her husband. *Major v. Burlington, C. R. & N. R. Co.*, 115–309, 88 N. W. 815.

The surviving husband has no right of action against one whose negligence or wrong has resulted in the instant death of the wife. *Seney v. Chicago, M. & St. P. R. Co.*, 125–290, 101 N. W. 76.

To support a recovery in an action for injuries causing death it must be shown that the death was caused by the wrongful act of the defendant. *Pearson v. Wilcox*, 109–123, 80 N. W. 228.

In an action instituted by the administrator in behalf of the estate to recover damages for injuries to the deceased causing his death, there can be no recovery on account of pain suffered during the interval between the injury and the death. *Jacobs v. Glucose Sugar Refining Co.*, 140 Fed. 766.

The right of a vendee under a contract to convey survives to his representatives. *Cone v. Cone*, 118–458, 92 N. W. 665.

The assignment of choses in action is authorized by this section, and in an action by the assignee thereof the debtor can only interpose such defenses as existed in his favor and against the assignor before notice of the assignment. See code § 3461. *Peterson v. Ball*, 121–544, 97 N. W. 79.

But it is doubted whether wages to be earned under a contract to labor for an indefinite period at a specified rate of wages is assignable as to wages to be earned in the future, so as to render the employer liable to the assignee for wages so earned. *Ibid.*

The right of action for damages for breach of contract survives to the executor, and the action therefor may be maintained by him. *Iowa-Minnesota Land Co. v. Conner*, 136–674, 112 N. W. 820.

The legal representative of a deceased litigant may proceed under the provisions of code § 4091 to have a judgment or decree set aside on the ground of fraud. *Wood v. Wood*, 136–128, 113 N. W. 492.

Where an action has been commenced in this state to recover damages for personal injuries received in another state, such action being continued after the death of the plaintiff, is governed by the law of this state and not by the law of the state where the action accrued. *Gordon v. Chicago, R. I. & P. R. Co.*, 154–449, 134 N. W. 1057.

The administrator of one for whose death recovery is sought on the ground of negligence may, in separate counts, allege a cause of action under the state statutes and under the federal employers' liability act, and cannot be required to elect as between the two causes of action. *Bankson v. Illinois Cent. R. Co.*, (D. C.) 196 Fed. 171.

SEC. 3445. Actions by or against legal representatives—substitution.

Where on the death of plaintiff his administrator was ordered to be substituted, but the case proceeded to judgment in the name of the original plaintiff without such substitution being made, held that afterwards by a *nunc pro tunc* entry the court could cure the defect and validate proceedings under such judgment. *Hunt v. Johnston*, 105–311, 75 N. W. 103.

In a contest over the probate of a will relating to personal property, the administrator or executor of a contestant should be substituted on his death. Such contest cannot be carried on in the interest of the deceased by his widow and heirs. *In re Will of Wiltsey*, 122–423, 98 N. W. 294.

The sum recovered by the personal representatives of one who has through the negligence of another received injuries causing his death will be distributed according to the law of the state where the injury causing death was inflicted. *In re Estate of Coe*, 130–307, 106 N. W. 743.

Under the statutes of this state, the suit for an injury causing death is prosecuted in the name of the administrator and anything recovered is distributed as personal property among the heirs. Such action may be maintained to recover the damages provided for under the federal employers' liability act, although the method of distribution and the rules of procedure

provided for by that act are different from those provided for in this state. *Bradbury v. Chicago, R. I. & P. R. Co.*, 149–51, 128 N. W. 1.

If a court errs in allowing the substitution of the legal representative rather than the successor in interest of a party to the suit, such error will not deprive the court of jurisdiction, and if objection on that ground is not made in the lower court it cannot be raised on appeal. *Oziah v. Howard*, 149–199, 128 N. W. 364.

Where an action had been commenced, although notice had not yet been served prior to the death of the defendant, and his legal representatives appeared and defended in the action without objection, held that the court was not without jurisdiction. *Campbell v. Collins*, 152–608, 132 N. W. 381.

A foreign administrator suing for injuries causing death where the cause of action arose in another state and such administrator is, under the statutes of the state of his appointment, trustee for the widow and children, may maintain an action in this state without complying with the statutory provision for appointment in this state. *Knight v. Moline, E. M. & W. R. Co.*, 140 N. W. 839.

These provisions as applying to actions for injuries which have resulted in death do not create a new cause of action but abrogate the common-law rule by which an existing cause of action is terminated by the death of a party entitled to recover. *Flynn v. Chicago, G. W. R. Co.*, 141 N. W. 401.

Where the decedent survives the injury though but for a short time, the cause of action accrues to him, but it is also deemed to have accrued to the personal representative at the same time. *Ibid.*

Under the employers' liability act passed by Congress, the cause of action is based, not upon the injury to the deceased, but upon the fact of his death by defendant's wrongful act. The extent of damages in such case is to be measured by the pecuniary loss sustained by particular beneficiaries rather than by the loss to the estate of the decedent as such. In this respect it differs from the law of this state by which the cause of action is presumed to have arisen to the deceased in his lifetime and survived after his death to his administrator. *McCullough v. Chicago, R. I. & P. R. Co.*, 142 N. W. 67.

The courts of this state have jurisdiction to entertain an action arising under the federal statute. *Ibid.*

Under the federal employers' liability act no action can be maintained for the benefit of relatives other than those specified. The right of action conferred is independent of the right of action which the deceased would have had if he had survived. *Thomas v. Chicago & N. W. & R. Co.*, (D. C.) 202 Fed. 766.

Section applied. *Edmunds v. Illinois Cent. R. Co.*, 80 Fed. 78; *Y-Ta-Tah-Wah v. Rebock*, 105 Fed. 257.

SEC. 3446. Construction of code provisions.

A statute in derogation of the common law must be liberally construed with a view to promote its objects and assist the parties in obtaining justice. *Van Horn v. Van Horn*, 107–247, 77 N. W. 846.

Statutory provisions as to grounds for a new trial do not necessarily include the power of the court to grant new trials, such as has been generally exercised under the common-law system. *Tathwell v. Cedar Rapids*, 122–50, 97 N. W. 96.

This provision held applicable to the statutory provision with reference to adoption. *Sires v. Melvin*, 135–460, 113 N. W. 106.

The provisions of this section do not exclude the application of the ordinary rule of *ejusdem generis* in the construction of statutes. *Brown v. Bell Co.*, 146–89, 123 N. W. 231, 124 N. W. 901.

A provision as to filing a petition in an appeal in a drainage ditch proceeding, held to be remedial in its nature and subject to liberal construction. *Elwood v. Board of Supervisors*, 156–407, 136 N. W. 709.

This section announces the well-established rule that the legislative language of a statutory provision must be liberally construed with a view to promoting the beneficent purpose of the enactment. So held as to the homestead statutes. *Swisher v. Swisher*, 157–55, 137 N. W. 1076.

The purpose of this section is only to negative the rule of the common law that statutes in derogation thereof are to be strictly construed, and not to change the rule of construction to be applied in determining the extent of a statutory exception to a general statutory provision. *Baker v. Clowser*, 138 N. W. 837.

The common-law rule that a statute conferring a right in derogation of the common law must be given a strict construction is abrogated by this provision in the interest of justice and fairness. *Chiesa v. Des Moines*, 138 N. W. 922.

CHAPTER 2.

OF LIMITATION OF ACTIONS.

SECTION **3447. Period of.** Actions may be brought within the times herein limited, respectively, after their causes accrue, and not afterwards, except when otherwise specially declared:

1. *In actions for injuries from defects in roads or streets—notice.* Those founded on injury to the person on account of defective roads, bridges, streets or sidewalks, within three months, unless written notice specifying the time, place and circumstances of the injury shall have been served upon the county or municipal corporation to be charged within sixty days from the happening of the injury;

2. *Penalties or forfeitures under ordinance.* Those to enforce the payment of a penalty or forfeiture under an ordinance, within one year;

3. *Injuries to person or reputation—relative rights—statute penalty—setting aside will.* Those founded on injuries to the person or reputation, including injuries to relative rights, whether based on contract or tort, or for a statute penalty, within two years; and those brought to set aside a will, within five years from the time the same is filed in the clerk's office for probate and notice thereof is given; provided that after a will is probated the executor may cause personal service of an original notice to be made on any person interested, which shall contain the name of decedent, the date of his death, the court in which and the date on which the will was probated, together with a copy of said will; said notice shall be served in the same manner as original notices and no action shall be instituted by any person so served after one year from date of service;

4. *Mechanic's lien.* Those to enforce a mechanic's lien, within two years from the expiration of the thirty or ninety days, as the case may be, for filing the claim as provided in the law relative to mechanics' liens;

5. *Against sheriff or other public officer.* Those against a sheriff or other public officer, growing out of a liability incurred by the doing of an act in an official capacity or by the omission of an official duty, including the nonpayment of money collected on execution, within three years;

6. *Unwritten contracts—injuries to property—fraud—other actions.* Those founded on unwritten contracts, those brought for injuries to property, or for relief on the ground of fraud in cases heretofore solely cognizable in a court of chancery, and all other actions not otherwise provided for in this respect, within five years;

7. *Written contracts—judgments of courts not of record—recovery of real property.* Those founded on written contracts, or on judgments of any courts except those provided for in the next subdivision, and those brought for the recovery of real property, within ten years;

8. *Judgments of courts of record.* Those founded on a judgment of a court of record, whether of this or of any other of the United States, or of the federal courts of the United States, within twenty years;

9. *Recovery of certain real estate.* That in all cases where any deed of trust or declaration of trust has been executed and the real estate affected thereby has been conveyed by the trustee or the surviving spouse or heirs of said trustee and such conveyance was duly recorded in the proper county prior to January first, eighteen hundred ninety, and the interest of the *cestui que trust* thereunder has not been by such *cestui que trust* conveyed, or established by proper proceedings in court, no action, suit or proceeding shall be commenced or maintained to foreclose the same,

or to establish or recover the interest of the *cestui que trust* therein, or of the surviving spouse or heirs of the *cestui que trust*, unless such action, suit or proceeding be commenced by filing petition and service of notice not later than the first day of March, A. D. nineteen hundred fourteen. [35 G. A., ch. 282, § 1; 35 G. A., ch. 281, § 1.] [26 G. A., ch. 63; 22 G. A., ch. 25; C. '73, §§ 486, 2529; R. §§ 1075, 1865, 2740; C. '51, § 1659.]

1. **In general—effect:** The defense of the statute of limitations is not a dishonorable one and it is not libelous to charge a debtor with having escaped the payment of his just debts by interposing such a defense. *Hollenbeck v. Hall*, 103–214, 72 N. W. 518.

The bar of the statute does not destroy the cause of action but merely bars the remedy after the time limited. *German American Sav. Bank v. Hanna*, 124–374, 100 N. W. 57.

A statute of limitations is a statute of repose. It takes away the right to maintain an action, but does not pay or cancel the obligation of the debt. Although the action thereon is barred the indebtedness may afford sufficient consideration for a new promise to pay. *Spilde v. Johnson*, 132–484, 109 N. W. 1023.

In equity: Equity will apply its rules as to the effect of delay and laches in analogy to the statute of limitations. *Adams v. Holden*, 111–54, 82 N. W. 468.

The statute of limitations is applicable to actions in equity as well as to actions at law. *Sioux City & St. P. R. Co. v. O'Brien County*, 118–582, 92 N. W. 857.

In an action at law, mere delay or acquiescence will not bar the action unless prolonged for the statutory period, save where there is presented the element of an estoppel, but in equity, laches or acquiescence may bar recovery although the delay has not been for such a length of time as that the action would be barred by the ordinary statute of limitations. *Doyle v. Burns*, 123–488, 99 N. W. 195.

While a court of equity recognizes as binding upon it the provisions of the statute of limitations, it also possesses the equitable power of disregarding stale claims, even though they may not have been technically barred by the statute. *Gray v. Bloom*, 151–566, 132 N. W. 42.

Change of statute: While the new limit may constitutionally be made applicable to causes of action already existing, provided a reasonable time is allowed after the statute takes effect in which the action may be brought, yet the general rule of construction is that such a statute will be given a retrospective effect only where it appears that such was the intention of the legislature. *Waples v. Dubuque*, 116–167, 89 N. W. 194.

The period of limitation may be changed by the legislature at pleasure with reference to causes of action already existing, provided that, if they are shortened, the bar is not immediate, and a reasonable time remains in which to sue, but contract limitations such as those which are usually inserted in policies of fire insurance cannot be impaired by subsequent legislation. *Farmers' Co-op. Creamery Co. v. Iowa State Ins. Co.*, 112–608, 84 N. W. 904.

While it is true that the statute of limitations relates only to the remedy and may be changed from time to time without impairing the obligation of contracts, yet the legislature has no power to cut off the remedy or bar a suit upon an existing cause of action instanter. A reasonable time must be given within which to prosecute an existing cause of action under the new statute. Therefore, held that the last clause of code § 3439 before its amendment by 29 G. A., ch. 137, was not applicable to judgments rendered more than twenty years before the code took effect, and as to which, under the section as it previously stood, and as construed in *Weiser v. McDowell*, 93–772, there was still a right to bring suit. *Cassady v. Grimmelman*, 108–695, 77 N. W. 1067.

The reduction of the period of limitation as to an existing contract or judgment is not an impairment of the obligation of contracts if a reasonable time is preserved during which an action may be maintained, and in determining the reasonableness of time preserved the period elapsing between the enactment of the statute and its taking effect may be considered. *Wooster v. Bateman*, 126–552, 102 N. W. 521.

It is not competent for the legislature by a statute of limitations to take away all remedies existing upon causes of action. *Norris v. Tripp*, 111–115, 82 N. W. 610.

A change in a statute, by which a remedy not previously available is given, initiates the period of limitation for such action. *Rice v. Crozier*, 139–629, 117 N. W. 984.

Must be pleaded: The plea of the statute of limitations can be raised only by answer, where the allegations of the petition show that the claim is not barred. *Goring v. Fitzgerald*, 105–507, 75 N. W. 358.

The statute of limitations cannot be relied upon under an answer interposing only a general denial. *Belken v. Iowa Falls*, 122–430, 98 N. W. 296.

Where the bar of the statute is not raised by demurrer, nor otherwise, it will be regarded as waived. *In re Estate of McMurray*, 107–648, 78 N. W. 691.

The court should not submit the statute of limitations to the jury as a defense unless it is pleaded, and a judgment for de-

fendant founded on a verdict returned on that ground will be set aside, even though facts on which such plea might have been founded appear in the record. The statute is deemed waived if not pleaded. *McDonald v. Bice*, 113–44, 84 N. W. 985.

The bar of the statute of limitations must be specially pleaded and cannot be raised by motion to direct a verdict. *Borghart v. Cedar Rapids*, 126–313, 101 N. W. 1120.

Under the pleadings in a particular case, held that the question whether plaintiff's action was barred was sufficiently raised by the pleadings. *Gray v. Bloom*, 151–566, 132 N. W. 42.

One who would rely upon the statute of limitations must specially plead it. Although the defense might under the allegations of the petition be raised by demurrer, yet by an allegation in the nature of a conclusion of law it may be set up in the answer. *Central Trust Co. v. Chicago, R. I. & P. R. Co.*, 156–104, 135 N. W. 721.

Who may plead: A grantee who takes subject to a mortgage already barred cannot rely on the statute of limitations as against a subsequent revival by the mortgagor. *Doran v. Doran*, 145–122, 123 N. W. 996.

The grantee of mortgaged property under a conveyance excepting the mortgage from the covenants of warranty stands in such privity to the mortgagor that as against an action to foreclose the mortgage brought against him alone he may plead the bar of the statute of limitations. *Fitzgerald v. Flanagan*, 155–217, 135 N. W. 738.

Amendment after period of limitation: Where the original petition states a complete cause of action and the amendment states another, the two causes of action being so distinct that either could be established without reference to the facts alleged in the other, the two causes of action are distinct, and the one stated in the amendment will be barred if the time for suing thereon has elapsed when the amendment is filed, although the action was commenced before the bar had become complete. *Box v. Chicago, R. I. & P. R. Co.*, 107–660, 78 N. W. 694; *Taylor v. Taylor*, 110–207, 81 N. W. 472.

But an amendment to conform the pleadings to the facts may properly be made to save the cause of action which it was attempted to plead in the first instance. *Taylor v. Taylor*, 110–207, 81 N. W. 472.

Where a substituted petition sets up a cause of action of the same nature, but not founded on the same facts, the cause of action is not to be deemed the same, and if the substituted petition is not filed within the statutory period, the cause of action therein pleaded is to be deemed barred. *Brooks v. Seevers*, 112–480, 84 N. W. 517.

A party cannot by amendment to his pleading set up a new cause of action which is barred at the time the amendment is filed, although it would not have been barred if set up in his original pleading. *Van Patten v. Waugh*, 122–302, 98 N. W. 119.

Therefore held that where a surety who had paid a note filed a claim against the estate of the principal on the note itself, and subsequently, after his cause of action as surety against his principal was barred, amended his claim so as to show the facts, his claim as thus amended could not be maintained. *Ibid.*

In an action brought to charge defendant as a member of a firm on an account, an amendment to the petition charging him individually on such account does not state a new action in such sense that it cannot be made after the period of limitation has run. *Padden v. Clark*, 124–94, 99 N. W. 152.

An amendment filed after the expiration of the statutory period of limitation may be considered if it does not set up a new cause of action, but only amplifies the grounds of specifications germane to the cause of action as originally pleaded. *Gordon v. Chicago, R. I. & P. R. Co.*, 129–747, 106 N. W. 177.

After the expiration of the statutory period of limitation an essential allegation may be added to plaintiff's petition by amendment, if the facts alleged in the petition are sufficient, without such amendment, to constitute a breach of duty, entitling plaintiff to relief. *Cahill v. Ill. Cent. R. Co.*, 137–577, 115 N. W. 216.

After the lapse of the statutory period for bringing action, an amendment may be allowed, the purpose of which is to avoid the effect of the statute of limitations. *Wise v. Outtrim*, 139–192, 117 N. W. 264.

The pleading of the statute of limitations is an affirmative defense and cannot be first interposed by amendment after verdict. *Knight v. Moline, E. M. & W. R. Co.*, 140 N. W. 839.

After the expiration of the statutory period for bringing an action, an amendment may be permitted in an action brought within the statutory period which does no more than state the details of the alleged cause of action. *Russell v. Chicago, R. I. & P. R. Co.*, 141 N. W. 1077.

In case of disability: After the statute of limitations once commences to run it is not tolled by the subsequent disability of him in whose favor the cause of action exists. *Black v. Ross*, 110–112, 81 N. W. 229.

Therefore held that insanity of a debtor, after a cause of action against him had accrued, would not extend the statute of limitations. The provisions of code § 3453 with reference to limitation of actions against an insane person apply only to causes of action accruing during disability. *Ibid.*

When the statutory period has commenced to run against a cause of action

it will not be suspended on account of the subsequent death or insanity of the person to whom the right of action has accrued. *Roelefsen v. Pella*, 121–153, 96 N. W. 738.

In case of death: The running of the statute of limitations is not interrupted by the death of the creditor. In general the statute may not be suspended after it has commenced to run. At any rate, mere denial of liability will not have the effect of suspending the running of the statute. *Mereness v. First Nat. Bank*, 112–11, 83 N. W. 711.

The running of the statute of limitations is not affected by the death of the debtor. *Widner v. Wilcox*, 131–223, 108 N. W. 238.

Although there is no statutory provision that the death of the debtor shall toll the statute of limitations, the inability of the creditor to enforce his claim after the debtor's death until in the regular course of administration an executor or administrator has been appointed before whom the claim may be filed, will prevent the bar of the statute accruing during such interval. *Alice E. Mining Co. v. Blanden*, 136 Fed. 252.

The death of the debtor does not stop the running of the statute of limitations. *In re Oldfield's Estate, Bowie v. Trowbridge*, 157– —, 138 N. W. 846.

Actions by married women: The statutory provisions as to limitation of actions contain no exceptions in behalf of married women in regard to actions against their husbands. *In re Estate of Deaner*, 126–701, 102 N. W. 825.

Estoppel: Where a person holding a cause of action is assured by the person against whom the claim exists that the statutory limitation will not be interposed, pending negotiations for settlement, with the intention that the former shall rely on such assurance, and he does so, the person against whom the claim exists cannot in a subsequent suit on such claim interpose the bar of the statute which has accrued during the time when the person holding the claim was reasonably relying on the assurance of the other party that no such claim would be made. *Holman v. Omaha & C. B. R. & B. Co.*, 117–268, 90 N. W. 833.

A defendant who by his own acts or conduct leads the plaintiff to delay the commencement of suit, though there be no express waiver of the limitation, is estopped from availing himself of the provisions of the statute by way of defense. *Goodwin v. Merchants' & Bankers' Mut. Ins. Co.*, 118–601, 92 N. W. 894.

The fact that a claimant is persuaded on grounds relating to his own interest to forbear bringing suit until the expiration of the statute of limitations does not estop the defendant from insisting on the bar of the statute. *McKay v. McCarthy*, 146–546, 123 N. W. 755, 125 N. W. 207.

Application of payments: In applying the statute of limitations to successive items of indebtedness, payments are to be credited, in the absence of any special direction or application, in the order in which the items accrue. *Marion Water Co. v. Marion*, 121–306, 96 N. W. 883.

When commences to run in general: Where the petition does not state the exact time of the breach, but is based upon a promise which is continuing, a demurrer that the cause of action is barred will not lie. *Rime v. Rater*, 108–61, 78 N. W. 835.

The limitation of action against an indebtedness to be paid in the future does not commence to run until the obligation to make payment arises. *Harrison v. Harrison*, 124–525, 100 N. W. 344.

As against an adverse title arising during coverture, the wife's right of action does not accrue until her dower interest becomes vested by the death of her husband. *Wallace v. Wallace*, 137–169, 114 N. W. 913.

In cases of fraud: The action by a creditor to subject property fraudulently conveyed by his debtor to the payment of his claim accrues when he has notice of the fraud, and he must bring his action within the statutory period from that time. *Stubblefield v. Gadd*, 112–681, 84 N. W. 917.

Proceedings to subject property to the satisfaction of a judgment must be brought within five years. *Applegate v. Applegate*, 107–312, 78 N. W. 34.

So long as the owner is nonresident the action will not become barred. *Ibid.*

An action based on fraud is barred in five years unless the running of the statute has been prevented by the fraud not being known to or ascertainable by the injured party. *Shircliffe v. Casebeer*, 122–618, 98 N. W. 486.

In cases of trust: The statute of limitations does not begin to run in favor of a person holding property in trust until he has actually repudiated the trust. *Zunkel v. Colson*, 109–695, 81 N. W. 175.

The statute of limitations does not begin to run against a trust until there has been some denial or repudiation of it by the trustee. *Smith v. Smith*, 132–700, 109 N. W. 194.

A cause of action to recover a fund alleged to be held in trust for the plaintiff does not accrue until demand has been made or the trust repudiated. *Widner v. Wilcox*, 131–223, 108 N. W. 238.

Where a grantee in a conveyance which is in fact a mortgage receives full payment of the debt, he thereupon becomes a trustee and cannot plead the statute of limitations for the purpose of securing or holding title, unless he has done some act indicating the disaffirmance of the trust. *Adams v. Holden*, 111–54, 82 N. W. 468.

The statute does not begin to run as against an action to establish a trust in real property until the right of the party insisting on the establishment of the trust has completely accrued. *Percival-Porter Co. v. Oaks*, 130–212, 106 N. W. 626.

The rule that the statute commences to run against an action for fraud from the time of the commission of such fraud does not apply to a case where the grantee takes title to property charged with a constructive trust. In such a case the statute only commences to run from the disavowal of the trust. *Newis v. Topfer*, 121–433, 96 N. W. 905.

The statute of limitations does not run against a trust until there has been some denial or repudiation by the trustee. *Carr v. Craig*, 138–526, 116 N. W. 720.

So long as the trust subsists the statute of limitations cannot be invoked as a bar to a suit for its enforcement by the *cestui que trust*. But after the denial of the right of the *cestui* by the trustee, so that his possession may be said to have become adverse to any claim thereunder, lapse of time may be interposed by way of plea in bar. *Blackett v. Ziegler*, 147–167, 125 N. W. 874.

As the trust continues to exist as against a purchaser from the trustee with knowledge of the trust, the statute of limitations as against the *cestui* does not begin to run on account of such transfer. Therefore held that the statute would not commence to run as against a remainderman on account of transfer of the property by the life tenant. *Ibid.*

Continuing actions—nuisance: Where an obstruction, placed by a city or town in its streets, is not of a character necessarily permanent, and is without authority, such obstruction is to be considered not a permanent but a continuing nuisance with reference to a property owner injured thereby. *Pettit v. Grand Junction*, 119–352, 93 N. W. 381.

The repeated obstruction of a street by unlawfully allowing trains to stand thereon is a continuing nuisance on the part of the railroad company, and the statute of limitations does not bar an action to restrain its continuance. *Gilcrest Co. v. Des Moines*, 128–49, 102 N. W. 831.

The act of the owner of a dominant estate in so draining his land as to cast surface water upon the servient estate otherwise than in the course of nature, constitutes a continuing nuisance, and not a permanent nuisance, and although the injury has continued for more than five years, there may be a recovery for the damage suffered within the five-year limitation. *Jones v. Stover*, 131–119, 108 N. W. 112.

A tile drain constructed by a landowner discharging water on the premises of an adjoining landowner without right, is a continuing and not a permanent nuisance, and action therefor is not barred within the statutory period after the construction of the drain. *Costello v. Pomeroy*, 120–213, 94 N. W. 490.

A ditch through which there is no permanent or constant flow of water and which naturally tends to fill up and disappear is not such a permanent structure that all the recoverable damages resulting from conducting water through it upon the lands of an adjoining owner accrue at the date of construction. *Geneser v. Healy*, 124–310, 100 N. W. 66.

The fouling of a stream by sewage constitutes a continuing nuisance, and a person injured thereby may recover for damage suffered within the five years preceding the bringing of the action. *Vogt v. Grinnell*, 133–363, 110 N. W. 603.

A nuisance created by a city by polluting a neighboring stream with sewage, such stream not being the stream into which the sewer directly empties, is a continuing and not a permanent nuisance, and right of action for continuance of the nuisance may be maintained without regard to the time when the nuisance was commenced. *Bennett v. Marion*, 119–473, 93 N. W. 558.

The wrongful discharge of sewage upon the land of a private owner is not a permanent but only a continuing nuisance and an action may be maintained for damages resulting within five years although the sewers through which the wrong is effected have been in existence more than five years. *Vogt v. Grinnell*, 123–332, 98 N. W. 782.

In case of partnership: The statute of limitations as to an action by one partner against another for a share of the profits of their partnership does not commence to run until the termination of the partnership relation. *Petty v. Haas*, 122–257, 98 N. W. 104.

Under a contract for winding up the business of a partnership in which it is agreed that each member is to be liable to the other for such assets of the firm as he may reduce to possession, the statute of limitation does not commence to run from the time of the making of the contract, but rather from the time liability thereunder accrues. *Varnum v. Winslow*, 106–287, 76 N. W. 708.

Contract to pay after death: Where an indebtedness is made payable out of a person's estate, the statute does not begin to run until the death of the obligor. *Bennett v. Lutz*, 119–215, 93 N. W. 288.

Breach of covenant: The statute of limitations does not commence to run against a cause of action for substantial damages for breach of covenant of warranty until such damages are actually sustained. *Foshay v. Shafer*, 116–302, 89 N. W. 1106.

The right of action for substantial damages under a covenant against incum-

brances does not accrue until the covenant has been broken by the enforcement of the lien which constitutes the incumbrance. *McClure v. Dee*, 115–546, 88 N. W. 1093.

On contingent liability: Where an action is based upon a contract, the maturity of which depends upon the happening of a contingency, the cause of action accrues only when the contingency happens. *Grouse v. Moody*, 130–320, 106 N. W. 757.

Extension of time: No cause of action accrues until the expiration of any valid extension that may be given on a note. *Iowa Loan & Trust Co. v. McMurray*, 129–65, 105 N. W. 361.

Postponing demand: A ward has a right to an accounting upon reaching his majority, and cannot, by postponing the demand therefor, extend the period of limitation. *Ackerman v. Hilpert*, 108–247, 79 N. W. 90.

The running of the statute cannot be postponed by failure to make demand. *Bonbright v. Bonbright*, 123–305, 98 N. W. 784.

A party cannot toll the statute of limitations by delay in making his demand, when demand is a condition precedent to the right of action. *Collman v. Equitable Life Assur. Soc.*, 133–177, 110 N. W. 444.

The period of limitation against an action on a certificate of deposit does not commence to run until demand, and such demand need not be made within the statutory period of limitation. (Overruling *Mereness v. First National Bank*, 112–11.) *Elliott v. Capital City State Bank*, 128–275, 103 N. W. 777.

Concealment: If the facts which a recorded deed shows, with other facts known, are of a character to suggest fraud, persons interested must be charged with the knowledge which inquiry made with reasonable diligence would disclose. *Clark v. Van Loon*, 108–250, 79 N. W. 88.

The mere deception practiced by the debtor in denying liability will not constitute such concealment as to prevent the running of the statute of limitations. *Mereness v. First Nat. Bank*, 112–11, 83 N. W. 711.

The statute does not begin to run where the cause of action is fraudulently concealed until the facts are discovered or might have been discovered by the exercise of diligence. *Cole v. Charles City Nat. Bank*, 114–632, 87 N. W. 671.

In cases where concealment and ignorance of facts are relied upon to suspend the running of the statute there must have been such concealment as would prevent a person exercising due diligence from discovering the facts. *Murray v. Chicago & N. W. R. Co.*, 92 Fed. 868.

Fraudulent concealment of a cause of action prevents the running of the statute of limitations. *Faust v. Hosford*, 119–97, 93 N. W. 58.

Where persons stand in reference to each other as principal and agent, and the agent commits an actual fraud upon the principal, mere silence upon his part amounts to a fraudulent concealment. The burden in such cases is on the defendant to show plaintiff's knowledge of the fraud. *Ibid.*

Limitation in particular cases:

Par. 1. **For injuries from defects in roads or streets—notice:** The provision for notice is applicable in a case where the injured party has survived more than three months after the injury, and action in behalf of his estate is subsequently brought for the same injury by his administrator. *Sachs v. Sioux City*, 109–224, 80 N. W. 336.

This provision is applicable where the injury originated in the neglect of the municipality to properly construct or maintain a bridge; for a bridge is properly a part of the street. *Ibid.*

The object of the statute as to notice is to appraise the city authorities of the location of the defect and the circumstance attending the accident with such reasonable certainty as shall enable them not only to investigate the city's liability while the facts are fresh, but also to ascertain what evidence there may be of conditions then existing, and of the character of the injury while witnesses are at hand. A notice by plaintiff's attorney to defendant demanding a settlement of his claim, not containing any statement of the place or circumstances of the injury, is not sufficient. *Giles v. Shenandoah*, 111–83, 82 N. W. 466.

Where an action was brought within ninety days on a claim against the city for defective sidewalk and the original notice specified the time, place and circumstances of the injury, held that this was sufficient notice to entitle the plaintiff to recover in another action brought after the expiration of six months. *Pardey v. Mechanicsville*, 112–68, 83 N. W. 828.

Reasonable certainty as to the place is all that is required in the notice. *Rusch v. Dubuque*, 116–402, 90 N. W. 80.

Notice of the accident, giving time, place and circumstances in reasonably specific terms, is sufficient. *Perry v. Clarke County*, 120–96, 94 N. W. 454.

While the circumstances of the injury are to be stated in the notice, the statute does not require the causes which produced the injury to be enumerated. *McCartney v. Washington*, 124–382, 100 N. W. 80.

Recovery by the claimant at least to the extent of the damage specified in the notice of claim is not defeated by asking in the petition to recover more than the amount claimed. *Van Camp v. Keokuk*, 130–716, 107 N. W. 933.

The fact that the notice includes more than is necessary under the statute and

alleges more than one defect, does not render it insufficient. *Bauer v. Dubuque*, 122–500, 98 N. W. 355.

Where the primary proof of notice to the city is shown to have been lost, secondary evidence is admissible. *Considine v. Dubuque*, 126–283, 102 N. W. 102.

Notice of claim against a city for personal injuries may be served by taking acknowledgment of service upon the mayor and city solicitor. *McCartney v. Washington*, 124–382, 100 N. W. 80.

This provision is not applicable to cities under special charter, but a similar provision expressly applicable to such cities is found in code § 1051. *Kenyon v. Cedar Rapids*, 124–195, 99 N. W. 692.

Code § 1051, containing provisions similar to those of this paragraph, held applicable only to cities under special charter. *Harvey v. Clarinda*, 111–528, 82 N. W. 994.

The provisions of code § 1050 as to the limitation of claims for unliquidated damages against special charter cities, held not applicable to claims existing at the time the code took effect. *Thoeni v. Dubuque*, 115–482, 88 N. W. 967.

Under code § 1051, relating specifically to cities under special charter and containing provisions similar to those found herein, it is sufficient if the notice states the nature and cause of the injury and the defect or negligence complained of. No amendment to the notice is provided for and the statute should have a liberal construction to the end that parties having meritorious claims shall not be cut off by mere technicality as to the form of notice required. *Schnee v. Dubuque*, 122–459, 98 N. W. 298.

A notice which in fact points out the place of the accident with such definiteness as to reasonably enable the officers of the city to investigate the conditions under which it is said to have happened sufficiently complies with the purpose of the statute. The statutory requirement of notice should be liberally construed to the end that parties having meritorious claims shall not be cut off by a technicality as to the form of notice required. *Buchmeier v. Davenport*, 138–623, 116 N. W. 695.

The notice is not jurisdictional and is sufficient if it has actually accomplished the purpose intended, although it is not signed. *Neeley v. Mapleton*, 139–582, 117 N. W. 981.

A notice stating that an injury referred to therein was sustained by reason of a fall on a defective sidewalk, specifying the time and place of the accident, held sufficient. *Ibid.*

A notice must be sufficiently definite in itself to enable a person of ordinary capacity, with knowledge of the physical condition of the streets, in the exercise of reasonable diligence to locate the place of injury. *Sollenbarger v. Lineville*, 141–203, 119 N. W. 618.

The question of the sufficiency of the notice is for the jury only when, in connection with proof of the situation and surroundings of the locality in connection with the description, there is an issue as to whether the place is pointed out with reasonable certainty. *Ibid.*

Notice is sufficiently specific if from its terms, with the inquiries suggested, and in the exercise of proper diligence, the municipal authorities could have discovered the locality of the defect causing the injury. *Harrison v. Albia*, 144–132, 122 N. W. 816.

The statute should not be given so strict a construction as to exclude proof of all facts relating to the nature and cause of the injury to the defendant or negligence complained of which are not detailed in the notice. It should be given a liberal construction to the end that parties having meritorious claims shall not be cut off by mere technicalities as to form of notice required. *Frazee v. Cedar Rapids*, 151–251, 131 N. W. 33.

The running of the statutory period for bringing action against a municipal corporation for personal injuries is not affected by the fact of the insanity of the person injured occurring after the injury and before the bringing of the action. *Roelefsen v. Pella*, 121–153, 96 N. W. 738.

The time prescribed by the statutory provision for bringing action against a municipal corporation for injury on account of a defective street is not extended by the provisions of code § 3453 relating to limitations of actions against minors. *Cushing v. Winterset*, 144–260, 122 N. W. 915.

Want of notice must be pleaded: The defense that a claim for unliquidated damages has not been made within thirty days is an affirmative one, and to be available the facts constituting it must be pleaded. *Borghart v. Cedar Rapids*, 126–313, 101 N. W. 1120.

The objection that action against a city for personal injuries received on account of defective streets is not brought within six months after the happening of the injury and that no written notice of the claim has been given is one that must be urged in the lower court, otherwise it cannot be considered on appeal. *Reed v. Muscatine*, 104–183, 73 N. W. 579.

It is not competent under a general denial in an action against a city to recover damages for personal injuries occasioned by a defective sidewalk, to urge for the first time on appeal the insufficiency of the notice given within sixty days from the happening of the injury. *Belken v. Iowa Falls*, 122–430, 98 N. W. 296.

Amended pleading: The plaintiff cannot recover under an amended petition filed more than ninety days after the injury, for injuries which are not in-

cluded within the notice of claim. *Ulbrecht v. Keokuk*, 124–1, 97 N. W. 1082.

Where within sixty days an action is brought for personal injuries due to defective sidewalk, and the place of the accident is described, an amendment after the expiration of sixty days, slightly changing the description of the place of the accident, but not describing any different place than that mentioned in the original petition, is proper. *Sachra v. Manilla*, 120–562, 95 N. W. 198.

Where the action is begun within three months after the injury, an amendment to the petition after that period which merely makes more certain the description of the place of the action does not state a new cause of action. *Palmer v. Waterloo*, 138–296, 115 N. W. 1017.

If action is commenced within three months on account of a sidewalk accident, a substituted petition amplifying the charge of negligence may be filed after the expiration of that period. *Woods v. Lisbon*, 138–402, 116 N. W. 143.

After the expiration of the time for bringing action the plaintiff may amend so as to include allegations of additional damages resulting to plaintiff beyond those alleged in the original petition. *Benson v. Ottumwa*, 143–349, 121 N. W. 1065.

Incidental facts not constituting a part of the wrong but elements to be shown for the purpose of supporting a recovery by the plaintiff may also be thus added by way of amendment. Therefore held that plaintiff, a minor, suing for injuries, might by way of amendment allege an assignment to him by his father of any right of action the latter might have on account of injury of such minor. *Ibid.*

Dismissal of action: Where an action against a city for injuries received from a defective sidewalk is brought within three months, no previous notice of the claim need be shown. But if such action is afterwards voluntarily dismissed, a new action will be barred, unless it is within the provisions of code § 3455, providing that if after the commencement of an action plaintiff, for any cause, except negligence in its prosecution, fails therein, and a new one is brought within six months thereafter, the second shall be held to be a continuance of the first. *Ceprley v. Paton*, 120–559, 95 N. W. 179.

In instituting the second action the burden is on plaintiff to allege and prove such diligence in prosecuting the first action as to bring the case within such provisions. *Ibid.*

Where a claim is made within proper time, the dismissal of an action thereon will not defeat a new action on such claim, within the statutory period of limitation, although after the time has elapsed for filing claims. *Escher v. Carroll County*, 141 N. W. 38.

Par 3. For statutory penalty: An action to recover three times the excessive charge of a common carrier, as authorized by 22 G. A., ch. 28, § 9, held to be an action for a penalty which must be therefore brought within two years. (Following *Herriman v. Burlington, C. R. & N. R. Co.*, 57–187, and distinguishing *Koons v. Chicago & N. W. R. Co.*, 23–493.) *Baker Wire Co. v. Chicago & N. W. R. Co.*, 106–239, 76 N. W. 665.

For injuries to relative rights: An action on a liquor seller's bond for damages to a wife by reason of sales to her husband is based on an injury to the relative rights of the wife, and should be brought within two years. *O'Banion v. DeGarmo*, 121–139, 96 N. W. 739.

An amendment made more than two years after the cause of action has accrued alleging sales in a different locality than that specified in the bond sets up a new cause of action and is barred. *Ibid.*

An action to recover damages for personal injuries is barred in two years from the time the right of action accrues. *Bogue v. Chicago, B. & Q. R. Co.*, (D. C.) 193 Fed. 728.

A foreign railroad corporation, operating a line of road within the state, may take advantage of this limitation. *Ibid.*

Par. 5. Against sheriff or other public officer: While the action against a sheriff for wrongful levy upon property is barred in three years, yet an action on an indemnifying bond given by the execution plaintiff to protect the sheriff may be brought within ten years. *Whitney v. Gammon*, 103–363, 72 N. W. 551.

An action against a clerk of court for omitting to index a judgment to plaintiff's damage must be brought within three years, and the time within which it may be brought is not extended under the provision of code § 3448 with reference to actions for relief on the ground of mistake. *Lougee v. Reed*, 133–48, 110 N. W. 165.

Par. 6. Unwritten contracts—other actions: The right of one joint obligor to recover against the other for his share of payments made on the joint obligation is barred in five years. *Novak v. Dupont*, 112–334, 83 N. W. 1062.

An action on an implied contract brought by a surety to recover indemnity from the principal is barred in five years after payment. *Van Patten v. Waugh*, 122–302, 98 N. W. 119.

The limitation as to actions on unwritten contracts and for injuries to property is applicable to a case where the owner of a party wall asks an accounting of the adjoining owner who has made use of such wall. *Pier v. Salot*, 134–357, 111 N. W. 989.

For recovery of personal property: Where upon the death of the owner of personal property one of his next of kin

converts it to his own use to the exclusion of the other next of kin, the right of action against him for the recovery of the property thus converted is barred after five years. *McCord v. McCord*, 136–53, 113 N. W. 552.

Contesting will: Within the statutory period of five years, an original action may be instituted to set aside the probate of a will which has been admitted to probate without contest. *Kelly v. Kelly*, 157–—, 138 N. W. 851.

Par. 7. On written contracts: A written agreement on the back of a certificate of assessment for street improvements, by which the property owner undertakes to pay the amount of the assessment in installments, is a written contract upon which action may be brought within ten years from the maturity of the demands called for. *Talcott v. Noel*, 107–470, 78 N. W. 39.

It appearing that defendants had become liable on subscriptions for stock in the corporation of which plaintiff was receiver, and that on sale of their stock to third parties their liability became that of guarantors for the payment of the corporate debts of the company to the amount of their unpaid subscriptions whenever such debts should be ascertained and the corporate property exhausted, held that as defendants' liability was upon the guaranty, the statute did not commence to run as against the same until the debts of the corporation were ascertained and its property was exhausted. *Wyman v. Bowman*, 127 Fed. 257.

The guardian's principal undertaking to account for funds received by him is a contract, and an action for failure to account for funds so received is an action for breach of contract within the statute of limitations. *Blakency v. Wyland*, 115–607, 89 N. W. 16.

An action in the federal court on coupons from bonds issued by a municipality is governed by the state statute, and coupons maturing more than ten years prior to the commencement of the action are barred. *Reynolds v. Lyon County*, 97 Fed. 155.

Action on mortgage: A suit to foreclose a mortgage is barred in ten years, and as the rights of mortgagor and mortgagee are reciprocal, redemption under a mortgage will be cut off in the same time. *Adams v. Holden*, 111–54, 82 N. W. 468.

The action to foreclose a mortgage is not barred so long as the debt secured may be enforced. *Freeburg v. Eksell*, 123–464, 99 N. W. 118.

The taking of a judgment for the debt does not discharge the mortgage lien. *Ibid.*

A mortgage is not barred so long as the debt is unpaid and enforceable. *Iowa Loan & Trust Co. v. McMurray*, 129–65, 105 N. W. 361.

The rights of the mortgagee by foreclosure as against other lien holders is not barred until the statute has barred the debt secured by such mortgage. *Citizens' State Bank v. Jess*, 127–450, 103 N. W. 471.

When a note secured by a mortgage is reduced to judgment, the running of the statute of limitations is suspended and the right to have the mortgage foreclosed is not barred so long as the debt secured thereby may be enforced by means of action on the judgment. *Gilman v. Heitman*, 137–336, 113 N. W. 932.

The right to foreclose and the right to redeem are reciprocal and where the one is barred the other must also be. *Mahaffy v. Faris*, 144–220, 122 N. W. 934.

A grantee expressly taking subject to a mortgage which is barred cannot insist on the bar as against a subsequent revivor by the mortgagor. *Doran v. Doran*, 145–122, 123 N. W. 996.

A mortgage is an incident of the debt secured and an action to foreclose is barred by the statute of limitations if the debt itself has become barred. *Boynton v. Salinger*, 147–537, 126 N. W. 369.

Under a bond for the purchase of real property providing for payment in installments, the statute of limitations runs against every installment from the time of its maturity. *Ibid.*

An action either on a note or on the mortgage given to secure such note must be brought within ten years from the time the cause of action accrues. If action on the note has become barred, an action to foreclose the mortgage is also barred. The mortgage, being considered a mere incident to the debt, is extinguished when the debt for which it is given is barred. *Fitzgerald v. Flanagan*, 155–217, 135 N. W. 738.

Recovery of real property: Possession of land under a parol gift will ripen into perfect title in ten years. *Sires v. Melvin*, 135–460, 113 N. W. 106.

A title by prescription cannot accrue in less than ten years. *Empire Real Estate Etc. Co. v. Beechley*, 137–7, 114 N. W. 556.

The provision of code supp. § 3447-b relating to limitation of action by spouse who has not joined in a conveyance to extinguish contingent dower right is not amendatory to this subdivision and is not subject to the exception of code § 3453 relating to the disability of insanity. *Collier v. Smaltz*, 149–230, 128 N. W. 396.

Adverse possession—in general: While it will be presumed that possession of land extends to the entire tract covered by the occupant's claim of right, such presumption will not prevail as against actual adverse possession by another of a portion of the tract covered by such claim, of which possession the claimant of the entire tract has knowledge. *Libbey v. Young*, 103–258, 72 N. W. 520.

Adverse possession must be shown to sustain the plea of the general statute of limitations in an action to recover possession of real property. *Gill v. Candler*, 114–332, 86 N. W. 300.

Adverse possession cannot be predicated upon a mistake in describing the land which both parties supposed to be included in the deed. *Lougee v. Shuhart*, 127–173, 102 N. W. 1125.

Where possession of land is taken under the belief that it is part of a tract which is purchased, which belief is not in accordance with the facts, the possession will not constitute adverse possession. *Kahl v. Schmidt*, 107–550, 78 N. W. 204.

From the time a railroad company is entitled to a certificate under a grant, adverse possession as against it commences to run, although the legal title remains in the government. *Iowa Railroad Land Co. v. Fehring*, 126–1, 101 N. W. 120.

When the statute of limitations commences to run by adverse possession, it continues to run so long as such possession continues. *Hanson v. Gallagher*, 154–192, 134 N. W. 421.

What acts sufficient: The acts of ownership relied on to constitute adverse possession, when there is no actual occupancy, must be such as are necessary to the enjoyment of the use and to acquire the profits the land may yield in its present condition. *Stern v. Fountain*, 112–96, 83 N. W. 826.

Acts of ownership sufficient to constitute adverse possession of uncultivated land are such acts as are necessary to the enjoyment of its use in its present condition and to acquire the profits which such lands would yield. *Rogers v. Turpin*, 105–183, 74 N. W. 925.

Claim of right—color of title: Title by adverse possession can in no event be acquired by mere possession. There must be an honest claim of right or color of title. *Biglow v. Ritter*, 131–213, 108 N. W. 218.

Possession to be adverse under the statute of limitations must have been held in good faith by the claimant. If he knows that he has no title or claim, and his possession is merely wanton, his occupancy, no matter how long continued, will not ripen into a title. *Clark v. Sexton*, 122–310, 98 N. W. 127.

Possession is presumptively subordinate to the title of the true owner, and the burden is on the party claiming by adverse possession to show that such possession was hostile, which necessarily involves knowledge, either express or implied, on the part of the true owner that such possession was adverse and under claim of right or color of title. *McClenahan v. Stevenson*, 118–106, 91 N. W. 925.

If possession is originally acquired in subordination to the title of the true owner, there must be a disclaimer of the title from him, and actual hostile possession, of which he has notice, or which is so open and notorious as to raise a presumption of notice. *Ibid.*

If one enters upon land with the owner's permission, expecting merely that the owner will give it to him in the future, such entry and possession will not consitute a hostile holding. *Ibid.*

Where the defendant has not been in possession of the property in dispute, no cause of action can be deemed to have accrued against him unless he has in some other way asserted some right thereto. *Mead v. Illinois Cent. R. Co.*, 112–291, 83 N. W. 979.

An adverse holding under good faith claim of title is sufficient, although there is record notice that the title is defective. *Severson v. Gremm*, 124–729, 100 N. W. 862.

A deed, though made by one having no authority to convey, is sufficient to support a claim of adverse possession, provided such possession was in good faith. *Roth v. Munzenmaier*, 118–326, 91 N. W. 1072.

Title by adverse possession is sufficient to support an equitable action, under code § 1440, to redeem from a tax sale prematurely made, notwithstanding the provisions of code § 1445 that a person claiming adversely to a tax deed must show fee simple title. *Ibid.*

Possession under a tax deed which is absolutely void may nevertheless constitute sufficient color of title to serve as the basis for a claim of adverse possession. *McCash v. Penrod*, 131–631, 109 N. W. 180.

One may claim under color of title, though his grantor has no real or apparent title to the premises, and a conveyance from one in possession is sufficient consideration for a claim of right and color of title on the part of the grantee, even though the grantor had no title whatever. *Blankenhorn v. Lenox*, 123–67, 98 N. W. 556.

For the purpose of showing claim of right and color of title, a conveyance in writing need not be proven. Parol evidence of sale may be sufficient, when accompanied by possession. *Ibid.*

Title by adverse possession may be acquired as against all those who claim under a grant of land which takes effect *in praesenti*, although such possession is not adverse against the government until the issuance of a patent. *Blumer v. Iowa Railroad Land Co.*, 129–32, 105 N. W. 342.

Adverse possession under a tree culture claim may be sufficient to ripen into title if held in good faith, although the claimant is mistaken in his belief that the claim made by him is sufficient. Possession under such claim is adverse to all other claims to the property, although not adverse to the government. *Ibid.*

Where plaintiff entered upon public land as a homestead claim, held that his possession after title was passed by the government under a railroad grant and his entry was canceled was adverse. *Wilbur v. Cedar Rapids & M. R. R. Co.*, 116–65, 89 N. W. 101.

Possession under a conveyance purporting to convey absolute title and taken in good faith is sufficient to support a claim of title by adverse possession, although the grantee had knowledge at the time of accepting the conveyance that there was the possibility of adverse claim to the property in the future. *Wenger v. Thompson*, 128–750, 105 N. W. 333.

Where one is in possession of property claiming as owner under a recorded deed, such possession constitutes notice to adverse claimants such as to support the bar of the statute of limitations. *McCarthy v. Colton*, 134–658, 108 N. W. 217.

One claiming as devisee under a will has color of title although the testator may not have had title to the property devised. *Daniels v. Dingman*, 140–386, 118 N. W. 373.

One who is in open and notorious possession under a deed in which he is grantee is in adverse possession, his possession being presumptively referable to his deed in the absence of any evidence to the contrary. *McBride v. Caldwell*, 142–228, 119 N. W. 741.

Claim of right under color of title being shown, it is presumed to be in good faith until the contrary is shown. The party who alleges bad faith has the burden of proving it. *Ibid.*

Knowledge of defect in title does not defeat the operation of the statute of limitations. Such knowledge is not of itself inconsistent with a bona fide claim of right. *Hughes v. Wyatt*, 146–392, 125 N. W. 334.

Where the claimant of property puts a deed upon record and enters into possession, his possession is presumptively referable to his deed. In such a case, in so far as good faith is essential to his right, it is presumed in his favor. *Ibid.*

Possession arising through mistake is not adverse. *Keller v. Harrison*, 151–320, 128 N. W. 851, 131 N. W. 53.

A claim of right to the property which affords a ground for taking and continuing to hold possession is sufficient as a basis for the claim of adverse possession although there is no color of title. *Hanson v. Gallagher*, 154–192, 134 N. W. 421.

One who takes possession in his own right may maintain adverse possession although subsequently an interest in the property accrues to him and others as cotenants. *Ibid.*

For the purpose of establishing a claim by adverse possession, it is not necessary to show knowledge of such claim on the part of others who have an interest in the property. *Ibid.*

To constitute adverse possession, there must be some claim of right or title or interest in or to the property by which the possessor in good faith supposes he has a right to it and under which he continues in possession. Entry into and continuance of possession as a trespasser will not ripen into a title. *Goulding v. Shonquist*, 141 N. W. 24.

Against cotenant: Possession by one tenant in common is presumptively for his cotenants as well as himself and not adverse to them, and the burden is on him to show that it was adverse for the required length of time to give him title as against them under the statute of limitations. He must show that the possession was with the intent to hold adversely and such intent must be indicated by acts calculated to exclude the cotenants. *Bader v. Dyer*, 106–715, 77 N. W. 469.

Exclusive occupancy by one tenant in common, accompanied by acts and declarations of ownership, if known to his cotenant, will amount to an ouster. Notice may be shown by circumstantial evidence. *Casey v. Casey*, 107–192, 77 N. W. 844.

The defense of adverse possession by one tenant in common against another or his grantee must be based upon a disclaimer of the common ownership and an open assertion of title in hostility thereto. Mere continuance in possession is not sufficient, nor is it sufficient that the party claiming under adverse possession has made use of the property not inconsistent with the common interest of the other tenant or his grantee. *Garst v. Brutsche*, 129–501, 105 N. W. 452.

The possession by a tenant in common is not adverse to his cotenants until he has in some unmistakable manner given to such cotenants notice or sufficient reason to know that he claims the property adversely. *Zunkel v. Colson*, 109–695, 81 N. W. 175.

Possession under a sheriff's deed for the interest of one tenant in common does not constitute ouster as to a cotenant. To constitute such ouster there must be actual notice of claim of title, followed by hostile acts under such claim. *Curtis v. Barber*, 131–400, 108 N. W. 755.

Possession by one tenant in common may be under such assertion of absolute, entire and exclusive ownership as to constitute an ouster against his cotenant, and cause the statute of limitations to commence to run in favor of the tenant asserting such right of possession. *Blankenhorn v. Lenox*, 123–67, 98 N. W. 556.

Before the statute of limitations will commence to run as between cotenants there must be an ouster and in fact adverse possession. Ordinarily the making of a deed by one cotenant purporting to convey the entire title will amount to an ouster. *Stern v. Selleck*, 136–291, 111 N. W. 451.

A conveyance by one of several cotenants of the entire premises constitutes an ouster of cotenants, and continued possession under such conveyance under color of title and claim of ownership for the period of limitation bars the cotenants. *Murray v. Quigley*, 119–6, 92 N. W. 869.

As between joint owners, continued possession by one will prevent the running of the statute of limitations in favor of the other. *Truth Lodge, etc., v. Barton*, 119–230, 93 N. W. 106.

One cotenant or his grantee may work an ouster and disseisin of his cotenants and, having held adverse possession under a claim of right or color of title for the period of the limitation, may assert full title and evoke the bar of the statute in protection thereof. For this purpose an actual ouster must be made to appear, but proof of actual physical eviction is not necessary. *Crawford v. Meis*, 123–610, 99 N. W. 186.

So the grantee of a life tenant may so dispute or assail the title of a remainderman as that the latter failing for the statutory period to assert his disputed title will be barred by the statute. *Ibid.*

Possession by one tenant in common is not adverse as to the others. *German v. Heath*, 139–52, 116 N. W. 1051.

One heir who continues in possession of real property after the death of the owner cannot be considered as holding adversely to coheirs. *Frye v. Gullion*, 143–719, 121 N. W. 563.

While the ouster of one cotenant by another may be constructive as well as actual, courts are slow to find such an ouster or to uphold the acquisition of a hostile title by mere possession upon a doubtful or equivocal showing of facts. This is especially true where the tenants in common are members of the same family. *Schoonmaker v. Schoonmaker*, 154–500, 133 N. W. 741, 135 N. W. 599.

Payment of taxes by the tenant in possession is of no significance as showing ouster. *Ibid.*

Acts and words relied upon to show an ouster must not be of doubtful character but clear and unambiguous. *Ibid.*

The burden is upon the cotenant in possession to establish a claim such as to extinguish the title of his cotenants by clear and persuasive evidence. *Ibid.*

The possession of one claiming to act as executor of a deceased owner is not adverse to the interest of the heirs of such owner. *Follett v. Meader*, 155–405, 136 N. W. 216.

A life tenant or tenant in common cannot ordinarily hold adversely to the remainderman or cotenant; but this rule is applicable only where such relationship is continuous and uninterrupted and does not apply where there has been an ouster or disseisin, followed by adverse possession under a color of title or claim of right for the statutory period. *Mitchell v. Vest*, 157–—, 136 N. W. 1054.

Against remainderman: Title by adverse possession may accrue against a remainderman not yet entitled to possession, as under the statutory provision relating to actions to quiet title such remainderman has an interest which he may protect by an action. *Hubbird v. Goin*, 137 Fed. 822.

Grantor and grantee: The mere fact of retention of possession by the grantor after delivery of a conveyance and the making of improvements on the premises by such grantor, does not of itself amount to adverse possession. *Luckhart v. Luckhart*, 120–248, 94 N. W. 461.

A grantor remaining in possession after conveyance is presumed, in the absence of a contrary showing, to be holding in subordination to the title of his grantee. He may acquire title by adverse possession, even as against his warranty deed, but he must explicitly disclaim holding under his grantee and openly assert his title in hostility to the title claimed under his own previous deed. *McClenahan v. Stevenson*, 118–106, 91 N. W. 925.

The continuance in possession by the grantor after the conveyance is not adverse as to the grantee. *Garst v. Brutsche*, 129–501, 105 N. W. 452.

The possession of the judgment debtor may be adverse to that of the purchaser under execution on such judgment; and it will be so held when it is shown that he has claimed title in himself, open and notoriously, for the statutory period. *Bosley v. Stewart*, 140–101, 117 N. W. 1103.

Continuance of possession by the grantor in a deed is not of itself sufficient to set running the statute of limitations. *Walsh v. Doran*, 145–110, 123 N. W. 999.

A vendee taking possession under a contract of purchase holds in subordination to his vendor until the conditions are complied with. *Boynton v. Salinger*, 147–537, 126 N. W. 369.

Mere continuance of possession by a grantor after his conveyance of the land does not set the statute of limitations to running. In such cases something more than mere possession must be shown. *Iowa Cent. R. Co. v. Homan*, 151–404, 131 N. W. 878.

Trustee and cestui que trust: At law the *cestui que trust* is regarded as a tenant at will to the trustee, and until this tenancy is terminated there can be no adverse possession. *McClenahan v. Stevenson*, 118–106, 91 N. W. 925.

Landlord and tenant: A tenant cannot deny or dispute his landlord's title, and this rule obtains even if the tenant is in possession at the time the lease is made. One who acquires a leasehold interest in land of which he is in possession does an act which so explains his previous possession as to rebut any subsequent claim

that it was adverse. *McClenahan v. Stevenson*, 118–106, 91 N. W. 925.

Railroad right of way: One who purchases and goes into possession of premises, subject to a railroad right of way, does not by continuance of such possession acquire a better right than his grantor had with reference to such right of way, regardless of representations made by the grantor as to extent of the right of way, such representations not being known to the railroad company. *Chicago, M. & St. P. R. Co. v. Snyder*, 120–532, 95 N. W. 183.

While property taken for the public use cannot be encroached on by an abutting owner so as to deprive the corporation of its title save by an appropriation absolutely inconsistent with such use when needed, yet where property is dedicated to a railroad company for depot purposes and there is no evidence of its possession or use for such purposes, this doctrine has no application. *Chicago, M. & St. P. R. Co. v. Hanken*, 140–372, 118 N. W. 527.

The doctrine of acquiescence as to boundary lines is applicable in a proper case to the depot grounds of a railroad company. The company is not compelled to fence the portion of its depot grounds necessarily used by the public, yet where a division fence has been erected and maintained by the acquiescence of the parties, this is notice of the boundary between the depot ground and the adjacent lots. *Iowa Cent. R. Co. v. Homan*, 151–404, 131 N. W. 878.

Agreed boundary—acquiescence: The fact that owners of adjoining tracts of land have for many years occupied up to a line, supposed to represent the boundary between them, and have acquiesced in such boundary, is a strong circumstance to show the correctness of such boundary line. *Corey v. Ft. Dodge*, 118–742, 92 N. W. 704.

The boundaries recognized by parties at the time of a conveyance and with reference to which they subsequently occupied the property adversely to each other become binding after the statutory period of adverse possession, and will control the description. *Dows Real Estate & Trust Co. v. Emerson*, 125–86, 99 N. W. 724.

Acquiescence in a certain line, with possession up to it for a period of ten years, is conclusive evidence of an agreement as to the true line, and will bind the parties concerned. *Axmear v. Richards*, 112–657, 84 N. W. 686.

Where a division line between adjoining owners has been acquiesced in by them for a period of ten years, an agreement to make it the true boundary will be implied and neither may ordinarily be heard to dispute it. *Kulas v. McHugh*, 114–188, 86 N. W. 288.

Occupancy to a line of trees planted upon what the parties agreed was the boundary line, held to be adverse, although it subsequently appeared that there was a mistake as to the location of the line. *Handorf v. Hoes*, 121–79, 95 N. W. 226.

Where, for a period longer than the statute of limitations, property owners whose premises abut on opposite sides of a highway have occupied to the boundaries of the highway, as fixed by them, one of them cannot afterwards complain that the boundaries of the highway are not in accordance with its true location. *Buch v. Flanders*, 119–164, 93 N. W. 101.

If coterminous owners have adopted another line than that of the government survey as their division line, and have occupied up to it and recognized it as such for a period of ten years, then such line is to be regarded as the boundary line. *Miller v. Mills County*, 111–654, 82 N. W. 1038.

Where the owner of a government subdivision of land erected a fence and subsequently planted a hedge on what he claimed to be his line, and cultivated to such fence, and the adjoining proprietor likewise in cultivation recognized the fence as the boundary line, and this claim and recognition continued for ten years, held that the first party had acquired title by adverse possession to a strip of land included by his fence beyond the true boundary of the subdivision of land to which he had title. *Fullmer v. Beck*, 105–517, 75 N. W. 366.

Where a division line between two tracts of land has been definitely marked by the erection and maintenance of a fence, which has been recognized by the owners as the division line, and to which they have occupied and cultivated land without objection under a claim of ownership for more than ten years, the line so established is the division line between such tracts. *Lawrence v. Washburn*, 119–109, 93 N. W. 73.

Where adjoining property owners improved their property with reference to a line run by a surveyor and continued to occupy their respective premises with reference to such line for the statutory period of limitation, held that such line had become the boundary line by adverse possession and acquiescence and could not be disturbed on account of a subsequent survey showing that the agreed line did not correspond with the actual line. *O'Callaghan v. Whisenand*, 119–566, 93 N. W. 579.

The boundary line between the two premises having been established for a part of its distance by reason of acquiescence in the making of improvements, held that the boundary line would be deemed to be a straight line determined by the portion of it thus established. *Ibid.*

Occupation to a boundary line, acquiesced in by the parties as being founded on a claim of right, is adverse regardless of whether the boundary by acquiescence is the true boundary. *Klinkner v. Schmidt*,

114–695, 87 N. W. 661; *Rattray v. Talcott*, 124–398, 100 N. W. 36; *Klinkefus v. Vanmeter*, 122–412, 98 N. W. 286; *Harndon v. Stultz*, 124–734, 100 N. W. 851; *Watson v. Hogan*, 130–350, 106 N. W. 759; *Younker v. White*, 136–23, 111 N. W. 824; *McBride v. Bair*, 134–661, 112 N. W. 169.

A boundary line up to which each party has occupied for more than ten years is not to be questioned by a resurvey. The purpose of the surveyor should be to locate the line as originally located. *Bevering v. Smith*, 121–607, 96 N. W. 1110.

Where adjoining owners treat a division fence as marking the line between their lands, and so recognize it for the statutory period of limitations, it will ordinarily be held to constitute the true boundary, and a mere agreement to have a resurvey made which does not bind either party to an acceptance of the result will not overthrow the boundary line as established by acquiescence. *Andrews v. Meredith*, 131–716, 109 N. W. 287.

Acquiescence in a definite line as the true boundary for the period of limitations is binding upon the parties, and is not negatived by the showing of a mere oral agreement to have a survey made to ascertain and establish the true line, there being no subsequent acquiescence in the result of such survey. *Uker v. Thieman*, 132–79, 107 N. W. 167.

To give rise to title by adverse possession to the common boundary line it must appear that the claim of title by possession to such boundary line has continued for the statutory period or for such length of time and under such circumstances as to raise an inference that the boundary has been settled by acquiescence. *Hootman v. Hootman*, 133–632, 111 N. W. 60.

Neither failure of the boundary line as determined from a survey based on the description in a plat or conveyance to correspond with the line established by acquiescence, nor the fact that the line established by acquiescence is not a straight line such as is called for in the description, furnish such controlling circumstances as will defeat a claim of title based on acquiescence in a boundary line. *Laughlin v. Francis*, 129–62, 105 N. W. 360.

The doctrine of adverse possession as distinguished from acquiescence in a common boundary line does not apply where the party claiming title has not been in the exclusive hostile possession to the boundary line contended for, and is not shown to have had an intent to claim to such boundary line, regardless of the true boundary. *Boltz v. Colsch*, 134–480, 109 N. W. 1106.

Possession to be adverse must have been uninterrupted and hostile. *Ibid.*

Where a survey is had to ascertain the line, and the line thus ascertained is treated as the correct one under the belief that it is so, possession of such land will not be adverse of any portion of the adjoining tract which by mistake has been included within the premises. *Kahl v. Schmidt*, 107–550, 78 N. W. 204.

In the absence of proof of acquiescence in the boundary line indicated by a fence, one of the adjoining owners is not estopped by proof of the existence of such fence from showing the true line. *Erikson v. Slate*, 130–187, 106 N. W. 621.

The mere fact that there is a fence upon a line claimed by one of the parties as a boundary line between adjoining properties is not conclusive upon the question of acquiescence or adverse possession. But if it appears that the two adjoining owners have by parol fixed a line or acquiesced in it as a common boundary line, such line is conclusive, although the possession with reference thereto may not have been for the full statutory period. *Kitchen v. Chantland*, 130–618, 105 N. W. 367.

Where the boundary line has been in dispute, adverse possession by acquiescence does not arise. *Liddle v. Blake*, 131–165, 105 N. W. 649.

The doctrine of acquiescence in a common boundary does not apply where there is no showing that the fence designating such boundary as originally built was intended as a designation of the boundary line, or that the parties have ever treated it as designating such boundary. *Boltz v. Colsch*, 134–480, 109 N. W. 1106.

An oral agreement creating an easement, while it may not be enforceable against a subsequent purchaser without notice, is sufficient for the foundation of a claim of right which may ripen into good title by adverse usage. *O'Reagan v. Duggan*, 117–612, 91 N. W. 909.

The line up to which an owner occupies by eaves, window blinds and sewer drains must be held to be the boundary line of his adverse possession. *Atkins v. Pfaffe*, 136–728, 114 N. W. 187.

The maker of improvements with reference to an established line shows acquiescence in such line as a boundary. *Leifheit v. Neylon*, 139–32, 117 N. W. 4.

Although the doctrine of adverse possession does not apply to a case where a party has had no intent to claim more than his deed calls for, yet a line may be established by recognition and acquiescence, although neither of the parties has intended to claim more than is described in his deed. *Bradley v. Burkhart*, 139–323, 115 N. W. 597.

Acquiescence does not presuppose an agreement to a line, but on the other hand an agreement to a boundary is to be inferred from a long acquiescence therein. *Keller v. Harrison*, 139–383, 116 N. W. 327.

One who has claimed title and occupied premises up to a definite boundary line with the consent and acquiescence of the adjoining landowner has title by ad-

verse possession. *Anderson v. Buchanan*, 139–676, 116 N. W. 694.

Possession by acquiescence up to a boundary line for the statutory period gives title by adverse possession. *Chicago, M. & St. P. R. Co.*, 140–372, 118 N. W. 527.

Possession held by mistake and without intention to assert possession beyond the true boundary is not adverse. *Webster v. Shrine Temple Co.*, 141–325, 117 N. W. 665.

Possible circumstances may be such as to justify the inference of acquiescence in a boundary line in a less time than ten years; but where nothing is shown save occupation up to a fence or other monument marking the division between adjoining premises, such occupation must have continued for the period of the statute of limitations to become conclusive on the parties. *Matson v. Poncin*, 152–569, 132 N. W. 970.

Where title has been established by adverse occupancy to an agreed boundary line, a subsequent consent to a survey to establish the real line without an agreement to abide by the result does not destroy the effect of the adverse possession. *Frederickson v. Bierent*, 154–34, 134 N. W. 432.

In such case, a new survey would not of itself establish the boundary. An express agreement to that effect would be necessary. But such an agreement, even if shown, unless followed by possession or improvement of the property with reference to the new line, with the acquiescence or agreement of the plaintiff, would not affect the old line as established by acquiescence and adverse possession. *Ibid.*

Acquiescence in an agreed boundary line accompanied by possession for ten years up to such line is conclusive evidence of an agreement that such line shall constitute the boundary line. *McCoy v. Paxton*, 156–194, 135 N. W. 1091.

Proof of acquiescence for many years based upon the maintenance and repair of a fence and occupancy of the land to the line thus indicated is sufficient to establish title. *Savage v. Armstrong*, 156–473, 137 N. W. 474.

The inference arising from ten years' acquiescence in a boundary fence and occupancy with reference to such fence as the true line may be overcome by proof of other controlling circumstances inconsistent with and contradicting the inference of acquiescence; but if there are no controlling circumstances to overcome the inference from acquiescence, then the presumption from such acquiescence is sufficient to determine the boundary line in controversy. *Ibid.*

Where a boundary line is found to have been established by acquiescence, it is binding upon the parties as to the true line. *McGovern v. Heery*, 141 N. W. 435.

A title which arises from acquiescence or estoppel is not necessarily limited by fixed and platted boundaries. *Willson v. Beck*, 142 N. W. 78.

Acts of ownership and control over a tract of land which are as consistent with harmless encroachments on unoccupied property as with ownership or claim of right, do not amount to adverse possession to a particular boundary. *Ibid.*

Easement: Use of a right of way, with permission of and without claim of right in hostility to the owner, is not adverse possession. *Friday v. Henah*, 113–425, 85 N. W. 768.

The burden of proof as to adverse possession is on the party claiming in hostility to the title, and in case of an easement by grant, the adverse possession must consist of assertion of right as against the claim under the grant, continued for the statutory period of limitations. *Reed v. Gasser*, 130–87, 106 N. W. 383.

Husband and wife: It is doubtful if the husband may, under any circumstances, hold adversely to his wife, especially where the property is a homestead. The possession of husband and wife is the possession of the one in whom is the legal title. *Hays v. Marsh*, 123–81, 98 N. W. 604.

Recovery of dower: The wife's right of action for dower out of lands conveyed by her husband during coverture in which she has not joined does not accrue until the death of the husband, and until that time the statute of limitations does not commence to run as against such right. *Lucas v. Whitacre*, 121–251, 96 N. W. 776.

The action of a widow against the grantee of her husband for the recovery of her dower interest in land conveyed by her husband during coverture, without her joinder in the conveyance, does not accrue until the death of the husband. *Lucas v. White*, 120–735, 95 N. W. 209.

The possession by the grantee of the husband under a conveyance in which the wife has not joined to extinguish her dower right becomes adverse as to the wife's dower right twenty days after the death of the husband. (See code § 3369.) And the widow's action to assert her right to a distributive share in such property must be brought within ten years thereafter. *Britt v. Gordon*, 132–431, 108 N. W. 319.

The right of a widow to recover her distributive share of her husband's property does not accrue until ouster, or some denial on the part of the heirs of her husband or their grantees of her right. Mere possession on the part of such heirs or grantees is not adverse and does not give rise to a right of action. But where the widow's action is against strangers, who claim the entire title and estate under a deed from the husband under which they have been in actual possession, the

widow's right of action accrues immediately upon the death of her husband, and the statute begins to run in favor of such adverse claimants. *Ibid.*

Against public: Title by adverse possession alone cannot be acquired against the public. The public may be estopped by its conduct, but the statute of limitations will not run against the sovereign or its agencies. The only basis for an estoppel as against the public is conduct of the officers having authority with relation to the subject matter in standing by and permitting improvements to be made on property which belongs to the public. *Biglow v. Ritter*, 131–213, 108 N. W. 218.

The statute of limitations does not apply to a city so as to prevent its exercise of governmental functions; but the doctrine of acquiescence in a certain line as being the true line is applicable to municipalities as well as to private individuals. *Eldora v. Edgington*, 130–151, 106 N. W. 503.

As against the state holding title to the beds and banks of navigable rivers for the public, there can be no adverse possession. *Board of Park Commissioners v. Taylor*, 133–453, 108 N. W. 927.

Ordinarily the rule of adverse possession does not apply to a public corporation in the exercise of its governmental functions. *Vorhes v. Ackley*, 127–658, 103 N. W. 998.

In establishing and maintaining a highway a municipality exercises governmental functions and the statute of limitations does not run against it with respect to encroachments therein. *Quinn v. Baage*, 138–426, 114 N. W. 205.

The doctrine of adverse possession does not apply to municipalities or other bodies exercising governmental functions for the reason that the statute of limitations does not run in such cases. *Johnson v. Shenandoah*, 153–493, 133 N. W. 761.

But as to the right of a city to a street, an adverse claimant may rely upon estoppel on the part of the city to claim that the street is at any other place than where the parties owning abutting property acknowledge it to be. *Ibid.*

Such estoppel may be based upon the erection of valuable and permanent improvements with reference to lines marked out and claimed by abutting property owners who would be greatly injured were they compelled to remove such improvements. *Ibid.*

As to streets: The statute of limitations will not run to defeat the city in the exercise of its governmental authority with reference to streets. *Chicago, R. I. & P. R. Co. v. Council Bluffs*, 109–425, 80 N W. 564.

While it may be that the statute of limitations as to real property does not run against a claim of a city to premises belonging to it as a street, yet it may so deal with the property, by recognizing the rights of another as owner thereof, as to estop itself from asserting the title thereto. The exaction of public charges against the property as belonging to a private owner will constitute such estoppel. *Davenport v. Boyd*, 109–248, 80 N. W. 314.

The owner of a lot abutting on the street does not acquire title by adverse possession as against the city to the strip of land between his lot line and the sidewalk, by mere occupancy. *Markham v. Anamosa*, 122–689, 98 N. W. 493.

While mere nonuser for the statutory period will not constitute an abandonment by a city of a street duly laid out, yet where there has been such nonuser, accompanied by actual and notorious possession of the land by an individual as private property, under a claim of right, an abandonment will be presumed and the public right in the street will be held to be extinguished. *Weber v. Iowa City*, 119–633, 93 N. W. 637.

One who claims the right to an alley, shown on the plat to be a public alley, and as to which there have been proceedings by the town for dedication, although irregular, and makes improvements thereon accordingly, may rely upon such possession, continued for a sufficient length of time, as giving title by adverse possession. *Blennerhasset v. Forest City*, 117–680, 91 N. W. 1044.

Long occupancy of city lots and improvement thereof in accordance with lines and corners which may have been marked out at the time the plat was filed, is better evidence that these are correct than the deductions and measurements of a surveyor regardless of his competency and experience. *Harris v. Lewis*, 156–413, 136 N. W. 674.

While a landowner cannot by limitations acquire title adversely to a city or town with reference to its streets, the municipality may, by the conduct of its citizens and its officers, be estopped from claiming beyond a given line as the street although it be not the true line. *Bridges v. Grand View*, 139 N. W. 917.

Par. 8. Judgments of courts of record: In the absence of any statutory limitation in the state in which a judgment is rendered, an action on such judgment brought in this state will be barred only under the provisions of the statute of limitations in this state. *Mahoney v. State Ins. Co.*, 133–570, 110 N. W. 1041.

The fact that the indebtedness on which a foreign judgment was rendered was barred at the time of bringing the action cannot be urged as a defense against the judgment rendered on such cause of action. *Tomlin v. Woods*, 125–367, 101 N. W. 135.

The rule adopted in *Weiser v. McDowell*, 93–772, has no application to a judgment rendered before the code of '73 went into effect. *Wilson v. Tucker*, 105–55, 74 N. W. 908.

The act of the 29 G. A., ch. 137 (code supp. § 3439), reducing the period of limitation for actions on judgments rendered prior to the taking effect of the code, is not unconstitutional, as it preserves to the holder of the judgment a reasonable time within which his action may be maintained. *Wooster v. Bateman*, 126–552, 102 N. W. 521.

Under the provisions of 29 G. A., ch. 137, actions on judgments rendered prior to the taking effect of the code of 1897 must be brought within the limitation prescribed by the code, unless brought within one year after the taking effect of that statute. *Haugen v. Oldford*, 129–156, 105 N. W. 393.

Where a judgment of a justice of the peace by the filing of a transcript becomes a judgment of the district court, it is subject only to the limitation applicable to other judgments of the district court, and the period of limitation commences to run from the time the justice's judgment is made a judgment of the district court by the filing of a transcript and a proper entry on the records of the district court. *Miller v. Rosebrook*, 136–158, 113 N. W. 771.

Right of action on a judgment by confession for the amount of a note secured by mortgage runs for twenty years irrespective of the period of limitation as to the indebtedness thus secured. *Gilman v. Heitman*, 137–336, 113 N. W. 932.

Execution under a judgment may be levied within twenty years, although the lien of the judgment on the property seized has already expired. *Mudge v. Livermore*, 148–472, 123 N. W. 199.

(In the code notes to this section, on page 1245, second column, the reference for the case of *Auchampaugh v. Schmidt*, should be 70–642, instead of 72–656. In the last paragraph on page 1248, second column, the word "stay" in the sixth line should be "start.")

SEC. **3447-a. Death of party to be charged—extension of time.** That in all cases where by the death of the party to be charged, the bringing of an action against his estate shall have been delayed beyond the period provided for by statute, the time within which action may be brought against his estate is hereby extended for six months from the date of the death of said decedent. [31 G. A., ch. 151.]

Before the passage of this statute, the death of the debtor did not toll the statute. But such rule was not applicable to the allowance of claims in probate. *In re Kimball's Estate, Flanigan v. Kimball*, 139 N. W. 456.

SEC. **3447-b. Recovery of interest in real estate when spouse failed to join in conveyance.** That section thirty-four hundred forty-seven-b of the supplement to the code, 1907, be and the same is hereby repealed and the following enacted in lieu thereof:

"In all cases where the holder of the legal or equitable title or estate to real estate situated within this state, prior to the first day of January, eighteen hundred ninety, conveyed said real estate or any interest therein by deed, mortgage, or other instrument, and the spouse failed to join therein, such spouse or the heirs at law, personal representatives, devisees, grantees, or assignees of such spouse shall be barred from recovery unless suit is brought therefor within one year after the taking effect of this act. But in case the right to such distributive share has not accrued by the death of the spouse making such instrument, then the one not joining is hereby authorized to file in the recorder's office of the county where the land is situated, a notice with affidavit, setting forth affiants claim, together with the facts upon which such claim rests, and the residence of such claimants; and if such notice is not filed within two years from the taking effect of this act, such claim shall be barred forever. Any action contemplated in this section may include land situated in different counties, by giving notice thereof as provided by section thirty-five hundred forty-four of the code. Provided that the repeal of said section shall not affect any act done, any right accruing or which has accrued or been established, nor any suit or proceeding had or commenced in any civil cause before the time when such repeal takes effect; but the proceedings in such cases shall

be conformed to the provisions of said repealed section as far as consistent." [34 G. A., ch. 160, § 1; 34 G. A., ch. 159, § 1.] [31 G. A., ch. 152, § 1.]

The provisions of this statute are not subject to the exception of code § 3453 relating to the disability of insanity. *Collier v. Smaltz*, 149–230, 128 N. W. 396.

Nor is the statutory provision unconstitutional as prescribing an unreasonable limitation on a right of action. *Ibid.*

It was not the legislative intention to restrict the operation of this statute to cases where there was paper title placed on record. The intent was to require all parties claiming a dower right, although contingent, to follow the course pointed out in the statute. *Hutchinson v. Olberding*, 150–604, 130 N. W. 139.

SEC. **3447-c. Foreclosure of certain mortgages.** That section thirty-four hundred forty-seven-c of the supplement to the code, 1907, is hereby repealed and the following enacted in lieu thereof:

No action shall be maintained to foreclose or enforce any real estate mortgage, bond for deed, trust deed or contract for the sale or conveyance of real estate, after twenty years from the date thereof, as shown by the record of such instrument, unless the record of such instrument shows that less than ten years have elapsed since the date of maturity of the indebtedness or part thereof, secured thereby, or since the right of action has accrued thereon, or unless the record shows an extension of the maturity of the instrument or of the debt or a part thereof, and that ten years from the expiration of the time of such extension have not yet expired. The date of maturity, when different than as appears by the record of the instrument, and the date of maturity of any extension of said indebtedness or part thereof, may be shown at any time prior to the expiration of the above periods of limitation by the holder of the debt or the owner or assignee of the instrument filing an extension agreement, duly acknowledged as the original instrument was required to be acknowledged, in the office of the recorder where the instrument is recorded, or by noting on the margin of the record of such instrument in the recorder's office an extension of the maturity of the instrument or of the debt secured, or any part thereof; each notation to be witnessed by the recorder and entered upon the index of mortgages in the name of the mortgagor and mortgagee; provided that the holder or assignee of any such instrument, or the holder of any debt or part thereof, secured by any instrument, shall have until July fourth, nineteen hundred twelve, in which to file such extension agreement or to note the marginal extension as to any instrument executed prior to the taking effect of this act and coming within the provisions hereof. This act shall in no case revive the rights or claims barred by section thirty-four hundred forty-seven-c of the supplement to the code, 1907. [35 G. A., ch. 283, § 1; 34 G. A., ch. 161, § 1.] [31 G. A., ch. 152, § 2.]

SEC. **3448. Fraud—mistake—trespass.**

The fraud referred to in this section is such as is solely cognizable in a court of equity. *Daugherty v. Daugherty*, 116–245, 90 N. W. 65.

In an action to recover on account of fraud the statute begins to run from the time the fraud is discovered. *Telegraph v. Loetscher*, 127–383, 101 N. W. 773.

For the purpose of starting the running of the statute of limitations against an action for fraud, the recording of a deed involving the fraud complained of is sufficient to constitute notice. *McDonald v. Bayard Sav. Bank*, 123–413, 98 N. W. 1025.

The filing of a patent from the state to the patentee is notice to those claiming title under such patent of any fraud involved in the issuance of the patent. *Murray v. Quigley*, 119–6, 92 N. W. 869.

Where an action is cognizable in equity by reason of the fiduciary relations existing between the parties, this section is applicable. *Faust v. Hosford*, 119–97, 93 N. W. 58.

So long as it is legally impossible to

say whether or not a representation as to title of property conveyed is false, the statute does not begin to run as against an equitable action to set aside the conveyance for the falsity of such representation. *Weise v. Grove*, 123–585, 99 N. W. 191.

The statutory provision with reference to limitation of actions on the ground of fraud and mistake is applicable to such mistake as is cognizable in courts of law as well as the basis of equitable relief. But the statute commences to run against the cause of action arising from a pure mistake at the time when the mistake might in the exercise of ordinary diligence have been discovered. *West v. Fry*, 134–675, 112 N. W. 184.

The fraud referred to in this section is such as was originally cognizable in equity, but the matter of mistake is not so limited. Therefore in case of a mistake, whether cognizable in equity or at law, the action does not accrue until discovery of the mistake. *Baird v. Omaha & C. B. R. & B. Co.*, 111–627, 82 N. W. 1020.

This provision as to when a right of action based on mistake accrues has no application to an action to recover taxes subsequently paid by a tax purchaser on property, as to which his tax title appears to have been defective by reason of mistake of the auditor. Such an action is barred in five years from the time of payment of taxes. *Lonsdale v. Carroll County*, 105–452, 75 N. W. 332.

As against an action for the cancellation or reformation of a deed on the ground of mistake, the limitation does not commence to run until the mistake is discovered. *Bottorff v. Lewis*, 121–27, 95 N. W. 262.

Where a railroad company, claiming title to land under a railroad grant from the United States, had been notified that land certified to it had been certified under a mistake as to the legal rights of the company, held that in afterwards redeeming the land from taxes it acted at its peril, and an action to recover taxes so paid, not brought within the statutory period, was barred by the statute of limitations. *Sioux City & St. P. R. Co. v. O'Brien County*, 118–582, 92 N. W. 857.

A cause of action to reform a conveyance on account of mistake arises immediately upon the discovery of the mistake, and if the action is not brought within the statutory period after such discovery it is barred. *Garst v. Brutsche*, 129–501, 105 N. W. 452.

In an action for money had and received predicated upon the wrongful payment by the county treasurer to the defendant school district of taxes collected on property situated in the plaintiff school disdict, the period of limitation commences to run from the time of erroneous payment and not from the time when the mistake was discovered. *Independent School District v. Independent School District*, 123–455, 99 N. W. 106.

The provision that actions for relief on the ground of mistake are not to be deemed to accrue until the mistake is discovered has no application to an action against a clerk of court for omitting to index a judgment. *Lougee v. Reed*, 133–48, 110 N. W. 165.

Wherever relief is asked on account of fraud in the sale of land, the plaintiff is charged with knowledge of such fraud from the time of the recording of a conveyance executed in pursuance of the fraud relied upon. *Piekenbrock v. Knoer*, 136–534, 114 N. W. 200.

Fraudulent concealment is the same as actual fraud, and where a fiduciary relation exists, mere silence on the part of the agent or trustee is fraudulent concealment. *Caffee v. Berkley*, 141–344, 118 N. W. 267.

Notice to or knowledge by an agent who is acting in hostility to his principal is not notice to the principal. *Ibid.*

The principal is not bound to search the records of conveyances for the purpose of ascertaining the truth or falsity of representations made to him by his agent with reference to the conveyance of property. *Ibid.*

An action for deceit which was cognizable at common law accrues when the transaction is consummated rather than when the deceit is discovered by the aggrieved party. *McKay v. McCarthy*, 146–546, 123 N. W. 755, 125 N. W. 207.

It is immaterial under this section whether the action be solely cognizable in equity or not, if it appear that there has been a fraudulent concealment of the facts such as to toll the period of limitation. *Cress v. Ivens*, 155–17, 134 N. W. 869.

The recording of a deed constitutes notice to all parties interested in the breach of a constructive trust under which the land is held by the grantor, and the statute of limitations commences to run from that time. *Burch v. Nicholson*, 157– —, 137 N. W. 1066.

Section applied in case of mistake. *Cole v. Charles City Nat. Bank*, 114–632, 87 N. W. 671.

SEC. 3449. Open account.

An action upon open account brought within five years after the date of the last item is not barred. *Padden v. Clark*, 124–94, 99 N. W. 152.

In an action to recover compensation for services practically continuous for many years, the plaintiff cannot be limited to evidence of such service within five years. *In re Oldfield's Estate, Bowie v. Trowbridge*, 157– —, 138 N. W. 846.

SEC. 3450. Commencement of action.

This provision is applicable also to special statutory limitations. *Smith v. Callanan*, 103–218, 72 N. W. 513.

The provisions of this section apply only to the general statute of limitations. A right which is given to be enforced by bringing an action within a specified period is controlled by the provisions of code § 3514, that actions shall be commenced by serving defendant with notice. (Distinguishing *Smith v. Callanan*, 103–218.) *Hawley v. Griffin*, 121–667, 92 N. W. 113, 97 N. W. 86.

The delivery of an original notice to the sheriff for service does not constitute the commencement of the action where, after it has been placed in the sheriff's hands, he is unable to make service and two terms of court are allowed to intervene without further attempt to have service made. The intention that the notice shall be served must be continuous, and the effect of it is lost where the notice placed with the sheriff is abandoned. *Richardson v. Turner*, 110–318, 81 N. W. 593.

Where there is nothing in the record to disclose the service of an original notice which would interrupt the statute of limitations, and the only appearance of the defendant is the voluntary filing of an answer after the expiration of the statutory period of limitation, the date of the answer will be regarded as the time of the commencement of the action, although the petition was filed before the expiration of the period of limitation. *Dolan v. Burlington, C. R. & N. R. Co.*, 129–626, 105 N. W. 834.

For every purpose save the determination of the question whether action is brought before the expiration of the period of limitation, the action is deemed to be commenced only when the notice is in fact served. If service is by publication, then it is commenced on the date of the last publication required by statute. *Littlejohn v. Bulles*, 136–150, 113 N. W. 756.

Where, after the right to sue on a foreign judgment has become barred, the defendant has appeared in an attachment proceeding in which his property has been seized before the bar of the statute has run, the court may proceed in the attachment suit to subject the attached property to the payment of the debt, but acquires no jurisdiction to render a personal judgment. In such case the attachment proceeding should be deemed commenced from the time of the filing of the petition and levy on the property. *Slater v. Roche*, 148–413, 126 N. W. 925.

Save for the purpose of avoiding a plea of the statute of limitations, an action is not begun by delivering a notice to the sheriff but by service of notice being actually obtained. *Boone v. Boone*, 137 N. W. 1059, 141 N. W. 938.

An action is commenced when the original notice is placed in the hands of the sheriff for service, and as between two actions, that one is prior in commencement in which notice is thus first placed in the hands of the sheriff. *Wray v. Wray*, 140 N. W. 414.

The fact that the petition is demurrable does not destroy its effect as constituting a commencement of the action within the period of limitation. *Knight v. Moline, E. M. & W. R. Co.*, 140 N. W. 839.

SEC. 3451. Nonresidence.

The time during which the defendant is a nonresident of the state is not to be computed in determining the period of limitation. *Davenport v. Allen*, 120 Fed. 172.

In an action to subject property fraudulently conveyed to the payment of a judgment, nonresidence will prevent the running of the statute until the property comes into the hands of a resident. *Applegate v. Applegate*, 107–312, 78 N. W. 34.

As against an action for partition the statute of limitations does not begin to run until there is someone within the jurisdiction of the state against whom the action might be brought. Even though the defendant had a tenant in possession of the property upon whom service might have been made, the nonresidence of the owner will defeat the statute of limitations. *Stern v. Selleck*, 136–291, 111 N. W. 451.

Where nonresidence of the defendant was relied upon by the plaintiff as obviating the objection of the statute of limitations, an instruction that if defendant established and maintained a residence in another state, then during such time as he was a resident of such other state he was a nonresident of this state, was proper. *Des Moines Sav. Bank v. Kennedy*, 142–272, 120 N. W. 742.

Mere delay in bringing action does not defeat the right of a creditor to rely upon the nonresidence of his debtor as defeating the statute of limitations. *Thomas v. Holmes*, 142–288, 120 N. W. 636.

This section applies to a case where the defendant was a nonresident prior to the accrual of the cause of action and remained a nonresident until the action was brought. It is immaterial that the plaintiff himself is a nonresident. *McNamara v. McAllister*, 150–243, 130 N. W. 26.

Residence and not citizenship is referred to by the provisions of this section. *Bogue v. Chicago, B. & Q. R. Co.*, (D. C.) 193 Fed. 728.

SEC. 3452. Bar in foreign jurisdiction.

An action for wrongful attachment in another state where the cause of action arose and the defendant resides, which is barred by the laws of that state, is also barred here. *Smyth v. Peters Shoe Co.*, 111–388, 82 N. W. 898.

Where a note executed in another state is mailed to the payee in this state, in accordance with agreement, express or implied, the cause of action on such note is one arising in that state, and if barred by the law of that state where the maker resided and still continued to reside until the bar was completed, it is barred here although the payee of the note has resided in this state. *Tharp v. Thero*, 112–573, 84 N. W. 709.

A judgment by confession upon warrant of attorney rendered in another state against one who is a resident of this state may be valid although the cause of action is already barred by the laws of this state. *Cuykendall v. Doe*, 129–453, 105 N. W. 698.

In determining whether the cause of action is one arising within this state, the intention of the parties to the contract out of which the cause of action arises will ordinarily prevail, and that intention may be found from the circumstances surrounding the transaction. So when a note was by previous agreement signed and mailed to the payee in this state who in pursuance of the transaction thereupon remitted to the maker the amount of the note, held that the cause of action thereon was one arising in this state. *Moran v. Moran*, 144–451, 123 N. W. 202.

The cause of action on a promissory note arises, within the meaning of this statutory provision, at the time when the note becomes a legal and binding obligation. It does not accrue until the note is payable. *Ibid.*

Where the court of another state in which the parties have resided might have entertained an action with reference to the subject matter but could not have afforded a full and adequate remedy on account of the situation of the property involved being in this state, the fact that during such residence the cause of action in such other state may have become barred will not constitute a bar to the action in this state. *Curtis v. Armagast*, 138 N. W. 873.

A cause of action cannot be said to arise in any jurisdiction whose courts cannot take cognizance of the complaint and administer the proper relief. *Ibid.*

The fact that the cause of action is barred by the laws of another state where it arose is effectual as a bar in this state by reason of the provisions of this section. *Knight v. Moline, E. M. & W. R. Co.*, 140 N. W. 839.

SEC. 3453. Minors and insane persons.

This provision applies only to those who are under disability at the time the cause of action accrues. Such disability subsequently arising does not extend the statutory period. *Roelefsen v. Pella*, 121–153, 96 N. W. 738.

Therefore, held that the insanity of a debtor, occurring nine years and four months after the cause of action on a contract accrued, would not extend the limitation of action on the contract. *Black v. Ross*, 110–112, 81 N. W. 229.

As against a minor the period of the statute of limitations does not become complete until the expiration of a year after he attains his majority. *Rice v. Bolton*, 126–654, 100 N. W. 634, 102 N. W. 509.

The provisions of par. 1 of code § 3447 relating to the time for bringing action against a municipal corporation for an injury due to a defective street are not extended by this section relating to limitation of actions brought by minors. *Cushing v. Winterset*, 144–260, 122 N. W. 915.

The exception of this section does not apply to the provisions of code supp. § 3447-b relating to a limitation on an action by the spouse who has not joined in a conveyance of real property. *Collier v. Smaltz*, 149–230, 128 N. W. 396.

The exception as to insane persons extends to idiots, lunatics and persons of unsound mind. *Jefferson v. Rust*, 149–594, 128 N. W. 954.

SEC. 3455. Failure of action.

Where plaintiff's first action was dismissed on account of his negligence in not filing the petition in time for the term designated in his notice, held that a subsequent action brought after the expiration of the statutory period of limitation but within six months from the dismissal of the first action could not be sustained. *Conley v. Dugan*, 105–205, 74 N. W. 774.

A plaintiff against whom judgment has been rendered after refusal to amend upon ruling against him, on demurrer to his petition, cannot bring a new action under this section. *Gregory v. Woodworth*, 107–151, 77 N. W. 837.

Where the plaintiff is entitled to a continuance on account of an emergency arising in the progress of the case, but instead of asking such continuance he dismisses the action, he is negligent within the language of this section. *Pardey v. Mechanicsville*, 112–68, 83 N. W. 828.

This section does not apply where the cause of action stated in the second action

is different from that alleged in the first, though based on the same transaction. *Whalen v. Gordon*, 95 Fed. 305.

This provision has no application to a second action on a policy of insurance brought after the expiration of the limitation provided by the contract, although such action is commenced within six months of the dismissal of an action in which the plaintiff failed because it was prematurely brought. The contract provision in an insurance policy supersedes the statutory provisions. *Wilhemi v. Des Moines Ins. Co.*, 103–532, 72 N. W. 685. And see *Harrison v. Hartford F. Ins. Co.*, 67 Fed. 298.

Where the first action is dismissed and the second brought after the expiration of the period of limitations, but within six months of the dismissal of the first action, the burden is on the plaintiff to allege and prove such diligence in prosecuting the first action as to bring the case within the provisions of this section. *Ceprley v. Paton*, 120–559, 95 N. W. 179.

SEC. 3456. Admission in writing—new promise.

The debtor cannot avoid a written admission of liability signed by him by showing that he signed the same without reading it under a misapprehension of its contents, due to statements of the attorney of the opposite party, which were not fraudulent. *Bannister v. McIntire*, 112–600, 84 N. W. 707.

Where a guardian in his written statement of account acknowledged the receipt of money as guardian, held that this was sufficient acknowledgment to extend the statute of limitations as to an action against him to recover the amount thus acknowledged to have been received. *Blakeney v. Wyland*, 115–607, 89 N. W. 16.

It is not necessary that the admission be express; it is enough if the writing clearly and unequivocally refers to the instrument in suit and clearly admits that it is not paid. *Will v. Marker*, 122–627, 98 N. W. 487.

An admission such as is contemplated by statute does not arise by mere implication. It must be clear, express and direct, with reference to the indebtedness admitted. Parol evidence is competent to connect the admission with the indebtedness referred to therein, but not for the purpose of giving rise to an implied promise to pay an indebtedness not therein referred to. Therefore held that a written acknowledgment as to one of the notes secured by a mortgage did not prevent the bar of the statute subsequently becoming effectual as to another note so secured. *Finn v. Seegmiller*, 134–15, 111 N. W. 314.

The extension agreement may be signed by an authorized agent. *Iowa Loan & Trust Co. v. McMurray*, 129–65, 105 N. W. 361.

It is not competent by parol evidence to show that a subsequent note was given for unpaid interest on the note in suit in order to remove the bar of the statute of the limitations which can only be done by an admission in writing. *Kleis v. McGrath*, 127–459, 103 N. W. 371.

A judgment may be revived by a written admission or a new promise. *Spilde v. Johnson*, 132–484, 109 N. W. 1023.

In a particular case held that reference to the claim in a letter was sufficient to constitute a written admission or a new promise. *McConaughy v. Wilsey*, 115–589, 88 N. W. 1101.

Evidence in a particular case held sufficient to identify the instrument sued on as one acknowledged by the debtor in writing as a valid obligation. *Campbell v. Campbell*, 118–131, 91 N. W. 894.

It is not necessary that both an admission of the debt and a new promise to pay shall be made and signed by the party, but either is sufficient. *Senninger v. Rowley*, 138–617, 116 N. W. 695.

To have the effect of an admission within the statute, it is not required that the writing specifically describe the debt or mention its exact amount, but the identity of the debt and the amount thereof may be shown by extrinsic evidence. *Ibid.*

The revivor of the debt revives the mortgage given to secure its payment. *Ibid.*

A conveyance subject to a mortgage described therein is a sufficient admission in writing to revive the mortgage debt. *Doran v. Doran*, 145–122, 123 N. W. 996.

It should appear with reasonable certainty that the admission relates to the debt in suit, and if such relation does reasonably appear it is for the debtor insisting that the admission relates to some other indebtedness to show its existence. *Ibid.*

The statute relates only to the form of evidence necessary to remove the bar of the statute. It does not require a new promise or its equivalent. *Ibid.*

It is not necessary that the admission in writing be made to the creditor himself or someone representing him or in privity with him; and held that where a mortgagor after the mortgage indebtedness had become barred by the statute conveyed the property subject to the mortgage, such conveyance constituted a sufficient admission to revive the mortgage debt in favor of the mortgagee. *Ibid.*

The recovery on account of the admission or new promise should be limited to the amount admitted, irrespective of the amount actually due; and where the admission was of five hundred dollars and accruing interest, held that there could be no recovery for interest which had accrued on that amount of indebtedness prior to the admission. *Ibid.*

Neither an oral nor a written representation to the plaintiff not fraudulent, inducing him to withhold the bringing of action until the statutory bar has accrued, will constitute a revivor of such cause of action. *McKay v. McCarthy*, 146–564, 123 N. W. 755.

The grantee of a mortgagor, although he has not assumed the payment of the debt, may waive the statute of limitations as against an action to subject the land to the payment of such debt by foreclosure of the mortgage. *Fitzgerald v. Flanagan*, 155–217, 135 N. W. 738.

Such waiver may be established by parol evidence of a new promise to pay. *Ibid.*

SEC. 3457. Counterclaim.

A claim which is already barred but which was held by the defendant at the time plaintiff's cause of action arose and was not barred at the time the claim sued on originated, may be pleaded as a counterclaim. *Richardson v. Richardson*, 134–242, 111 N. W. 934.

A ground of counterclaim is available as a defense although not interposed until after the bar of the statute of limitations as to the ground of counterclaim has accrued. *Bradley v. Hufferd*, 138–611, 116 N. W. 814.

CHAPTER 3.

OF PARTIES TO AN ACTION.

SECTION 3459. Plaintiff—party in interest—exception.

Where a city provides salaries for police judge and marshal, so that the fees thereof are to go into the city treasury, the city may, as the real party in interest, bring action for the recovery of such fees in criminal cases from the county. *Des Moines v. Polk County*, 107–525, 78 N. W. 249.

One to whom a note is indorsed for collection may maintain an action thereon. *Lehman v. Press*, 106–389, 76 N. W. 818.

One to whom negotiable municipal bonds, transferable by delivery, have been delivered as agent for another, may sue thereon in his own name, being vested with the legal title, although the action is subject to any defense between the maker and the beneficial owner. *Salmon v. Rural Ind. School Dist.*, 125 Fed. 235.

A party holding the title of an instrument may sue thereon. So, where the action was brought by a foreign receiver which could not be maintained by him as such receiver, held that as an individual to whom the cause of action sued on had been assigned he could maintain such action. *Hale v. Harris*, 112–372, 83 N. W. 1046.

The assured in a contract of fire insurance may maintain an action to recover thereunder, although it has been pledged to a mortgagee. *Smith v. Continental Ins. Co.*, 108–382, 79 N. W. 126.

With respect to contracts made by the cashier of a bank for its benefit, he may maintain an action without joining the bank, being the trustee of an express trust for the bank. *Leach v. Hill*, 106–171, 76 N. W. 667.

Where a contract is made for the benefit of a person not a party thereto, such third party may bring action thereon. Therefore, held that where one party authorized another to draw checks in his own name on a certain bank with the agreement that the first party would see that the checks were honored, the cashier of a bank receiving such checks had a right of action against the person who had agreed to see that the checks were paid. *Ibid.*

The trustee of an express trust may bring action without joining those for whose benefit the action is prosecuted. *Zion Church v. Parker*, 114–1, 86 N. W. 60.

Defect of parties appearing on the face of the petition is waived by not objecting thereto in the proper manner. *Ibid.*

The party for whose benefit a contract has been made may maintain an action thereon. *Runkle v. Kettering*, 127–6, 102 N. W. 142.

The principle that one may sue upon the promise made to another for his benefit is confined to cases where the person for whose benefit the promise is made has the sole, exclusive interest in its performance. *Chicago, R. I. & P. R. Co. v. Ottumwa*, 112–300, 83 N. W. 1074.

The party with whom or in whose name the contract is made for the benefit of another may sue thereon in his own name without adding the descriptive words used by him in designating the capacity in which he acted in making the contract. *McKee v. Needles*, 123–195, 98 N. W. 618.

One who sells property to another on an agreement that its value shall be credited on the note of a third person may, on failure of the purchaser to make the credit as agreed, maintain an action against the purchaser for the value of the property. *Dorr Cattle Co. v. Jewett*, 116–93, 89 N. W. 109.

The holder of an unaccepted check may maintain an action thereon against the bank subject to the offset of any note or other claim held by the bank against the drawer. (Following earlier cases, but not referring to § 189 of the negotiable instruments act, supp. § 3060-a.) *Gloom v. Winthrop State Bank*, 121–101, 96 N. W. 733.

In a contest over the probate of a will relating to personal property, the administrator or executor of a contestant should be substituted on his death. Such contest cannot be carried on in the interest of the deceased by his widow and heirs. *In re Will of Wiltsey*, 122–423, 98 N. W. 294.

A member of an unincorporated association cannot maintain an action in behalf of the association. *Westbrook v. Griffin*, 132–185, 109 N. W. 608.

An order of substitution of a trustee in bankruptcy in place of the bankrupt in an action to recover property delivered under a sale procured by fraud, does not terminate the jurisdiction of the court as to the bankrupt himself, and a judgment against him is not invalid. *Kuh, Nathan & Fisher Co. v. Glucklick*, 120–504, 94 N. W. 1105.

While an action should be prosecuted in the name of the real party in interest, one who sues by way of substitution is subject to the burdens as well as entitled to the benefits of the action of his predecessor. *Crary v. Kurtz*, 132–105, 105 N. W. 590, 109 N. W. 452.

The executor named in a will which has not yet been admitted to probate is not a trustee of an express trust in such sense as to be authorized to contest the probate of a codicil. *In re Estate of Stewart*, 107–117, 77 N. W. 574.

This section will be recognized by the federal courts in determining whether a suit is brought in the name of the proper party. *Edmunds v. Illinois Cent. R. Co.*, 80 Fed. 78.

One for whose benefit a contract is made is the real party in interest as to an action for breach thereof, regardless of whether the consideration proceeds from him or another. *In re Estate of Youngerman*, 136–488, 114 N. W. 7.

An officer or stockholder of a corporation is not a real party in interest in an action brought in behalf of the corporation. *Stewart v. Hall*, 144–113, 122 N. W. 609.

But if the suit has been prosecuted in the name of one not entitled to maintain it, the supreme court, on reversal on that ground, may remand the case with leave to plaintiff to bring in the necessary parties. *Ibid.*

One whose apparent interest in the controversy might be eliminated by a formal disclaimer is not necessarily a real party in interest. *White v. Chicago & N. W. R. Co.*, 145–389, 124 N. W. 162.

One who sues as surviving partner for a claim belonging to the partnership sues in his own right, and his description of himself as surviving partner is immaterial. *Murphy v. Cochran*, 146–443, 123 N. W. 349.

In an action brought by a party with whom a contract is made for the benefit of others, it is not necessary to make defendant another person named in the contract who has no real interest whatever in the matter in dispute. *Rapp v. Linebarger*, 149–429, 128 N. W. 555.

The owner of property is entitled to maintain an action for damages thereto, without regard to the rights of another who may be entitled to the proceeds of such recovery. *Betts v. Chicago, B. & Q. R. Co.*, 150–252, 129 N. W. 962.

One for whose benefit a contract is made may maintain an action thereon. *Weiser v. Ross*, 150–353, 130 N. W. 387.

Where one contracting in his own right has used a trade name in making such contract, he may sue thereon either in his own name or in the name used. *Enslow v. Ennis*, 155–266, 135 N. W. 1105.

Where the plaintiff sues purely in a representative capacity, he can only recover on showing a cause of action which has accrued to him in that capacity, and not a cause of action in his own right. *Van Sickle v. Staub*, 155–472, 136 N. W. 546.

A party who is authorized by statute to sue need not be the real party in interest. *Reusch v. Loserth*, 139 N. W. 454.

Whether or not a third person may enforce a contract made for his benefit does not depend at all upon whether he has furnished the consideration for the agreement. *Gould v. Gunn*, 140 N. W. 380.

Where a plaintiff sues an assignee of a cause of action and the assignor testifies on the trial and has knowledge of plaintiff's claim as assignee, such assignor is estopped from thereafter making any claim against the assignee. *Carpenter v. Modern Woodmen*, 142 N. W. 411.

SEC. 3460. Plaintiffs joined.

Several judgment creditors may join as plaintiffs in an action to set aside a fraudulent conveyance. *Gamet v. Simmons*, 103–163, 72 N. W. 444.

Where the claims of the insured and the person for whose benefit the policy is specified to have been taken have been assigned to another, who sues for the loss, there may be a reformation of the policy without the original parties thereto being made parties to the action. *Benesh v. Mill Owners' Mut. F. Ins. Co.*, 103–465, 72 N. W. 674.

Where all the parties having a like interest join in the bringing of an action, the amount in controversy is the aggregate of the amounts of the claims of the different parties so joining. *Comstock v. Eagle Grove*, 133–589, 111 N. W. 51.

Members of a voluntary association may join in asking relief as against other members who have been guilty of fraud in representing such association, all persons interested being made parties to the proceeding. *Cress v. Ivens*, 155–17, 134 N. W. 869.

This provision for the joinder of all parties having an interest in the subject matter of the action or in obtaining the relief demanded was designed to introduce into ordinary actions the rules which formerly obtained in chancery practice with respect to parties plaintiff. *Miller v. Hawkeye Gold Dredging Co.*, 156–557, 137 N. W. 507.

But although claims of different plaintiffs grow out of the same transaction, if they are not interested in the same cause of action they cannot join. *Ibid.*

To justify joining parties as plaintiffs there must be some community of interest in the principal claim presented for adjudication and some common benefit or advantage in the relief sought. *Ibid.*

SEC. 3461. Assignment—without prejudice.

The assignment of a chose is without prejudice to any counterclaim, defense or cause of action, whether matured or not, if matured when pleaded, existing in favor of the defendant and against the assignor before notice of the assignment. *Hayes v. Clinton County*, 118–569, 92 N. W. 860.

Since the adoption of this statutory provision, the assignee is subject not only to defenses, but also to equitable rights of set-off existing in favor of the maker of a note as against the assignor. *DeLaval Separator Co. v. Sharpless*, 134–28, 111 N. W. 438.

The assignee of a cause of action held by an insolvent bank takes such claim subject to a set-off in favor of the debtor of any deposit he may have in such bank. *Little v. Sturgis*, 127–298, 103 N. W. 205.

One who takes a negotiable instrument by assignment and not by negotiation in due course takes subject to the defenses available to the maker as against the assignor. *Hecker v. Boylan*, 126–162, 101 N. W. 755.

In an action by the assignee of a chose in action, the defendant can only interpose such defenses as existed in his favor and against the assignor, before notice of the assignment. *Peterson v. Ball*, 121–544, 97 N. W. 79.

After the assignment of a judgment the judgment debtor is not entitled to set off as against such assignee a judgment subsequently acquired against the judgment creditor. *Miller v. Rosebrook*, 136–158, 113 N. W. 771.

An assignment of a right to recover damages on account of injuries is good although the defendant has no notice of such assignment until after the statutory period of limitation has expired. *Benson v. Ottumwa*, 143–349, 121 N. W. 1065.

The right of action to recover damages for a tort may be sold, transferred or assigned so as to give the assignee the same right of action as that held by the assignor. But the assignor cannot by settlement with the wrongdoer cut off any rights existing as against the assignee with reference to the disposition of the proceeds of the action. *Kithcart v. Kithcart*, 145–549, 124 N. W. 305.

SEC. 3462. Defendants.

In an action against an insolvent corporation it is not necessary to make the receiver of the corporation a party defendant unless an attempt is made thereby to interfere with the right of the receiver to the property intrusted to his care. *State Bank v. McElroy*, 106–258, 76 N. W. 715.

The action of the board of a public corporation in issuing bonds cannot be annulled on certiorari where the holders of the bonds have not been made parties. *Brockway v. Board of Supervisors*, 133–293, 110 N. W. 844.

A contractor to whom bonds have been issued in payment of work is an indispensable party to a suit to restrain the further issuance of bonds to him and the collection of the taxes for the payment thereof. *Tod v. Crisman*, 123–693, 99 N. W. 686.

The surety is not a necessary party to a cross-petition in which the principal debtor seeks to assert his rights against a third person growing out of the transaction with reference to which he is sued. *First National Bank v. Dutcher*, 128–413, 104 N. W. 497.

In an action to set aside a conveyance for false representation as to title it is immaterial that a third person appearing to have some interest in the property is not made a party. *Weise v. Grove*, 123–585, 99 N. W. 191.

It is not error to refuse to permit other parties to be brought in as defendants where there is no controversy presented by the pleadings the determination of which will affect their rights. *Burns v. Chicago, Ft. M. & D. M. R. Co.*, 110–385, 81 N. W. 794.

In an action on a nonnegotiable instrument, brought by a transferee thereof, the defendant, who has therefore the opportunity to make as against the holder any defense which he could make against the original payee, is not entitled to have the payee and assignor of the instrument made a party. *Shambaugh v. Current*, 111–121, 82 N. W. 497.

Joinder of different parties defendant liable to the plaintiff on different causes of action is not allowable. *Iowa Lillooet Gold Mining Co. v. Bliss*, 144 Fed. 446.

A misjoinder or uniting of parties who should not be joined cannot be taken advantage of by demurrer, but must be reached by motion. *Dolan v. Hubinger*, 109–408, 80 N. W. 514.

If such objection is not raised by motion it is deemed waived. *Lull v. Anamosa Nat. Bank*, 110–537, 81 N. W. 784.

One who has conditionally paid a sum of money which is in controversy to the clerk of the court and has no further interest in its disposition, is not a necessary party to a suit with reference to the disposition of such money. *Hubbard v. Ellithorpe*, 135–259, 112 N. W. 796.

Where two persons are asserting conflicting claims to property in possession of a third person indifferent in interest as to which shall succeed, such third person should be made a party defendant. *Barto v. Harrison*, 138–413, 116 N. W. 317.

One who has an interest in the controversy or is a necessary party to its adjudication may be made a defendant. *Benjamin v. Iowa City Elec. Light Co.*, 144–659, 123 N. W. 322.

There is manifest distinction between a case in which, by reason of defect of parties, plaintiff is entitled to no relief whatever and one in which the plaintiff has shown himself to be entitled to relief, but it appears that the relief granted will not be effectual as to persons interested who have not been made parties. In the latter case, the court is not without jurisdiction. *Oziah v. Howard*, 149–199, 128 N. W. 364.

In an action against an unincorporated association, service on one member is not sufficient to give jurisdiction as to other members of such association. And if the association only is named as defendant, service of notice upon one member thereof is unavailing. *Hanley v. Elm Grove Mut. Telephone Co.*, 150–198, 129 N. W. 807.

An action for attachment, in which no issue is raised as between plaintiff and defendant in regard to the ownership of the attached property, should not be abated on account of failure to bring in as a defendant a third person who may have a claim to such property. *Dimsdale v. Tolerton-Warfield Co.*, 151–425, 131 N. W. 689.

A petition is not subject to demurrer because of defect of parties defendant. *Reed v. Hollingsworth*, 157–94, 135 N. W. 37.

SEC. 3463. United interest.

Tenants in common when jointly interested in the damages must join in an action for trespass. *Anderson v. Acheson*, 132–744, 110 N. W. 335.

Nonjoinder of a necessary party plaintiff must be raised in the manner pointed out by statute in order to be available. If the defect is apparent on the face of the petition it can only be raised by demurrer, and if not thus apparent, by answer alleging the facts rendering the joinder of such party necessary. *Ibid.*

SEC. 3464. One suing for all.

Where in a bank receivership proceeding some of the creditors object to the allowance of preferred claims, other creditors of the same class and in the same right may join in an appeal although not formally made parties in such proceeding. *In re First State Bank*, 149–662, 129 N. W. 70.

One or more parties plaintiff may sue for others who have the same general interest or who are so numerous as to make it impracticable to bring all of them before the court. *Dumont v. Peet*, 152–524, 132 N. W. 955.

SEC. 3465. Joint and several obligations.

If plaintiff maintains his action against one of several defendants he may have judgment against that one, and the other defendants may have judgment against plaintiff for costs. *Lull v. Anamosa Nat. Bank*, 110–537, 81 N. W. 784.

Notwithstanding the provisions of this section, a partnership contract not to engage in a particular business for a specified time, although signed by the members of the firm as individuals, will be binding only on the partnership, and not on the individual members. *Streichen v. Fehleisen*, 112–612, 84 N. W. 715.

Action against the surety on a liquor seller's bond for civil damages caused by the sale of liquor may be maintained without making the principal a party. *Knott v. Peterson*, 125–404, 101 N. W. 173.

The maker and the indorser of a note may be joined as defendants in a suit thereon. *Swartley v. Oak Leaf Creamery Co.*, 135–573, 113 N. W. 496.

So in an action to reach the property of a dormant corporation for a corporate debt, officers of the corporation holding its property may be joined with the corporation. *Ibid.*

In an action against the maker of a promissory note the indorser thereof may be joined as defendant. *Darling v. Blazek*, 142–355, 120 N. W. 961.

Though the action is instituted against defendants jointly and they join in one

answer and a general verdict is rendered against them, a new trial may be granted as to one of such defendants for insufficiency of evidence to justify a verdict as against him. *Pearse v. Balm*, 152–422, 132 N. W. 821.

The plain purpose of this section is to abolish the common-law rule requiring the joinder in one action of all parties jointly bound, no matter how the obligation arises. Therefore suit may be brought against one or more of several joint executors or administrators. *Farmers' Bank v. Wright*, (C. C.) 158 Fed. 841.

An action to recover damages for causing the intoxication of a person, to plaintiff's injury, may be maintained against separate sellers who have contributed to such intoxication, or against the sureties on the bonds of such sellers. *Kaus v. American Surety Co.*, (D. C.) 199 Fed. 972.

SEC. 3466. Other parties brought in.

When the determination of a controversy between the parties before the court cannot be made without the presence of other parties, they must be ordered brought in. *Farmers' Savings Bank v. Independent School Dist.*, 122–99, 97 N. W. 988.

A plaintiff may be required to bring in other defendants for the purpose of avoiding a multiplicity of actions against the same party. *Stroup v. Bridger*, 124–401, 100 N. W. 113.

Failure to bring in indispensable parties may be a sufficient ground for denying relief, although the objection is not raised in the trial court. *Tod v. Crisman*, 123–693, 99 N. W. 686.

One who is a proper but not a necessary party need not be brought into the litigation, and a failure to bring in such party cannot be complained of. *Busse v. Schaefer*, 128–319, 103 N. W. 947.

Where a party is necessary to the granting of effective relief he may be brought in, although it is not necessary for the establishment of the cause of action. *Rea v. Ferguson*, 126–704, 102 N. W. 778.

An action may be maintained against a surety alone without bringing in his principal. *Bannister v. McIntire*, 112–600, 84 N. W. 707.

In an action to recover real property it is not proper for defendant in a cross-petition setting up adverse possession by reason of occupation to a boundary line different from that recognized by plaintiff, to bring in as codefendants other parties owning adjoining property as to whom the same question may arise. *Klinker v. Schmidt*, 106–70, 75 N. W. 672.

A mortgagee of personal property, sued by the mortgagor for its conversion, has the right to have subsequent mortgagees brought in. *Kohn v. Dravis*, 94 Fed. 288.

Where one seeks protection against conflicting claims to the same debt or duty and has an opportunity by having a party brought in, to have the conflicting claim settled in one action at law, he has no right to the equitable remedy entered by bill of interpleader. *Hoyt v. Gouge*, 125–603, 101 N. W. 464.

A court of equity has the power to order any person to be brought in as a plaintiff who has or claims to have any interest in the controversy. *Benjamin v. Iowa City Elec. Light Co.*, 144–659, 123 N. W. 322.

Where a case may be decided without prejudice to the rights of those who might have been made parties but have not been brought in, it is not error to enter a decree in their absence. *Duetzmann v. Kuntze*, 147–158, 125 N. W. 1007.

The rule as to necessary parties, requiring that all parties whose interests are involved in the matter be brought in, has application only to proceedings in equity where the plaintiff is asking some relief to which he is not entitled, unless he can make the decree binding on those who are to be affected by it. *Searles v. Northwestern Mut. Life Ins. Co.*, 148–65, 126 N. W. 801.

The remedy for the failure to bring in the necessary parties is not by pleading by way of abatement but by motion asking the court to bring in such parties. *Ibid.*

Even in equity cases the impossibility of bringing in the necessary parties is a reason for not doing so. *Ibid.*

The absence of defendants who might have been made parties does not deprive the court of jurisdiction over the subject matter and the parties before it. *Stewart v. Hall*, 150–744, 130 N. W. 993.

This provision is specially applicable to cases where the debtor is under an apparent liability to two different parties for the same debt and only one of them is before the court. *Kauffman v. Phillips*, 154–542, 134 N. W. 575.

But the defendant thus brought in cannot by cross-petition against the plaintiff set up a cause of action of his own, independent of the claim which renders his presence in the case necessary to the adjudication of the plaintiff's right. *Ibid.*

SEC. 3467. Suit on public bond.

Anyone who has sustained an injury may sue on such bond as the real party in interest. *Home Sav. & T. Co. v. District Court*, 121–1, 95 N. W. 522.

An action on a bond may be maintained in the name of any person intended to be secured thereby. *Hipwell v. National Surety Co.*, 130–656, 105 N. W. 318.

Where a bond was executed to the chief financial officer of a life insurance asso-

ciation for the security of the funds of the association deposited by him in a bank and before action on the bond was brought he had ceased to be such officer, held that he was not a party entitled to maintain an action on such bond. *Bort v. McCutchen*, 147 Fed. 626.

SEC. 3468. Partnership.

The creditor of a partnership may bring an action against members of the partnership individually to charge them with a partnership debt without joining the firm, but to maintain such action the plaintiff must show that the alleged indebtedness existed. In such a case it would be a complete defense to show that as between plaintiff and the alleged members of the firm the indebtedness had been finally adjudicated not to exist. *Baxter v. Rollins*, 110–310, 81 N. W. 586.

In an action brought against a partnership it is not proper to render judgment against a member of the firm for an individual liability. *Ogle v. Miller*, 128–474, 104 N. W. 502.

A judgment against a partnership as such is a judgment against the firm and nothing more, and no judgment can be entered against an individual member except as he has been made a party defendant and served with notice. *Anderson v. Wilson*, 142–158, 120 N. W. 677.

The plaintiff may prosecute his case to judgment against the partnership alone, or against the partnership and any member thereof, and may enforce his judgment against such defendants without waiting to obtain jurisdiction over other members and without losing his right to proceed in a new action on the original cause against members not made parties; and his execution can be no broader than his judgment nor can it run against any other property than that of the judgment defendant. If he desires an execution against the property of any individual member, he must first obtain a judgment in some manner against the owner of such property. *Ibid.*

Where the defendant takes the position that the claim sued upon in a partnership name in fact belongs to an individual, doing business under such partnership name, he cannot afterwards object that judgment is rendered in favor of such individual. *Hartkemeyer v. Griffith*, 142–694, 121 N. W. 372.

If the plaintiff chooses to take his judgment against the partnership alone, a judgment against the partnership is all that he has; and his execution can be no broader than his judgment, nor can it run without some special order against any other property than that of the partnership. If he desires an execution against the property of an individual member, he must first obtain a judgment in some manner against such member. *Lansing v. Bever Land Co.*, 157– —, 138 N. W. 833.

Under this provision, action may be brought by or against a partnership, as such, or against all or either of the individual members, or against it and all or any of its members. *Bruett v. Austin Drainage Excavator Co.*, (C. C.) 174 Fed 668.

SEC. 3475. Actions by state.

This provision has no relation to actions by a county or other municipal corporation, and an appeal in an action in which judgment is rendered against a county will not suspend the judgment unless a supersedeas bond is filed. *Harrison v. Stebbins*, 104–462, 73 N. W. 1034.

SEC. 3476. Transfer—abatement.

Where a cause of action is transferred by assignment there is no occasion for dismissing the action, nor is the assignee entitled to intervene. His proper relief, if any, is to have himself substituted as plaintiff. *Bank of Commerce v. Timbrell*, 113–713, 84 N. W. 519.

An assignment of a cause of action after suit thereon has been instituted is not a ground for abating the action or for requiring the substitution of assignee as the party plaintiff. *Mayo v. Halley*, 124–675, 100 N. W. 529; *Emerson v. Miller*, 115–315, 88 N. W. 803; *Kringle v. Rhomberg*, 120–472, 94 N. W. 1115; *Citizens' State Bank v. Jess*, 127–450, 103 N. W. 471.

A substituted party takes up the prosecution or defense of the case at the point where the original party left it, assuming the burdens as well as receiving the benefits of the action of his predecessor. *Crary v. Kurtz*, 132–105, 105 N. W. 590, 109 N. W. 452.

A pending action is not abated by the discharge of the plaintiff in a bankruptcy proceeding subsequently instituted. *Wilsey v. Jewett*, 122–315, 98 N. W. 114.

After loss a policy of fire insurance may be assigned and if the assignment be after action brought, the suit may be continued in the name of the assignee. *Bartling v. German Mut. L. & T. Ins. Co.*, 154–335, 134 N. W. 864.

One who acquires, by execution sale, the rights of a judgment plaintiff may ask to be substituted as plaintiff, pending an appeal; but the defendant cannot on account of such transfer of interest have the action abated. *Markley v. Western Union Tel. Co.*, 141 N. W. 443.

SEC. 3477-a. **Recovery by woman or her estate for personal injury—maximum.** When any woman receives an injury caused by the negligence or wrongful act of any person, firm or corporation, including a municipal corporation, she may recover for loss of time, medical attendance and other expenses incurred as a result thereof in addition to any elements of damages recoverable by common law; and if such injury result in causing death, her administrator may sue and recover for her estate, the value of her services as a wife or mother or both in such sum as the jury may deem proportionate to the injury resulting in her death, in addition to such damages as are recoverable by common law; also loss of services and expenses incurred before death, if not previously recovered, and in such case of injury arising from wilful, gross, or wanton negligence, punitive damages may be allowed by the jury in addition to other damages herein provided, but in no event shall the amount exceed the sum of six thousand dollars. [34 G. A., ch. 163, § 1.]

SEC. 3480. Actions by minors.

A court acquires jurisdiction in an action brought by a minor in his own name and not by guardian or next friend and though its judgment may be erroneous because the action is not properly brought it is not void. *Parkins v. Alexander*, 105–74, 74 N. W. 769.

Therefore, where in an action brought by a minor in his own name before a justice of the peace judgment was rendered for the plaintiff and defendant appealed to the district court, held that the latter court had jurisdiction to allow the substitution of a next friend as plaintiff and proceed with the case. *Ibid.*

An action in favor of a minor should be brought by his guardian or next friend, but as the minor is the real party in interest, the court is not without jurisdiction if the action is brought by the minor in his own right. *First Nat. Bank v. Casey*, 138 N. W. 897.

SEC. 3482. Defense by minor.

A judgment against an infant without defense by a guardian is clearly erroneous, and such error may be made the ground for granting a new trial under the provisions of code § 4091. *Wise v. Schloesser*, 111–16, 82 N. W. 439.

A judgment rendered against a minor without appointment of or defense by a guardian is not void, but at most irregular. *Reints v. Engle*, 130–726, 107 N. W. 947.

The fact that a guardian *ad litem* appears for a minor does not render it imperative that such guardian represent the minor on appeal. The court may appoint a general guardian and authorize him to prosecute the appeal for such minor. *In re Estate of Strang*, 131–583, 106 N. W. 631.

An appointment of a guardian *ad litem* before the court has acquired jurisdiction of the minor is not invalid. *Rice v. Bolton*, 126–654, 100 N. W. 634, 102 N. W. 509.

The appointment of such a guardian is not in itself a jurisdictional matter. *Ibid.*

The entry of judgment without such appointment in the absence of an appearance is not void, but an irregularity only. *Ibid.*

The appointment of a guardian *ad litem* for a minor defendant will ordinarily be made upon the motion of either party, and it is to be presumed that the court appoints a proper person for such purpose. The fact that the guardian appointed does not make active defense is not in itself evidence of fraud. *Harris v. Bigley*, 136–307, 111 N. W. 432.

The entry of judgment against a minor without defense by guardian is reversible error. *State v. Stark*, 149–749, 129 N. W. 331.

The presence, during the trial, of the parent who has not been appointed guardian of the minor's property is not sufficient. *Ibid.*

Where a guardian *ad litem* files an answer for the minor, the court has jurisdiction over the person of the minor and over the subject matter and its judgment, though erroneous, is not subject to collateral attack. *Ringstad v. Hanson*, 150–324, 130 N. W. 145.

The fact that the defense of a minor defendant is not made by guardian does not deprive the court of jurisdiction to render judgment, although a judgment without such defense is erroneous. *First Nat. Bank v. Casey*, 138 N. W. 897.

SEC. 3485. Defense of insane person—appointment of guardian.

Where the insanity of a defendant is not called to the attention of the court and a judgment is rendered against him by default, no guardian *ad litem* being appointed nor defense made, the judgment may be set aside on petition, under the pro-

visions of code § 4091, relating to new trial after the expiration of the term at which the judgment is rendered. *Hawley v. Griffin*, 121–667, 92 N. W. 113, 97 N. W. 86.

A decree against a defendant who is in fact insane may be vacated and a new trial ordered, where no guardian *ad litem* was appointed to defend, although the fact of insanity was not made to appear of record in the proceeding. *Ibid.*

Where plaintiff in an action against an insane defendant is unsuccessful, compensation for the services of the guardian *ad litem* appointed by the court should be taxed against him as costs. *Burkhardt v. Burkhardt*, 107–369, 77 N. W. 1069.

In a proceeding by the guardian for the sale of the ward's property in which a guardian *ad litem* has been appointed for the ward, the guardian *ad litem* should plead whatever might defeat the action of the guardian. *In re Guardianship of Kimble*, 127–665, 103 N. W. 1009.

In an action against an insane person represented by a guardian, a personal judgment may be rendered enforceable against the property of such insane person. *Gressly v. Hamilton County*, 136–722, 114 N. W. 191.

SEC. 3487. Interpleader.

Although an interpleader is expressly recognized only in actions of replevin, the general statutory provision that a plaintiff may prosecute his action by equitable proceedings in all cases where courts of equity before the adoption of the code had jurisdiction (code § 3427), still authorizes the action of interpleader as previously recognized in equity. *Hoyt v. Gouge*, 125–603, 101 N. W. 464.

CHAPTER 4.

OF PLACE OF BRINGING ACTION.

SECTION 3491. In relation to real property.

Where the court acquires jurisdiction by virtue of the location of the real property, one who is made defendant in the action and seeks to establish his title is not entitled to have the venue changed to the county of his residence. *Booth v. Bradford*, 114–562, 87 N. W. 685.

An action for specific performance is transitory, unless made local by statute, and may be brought in the court having jurisdiction of the property, or in one having jurisdiction of the person only, at the option of the plaintiff. *Epperly v. Ferguson*, 118–47, 91 N. W. 816.

An action for specific performance is contract to convey land may be brought and prosecuted in the county where the land is situated, and the defendant is not entitled to have the venue changed to the county of his residence. *Bradford v. Smith*, 123–41, 98 N. W. 377.

An action for the specific performance of a contract for the sale of land and to quiet title thereto may properly be brought in the county where the land is situated. *Donaldson v. Smith*, 122–388, 98 N. W. 138.

A suit to set aside a deed and declare the property that of another than the grantee therein should be brought in the county where the real estate or some part of it is situated. *Long v. Garey Inv. Co.*, 135–398, 112 N. W. 550.

A court having jurisdiction of an action by an administrator regarding lands in more than one county, may, on dismissal as to the lands located in the county where the action is brought, retain jurisdiction to grant relief as to the lands in another county. *Ibid.*

SEC. 3493. To foreclose mortgage or mechanic's lien.

Although this section requires that an action for the foreclosure of a mortgage on real property shall be brought in the county in which the property to be affected is situated, nevertheless the objection that an action to foreclose is brought in another county from that in which the property is situated is not jurisdictional, and if the defendant does not move for a transfer of the action to the proper county, he cannot afterwards urge such objection. *McDonald v. Second Nat. Bank*, 106–517, 76 N. W. 1011.

The statute confers on the defendant a right to insist upon a foreclosure suit being tried in the county in which the subject matter is situated, but this right may be waived by defendant. *Ibid.*

In an action to foreclose a mortgage, properly brought in the county in which the mortgaged property is situated, one who is on cross-petition of the defendant made a party to the suit is not entitled to have the venue changed to the county of his residence. Such cross-petition and the proceedings thereunder do not constitute a separate action. *Brown v. Holden*, 120–191, 94 N. W. 482.

SEC. **3494. Local actions.** Actions for the following causes must be brought in the county where the cause, or some part thereof, arose:

1. *For fines, penalties or forfeitures.* Those for the recovery of a fine, penalty or forfeiture imposed by a statute; but when the offense for which the claim is made was committed on a watercourse or road which is the boundary of two counties, the action may be brought in either of them;

2. *Against public officers.* Those against a public officer or person specially appointed to execute his duties, for an act done by him in virtue or under color of his office, or against one who by his command or in his aid shall do anything touching the duties of such officer, or for neglect of official duty;

3. *On official bonds.* Those on the official bond of a public officer;

4. *Executor, administrator or guardian.* Those on the bond of an executor, administrator, or guardian may be brought in the county in which the appointment was made and such bond filed;

5. *Actions on other bonds.* And actions on all other bonds provided for or authorized by law may be brought in the county in which such bond was filed and approved. [31 G. A., ch. 153; 27 G. A., ch. 99, § 1; C. '73, § 2579; R. § 2796.]

SEC. **3496. Place of contract.**

To authorize suit against defendant in a county other than that of his residence on the ground that the contract on which he is sued provides for performance at a particular place, the provisions must be express and not merely by implication. *Baily v. Birkhofer*, 123–59, 98 N. W. 594.

To authorize action on a contract to be brought against a nonresident of the county on the ground that performance in the county is provided for, it must appear in terms from the agreement that there was to be a performance in such county; otherwise an application for change of venue should be granted. *Moyers v. Council Bluffs Nursery Co.*, 125–672, 101 N. W. 508.

If the jurisdiction of the court depends on the fact that the contract sued upon is payable at a particular place, it is competent in a collateral attack upon the judgment to show that as a matter of fact the contract did not so provide. *Cooley v. Barker*, 122–440, 98 N. W. 289.

A bond for the payment of damages which shall be sustained by failure to perform a decree which may be subsequently rendered is not a contract to be performed at any particular place. *Prader v. National Masonic Accident Assn.*, 107–431, 78 N. W. 60.

A blank left for the purpose in a note may be filled in by the payee so as to authorize suit to be brought in a particular county thus designated. *Johnston v. Hoover*, 139–143, 117 N. W. 277.

Where a resident of one county contracted with a resident of another for the purchase of property to be paid for on delivery in money or by giving an approved note payable in the county of the residence of the seller, held that there was no contract for performance in a particular place. *Wayt v. Meighen*, 147–26, 125 N. W. 802.

If in an action properly brought in a county other than defendant's residence in the state, a cause of action is joined on which suit can only be maintained in the county of defendant's residence, the latter cause of action may properly be stricken out on motion. *First Nat. Bank v. Shriver*, 152–504, 132 N. W. 848.

If the action is on an implied contract, this statutory provision has no application, and if it is upon a written contract or agreement to pay or perform at a given place, it must be express in order to give a court at that place jurisdiction in an action against the resident of another county. *Wixom v. Hoar*, 139 N. W. 890.

SEC. **3497. Against common carriers.** An action may be brought against any railway corporation, the owner of stages, or other line of coaches or cars, express, canal, steamboat and other river crafts, telegraph and telephone companies, and the lessees, companies or persons operating the same, in any county through which such road or line passes or is operated. [29 G. A., ch. 138, § 1; C. '73, § 2582.]

A railroad company is suable in any county through which its road passes and may be sued in the superior court of a city in such county; but if not a resident of the city, it is entitled to change the venue to the district court under code § 261. *Wiar v. Wabash R. Co.*, 151–121, 130 N. W. 794.

SEC. 3498. Against construction companies.

The statutory provision as to venue of actions against persons engaged in the construction of railways does not authorize a suit against a subcontractor on an oral contract for grain purchased by him to feed his team in a county other than that of his residence. *Wilkinson v. McCarthy*, 127–292, 103 N. W. 136.

SEC. 3499. Against insurance companies.

These provisions as to place of bringing suit on a policy of insurance are applicable, although as an incident to the relief sought the court is asked to reform the terms of the policy. *Benesh v. Mill Owners' Mut. F. Ins. Co.*, 103–465, 72 N. W. 674.

An insurance company may be sued where the contract of insurance is made. *Teller v. Equitable Mut. L. Assn.*, 108–17, 78 N. W. 674.

The statutory provision that an action for breach of contract of insurance may be brought in the county in which the contract was made is not to be confined in its application to actions for losses under policies of insurance, but it applies also to actions relating to the consideration for a policy. *Cameron v. Mutual Life & Trust Co.*, 121–477, 96 N. W. 961.

Where one company undertakes to carry out the contracts of another, it is subject to suit under such contracts wherever the company entering into such contracts might have been sued. *Petite v. Atlas Ins. Co.*, 142–265, 120 N. W. 642.

An action on an accident insurance policy may be brought in the county where the loss occurs, and application to transfer it to the county of the company's main office cannot be sustained. *Jenkins v. Hawkeye Com. Men's Assn.*, 147–113, 124 N. W. 199.

When a mutual company consents to the removal of property covered by its policy to another county and receives premiums on the policy after such removal, the action may properly be brought and maintained in the county where the loss occurs. *Kesler v. Farmers' Mut. F. & L. Ins. Assn.*, 141 N. W. 954.

SEC. 3499-a. Against operators of coal mines brought in county where mine is located. An action may be brought against any corporation, company, or person, owning, leasing, operating, or maintaining a coal mine, in the county where said mine is located, on any contract, or for any tort, in any manner connected with or growing out of the construction, use, or operation of said mine. [28 G. A., ch. 121, § 1.]

SEC. 3500. Office or agency.

This section does not require that the office or agency be permanent rather than transient nor that the business carried on be a considerable share of that done by the principal. *Locke v. Chicago Chronicle Co.*, 107–390, 78 N. W. 49.

The fact that the person served with notice was at the time representing the defendant company as secretary in the making of a contract and in determining the manner of execution thereof, held sufficient to show an agency such as to authorize the bringing of an action on a contract thus made within the county of such agency. *Thistle Coal Co. v. Rex Coal & Mining Co.*, 132–592, 109 N. W. 1094.

Under this section, held that where a resident of one county sent an agent into another county to sell and contract for the delivery of fruit trees, and subsequently sent the same agent with the trees to that county for delivery, in accordance with the terms of the contract, an action relating to the contract could be brought against him in that county. *Wood v. Rice*, 118–104, 91 N. W. 902; *Goodrich v. Fogarty*, 130–223, 106 N. W. 616.

A suit for commission in connection with the sale of real property may be brought in the county in which the agent acts in negotiating such sale. *Gilbert v. McCullough*, 140–362, 118 N. W. 511.

A steamship company having established an agency in a city for the sale of tickets, an action for breach of the contract of transportation arising out of the sale of a ticket by such agency may be brought within the county. *Zabron v. Cunard Steamship Co.*, 151–345, 131 N. W. 18.

This section is not confined in its application to actions upon contracts alone. *Donisthorpe v. Lutz*, 155–379, 136 N. W. 233.

Where, as a ground for motion for change of venue, it is contended that the cause of action did not grow out of the business of the office or agency in the county, the question thus raised is to be determined by affidavits and counter affidavits. *Ibid.*

SEC. 3500-a. Against surety companies. Suit may be brought against any company or corporation furnishing or pretending to furnish surety, fidelity, or other bonds in this state, in any county in which the

principal place of business of such company or corporation is maintained in this state, or in any county wherein is maintained its general office for the transaction of its Iowa business, or in the county where the principal resides at the time of bringing suit, or in the county where the principal did reside at the time the bond or other undertaking was executed; and in the case of bonds furnished by any such company or corporation for any building or improvement, either public or private, action may be brought in the county wherein said building or improvement, or any part thereof is located. [34 G. A., ch. 164, § 1.]

SEC. 3501. Place of residence.

Except as otherwise specified, personal actions are to be brought in the county where the defendants or some of them, if more than one, actually reside. *Wilkinson v. McCarthy*, 127–292, 103 N. W. 136.

It is not error to overrule a motion to tax the costs to the plaintiff on the ground that defendants are sued in the wrong county, if it appears that one of them was in fact a resident of the county of trial. *Prewitt v. Wilson*, 128–198, 103 N. W. 365.

The statute exacts service on residents of the state in the counties of their actual residence. *Des Moines Sav. Bank v. Kennedy*, 142–272, 120 N. W. 742.

Without his waiver or consent, the maker of a promissory note cannot be drawn from the county of his residence to that of the residence of the indorser to defend an action on the note; but the indorser may be so drawn to the county of the maker where the latter is a resident of the state. *Darling v. Blazek*, 142–355, 120 N. W. 961.

The general rule is that all personal actions must be brought in the county where the defendant actually resides, if he is a resident of the state, with an exception as to action upon a written contract to be performed in a county other than that of the defendant's residence. If, with an action properly brought in a county other than that of the defendant's residence, a cause of action is joined which cannot properly be sued on in such county, the latter cause of action may be stricken out on motion. *First Nat. Bank v. Shriver*, 152–504, 132 N. W. 848.

An action cannot be brought in a county other than that of defendant's residence except it be upon a written contract which expressly provides that it is to be performed at some other place. *Wixom v. Hoar*, 139 N. W. 890.

SEC. 3502. Residents of different counties.

While a dismissal of the action as to resident defendants entitles nonresident defendants to dismissal as to them, such nonresidents must ask relief by motion, otherwise they will be bound by the adjudication. *Brown v. Iowa Legion of Honor*, 107–439, 78 N. W. 73.

Where the case has not been disposed of as against the resident defendant prior to the return of the verdict against the nonresident, the latter is not entitled to have the action dismissed as against himself on the ground that no relief is granted as against the resident defendant. *Lyon v. Barnes*, 133–717, 111 N. W. 9.

If the action is dismissed as to those who are residents of the county, or judgment is rendered in their favor, a nonresident defendant is entitled to have the cause dismissed also as to him. *Woodling v. Mitchell*, 127–262, 103 N. W. 115.

Before one claiming to be a nonresident defendant can avail himself of the provisions of this section he must show the fact of nonresidence. *Constantine v. Rowland*, 147–142, 124 N. W. 189.

SEC. 3504. Change when brought in wrong county.

By answering after the overruling of an application for a change of place of trial the applicant does not waive error in overruling such motion. *Foss v. Cobler*, 105–728, 75 N. W. 516.

Where administration is granted in a county other than that of the residence of deceased at the time of his death, it is void. In such case motion for a change of venue is not necessary. *In re King's Estate*, 105–320, 75 N. W. 187.

If an action to foreclose a mortgage is brought in a county where no part of the mortgaged property is situated, it may on motion be changed to the proper county, but failure to ask for the change will be a waiver of the objection. The court is not without jurisdiction in such case. *McDonald v. Second Nat. Bank*, 106–517, 76 N. W. 1011.

This provision as to transfer of the case to the proper county has no application where suit is brought in one county to enjoin the enforcement of a judgment rendered in another county in violation of the provisions of code § 4364. *Hawkeye Ins. Co. v. Huston*, 115–621, 89 N. W. 29.

The defendant sued in the wrong county who procures a change of venue to the proper county is not entitled to recover personal expenses and attorney's fees in defending the case. The allowance is large-

ly discretionary with the court. *Moyers v. Council Bluffs Nursery Co.*, 132–98, 107 N. W. 924.

The party desiring a change of venue is entitled to compensation for attorney in preparing application for change and affidavits in support thereof, but he is not entitled to the expense of his attorney in traveling to the place of holding court if the motion is not resisted and he has no reason to believe that it will be resisted. *Athey v. Slife*, 137–173, 114 N. W. 915.

Where, in an action brought in a county other than that of the defendant's residence in the state, two causes of action are joined, one of which cannot properly be maintained in that court, the remedy is not by moving to change the venue of the action to the county of defendant's residence, but by striking out the cause of action improperly joined. *First Nat. Bank v. Shriver*, 152–504, 132 N. W. 848.

These provisions as to change of venue have no application to a proceeding for the appointment of a guardian. If the court finds that the person for whom guardianship is asked is not a resident of the county, the proceedings should be dismissed. *Holly v. Holly*, 157– —, 138 N. W. 445.

SEC. **3504-a. Against municipal corporations.** Actions against municipal corporations, including cities organized under special charter, in all counties where terms of the district court are held in more than one place must be brought in the county and at the place where terms of the district court are held nearest to where the cause or subject of the action originated. [32 G. A., ch. 162.]

CHAPTER 5.

OF CHANGE OF PLACE OF TRIAL.

SECTION **3505. Grounds for.** A change of the place of trial in any civil action may be had in any of the following cases:

1. *County a party.* Where the county in which the action is pending is a party thereto, if the motion is made by the party adversely interested, and the issue be triable by jury;

2. *Judge a party or interested.* Where the judge is a party, or is directly interested in the action, or is connected by blood or affinity with any person so interested nearer than the fourth degree;

3. *Prejudice or local influence.* Where either party files an affidavit, verified by himself and three disinterested persons not related to the party making the motion nearer than the fourth degree, nor standing in the relation of servant, agent or employe of such party, stating that the inhabitants of the county or the judge is so prejudiced against him, or that the adverse party or his attorney has such an undue influence over the inhabitants of the county, that he cannot obtain a fair trial; and when either party files such an affidavit the other party shall have a reasonable time in which to prepare and file counter affidavits, and the court or judge, in its discretion, may cause the affiants upon either side to be brought into court for examination upon the matters contained in their affidavits, and, when fully advised, shall allow or refuse the change according to the very right and merits of the matter;

4. *Agreement.* By the written agreement of the parties;

5. *Jury not obtainable.* If the issue is one triable by a jury, and it is made apparent to the court or judge that a jury cannot be obtained in the county where the action is pending, then, upon the application of either party, a change of place of trial shall be granted to the nearest county in which a jury can be obtained.

6. *Fraud in the inception of written contract.* In an action brought on a written contract in the county where the contract by its express terms is to be performed, in which a defendant to said action, residing in a dif-

ferent county in the state, has filed a sworn answer alleging fraud in the inception of the contract constituting a complete defense thereto, such defendant, upon application and the filing of a sufficient bond, may have such action transferred to the district court of the county of his residence. If upon the trial of the action judgment is rendered against the defendant, it shall include the reasonable expenses incurred by the plaintiff and his attorney, on account of change of place of trial, as part of the costs. The bond above referred to shall be with sureties to be approved by the clerk, in an amount to be fixed by the court or judge in vacation for the payment of all costs which may accrue in the action in the court in which it is brought, or in any other to which it may be carried, either to the plaintiff or to the officers of the court.

Not more than two such changes to either party shall be allowed for any of the causes enumerated in this section; nor shall a change be allowed in case of appeal from a justice of the peace; nor, when the issues can only be tried to the court, for any objection to the inhabitants of the county, or for the objection that the adverse party or his attorney has such an undue influence over the inhabitants thereof that he cannot obtain a fair trial. After a change of place of trial has been taken and a trial had, and the jury discharged or a new trial granted, a subsequent change may be taken for any of the causes mentioned in this section. [33 G. A., ch. 202, § 1.] [20 G. A., ch. 94; 17 G. A., ch. 118; C. '73, § 2590; R. § 2803; C. '51, § 1706.]

Par. 1. **County a party:** In an action against the county, the plaintiff has the right to change of venue to another county, and if he does not elect to have a change, he cannot challenge the jurors on the ground that they are taxpayers of the county. *Wilson v. Wapello County*, 129–77, 105 N. W. 363.

Par. 3. **Prejudice:** The judge is warranted in considering matters which are of his own knowledge and conviction in the disposition of a motion, and the denial of the change for prejudice of the judge will not be disturbed on appeal where the circumstances indicate that the denial was in the exercise of a reasonable discretion. *Petty v. Hayden*, 115–212, 88 N. W. 339.

Where the showing is of prejudice in the portion of the county where the transaction involved took place, it is not sufficient. *State v. Moats*, 108–13, 78 N. W. 701.

Where change of place of trial was asked on account of prejudice in the community arising from previous trials of another case involving the same facts, held that it could not be presumed that the verdicts rendered in the other cases were not the result of a fair consideration of the facts by the jury, and that they indicated passion and prejudice in the community against the defendant in that case, who was the same defendant as in the case in which the application for change was made. *Croft v. Chicago, R. I. & P. R. Co.*, 134–411, 109 N. W. 723.

The showing in a particular case held not sufficient to require change of venue on account of prejudice likely to have been created by newspaper publications. *Alverson v. Anchor Mut. F. Ins. Co.*, 105–60, 74 N. W. 746.

In general: This section relates to civil actions, and not to special proceedings. *Union Bldg. & Sav. Assn. v. Soderquist*, 115–695, 87 N. W. 433.

The granting or refusing of an application for change of venue is a matter largely within the discretion of the court to which the motion is addressed, and when a showing is made which is regular in form and *prima facie* sufficient, the ruling of the trial court sustaining it is rarely, if ever, reversed on appeal. The correctness of the ruling of the trial court is not to be determined by comparative count of affidavits. *Faivre v. Manderscheid*, 117–724, 90 N. W. 76.

Where a party, as a condition to having a default against him set aside, agreed to a trial of the case without change of venue, held that it was not necessarily beyond the power of the court, after one trial had been had and prejudice and passion had become apparent, to grant a change of venue to another county. *Doyle v. Burns*, 138–439, 114 N. W. 1.

SEC. 3507. **To what county or court.** If the application for a change is granted for any cause except on account of the prejudice or disability of the judge, or under subdivision six of the first section of this chapter, the cause shall be sent to the nearest or most convenient county in the district, unless objections supported by affidavit are made to each county in the

district, in which case to the nearest or most convenient county in another district. If the objections are to the judge, the cause shall not be tried by him, but retained on the docket and tried as provided in the chapter relating to the district court. [33 G. A., ch. 202, § 2.] [C. '73, § 2592; R. § 2805; C. '51, § 1707.]

SEC. 3509. **When change perfected.**

The making and transmission of the transcript is not the act, or one of the acts, which is necessary to perfect a change of venue. If the clerk gives a defective transcript it may be perfected within a reasonable time. *Faivre v. Manderscheid*, 117–724, 90 N. W. 76.

When the papers transmitted are received into the official custody of the clerk of the court to which the change is granted, and the case is entered upon the docket of that court, the court acquires jurisdiction, and an omission of the clerk to properly note such filing can be cured by order of court. *Ibid.*

SEC. 3511. **Costs of change.** Unless the change is granted under subdivisions two, four, five or six of the first section of this chapter, all costs caused thereby or that are rendered useless by reason thereof, shall be paid by the applicant, and the court or judge, at the time of making the order, shall designate in general terms such costs, and no change shall be held perfected until the same are paid. [33 G. A., ch. 202, § 3.] [C. '73, § 2596; R. § 2809; C. '51, § 1712.]

The court having failed to designate or point out the costs to be paid as a condition for granting the change of venue, it must be assumed that there were no costs which the party was required to pay. *Faivre v. Manderscheid*, 117–724, 90 N. W. 76.

Failure to comply with conditions imposed by the court which it has a right to impose, constitutes a waiver of the right to transfer. *Iowa Loan Co. v. Wilson*, 145–381, 124 N. W. 201.

CHAPTER 6.

OF THE MANNER OF COMMENCING ACTIONS.

SECTION 3514. **Original notice.**

Commencement of action: The commencement of the action with regard to special statutory limitations is to be dated from the placing of the notice in the hands of the sheriff for service, the same rule being applicable as in case of the general statute of limitations under the provisions of code § 3450. *Smith v. Callanan*, 103–218, 72 N. W. 513.

The provision of this section is to be applied in determining whether an equitable action to redeem the lands of a minor or insane person within one year after the termination of the disability has been brought within proper time, and also in determining whether a proceeding by petition to set aside a judgment against a minor or insane person, not represented by guardian, has been commenced within one year, as required by code § 4094. The provision in the general statute of limitations (code § 3450), that an action shall be deemed commenced when the notice is placed in the hands of the sheriff for service, has no application in such cases. (Distinguishing *Smith v. Callanan*, 103–318.) *Hawley v. Griffin*, 121–667, 92 N. W. 113, 97 N. W. 86.

Under code § 3450 the placing of an original notice in the hands of the sheriff for service is a sufficient commencement of the action under the statute of limitations, but the intention that the notice shall be served must be continuous, and if the sheriff returns the notice as unserved, and two terms of court are allowed to elapse without further attempt to have service made, the action is to be deemed abandoned. *Richardson v. Turner*, 110–318, 81 N. W. 593.

Service of notice by publication is completed in such sense that the action has been begun when the last publication provided for has been made. *Littlejohn v. Bulles*, 136–150, 113 N. W. 756; *Keller v. Harrison*, 139–383, 116 N. W. 327.

In an attachment proceeding in which service is had by publication the action, so far as it subjects the property to the payment of the debt, is to be deemed commenced when the petition is filed and the property is levied upon. *Slater v. Roche*, 148–413, 126 N. W. 925.

Service of notice is the commencement of the action for the purpose of determin-

ing the jurisdiction of the court to appoint a receiver therein. *Paine v. Mueller*, 150–340, 130 N. W. 133.

Except for the purpose of avoiding a plea of the statute of limitations (see code § 3450), an action is not begun by delivering a notice to the sheriff, but by service of notice being actually obtained. *Boone v. Boone*, 137 N. W. 1059, 141 N. W. 938.

An action is begun by service of notice actually obtained. *Wray v. Wray*, 140 N. W. 414.

Where action by a partnership has been commenced in the original names of the members and notice of such action has been served, the right of defendant, a citizen of another state, to remove the case to the federal court has become complete and cannot be defeated by amending the petition so as to show the action to be by the partnership only. *Bruett v. Austin Drainage Excavator Co.*, (C. C.) 174 Fed. 668.

Jurisdiction: The general provision is for obtaining jurisdiction by a personal service. Provisions as to jurisdiction on notice by publication are exceptional. *Bisby v. Mould*, 138–15, 115 N. W. 489.

Personal service outside the state is not sufficient to give the court jurisdiction *in personam*. *Raher v. Raher*, 150–511, 129 N. W. 494.

Sufficiency: The time fixed by statute as to notice, filing of pleadings, etc., is to enable the parties to prepare for trial; but by consent of parties the court may have jurisdiction to try the case at the term at which the petition is filed, although proper notice of the filing of the petition has not been given. *Rummel v. Dealy*, 112–503, 84 N. W. 526.

A notice of a cause of action against two persons for goods sold and delivered to them will sustain a prosecution of action against one of them for goods sold and delivered to him alone. *Padden v. Clark*, 124–94, 99 N. W. 152.

In an action to foreclose a mortgage it is not necessary to describe the land covered by the mortgage, and therefore a misdescription in the notice of the land covered by the mortgage will not render the notice void so that the court is without jurisdiction to determine the sufficiency of the notice and to render a valid judgment. *Fleming v. Hager*, 121–205, 96 N. W. 752.

As to the signing of the notice, no more is required than that the name of the plaintiff or that of his attorney be attached to the notice by any of the known methods of impressing the name on paper, whether by writing, printing or lithographing, providing it is done with the intention of signing, or be adopted in issuing the original notice for service. *Cummings v. Landes*, 140–80, 117 N. W. 22.

The notice is required to designate the time and place for appearance of the persons served and this requirement is mandatory. *Ibid.*

It is not necessary that the notice state in detail the nature of the cause of action as specifically as might be required in the petition, but it must be specific enough to permit the defendant to understand the cause or causes upon which plaintiff expects to take judgment, and it should not be so constructed as to deceive an ordinarily cautious defendant and secure the entry to his prejudice of a judgment or order, of the purpose to ask which the notice gives him no warning. The defendant has the right to assume that the notice has been drawn and framed in good faith. *Blain v. Dean*, 142 N. W. 418.

As to the sufficiency of the original notice in an action to quiet title, see notes to § 4224 in this supplement.

SEC. 3515. Dismissal for failure to file petition.

Statutes with reference to time for filing pleadings not in express terms made mandatory are generally regarded as directory only. *Edwards Loan Co. v. Skinner*, 127–112, 102 N. W. 828.

Where the petition is not filed by the time fixed therefor in the original notice the defendant is entitled to have the case dismissed. *Conley v. Dugan*, 105–205, 74 N. W. 774.

This statutory provision does not require the dismissal of the action on the ground that the petition is not signed by the plaintiff or his attorney. *First National Bank v. Stone*, 122–558, 98 N. W. 362.

SEC. 3517. How long before term.

Where notice is served on a party outside of the state, within less than twenty days before the term at which judgment is entered against him, such judgment is at least premature and should be set aside. *Streeter v. Gleason*, 120–703, 95 N. W. 242.

SEC. 3518. Method of service.

A judgment entered on substituted service is valid. *Hass v. Leverton*, 128–79, 102 N. W. 811.

The holding in *Fanning v. Krapfl*, 61–417, that whoever undertakes to give notice by publication and misnames the defendant is without excuse and the notice will not confer jurisdiction, is equally pertinent to a case of substituted service *Thornily v. Prentice*, 121–89, 96 N. W. 728.

In an action against a married woman the original notice may be served by leaving a copy with her husband at his place of residence in case the wife is not found within the county, although she may have temporarily abandoned him and is not actually residing with him at the time. *Galvin v. Dailey*, 109–332, 80 N. W. 420.

Anyone upon whom service may be made may acknowledge such service; and thus service upon a municipal corporation being authorized to be made by service on the mayor or clerk, an acknowledgment of the service by mayor or clerk is binding on the corporation. *McCartney v. Washington*, 124–382, 100 N. W. 80.

While it may be that the parent or guardian can acknowledge service of notice in behalf of a minor, such acknowledgment in his own behalf, he being a party to the suit, does not constitute an acknowledgment in behalf of the minor such as to render the service effectual on such minor. *Cummings v. Landes*, 140–80, 117 N. W. 22.

To justify service of notice by leaving a copy with a member of the family, the defendant must be an actual resident of the county. *Des Moines Sav. Bank v. Kennedy*, 142–272, 120 N. W. 742.

Acknowledgment of service of notice dated and signed will be presumed genuine. *Black v. Chase*, 145–715, 122 N. W. 916.

To confer jurisdiction *in personam*, personal service must be made within the state. *Raher v. Raher*, 150–511, 129 N. W. 494.

Unless otherwise specified, a statute providing for the service of notice contemplates personal service and not one which is merely constructive or substituted. *Scanlon v. Scanlon*, 154–748, 135 N. W. 634.

The acknowledgment of service should be dated in order to make it effectual to give priority over another action in which there is actual service and parol evidence is not admissible to show priority of the acceptance. *Wray v. Wray*, 140 N. W. 414.

SEC. 3519. Return of personal service.

Where the affidavit of service appears to have been signed by the person making it, and the notary so writes the jurat as to make use of the signed name as a part of the jurat itself, this fact does not prevent the return being considered as duly signed and sworn to. *Blair v. Hemphill*, 111–226, 82 N. W. 501.

The statutory provisions with reference to service of notice recognize no smaller governmental subdivisions than counties and a return of service of the original notice as having been made in a particular town does not show that town to be the residence of the person upon whom service is made. *Shoemaker v. Roberts*, 103–681, 72 N. W. 776.

The return of the officer as to substituted service should correctly state the township, town or city where the service was made, and an error in such statement will render the notice ineffectual to confer jurisdiction. Thus, where the return was of service in a certain township, whereas it was in fact made in a town included within that township, held that a default rendered on such service was void. *Bradley Mfg. Co. v. Burrhus*, 135–324, 112 N. W. 765.

The return of an officer as to service by leaving a copy held not to be overcome by the testimony of a witness, given many years afterward, based only upon his recollection. *Galvin v. Dailey*, 109–332, 80 N. W. 420.

Service of notice will be presumed from recital thereof in the judgment, and the burden is on the person attacking the judgment to overcome the presumption, which will not be done by showing facts from which merely a contrary presumption may arise, such as absence of notice from the files or of entries in the appearance docket and fee book. *Farnsley v. Stillwell*, 107–631, 78 N. W. 678.

Where there was a recital of service in a decree, and as against that explicit denials on the part of the party alleged to have been served of the service of any notice, strengthened by other evidence, held that the finding of the lower court that there had been no service would be sustained. *Miller v. Minneapolis & St. L. R. Co.*, 119–41, 93 N. W. 76.

The judgment of the court is conclusive as to whether the facts essential to jurisdiction in the particular case exist. *Applegate v. Applegate*, 107–312, 78 N. W. 34.

Where a return showed service on defendant's son but it did not appear that defendant was not found within the county or that a copy was left at his usual place of residence or that the son was a member of his family or over fourteen years of age, held that such return showed no service whatever, and not simply defective service. *Thompson v. Thompson*, 117–65, 90 N. W. 493.

Return of service "by leaving a copy of notice with Paul Thornily, over 15 years of age, his son," held not sufficient to show service upon the defendant. *Thornily v. Prentice*, 121–89, 96 N. W. 728.

A return of substituted service which states that the notice was left with the defendant's wife is sufficient, without naming her. *Hass v. Leverton*, 128–79, 102 N. W. 811.

In a particular case held that evidence of want of service of notice in pursuance of which a judgment was rendered was sufficient to overcome the presumption of service arising from the rendition of the judgment and from entries on the appear-

ance docket and fee book showing return of service, the original of the sheriff's return not being introduced in evidence. *Shehan v. Stuart*, 117–207, 90 N. W. 614.

A judgment may be collaterally attacked for want of jurisdiction when there is no notice, as, for instance, where the notice is by publication without the previous filing of an affidavit as required in such cases. But where there is a notice supported by a proper preliminary proceeding, the sufficiency of which is subject to construction and upon which the court must judge of its own jurisdiction, the judgment is good until set aside in some direct proceeding. *Priestman v. Priestman*, 103–320, 72 N. W. 535.

Where there is an attempted service, and the question is whether the forms of law were complied with, the case is one of defective service, and not want of service. *Longueville v. May*, 115–709, 87 N. W. 432.

A judgment which is void for want of service may be set aside at any time. *Spencer v. Berns*, 114–126, 86 N. W. 209.

Where the service of notice is merely informal or defective the judgment is not subject to collateral attack. *Thornily v. Prentice*, 121–89, 96 N. W. 728.

If the notice is defective merely, such defect cannot be taken advantage of in an action on the judgment. *Tomlin v. Woods*, 125–367, 101 N. W. 135.

A nonresident who has come into this state for the purpose of attending a trial in an action to which he is a party, is privileged from the service of civil process in another action. *Murray v. Wilcox*, 122–188, 97 N W. 1087.

The unsupported testimony of defendant that the notice was not served, held not sufficient to overcome the sworn return of the officer. *Bowden v. Hadley*, 138–711, 116 N. W. 689.

It is not provided that the return of service shall disclose a statement of the age of the person served. *Ringstad v. Hanson*, 150–324, 130 N. W. 145.

In a particular case, held that the evidence was sufficient to sustain the finding of the lower court in favor of service as recited in the return and as against oral testimony to the effect that no such service was made. *Ibid.*

Where the service of an original notice is defective only, the judgment is not void and cannot be collaterally attacked. *Mullinnix v. Brown*, 151–468, 131 N. W. 671.

SEC. 3524. Proof of service—patients in hospital for insane.

The entry of judgment on a return purporting to be made by a deputy sheriff, and not under oath, is not conclusive that the person making such return had authority to do so, and parol evidence is admissible to show that no such service was ever made, and that the court was therefore without jurisdiction in entering the judgment. *Buck v. Hawley*, 129–406, 105 N. W. 688.

A judgment rendered upon service of notice upon an insane person without compliance with the special provisions as to service in such case is not absolutely void, but voidable. *Day v. Goodwin*, 104–374, 73 N. W. 864.

The return of personal service made outside the state is not sufficient to give jurisdiction *in personam*. *Raher v. Raher*, 150–511, 129 N. W. 494.

SEC. 3525. Superintendent may acknowledge service.

Acknowledgment of service on an insane person by the superintendent of a hospital for the insane in which such person is confined is authorized. And in a particular case, held that the acknowledgment was sufficient although there was a variance in name, there being no question as to the identity of the person to be served. *In re Estate of Strang*, 131–583, 106 N. W. 631.

SEC. 3528. Service on county—presentation of claims.

Where a city provides salaries for police judge and marshal, and the fees of such officers therefor become payable to the city, and such fees in criminal cases are to be paid by the county, the filing with the county auditor of transcripts showing that such fees have been earned, is a sufficient demand against the county to enable the city to recover the fees in an action. *Des Moines v. Polk County*, 107–525, 78 N. W. 249.

The acceptance of a portion of a claim allowed by the board does not bar recovery of the balance if there is an absolute liability for the full amount of the claim. *Resner v. Carroll County*, 126–423, 102 N. W. 148.

The provision requiring notice of unliquidated demands before the institution of suit thereon applies to all demands of that character whether arising out of contract or tort. *Little v. Pottawattamie County*, 127–376, 101 N. W. 752.

But the failure to make demand before suit is brought may be cured by such demand subsequently made and alleged in supplemental or amended petition. *Ibid.*

No provision similar to that of this section is found in the statute applicable to cities except in code § 1050, which is applicable only to cities under special charter. *Kenyon v. Cedar Rapids*, 124–195, 99 N. W. 692.

The requirement of a filing of a claim has application to unliquidated claims of all kinds—those arising from tort as well as from contract. *Escher v. Carroll County*, 146–738, 125 N. W. 810.

A claim must be presented in writing and it must appear that the payment demanded in such writing was refused. An oral demand on a claim is not sufficient. *Ibid.*

The presentation of the claim under this section is a condition precedent to the right to maintain suit against the county, and the institution of an action against the county on the claim is not a substitute for the presentation of the claim. *Seddon v. Western Union Tel. Co.*, 146–743, 126 N. W. 969.

Where the board has considered and rejected a claim, the county cannot be heard to say that its disallowance was ineffective to justify the bringing of an action on the ground that the claimant desiring speedy action in order to be enabled to institute his suit before the expiration of the statutory period of limitation requested immediate action, preferring immediate rejection to postponement. *Brooks v. Van Buren County*, 155–282, 135 N. W. 1110.

The board should have a reasonable time in which to determine what disposition shall be made of the claim. Failure of the board to act is equivalent to refusal to pay. *Escher v. Carroll County*, 141 N. W. 38.

The statute does not require that the paper on which the claim is stated should be marked filed. Receipt of it by the auditor is sufficient. *Ibid.*

The claimant may file a claim for additional damages and include such claim in his prayer for damages on the bringing of the action. *Ibid.*

SEC. 3529. **On agent of corporation.** If the action is against any corporation or person owning or operating any railway or canal, steamboat or other river craft, or any telegraph, telephone, stage, coach or car line, or against any express company, or against any foreign corporation, service may be made upon any general agent of such corporation, company or person, wherever found, or upon any station, ticket or other agent or person transacting the business thereof or selling tickets therefor in the county where the action is brought; if there is no such agent in said county, then service may be had upon any such agent or person transacting said business in any other county. If the action is against any railway corporation which has merged and consolidated its stock, property, franchises and liabilities with that of any other railway corporation, as authorized by section two thousand and thirty-six of the code, or which has sold or leased its property and franchises to any other railway corporation as authorized by section two thousand and sixty-six of the code, service of the original notice may be made upon any station, ticket or other agent of the merged, vendee or lessee corporation in the county where the action is brought; if there is no such agent in said county, then service may be made upon such agent or person in any other county. [32 G. A., ch. 163; 29 G. A., ch. 139, § 1; C. '73, § 2611; R. § 2825; C. '51, § 1727.]

Service upon a resident agent of a foreign corporation is not effectual unless he is a general agent maintaining an office in this state and the subject matter of the suit has relation to the business of such office. *McGuire v. Great Northern R. Co.*, (C. C.) 155 Fed. 230.

A corporation is conclusively presumed to be a citizen of that state under whose laws it is organized, and jurisdiction in an action against it in another state cannot be acquired without service of notice upon some duly authorized agent. *Carpenter v. Willard Case Lumber Co.*, (C. C.) 158 Fed. 697.

A commission merchant, having an order for the purchase of lumber under which he makes a contract for the purchase of lumber from a foreign corporation, does not become the agent of such corporation in such sense that jurisdiction may be secured against it by service of notice upon him, the corporation having no property or place of business within the state. *Ibid.*

SEC. 3530. **On agent of insurance company.**

This section which first appears in the code of 1897 was undoubtedly intended to be cumulative rather than exclusive in character, and to provide a method of service upon an agent in any case, no matter whether the action arose out of or was connected with any business involved in his agency or not. *Bradshaw v. Des Moines Ins. Co.*, 154–101, 134 N. W. 628.

SEC. 3531. On municipal or other corporation.

If the notice is directed to a school district and served on the president thereof, it is sufficient to constitute notice to the district. *Haggard v. Independent School Dist.*, 113–486, 85 N. W. 777.

The mayor or clerk upon whom service may properly be made may accept such service by written acknowledgment thereof. *McCartney v. Washington*, 124–382, 100 N. W. 80.

Service upon the secretary of a corporation is sufficient service upon the corporation. *The Telegraph v. Lee*, 125–17, 98 N. W. 364.

Although the defendant in the action may be designated as a copartnership, yet if it is in fact a corporation, and is served as a corporation, the court acquires jurisdiction. *Taft Co. v. Bounani*, 110–739, 81 N. W. 469.

Where foreign corporations are required as a condition of doing business within a state to appoint an agent upon whom service may be made within the state, service upon an agent appointed in attempted compliance with such statutory requirements will be valid, although it does not technically authorize the service of process upon him. *Green v. Equitable Mut. L. & End. Assn.*, 105–628, 75 N. W. 635.

Under this section service may be made on a corporation, even after an attempt at voluntary dissolution, in an action to enforce against it a claim which was unliquidated at the time of such dissolution. *Wisconsin & Ark. Lumber Co. v. Cable*, 140 N. W. 211.

SEC. 3532. On agent, as to business of office or agency.

It is sufficient if the principal has an office or agency in the county in which the suit growing out of or connected with the business of that office or agency is brought and service of the notice be made upon an agent or clerk employed in that office or agency. *Locke v. Chicago Chronicle Co.*, 107–390, 78 N. W. 49.

A nonresident corporation may be sued in any county in which it can be found and service upon it may be made by serving an officer or agent. *Moffitt v. Chicago Chronicle Co.*, 107–407, 78 N. W. 45.

To sustain a service on an agent or clerk under this section, it must appear that the action grew out of some matter connected with the business of such agent or clerk. *Barnabee v. Holmes*, 115–581, 88 N. W. 1098.

SEC. 3533. On minor.

A return of service on a minor by reading and delivering a copy to him in the presence of his father, mother or guardian is not a compliance with the statute. *Cummings v. Landes*, 140–80, 117 N. W. 22.

Such defective service will not be rendered sufficient by personal service on the parent or guardian who is a party to the suit in his own interest. *Ibid.*

The statute prescribing what the return of service shall disclose does not exact any statement of the age of the person served. *Ringstad v. Hanson*, 150–324, 130 N. W. 145.

SEC. 3534. By publication. Service may be made by publication, when an affidavit is filed that personal service cannot be made on the defendant within this state, in either of the following cases:

1. In actions brought for the recovery of real property, or an estate or interest therein;
2. In an action for the partition of real property;
3. In an action for the sale of real property under a mortgage, lien or other incumbrance or charge;
4. In actions to compel the specific performance of a contract of sale of real estate, or in actions to establish or set aside a will, where in such cases any or all of the defendants reside out of this state and the real property is within it;
5. In actions brought against a nonresident of this state, or a foreign corporation, having in the state property or debts owing to such defendant, sought to be taken by any of the provisional remedies, or to be appropriated in any way;
6. In actions which relate to or the subject of which is real or personal property in this state, when any defendant has or claims a lien or interest, actual or contingent, therein, or the relief demanded consists wholly or

partly in excluding him from any interest therein, and such defendant is a nonresident of the state or a foreign corporation;

7. In all actions where the defendant, being a resident of the state, has departed therefrom, or from the county of his residence, with intent to delay or defraud his creditors, or to avoid the service of a notice, or keeps himself concealed therein with like intent;

8. Where the action is for a divorce, if the defendant is a nonresident of the state, or his residence is unknown;

9. Where the action is an action to quiet title to real estate if the defendant is a nonresident of the state or his residence is unknown;

10. Where the action is for the annulment of an illegal marriage, if the defendant is a nonresident of the state, or his residence is unknown. [35 G. A., ch. 285, § 1; 35 G. A., ch. 284, § 1.] [C. '73, § 2618; R. §§ 2831–2; C. '51, § 1725.]

Whoever undertakes to give notice by publication and misnames the defendant is without excuse, and the notice will not confer jurisdiction. (Following *Fanning v. Krapfl*, 61–417.) *Thornily v. Prentice*, 121–89, 96 N. W. 728.

Where judgment is rendered by default in a divorce proceeding, on service of notice by publication which does not correctly give the name of defendant nor spell it so as to indicate the correct pronunciation, the judgment is subject to collateral attack. *Hubner v. Reickhoff*, 103–368, 72 N. W. 540.

The fact that in an original notice in an action to foreclose a mortgage the land covered by the mortgage is misdescribed does not deprive the court of jurisdiction to proceed under such notice, and a judgment rendered in pursuance thereof is not void, so as to be subject to collateral attack. *Fleming v. Hager*, 121–205, 96 N. W. 752.

The filing of an affidavit is a condition precedent to the service of notice by publication, and a judgment rendered without an appearance by the defendant served only by publication when the affidavit has not been filed is void. *Priestman v. Priestman*, 103–320, 72 N. W. 535.

And held that filing of the affidavit after the first publication, although before the conclusion of the publication, was not sufficient. *Ibid.*

Where the decree recites service by publication, and the appearance docket shows that an affidavit of nonresidence was filed with the petition and before the first publication, and there is evidence of witnesses that they saw the affidavit, etc., the judgment will be sustained, although the affidavit was not found on file after the judgment was entered. *Omaha Nat. Bank v. Squire*, 113–365, 85 N. W. 624.

A proceeding by a subcontractor to enforce a mechanic's lien may be maintained as a proceeding *in rem* without asking a personal judgment against the principal contractor, where the principal contractor is a nonresident upon whom personal service cannot be obtained. *Simonson Bros. Mfg. Co. v. Citizens' State Bank*, 105–264, 74 N. W. 905.

The rule that a judgment without personal service against a nonresident is only good so far as it affects the property which is taken or brought under the control of the court or tribunal, is applicable also where a city attempts to enforce by personal judgment an indebtedness for special assessments on his property. *Dewey v. Des Moines*, 173 U. S. 193.

Service of notice by publication is authorized as to actions to quiet title, it being made to appear by affidavit that the defendant is a nonresident of the state. *Bales v. Williamson*, 128–127, 103 N. W. 150; *Ruppin v. McLachlan*, 122–343, 98 N. W. 153.

Notice by publication may be served on a nonresident defendant in an action to construe a will. *Dillavou v. Dillavou*, 130–405, 106 N. W. 949.

Action is not commenced by publication of notice until the last publication provided for by statute has been made. *Littlejohn v. Bulles*, 136–150, 113 N. W. 756.

Where the published notice designated the defendant as "Chase Marker" instead of "Chan Marker," held that the notice was not such as to confer jurisdiction. *Schaller v. Marker*, 136–575, 114 N. W. 43.

The court acquires jurisdiction by publication only by a strict compliance with the statutory requirements. *Ibid.*

The ordinary presumptions in favor of a judgment do not apply to a judgment rendered on service by publication. *Ibid.*

There is no provision for service of notice by publication in a proceeding to annul a marriage. *Bisby v. Mould*, 138–15, 115 N. W. 489.

Where the defendant in a divorce action is actually living in another state, service by publication cannot be defeated on account of the mere statement of an intention to return to reside in the state. *Lewis v. Lewis*, 138–593, 116 N. W. 698.

In an attachment proceeding to subject the property of a nonresident to the payment of his debts the action is to be deemed commenced, so far as the statute

of limitations is concerned, when the petition is filed and the property is levied upon. *Slater v. Roche*, 148–413, 126 N. W. 925.

The statute provides for service by publication in actions to quiet title only as to defendants who are in fact nonresidents, and proof that a defendant served only by publication was in fact a resident of the state renders the decree in such case ineffectual as to him. *Oziah v. Howard*, 149–199, 128 N. W. 364.

Personal service outside the state, although it be upon one who is a resident of this state, does not give jurisdiction *in personam*. *Raher v. Raher*, 150–511, 129 N. W. 494.

SEC. **3534-a. Decrees legalized—affidavit of nonresidence.** That in all cases where decrees of court have been obtained prior to the first day of January, nineteen hundred and seven, upon publication of notice before the filing of the affidavit of nonresidence, as provided by section thirty-five hundred thirty-four of the code, and the same has not been filed as provided by law, but has been filed during the time that the notice was being published, on which such decrees are based, are hereby legalized and such decrees shall have the same force and effect as though the affidavit of nonresidence, as provided in said section, was filed at the time of or prior to the first publication of such notice, and that all decrees so obtained, as aforesaid, are hereby legalized and held to have the same force and effect as though the affidavit of nonresidence had been filed, as by law required. [34 G. A., ch. 224, § 1.]

SEC. **3534-b. Not to affect pending litigation.** Nothing in this act contained shall be construed as to affect pending litigation. [34 G. A., ch. 224, § 2.]

SEC. **3535. Method.**

A daily record of court proceedings and transfers of property which is mailed to regular subscribers is a newspaper within the meaning of this section. *Brice v. Graves*, 142–722, 121 N. W. 504.

The affidavit must show publication for the full time before it is made and such affidavit must be filed before default on such service is entered. *Manion v. Brady*, 138 N. W. 558.

Parol testimony to show the facts which should appear of record as to service is not admissible. *Ibid.*

The statutes conferring jurisdiction to render a judgment against a nonresident defendant on service of notice by publication only, must be strictly and literally complied with or the judgment and all subsequent proceedings based thereon are void. *Ibid.*

The affidavit that personal service cannot be made on the defendant within the state must be filed before publication of the notice. *Ibid.*

SEC. **3536. When complete—proof.**

A published notice requiring appearance at an impossible date is no notice and confers no jurisdiction on the court over the party or the subject matter. *Gaar v. Taylor*, 128–636, 105 N. W. 125.

The plaintiff in an action commenced by publication cannot take the affidavit of the publisher as to the fact of publication for the purpose of providing the proof thereof required by statute. *Empire Real Estate & Mort. Co. v. Beechley*, 137–7, 114 N. W. 556.

Insufficiency of the proof of publication on which judgment by default is entered cannot be raised on appeal from such judgment without having moved to set it aside or in some other manner attacked the sufficiency of the service in the trial court. *Belknap v. Belknap*, 154–213, 134 N. W. 734.

The affidavit must be made by the publisher or his foreman. *Manion v. Brady*, 138 N. W. 558.

SEC. **3536-a. Decrees legalized—affidavit of publication by editor.** That in all cases where decrees of court have been obtained prior to January first, nineteen hundred eleven, in which the proof of the publication of the original notice has been made by the affidavit of the editor of the newspaper in which such original notice was published, are hereby legalized, and such decrees shall have the same force and effect as though the affidavit of the publisher, or his foreman, of the newspaper in which the original notice was published had been filed as provided by section thirty-

five hundred thirty-six of the code, and that all decrees so obtained as aforesaid are hereby legalized and held to have the same force and effect as though the proof of the publication of the original notice had been made by the affidavit of the publisher, or his foreman, of the newspaper in which such original notice was published. [35 G. A., ch. 286, § 1.]

SEC. 3536-b. **Not to affect pending litigation.** Nothing in this act contained shall be construed as affecting pending litigation. [35 G. A., ch. 286, § 2.]

SEC. 3537. **Actual service.**

Personal service of notice outside of the state gives the court jurisdiction to render judgment *in rem* in an attachment suit. *Clark v. Tull*, 113–143, 84 N. W. 1030.

Personal service of notice in another state does not give the court jurisdiction to render a personal judgment. *Richardson v. Richardson*, 134–242, 111 N. W. 934.

Actual personal service without the state, although made upon one who is a resident of this state, is a substitute for notice by publication, but does not confer jurisdiction *in personam*. *Raher v. Raher*, 150–511, 129 N. W. 494.

SEC. 3538. **Unknown defendants.** That section thirty-five hundred thirty-eight of the code be and the same is hereby repealed and the following enacted in lieu thereof:

"Where it is necessary to make an unknown person defendant, the petition shall be sworn to and state the claim of plaintiff with reference to the property involved in the action, that the name and residence of such person is unknown to the plaintiff, and that he has sought diligently to learn the same. The notice thereof shall contain the name of the plaintiff, a description of the property, the claim of the plaintiff thereto, the relief demanded, the name of the court, and the term in which appearance must be made. Such notice must be entitled in the full name of the plaintiff against the unknown claimants of the property and shall be signed by the plaintiff or his attorney." [35 G. A., ch. 287, § 1.] [24 G. A., ch. 34; C. '73, §§ 2622–3; R. §§ 2836–7.]

SEC. 3540. **Length of publication.** Such notice shall be filed in the action, and its contents shall be published in the paper, and for the time designated, at least once each week for four successive weeks, and at the end of said time service shall be complete, and such unknown person in court at the next term thereafter. [32 G. A., ch. 164; 31 G. A., ch. 154; C. '73, § 2625; R. § 2839.]

SEC. 3541. **Mode of appearance—when required.** That section thirty-five hundred forty-one of the code be and the same is hereby repealed and the following enacted in lieu thereof:

"The mode of appearance may be:

1. By delivering to the plaintiff or the clerk of the court a memorandum in writing to the effect that the defendant appears, signed either by the defendant in person or his attorney, dated the day of its delivery and filed in the case;

2. By entering an appearance in the appearance docket or judge's calendar or by announcing to the court an appearance which shall be entered of record;

3. By taking part either personally or by attorney in the trial of the case;

4. Any defendant may appear specially for the sole purpose of attacking the jurisdiction of the court. Such special appearance shall be announced at the time it is made and shall limit the party to jurisdictional matters only and shall give him no right to plead to the merits of the case.

5. No member of the general assembly shall be held to appear or answer in any civil or special action in any court while such general assembly is in session, nor shall any person be held to answer or appear in any court on any day now or hereafter made a legal holiday." [34 G. A., ch. 162, § 1.] [15 G. A., ch. 10; C. '73, § 2626; R. § 2840.]

Effect of appearance: An appearance by the assignee in insolvency of a foreign corporation may by comity be recognized and will bind the corporation although such assignee has no legal authority beyond the extent of the jurisdiction in which he is appointed. *State Bank v. McElroy*, 106–258, 76 N. W. 715.

The court having jurisdiction of the subject matter acquires jurisdiction of the case by appearance. *Applegate v. Applegate*, 107–312, 78 N. W. 34.

By appearance to an action, even though for a special purpose, jurisdiction to determine the case upon its merits is conferred upon the court. *Locke v. Chicago Chronicle Co.*, 107–390, 78 N. W. 49; *Moffitt v. Chicago Chronicle Co.*, 107–407, 78 N. W. 45.

Appearance by motion to dismiss for want of jurisdiction, where service has been made on an alleged agent, is sufficient to give the court jurisdiction in case the motion is overruled. *Teller v. Equitable Mut. L. Assn.*, 108–17, 78 N. W. 674.

The appearance of a defendant in a divorce proceeding to object to the granting of temporary alimony is such appearance as to give the court jurisdiction. *Hamilton v. Hamilton*, 129–628, 106 N. W. 5.

A defendant may not make a special appearance to resist an interlocutory order or ruling, and then say he is not in court for the purpose of a judgment on the merits. *Blondel v. Ohlman*, 132–257, 109 N. W. 806.

Appearance by a nonresident defendant to plead to the jurisdiction of the court, held to constitute a waiver of objection to the jurisdiction of the federal court on removal of the case from the state court. *Louden Machinery Co. v. American Malleable Iron Co.*, 127 Fed. 1008.

Recital that defendant defaulted for want of pleading after appearing in the action is sufficient to show jurisdiction of the court. *Harrison County v. State Sav. Bank*, 127–242, 103 N. W. 121.

A trustee holding the legal title to mortgaged property cannot appear for the *cestui que trust* so as to render a personal judgment against the latter binding. *Thornily v. Prentice*, 121–89, 96 N. W. 728.

The appearance which gives the court jurisdiction must have some relation to the merits of the controversy and the purpose must be to invoke some action on the part of the court having direct bearing in some way upon the question of the judgment or decree proper to be entered. The taking of a stay of execution is not such appearance as to confer jurisdiction for the entry of a personal judgment for deficiency. *Bank of Horton v. Knox*, 133–443, 109 N. W. 201.

Voluntary appearance or submission to the jurisdiction of the court on the part of a garnishee will not confer jurisdiction to render judgment against him if there is no valid judgment against the defendant for want of original jurisdiction in the case. *Schaller v. Marker*, 136–575, 114 N. W. 43.

An appearance by filing a motion to quash the writ in an action of replevin is an appearance to such action. *Bummelhart v. Boone*, 147–390, 126 N. W. 338.

A special appearance to object that the action is not maintainable in the county gives the court jurisdiction. *Zabron v. Cunard Steamship Co.*, 151–345, 131 N. W. 18.

Appearance by city attorney in an action against the city is sufficient to give the court jurisdiction. *Rankin v. Chariton*, 139 N. W. 560, 141 N. W. 424.

Holidays: Judicial business may be transacted on the fourth of July and a witness may be punished for contempt in not appearing on that day in response to a subpœna. *Chambers v. Oehler*, 107–155, 77 N W. 853.

Legal holidays are also enumerated in code § 3053 as days on which negotiable paper cannot be presented for protest. *Brennan v. Roberts*, 125–615, 101 N. W. 460.

The statutory exemption as to appearance in an action on the days specified as holidays has no application to subsequent proceedings in the case, after there has been a sufficient appearance. *Michel v. Borholm Co-operative Creamery*, 128–706, 105 N. W. 323.

Sunday or any other day mentioned by this section as a holiday should not be excluded in estimating the three days within which a motion for new trial is to be filed. *German Sav. Bank v. Cady*, 114–228, 86 N. W. 277.

Privilege: A nonresident who has come into this state for the purpose of attending a trial in an action to which he is a party, is privileged from the service of civil process in another action. He is entitled to the same privilege as one who attends as a witness. *Murray v. Wilcox*, 122–188, 97 N. W. 1087.

SEC. 3543. **Notice of action pending — indexing.** That section thirty-five hundred forty-three of the code be and the same is hereby repealed and the following enacted in lieu thereof:

"When a petition affecting real estate is filed, the clerk of the district court where filed shall forthwith index same in an index book to be provided therefor, under the name of the parties plaintiff and defendant, entering a memorandum at each place where indexed, giving the description of the premises involved, the number of the case and the nature of the claim made. If the petition be amended to include other parties or other lands, same shall be similarly indexed. When the cause is finally determined the result shall be indicated in said book wherever indexed. When so indexed said action shall be considered pending so as to charge all third persons with notice of its pendency, and while pending no interest can be acquired by third persons in the subject matter thereof as against the plaintiff's rights. If the real property affected be situated in the county where the petition is filed it shall be unnecessary to show in said index lands not situated in said county, and if the description be lengthy the clerk may give same in full in one place and refer thereto at all other places in said index book." [35 G. A., ch. 288, § 1.] [C. '73, § 2628; R. § 2842.]

Where, without authority of one party, a case was marked on the judge's calendar as settled, and a corresponding entry was made in the court record, but subsequently a trial notice was filed in the case and it was put on the calendar for the succeeding term, held that one who purchased real property involved in such action after the service of the trial notice was affected with notice of the pendency of the action. *Furry v. Ferguson*, 105–231, 74 N. W. 903.

A purchaser at execution sale under a judgment takes subject to any right subsequently established in an action already pending, to have the premises declared a homestead and exempt from sale under such judgment. *McClelland v. Bennett*, 106–74, 75 N. W. 667.

The primary object of the rule as to *lis pendens* is to keep the property within the power of the court until final judgment or decree shall be entered, and thus to enable the courts to give force and effect to such judgments. In the absence of the statutory provisions, the notice involved in the pendency of the action continues until the suit is determined by final decree, or until it is suspended by a failure to make what is called a "full prosecution." An appeal from the final judgment of an inferior court continues the *lis pendens* during the pendency of the appeal. It has also been held that where there is an apparent neglect to prosecute, a reasonable excuse for the delay complained of is always available to keep the *lis pendens* alive. Full prosecution exists so long as the action is pending and the court has complete jurisdiction over the matter in controversy. Under the provisions of this section *lis pendens* commences when the petition has been filed and continues while the action is pending. *Olson v. Leibpke*, 110–594, 81 N. W. 801.

Lis pendens is notice to those only who attempt to acquire some interest in the subject matter of a litigation after suit is begun and from a party thereto. But one who has instituted such suit does not become a purchaser in such sense as to be protected against unrecorded instruments. *Noyes v. Crawford*, 118–15, 91 N. W. 799.

One purchasing at execution sale is bound to take notice of an action as to the title to the property pending against the owner. *Bacon v. Early*, 116–532, 90 N. W. 353.

One who purchases or otherwise acquires an interest from the defendant in a foreclosure proceeding, brought in the county where the land is situated, takes subject to the determination of such proceeding, and, although not made a party, has no equitable right to redeem from the foreclosure sale. *Cooney v. Coppock*, 119–486, 93 N. W. 495.

The lessee of a party enjoined from the use of premises for the sale of intoxicating liquors is bound by such injunction. *Harris v. Hutchison*, 140 N. W. 830.

CHAPTER 7.

OF JOINDER OF ACTIONS.

SECTION 3545. When permitted—issues tried separately.

Causes of action may be joined where each may be prosecuted by the same kind of proceedings, by the same party, in the same right, and if suit on all may be brought and tried in the same county. *Chambers v. Oehler*, 104–278, 73 N. W. 481.

It is proper to join in one action claims on tort and on contract. *Devin v. Walsh*, 108–428, 79 N. W. 133.

An action by a wife for damages by reason of sales of liquor to her husband cannot be joined with an action to recover penalty for sales to minors or habitual drunkards. *Carrier v. Bernstein*, 104–572, 73 N. W. 1076.

It is not proper to join with an action on a bond to indemnify against the enforcement of a decree a cause of action on the decree itself. *Prader v. National Masonic Accident Assn.*, 107–431, 78 N. W. 60.

It is not proper in the same action to join separate causes of action against different defendants. *Iowa Lillooet Gold Mining Co. v. Bliss*, 144 Fed. 446.

Distinct causes of action triable by the same method may be pleaded in different counts of one petition. *Waters v. Waterloo*, 126–199, 101 N. W. 871.

The statement in different counts of two inconsistent causes of action does not show an election to rely upon one of them rather than another. *Continental Ins. Co. v. Clark*, 126–274, 100 N. W. 524.

A party cannot split up his cause of action or defense and try the case in piecemeal. *Hogle v. Smith*, 136–32, 113 N. W. 556.

There can be a joinder of actions only where the several causes of actions can be tried by the same kind of proceedings and are held by the same party and against the same party and in the same right or capacity. It is not permissible to deprive defendant of a right to trial by ordinary procedure of a cause of action against him by joining with it another cause of action triable by equitable procedure. *Faville v. Lloyd*, 140–501, 118 N. W. 871.

Where two causes of action are joined, one of which only may be properly maintained in the county, the action on the cause which cannot properly be maintained in such county may be stricken out on motion. *First Nat. Bank v. Shriver*, 152–504, 132 N. W. 848.

Where a cause of action at law is improperly joined with a cause of action in equity and the defendant has made proper objection, the supreme court will on appeal refuse to give consideration to the action at law on finding that the decree for the defendant in equity was improperly granted. *Keckevoet v. Dubuque*, 157– —, 138 N. W. 540.

If there be two or more contracts of the same general nature upon each of which the defendant and his guarantor have assumed the same kind of liability, recovery for breach of each may be sought in one action. *Watkins Medical Co. v. Moss*, 141 N. W. 497.

It is not proper to join in an equitable action a cause of action which is cognizable only at law. *Watt v. Robbins*, 142 N. W. 387.

The administrator of the estate of one for whose death recovery is sought on the grounds of negligence may, in separate counts, ask recovery under the state statutes and under the federal employers' liability act. *Bankson v. Illinois Cent. R. Co.*, (D. C.) 196 Fed. 171.

SEC. 3548. Misjoinder waived.

The remedy for misjoinder of actions is by motion. *Citizens' State Bank v. Jess*, 127–450, 103 N. W. 471; *Mitchell v. McLeod*, 127–733, 104 N. W. 349.

By failing to appear, a defendant waives objection to misjoinder of actions. *McDonald v. Second Nat. Bank*, 106–517, 76 N W. 1011; *Lull v. Anamosa Nat. Bank*, 110–537, 81 N. W. 784.

CHAPTER 8.

OF PLEADING.

SECTION 3551. Motions and demurrers.

The provision that motions assailing pleadings must be in writing may be waived and the opposite party will be deemed to have acquiesced therein where without objection the motion is made orally and taken down by the official stenog-

rapher. *Fischer v. Johnson*, 106–181, 76 N. W. 658.

Failure to object to the filing of a motion as not within the proper time may be urged in connection with the consideration of the motion on its merits, and need not be taken at the time the motion is filed. *Turley v. Griffin*, 106–161, 76 N. W. 660.

A motion to strike from the files another motion is wholly unnecessary. The motion may be overruled if not properly introduced, although no specific objection to it on that ground is made. *German Sav. Bank v. Cady*, 114–228, 86 N. W. 277.

A receiver's final report on which his discharge is granted may be set aside on the ground that no notice of a motion for the acceptance of the final report and for discharge had been entered on the motion docket in accordance with the practice prevailing in the county with reference to noting the filing of motions upon such docket. *Williams v. Des Moines Loan & Trust Co.*, 126–22, 101 N. W. 277.

SEC. 3552. Subsequent pleadings.

While a party, after his pleading has been held defective, is entitled until noon of the next day in which to amend or plead over, yet if without objection he allows the court to proceed before the expiration of that time without so amending or pleading over he cannot complain on appeal. *Chase v. Wright*, 116–555, 90 N. W. 357.

The defendant is required to demur to the petition or to assail it by motion or to take issue upon it before noon of the second day of the next term after proper service has been made. This is the time when defendant is required by law to answer or plead, and an application for removal to the federal court must be made before such date, irrespective of any extension of time by order of court or agreement of parties within which the defendant may be allowed to thus plead. *Wilson v. Big Joe Block Coal Co.*, 135–531, 113 N. W. 348.

Although a reply is not filed in due season, it is within the discretion of the trial court to permit it to be filed. *Ellis v. Oliphant*, 141 N. W. 415.

SEC. 3554. Extension of time.

When time is given until a day named for filing a pleading it should be filed before the named day. *Carver v. Seevers*, 126–669, 102 N. W. 518.

Extension of time for further pleading does not extend the time within which application for removal to the federal courts may be made. *Wilson v. Big Joe Block Coal Co.*, 135–531, 113 N. W. 348.

SEC. 3557. Pleadings defined—filing—forms abolished.

The rule that when the construction of a pleading is doubtful, after giving to the language a reasonable intendment, it should be resolved against the pleader, is not to be applied save when the attack is by motion or demurrer. The rules by which the sufficiency of pleadings is to be determined are those prescribed by this section. *Lampman v. Bruning*, 120–167, 94 N. W. 562.

While a motion is for some purposes to be regarded as a pleading, yet the bar of the statute of limitations cannot be raised by a motion to direct a verdict, but must be specially pleaded. *Borghart v. Cedar Rapids*, 126–313, 101 N. W. 1120.

Questions presented for determination by motions or demurrers are issues, the determination of which constitutes a trial. *Columbus Junction Tel. Co. v. Overholt*, 126–579, 102 N. W. 498.

A party is required only to prove what is essential to entitle him to the relief sought and in an action against a common carrier for negligence in the transportation of live stock, it is immaterial whether the action is in form one for breach of contract or for tort. *Gilbert v. Chicago, R. I. & P. R. Co.*, 156–440, 136 N. W. 911.

Although forms of action are abolished, yet the substance remains and the relief formerly obtainable in equity by bill of review or a bill in the nature of a bill of review is still available through pleadings such as are authorized by the code. *Barz v. Sawyer*, 141 N. W. 319.

SEC. 3558. Copy filed—fee—taking files from office.

Failure to file a copy of a pleading is not a ground for vacating the judgment afterwards rendered. *Stephens v. City Council*, 132–490, 107 N. W. 614.

SEC. 3559. Petition—what to contain—counts—divisions—paragraphs.

Title of action: The omission to properly entitle the petition as provided in paragraph two of this section is merely a defect of form for which the defendant is not entitled as a matter of right to have the action dismissed. *First National Bank v. Stone*, 122–558, 98 N. W. 362.

Statement of cause of action: Allegations in the petition which direct the attention of the court with reasonable cer-

tainty to the facts upon which the prayer for relief is based, are ordinarily held sufficient. *Conner v. Baxter*, 124–219, 99 N. W. 726.

A statement of facts relied upon by the plaintiff as entitling him to relief is a sufficient pleading of such facts to sustain a decree for the relief to which, as a matter of law, the plaintiff is entitled under such facts. *Atlee v. Bullard*, 123–274, 98 N. W. 889.

When a material fact necessary to a recovery is omitted from a petition it is said that it does not state a cause of action. *Box v. Chicago, R. I. & P. R. Co.*, 107–660, 78 N. W. 694.

A prayer for relief cannot take the place of a statement of facts showing the party to be entitled to relief. *In re Estate of Bruning*, 122–8, 96 N. W. 780.

A party is presumed to have stated the case as strongly as the facts will justify in his favor and nothing will be assumed in his favor which has not been averred or may not upon a liberal or fair interpretation be implied from his averments. *Witham v. Blood*, 124–695, 100 N. W. 558.

An allegation of ownership, although in effect a mere legal conclusion, is to be treated as an allegation of fact. *Ruppin v. McLachlan*, 122–343, 98 N. W. 153.

The petition in an action to foreclose a mortgage covering specific personal property should state the facts entitling plaintiff to a special execution, and if it does so the court may decree a special execution to issue for any part of the property, no matter where it may be located within the state. *King v. Nelson*, 120–606, 94 N. W. 1095.

Allegations of contractual relations with a common carrier or telegraph company do not necessarily make the action one upon contract rather than in tort. *Cowan v. Western Union Tel. Co.*, 122–379, 98 N. W. 281.

A petition is sufficiently certain if it advises the opposite party of the exact claim made by the plaintiff. *McCrary v. Lake City Elec. Light Co.*, 139–548, 117 N. W. 964.

On information: A statement of facts on information and belief is sufficient, in the absence of a motion attacking the pleading on this ground. *Robinson v. Ferguson*, 119–325, 93 N. W. 350.

Ultimate facts: The pleading should state ultimate facts and not the evidence. *Johnson v. Chicago, R. I. & P. R. Co.*, 107–1, 77 N. W. 476.

A paragraph in a petition which is in the nature of a statement of evidence not relevant to any issue in the case and not of ultimate and material facts may properly be stricken out on motion. *Tisdale v. Major*, 106–1, 75 N. W. 663.

Ultimate facts only and not evidence of them are to be stated in the petition; but held that allegations that the placing of a trolley pole in front of plaintiff's premises was without necessity and to annoy plaintiff and injure and depreciate the value of his property, and that it was an obstruction to the enjoyment of his property and had caused depreciation therein, were sufficient to set out a cause of action, in the absence of a motion for more specific statement. *Snyder v. Ft. Madison Street R. Co.*, 105–284, 75 N. W. 179.

Where statutes of another state relied on are merely evidence of ultimate facts, they need not be pleaded, but can be introduced in evidence in support of the ultimate fact which is properly pleaded. *Green v. Equitable Mut. L. & End. Assn.*, 105–628, 75 N. W. 635.

Allegations of evidence have no proper place in the pleadings. *Morton v. Woods*, 154–728, 135 N. W. 400.

Implied contracts: Under allegations showing implied promise to pay for services, no recovery can be had under breach of an express agreement. *Duncan v. Gray*, 108–599, 79 N. W. 362.

Where the petition states a cause of action on an express agreement alone, no recovery can be had on *quantum meruit*. *In re Oldfield's Estate, Bowie v. Trowbridge*, 157– —, 138 N. W. 846.

And further see notes to code § 3597 in this supplement.

Negligence: An allegation of negligence in a mine owner in allowing the roof of an entry to be in a dangerous condition with knowledge thereof, is sustained by evidence that it had been in a dangerous condition for such length of time as that knowledge thereof would be imputed to defendant. *Blazenic v. Iowa & W. Coal Co.*, 102–706, 72 N. W. 292.

In an action to recover damages for injuries resulting from negligence, the plaintiff should be limited in his testimony to the specific negligence alleged. *Wirstlin v. Chicago, M. & St. P. R. Co.*, 124–170, 99 N. W. 697.

Statement of the specific acts or facts constituting the alleged negligence by which the injury has been occasioned is not necessary to the statement of a cause of action for such negligence, and after the period of limitation for bringing such action has expired, an amendment in an action seasonably brought may be allowed if it simply amplifies the specifications or grounds of the alleged negligence. *Gordon v. Chicago, R. I. & P. R. Co.*, 129–747, 106 N. W. 177.

Freedom from contributory negligence: Plaintiff, in an action to recover damages for malpractice of a physician should allege freedom from contributory negligence, and, having failed to do so, the defendant may raise the objection by motion in arrest of judgment. *Decatur v. Simpson*, 115–348, 88 N. W. 839.

The fact that the petition does not allege freedom of plaintiff from contributory neg-

ligence in a case where such fact should be alleged may be raised by motion in arrest of judgment. *Kleineck v. Reiger*, 107–325, 78 N. W. 39.

Where the wrong charged in plaintiff's petition is a wilful one, contributory negligence need not be negatived. *Continental Ins. Co. v. Clark*, 126–274, 100 N. W. 524.

A general allegation in an action for an injury alleged to be due to defendant's negligence, that plaintiff was without fault or negligence on his part, is sufficient, unless specifically attacked. *Hobbs v. Marion*, 123–726, 99 N. W. 577.

Where defendant in an action for personal injuries sets up the contributory negligence of the plaintiff, the plaintiff who intends to rely upon the fact that defendant might have avoided the injury in the exercise of reasonable care after the negligent act of the plaintiff became known to him, should allege such matter by way of reply. *Ford v. Chicago, R. I. & P. R. Co.*, 106–85, 75 N. W. 650.

Although absence of contributory negligence should be alleged in an action to recover damages for negligence, such allegation is not essential to the cause of action and may be alleged in an amendment after the expiration of the statutory period of limitations. *Cahill v. Illinois Cent. R. Co.*, 137–577, 115 N. W. 216.

Fraud: In alleging fraud committed by an agent it is not necessary to set up the fact of agency, nor that of ratification. The fraud in such case may be pleaded as that of the principal. *Higbee v. Trumbauer*, 112–74, 83 N. W. 812.

Mere general statements of fraud are insufficient. But where attempt is made to set out the claim of fraud, though not sufficiently specific, the defect must be reached by motion; and if not then raised, cannot afterwards be relied upon. *Seeley v. Seeley-Howe-Le Van Co.*, 130–626, 105 N. W. 380.

Fraud cannot be pleaded in general terms, but the facts relied upon must be stated; and a pleading containing nothing more than the mere allegation that a transaction was fraudulent is subject to demurrer. *Toovey v. Ayrhart*, 136–694, 114 N. W. 181.

While the facts relied upon to constitute fraud should be clearly stated, yet an allegation of fraud in terms somewhat general may be sustained if not attacked by motion for more specific statement. *Johnson v. Carter*, 143–95, 120 N. W. 320.

Waiver: Where facts are alleged by way of waiver they cannot be proven to establish the making of a contract. A contract relied upon should be pleaded and a party should not be allowed to plead it one way and prove it to be different. *Kinkead v. McCormick Har. Mach. Co.*, 106–222, 76 N. W. 663.

Where a passenger sued to recover damages for being put off a train on account of insufficiency of his ticket, held that if he relied on waiver of the conditions of the ticket such waiver must be pleaded. *Trezona v. Chicago, G. W. R. Co.*, 107–22, 77 N. W. 486.

Waiver of breach of conditions in a policy of insurance must be pleaded. *McCoy v. Iowa State Ins. Co.*, 107–80, 77 N. W. 529.

In an action on an insurance policy, allegation that due notice was given necessarily implies proofs of loss, and waiver of proofs must be specially pleaded. *Parsons v. A. O. U. W.*, 108–6, 78 N. W. 676.

While it is true that a waiver must be pleaded, it is also true that insufficiency of the pleading of the waiver, where it is apparent that a waiver is intended to be pleaded, may be waived by failure to seasonably raise the objection. *Barrett v. Des Moines Mut. H. & C. Ins. Assn.*, 120–184, 94 N. W. 473.

A waiver which is relied on must be pleaded. *Kinkead v. McCormick Har. Mach. Co.*, 106–222, 76 N. W. 663; *Murray v. Thicssen*, 114–657, 87 N. W. 672; *Herrstrom v. Newton & N. W. R. Co.*, 129–507, 105 N. W. 436.

Estoppel: Matters in estoppel to be available as such must be specially pleaded. *Spencer Co. v. Papach*, 103–513, 70 N. W. 748, 72 N. W. 665; *Kingsbury v. Chicago, M. & St. P. R. Co.*, 104–63, 73 N. W. 477; *Tracy Land Co. v. Polk County Land & Loan Co.*, 131–40, 107 N. W. 1029.

Custom: A custom relied upon as affecting a contract must be pleaded. *Eller v. Loomis*, 106–276, 76 N. W. 686.

In an action against a master for negligence as to inspection and repair for the purpose of keeping safe the place where the servant is to work, the general custom in such business as to the duty to inspect and repair, with reference to whether it rests upon the master or the servant, may be proven without being pleaded. *Thayer v. Smoky Hollow Coal Co.*, 121–121, 96 N. W. 718.

Duress must be specially pleaded, and until pleaded evidence to prove it cannot properly be received over objection. *Sturman v. Sturman*, 118–620, 92 N. W. 886.

Payment: A pleading which contains an allegation that a given sum of money is "substantially if not wholly" paid does not allege with sufficient definiteness that such amount has been fully paid. *Hardin County v. Wells*, 108–174, 78 N. W. 908.

In actions for breach of contract for the payment of a specified sum of money, nonpayment constitutes the breach of the contract sued for, and must be alleged. Such an allegation is put in issue by a general denial. *Howerton v. Augustine*, 130–389, 106 N. W. 941.

Where the action is based upon contract and nonpayment constitutes the very breach for which plaintiff is demanding a recovery, the petition must allege the nonpayment in order to state a cause of ac-

tion; but where damages were alleged for wrongful termination of a contract of employment, held that an allegation of nonpayment of such damages was not essential. *Harrod v. Wineman*, 146–718, 125 N. W. 812.

Want of notice: Where in an action on a certificate of insurance in a mutual accident association it was alleged that plaintiff had complied with all the conditions and provisions of the articles of incorporation and by-laws of said association on his part to be kept and performed, and defendant interposed only a general denial, held that defendant could not rely on failure of the plaintiff to prove the giving of notice as required by the articles. *Hart v. National Masonic Acc. Assn.*, 105–717, 75 N. W. 508.

Allegation of damage: In an action to recover damages for personal injuries, an allegation that plaintiff suffered great bodily pain, etc., is sufficient to sustain an allowance for mental pain and suffering. *Ousley v. Hampe*, 128–675, 105 N. W. 122.

In an action to recover damages for personal injuries an averment that by reason of the injuries alleged plaintiff has continually suffered, and still suffers pain, and believes said injuries to be permanent, is sufficient to support a recovery for future pain and suffering. *Evans v. Elwood*, 123–92, 98 N. W. 584.

In alleging damages in an action for personal injuries, where recovery is sought for pain and suffering, it is not necessary to allege the particulars of the personal injuries from which the pain and suffering resulted. *Kircher v. Larchwood*, 120–578, 95 N. W. 184.

Under an allegation of damage to property, proof of its destruction is competent. *Monarch Mfg. Co. v. Omaha & C. B. & S. R. Co.*, 127–511, 103 N. W. 493.

Under a general allegation of damages, plaintiff may prove and recover all such damages as are the natural and direct consequence of the wrong of which complaint is made. But the allegations of the injury must be sufficient to apprise the adverse party, at least inferentially, of what may reasonably be anticipated in order that he may be prepared to meet the proof. *Palmer v. Waterloo*, 138–296, 115 N. W. 1017.

Prayer: A prayer that plaintiff have "such other rights as would be proper in the premises" does not convert a petition to recover possession of personal property, or the value thereof, into an equitable action, but where the petition, which seemed otherwise to be based on a right to recover at law, also averred a trust arising under the facts for plaintiff's benefit, held that it sufficiently appeared that the petition was in equity. *Stokes v. Sprague*, 110–89, 81 N. W. 195.

A prayer that a deed be set aside for fraud, or, if it be held valid, that the contract price be recovered and a vendor's lien given does not involve such inconsistent or contradictory relief as to be improper. *Hogueland v. Arts*, 113–634, 85 N. W. 818.

It is not necessary that there be a prayer for costs. *Reed v. Corrigan*, 114–638, 87 N. W. 676.

The jury should be specifically limited as to the amount of recovery to the specific items on which recovery is asked in an action on an account, and it is error to so instruct as that there can be a total recovery for an amount not exceeding the total claim, without regard to a finding as to the specific items. *Baker v. Oughton*, 130–35, 106 N. W. 272.

In an equity action to enforce a lien it is proper to render a money judgment under a prayer for general relief. *American Trading & Storage Co. v. Gottstein*, 123–267, 98 N. W. 770.

The prayer for general relief is broad enough to authorize a judgment for the recovery of a sum of money. *Saunders v. King*, 119–291, 93 N. W. 272.

It is error for the court to grant relief not called for by the petition, or a judgment or decree different from that prayed for. *Bottorff v. Lewis*, 121–27, 95 N. W. 262.

The judgment must follow the prayer for relief and cannot be extended beyond it. *Browne v. Kiel*, 117–316, 90 N. W. 624.

Under a prayer for general relief, a party is entitled in equity to any relief which is consistent with the allegations of the petition and sustained by the proof. *Johnston v. Myers*, 138–497, 116 N. W. 600.

Under a prayer for general relief in an equitable action the court may award money damages without any specific prayer therefor. *Johnson v. Carter*, 143–95, 120 N. W. 320.

In an action to recover money payable on demand, for payment of which proper demand has been made, interest may be recovered without a special allegation in the petition as to the right to interest if the amount claimed in the petition is enough to include such interest. *Fremont County v. Fremont County Bank*, 145–8, 123 N. W. 782.

Under a general prayer for equitable relief, the court may grant any relief which appears to be equitable upon the facts pleaded and proved, and it may retain jurisdiction of the proceedings for the complete adjudication of every right which is fairly involved in or dependent upon the issues tendered by the pleadings, even though such relief be inconsistent with the specific relief prayed for. *Reiger v. Turley*, 151–491, 131 N. W. 866.

It is not a valid objection to the exercise of equitable jurisdiction that the party seeking relief prays alternatively

that if such relief be denied he may have a money recovery. *Ibid.*

A prayer for relief not resting upon any allegation of the petition does not entitle the plaintiff to relief. *Watt v. Robbins*, 142 N. W. 387.

Entire cause of action: A party cannot split up his cause of action. When he brings suit to claim a lien he must present all the facts entitling him thereto, and will not be allowed in one case to assert a mortgage lien, and when defeated with reference thereto, claim a general equitable lien in another action against the same property for the same indebtedness. *Zion Church v. Parker*, 114–1, 86 N. W. 60.

A party to litigation may not split up his causes of action and try his case by piecemeal. He may not present one branch of his case for the determination of the court and when unsuccessful therein begin over again and present some other matter upon which he relies which might theretofore have been presented and determined. *Ingold v. Symonds*, 134–206, 111 N. W. 802.

A continuous book account is to be treated as an entirety, and cannot without agreement of the parties be split into separate and distinct demands so as to form a basis for distinct suits. The fact that the items of the account are for goods sold at different times and on different orders does not entitle the seller to sue separately for each distinct item. *Williams-Abbott Elec. Co. v. Model Elec. Co.*, 134–665, 112 N. W. 181.

Even though different items of an account might have been the subject of separate suits, yet after the right of action as to all the items has matured, they must be embodied in one suit to avoid multiplicity of actions. *Ibid.*

Issues not raised: As parties may be amendment introduce new issues, or make certain those intended, their interpretation of the pleadings, when clearly manifested, is uniformly adopted by the courts. Permitting the introduction of evidence on an issue not specifically pleaded, without objection, obviates the necessity of its formal presentation. *Fenner v. Crips*, 109–455, 80 N. W. 526.

Counts: The objection that the petition and an amendment thereto stating but one count allege inconsistent and contradictory causes of action must be taken before the submission of the case to the jury. *Robbins v. Bosserman*, 133–318, 110 N. W. 587.

Although in the same count of the petition is stated a cause of action for breach of warranty and also a claim for recovery as upon rescission of the contract of sale, yet if no attack is made on account of the improper joinder of causes of action in the same count, a recovery may be sustained, if supported by the evidence, upon either ground. *Westbrook v. Reeves*, 133–655, 111 N. W. 11.

The plaintiff may allege two inconsistent causes of action as based on the same facts, such as a cause of action for breach of contract and another for tort in an action against a common carrier; but in the absence of any objection made in proper time and manner to such double pleading, the opposite party cannot take advantage of such inconsistency after verdict. *Chicago & N. W. R. Co. v. DeClow*, 124 Fed. 142.

Plaintiff may in separate counts ask to recover damages for breach of specific contract and also for *quantum meruit* under an implied contract. *Bowe v. Frink*, 137–1, 114 N. W. 543.

The same cause of action may be pleaded in different counts and plaintiff may join two counts in which recovery is asked on different and inconsistent states of facts. *Hendrix v. Letourneau*, 139–451, 116 N. W. 729.

Where the petition states more than one cause of action, each must be stated wholly in a count or division by itself and must be sufficient in itself. *Watt v. Robbins*, 142 N. W. 387.

Where, in the same action, the administrator of the estate of a deceased person asks recovery on account of the death of the deceased, due to negligence, under the state statutes and under the federal employers' liability act, the two causes of action should be stated in separate counts. *Banksón v. Illinois Cent. R. Co.* (D. C.) 196 Fed. 171.

SEC. 3560. Amended before answer.

When plaintiff amends his petition before answer, notice of such amendment must be served upon the defendant. *Ogle v. Miller*, 128–474, 104 N. W. 502.

SEC. 3561. Demurrer—causes of.

Grounds in general: Some of the grounds of demurrer relate to the omission of allegations which are not essential to the statement of a cause of action. *Cahill v. Illinois Cent. R. Co.*, 137–577, 115 N. W. 216.

Capacity to sue: Failure of plaintiff suing as a corporation to allege corporate capacity may be taken advantage of by way of demurrer, but cannot be raised after judgment. *Calnan Construction Co. v. Brown*, 110–37, 81 N. W. 163.

Where want of capacity to sue is apparent on the face of the petition, such want of capacity is a ground of demurrer and unless the objection is raised by demurrer, it is deemed to be waived. *Dumont v. Peet*, 152–524, 132 N. W. 955.

Another action pending: The provision that pendency of another action between the same parties for the same cause may be a ground of demurrer, and that objections which are grounds of demurrer may be taken by answer when the ground does not appear on the face of the petition, does not determine the question whether the pendency of a prior action in another state or in a foreign country is a ground of abatement. Such pendency is not as a matter of law pleadable in abatement to an action in this state. *Schmidt v. Posner*, 130–347, 106 N. W. 760.

Defect of parties: A question as to defect of parties is not jurisdictional, and such a defect is waived unless raised by demurrer or in other proper manner. *Fulliam v. Drake*, 105–615, 75 N. W. 479.

The defect of parties which will afford ground for demurrer is the nonjoinder of those who should have been joined, either as plaintiffs or defendants. A misjoinder can be taken advantage of only by motion. *Dolan v. Hubinger*, 109–408, 80 N. W. 514.

Nonjoinder of necessary parties is such defect of parties as may be raised by demurrer. *Anderson v. Acheson*, 132–744, 110 N. W. 335.

Misjoinder of parties or of causes of action should be raised by motion and not by demurrer. *Citizens' State Bank v. Jess*, 127–450, 103 N. W. 471.

Defect in parties is not waived by a failure to make objection when the omitted parties are indispensable to the final adjudication of the rights of the parties before the courts. Such a defect of the parties may be raised for the first time on appeal. *Tod v. Crisman*, 123–693, 99 N. W. 686.

Nonjoinder of a necessary party is waived by not demurring to the petition or raising the question by answer. *Lenoch v. Yoss*, 157– —, 136 N. W. 542.

Insufficient statement of cause of action: When the construction of a pleading assailed by demurrer is doubtful, after giving to its language a reasonable intendment, the doubt is to be resolved against the pleader. *Stephens v. City Council*, 132–490, 107 N. W. 614.

To entire pleading: Where the petition contains but a single count it must upon demurrer be held good or bad as an entirety, and the demurrer should go to the sufficiency of the entire petition, and not to specified portions thereof. *Gordon v. Chicago, R. I. & P. R. Co.*, 129–747, 106 N. W. 177.

Sufficiency of demurrer: Although the demurrer raises an objection which should have been raised by motion, nevertheless if no question is raised as to the sufficiency of the demurrer on that ground there is no error in treating it as a motion and ruling upon it accordingly. *Frazer v. Andrews*, 134–621, 112 N. W. 92.

A demurrer made to depend, not upon what is alleged or revealed in the pleading demurred to, but upon a statement or recitation of facts not appearing in such pleading, is a "speaking" demurrer and is bad. *Jeffries v. Fraternal Bankers' Reserve Soc.*, 135–284, 112 N. W. 786.

The grounds of the demurrer must meet the case made by the petition. *Harris-Emery Co. v. Pitcairn*, 122–595, 98 N. W. 476.

What admitted by demurrer: A demurrer only admits facts which are well pleaded. *Cowell v. City Water Supply Co.*, 130–671, 105 N. W. 1016.

A demurrer admits all facts well pleaded, but not conclusions of law or facts which are contrary to law or which are legally impossible. *Iowa Mut. Tornado Ins. Assn. v. Gilbertson*, 129–658, 106 N. W. 153.

Where the demurring party stands upon his demurrer, he admits facts alleged in the pleading demurred to so far as they are well pleaded. *Jeffries v. Fraternal Bankers' Reserve Soc.*, 135–284, 112 N. W. 786.

Allegations of fact as to the law of another state are confessed by demurrer. *American Trading & Storage Co. v. Gottstein*, 123–267, 98 N. W. 770.

Waiver: The defendant by not moving to strike an amendment to the petition, after the original pleading has been held to be defective on demurrer, waives the right to claim that the amendment is merely the restatement of the petition which has been held defective. *Koboliska v. Swehla*, 107–124, 77 N. W. 576.

While, generally speaking, grounds of motion are waived by demurring, the court has never been very insistent upon technical accuracy in the use of names given to such pleadings, and although a ground of demurrer is stated as a ground of motion the court may properly treat it as raising an objection proper to be raised by demurrer. *Wisconsin Lumber Co. v. Greene & Western Tel. Co.*, 127–350, 101 N. W. 742.

Demurrer to evidence: An objection to evidence because no cause of action is stated in the petition is not recognized in practice. It is a sort of oral demurrer for which there is no authority. *Bower v. Commercial Building Inv. Co.*, 110–491, 81 N. W. 720.

As to motion to direct a verdict see notes to code § 3722 in this supplement.

SEC. 3562. How specific.

A demurrer is not a pruning hook and cannot be used to trim out immaterial and irrelevant matter. This must be done by motion. *In re Estate of McMurray*, 107–648, 78 N. W. 691.

In a special proceeding the demurrer must specify and number the grounds of objection to the pleading. *Ibid.*

A demurrer to a petition in an action at law, stated in the terms of the fifth division of the preceding section, is not sufficient and should be overruled. *Stokes v. Sprague*, 110–89, 81 N. W. 195.

In an action at law the defects in the petition must be specifically pointed out and a general statement of the ground of demurrer is not sufficient. *Robinson v. Grant*, 119–573, 93 N. W. 586.

In a law action the demurrer must point out the ground of objection; it is not sufficient to say that the facts stated do not constitute a cause of action or a defense. *Timken Carriage Co. v. Smith & Co.*, 123–554, 99 N. W. 183.

In a law action a demurrer to an answer which in effect states no more than that the allegations of the answer do not constitute a defense, is insufficient. *Slafter v. Concordia Fire Ins. Co.*, 142–116, 120 N. W. 706.

Where the sole relief demanded is equitable, a general demurrer is sufficient. *Mengel v. Mengel*, 145–737, 120 N. W. 72, 122 N W. 899.

In an action on contract, the statement by way of demurrer that the facts alleged in plaintiff's petition did not entitle plaintiff to recover because the petition did not allege or show that defendant had ever become liable on any enforceable contract entered into on his part, was held sufficient. *Stewart v. Puck Soap Co.*, 154–411, 135 N. W. 70.

SEC. 3563. Objection raised by answer—arrest of judgment.

Waiver of objections: Grounds of demurrer or motion are waived by proceeding to trial without raising such objection. *Chicago & N. W. R. Co. v. DeClow*, 124 Fed. 142.

Failure to demur or move in arrest of judgment on account of defects in the petion constitutes a waiver of such defects. *Nichols-Shepard Co. v. Ringler*, 135–181, 112 N. W. 543.

A defect appearing in the petition is waived if no attack is made thereon, either by demurrer or motion in arrest. *Mitchell v McLeod*, 127–733, 104 N. W. 349.

Where defendant answers he thereby waives any ground of demurrer. *Barrett v. Des Moines Mut. H. & C. Ins. Assn.*, 120–184, 94 N. W. 473.

Failure to demur on the ground of nonjoinder of parties is a waiver of such objection. *Anderson v. Acheson*, 132–744, 110 N. W. 335.

Objection to improper joinder of causes of action is waived by answering. *Keller v. Strong*, 104–585, 73 N. W. 1071.

Objection as to misjoinder of causes of action should be made by motion to strike, and is waived by failure to raise the objection. *Campbell v. Spears*, 120–670, 94 N. W. 1126.

An objection which might be raised by motion for more specific statement is waived by going to trial. *Fox v. Waterloo Nat. Bank*, 126–481, 102 N. W. 424.

Where a case has been tried on the theory that the pleadings are sufficient to present the question which is submitted, a party cannot on appeal for the first time take advantage of defects in such pleadings. *Alexander v. Grand Lodge A. O. U. W.*, 119–519, 93 N. W. 508.

The allegations of a pleading not sufficiently specific will support a judgment if not in any manner questioned. A party who has had the benefit of the correct rule of law on the theory on which the case had been tried cannot afterwards complain of insufficiency of the pleadings *Hobbs v. Marion*, 123–726, 99 N. W. 577.

After waiving any objection which might have been raised to the pleadings, a party cannot claim that they did not present the issue which is in fact tried *Caldwell v. Drummond*, 127–134, 102 N. W. 842.

Where defendant is allowed to introduce, without objection, under the general issue, evidence of a defense that could be properly offered only under a special defense pleaded, plaintiff should be deemed to have waived the objection to the insufficiency of the pleading. *Beach v. Wakefield*, 107–567, 76 N. W. 688, 78 N. W. 197.

And see notes to § 3597.

Statute of frauds: When parol evidence of a contract within the statute of frauds is introduced upon the trial without objection, it cannot afterwards be objected to upon appeal. *Marr v. Burlington, C. R. & N. R. Co.*, 121–117, 96 N. W. 716.

Statute of limitations: The defense of the statute of limitations is an affirmative one, and is waived if not pleaded. When not pleaded such defense should not be submitted to the jury, even though supported by facts appearing in the record. *McDonald v. Bice*, 113–44, 84 N. W. 985.

Although the allegations of the petition are such that the defense of the statute of limitations might be raised by demurrer, such defense may be raised by an allegation in the answer in the nature of a conclusion of law. *Central Trust Co. v. Chicago, R. I. & P. R. Co.*, 156–104, 135 N. W. 721.

And see notes to § 3447.

Misjoinder of parties: The method of reaching misjoinder is by motion and not by demurrer or answer. *Steber v. Chicago, G. W. R. Co.*, 139–153, 117 N. W. 304.

Ruling not conclusive: The ruling on a demurrer does not constitute the law of the case in such sense that a subsequent ruling inconsistent with that made

on the demurrer may not be sustained. *Darling v. Blazek*, 142–355, 120 N. W. 961.

A ruling on demurrer does not become the law of the case, and the same question which is raised by demurrer may be raised at subsequent stages of the procedure as though no such ruling had been made. Pleading over after a ruling on demurrer does not waive the right to raise the same question in some other manner. *Back v. Back*, 148–223, 125 N. W. 1009.

Where a demurrer to the petition is overruled and an answer is filed, the ruling on the demurrer is not an adjudication of the questions raised and the sufficiency of the pleading attacked may be determined as if no demurrer had been filed. *Ware v. Leffert*, 151–17, 130 N. W. 793.

Motion in arrest of judgment: It is not every objection which might have been good if raised by demurrer that is available to the unsuccessful party on motion in arrest of judgment. The objection that inconsistent causes of action are stated in the same count of the petition cannot thus be raised. *Robbins v. Bosserman*, 133–318, 110 N. W. 587.

Where plaintiff in an action for personal injuries fails to allege freedom from contributory negligence, and defendant demurs to the petition on that ground and the demurrer is overruled, defendant may still raise the objection by a motion in arrest of judgment, and if the plaintiff does not offer to cure such defect by taking advantage of code § 3760, the court may properly sustain the motion. *Decatur v. Simpson*, 115–348, 88 N. W. 839.

Failure in a petition stating a cause of action for personal injuries to allege the freedom of the plaintiff from contributory negligence may be taken advantage of by motion in arrest of judgment. *Brown v. Illinois Cent. R. Co.*, 123–239, 98 N. W. 625.

The court should not, however, make the omission of such allegation a ground for directing a verdict for the defendant without giving the plaintiff an opportunity to amend in that respect. *Ibid.*

The objection that an action was prematurely brought may be raised by motion in arrest of judgment. *Reeves v. Lamm*, 120–283, 94 N. W. 839.

The objection that notice of a claim for damages against a telegraph company was not presented within sixty days, as required by statute (code § 2164), may be first raised by motion in arrest of judgment. *Free v. Western Union Tel. Co.*, 135–69, 110 N. W. 143.

A party does not by pleading over waive his right to attack the pleading of the adverse party at a subsequent time in the progress of the case, but he may raise the question of the sufficiency of the pleading by motion in arrest of judgment, or to direct a verdict. If, however, he fails to make objection this way he cannot have the ruling reviewed on appeal. *Hawkeye Loan & Brokerage Co. v. Gordon*, 115–561, 88 N. W. 1081.

If the pleadings do not present a cause of action or defense, and the question has been properly raised in the court below, and a ruling had thereon, the question may be reviewed upon proper assignment of error in an equity case, notwithstanding the fact that the party may have pleaded over and had a trial on the merits. *Ibid.*

A motion in arrest of judgment should not be sustained on account of a defect in the pleading which might be cured by amendment; and where an issue has in fact been submitted which might have been raised by proper pleading, the technical failure to raise such issue is cured by the verdict. *Cahill v. Illinois Cent. R. Co.*, 137–577, 115 N. W. 216.

SEC. 3564. Demurrer to one of several causes—effect of demurrer and ruling.

The provision of 25 G. A., ch. 96, that no pleading should be held sufficient on account of the failure to demur thereto, held not to entitle a party to urge in the supreme court objections to a pleading not raised in the trial court. *Reed v. Muscatine*, 104–183, 73 N. W. 579; *Wood v. Dunham*, 105–701, 75 N. W. 507; *Lacy v. Kossuth County*, 106–16, 75 N. W. 689.

An objection to the petition, not raised by answer or demurrer, is not deemed waived under the present code. *Pierson v. Independent School Dist.*, 106–695, 77 N. W. 494.

The provision of 25 G. A., ch. 96, as to the effect of a ruling on demurrer, does not change the rule of pleading that a party answering over after his demurrer to a petition has been overruled thereby waives any error in such ruling. *Buchanan v. Blackhawk Coal Works*, 119–118, 93 N. W. 51.

The provision as to the effect of the overruling of a demurrer was not designed to permit a review of the ruling on the demurrer which had been overruled, where the party demurring had afterwards filed an answer or replied, but to provide that the ruling should not have the effect of an adjudication, and to permit the party demurring unsuccessfully to question the sufficiency of the pleading in other ways during the progress of the trial, as by motion to direct a verdict, or in arrest of judgment. In such a case the party, by pleading over, waives his right to complain of the ruling on his demurrer, but does not waive his right to attack the pleading on the grounds upon which his demurrer was founded at any subsequent

time in the progress of the case. *Frum v. Keeney*, 109–393, 80 N. W. 507.

Notwithstanding the provisions of 25 G. A., ch. 96 (now embodied in the last sentence of this section), questions not raised in the court below will not be considered on appeal. *Hough v. Gearen*, 110–240, 81 N. W. 463.

Mere failure to demur to a defective petition does not prevent defendant from raising the objection in some other way. But he cannot allow the case to be tried on the theory that the petition is sufficient and then on exceptions to the giving of instructions on the issue raise the question as to whether a cause of action is stated. *Enix v. Iowa Cent. R. Co.*, 114–508, 87 N. W. 417.

Where the sufficiency of a pleading is not attacked by demurrer or otherwise and the allegations thereof are established by the proof, the party relying on such pleading is entitled to succeed, although it might have been held defective had it been attacked. *Ormsby v. Graham*, 123–202, 98 N. W. 724.

The objection that the defendant is a township and therefore is not a public corporation which can be sued is not waived by failure to demur to the petition on this ground, but may be raised in any other proper manner. *Austin Western Co. v. Weaver Twp.*, 136–709, 114 N. W. 189.

In order to raise by objection to evidence a question as to the sufficiency of an answer which might be raised by demurrer, the objection must in some way call the court's attention to that as the ground. *Coad v. Schaap*, 144–240, 122 N. W. 900.

SEC. 3565. Joinder in demurrer—answering, amending or pleading over.

Pleading over: By amending or pleading over after an adverse ruling on a motion or demurrer the pleader waives any error in such ruling. *Hurd v. Ladner*, 110–263, 81 N. W. 470; *Frick v. Kabaker*, 116–494, 90 N. W. 498; *McKee v. Illinois Cent. R. Co.*, 121–550, 97 N. W. 69; *Hunn v. Ashton*, 121–265, 96 N. W. 745; *Davis v. Boyer*, 122–132, 97 N. W. 1002; *Scribner v. Taggart*, 123–321, 98 N. W. 798; *Redhead v. Iowa National Bank*, 123–336, 98 N. W. 806; *Long v. Furnas*, 130–504, 107 N. W. 432; *Iowa-Minnesota Land Co. v. Conner*, 136–674, 112 N. W. 820.

A party going to trial after the overruling of a motion to strike, or of a demurrer, cannot urge error in such ruling on an appeal from the final judgment, unless subsequently on the trial he has presented in some way to the court his objections to the pleadings. *Puritan Mfg. Co. v. Emporium*, 130–526, 107 N. W. 428.

If a party, after an adverse ruling on demurrer or on motion, pleads over or secures time to plead, he by so doing waives the error in the ruling, and it has likewise been held that where the law tenders an issue without the filing of further pleadings, he who would take advantage of an order overruling a demurrer must stand upon the pleading in order to have his case reviewed; but a defendant who demurs to plaintiff's petition and after the overruling of the demurrer does not ask for further time to plead over, files no other pleading in the case and makes no further appearance, is deemed to stand on the demurrer without the record showing a formal election. If it affirmatively appears that the unsuccessful party did not waive the error under the ruling, that is sufficient. *Denby v. Fie*, 106–299, 76 N. W. 702.

By filing an amendment to his petition after a demurrer thereto is sustained, the plaintiff waives any error in the ruling on the demurrer. But such ruling does not thereby become an adjudication in such sense that the same question cannot be raised in some other way. On the other hand the defendant by failing to object further to the allegations in the amendment which are open to the same objection previously made by demurrer does not waive his grounds of demurrer if his answer contains the same objections which by demurrer were interposed to the original petition. *Marshall Ice Co. v. LaPlant*, 136–621, 111 N. W. 1016.

By pleading over after a ruling sustaining a demurrer to his petition, plaintiff waives the error, if any, but the ruling does not constitute an adjudication, and the same question may be presented in other ways. *Geiser Mfg. Co. v. Krogman*, 111–503, 82 N. W. 938.

One who pleads over after an adverse ruling on a demurrer waives the error in that ruling, but such ruling does not constitute an adjudication binding in the subsequent course of the trial and the same question may be presented in other ways as by motion in arrest or to direct a verdict or by objections to evidence. *Watkins v. Iowa Cent. R. Co.*, 123–390, 98 N. W. 910.

One who after his pleading has been held defective on demurrer pleads over by a mere repetition of the matter before held insufficient, does not waive the ruling against him, but if he has not excepted to the ruling the only question on a subsequent motion to strike the new pleading as a mere repetition is as to whether it is in fact a repetition of the pleading held to be insufficient. But new matter cannot be

attacked by a motion to strike on the ground that the allegation thereof is a mere repetition. *Ibid.*

Plaintiff appealing from judgment against him on demurrer to his petition on the ground that it does not state facts sufficient to show a cause of action, cannot complain of the sustaining of a motion complied with by him requiring him to make his petition more specific. *Sigmond v. Bebber*, 104–431, 73 N. W. 1027.

Standing upon pleading or demurrer: Where judgment has been rendered against plaintiff whose petition has been held insufficient on demurrer, and who has elected to stand on his petition and not to amend, such judgment constitutes a final adjudication. *Gregory v. Woodworth*, 107–151, 77 N. W. 837.

In general, judgment goes against the party whose pleading is held insufficient on demurrer only when he elects to stand on his pleading, or when, having asked leave to amend, he is in default for not doing so. *Williams v. Williams*, 115–520, 88 N. W. 1057.

A party who elects to stand on his demurrer concedes the facts properly pleaded and simply challenges the conclusions of law predicated upon such facts. *Slafter v. Concordia Fire Ins. Co.*, 142–116, 120 N. W. 706.

A demurrer is a legal exception to the sufficiency of a pleading; and when the petition is held insufficient as to certain items contained therein and plaintiff fails to plead over, judgment of dismissal as to counts containing such items may be entered. *Wapello State Sav. Bank v. Colton*, 143–359, 122 N. W. 149.

Where a party stands on his pleading which has been held insufficient on demurrer and appeals he cannot after affirmance amend so as to obviate the ruling on demurrer. *Ibid.*

SEC. 3566. Answer—what to contain—distinct defenses.

Denial: In an action for libel where plaintiff alleges the falsity of the statements, defendant may under general denial introduce evidence of their truth. *Locke v. Chicago Chronicle Co.*, 107–390, 78 N. W. 49; *Moffitt v. Chicago Chronicle Co.*, 107–407, 78 N. W. 45.

Under a general denial of a settlement, any evidence should be received which tends to show that no valid settlement was made. *Beach v. Wakefield*, 107–567, 76 N. W. 688, 78 N. W. 197.

Under general denial in an action for breach of contract the defendant may not only offer testimony in denial of the contract as claimed by plaintiff, but also to prove the contract which defendant claims was in fact made, and the nonperformance thereof on plaintiff's part. *Tracy Land Co. v. Polk County Land & Loan Co.*, 131–40, 107 N. W. 1029.

In an action for goods sold to defendant the defendant may under general denial prove that the goods were purchased by him for another. *Cole v. Laird*, 121–146, 96 N. W. 744.

Where plaintiff's claim is based on various items, each of which is expressly denied, the validity of each item is put in controversy, although the plaintiff claims in the aggregate much less than the total amount of the items specified. *Steele v. Crabtree*, 130–313, 106 N. W. 753.

Where plaintiff sues for breach of contract for the payment of a specified sum of money, he must allege the fact of nonpayment and such fact is put in issue by a general denial. *Howerton v. Augustine*, 130–389, 106 N. W. 941.

In an action for specific performance based on a contract of sale made by an agent, the defendant may under general denial show want of authority to the agent to enter into such contract. *Staten v. Hammer*, 121–499, 96 N. W. 964.

A general or specific denial as authorized by the statute may be introduced without being objectionable as a conclusion. While conclusions may not be pleaded by way of affirmative averment, there is no such objection to a general or specific denial. *Provident Bank Stock Co. v. Schafer*, 110–440, 81 N. W. 689.

A specific denial in response to any specific allegation, not predicated on any new matter, adds no new issue to that arising by a general denial. *Hess v. Hayes*, 146–620, 125 N. W. 671.

While a general denial of indebtedness does not raise an issue, the defendant cannot be properly charged as being in default while such denial remains unassailed. *Thorn v. Hambleton*, 149–214, 128 N. W. 393.

New matter — affirmative defenses: Where the plaintiff's petition shows on its face that the claim is not barred by the statute of limitations, the question can be raised by defendant only by an answer. *Goring v. Fitzgerald*, 105–507, 75 N. W. 358.

Settlement is an affirmative defense as to which the burden of proof is on the defendant. *Johnson v. Berdo*, 131–524, 106 N. W. 609.

A defendant, in order to avail himself of facts not appearing on the face of a contract to establish its invalidity, must plead such facts. *Richey v. Rowland*, 130–523, 107 N. W. 423.

Where affirmative matter is pleaded both by way of defense and as a ground for a counterclaim, the dismissal of the counterclaim does not constitute a dismissal of

the defense. *Steele v. Crabtree*, 130–313, 106 N. W. 753.

Confession and avoidance: While allegations by way of avoidance must be coupled with a confession of plaintiff's cause of action, it is sufficient if the confession be by implication. *Jackson v. Independent School Dist.*, 110–313, 81 N. W. 596.

A plea in confession and avoidance is necessary only when defendant proposes to admit the truth of a material allegation made by the plaintiff and to avoid liability thereon by affirmative proof of matters which destroy the effect of the allegations admitted. *Staten v. Hammer*, 121–499, 96 N. W. 964.

Special defenses: In an action for malicious prosecution, evidence of advice of counsel as rebutting malice and want of probable cause is admissible without being specially pleaded. *McAllister v. Johnson*, 108–42, 78 N. W. 790.

If it is desired to rely upon facts as an affirmative defense, they should be pleaded in avoidance. *Kingsbury v. Chicago, M. & St. P. R. Co.*, 104–63, 73 N. W. 477.

In a suit against a municipal corporation, based on a contract for services, the defense that the contract is *ultra vires* must be specially pleaded. *Ryan v. Lone Tree*, 122–420, 98 N. W. 287.

If the defendant in an action on a written contract relies upon breach by plaintiff of a condition precedent, the plaintiff relying upon waiver of the performance of such condition must plead such waiver. *Cavanagh v. Iowa Beer Co.*, 136–236, 113 N. W. 856.

And see notes under § 3629.

Inconsistent defenses: While a defendant has the right to plead the same defense as many times as he sees fit, he has the right to prove it but once, and if this right is preserved to him he cannot complain of the action of the trial court in striking out portions of his answer. *Shambaugh v. Current*, 111–121, 82 N. W. 497.

Where one of the divisions of an answer admits defendant's liability, plaintiff is entitled to judgment, although in other divisions of the answer defendant's liability is controverted. *Burns v. Chicago, Ft. M. & D. M. R. Co.*, 110–385, 81 N. W. 794.

Defendant in an action for goods sold and delivered may plead rescission and also set up a counterclaim for breach of warranty. He is not required to elect. *Thorson & Cassidy Co. v. Baker*, 107–49, 77 N. W. 510.

As to inconsistent defenses see code § 3620 and notes.

In an action on a contract, the defendant may, in addition to a general denial, plead another and different contract by the terms of which the plaintiff was to be compensated in a different manner than under the contract referred to in the petition. *Lemke v. Franzenburg*, 141 N. W. 332.

Partial defense: A demurrer cannot be interposed to allegations in an answer not pleaded in themselves as a complete defense, but as material with other allegations in making out a defense. *Seaton v. Grimm*, 110–145, 81 N. W. 225.

Even matter in mitigation should be specially pleaded as a partial defense, and cannot be proven under a general denial. *Vierling v. Binder*, 113–337, 85 N. W. 621.

Equitable defense: A judgment cannot be attacked in equity on account of any defense which might have been interposed to the recovery of judgment. *Ulber v. Dunn*, 143–260, 119 N. W. 269.

Counterclaim: Allegations in the answer which are in the nature of a counterclaim will support affirmative relief to the defendant, no objection to the sufficiency of the pleading as constituting a counterclaim having been made. *Crawford v. Ft. Dodge Plaster Co.*, 125–658, 101 N. W. 479.

The defendant has a right to file a counterclaim at the time of filing his answer. *Smith v. Redmond*, 141–105, 119 N. W. 271.

A defendant sued upon a specified contract may counterclaim for any alleged breach thereof by the plaintiff unless the demand or cause of action so pleaded has been in some manner settled or adjusted or the defendant has in some other manner estopped himself from asserting it. If the right to counterclaim has been thus lost or avoided or waived, that fact constitutes an affirmative defense which, to be of avail, must be pleaded. *Watkins Medical Co. v. Moss*, 141 N. W. 497.

SEC. 3568. Divisions of answer.

Where the answer is in separate divisions, the matter pleaded in other divisions may be taken into consideration in determining what force and effect should be given to any one division. *Teeple v. Hawkeye Gold Dredging Co.*, 137–206, 114 N. W. 906.

The fact that affirmative defenses are joined with a general denial will not authorize the sustaining of a demurrer to the entire answer, the remedy of the plaintiff being by motion to require the defendant to separately plead the separate defenses or to elect on which he will rely. *McKay v. McCarthy*, 146–546, 123 N. W. 755.

SEC. 3570. Counterclaim—how stated—what may constitute.

Nature of counterclaim—when proper: The counterclaim proper presents matter upon which an original action might have been brought in defendant's favor. *Bardes v. Hutchinson*, 113–610, 85 N. W. 797.

A counterclaim does not constitute a defense. *Johnson v. Nash-Wright Co.*, 121–173, 96 N. W. 760.

The mere fact that affirmative relief is prayed for in a counterclaim or cross bill against the plaintiff does not justify judgment in the defendant's favor against the plaintiff on the failure of the latter to appear if the allegations of the defendant's pleading are merely defensive in character. *Stewart v. Gorham*, 122–669, 98 N. W. 512.

Any new matter constituting a cause of action in favor of defendant may be pleaded as a counterclaim against the demand of the plaintiff, provided such counterclaim was held by the defendant at the time the action by plaintiff was brought. *Richardson v. Richardson*, 134–242, 111 N. W. 934.

A cause of action not held by the defendant at the time action is instituted against him by the plaintiff cannot be interposed as a counterclaim. *Morrison Mfg. Co. v. Rimerman*, 127–719, 104 N. W. 279.

A counter demand going directly to the amount due on account of the very transaction out of which the demand arises is a right of recoupment which is often spoken of as a defense and is more than a mere counterclaim. *Medart Pulley Co. v. Dubuque Turbine & Roller Mill Co.*, 121–244, 96 N. W. 770.

Inasmuch as the landlord in an action for an attachment for rent cannot join other causes of action against the tenant, if the tenant sets up a counterclaim plaintiff may in reply interpose any matter of set-off which he may have as against the counterclaim. *Illsly v. Grayson*, 105–685, 75 N. W. 518.

After trial in an equity case and remanding the case for further proceedings, it is not proper to allow the introduction of a counterclaim which sets up a right of recovery at law and which does not grow out of the same transaction. *Allen v. Davenport*, 115–20, 87 N. W. 743.

A claim for repayment of money paid for intoxicating liquors illegally sold (code § 2423) exists from the time such payment was made, and nothing but a demand is necessary to mature it, and therefore such a claim may be introduced by way of counterclaim, although the demand for repayment has not been made until after the bringing of the action in which the counterclaim is sought to be introduced. *Brown v. Wieland*, 116–711, 89 N. W. 17.

A counterclaim based on a cause of action arising out of the contracts or transactions set forth in the petition or connected with the subject of the action is in effect a set-off. *Hogle v. Smith*, 136–32, 113 N. W. 556.

A cause of action thus pleaded is barred by a judgment in the action in which the counterclaim is so pleaded, although the defendant neglects to introduce evidence in support of such counterclaim. *Ibid.*

In an action brought for the value of goods as in conversion or upon an implied promise to pay the value thereof, the defendant may plead by way of counterclaim any indebtedness of the plaintiff to him. *Smith Lumber Co. v. Scott County Garbage Co.*, 149–272, 128 N. W. 389.

A codefendant who answers a cross-petition on its merits without objection submits the subject matter to the jurisdiction of the court and cannot afterwards complain that the cross-petition contains matter not pertaining to the petition. *Novak v. Novak*, 137–519, 115 N. W. 1.

One of two codefendants cannot by cross-petition set up against the plaintiff a cause of action in which his codefendant has no interest. *Kauffman v. Phillips*, 154–542, 134 N. W. 575.

Action in representative capacity: In an action brought in a representative capacity a counterclaim against the plaintiff as an individual cannot be interposed. *Headington v. Smith*, 113–107, 84 N. W. 982.

Debt belonging to partnership: A claim against an estate after the death of the intestate cannot be set up as a counterclaim in an action by the administrator. *Sullivan v. Nicoulin*, 113–76, 84 N. W. 978.

To be available as a counterclaim the claim must have been owed to the defendant at the time of the commencement of the action, and it is not enough that the debt belonged to a partnership of which he was a member. *Ibid.*

The indebtedness of one member of a partnership cannot be set off as against an action brought by the partnership to recover partnership funds. *Hoaglin v. Henderson*, 119–720, 94 N. W. 247.

Failure to interpose: A counterclaim may or may not be pleaded in an action as the defendant shall elect, and held that the vendee of property, buying under a guaranty, might plead breach of the guaranty as a defense in an action for the balance of the purchase money, and afterwards in an independent action recover damages sustained by reason of the seller's breach. *Jones v. Witousek*, 114–14, 86 N. W. 59.

If the matter of set-off or counterclaim is presented and passed upon in the suit it is barred by the judgment; if not, defendant may make it the subject of a separate and distinct action. *Ibid.*

The fact that defendant in an attachment suit pleads and establishes a counterclaim, thus defeating recovery of judg-

ment by plaintiff, does not show that the attachment was sued out maliciously and without probable cause. The defendant has the election not to plead the indebtedness in his favor as a set-off or counterclaim, but to make it the subject of a separate and distinct action. *Smeaton v. Cole*, 120–368, 94 N. W. 909.

Failure to plead an existing cause of action as a counterclaim does not operate as a cancellation or satisfaction of such cause of action. *Ferguson v. Epperly*, 127–214, 103 N. W. 94.

SEC. 3572. Counterclaim by comaker or surety.

An adjudication of the principal's right to a set-off or counterclaim is conclusive on the surety afterwards seeking the benefit thereof. *Beh v. Bay*, 127–246, 103 N. W. 119.

SEC. 3574. Cross-petition.

Wholly distinct and independent transactions cannot be brought into an action by cross-petition. It is only where a defendant has a cause of action affecting the subject matter of the main suit that a cross-petition against a codefendant or a third person may be interposed. *Culbertson v. Salinger*, 131–307, 108 N. W. 454.

New parties may be brought into a case in order to settle in one action all controversies growing out of the transaction to which the action relates by affording the parties thus brought in an opportunity to file a cross-petition. *Farmers & Mer. Bank v. Wood*, 143–635, 118 N. W. 282, 120 N. W. 625.

The law allows and encourages the bringing, so far as practicable of all controversies relating to the same subject matter of dispute into one action. Therefore held that a defendant might, in a cross bill, get relief against a codefendant although the matter alleged constituted no answer to plaintiff's claim. *Minden Canning Co. v. Hensley*, 149–168, 126 N. W. 1115.

Wholly distinct and independent transactions cannot be brought into the case by cross-petition against a codefendant. Such petition must relate to the subject matter of the action or the contract or transaction upon which the action was instituted. *Eller v. Newell*, 141 N. W. 52.

One who is not made party to the suit cannot, in the federal courts, file a cross bill. *United States Gypsum Co. v. Hoxie*, (C. C.) 172 Fed. 504.

SEC. 3575. Demurrer to answer.

If matter pleaded as a defense is not attacked by motion or demurrer it will, if proved, defeat the plaintiff's action, although had the question been raised the answer would have been held to present no defense. *Ormsby v. Graham*, 123–202, 98 N. W. 724.

Failure to make sufficient answer in a proceeding auxiliary to execution is not to be taken advantage of by demurrer. *Jordan Co. v. Sperry*, 141–225, 119 N. W. 692.

The statement as ground of demurrer to an answer that the facts set out do not constitute a defense is not sufficient. *Slafter v. Concordia Fire Ins. Co.*, 142–116, 120 N. W. 706.

SEC. 3576. Reply—when necessary.

A reply introducing a new cause of action should be stricken out on motion. *Hunt v. Johnston*, 105–311, 75 N. W. 103.

Where in an action for personal injuries defendant pleads contributory negligence of the plaintiff, the plaintiff, desiring to rely upon the fact that defendant might by reasonable care have prevented the injury to plaintiff after plaintiff's contributory negligence became apparent, should plead such fact in the reply. *Ford v. Chicago, R. I. & P. R. Co.*, 106–85, 75 N. W. 650.

Matter in avoidance of facts alleged in the answer should be pleaded in a reply. *Pitstick v. Osterman*, 107–189, 77 N. W. 845.

The allegations of an answer setting up an affirmative defense are denied by operation of law without the filing of a reply. *League v. Ehmke*, 120–464, 94 N. W. 938.

The averment of settlement in an answer is denied by operation of law. If, however, the plaintiff desires to impeach such settlement on account of fraud or mistake, such matter should be set up in a reply. *Stomne v. Hanford Prod. Co.*, 108–137, 78 N. W. 841.

A reply should not be stricken out on motion for being inconsistent with the petition where no inconsistency appears on the face of the reply, though such inconsistency may become apparent under the evidence. *Keairnes v. Durst*, 110–114, 81 N. W. 238.

Where one sets up matter of avoidance in the reply it is not necessary that he couple it with a denial. The law denies all affirmative allegations in the answer, save where a counterclaim is pleaded. *Parno v. Iowa Merchants Mut. Ins. Co.*, 114–132, 86 N. W. 210.

Facts recited in a reply are not to be treated as constituting a cause of action, either of themselves or in connection with matters stated in the petition, but only as avoiding the defense alleged in the answer. *Cedar Rapids Water Co. v. Cedar Rapids*, 117–250, 90 N. W. 746.

Refusal to strike an unverified reply may be error without prejudice, though the petition is verified, if the reply consists only of a general denial to the allegations of the answer. *Keller v. Harrison*, 139–383, 116 N. W. 327.

SEC. 3577. Statements of.

Allegations of the answer being denied by operation of law, the burden of proving the same is upon the defendant, notwithstanding confession and avoidance pleaded in the reply. *Parsons v. A. O. U. W.*, 108–6, 78 N. W. 676.

SEC. 3580. Verification—when necessary.

The omission of the signature of plaintiff's attorney at the conclusion of the petition is a defect of form only, and in the absence of a showing that the defendant has been misled or prejudiced thereby, it does not necessitate the dismissal of the action on defendant's motion. *First National Bank v. Stone*, 122–558, 98 N. W. 362.

The signature of a pleading purporting to be signed by the party in whose behalf it is filed, may be assumed, in the absence of evidence to the contrary, to be his signature. *Frank v. Berry*, 128–223, 103 N. W. 358.

Although the jurat does not show in what county the oath was administered, it will be presumed that it was administered in the proper county. *Turner v. Loomis*, 146–655, 125 N. W. 662.

The failure to verify an answer, when verification is necessary, does not expose the defendant to the peril of being held in default so long as his pleading stands unassailed by motion or demurrer. *Thorn v. Hambleton*, 149–214, 128 N. W. 393.

SEC. 3581. By corporation.

A corporation may verify its answer denying the genuineness of the corporate signature by the oath of its secretary. *Marshall Field Co. v. Oren Ruffcorn Co.*, 117–157, 90 N. W. 618.

SEC. 3583. By agent or attorney.

The provision that an affidavit of an attorney to a pleading is insufficient if it fails to show his competency to state the facts has reference to pleadings only and not to other matters which may require verification. The affidavit of an attorney made the basis of an auxiliary proceeding will be presumed to have been made with knowledge of the facts and to have been accepted by his client in whose behalf such affidavit is made. *Carpenter v. Clements*, 122–294, 98 N. W. 129.

Where the verification is by an attorney his competency to make oath as to facts must appear; but the recital that he is familiar with all the statements made in the pleading and that they are true as he verily believes, is sufficient. *Turner v. Loomis*, 146–655, 125 N. W. 662.

SEC. 3588. Failure to verify.

Failure to verify a petition of forcible entry and detainer will be waived if not taken advantage of in the trial court. *Herkimer v. Keeler*, 109–680, 81 N. W. 178.

Advantage of the failure to verify a pleading can only be taken by motion to strike. *Newburn v. Lucas*, 126–85, 101 N. W. 730.

Verification of a reply is immaterial when such reply pleads only a general denial of the answer such as is implied by operation of law. *Keller v. Harrison*, 139–383, 116 N. W. 327.

SEC. 3591. Amendments not verified.

The court may permit an amendment to be filed without verification. *Thompson v. Brown*, 106–367, 76 N. W. 819.

Where no new cause of action is set up in an amendment to the petition it is not necessary that such amendment be verified. *Keller v. Harrison*, 139–383, 116 N. W. 327.

Section applied. *Boos v. Dulin*, 103–331, 72 N. W. 533.

SEC. 3592. Pleading in slander and libel.

Extrinsic facts need not be alleged in an action for slander to show that the language charged was spoken in a defamatory sense. *Craver v. Norton*, 114–46, 86 N. W. 54.

SEC. 3593. Matter in mitigation—justification.

Matters in mitigation cannot be proven unless specially pleaded. *Craver v. Norton*, 114–46, 86 N. W. 54; *Flam v. Lee*, 116–289, 90 N. W. 70.

In an action for breach of promise of marriage, want of chastity on the part of the plaintiff before or after the alleged promise is a circumstance tending to lessen damages, but must be specially pleaded by way of mitigation. Likewise seduction of plaintiff by the defendant, if relied upon, should be specially pleaded in such case by way of aggravation. *Herriman v. Layman*, 118–590, 92 N. W. 710.

In an action for criminal conversation the bad character of plaintiff's wife prior to her marriage is matter in mitigation of damages only, and as such must be pleaded. *Frank v. Berry*, 128–223, 103 N. W. 358.

In an action by the wife for alienation of her husband's affections, the bad moral character of the plaintiff may be pleaded and shown by way of mitigation of damages. *Hardwick v. Hardwick*, 130–230, 106 N. W. 639.

Under a denial, a plea in mitigation, such as that the defendant in an action for slander did not intend to charge a crime, cannot be proven. *Ladwig v. Heyer*, 136–196, 113 N. W. 767.

The plea of justification in libel must be as broad as the charge. *Mulvaney v. Burroughs*, 152–439, 132 N. W. 873.

Where the defendant in an action for slander denies the speaking of the words charged and alleges nothing by way of mitigation, it is not necessary for the court to instruct as to the effect of mitigating circumstances which may appear in the evidence. *Hahn v. Lumpa*, 157– —, 138 N. W. 492.

SEC. 3594. Intervention.

In a proceeding before the board of supervisors for the remission of a mulct tax, there is no right of intervention by a mortgagee of the premises on which the tax has been levied for the determination of the question whether his mortgage is prior to the lien of the tax, nor can such question be raised in the district court on appeal from the action of the board. *David v Hardin County*, 104–204, 73 N. W. 576.

It is the policy of the law to permit conflicting claims of priority growing out of a single mortgage to be settled in one action and such a result may be secured by intervention of parties interested in the property. *Cooper v. Mohler*, 104–301, 73 N. W. 828.

An assignee for the benefit of creditors, to whom has been transferred a right to recover on an attachment bond, may intervene in the original action for the purpose of recovering on such bond. *Ringen Stove Co. v. Bowers*, 109–175, 80 N. W. 318.

An assignee of the claim on which the action is based is not entitled to intervene. He may allow the action to proceed in the name of the assignor, or may have himself substituted. *Bank of Commerce v. Timbrell*, 113–713, 84 N. W. 519.

Where the wife in a proceeding for divorce and alimony asked to have a conveyance of property from her husband to a third party set aside as fraudulent, and after a dismissal of the action by plaintiff was filed and before any order of dismissal had been entered, attorneys for the wife sought to intervene, asking to have their claims for attorneys' fees enforced against the land, held that they had no such standing with reference to the controversy as to be entitled to intervene, and that at any rate the application was too late. *Keehn v. Keehn*, 115–467, 88 N. W. 957.

The creditor of an insolvent partnership may come into a receivership proceedings in which the distribution of assets of the firm is being determined as between the partners and have an order for the payment of his claim. *Johnson v. Johnson*, 132–457, 107 N. W. 802.

One who intervenes in an action may subsequently withdraw such intervention so as not to be bound by the further proceedings in the case. *Guinn v. Iowa & St. L. R. Co.*, 125–301, 101 N. W. 94.

In an action against the tenant of a farm to restrain him from interfering with or obstructing the outlet to a tile drain carrying water from adjoining premises, the owner of the land involved is entitled to intervene for the purpose of having his rights as against the threatened discharge of water upon his land protected. *Orcutt v. Woodard*, 136–412, 113 N. W. 848.

A decree against defendant by default will not be binding on an intervener whose petition of intervention remains undisposed of at the time the decree is rendered. *McCullough v. Connelly*, 137–682, 114 N. W. 301.

There is no method provided by which the attaching plaintiff can compel another person to intervene for the purpose of

setting up any claim he may have to the property. *Dimsdale v. Tolerton-Warfield Co.*, 151–425, 131 N. W. 689.

One who intervenes in an action is not entitled to maintain a cross bill against the plaintiff on an independent cause of action. *Kauffman v. Phillips*, 154–542, 134 N. W. 575.

On an appeal from the action of the board of supervisors in holding a petition for general consent to the sale of intoxicating liquors to be insufficient, any citizen may intervene under the provisions of code § 2450. *Anderson v. Board of Supervisors*, 156–153, 135 N. W. 570.

SEC. 3595. Decision—no delay—costs.

The provisions of this section as to delay refer to delay of trial and not to such delay as may result from an immediate trial. If the intervener, by his action, does not occasion any postponement, he is not chargeable with delay resulting from the trial of his petition of intervention. *Ringen Stove Co. v. Bowers*, 109–175, 80 N. W. 318.

SEC. 3597. Variance—amendments.

A variance between allegations and proof which does not mislead the opposite party is immaterial. *Harward v. Davenport*, 105–592, 75 N. W. 487; *Wenks v. Hazard*, 149–16, 127 N. W. 1099.

Objection cannot be made to the allowing of an amendment on the ground of surprise when the evidence which may be introduced thereunder would have been admissible under the original pleading. *Thompson v. Brown*, 106–367, 76 N. W. 819.

As the parties by amendment may introduce new issues or make certain those intended, their interpretation of the pleadings, when clearly manifested, is uniformly adopted by the courts. Thus, permitting the introduction of evidence on an issue not specially pleaded, without objection, obviates the necessity of its formal presentation. *Fenner v. Crips*, 109–455, 80 N. W. 526.

It does not constitute a fatal variance between the allegations and the proof that the plaintiff establishes more than is necessary to sustain the allegations of his petition. *Goodrich v. Fogarty*, 130–223, 106 N. W. 616.

Where the case goes to trial without objection on a cause of action not set up in the petition, but which is supported by evidence, the defendant cannot complain of the defect in the petition. *Shoemaker v. Turner*, 117–340, 90 N. W. 709.

A verdict should not be directed on account of a defect in the petition which might be cured by amendment. *Cahill v. Illinois Cent. R. Co.*, 137–577, 115 N. W. 216.

Where the parties have construed the pleadings as raising an issue, neither one afterwards will be allowed to contend that the pleadings do not present such issue. *Parker v. Parker*, 155–65, 135 N. W. 71.

A party cannot complain that the trial court submits the case to the jury upon his own theory inconsistent with the allegations of his pleading. *Boerner Fry Co. v. Mucci*, 138 N. W. 866.

Where the case has been tried upon the theory that the issues presented are raised by the pleadings, the objection that the pleadings do not in fact raise such issues is waived; but this rule does not apply where the evidence offered is admissible upon the issues actually tendered, and in such case no acquiescence can be inferred from a failure to object to the introduction of such testimony. *Watt v. Robbins*, 142 N. W. 387.

And see notes to § 3563.

A plaintiff relying upon an express agreement must prove it and cannot recover under an implied contract. *Duncan v. Gray*, 108–599, 79 N. W. 362; *Hunt v. Tuttle*, 125–676, 101 N. W. 509; *Leonard v. Leonard*, 134–131, 111 N. W. 409; *In re Oldfield's Estate, Bowie v. Trowbridge*, 157– —, 138 N. W. 846.

Plaintiff need not file an amendment to his petition because of variance between the allegations and the proof, where the defendant is estopped to say that he was misled thereby. *Voelker v. Chicago, M. & St. P. R. Co.*, 116 Fed. 867.

Where plaintiff suing for breach of contract does not allege whether it is oral or in writing, in the absence of any attack on the pleading on that ground, recovery can be had on proof of an oral agreement. *Newburn v. Hyde*, 132–88, 107 N. W. 604.

SEC. 3599. Failure of proof.

Failure to prove unnecessary allegations in the petition will not defeat recovery.

See notes to code § 3639 in this supplement.

SEC. 3600. Amendments allowed.

Right to amend: The rule is to allow amendments to pleadings, and where the amendment is offered before trial is begun and presents matter which has any reasonable relevancy to the controversy to be decided, leave to file such amendment

should be granted. *Bruner v. Brotherhood of American Yeomen*, 136–612, 111 N. W. 977.

The clause, "when the amendment does not change substantially the claim or defense," has reference solely to "conforming the pleadings or proceedings to the facts proved," and does not limit the portion of the section relating to the correction of a mistake in the name of the party, or a mistake in any other respect. *Taylor v. Taylor*, 110–207, 81 N. W. 472.

Statutes authorizing amendments are to be liberally construed. *Ibid.*

A party may not by successive amendments present his case by piecemeal. *Ingold v. Symonds*, 134–206, 111 N. W. 802.

Failure of the plaintiff in an action to recover damages for personal injuries to allege freedom from contributory negligence should not be taken advantage of by the trial court as a ground for directing a verdict for the defendant without affording the plaintiff an opportunity to amend by alleging want of contributory negligence. Such defect may be waived by the defendant. *Brown v. Ill. Cent. R. Co.*, 123–239, 98 N. W. 625.

The necessary averment, in an action for negligence, of plaintiff's freedom from contributory negligence may be made by amendment after the expiration of the statutory period within which the action may be instituted. *Cahill v. Illinois Cent. R. Co.*, 137–577, 115 N. W. 216.

The fact that the matter set out by way of amendment is one without which plaintiff would not have been entitled to recover does not necessarily preclude the allegation of such fact in an amendment after the expiration of the statutory period. *Ibid.*

The rule is to allow amendments whenever substantial rights are not prejudiced by doing so. *Hanson v. Cline*, 142–187, 118 N. W. 754.

Where the granting of leave to amend operates to give both parties an opportunity to submit their claims to the jury, the allowance of the amendment will be sustained as in the interest of justice. *Welsh v. Haleen*, 157– —, 138 N. W. 502.

The right to file amendments at any stage of the case is liberally granted so long as the exercise of such right does not result in prejudice to the adverse party. *Detrick v. Patterson*, 141 N. W. 325.

Discretion of trial court: The trial court may exercise a wide discretion in the matter of allowing amendments in the interest of justice. *Livingston v. Heck*, 122–74, 94 N. W. 1098.

Amendments to pleadings are allowed with great liberty, and a large discretion is vested in the trial courts in permitting them Unless some prejudice results from the filing thereof or some injustice appears, rulings with reference to such matters will not be disturbed on appeal. *Williams Shoe Co. v. Gotzian*, 130–710, 107 N. W. 807; *McClurg v. Brenton*, 123–368, 98 N. W. 881.

The exercise of discretion on the part of the court in striking out an amendment will not be reviewed unless an abuse of discretion appears. *Bay v. Monroe County*, 121–302, 96 N. W. 854.

While the matter of allowing amendments is discretionary, still this discretion is a legal one and should always be exercised with a view to substantial justice. *Cole v. Laird*, 121–146, 96 N. W. 744.

In a particular case held that the court did not abuse its discretion in allowing an amendment. *Weiland v. Ehlers*, 107–186, 77 N. W. 855.

To allow amendments is the general rule and unless the court abuses its discretion in this respect, there is no reversible error. *Mansfield v. Mallory*, 140–206, 118 N. W. 290.

It is within the discretion of the court to permit an amendment to be made to the pleadings at any time where the amendment contains matter material to the proper determination of the case; and the discretion of the trial court in permitting an amendment will not be interfered with on appeal when substantial prejudice is not shown to have resulted to the party complaining. *Farmers' Mercantile Co. v. Farmers' Ins. Co.*, 141 N. W. 447.

Where an amendment is offered and allowed, the ruling will not constitute error in itself, although the opposite party objects at the time on the ground that he has not proper opportunity to meet the issue presented, for he may ask for time to meet such issue and, if necessary, have a continuance to enable him to produce the evidence which he desires; and if he does not do so, he cannot complain of the allowance of the amendment and have a new trial. *Ibid.*

To grant amendments is the rule; to refuse them, the exception. The allowance or refusal of amendments is a matter which is largely within the sound discretion of the trial court. The advisability of allowing an amendment is a question of fact to be determined by the trial court and its determination will not be reviewed on appeal except in cases showing gross abuse of its discretion. *Roberdee v. Bierkamp*, 142 N. W. 217.

Leave to file: Amendments are allowed with great liberality, and the mere fact that they are filed without leave is no ground for striking them from the files where the amendment is such an one as should have been allowed had permission been asked to file it. *West Side Lumber Co. v. Hathaway*, 115–654, 89 N. W. 35.

Leave to file is immaterial if the court subsequently treats the amendment as constituting a part of the pleadings. *Rice v. Bolton*, 126–654, 100 N. W. 634, 102 N. W. 509; *Berkey v. Lefebure*, 125–76, 99 N. W. 710.

Formal leave to file an amendment is not necessary where it is filed in open court during the progress of trial and properly entered on the notice book. *McGuire v. Chicago, B. & Q. R. Co.*, 138–664, 116 N. W. 801.

Although a party has no right to file an amendment without leave of court, such an amendment should not be stricken on motion if it is one which should have been allowed had leave to file been asked. *Hanson v. Cline*, 142–187, 118 N. W. 754.

Within what time—pending trial: The allowance of amendments at almost any stage of the trial is the rule, and the refusal of such privilege is the exception. *Jarozewski v. Allen*, 117–632, 91 N. W. 941.

An amendment pending the trial for the purpose of conforming the pleadings to the proofs is proper. *Tyler v. Bowen*, 124–452, 100 N. W. 505; *Johnson v. Farmers' Ins. Co.*, 126–565, 102 N. W. 502.

An amendment to a pleading so as to make its allegations conform to the evidence should not be denied, though not made until after the evidence is closed. *Cole v. Laird*, 121–146, 96 N. W 744

After the conclusion of the evidence and before the opening of the arguments to the jury a party may be allowed to amend his pleadings to correspond to the proofs. *Taylor v. Star Coal Co.*, 110–40, 81 N. W. 249.

Liberality in permitting amendments is the rule and the party against whom a demurrer has been sustained may amend or plead over as a matter of course at any time before the opposing party takes advantage of his default by motion for judgment. *Redhead v. Iowa Nat. Bank*, 123–336, 98 N. W. 806.

An amendment offered after the evidence is all in which does not involve a change of front but is designed to obviate a supposed variance of the pleading and proof may be permitted after the close of the evidence. *Pace v. Webster City*, 138–107, 115 N. W. 888.

It is not error to refuse to strike an amendment filed at the conclusion of the trial and without leave of court if it does not change the issues nor call for any relief which could not properly have been awarded without it. *Johnson v. Carter*, 143–95, 120 N. W. 320.

It is within the discretion of the trial court to permit an amendment to the petition at the close of the evidence. If the defendant is taken by surprise he should ask for postponement of the trial and not doing so cannot raise the objection on appeal. *Duffy v. Henderson*, 155–117, 135 N. W. 573.

After the close of the evidence an amendment to the petition may be allowed which asks relief in connection with the subject matter on account of rights accruing since the petition was filed. *Erwin v. Fillenwarth*, 137 N. W. 502.

After submission: The court will not be presumed to have taken into consideration an amendment to the pleadings filed after the case was submitted, without leave of court or notice to the opposite party. *Sturman v. Sturman*, 118–620, 92 N. W. 886.

A party is not entitled to file an amendment to his pleading after the case has been submitted which substantially changes the cause of action or defense. *LeMars Bldg. & Loan Assn. v. Burgess*, 129–422, 105 N. W. 641.

Where an application was not made for leave to file an amendment to a petition for the purpose of making it conform to the evidence until several days after the verdict was rendered, held that the action of the court in refusing to allow such amendment would not be reversed on appeal. *Ankrum v. Marshalltown*, 105–493, 75 N. W. 360.

Error in admitting evidence of an issue not raised by the pleadings cannot be cured by an amendment of the pleadings after the trial introducing such issue. *Cole v. Thompson*, 134–685, 112 N. W. 178.

An amendment filed after the entry of the judgment appealed from cannot be considered on the appeal from such judgment. *Hartkemeyer v. Griffith*, 142–694, 121 N. W. 372.

An amendment after verdict will not be permitted for the purpose of setting up the statute of limitations. *Knight v. Moline, E. M. & W. R. Co.*, 140 N. W. 839.

Discretion as to time: While a great liberality should be shown by the courts in allowance of amendments that are in furtherance of justice, the right to amend is not absolute and attorneys should not be encouraged to wait until the last moment before presenting their cases. If the amendment is not filed until the commencement of the trial the exercise of discretion by the trial court in striking the amendment from the files will be sustained. *Emerson v. Converse*, 106–330, 76 N. W. 705.

The discretion of the court in disregarding an amendment on the ground that it was filed too late will not be interfered with on appeal. *Burkhardt v. Burkhardt*, 107–369, 77 N. W. 1069.

Amendment of pleadings after trial is begun is not always a matter of right and the ruling of the trial court in refusing leave to file such amendment will not be interfered with on appeal in the absence of a showing of any abuse of discretion.

American Life Ins. Co. v. Melcher, 132–324, 109 N. W. 805.

There is no abuse of discretion in not allowing an answer to be filed after the trial has been called and the jury waived, the defensive matter averred being admissible under general denial. *Dunton v. Dawley*, 122–512, 98 N. W. 307.

The discretion of the court in denying the right to file an amendment not offered in proper time will not be interfered with on appeal. *Davis v. Boyer*, 122–132, 97 N. W. 1002.

The trial court has large discretion in the matter of extending time for filing amendments, and where no default has actually been entered, its action in giving further time to amend will not, in general, be disturbed. *Davis v. Huber Mfg. Co.*, 119–56, 93 N. W. 78.

Parties who do not complete their pleadings until trial has begun ordinarily have no room to complain if the trial court declines to look with leniency upon such procrastination, especially where no excuse is suggested. *O'Neil v. Adams*, 144–385, 122 N. W. 976.

The court may in its discretion fix a time in the future after which amendments which might reasonably have been interposed within that time will not be considered. *Sawyer v. Stilson*, 146–707, 125 N. W. 822.

Rulings as to the allowance of amendments are largely within the discretion of the trial court, and where a party had delayed filing an amendment for many months and filed it only on the day set for trial, held that the exercise of discretion on the part of the trial judge in striking it from the record was not reversible error. *Markley v. Western Union Tel. Co.*, 151–612, 132 N. W. 37.

New parties: To save an action from abating, plaintiff should be allowed, on request, to have proper parties substituted before the court directs a verdict for the defendant on the ground that plaintiff is not the proper party to sue. *Hook v. Garfield Coal Co.*, 112–210, 83 N. W. 963.

Where a party sues in his own right he may, if the facts warrant, amend his complaint so as to make the suit stand in his representative capacity; and conversely, if he sues in his representative capacity, he may be allowed to amend by declaring as an individual. In either case, such amendment does not amount to a substantial change of the cause of action. *Myers v. Chicago, B. & Q. R. Co.*, 152–330, 131 N. W. 770.

Raising new issues: Where an amendment to an answer tendered an entirely new and distinct issue after the case had been once tried, and was offered at the conclusion of defendant's evidence upon the second trial, no good reason appearing for not having filed it before that time, held that it was properly refused. *National Horse Importing Co. v. Novak*, 105–157, 74 N. W. 759.

An amendment to a petition in an attachment suit may set up a new ground of attachment. *Emerson v. Converse*, 106–330, 76 N. W. 705.

Where, in an action to recover for negligence, one ground of negligence is stated in the petition and another in an amendment thereto, the cause of action stated in the amendment will be barred if barred when the amendment is filed, although not barred when the action was commenced. *Box v. Chicago, R. I. & P. R. Co.*, 107–660, 78 N. W. 694.

An issue tendered by an amended answer, setting up want of consideration in a written contract sued upon, may be considered although the amendment is not filed until after motion is made to direct a verdict, the ruling of the court allowing such amendment not being attacked. *Beaty v. Carr*, 109–183, 80 N. W. 326.

The allowance of an amendment, the purpose of which is to avoid the statute of limitations, leaving the essential grounds for recovery substantially unchanged, is upheld. *Taylor v. Taylor*, 110–207, 81 N. W. 472; *Wise v. Outtrim*, 139–192, 117 N. W. 264.

Where a substituted petition sets up a cause of action of the same nature, but not founded on the same facts, the cause of action is not to be deemed the same, and if the substituted petition is not filed within the statutory period, the cause of action therein pleaded is to be deemed barred. *Brooks v. Seevers*, 112–480, 84 N. W. 517.

An amendment filed after verdict, raising an entirely new issue, may be stricken out on motion. *Shawyer v. Chamberlain*, 113–742, 84 N. W. 661.

After a final submission, either before or after reversal on appeal, there is no good reason for opening the case for the purpose of allowing the introduction of a new cause of action by way of counterclaim, not growing out of the same transaction, and which may quite as well be investigated and decided in a separate proceeding. *Allen v. Davenport*, 115–20, 87 N. W. 743.

The question whether plaintiff may amend his petition setting up a different cause of action should be raised by motion to strike, and if such motion is sustained, the plaintiff should have the opportunity allowed by statute to cure the defect in his petition by further amendment. It is not proper in such case to render judgment against the plaintiff without the lapse of the statutory period allowed for further pleading. *Williams v. Williams*, 115–520, 88 N. W. 1057.

In an action against a city for personal injuries by reason of defective sidewalk,

the place where the accident occurred is material to the cause of action, but a change of the description of such place, to cure an oversight or inadvertence, does not introduce a new cause of action. *Sachra v. Manilla*, 120–562, 95 N. W. 198; *Woods v. Lisbon*, 138–402, 116 N. W. 143.

While amendments are allowed with great liberality, yet it is quite irregular to introduce a new cause of action after the submission of a case for the purpose of conforming the pleadings to the proof and the court may properly refuse to entertain such amendment. *Boardman v. Louis Drach Const. Co.*, 123–603, 99 N. W. 176.

An amendment seeking to hold the defendant as a debtor on his own account while the original petition charged him as a member of a partnership, does not so change the cause of action that such amendment cannot be made after the five-year limit has expired. *Padden v. Clark*, 124–94, 99 N. W. 152.

Refusal to allow the filing of an amended pleading introducing new issues during the trial is not an abuse of discretion requiring reversal. *Allen v. North Des Moines M. E. Church*, 127–96, 102 N. W. 808.

The statement in an amendment of additional grounds of negligence does not constitute the interposition of a new cause of action. *Thayer v. Smoky Hollow Coal Co.*, 129–550, 105 N. W. 1024.

New issues should not be injected by amendment after the conclusion of the arguments to the jury. *Herrstrom v. Newton & N. W. R. Co.*, 129–507, 105 N. W. 436.

An amendment to the answer tendered at the close of the argument interposing a new defense may be rejected at the discretion of the court, no reason being made to appear why it should not have been earlier offered. *Kettering v. Eastlack*, 130–498, 107 N. W. 177.

It is not error to refuse leave to file an amendment to the petition after the close of the evidence, in which a new substantive allegation is made. *American Soda Fountain Co. v. Dean Drug Co.*, 136–312, 111 N. W. 534.

The proper function of an amendment after the trial of the case is to conform the pleadings to the proof, but it is not permitted to substitute a new cause of action or bring in new parties. *Austin Western Co. v. Weaver Twp.*, 136–709, 114 N. W. 189.

It is within the discretion of the court to refuse to defendant the permission to amend so as to change the issues after the plaintiff has rested his case. *Vorhes v. Buchwald*, 137–721, 112 N. W. 1105.

An amendment which merely makes a matter of description in the petition more certain cannot be regarded as stating a new cause of action. *Palmer v. Waterloo*, 138–296, 115 N. W. 1017.

An amendment which would effect a radical change in the issues and which is offered so late in the progress of the case that a trial of such issues would necessarily delay the determination of the issues pending may properly be refused. *Moyers v. Fogarty*, 140–701, 119 N. W. 159.

An amendment alleging no new facts and tendering no new issues, but changing only the prayer for relief, may properly be allowed to stand. *Burke v. Burke*, 142–206, 119 N. W. 129.

If either party permits the other without objection to put in evidence facts which indicate the necessity of an amendment of a pleading in order to have the real merits of the controversy considered and decided, no wrong is done if objection to such amendment is overruled. *Zelenka v. Port Huron Mach. Co.*, 144–592, 123 N. W. 332.

Plaintiff may be permitted to amend before verdict so as to increase the amount of his claim. *De Lashmutt v. Chicago, B. & Q. R. Co.*, 148–556, 126 N. W. 359.

An amendment to an answer tendering a new issue, which is filed after all the evidence has been introduced, may properly be stricken. *Bradbury v. Chicago, R. I. & P. R. Co.*, 149–51, 128 N. W. 1.

An amended reply setting up new matter by way of confession and avoidance in response to new matter set up in an amendment to the answer should not be stricken out. *Knapp v. Brotherhood of American Yeomen*, 149–137, 126 N. W. 336.

An amendment setting up a defense after the close of plaintiff's evidence which might have been interposed before the trial may be stricken from the files in the court's discretion, in the absence of any showing of excuse for the delay. *Dumont v. Peet*, 152–524, 132 N. W. 955.

Where, in an action for negligence resulting in personal injuries, an amendment filed after the expiration of the period of limitation does no more than state the details of the alleged negligence, it does not state a new cause of action. *Russell v. Chicago, R. I. & P. R. Co.*, 141 N. W. 1077.

Where an amendment does not change the cause of action and adds only a more specific description, a continuance on account of the allowance of such amendment may be refused. *Wilson v. Chicago, M. & St. P. R. Co.*, 142 N. W. 54.

Amendments are frequently allowed where there is a change in the claim as originally made. But where it is done the court allows the change upon conditions and gives to the other parties always an opportunity to introduce further testimony to meet the change in the issues. *Roberdee v. Bierkamp*, 142 N. W. 217.

After action barred: If the new matter pleaded does not state a new cause of action, but merely amplifies the charges of negligence made in the petition, the amendment may be upheld, although filed after the period of limitation has run. *Gordon v. Chicago, R. I. & P. R. Co.*, 129–747, 106 N. W. 177.

An amendment specifying more particularly the damages flowing from the wrongs alleged in the petition may be interposed after the statutory period for maintaining the action for such injuries has run. *Anderson v. Acheson*, 132–744, 110 N. W. 335.

Substitute: An amended pleading may appear to be and be treated as a substitute. *In re Estate of McMurray*, 107–648, 78 N. W. 691.

Superseded pleading: Where a pleading has been superseded by a subsequent pleading filed as a substitute, the former pleading cannot be used for any purpose on the trial without being introduced in evidence. *Longley v. McVey*, 109–666, 81 N. W. 150.

It is only when the original pleading has been superseded by a subsequent pleading that the averments of such original pleading are not to be taken against the pleader unless the pleading is introduced in evidence. *Burns v. Chicago, Ft. M. & D. M. R. Co.*, 110–385, 81 N. W. 794.

A pleading which has been superseded or withdrawn cannot be submitted to the jury to prove an admission contained therein unless it is introduced in evidence. *Marshall Field Co. v. Oren Ruffcorn Co.*, 117–157, 90 N. W. 618.

The fact that averments of a substituted petition are inconsistent with those of the previous pleading is not a ground of demurrer. *Williams v. Williams*, 115–520, 88 N. W. 1057.

Pleadings superseded remain a part of the record, but they cannot be read or commented on in the trial unless formally introduced in evidence. *Ibid.*

Pleadings when superseded by others may be introduced in evidence, but only as showing admissions of adverse party. As such they are not conclusive. *McClure v. Great W. Acc. Assn.*, 141–350, 118 N. W. 269.

Admissions in a pleading which has been superseded may be considered as evidence against the party filing such pleading, if it is introduced in evidence. *Arnd v. Aylesworth*, 145–185, 123 N. W. 1000.

A pleading which has been withdrawn may be introduced in evidence as constituting an admission, but it is not a conclusive admission and goes to the jury with other evidence. *Sievertsen v. Paxton-Eckman Chem. Co.*, 133 N. W. 744, 142 N. W. 424.

Must be substantial: It is proper to strike out a pleading, even though filed as a substitute for all previous pleadings, which is in substance a mere repetition of allegations which have been held insufficient on a demurrer to a former pleading in the same case. *Hoyt v. Beach*, 104–257, 73 N. W. 492.

The court may properly strike out an amendment which amounts to nothing more in legal effect than a refiling of the original pleading. *McKee v. Illinois Central R. Co.*, 121–550, 97 N. W. 69.

An amended and substituted petition, restating what has been previously pleaded, may be stricken out on motion. *Curl v. Foehler*, 113–597, 85 N. W. 811.

After the sustaining of a demurrer to a pleading, an amendment which does not obviate the objections to such pleading may be properly stricken from the files. *Blackett v. Ziegler*, 147–167, 125 N. W. 874.

Entered on docket: Where an amendment is treated by all the parties as filed and the case tried on the issues raised by such amendment, it cannot afterwards be objected that the amendment was not entered on the appearance docket. *Foley v. Cedar Rapids*, 133–64, 110 N. W. 158.

Change of forum: Under the code system of pleading no litigant should be denied relief because of an error in the mere form of the action, when he has the right to amendment to adopt that appropriate to the relief prayed. The mere method should not obscure the results to be obtained. *Cox Shoe Co. v. Adams*, 105–402, 75 N. W. 316.

Therefore, held that in an action of replevin wherein it appeared that the plaintiff was entitled to equitable relief, he should be allowed to amend, asking such relief, and have the case transferred to the proper calendar. *Ibid.*

After the trial of a case as in equity, if the plaintiff is allowed to amend his petition so as to convert his demand from one of equitable cognizance to an action at law for damages, the court should set aside the submission and proceed to a trial by ordinary proceedings. *Hartwig v. Iles*, 131–501, 109 N. W. 18.

A party should not be allowed by amendment to convert an equitable action into one at law and have a change to the law docket after the evidence has been taken by depositions as in an equitable action. *Saunders v. Wells*, 135–11, 112 N. W. 205.

After remand: To justify the filing of an amendment after the remanding of a cause heard *de novo* on appeal, matters must have arisen subsequently to the decree or things must have happened pending the trial which could not have been considered at the trial or owing to some other contingency which reasonable foresight could not well have guarded against. *Kossuth Co. St. Bank v. Richardson*, 141–738, 118 N. W. 906.

An amendment which does no more than conform the pleadings with the proof upon which the case has been tried and upon which it is in fact tried after remand on appeal should not be stricken out. *Hanson v. Cline*, 142–187, 118 N. W. 754.

SEC. 3601. Errors disregarded.

The statutory provisions abolishing forms of action do not obliterate all difference between kinds of actions. A party declaring upon conversion of property cannot have recovery as upon a contract or agreement to pay. *Himmelman v. Des Moines Ins. Co.*, 132–668, 110 N. W. 155.

Informalities in the submission and determination of a case will not constitute sufficient ground for reversal on appeal where the party complaining was given full opportunity to and did present his whole case. *Pratt v. Fishwild*, 121–642, 96 N. W. 1089.

This section is applicable to the pleadings in the case. *Lampman v. Bruning*, 120–167, 94 N. W. 562.

SEC. 3603. How amendment made.

An amendment is regarded as a continuation of the original pleading, and as relating back to the commencement of the suit. *Scott v. Frank*, 121–218, 96 N. W. 764.

An amendment is to be construed with the original pleadings. *Mock v. Chalstrom*, 121–411, 96 N. W. 909; *Brutsche v. Bowers*, 122–226, 97 N. W. 1076.

An amended petition may be an essentially different pleading from an amendment to a petition, and may clearly appear to be intended as a substitute. *In re Estate of McMurray*, 107–648, 78 N. W. 691. And see notes to code § 3600 in this supplement.

After the filing of a substitute petition and a subsequent withdrawal of the same, the plaintiff may file an amendment to the original petition. *Thayer v. Smoky Hollow Coal Co.*, 129–550, 105 N. W. 1024.

SEC. 3604. Interrogatories annexed to pleading.

It is not necessary to submit interrogatories which do not call for ultimate facts nor for answers which would necessarily control the verdict. *Thompson v. Brown*, 106–367, 76 N. W. 819.

The statutory provision requiring answers by the opposite party to interrogatories attached to the pleading are applicable to corporations as well as to individuals. The answers in such cases are to be made by the proper agent of the corporation. *Blair v. Sioux City & P. R. Co.*, 109–369, 80 N. W. 673.

Interrogatories may be attached to an amendment to a pleading, and it is within the sound discretion of the court to permit such amendment at any time during the trial. *Ibid.*

It is proper to strike out interrogatories proposed in an amended petition where it is manifest that to permit them to stand would necessarily postpone the trial, and plaintiff offers no excuse for the delay in propounding them. *Theis v. Chicago & N. W. R. Co.*, 107–522, 78 N. W. 199.

In the absence of objection by the opposite party, it is not error to allow interrogatories to be propounded in an amendment to the pleading. *Free v. Western Union Telegraph Co.*, 135–69, 110 N. W. 143.

Interrogatories attached to a pleading are not a part of the pleading, and the answers thereto cannot be considered in determining the issues of law arising on the pleadings. *Van Norman v. Modern Brotherhood*, 134–575, 111 N. W. 992.

Statutory provisions for requiring answers under oath to interrogatories propounded in the pleadings to the opposite party are a substitute for the proceeding for discovery in equity. If the party who has called for the answers does not see fit to introduce them in evidence, the party making the answers cannot do so save under such circumstances as would authorize the use of a deposition by such party. In behalf of the party in whose favor the answers are given they are subject to the objection that the witness is present in court and able to testify and also subject to any objections which might be properly urged to them if given in a deposition. *Beem v. Farrell*, 135–670, 113 N. W. 509.

While permitting amendments to answers to interrogatories is discretionary with the court, such amendments, if allowed, should be limited to mere corrections of oversights. A party should not be allowed by amendment of his answer to add evidence which should properly be introduced by depositions. *City Deposit Bank v. Green*, 138–156, 115 N. W. 893.

SEC. 3605. Answers thereto.

If after filing answers to interrogatories the party answering desires to add to the testimony thus given, he should do so by testimony given in the usual form or by deposition and not by amendment to his answers. *City Deposit Bank v. Green*, 138–156, 115 N. W. 893.

SEC. 3606. Time of responding.

While exceptions to interrogatories annexed to a pleading should be passed on before the entry of an order requiring answers thereto, circumstances may arise justifying the setting aside of the order requiring answers, in order that exceptions to the interrogatories may be interposed. *Free v. Western Union Tel. Co.*, 135–69, 110 N. W. 143.

SEC. 3609. How verified.

Where the answers to interrogatories made by the officers of a corporation in a case against the corporation show on their face that they are not made in good faith, and that, although the officers making the answers have not personal knowledge of the facts inquired about, they might have acquired such knowledge from the records and books of the corporation accessible to them, such answers may be stricken out and the penalty for failure to make proper answers may be enforced. *Blair v. Sioux City & P. R. Co.*, 109–369, 80 N. W. 673.

The pleading of a corporation may be verified by the oath of its proper officer. *Marshall Field Co. v. Oren Ruffcorn Co.*, 117–157, 90 N. W. 618.

SEC. 3610. Effect of failure to answer.

Failure to answer interrogatories propounded in a pleading does not authorize the summary entering of judgment. *Modern Steel Structural Co. v. Van Buren County*, 126–606, 102 N. W. 536.

Before rendering judgment for failure to make answers to interrogatories, an opportunity should be afforded to answer the interrogatories by fixing a time within which such answers must be filed, either by entering such an original order or by extending the time originally fixed, and such remedy cannot be given where the time for answering has elapsed without an order affording such reasonable time. *Free v Western Union Tel. Co.*, 135–69, 110 N. W. 143.

Failure to answer the interrogatories propounded, even where there is the prescribed affidavit, does not entitle the party propounding such interrogatories to a judgment without a trial nor preclude the other side from the right to trial by jury. *Independent School Dist. v. Solon Ind. School Dist.*, 148–154, 125 N. W. 184.

If this statute should be construed as providing that the affidavit may be made by counsel for the litigant, he should at least aver his knowledge of the matters in controversy. *Ibid.*

The defendant is entitled to have the questions propounded by him answered by the persons to whom they are addressed and an answer volunteered by another may be rightfully excluded. On the exclusion of such answers, the defendant may demand that a day be fixed for the filing of appropriate answers by proper persons and that upon failure to do so, the plaintiff's action shall be dismissed. *Baldwin v. Moser*, 155–410, 136 N. W. 195.

SEC. 3611. Answers compelled.

Without regard to statutory provisions, the court may compel answers to interrogatories by proceedings for contempt, and on failure of the party to answer may strike his pleadings. *Free v. Western Union Tel. Co.*, 135–69, 110 N. W. 143.

But where the facts sought to be elicited are admitted by answer even though filed without leave of court, and there is nothing to show bad faith, the court should not strike the defendant's pleading for failure to answer interrogatories propounded by plaintiff, and enter judgment by default against him. *Ibid.*

SEC. 3613. Allegations as to time.

Allegations of time, when not material, need not be proven as made. *Arrison v. Mystic Toilers*, 129–303, 105 N. W. 580.

Allegations as to time are not as a general rule material. *Central Trust Co. v. Chicago, R. I. & P. R. Co.*, 156–104, 135 N. W. 721.

SEC. 3615. Evidence under denial.

A custom relied upon as affecting a contract cannot be proven under a general denial, but must be pleaded. *Eller v. Loomis*, 106–276, 76 N. W. 686.

In an action for criminal conversation the defendant cannot, under general denial, prove consent or connivance of the husband to the improper relations with the wife. Such facts should be pleaded by way of special defense. *Morning v. Long*, 109–288, 80 N. W. 390.

The evidence which tends to negative or disprove the matters of fact alleged in the petition is proper to be admitted under

a general denial. Therefore in a joint action against an employer and an employe for a tort committed by the latter, a general denial of liability by the former is sufficient to warrant the admission that the latter was an independent contractor for whose acts the former was not liable. *Overhouser v. American Cereal Co.*, 128–580, 105 N. W. 113.

A mere general denial of a claim based on a written contract raises no issue under which testimony as to the peculiar or trade meaning of the words used in the contract is admissible. *Tubbs v. Mechanics' Ins. Co.*, 131–217, 108 N. W. 324.

Only evidence negativing the facts relied upon by the plaintiff is admissible under a denial. An affirmative defense should be specially pleaded. *Saddler v. Pickard*, 142–691, 121 N. W. 374.

Further as to general denial see notes to § 3566.

SEC. 3618. Sham defenses—redundant matter.

The remedy for getting rid of immaterial and irrelevant matter is by motion. *In re Estate of McMurray*, 107–648, 78 N. W. 691.

The objection that a pleading is sham or frivolous cannot be interposed by demurrer. *Williams v. Williams*, 115–520, 88 N W. 1057.

Even upon its own motion the trial court has the inherent power to strike from the files a petition containing scandalous and irrelevant matter. *Crabtree v. Steele*, 137–726, 115 N. W. 593.

SEC. 3620. Inconsistent defenses—verification.

Defendant in an action for goods sold and delivered may plead rescission and also set up a counterclaim for breach of warranty. He is not required to elect. *Thorson & Cassidy Co. v. Baker*, 107–49, 77 N. W. 510.

A party may interpose inconsistent defenses. Thus defendant in an action to set aside a conveyance as fraudulent may deny the sale and also allege that the sale relied upon by the plaintiff was in fraud of creditors. *Jordan v. Crickett*, 123–576, 99 N. W. 163.

Defendant may in different divisions of his answer plead a general denial and a confession and avoidance, and the effect of the general denial will not be nullified by the colorable confession necessarily alleged in connection with the avoidance. *Rudd v. Dewey*, 121–454, 96 N. W. 973.

The doctrine of election in pleading applies only to inconsistent causes of action, and not to inconsistent defenses. *Bruner v Brotherhood of American Yeomen*, 136–612, 111 N. W. 977.

Inconsistent defenses may be pleaded and relied upon, and the defendant cannot be required to elect as between them. *Cole v Laird*, 121–146, 96 N. W. 744.

Inconsistent defenses may be pleaded in different divisions of the answer. *Sturgis v. Slocum*, 140–25, 116 N. W. 128.

The defendant may plead inconsistent defenses. *Davidson v. Smith*, 143–124, 121 N. W. 503; *In re Estate of Crocker, Jamison v. Crocker*, 148–104, 126 N. W. 962; *Henderson v. Standard Fire Ins. Co.*, 143–572, 121 N. W. 714.

SEC. 3622. What deemed admitted.

Allegations of the petition which are not denied are to be treated as true. *Kent v. Muscatine, N. & S. R. Co.*, 115–383, 88 N. W. 935; *Redhead v. Iowa Nat. Bank*, 127–572, 103 N. W. 796.

Where the parties proceed to trial without answer or other pleading to an amended petition the plaintiff cannot afterwards claim that defendant is in default as to the amendment or that its allegations should be treated as confessed. *Gregory v. Bowlsby*, 126–588, 102 N. W. 517.

The statements made in a pleading which have been superseded or withdrawn do not constitute admissions presumptively true as against the pleader. *McDonald v. Nugent*, 122–651, 98 N. W. 506.

The rule that allegations in the petition not denied in the answer are to be deemed true has no application on an appeal from the board of review for the assessment of taxes, although such appeal is to be determined as an equitable proceeding. *City Council v. National Loan & Investment Co.*, 122–629, 98 N. W. 488.

An answer denying nothing but the damages suffered by the plaintiff raises no issue. *Byrne v. Independent School Dist.*, 139–618, 117 N. W. 983.

SEC. 3623. Account—bill of particulars.

Although a verified bill of particulars does not in every respect meet the requirements of this section, yet in the absence of timely objection it may be treated as sufficient if it serves the purpose of the case. *Sitzer v. Fenzloff*, 112–491, 84 N. W. 514.

SEC. 3626. Conditions precedent.

The general denial of a general allegation of the performance of conditions precedent does not put such allegations in issue. *Krause v. Modern Woodmen*, 133–199, 110 N. W. 452.

SEC. 3627. Action in representative capacity.

In filing a claim against an estate it is not necessary to specify in what capacity the claim is made, and denial of the capacity of plaintiff to sue must be made specific. *University of Chicago v. Emmert*, 108–500, 79 N. W. 285.

While a failure to allege corporate capacity is a ground of demurrer, such objection comes too late after judgment. *Calnan Const. Co. v. Brown*, 110–37, 81 N. W. 163.

It is necessary to allege the representative capacity of a plaintiff or defendant, as the case may be, and a failure to do so is a ground of demurrer. *Ware v. Leffert*, 151–17, 130 N. W. 793.

SEC. 3628. Denial—facts must be stated.

Where the petition in an action on a policy of insurance states that plaintiff has performed every act necessary to comply with the terms of the policy, defendant cannot rely upon failure to submit to an appraiser without pleading such fact as a defense. *Smith v. Continental Ins. Co.*, 108–382, 79 N. W. 126.

Where corporate existence is a material allegation of fact, proof of which is necessary to sustain plaintiff's claim, the case is not governed by this section. *Taft Co. v. Bounani*, 110–739, 81 N. W. 469.

Where plaintiff alleges its corporate capacity, and the denial is merely want of information on the subject, this is not sufficient to put in issue the corporate capacity of the plaintiff. *Iowa Sav. & L. Assn. v. Selby*, 111–402, 82 N. W. 968.

To put in issue defendant's corporate capacity as alleged in the petition, facts showing want of such capacity must be specially pleaded. *Stork v. Supreme Lodge K. of P.*, 113–724, 84 N. W. 721.

A trustee in bankruptcy, suing in the interest of creditors, need allege no more than the fact of his representative capacity to entitle him to maintain the suit, and such allegation can only be put in issue by specially pleading the facts relied upon to show that he is not entitled to maintain such suit. *Crary v. Kurtz*, 132–105, 105 N. W. 590, 109 N. W. 452.

After the specific denial contemplated by this section, the burden rests upon the plaintiff to prove performance of a condition precedent or waiver thereof. *Knapp v. Brotherhood of Am. Yeomen*, 139–136, 117 N. W. 298.

An allegation as to corporate capacity must be controverted by specifically pleading the want of such capacity. *Iowa Bus. Men's B. & L. Assn. v. Fitch*, 142–329, 120 N. W. 694.

A general denial of the existence of a partnership is not sufficient to raise an issue. *Richards v. Hellen*, 153–66, 133 N. W. 393.

SEC. 3629. Matters specifically pleaded.

In an action for criminal conversation, defendant, desiring to prove the acquiescence of the husband in the relations to his wife, should set up the facts by way of special defense. If he does not do so, he cannot prove them under general denial. *Morning v. Long*, 109–288, 80 N. W. 390.

The defense of the statute of limitations is waived if not pleaded. *McDonald v. Bice*, 113–44, 84 N. W. 985.

Matter which is admissible under a general denial need not be pleaded by way of justification. *Overhouser v. American Cereal Co.*, 128–580, 105 N. W. 113.

In an action for breach of contract for the payment of a specified sum of money, an allegation of nonpayment is essential and the fact of payment need not be alleged as a special defense, but may be proven under a general denial. *Howerton v. Augustine*, 130–389, 106 N. W. 941.

Where it is desired to show, in opposition to a claim for services rendered at the request of deceased, that they were intended and understood to be gratuitous, such defense should be specially pleaded. *Saddler v. Pickard*, 142–691, 121 N. W. 374.

Where a carrier is sued for damage to goods on a connecting line, the defendant cannot, under a general denial, show that it contracted for exemption from liability as to connecting lines. *Aultman Engine & Thresher Co. v. Chicago, R. I. & P. R. Co.*, 143–561, 121 N. W. 22.

Where the plaintiff has alleged and proved facts entitling him to recover, he need not go further and prove nonessential averments contained in his petition. *Swiney v. American Express Co.*, 144–342, 115 N. W. 212, 122 N. W. 957.

Section applied. *Shawyer v. Chamberlain*, 113–742, 84 N. W. 661.

And see notes under § 3566.

SEC. 3630. Motion for more specific statement.

A motion to strike out defensive matter from an answer on the ground that it is immaterial and redundant cannot be supported by affidavit. *Mast v. Wells*, 110–128, 81 N. W. 230.

In an action against two defendants to recover compensation for keeping, caring for and feeding stock at the request of the defendants, orally made, held that it was error to overrule a motion asking that plaintiff be required to state whose property it was he kept, cared for and fed, and at whose instance and for whose benefit he performed the labor specified. *Hurd v. Ladner*, 110–263, 81 N. W. 470.

Where defendant in his answer denies, either generally or specifically, the allegations of plaintiff's petition, he cannot be required by motion for more specific statement to make such denials more particular. *Provident Bank Stock Co. v. Schafer*, 110–440, 81 N. W. 689.

Section applied as to stating whether a contract is in writing. *Montgomery v. Downey*, 116–632, 88 N. W. 810.

In an action to enjoin a liquor nuisance, held that while the general allegation of unlawfully keeping and selling intoxicating liquor in violation of law was sufficient, yet where it was made to appear by a motion, supported by affidavit, that the defendant was entitled to sell liquor under a permit, the court rightly sustained a motion to require the plaintiff to state more specifically wherein the keeping and selling by defendant was unlawful. *Abrams v. Sandholm*, 119–583, 93 N. W. 563.

Where the petition in a liquor injunction case charged defendants with maintaining a liquor nuisance, held that the defendants were not, on showing by affidavits that they were operating under the mulct law, entitled to a more specific statement as to the particulars of the violation charged. *Knauss v. Gruenwald*, 156–331, 136 N. W. 690.

Any error in the sustaining of a motion tor more specific statement is waived by amending in response to such motion. *Hunn v. Ashton*, 121–265, 96 N. W. 745.

A petition is sufficiently specific if it advises the defendant of the exact claim made by the plaintiff. Although the trial court has some discretion in ruling on a motion for more specific statement, yet where it clearly appears that the pleading is sufficient, the act of the court in sustaining a motion for more specific statement may be corrected on appeal. *McCrary v. Lake City Elec. Light Co.*, 139–548, 117 N. W. 964.

The remedy for failure to make sufficient answer in a proceeding auxiliary is not to be taken advantage of by motion to strike, but by motion for more specific statement. *Jordan Co. v. Sperry*, 141–225, 119 N. W. 692.

SEC. 3638. Bond—breaches of.

Judgment against sureties on a bond being for the delinquency of the principal not to exceed the amount named in the bond, interest on a principal's liability should be added even as against the sureties from that time. *Ellyson v. Lord*, 124–125, 99 N. W. 582.

SEC. 3639. Amount of proof.

Unnecessary averments in a pleading need not be proven. *Kerr v. Topping*, 109–150, 80 N. W. 321; *Russell v. Holder*, 116–188, 89 N. W. 195; *Krejci v. Chicago & N. W. R. Co.*, 117–344, 90 N. W. 708; *Perpetual B. & L. Assn.. v. United States Fid. & Guar. Co.*, 118–729, 92 N. W. 686; *Anderson v. Acheson*, 132–744, 110 N. W. 335; *Williamson v. Robinson*, 134–345, 111 N. W. 1012.

A party is not required to prove more of the allegations of his pleading than necessary to entitle him to the relief demanded or any relief included in that which is demanded. *Garvik v. Burlington, C. R. & N. R. Co.*, 124–691, 100 N. W. 498; *Everett v. Christopher*, 125–668, 101 N. W. 521.

Where plaintiff seeks to recover on an implied contract and also for trespass on the same facts, he may recover on the implied contract without proving the trespass. *Harrison v. Palo Alto County*, 104–383, 73 N. W. 872.

Although plaintiff in an action for assault and battery alleges malice which is not necessary to be proven in such an action, he may recover without malice being shown. *Reizenstein v. Clark*, 104–287, 73 N. W. 588.

A party to an action is not compelled to prove more than is necessary to entitle him to the relief asked for. *Blunck v. Chicago & N. W. R. Co.*, 142–146, 120 N. W. 737.

Where an allegation might have been entirely omitted without rendering the pleading inadequate as a statement of a cause of action, it is not necessary to prove such allegation. *Luttermann v. Romey*, 143–233, 121 N. W. 1040.

It is sufficient that the party prove such of his essential allegations as entitle him to judgment. *Murphy v. Cochran*, 146–443, 123 N. W. 349.

One who sues in a representative capacity cannot recover on a cause of action established in his favor in his individual capacity. *Van Sickle v. Staub*, 155–472, 136 N. W. 546.

On an issue raised by a general denial, plaintiff need prove no more than enough to make out a prima-facie case for recovery, no matter what may be the allegations in his petition. *Central Trust Co. v. Chicago, R. I. & P. R. Co.*, 156–104, 135 N. W. 721.

To make out a prima-facie case of liability of the common carrier of goods, it is only necessary to prove a breach of the contract to safely transport by showing good condition when delivered to the carrier and receipt at the end of the transportation in bad condition, not apparently due to natural vice of the property. *Gilbert v. Chicago, R. I. & P. R. Co.*, 156–440, 136 N. W. 911.

While the plaintiff is not required to prove all the allegations of his petition, he must allege enough to constitute a cause of action and the interpretation which he puts upon such cause of action is binding upon him. *Dean v. Goodrich*, 140 N. W. 435.

The plaintiff is not bound to prove any fact stated in his petition which is not necessary to a recovery. *Forsythe v. Kluckhohn*, 142 N. W. 225.

SEC. 3640. Denial of genuineness of signature.

Having once denied the signature under oath, defendant is not bound to renew his denial in subsequent amendments. *Renner v. Thornburg*, 111–515, 82 N. W. 950.

Such denial throws the burden of proof on the opposite party. *Ibid.*

In an action on a note purporting to be signed by a corporation, the corporation may deny the genuineness of its signature by alleging that its president who signed the corporate name had no authority to do so. The verification of such sworn denial by a proper officer of the corporation is sufficient to put in issue the genuineness of the corporate signature. *Marshall Field Co. v. Oren Ruffcorn Co.*, 117–157, 90 N. W. 618.

Where the execution of a note and mortgage is denied under oath, the burden is on the plaintiff to prove the execution. *Damman v. Vollenweider*, 126–327, 101 N. W. 1130.

Where the signature of a written instrument is so denied as to throw the burden of proof upon the plaintiff suing thereon, and the plaintiff wholly fails to sustain the averments of his petition, as against such denial, it is not error to render a judgment for the defendant. *Peterson v. Ball*, 121–544, 97 N. W. 79.

Where the genuineness of the signature is not denied under oath, the party relying on the invalidity of the contract sought to be established has the burden of proving that it is not genuine. *Currier v. Clark*, 145–613, 124 N. W. 622.

Failure to verify the denial of the genuineness of the signature of an instrument on which the suit is founded does not affect the sufficiency of such denial to tender an issue. *Thorn v. Hambleton*, 149–214, 128 N. W. 393.

It is doubtful whether this statutory provision has any application in a case where the person whose signature is questioned is dead. *Elliott v. Capital City State Bank*, 149–309, 128 N. W. 369.

Where the issue as to the genuineness of a signature is properly raised, the burden is upon the plaintiff to offer some sort of legitimate evidence as to the character of the signature attached to the paper on which he relies. *Doty v. Braska*, 151–23, 126 N. W. 1108.

Under the denial of the signature, it is not competent to prove a material alteration of the instrument for the purpose of establishing its invalidity. *Hessig-Ellis Drug Co. v. Todd-Baker Drug Co.*, 153–11, 132 N. W. 866.

Where neither the instrument sued upon nor copy thereof is attached to the pleading, the provisions of this section have no application. *Black v. Miller*, 138 N. W. 535.

Section applied. *Carthage Nat. Bank v. Butterbaugh*, 116–657, 88 N. W. 954.

[The code note for the case of *Schulte v. Coulthurst*, near the bottom of second column on page 1394, should be changed to read as follows:

Where a claim against an estate is based upon a note, a denial of the execution of the note puts in issue the genuineness of the signature and overcomes the presumption which ordinarily obtains in favor of the signature of a written instrument when the statutory denial is not made. *Schulte v. Coulthurst*, 94–418, 62 N. W. 770.]

SEC. 3641. Supplemental pleading.

A continuance of the same grievance complained of in the original petition may be pleaded by way of supplemental petition for the purpose of securing additional relief. *Foote v. Burlington Gas Light Co.*, 103–576, 72 N. W. 755.

The true criterion for determining the propriety of a supplemental petition does not lie in ascertaining whether it states a cause of action which might be independently maintained. If it may be read with the original petition and both consid-

ered as one pleading, and if its scope is limited to strengthening, developing or reenforcing the original cause of action, or of enlarging the extent of, or changing the relief sought, then it meets the very purpose of such pleading. The new cause of action which the law will not permit to be thus pleaded is one not related to that stated in the original petition and which, under the rules of pleading, must be set up in a separate count or division. *Ibid.*

Therefore, held in an action to recover damages resulting from the maintenance of a nuisance, a claim for additional damages accruing since the commencement of the action by reason of a continuance of the nuisance might be set up in a supplemental petition. *Ibid.*

This section does not authorize the presentation of an entirely new cause of action. *Allen v. Davenport*, 115–20, 87 N. W. 743.

In an action against a county on an unliquidated claim the failure to make demand as required by code § 3528 before instituting suit may be cured by a subsequent demand pleaded in a supplemental or amended petition. *Little v. Pottawattamie County*, 127–376, 101 N. W. 752.

A motion relating to the enforcement of a decree is not properly entitled a supplemental pleading. *Dunton v. McCook*, 120–444, 94 N. W. 942.

The fact that an action is prematurely brought is not a ground for abatement if the cause of action is complete and mature before the case comes to a hearing. The rule is to permit a supplemental pleading to be filed and to allow the case to proceed. *Gribben v. Clement*, 141–144, 119 N. W. 596.

It is not proper to allege in a supplemental pleading facts not materially affecting the remedy. *Wapello State Sav. Bank v. Colton*, 143–359, 122 N. W. 149.

Section applied. *Christie v. Iowa Life Ins. Co.*, 111–177, 82 N. W. 499.

SEC. 3642. Matter in abatement.

Where a prior action is so dismissed by the plaintiff as to waive any right to recover therein, such prior action cannot be relied on in abatement of a subsequent action. *Pray v. Life Indem. & Secur. Co.*, 104–114, 73 N. W. 485.

One of the recognized tests of determining whether the plea of another action pending is good lies in ascertaining whether the judgment, when obtained, would necessarily be *res adjudicata* of the issues of the action wherein the plea is interposed. *Valley Bank v. Shenandoah Nat. Bank*, 109–43, 79 N. W. 391.

Two actions for the same cause may not be maintained at the same time because the second suit is unnecessary for the enforcement of rights or the redress of wrongs, and simply annoys and harasses the defendant without cause, but the reason of the rule applies only when the plaintiff in both actions is the same person, and hence the rule itself falls when this is not true. The fact that the parties do not stand in the same relation in the two suits is an insuperable obstacle to the plea. *Pratt v. Howard*, 109–504, 80 N. W. 546.

The fact that the action depends upon the same right or title as another action pending will not suffice to sustain a plea in abatement. The two actions must involve the same cause of action. *Watson v. Richardson*, 110–698, 80 N. W. 416.

The rule that the court first acquiring jurisdiction of the case will retain the same to the exclusion of any other court of concurrent jurisdiction is not applicable unless it appears that the suits are between the same parties seeking the same remedy. *State v. Clough*, 111–714, 83 N. W. 727.

Another action pending is a good plea in abatement where the parties are the same, the issues identical and the interests of respective parties such as must be determined, although the parties plaintiff are not the same in the two suits. *Guinn v. Elliott*, 123–179, 98 N. W. 625.

The doctrine that a subsequent action may be abated on the ground of the pendency of a prior one between the same parties for the same cause does not apply where the prior action is pending in the courts of another state or in a foreign country. *Schmidt v. Posner*, 130–347, 106 N. W. 760.

This section does not specify what shall be a good plea in abatement. That must be determined independently of this statute. *Moffitt v. Chicago Chronicle Co.*, 107–407, 78 N. W. 45.

Pleas in abatement do not go to the merits of the action but rather to the procedure; and a pleading tending to show that the action has been prematurely brought is a plea in abatement, and judgment for defendant on that ground will not bar a subsequent action. Nor will a judgment for defendant on the ground that the plaintiff has not proven capacity to sue constitute a bar to another suit. *Telegraph v. Lee*, 125–17, 98 N. W. 364.

An affirmative defense in the nature of a plea in abatement is denied by operation of law. *State v. Beardsley*, 108–396, 79 N. W. 138.

The pendency of a prior suit, on being pleaded, will be given effect to abate a suit subsequently brought, where the parties are the same, the issues growing out of the same set of facts are identical and the re-

lief prayed for is the same. *Van Vleck v. Anderson*, 136–366, 113 N. W. 853.

Pendency of another action does not deprive the court of jurisdiction to proceed and is pleadable in abatement only. *Hemmer v. Dunlavey*, 143–265, 121 N. W. 1024.

SEC. 3644. Consolidation of actions.

Two actions, one in law and the other in equity, although between the same parties, should not be consolidated. *Hodowal v. Yearous*, 103–32, 72 N. W. 294.

Where so far as the parties defendant are actually served with notice the actions may properly be consolidated, such consolidation will not be erroneous on account of the fact that other parties defendant are named in the two actions, who if they had been properly brought into court would have prevented the consolidation. *Bank of Montreal v. Ingerson*, 105–349, 75 N. W. 351.

The important inquiry as to the consolidation of actions in equity is as to the identity of the subject matter involved. The aim is to bring in all the parties in interest, and suits will be consolidated without special regard to the identity of parties. This is because of the power of such a court to make appropriate orders, according to each party exact justice. *Cox Shoe Co. v. Adams*, 105–402, 75 N. W. 316.

Consolidation is effected on the order of court alone, upon application of a party or by motion. When applied for, the order is discretionary and the action of the trial court in the matter will be interfered with only on a clear showing of abuse. *Jones v. Witousek*, 114–14, 86 N. W. 59.

Refusal to order consolidation of actions is so largely discretionary that the action of the court will not ordinarily be interfered with. *Keller v. Harrison*, 139–383, 116 N. W. 327.

An agreement, for the purposes of trial, that cases, not such as should be consolidated on motion, may be tried together does not apply to a second trial at another term. *Ruby v. Chicago, M. & St. P. R. Co.*, 150–128, 129 N. W. 817.

CHAPTER 9.

OF TRIAL AND JUDGMENT.

SECTION 3647. Issues.

An issue of law is raised by presenting a question for determination on demurrer or plea. *Columbus Junction Tel. Co. v. Overholt*, 126–579, 102 N. W. 498.

SEC. 3649. Trial defined.

A judicial examination of an issue of law raised by a demurrer or plea is a trial. *Columbus Junction Tel. Co. v. Overholt*, 126–579, 102 N. W. 498.

The trial of an action as defined by statute is not completed until all the issues raised are passed on. The return of the verdict does not necessarily conclude the examination either of questions of fact or of law. *Bevering v. Smith*, 121–607, 96 N. W. 1110.

SEC. 3650. How issues tried.

There is not in general a right to a jury trial in special proceedings. *Green v. Smith*, 111–183, 82 N. W. 448.

An issue in a special proceeding, although not triable to a jury, is triable as an ordinary action and not in equity unless the statute so provides. *In re Cherokee County Printing*, 156–282, 136 N. W. 765.

The provision of this section for a reference does not authorize an order for trial on depositions. *Ibid.*

Where there is no element of accounting or other recognized ground of equitable jurisdiction, mere intricacy of the calculations necessary to determine the amount of plaintiff's recovery will not justify the court in refusing to grant a jury trial in an action at law. *Galusha v. Wendt*, 114–597, 87 N. W. 512.

The issues on an appeal under code § 2450 as to the correctness of the action of the board of supervisors in canvassing a statement of consent under the mulct law are triable without a jury, and it is error to submit issues in such a proceeding to a jury, even in an advisory way. *Porter v. Butterfield*, 116–725, 89 N. W. 199.

Having demanded a jury trial and excepted to the ruling refusing it, the party does not waive error in the ruling by proceeding to trial in equity. *Jamison v. Ranck*, 140–635, 119 N. W. 76.

As the statute relating to mandamus

expressly provides that it shall be tried as an equitable action, the court has no authority, over the defendant's objection, to order the case tried to a jury. *Klopp v. Chicago, M. & St. P. R. Co.*, 156–466, 136 N. W. 906.

SEC. 3651. Method of trial in ordinary actions—appeal.

A proceeding for admeasurement of dower is triable ordinarily upon assignment of error and not *de novo*. *In re Estate of Lund*, 107–264, 77 N. W. 1048.

On the trial of issues in a special proceeding not made triable in equity, the court is not authorized to order the case tried upon depositions or other written evidence. *In re Cherokee County Printing*, 156–282, 136 N. W. 765.

SEC. 3652. In equitable actions—certificate of evidence—trial anew on appeal. In equitable actions wherein issues of fact are joined, all the evidence offered in the trial shall be taken down in writing, or the court may order the evidence, or any part thereof, to be taken in the form of depositions, or either party may, at pleasure, take his testimony, or any part thereof, by deposition. All the evidence so taken shall be certified by the judge at any time within six months after the entry of a final decree, and the evidence and certificate be made a part of the record, and go on appeal to the supreme court, which shall try the cause anew. But this section shall be so construed as to include the evidence taken in shorthand, when the reporter's notes of such evidence have been certified to by the judge and reporter within the time herein provided. [31 G. A., ch. 155; 19 G. A., ch. 35, § 1; 17 G. A., ch. 145; C. '73, § 2742.]

Evidence taken down—filing transcript: Under the statutory provisions that in equity cases the evidence shall be taken down in writing and all the evidence so taken shall be certified by the judge and be made a part of the record and go on appeal to the supreme court, the transcript of the evidence taken in shorthand and certified by the reporter and filed is to be deemed written evidence. But otherwise the trial judge must finally determine what the evidence is in the case tried before him and the certificate of the judge to the shorthand notes is conclusive that they contain the evidence on the trial. It is immaterial whether the reporter certifies to the correctness of such notes or his transcript thereof. *Dietz v. Capital City Brick & Pipe Co.*, 103–542, 72 N. W. 691.

The provisions of code of '73, § 2742, as amended, that the written evidence should be certified within the time allowed for appeal, was not affected by the provision of 26 G. A., ch. 64, by which the transcript of the shorthand reporter's notes might be transmitted to the supreme court in lieu of the clerk's transcript of such evidence. *Sloan v. Davis*, 105–97, 74 N W. 922.

The notes of the stenographer are not evidence in writing within the statutory provision as to taking down the evidence in writing in an equity case, but when such notes identifying all documentary evidences are duly certified to by the trial judge the transcript thereof, including the judge's certificate, duly certified by the reporter, may become written evidence. To secure a trial *de novo*, however, a transcript of the evidence must be on file within six months from the time final decree is entered. *Smith v. Wellslager*, 105–140, 74 N. W. 914.

According to the law as it now stands equity actions are to be tried on written evidence and no motion for that purpose is required. To make the transcript when duly certified a part of the record for the purpose of appeal it is necessary to file it with the clerk within six months from the time final decree was entered, and evidence not thus preserved cannot be considered on appeal, even on assignment of errors. *Ibid.*

The failure of the reporter to furnish appellant a transcript of the evidence in an equity case in time to enable him to prosecute his appeal will not be a ground for new trial if appellant has been negligent in attempting to procure such transcript. *McKinley v. McKinley*, 123–574, 99 N. W. 162.

The fact that after the trial the defeated party is prevented, by the death of the reporter before the making of a transcript, from securing such record as is necessary to enable him to present the case on appeal for trial *de novo*, will not entitle him to a new trial. *Dumbarton Realty Co. v. Erickson*, 143–677, 120 N. W. 1025.

Where the evidence in an equitable action is not certified and filed in the lower court within six months, there cannot be a trial *de novo* on appeal. *Kringle v. Kringle*, 123–365, 98 N. W. 883.

It is only in equitable actions that a trial *de novo* is to be had on appeal to the supreme court, and this rule applies to probate proceedings relating to the custody of children. *Brem v. Swander*, 153–669, 132 N. W. 829.

If the shorthand notes or transcript in an equity case are lost the court may order a substitution and will not be without jurisdiction to do so in a proceeding commenced within the time allowed for taking appeal although the final order for substitution is not entered until the time for the appeal in which it is desired to make use of the evidence has expired. *Ormsby v. Graham*, 123–202, 98 N. W. 724.

Where appellee has set out in an additional abstract portions of the evidence which he avers to be a part of the record, he cannot raise the question whether the evidence was properly preserved in an equity case. *Sarvis v. Caster*, 116–707, 89 N. W. 84.

After the evidence has on appeal been stricken from the record because not properly preserved and the case has been submitted on the part of appellee, appellant is not entitled to have the evidence reinstated and the case considered as though such evidence was in the record. *Citizens' Bank v. Johnson*, 107–365, 77 N. W. 1046.

Depositions: Under § 2742 of the code of '73, held that the court might in its discretion refuse to order the testimony to be taken by depositions. But held that such refusal even though erroneous would not constitute prejudicial error as the party would have had a right to introduce the evidence by depositions so far as he desired. *Varnum v. Winslow*, 106–287, 76 N. W. 708.

In an equity case either party may take his testimony by deposition without a prior order of the court. *Tinning v. Mumm*, 146–263, 125 N. W. 203.

The provision as to taking evidence by depositions is not applicable in an action to enjoin a liquor nuisance which by the provisions of code § 2406 is triable at the first term after notice. *Tuttle v. Pockert*, 147–41, 125 N. W. 841.

Either party may, at the appearance term, insist upon a continuance for the purpose of taking his evidence by deposition, but cannot insist on that right at a subsequent term at which the case is called for trial. *Wahlberg v. Buchwald Lumber Co.*, 153–618, 133 N. W. 1055.

Certificate of judge and reporter: To justify a trial anew of an equity case in the supreme court the evidence must be certified and filed within the time allowed for appeal, that is, six months. *Bauernfiend v. Jonas*, 104–56, 73 N. W. 500.

The office of the certificate of the judge is to identify the evidence and to make it of record when filed, while it is the office of the certificate of the clerk to identify and authenticate the record. *Ibid.*

Failure to file the certificate in time cannot be cured by an order *nunc pro tunc*. *First Nat. Bank v. Redhead*, 103–421, 72 N. W. 651.

Where the evidence is not thus preserved the court cannot, on assignment of error, pass upon questions in the case requiring the consideration of the evidence. *Smith v. Wellslager*, 105–140, 74 N. W. 914.

Where the evidence has not been taken down, certified and preserved as required, a motion in the supreme court to strike the evidence set out in the abstract will be sustained. *Co-Operative Bank v. Meldrum*, 128–694, 105 N. W. 206.

Where the judge certified that the evidence was all the evidence offered, given or introduced upon the trial, held that such certificate was sufficient. *Miller Brewing Co. v. Hansen*, 104–307, 73 N. W. 827.

A certificate that the record contains all the evidence offered and introduced on the trial is not sufficient to enable the court to try the case *de novo*. *Cheney v. McColloch*, 104–249, 73 N. W. 580.

A certificate that the transcript of the evidence is a correct, true and complete transcript of all the testimony introduced, both oral and documentary, together with the objections interposed by counsel and the rulings of the court thereon, exceptions taken, etc., is not sufficient to enable the court to try the case *de novo*, because it does not show that the record contains all of the evidence which was offered upon the trial below. *Greenlee v. Home Ins. Co.*, 103–484, 72 N. W. 676.

Exhibits which are sufficiently identified in the stenographer's report or translation, duly certified by the judge, are sufficiently preserved. *Mason v. Des Moines*, 108–658, 79 N. W. 389.

Under the provisions of code § 4118, embodied in rule 22 of the supreme court, it is not necessary to formally allege in the abstract on appeal that the evidence was certified by the trial judge and the certificate made of record. *Kirchman v. Standard Coal Co.*, 112–668, 84 N. W. 939.

It is not necessary to set out the certificate to the evidence in order to show that it has been properly preserved in an equity case, it being presumed that the proper steps have been taken, unless the question is raised by a specific denial. *Burget v. Greenfield*, 120–432, 94 N. W. 933.

To secure a trial *de novo* the provisions of this section must be complied with. Code § 3675 as to reporting the proceedings in general does not relate to the subject. *Dwyer v. Rock*, 115–722, 87 N. W. 495.

It is not required that the evidence in equity cases be taken down by the official reporter, and the certificate of the transcript should be made by the reporter who reports the proceedings. *Spinney v. Halliday*, 115–420, 88 N. W. 939.

A statement in the abstract of record showing that the report of the evidence

as filed in the trial court is certified by a person named, who is not designated or otherwise shown to have been the official reporter or a person authorized to report the evidence, is not sufficient. *Oskaloosa Nat. B. L. & I. Assn. v. Bailey*, 129–287, 105 N. W. 417.

A certificate of the evidence introduced on the trial of the case of "*D. M. Smith v. W. T. Brown and Nellie C. Sprague, et al.*" held not sufficient to entitle the appellant to a trial *de novo* in the case of "*D. M. Smith v. W. T. Brown and Mrs. Nellie C. Springer.*" And held that a statement of counsel in the abstract that the word "*Sprague*" was a clerical mistake for "*Springer*" could not be considered. *Smith v. Brown*, 123–114, 98 N. W. 567.

The amendment to this section by 31 G. A., ch. 155, directing that the section be so construed as to make sufficient the certification of the shorthand notes of the evidence within the prescribed time, is not to be construed as retroactive so as to save an appeal in which the right has been lost by failure to perfect the record under the section as it stood before such amendment. But as the amendment is remedial in character and merely changes the procedure, it may be held applicable in perfecting a record in all cases where the time within which this might have been done had not elapsed before the law became operative. *Richardson v. Fitzgerald*, 132–253, 109 N. W. 866.

The amendment, although it purports to make direction only as to the construction of the section amended, is in fact a change in the law, and not a curative act. *Ibid.*

Where the certificate to the shorthand notes shows that the record has been preserved as required by code § 3675, the judge's certificate to the translation of the notes is sufficient if it shows a full, true and complete extension of the notes as taken. *Fordyce v. Humphrey*, 152–76, 131 N. W. 686.

Certificate of referee: Under this section as amended, the evidence offered as well as that received in a trial to a referee must be preserved by his certificate. Such certificate must be as particular and certain as that required of certificates to be made by the trial judge; and there must also be a certificate of the trial judge in addition to that of the referee as to the evidence offered as well as that received. *Doyle v. Duckworth*, 149–623, 129 N. W. 59.

Assignments of error: Where appellant is entitled to a trial *de novo*, assignments of error relating to rulings on the introduction of evidence will not be considered. *Foy v. Armstrong*, 113–629, 85 N. W. 753.

In a case triable *de novo* the appellant cannot make assignments of error in the admission or rejection of evidence and have them considered as at law. *Spinney v. Halliday*, 115–420, 88 N. W. 939.

In an equity case rulings on motions to strike and on demurrers will not be considered unless exception is taken and error assigned. *Hogueland v. Arts*, 113–634, 85 N. W. 818; *Jackson v. Seevers*, 115–370, 88 N. W. 931.

That assignments of error are no longer necessary, even in actions tried by ordinary proceedings, see § 4136.

On a trial *de novo* the supreme court does not consider points of practice, unless they are in some manner brought to the attention of the trial court and exception taken to the ruling thereon. *West Side Lumber Co. v. Hathaway*, 115–654, 89 N. W. 35.

There can be no reversal for failing to exclude improper evidence in a trial in equity unless it appears that the evidence proper to be considered does not support the findings of the court. To entitle the appellant to reversal in such a case for the improper admission of evidence, it must appear that the court ruled adversely to him on objections to the admission of such evidence. *Edwards v. Olin*, 121–143, 96 N. W. 742.

Findings of lower court: The findings of a trial judge even in an equity case when based on the testimony of witnesses appearing before him will be disturbed on appeal with reluctance. *Johnson v. Farmers' Ins. Co.*, 126–565, 102 N. W. 502.

And see notes to § 4139.

SEC. 3653. Abstracts in equity causes.

The costs of this abstract are not to be taxed to the unsuccessful party. *Grapes v. Grapes*, 106–316, 76 N. W. 796.

SEC. 3654. Finding of facts.

A finding of facts by the court in a law case tried without a jury should not be disturbed unless so clearly against the evidence as to justify the conclusion that it was based on passion or prejudice. *Brown v. Curtis*. 111–542, 82 N. W. 945.

The finding of facts by the trial court must be sustained on appeal if there is any substantial evidence to support it. The trial court has the advantage of the presence of the witnesses, and his conclusions will not be interfered with where they are supported by the evidence and do not appear to have been the result of passion or prejudice. *Jenkins v. Dewey*, 122–530, 98 N. W. 313.

In a law action the findings of fact by the court in a case tried without the jury are entitled to the same force as the verdict of a jury. *Bullard v. Hopkins*, 128–703, 105 N. W. 197.

SEC. 3655. Trial term.

Parties may consent to trial at the term at which the petition is filed, although proper notice of the filing of the petition has not been given. *Rummel v. Dealy*, 112–503, 84 N. W. 526.

The general provision of this section that all causes of action, both at law and in equity, and special proceedings, except where otherwise provided, shall be tried at the first term after legal and timely service has been made, does not prevent the continuance of an action to a subsequent term, where the business of the court requires or substantial justice will be promoted thereby. *Cox v. Burnham*, 120–43, 94 N. W. 265.

SEC. 3656. In equitable actions. The appearance term shall not be the trial term for equitable actions, except those brought for mandamus or divorce, to foreclose mortgages and other instruments of writing whereby a lien or charge on property is created, or to enforce mechanics' liens, or appeal cases in contested elections. [32 G. A., ch. 165; 30 G. A., ch. 122; C. '73, § 2745; R. § 2856.]

While a party is not required in an equity case to proceed to trial at the appearance term if he is entitled to take his evidence by deposition, yet this rule has no application to a subsequent term at which the case is set for trial. *Wahlberg v. Buchwald Lumber Co.*, 153–618, 133 N. W. 1055.

SEC. 3657. Separate trials.

In an action against several defendants jointly, the court may grant separate trials, but this is discretionary. Although the action is allowed to proceed as against all, the plaintiff has still the burden of proving the allegations of his petition as against each. *Pearse v. Balm*, 152–422, 132 N. W. 821.

SEC. 3658. Trial notice.

The provisions as to trial notice do not apply to motions. *Manning v. Nelson*, 107–34, 77 N. W. 503.

The court cannot proceed with the trial of the case in the absence of a trial notice and without the formality of first assigning the case for trial. *Fogarty v. Battles*, 145–61, 123 N. W. 952.

Where a case has been continued from time to time by consent and no trial notice for a particular term has been given, the court has no authority to dismiss the case for want of prosecution. *O'Mara v. Newton & N. W. R. Co.*, 156–701, 137 N. W. 942.

Where the judge has, through misapprehension, dismissed the case for want of prosecution at the term to which it has been continued and for which no trial notice has been given, he may at a subsequent term set aside such order of dismissal. *National Loan & Inv. Co. v. Bleasdale*, 141 N. W. 456.

SEC. 3659. Assignments of trial causes—hearing of motions and demurrers.

The rules made by the judges of court in force prior to the adoption of the present code did not require the court to make assignments of cases for trial and it was not error for the court on request of a party to refuse to make such an assignment. *Slocum v. Brown*, 105–209, 74 N. W. 936.

An assignment of a cause for a particular day is not essential to its being called for trial in its regular order. The statutory provision as to assignment of causes is not mandatory. *Stewart v. Gorham*, 122–669, 98 N. W. 512.

An assignment of a cause for trial cannot be made where issues have not yet been joined. *Smith v. Redmond*, 141–105, 119 N. W. 271.

SEC. 3660. Docketing appeals from justices—other appeals.

This provision applies to docketing alone, and not to failure to pay filing fee. While the clerk has the right to exact his fee before docketing the case, if he does actually put the case on the docket, the appellee cannot have it dismissed for failure of appellant to pay the fee. *Vasey v. Parker*, 118–615, 92 N. W. 708.

If the case properly gets upon the docket even in the absence of a transcript and without the payment of a docket fee, the appellee cannot have the appeal dismissed

or the judgment or award affirmed on his paying the fee and causing the docketing of the case. The appellant is not required to file a transcript until the case is reached for trial. *Simons v. Mason City & Ft. D. R. Co.*, 128–139, 103 N. W. 129.

General appearance in court having jurisdiction of the case and the parties, with agreements from time to time as to the disposition of the case, will waive an entry of the case upon the appearance docket. *Ibid.*

Where the railroad company appeals from an assessment of damages for right of way and later the landowner also appeals, without paying a filing fee, the railroad company cannot by paying such fee have the landowner's appeal dismissed, and held that it was proper for the court to consolidate the landowner's appeal with the company's appeal and a subsequent dismissal of the latter would leave no question for trial. *McKinnon v. Cedar Rapids & I. C. R. & L. Co.*, 126–426, 102 N. W. 138.

The provision as to docketing appeals in the district court held applicable to an appeal from the action of the board of review for the assessment of taxes. *Stephens v. City Council*, 132–490, 107 N. W. 614.

It is evident from this section that an affirmative duty is placed on the appellant to get an appeal from the action of the board of tax reviewers before the district court for determination. Notice of an appeal is not alone sufficient. *Frost v. Board of Review*, 114–103, 86 N. W. 213. See also code § 4559 and notes.

SEC. 3662. Continuances—application for.

The costs referred to in this section are taxable costs and do not include attorney's fees and expense of travel of the party, save on subpœna. *Keller v. Harrison*, 151–320, 128 N. W. 851, 131 N. W. 53; *Moore v. Chicago, R. I. & P. R. Co.*, 151–353, 131 N. W. 30.

SEC. 3663. Causes for.

The matter of granting a continuance is largely within the discretion of the trial court and to justify a reversal it must clearly appear that this discretion has been abused and that an injustice has been done thereby. *Cheney v. McColloch*, 104–249, 73 N. W. 580; *Hibbets v. Hibbets*, 117–177, 90 N. W. 613; *State v. Wilson*, 124–264, 99 N. W. 1060; *State v. Pell*, 140–655, 119 N. W. 154.

The court may waive conditions imposed on the granting of a continuance where it is made to appear that without fault on the part of the attorney applying for such continuance, he is unable to properly present the case at the time set for trial. *American Soda Fountain Co. v. Dean Drug Co.*, 136–312, 111 N. W. 534.

A motion to amend a motion for a continuance after a ruling thereon based on counsel's admission that the witnesses would testify as claimed is not in order. At any rate, the trial court is vested with a large discretion in the matter. *Goldstein v. Morgan*, 122–27, 96 N. W. 897.

The filing of an amendment or of a supplemental petition will not alone authorize a continuance and if the defendant desires a continuance on that ground he must set out some good reason therefor. *Foote v. Burlington Gas Light Co.*, 103–576, 72 N. W. 755.

The grounds alleged in a motion for continuance in a particular case held not sufficient to require a reversal of the action of the trial court in overruling the motion. *Hibbets v. Hibbets*, 117–177, 90 N. W. 613.

A continuance, asked for the purpose of procuring depositions which cannot be taken during the term of the court without an express order, should be granted. *Husted v. Williams*, 126–634, 102 N. W. 519.

A showing as to absence of a party familiar with the facts, although incompetent to testify, held to be such that a refusal to grant a continuance was error. In such case the counsel of the party is entitled to have the advice of his client. *In re Townsend's Estate*, 122–246, 97 N. W. 1108.

Under the showing of surprise in a particular case, held that the party was entitled to a continuance in order to enable him to procure his evidence. *Flint v. Atlas Mut. Ins. Co.*, 134–531, 112 N. W. 1.

It is not error to refuse a continuance on the ground of the absence of a witness desired for impeachment purposes, where at the time the motion is made it does not appear that his testimony will be required. *State v. Hayden*, 131–1, 107 N. W. 929.

A continuance should not be granted for the absence of a witness where no facts are presented from which it might reasonably be expected or believed that the attendance or the testimony of such witness could be procured at any subsequent time. *State v. Burns*, 124–207, 99 N. W. 721.

Inability to secure the attendance of a witness is not sufficient ground for a continuance where the party has not used reasonable diligence in attempting to secure the attendance of such witness. *Moffitt v. Chicago Chronicle Co.*, 107–407, 78 N W. 45.

An amendment merely alleging an additional element of damages which could readily be investigated during the course of

the trial is not sufficient to require a continuance of the trial. *Palmer v. Waterloo*, 138–296, 115 N. W. 1017.

The granting of a continuance is largely in the discretion of the trial court, and where it appeared that the necessity of testimony of an absent witness had not become manifest until the defendant had testified, and the plaintiff showed reasonable diligence and asked postponement not beyond the term, held that the discretion of the court in granting such postponement was not abused. *Tisdale v. Ennis*, 144–306, 122 N. W. 959.

That a party or his attorney is unexpectedly prevented from attending court by sickness furnishes ground for postponement of the trial or continuance. *Turner v. Loomis*, 146–655, 125 N. W. 662.

Where motion for a new trial on the ground of absence of a witness was made on the eve of the trial and without a showing of diligence in attempting to procure the presence of the witness or his deposition, he being a nonresident, held that there was no error in overruling the motion. *McGinnis v. McGinnis*, 139 N. W. 466.

In the absence of any showing of excuse for not procuring the deposition of a witness in another state, a motion for a continuance on account of the absence of such witness may be overruled. *Davis v. Ritchey*, 139 N. W. 887.

Where the motion for continuance and affidavit in support thereof contain no statement that the facts proposed to be proven by the witnesses whose attendance cannot be procured could not be shown by other witnesses, they are not sufficient. *In re Millard's Estate, Stiles v. Huffmire*, 141 N. W. 1050.

The trial court may in its discretion deny the motion for a continuance on account of negligence of the party in not making proper effort to secure the presence or testimony of the witnesses. *Wilson v. Chicago, M. & St. P. R. Co.*, 142 N. W. 54.

Where an amendment does nothing more than specifically state the nature of the premises to which the action relates and introduces no new causes of action, a continuance on account of such amendment may be denied. *Ibid.*

Showing for continuance in particular cases held not sufficient. *In re Assignment of Cuddy*, 146–250, 124 N. W. 1071; *Wasson v. American Patriots*, 148–142, 126 N. W. 778.

SEC. 3664. Affidavits—what must show.

The affidavit must not only show diligence in attempting to secure the presence of the witness and the materiality of the evidence sought to be obtained, but also that the witness's presence can be secured by ordinary methods at the ensuing term, and where it appeared that the witness in question had once disobeyed a subpœna and there was no reason to think that he would come at any other time without compulsion, and also that he was a nonresident of the state, held that the showing was not sufficient. *State v. McGinn*, 109–641, 80 N. W. 1068.

Notwithstanding the evidence to procure which a continuance is sought may be cumulative, it may be that the interests of justice require the continuance to be granted. *State v. Hasty*, 121–507, 96 N. W. 1115.

The showing in a motion for a continuance as to the absence of witnesses held not sufficient because too general and indefinite, stating, so far as appeared, a mere surmise. *State v. Penney*, 113–691, 84 N. W. 509.

SEC. 3665. Admission by opposite party.

The only effect of the admission as to the testimony of an absent witness for the purpose of preventing a continuance, is to authorize such admitted testimony to be read as evidence; if it is not so read it is not for the consideration of the jury. *Michel v. Boxholm Co-Operative Creamery*, 128–706, 105 N. W. 323.

The admission that the absent witness would testify as alleged in the affidavit for continuance, does not waive objection to the incompetency of such testimony. *State v. Leuhrsman*, 123–476, 99 N. W. 140.

The admission as to what the witness will testify to cannot be used as evidence on a second trial. *Neidy v. Littlejohn*, 146–355, 125 N. W. 198.

SEC. 3666. Filing motion.

Where the ruling of the court on a motion for continuance is necessarily based on the sufficiency of the showing as to a complicated state of facts relating to the diligence of the party asking for the continuance, the ruling of the trial court will not be interfered with. *Percival-Porter Co. v. Oaks*, 130–212, 106 N. W. 626.

After the case is called for trial, a motion for continuance should not be considered which presents grounds as well known before the case was called as afterwards. *State v. Hart*, 140–456, 118 N. W. 784.

Where the showing for a continuance made on the eve of trial related to the mental condition of a witness, and it ap-

peared that this condition had existed for some time and it was not indicated that the witness would subsequently improve in that respect, held that the application was properly overruled. *McBride v. McBride*, 142–169, 120 N. W. 709.

SEC. 3671. Costs.

The costs here referred to are taxable costs. *Keller v. Harrison*, 151–320, 128 N. W. 851, 131 N. W. 53; *Moore v. Chicago, R. I. & P. R. Co.*, 151–353, 131 N. W. 30.

SEC. 3675. Report of trial—certificate.

Where the trial judge attached to the shorthand notes a certificate to the effect that such notes were the official report of the case and that they contained, together with the documentary evidence therein referred to, all of the evidence that was offered or introduced on the trial of said case and all objections and rulings made and exceptions taken, and made said official report in shorthand a part of the record, held that proceedings with reference to the separation of the jury which were found in the shorthand notes were thereby made a part of the record and might be considered on appeal. *State v. Smith*, 102–656, 72 N. W. 279.

Shorthand characters are not writing within the meaning of the statute and a certificate in such form is not sufficient. *Howerton v. Augustine*, 153–17, 132 N. W. 814; *Wiggins v. Swayze*, 139 N. W. 1075.

A translation of shorthand notes may be filed at any time provided the notes themselves are so filed as to constitute a bill of exceptions. *Howerton v. Augustine*, 153–17, 132 N. W. 814.

Prior to the adoption of this section no certificate of the reporter was necessary to enable his notes to be incorporated by reference into a skeleton bill of exceptions. *Sigler v. Murphy*, 107–128, 77 N. W. 577.

Under the showing in a particular case, held that the shorthand notes appeared to have been properly certified when filed. *First Nat. Bank v. Eichmeier*, 153–154, 133 N. W. 454.

Where the reporter's notes are filed with the clerk and referred to in a skeleton bill of exceptions, the evidence is sufficiently made a part of the record by such bill of exceptions although the notes thus filed are not certified nor entered as filed on the clerk's record. *In re Guardianship of Holcher*, 127–369, 101 N. W. 759.

The bill of exceptions need only contain such matter as will enable the court to pass on the errors assigned, and this rule is not changed by the provisions of this section by which the notes of the shorthand reporter became a substitute for the bill of exceptions. The section provides for the preparation of a full and complete bill. A partial bill may be prepared in the same manner, and if errors assigned are based entirely on rulings on the admissibility of evidence, or its effect, it is sufficient if the evidence offered and received, together with the objections, rulings and exceptions, is duly certified and filed as therein directed. If the proceedings are in fact taken down in shorthand and duly certified, they become a bill of exceptions, regardless of any preliminary order. *State v. Welsh*, 109–19, 79 N. W. 369.

Where the notes in shorthand were duly certified by the trial judge, but the reporter, after extending them, instead of copying the judge's certificate, detached it from the notes and attached it as a part of his own at the end of the transcript, held that the transcript as so prepared and certified should be treated as the evidence in the case. *Steele v. Potthast*, 109–413, 80 N. W. 517.

The transcript of the shorthand notes should be certified by the person who as reporter takes down the proceedings. It is not necessary that this be the official reporter, and, where the proceedings were reported by an assistant of the official reporter, held that the certificate of the official reporter to the transcript was not sufficient. *Spinney v. Halliday*, 115–420, 88 N. W. 939.

Although the stenographer who reports the case is not the official reporter and is not sworn, nevertheless, if the judge append the proper certificate to the transcript of the testimony, this is enough to preserve the evidence. *Meader v. Allen*, 110–588, 81 N. W. 799.

Where the shorthand notes have been duly certified by the reporter at the close of the trial and in fact filed with the clerk, the evidence is properly preserved whether the notes have been formally marked "filed" or not. *In re Estate of Bruning*, 122–8, 96 N. W. 780.

The certification of the shorthand reporter's transcript of his evidence cannot rightfully be demanded until the reporter has had a reasonable time for transcribing his notes. *Smith v. Smith*, 132–700, 109 N. W. 194.

Where counsel have agreed that the reporter shall certify all shorthand notes taken upon the trial, including those taken by his predecessor, counsel cannot afterwards assert that such certification is not proper. *Hofacre v. Monticello*, 128–239, 103 N. W. 488.

All that is necessary in a law action is that the translation of the shorthand notes be filed and in form for use when such

translation becomes necessary, and this time does not ordinarily arise until the supreme court is compelled to resort to the translation in order to discover what the evidence really was. *Ibid.*

Where appellant denies that the evidence was properly preserved and made of record by extension of the shorthand notes into longhand and the filing of the transcript, appellee must furnish a transcript from the clerk establishing the fact; otherwise the court cannot on appeal consider any question depending on the evidence. *State v. Owens*, 109–143, 80 N. W. 226.

The statutory provision making the translation of the shorthand notes sufficient as a bill of exceptions does not take away the authority of the trial court to approve and settle a bill of exceptions in accordance with former practice. *State v. Kehr*, 137–91, 114 N. W. 542.

By code § 3707 exceptions to instructions may be noted by the shorthand reporter without reason therefor being given. *White v. Elgin Creamery Co.*, 108–522, 79 N. W. 283.

While exceptions to instructions may be noted by the reporter at the time the instructions are given, a mere certificate to the transcript of the notes which recites, in general, exceptions to all instructions is not sufficient. *Black v. Miller*, 138 N. W. 535.

The entry by a reporter in his minutes of the fact of the return of the verdict does not constitute a record of the receipt of the verdict by the court so as to preclude the court from sending the jury out to correct the verdict which had been offered. *State v. Novak*, 109–717, 79 N. W. 465.

This section of the code works little change in the law as it formerly stood, beyond enlarging what shall be included in the report and making it mandatory upon the demand of either party. *In re Tobey's Estate*, 112–581, 84 N. W. 666.

The provisions of this section do not modify the provisions of code § 3652 as to what is required in order to secure a trial *de novo* in an equity case. *Dwyer v. Rock*, 115–722, 87 N. W. 495; *Spinney v. Halliday*, 115–420, 88 N. W. 939.

The provisions of 27 G. A., ch. 9, relating to the use of the shorthand reporter's transcript of the evidence in another case (see § 245-a), has no application in a subsequent case which is not a retrial of the one in which the evidence was given, nor in which the transcript is not offered for the purpose of impeachment. *Walker v. Walker*, 117–609, 91 N. W. 908.

Where there is evident mistake in the shorthand report of the testimony of a witness, it may be corrected by changing the record so that it will show what the witness in fact said. Such corrections should be in the trial court, and may be made on motion, supported by affidavits. *Campbell v. Campbell*, 118–131, 91 N. W. 894.

It is not error for the court to have the stenographer read over the shorthand notes of a portion of the evidence in the presence of the jury for the purpose of enabling the court to determine whether portions thereof should be stricken out. *State v. Fielding*, 135–255, 112 N. W. 539.

The report of evidence is a part of the record of the case, and it is not improper to have the testimony of witnesses read to the jury in accordance with their request. *State v. Perkins*, 143–55, 120 N. W. 62.

It is the duty of the reporter to attend the court as directed by the judge and he may recover his compensation for such attendance without regard to the services actually performed. *Ferguson v. Pottawattamie County*, 126-108, 101 N. W. 733.

SEC. 3680. When and how made.

Objection to the method of drawing talesmen should be interposed before the jury is selected. *State v. Minor*, 106–642, 77 N. W. 330.

SEC. 3684. When made—determination.

A party who accepts the jury and goes to trial without objection cannot afterwards be heard to complain either of the character of the jury or of the time of the trial. *Frank v. Davenport*, 105–588, 75 N. W. 480.

SEC. 3685. Peremptory.

Jurors may be interrogated on *voir dire* as to matters which may be important to the party in enabling him to intelligently exercise his peremptory challenge. *Simons v. Mason City & Ft. D. R. Co.*, 128–139, 103 N. W. 129.

It is not improper to allow a party for the purpose of exercising intelligently his peremptory challenges in an action for personal injuries to inquire with respect to the connection of the jurors with employers' casualty insurance companies. *Brusseau v. Lower Brick Co.*, 133–245, 110 N. W. 577.

Where the defendant in a criminal case, being entitled to ten peremptory challenges, when called upon to exercise his eighth challenge, stated by counsel that one peremptory challenge was waived, and the prosecution thereupon waived a peremptory challenge, held that the defendant was still entitled to exercise the right of

two further peremptory challenges and that it was error to refuse to allow him to do so. A waiver of one peremptory challenge is not a waiver of all further right of peremptory challenge as to persons already called as jurors. *State v. Hunter*, 118–686, 92 N. W. 872.

SEC. 3688. For cause.

Error in overruling a challenge for cause will not be deemed prejudicial where it does not appear in the record that the juror could not have been dismissed peremptorily. *Haggard v. Peterson*, 107–417, 78 N. W. 53.

The general statement that the party challenges a juror for cause is too indefinite. *Ibid.*

Where it does not appear that the party complaining of the overruling of his challenge to a juror exhausted his peremptory challenges, the ruling will be considered to have been without prejudice. *Harris v. Moore*, 134–704, 112 N. W. 163.

Error in overruling a challenge to a juror will not be ground for reversal where it does not appear that the challenged juror sat in the case or that appellant exhausted his peremptory challenges. *Furlong v. American Cent. Fire Ins. Co.*, 136–499, 113 N. W. 1087.

The erroneous exclusion of jurors on challenge is not a ground of reversal unless it is made to appear that this has resulted in the trial of the issues before a partial or incompetent jury; and if it appears that the complaining party did not exhaust his peremptory challenges, the error will be without prejudice. *Johnson v. Waterloo*, 140–670, 119 N. W. 70.

A party cannot complain of the exclusion of jurors by the court unless some prejudice is made to appear. *State v. Norman*, 135–483, 113 N. W. 340.

The fact that a witness professes to have formed an opinion as to plaintiff's right to recover, but not as to any controversy relating to the amount of recovery, will not render the action of the court in overruling a challenge as to him erroneous where it appears that plaintiff's right to recover was conceded and there was no controversy save as to the amount. *Furlong v. American Cent. Fire Ins. Co.*, 136–499, 113 N. W. 1087.

Errors on ruling as to challenges are not grounds for reversal where the court has directed a verdict. *Parr v. Union Electric Co.*, 150–70, 129 N. W. 301.

To take advantage of the disqualification of a juror after verdict, it is incumbent on the party complaining to show affirmatively that neither he nor his counsel had knowledge thereof before the juror was sworn. *State v. Bussamus*, 108–11, 78 N. W. 700; *State v. Moats*, 108–13, 78 N. W. 701.

Counsel are entitled to propound to the jurors questions relating to matters which may be considered in exercising the right of peremptory challenge. *Ruby v. Chicago, M. & St. P. R. Co.*, 150–128, 129 N. W. 817.

The fact that a juror is the client of an attorney engaged in the cause which is made the ground of challenge under this section, is not a ground of challenge in a criminal case under code § 5360. *State v. Carter*, 121–135, 96 N. W. 710.

It is not a ground of challenge that a juror was formerly the client of an attorney in the case and is still indebted to him for services rendered. *Jones v. Ford*, 154–549, 134 N. W. 569.

In an examination of jurors relative to their competency, questions may be asked as to facts the existence of which would not be ground for challenge. *Foley v. Cudahy Packing Co.*, 119–246, 93 N. W. 284.

The fact that one called as a juror has formed an opinion in the case by reading in the newspapers accounts of the facts involved, does not disqualify him if it appears from his answers to the questions that he can render a fair and impartial verdict on the evidence. *Croft v. Chicago, R. I. & P. R. Co.*, 134–411, 109 N. W. 723.

A challenge to a juror for cause cannot be made the basis of an exception to be heard on appeal unless the challenge states the ground thereof. *Payne v. Waterloo, C. R. & N. R. Co.*, 153–445, 133 N. W. 781.

In a proceeding for severance of territory from a city, resident taxpayers are subject to challenge as jurors, if their taxes would be affected by the issue. *Johnson v. Waterloo*, 140–670, 119 N. W. 70.

The determination of the competency of a juror is largely within the discretion of the trial judge. *In re Goldthorp's Estate*, 115–430, 88 N. W. 944.

Questions as to the competency of jurors are to be determined by the court in the exercise of a sound discretion, and where the court might reasonably find from the answers of the juror touching his qualifications that he had no feeling of any kind that would prevent him from rendering a fair and impartial verdict, held that the challenge was properly overruled. *Dale v. Colfax Consolidated Coal Co.*, 131–67, 107 N. W. 1096.

The challenge on the ground that the juror shows such a state of mind as will preclude him from rendering a just verdict involves a conclusion upon a fact question, and the decision of the court, in the exercise of reasonable discretion in the matter, will not be interfered with on appeal.

Wilson v. Wapello County, 129–77, 105 N. W. 363.

When the action is against the county, the fact that jurors are residents and taxpayers of the county will not disqualify them. The plaintiff in such an action has the right to a change of place of trial. *Ibid.*

In determining the competency of jurors, the court is vested with a large discretion which will not be interfered with except on a showing of a clear abuse. *In re Hannaher's Will*, 155–73, 135 N. W. 34.

The discretion of the trial court in passing upon a conflict in the evidence as to whether prejudice exists on the part of a juror will not be interfered with on appeal. *Mitchell v. Des Moines City R. Co.*, 141 N. W. 43.

Under the showing in a particular case, held that there was no abuse of discretion in overruling a challenge. *Moore v. Fryman*, 154–534, 134 N. W. 534.

SEC. 3700. Procedure after jury is sworn—order of evidence.

The question as to who has the right to open and close is properly a matter of practice, and will not be reviewed unless it appears that an injustice has been done by the trial court in its ruling on the matter. *Oxtoby v. Henley*, 112–697, 84 N. W. 942.

The defendant introducing an affirmative defense has the burden of establishing it. *Ibid.*

The order of argument and the conduct thereof, while prescribed by statute in a general way, are nevertheless peculiarly within the sound discretion of the court, and in the absence of a showing of clear abuse of discretion and of ground for believing that prejudice resulted, no reversal should be had on account of failure to follow the statute. *Breiner v. Nugent*, 136–322, 111 N. W. 446.

SEC. 3701. Argument—opening and closing.

Under the language of this section, differing from that of the corresponding section of the code of '73, the right to open and close is to be determined after the introduction of the evidence. *Schoonover v. Osborne*, 117–427, 90 N. W. 844.

The right to open and close depends upon the burden under the issues, as appearing by the evidence, and not necessarily as determined by the pleading. *Shaffer v. Des Moines Coal & Hay Co.*, 122–233, 98 N. W. 111.

The court may not be able to determine, until after all the evidence has been introduced, whether the burden has been so shifted as to change the order of argument or not, and the proper time to ask for an order as to the opening and closing in the argument to the jury is at the conclusion of all the testimony. *Wilson v. Big Joe Block Coal Co.*, 142–521, 119 N. W. 604.

The right to open and close the argument should be determined by the state of the evidence. *O'Connor v. Kleiman*, 143–435, 121 N. W. 1088.

The defendant cannot by mere ingenuity in pleading, as for instance by putting his answer in the form of an affirmative allegation rather than a specific denial, deprive the plaintiff of the right to open and close, if the substantial effect of the pleading is to controvert the truth of the essential averments of the petition. *Farmer v. Norton*, 129–88, 105 N. W. 371.

But the question as to who has the burden is one of procedure, and the ruling of the court with reference thereto will not be interfered with on appeal unless an abuse of discretion is shown which has been prejudicial to the appellant. Prejudice is not to be presumed from an error in such a ruling, but must be made to appear. *Ibid.*

The absence of the judge from the court room beyond the hearing of the proceedings, even during the arguments in the case, when not shown affirmatively to have been without prejudice, is in itself error alone sufficient to warrant a reversal of the judgment. *State v. Carnagy*, 106–483, 76 N. W. 805.

But objection on this ground may be waived by consent in advance, even in a criminal case. *State v. Hammer*, 116–284, 89 N. W. 1083.

See also notes to code § 3755 in this supplement.

In the absence of affirmative showing of prejudice, the ruling of the trial court in determining the order of argument to the jury will not be reviewed. *Fenton v. Iowa State Trav. Men's Assn.*, 139–166, 117 N. W. 251.

SEC. 3705. **Instructions—to be in writing.** That section thirty-seven hundred and five of the code be and the same is hereby repealed and the following enacted in lieu thereof:[1]

Either party may request instructions to the jury on points of law which shall be given or refused by the court. All instructions asked and the

charge of the court shall be in writing. [35 G. A., ch. 289, §§ 1, 2.] [C. '73, § 2784; R. § 3051.]

[1Substitute concludes with § 3705-c. EDITOR.]

In writing: A direction to the jury not to consider certain evidence except for a specific purpose need not be in writing. *State v. Hogan*, 115–455, 88 N. W. 1074.

The requirement that instructions must be in writing relates to the statement of the facts and the law governing the case as given to the jury when the case is ready for final submission. It is not necessary to reduce to writing admonitions given to the jury by the court during the course of the trial to the effect that they are to disregard evidence which has been improperly admitted. *State v. Smith*, 132–645, 109 N. W. 115; *Krause v. Redman*, 134–629, 112 N. W. 91.

Remarks made by the court in the presence of the jury with reference to the sufficiency of evidence may constitute error as fully as though embodied in an instruction. *Coldren v. Le Gore*, 118–212, 91 N. W. 1066.

What the court says by way of ruling on an objection need not be reduced to writing. *Frick v. Kabaker*, 116–494, 90 N. W. 498.

Where a ruling is made in the presence of the jury and just before the giving of instructions, excluding certain testimony, it is not error to fail to specifically instruct that such testimony is not to be considered. *State v. Foster*, 136–527, 114 N. W. 36.

The instructions which must be in writing are only such as are expressions of law applicable to the case, which the jury is bound to apply in order to render a verdict to establish the rights of the parties in accordance with the facts proven. A general cautionary direction to the jurors as to their duty is not an instruction which is required to be in writing. *Burton v. Neill*, 140–141, 118 N. W. 302

Directions given by the court to the jury on returning a special verdict, calling attention to the failure of the jury to comply with the court's instructions, do not constitute an instruction which is required to be in writing. *Erwin v. Fillenwarth*, 137 N. W. 502.

No distinction between instructions is to be made on the ground that some of them are in typewriting and others are written. *Kinyon v. Chicago & N. W. R. Co.*, 118–349, 92 N. W. 40.

Jurors are apt to attach great importance to statements with reference to the testimony made by the court during the trial of the case, and such statements frequently have the same weight and are as potent in influence as though embodied in a written instruction. *In re Will of Knox*, 123–24, 98 N. W. 468.

Signing: It is not required in a civil case that the judge shall sign the instructions, and even in cases where the statute provides for their being signed, such requirement is directory only. *Halley v. Tichenor*, 120–164, 94 N. W. 472.

Numbering: Failure to number the instructions is not a ground for a new trial. *Long v. Davis*, 136–734, 114 N. W. 197.

Duty to instruct: Without regard to any requests for instructions by either party, the court should give to the jury the law of the case, and a failure to do so will be reversible error. *Overhouser v. American Cereal Co.*, 128–580, 105 N. W. 113.

A party is entitled to instructions correctly covering the theory of the case presented by the pleadings and the evidence upon which it was tried, and if the court fails to so instruct there is reversible error. *Burroughs v. Butler-Ryan Co.*, 121–215, 96 N. W. 750.

It is not to be presumed that the jurors are familiar with the principles of the law and may be left to apply them without instruction by the court. *Snyder v. Fidler*, 125–378, 101 N. W. 130.

Propositions relating simply to matters to be considered in weighing evidence which would occur to every sensible and reasonable man without instruction need not be stated to the jury. *Stanley v. Cedar Rapids & M. C. R. Co.*, 119–526, 93 N. W. 489.

While words and terms in ordinary use need not be defined in instructions, yet in all cases where words or terms are used in a legal or technical sense differing from that which the common use of the words imports, it is proper and in many cases necessary to give definitive or explanatory instructions. *Overhouser v. American Cereal Co.*, 128–580, 105 N. W. 113.

The trial court is bound to see that in every case which goes to the jury they have clear and intelligent notions of the point to be determined and to this end should give necessary and proper instructions upon all the issues joined whether requested by counsel or not, and failure to instruct with reasonable fullness as to the issues is prejudicial error. *Capital City Brick & Pipe Co. v. Des Moines*, 136–243, 113 N. W. 835.

Jurors are presumed to be familiar with the English language and ordinarily the court is not obliged to define phrases having a well-understood meaning and in common use. *State v. Richardson*, 137–591, 115 N. W. 220.

It is the duty of the court to intelligently instruct the jury as to just what it

is to decide and to give the law applicable to the case under consideration; but if the instructions as a whole fairly present the issues to the jury there is no ground of complaint. *Blades v. Des Moines City R. Co.*, 146–580, 123 N. W. 1057.

It is not the province of the court to announce abstract principles of law but only to state the law to the jury correctly in such manner as will guide them in the consideration of the facts and in the determination of the matters in controversy. *Mitchell v. Des Moines City R. Co.*, 141 N. W. 43.

Cautionary instructions: An instruction directing the jury in their deliberations not to refer to, discuss or consider anything in connection with the case except the evidence received, and to exclude all extraneous matters, statements and suggestions, is proper. *State v. Butts*, 107–653, 78 N. W. 687.

It is not error to refuse to caution the jury to ignore a matter not referred to in the pleading nor involved in the proof. An instruction to the jury limiting its consideration to the evidence introduced is generally sufficient in that case. *Cronk v. Wabash R. Co.*, 123–349, 98 N. W. 884.

It is not error to instruct the jury, after they have been for a long time in deliberation without agreement, that each should examine the issues submitted to them with candor and a proper regard and deference to the opinion of the others and avoid a spirit of controversy, and that it is desirable for them to return a verdict. *State v. Richardson*, 137–591, 115 N. W. 220.

After the jury has been in deliberation for some time without being able to agree, the court is justified in giving a cautionary instruction as to their duty of further deliberation for the purpose of reaching an agreement if possible. *Burton v. Neill*, 140–141, 118 N. W. 302.

An instruction to the jury to arrive at its verdict solely on the evidence introduced, being governed by the instructions of the court, and to permit nothing else to influence or prejudice its action, is not open to the objection that it improperly excludes from the consideration of the jury the arguments of counsel. *Johnston v. Cedar Rapids & M. C. R. Co.*, 141–114, 119 N. W. 286.

It is not error to instruct the jury that in construing the testimony and arriving at the truth of the controversy they are not required to disregard their own experience and judgment as men. *Youtzy v. Cedar Rapids*, 150–53, 129 N. W. 351.

In directing the jury to retire for further deliberation after being interrogated as to whether a verdict had been arrived at, held not error for the court to say that they ought to be able to agree and that it was desirable for them to do so. *Parks v. Laurens*, 153–567, 133 N. W. 1054.

Where the trial judge becomes convinced that jurors are working to no purpose, that they have forgotten their function or are failing to give the case proper consideration, it is his duty to set them right and by proper instructions bring them to a realizing sense of their duties and responsibilities. And an instruction which thus calls the jurors' attention to their duty is not erroneous. *Armstrong v. James*, 155–562, 136 N. W. 686.

In weighing the testimony the jurors may use the knowledge and experience which they possess in common with mankind in general; but it is error to instruct that in determining a question of fact the jury may consider their own observations and experiences, if any, with relation to the subject matter involved in the issues being tried. *Downing v. Farmers' Mut. F. Ins. Co.*, 157– —, 138 N. W. 917.

Upon request the jury should be instructed that the case is to be tried upon evidence given and not upon information that one or more of the jurors may have outside of the record. *Ibid*

It is error to instruct the jury that they are not bound down and circumscribed by those rules which become embedded in the mind of the educated lawyer, if such rules relate to the ascertainment of the truth from the evidence adduced. *State v. Engstrom*, 145–205, 123 N. W. 948.

It is not error to instruct that jurors have not the right to substitute their own judgment for that of the testator in will contests. *In re Martin's Will*, 142 N. W. 74.

Instructions should be asked: Error in an instruction given may be ground for reversal, even though the appellant has not asked an instruction on the subject in proper form. It is only where the instruction given is complained of as not being sufficiently specific that the party complaining must show that more specific instructions were asked by him. *State v. Goering*, 106–636, 77 N. W. 327.

The court is not required to give instructions asked in their exact language, although as asked they are unobjectionable. It is not error to cover such instructions in a different form. *Strand v. Grinnell Automobile Garage Co.*, 136–68, 113 N. W. 488.

Even though an instruction asked does not fully and properly state the law, yet if it refers to a subject on which it is proper to instruct the jury, it may be error to fail to give instructions on that subject. *Hanson v. Kline*, 136–101, 113 N. W. 504.

Where the instruction is correct as given, though not as explicit as might be desired, error cannot be predicated thereon in the absence of a request for more specific instructions. *State v. House*, 108–68, 78

N. W. 859; *State v. Atkins*, 122–161, 97 N. W. 996; *Hill v. Glenwood*, 124–479, 100 N. W. 522.

Where the instructions are good as far as they go, it is not error to fail to instruct on other matters as to which no instructions are asked. *Keyes v. Cedar Falls*, 107–509, 78 N. W. 227.

A party cannot complain of failure of the court to give instructions as to a specific question in the absence of request for an instruction on the subject. *Murphy v. Hiltibridle*, 132–114, 109 N. W. 471.

Where an instruction is right as far as it goes, and the complaining party has not asked additional instructions, he cannot complain of the failure to extend the instruction to cover particular matters involved in the evidence. *Williams v. Mineral City Park Association*, 128–32, 102 N. W. 783.

Where the charge as given is reasonably full, complete and fair, and is correct as far as it goes, the appellant cannot complain of failure to give fuller instructions as to particular matters with reference to which no instructions have been asked. *Elliott v. Capital City State Bank*, 149–309, 128 N. W. 369.

In the absence of a request, failure to give instructions relating to burden of proof is not erroneous. *Harvey v. Clarinda*, 111–528, 82 N. W. 994.

In the absence of a request for instructions, it is not error for the court to fail to instruct with reference to preponderance of the evidence. *Osborne v. Ringland*, 122–329, 98 N. W. 116.

The jury may be depended upon without instructions to apply the ordinary rules as to the weight and credit to be given to the testimony of witnesses, and in the absence of any request for special instructions on the subject or any state of affairs rendering it peculiarly important that such instructions be given, the judgment will not be reversed on appeal for failure to give such instructions. *State v. Duffy*, 124–705, 100 N. W. 796.

A party does not waive objection to insufficiency of the evidence to sustain an issue by asking an instruction relating to that issue. *Boyer v. Commercial Bldg. Inv. Co.*, 110–491, 81 N. W. 720.

Where evidence has been erroneously admitted and is afterwards withdrawn, the complaining party may properly ask an instruction that the jury shall not consider the evidence thus withdrawn, but, failing to do so, it does not necessarily constitute error to fail to give such an instruction. *State v. McKnight*, 119–79, 93 N. W. 63.

Where evidence, in its general nature inadmissible, is admitted and received for a special purpose, the court, on the request of a party, should instruct the jury as to the purpose for which the evidence may be considered, but it is not error to fail to give such an instruction where none is asked. *Bennett v. Marion*, 119–473, 93 N. W. 558; *Kircher v. Larchwood*, 120–578, 95 N. W. 184.

Where evidence is properly admitted only for a specific purpose, and is not to be considered for another purpose, an instruction allowing the jury to consider it for the improper purpose will be prejudicial error, although no instruction as to the purpose for which it may properly be used is asked. *Lundvick v. Westchester Fire Ins. Co.*, 128–376, 104 N. W. 429.

As a rule instructions offered by counsel are not so framed that the court is justified in giving them literally as asked, but if the main thought sought to be expressed contains a pertinent legal principle, which is not already fully covered by other instructions given, the court should embody it in proper words in its own charge. *Kinyon v. Chicago & N. W. R. Co.*, 118–349, 92 N. W. 40.

The court may adopt the language of counsel embodied in requests for instructions, but it is a better practice to embody such requests so far as proper in its own charge. *State v. Busse*, 127–318, 100 N. W. 536.

In the absence of a request, the court is not bound to specifically instruct with reference to the bearing of the different items of evidence adduced. *Mitchell v. Chicago, R. I. & P. R. Co.*, 138–283, 114 N. W. 622.

Ordinarily the supreme court will not reverse for failure to give instructions not asked unless it be satisfied that such failure has deprived the appellant of a fair trial. *State v. Brandenberger*, 151–197, 130 N. W. 1065.

The party asking instructions should present them to the court or otherwise bring them to the court's attention. *State v. Klute*, 140 N. W. 864.

The provision as to marking instructions as "given" or "refused" or "modified" is intended to be kept as a matter of record and not as a matter of information to the jury, and it is directory only, so that failure to strictly observe such provision is not prejudicial error. *Farrell v. Citizen's Light & R. Co.*, 137–309, 114 N. W. 1063.

Refusal of proper instructions: It is error to refuse a correct instruction as to material matter not covered by the instructions given. *Botkin v. Cassady*, 106–334, 76 N. W. 722.

It is not error to refuse instructions asked where the subject is properly covered by instructions given by the court. *Belken v. Iowa Falls*, 122–430, 98 N. W. 296.

It is not error to refuse an instruction as to a matter which is sufficiently covered by instructions given. *State v. Wangler*, 151–555, 132 N. W 22; *Boerner-Fry Co. v. Mucci*, 138 N. W. 866.

The trial court is not bound to submit every requested instruction which may be unobjectionable as an abstract legal proposition, especially where the point has been covered in the charge, or where the giving of the requested instruction would tend to mislead or confuse the jury. *Gray v. Chicago, R. I. & P. R. Co.*, 139 N. W. 934.

Some particular phase of the case should not be given undue prominence in the instructions. The better method is for the court to state in brief and clear terms the general principles of law applicable to the issues being tried and leave the jury to apply the law so given to the facts which are found to be established by the evidence. *Ibid.*

Requested instructions, though abstractly correct, may properly be refused where they are liable to mislead the jury as to the rules that should guide them in the consideration of the case. *Carpenter v. Campbell Automobile Co.*, 140 N. W. 225.

Error of which party cannot complain: A party cannot complain of an instruction given which in substance and effect follows an instruction asked by him, even though erroneous. *Bonnot Co. v. Newman*, 109–580, 80 N. W. 655.

When an issue is clearly recognized by a party as being involved in the trial, and he not only makes no objection thereto, but affirmatively consents or requests that it be passed upon, he cannot be heard afterward to complain of the action of the court in submitting such issue to the jury. *Fenner v. Crips*, 109–455, 80 N. W. 526.

A party cannot complain of the action of the court in submitting to the jury an issue on which such party has himself asked instructions. *Benton County Sav. Bank v. Boddicker*, 117–407, 90 N. W. 822.

A party cannot complain of an instruction which in the respect complained of does not go beyond instructions which he himself has asked. *Padelford v. Eagle Grove*, 117–616, 91 N. W. 899.

The appellant cannot complain of erroneous language in the instructions taken from those asked by him. *Bryce v. Burlington, C. R. & N. R. Co.*, 128–483, 104 N. W. 483.

A party cannot complain of the submission to the jury of an issue on which the case has been tried and as to which the party has himself asked instructions. *Seibert v. Germania Fire Ins. Co.*, 132–58, 106 N. W. 507.

A party cannot on appeal complain that an issue was erroneously submitted to the jury on the ground that there was no evidence to support it, when he has himself asked instructions with reference to such issue. *Spicer v. Webster City*, 118–561, 92 N. W. 884.

One who has in asking instructions suggested the theory on which the case should be presented to the jury cannot complain that the court in the instructions given followed such theory. *In re Kah's Estate*, 136–116, 113 N. W. 563.

A judgment will not be reversed for error of law in an instruction given at the appellant's request. *Grosjean v. Chicago, M. & St. P. R. Co.*, 146–17, 123 N. W. 162.

The appellant cannot complain that in instructing the jury the court adopted the language of his pleadings in stating the issues. *Stephens v. Brill*, 140 N. W. 809.

Duty to state the issues: While the issues in the case should be clearly defined by the court, it is not necessary that they be grouped and stated in separate paragraphs of the charge devoted to that purpose alone. It is enough if the instructions as a whole point out the entire issues of the case. *Meyer v. Boepple Button Co.*, 112–51, 83 N. W. 809.

In stating the issues the court should confine itself to a concise statement of the material issues; but although the allegations of the pleadings are unnecessarily set out, yet if the court by a subsequent brief statement of the matters which the jury is to consider calls attention to the material issues there is no prejudicial error. *Schaefer v. Anchor Mutual Fire Ins. Co.*, 133–205, 100 N. W. 857, 110 N. W. 470.

The danger of confusing the jury by a too extended and literal recitation of all the matters with which counsel frequently burden their pleadings is to be discouraged and avoided. *Shebek v. National Cracker Co.*, 120–414, 94 N. W. 930.

An instruction which eliminates a defense of the statute of limitations relied upon by the defendant, and permits the jury to find a verdict for plaintiff without reference to that question, is erroneous. *Faust v. Hosford*, 119–97, 93 N. W. 58.

The court should instruct with reference to plaintiff's theory of the case if under that theory he is entitled to recover on proof of the essential facts. *Kempe v. Bennett*, 134–247, 111 N. W. 926.

The failure of the court to submit an issue raised by the answer is prejudicial error. *Steele v. Crabtree*, 130–313, 106 N. W. 753.

Where a case has been tried without objection on the theory that an issue has been raised by a pleading not properly filed, the court may properly submit such issue to the jury. *Marengo Savings Bank v. Kent*, 135–386, 112 N. W. 767.

It is error in stating the issues to charge the jury that plaintiff is required to establish all the material allegations of his petition. Such an instruction leaves it to the jury to determine for themselves what allegations of the petition are material and imposes upon the plaintiff the burden of proving allegations which, while they may be material, are not necessarily es-

sential to the plaintiff's right of recovery. *Williams v. Iowa Central R. Co.*, 121–270, 96 N. W. 774.

Failure to state one of the issues in the opening statement will not constitute prejudicial error where such issue is subsequently submitted for the determination of the jury. *German Savings Bank v. Fritz*, 135–44, 109 N. W. 1008.

Error in stating the issues so as to include an issue not proper for submission to the jury may be cured by subsequent specific instructions to the jury as to the issues to be determined. *Bryce v. Burlington, C. R. & N. R. Co.*, 128–483, 104 N. W. 483; *McGovern v. Interurban R. Co.*, 136–13, 111 N. W. 412.

Error in stating the claims of the plaintiff may be cured by subsequent instructions expressly stating that damages are not to be allowed on account of one of the claims of the plaintiff included in the general statement of the issues. *Hollingworth v. Fort Dodge*, 125–627, 101 N. W. 455.

While it may be error in some cases to instruct that the burden is upon the plaintiff to establish all the material allegations of his petition, yet if in other instructions the jury is told what plaintiff is required to show in order to make out a case the error may be cured. *German Ins. Co. v. Chicago & N. W. R. Co.*, 128–386, 104 N. W. 361.

Error relating to an issue which is subsequently withdrawn from the jury will not be ground for reversal. *Howard v. Lamoni*, 124–348, 100 N. W. 62.

It is not error to fail to submit to the jury an issue which has been withdrawn. *German Ins. Co. v. Chicago & N. W. R. Co.*, 128–386, 104 N. W. 361.

The court may properly disregard the issues made in the pleadings and instruct with reference to the issues on which evidence has been introduced by both sides. *Hanson v. Kline*, 136–101, 113 N. W. 504.

It is not error to fail to give a formal statement of the issues, if the court directs the jury with reference to the facts necessary to be found to justify a recovery and states what will defeat a recovery. *Kenny v. Bankers Accident Ins. Co.*, 136–140, 113 N. W. 566.

The court is required to state to the jury all the issues joined by the pleadings upon which any testimony has been offered, and failure to do so is not waived by the omission to ask or formulate an instruction thereon. *Wise v. Outtrim*, 139–192, 117 N. W. 264.

Where the instructions as a whole fairly advise the jury as to the exact matters to be tried, a failure to specifically state what issues are material to a determination of the case will not constitute reversible error. *Ottoway v. Milroy*, 144–631, 123 N. W. 467.

Reference to pleadings: The court should determine, from an examination of the pleadings, what the issues are and so state them to the jury as to be readily comprehended. The setting out of the pleadings in lieu of such statement will not be tolerated unless manifestly without prejudice. *Swanson v. Allen*, 108–419, 79 N. W. 132.

While it has been held erroneous to refer the jury to the pleadings for the issues, it has never been held that the trial court might not set forth the issues in the manner in which they are stated in the pleadings. *Ft. Madison v. Moore*, 109–476, 80 N. W. 527.

It is erroneous to copy into the instructions at length the pleadings in the case when they present issues which it is not proper to submit to the jury. In such case the court should state in its own language the real issues which are submitted to the jury. *West v. Averill Groc. Co.*, 109–488, 80 N. W. 555.

Where the court failed in stating the issues to mention some of the grounds of negligence alleged and relied on by plaintiff, held that there was error which was not cured by reference to the particulars of negligence charged in the petition. *Hart v. Cedar Rapids & M. C. R. Co.*, 109–631, 80 N. W. 662.

Where the petition was very short and simple and charged the negligence for which the plaintiff sought to recover in such unambiguous language that the court could not well make the cause of action more intelligible or shorter by an independent statement, held that it was not error to recite the pleading in the instructions. *Graybill v. Chicago, M. & St. P. R. Co.*, 112–738, 84 N. W. 946.

An instruction in a particular case which, while not a copy of the pleadings, substantially followed the pleadings without pointing out definitely the questions to be determined by the jury, held erroneous. *Erb v. German-American Ins. Co.*, 112–357, 83 N. W. 1053.

The court should state the issues to the jury without copying the pleadings in full, but as a rule the supreme court will not reverse for such improper practice, if in other parts of the charge the real issues are distinctly stated so that no prejudice has resulted. *Welch v. Union Cent. L. Ins. Co.*, 117–394, 90 N. W. 828.

Even when the parties consent that the court may refer the jury to the pleadings for the statement of the issues in a case, it is of doubtful propriety for the court to compel the jury to search out and determine the issue they are to decide. *Trumble v. Happy*, 114–624, 87 N. W. 678.

It is not proper for the court, in stating the issues, to use copies of the pleadings and read them in *haec verba* to the jury, but a party who has consented to such a course of proceeding cannot be heard to complain thereof. *De Wulf v. Dix*, 110–553, 81 N. W. 779.

It is not improper for the court to make use of the pleadings in stating the issues where the parties have mutually consented thereto. *Oxford Junction Savings Bank v. Cook*, 134–185, 111 N. W. 805.

Where the pleadings are clear and concise and state the exact issues, and counsel agree that the court may make use of them in stating the issues to the jury, there is no error in doing so. *Dean v. Carpenter*, 134–275, 111 N. W. 815.

While it is not good practice to copy the pleadings into the instructions in stating the issues, such form of statement will not constitute prejudicial error where there is nothing in the case to cause such form of statement to result in confusion to the jury. *German Ins. Co. v. Chicago & N. W. R. Co.*, 128–386, 104 N. W. 361.

It is not reversible error to substantially copy the pleadings in stating the issues if the court in other portions of the charge clearly states the exact matters in dispute. *Livingston v. Stevens*, 122–62, 94 N. W. 925.

Where the issues are simple and the pleadings are concise, it is not prejudicial for the court to state the issues in the language of the pleadings. *McDivitt v. Des Moines City R. Co.*, 141–689, 118 N. W. 459.

Where the pleadings contain a clear statement of the issues, so that when copied they intelligently present the very matters to be tried, there is no error in copying them in stating the issues, although as a general rule it is better for the court to state the exact matters to be tried in its own language, omitting all extraneous matters and especially taking from the case all issues which have been withdrawn. *Canfield v. Chicago, R. I. & P. R. Co.*, 142–658, 121 N. W. 186.

The issues should be clearly stated by the trial court instead of copying the pleadings as a part of the instructions. *Black v. Miller*, 138 N. W. 535.

Amount of recovery: In an action on account consisting of several items, it is error to instruct that if plaintiff is entitled to recover he should be allowed a sum not in excess of the aggregate amount claimed, as such instruction permits the jury to disallow some items and award more than is claimed on others. *Miller v. Armstrong*, 123–86, 98 N. W. 561; *Baker v. Oughton*, 130–35, 106 N. W. 272.

While the jury should be limited in an action for personal injuries to a recovery of an amount not exceeding the amount claimed in the petition, it may constitute error to so instruct as to indicate to the jury that a verdict for the entire amount claimed would be proper. *McGovern v. Interurban R. Co.*, 136–13, 111 N. W. 412.

It is not error to assume that the cause of action has been established in stating the measure of damages, where the court has already instructed the jury as to what they must find in order to justify a verdict for the plaintiff. *Ludwig v. Heyer*, 136–196, 113 N. W. 767.

It is error without prejudice to refuse an instruction as to plaintiff's measure of damages where the jury on the issue of defendant's liability finds for defendant. *McMahon v. Iowa Ice Co.*, 137–368, 114 N. W. 203.

Issues not raised: It is error to instruct on issues not presented by the pleadings even though evidence has been introduced without objection which presents other issues. *Eller v. Loomis*, 106–276, 76 N. W. 686.

It is erroneous to instruct on an issue not raised by the pleadings, and on which no evidence has been introduced. *Duncan v. Gray*, 108–599, 79 N. W. 362; *Blackman v. Kessler*, 110–140, 81 N. W. 185; *Anderson v. Roberts*, 112–749, 84 N. W. 928; *Helm v. Loveland*, 136–504, 113 N. W. 1082.

It is error to instruct on matters not within the issues and in respect of which there has been no attempt to make proof. *Albertson v. Lewis*, 132–243, 109 N. W. 705.

The instructions must be pertinent to the issues and the evidence. *Armstrong v. Mutual Life Ins. Co.*, 121–362, 96 N. W. 954.

It is improper to submit to the jury in an action for personal injuries resulting from negligence, charges of negligence which are not made in the pleadings. *Beard v. Guild*, 107–476, 78 N. W. 201.

It is error to instruct with reference to an issue not raised by the pleadings. Therefore, held that where plaintiff sued a railroad company for injury caused to him as a passenger by defendant's negligence, it was error to submit the question whether he, as a trespasser, could recover against the railroad company for gross negligence. *Fitzgibbon v. Chicago & N. W. R. Co.*, 108–614, 79 N. W. 477.

An instruction on the theory that an issue is in the case which is not in fact tendered by the pleadings nor otherwise properly presented, is ground for new trial. *Hydinger v. Chicago, B. & Q. R. Co.*, 126–222, 101 N. W. 746.

It is error to submit to the finding of the jury matters which are conceded, or concerning which there is no controversy in the evidence. *Williams v. Iowa Central R. Co.*, 121–270, 96 N. W. 774; *Garvick v. Burlington, C. R. & N. R. Co.*, 124–691, 100 N. W. 498.

It is not error to fail to submit to the jury a question as to which the evidence

is undisputed. *Mitchell v. Union Terminal R. Co.*, 122–237, 97 N. W. 1112.

An instruction which is correct as an abstract proposition will be presumed to have been given upon proper occasion. *State v. Wilson*, 124–264, 99 N. W. 1060.

It is proper to submit issues not raised by the pleadings when consent thereto or acquiescence therein has been established by failure to object to the introduction of evidence bearing thereon or in some other manner. *McLeod v. Thompson*, 138–304, 115 N. W. 1105.

Where the court specifically sets out in its statement of the issues those which the jury are to consider and omits in this statement issues presented by the pleadings which are not proper to be submitted under the evidence, it commits no error in failing to withdraw such omitted issues from the jurors' consideration or to specifically direct the jury that no recovery can be had on such issues. *Latman v. Douglas*, 149–699, 127 N. W. 661.

Where the jury is specifically instructed as to what issues they are to determine, a statement of issues presented by the pleadings which are not thus referred to will not constitute prejudicial error. *Vernon v. Iowa State Traveling Men's Assn.*, 157– —, 138 N. W. 696.

It is not proper to submit to the jury an issue not raised by the pleadings. *O'Neil v. Cardina*, 140 N. W. 196.

Error without prejudice: The submission to the jury of an issue which should have been decided as a matter of law is error without prejudice where the finding of the jury is such as the court should have made. *Mace v. Boedker*, 127–721, 104 N. W. 475.

Error in submitting to the jury the issue as to undue influence in the execution of a will is without prejudice where there is an express finding supported by the evidence that the testator lacked mental capacity to make the will. *In re Will of Selleck*, 125–678, 101 N. W. 453.

Where the submission of an issue not raised by the pleadings does not tend to the prejudice of the party complaining, the error will not be ground for reversal on appeal. *Stephens v. Brill*, 140 N. W. 809.

Instructions not supported by evidence: It is error to submit to the jury a material issue of fact concerning which there is no evidence. *Podhaisky v. Cedar Rapids*, 106–543, 76 N. W. 847; *State v. Swallum*, 111–37, 82 N. W. 439; *Olmstead v. Hoy*, 112–349, 83 N. W. 1056; *Erb v. German-American Ins. Co.*, 112–357, 83 N. W. 1053; *Anderson v. Roberts*, 112–749, 84 N. W. 928; *In re Will of Knox*, 123–24, 98 N. W. 468; *Belcher v. Ballou*, 124–507, 100 N. W 474; *State v. Smith*, 129–709, 106 N. W. 187.

It is clearly erroneous and presumptively prejudicial to submit an issue upon which there is no evidence. *Fothergill v. Fothergill*, 129–93, 105 N. W. 377; *State v. Fuller*, 125–212, 100 N. W. 1114.

The appropriateness of instructions cannot be determined by the pleadings alone; reference must be had also to the testimony introduced and to the issues actually contested upon the trial. *Struebing v. Stevenson*, 129–25, 105 N. W. 341

An issue in respect to which there is no evidence or upon which a recovery could not be had in any event should not be submitted to the jury. *Hanley v. Ft. Dodge Light & Power Co.*, 133–326, 107 N. W. 593, 110 N. W. 579.

An instruction submitting a question to the jury upon which there is no evidence may be so carefully guarded in language that no prejudice can have resulted from giving it. *Camp v. Chicago, G. W. R. Co.*, 124–238, 99 N. W. 735.

The court is not bound to submit to the jury every issue raised by the pleadings, but should submit only such issues as are for the determination of the jury under the evidence. *Lush v. Parkersburg*, 127–701, 104 N. W. 336.

It is not error to fail to submit to the jury an issue as to which there is no evidence. *Frank v. Berry*, 128–223, 103 N. W. 358; *Struebing v. Stevenson*, 129–25, 105 N. W. 341; *Brusseau v. Lower Brick Co.*, 133–245, 110 N. W. 577.

In an action to recover damages for personal injuries, it is error to direct the jury that they may allow damages for nursing where no evidence of the expense of nursing has been introduced. *Lamb v. Cedar Rapids*, 108–629, 79 N. W. 366.

Where under the evidence the plaintiff is entitled to recover on only one of two grounds of action set up in his petition, it is error in stating the issues to a jury to recognize the other ground of recovery. *Tuffree v. Steward*, 109–600, 80 N. W. 681.

It is error to submit to the jury for determination allegations of negligence as to which there is no evidence Even though the evidence as to one of the grounds of negligence alleged is conclusive it will not be error without prejudice to submit other grounds as to which there is no evidence, for the jury may rest their findings on the ground not supported by the evidence. *Stevens v. Citizens' Gas & Elec. Co.*, 132–597, 109 N. W. 1090.

Where by agreement of parties instructions were orally given, held that it was not error to read the answer in the case, although it was claimed that there was no evidence in support thereof, it appearing that the court later in the charge called attention specially to the issues which had support in the testimony. *Frank v. Davenport*, 105–588, 75 N. W. 480

It is error to submit an issue as to which there is no evidence. *Morton v. Woods*, 154–728, 135 N. W. 400.

It is not reversible error to submit to the jury an issue as to the amount of damage to be allowed for injuries to certain property "if it be found that any such damages were shown," although there is no evidence as to the amount of such damage, it being presumed that the jury will not take account of any damage not shown by the evidence. *Scott v. O'Leary*, 157–—, 138 N. W. 512.

Construction of instruments: It is for the court to give the jury the meaning of a written contract upon the various hypotheses presented by the evidence. *Clement v. Drybread*, 108–701, 78 N. W. 235.

In an action for malicious prosecution it is error to leave it to the jury to determine from the pleadings in the former case what was alleged therein as the complaint against the defendant in that case. *Erb v. German-American Ins. Co.*, 112–357, 83 N. W. 1053.

Where the terms used in the contract are plain and unambiguous, omission to define such terms, in the absence of proper request, is not error. *Ware Cattle Co. v. Anderson*, 107–231, 77 N. W. 1026.

Where the intent and meaning of a written contract is plain and clear from an ordinary interpretation of the language used, the contract is to be construed by the court but not otherwise. *Schultz v. Ford*, 133–402, 109 N. W. 614.

The construction and interpretation of contracts is a question for the court and not for the jury. *Tubbs v. Mechanics' Ins. Co.*, 131–217, 108 N. W. 324.

Where an agreement is fully proved and is not ambiguous in terms, the court should declare its meaning and define the rights and obligations of the parties created thereby. *Johnson v. Carter*, 120–355, 94 N. W. 850.

Where the determination of the issues involves the construction of a city ordinance, it is for the court and not the jury to determine what will constitute a violation of such ordinance. *Union Scale Co. v. Iowa Machinery & Supply Co.*, 136–171, 113 N. W. 762.

As to questions of fact: It is erroneous to single out a portion of the evidence relied upon by plaintiff and say that such evidence will not justify a recovery. *Crowell v. McGoon*, 106–266, 76 N. W. 672.

It is not error to say to the jury that "evidence has been introduced tending to show" certain facts as to which there has in fact been some evidence introduced. *State v. Baughman*, 111–71, 82 N. W. 452.

An instruction which does not assume anything as to the disputed facts, but simply directs the jury as to the effect of certain facts if found, is not objectionable as an instruction upon the facts. *Owen v. Christensen*, 106–394, 76 N. W. 1003.

Where the issue in an action for personal injuries received by a servant in his employment was as to whether the injured person had assumed the risk of certain defects in the machinery, held that it was proper to make the defense dependent upon the proof of certain specific facts exactly as the evidence tended to show them, which were relied upon as evidence to show assumption of risk. *Shebeck v. National Cracker Co.*, 120–414, 94 N. W. 930.

Instructions must always be based on evidence, and when the jury is told that if they find certain things, then such and such a result must follow, there is no reason for saying that such an instruction is misleading because the words "from the evidence" or "as shown by the evidence" are omitted. *Stanley v. Cedar Rapids & M. C. R. Co.*, 119–526, 93 N. W. 489.

It is not proper to instruct the jury that certain facts, if found, would conclusively establish contributory negligence; the question of contributory negligence is for the determination of the jury. *Schulte v. Chicago, M. & St. P. R. Co.*, 124–191, 99 N. W. 714.

Where certain facts are relied on as tending to prove an ultimate fact which is for the jury, the court may say that such facts are properly to be considered in determining the ultimate fact, but it should not charge as matter of law that any one or more of them, if found, would establish the ultimate fact. *Clark v. Shannon & Mott Co.*, 117–645, 91 N. W. 923.

If, in a given state of facts, reasonable minds might reach different conclusions as to the ultimate fact established, the question as to the ultimate fact is for the jury. *Payne v. Fraternal Acc. Assn.*, 119–342, 93 N. W. 361.

Where the facts are undisputed and the inferences which may be drawn therefrom are such as that reasonable minds cannot differ with respect thereto, the trial court is justified in instructing the jury as to the effect of the testimony on a given point. *Hughes v. Iowa Cent. R. Co.*, 128–207, 103 N. W. 339.

Where there is a conflict in the evidence it is erroneous for the court to instruct the jury as to the facts. *Eller v. Loomis*, 106–276, 76 N. W. 686; *Selley v. American Lubricator Co.*, 119–591, 93 N. W. 590; *Brayton v. Boomer*, 131–28, 107 N. W. 1099.

It is not prejudicial error for the court to assume a fact about which there is no dispute. *State v. Cunningham*, 111–233, 82 N. W. 775; *State v. Evans*, 122–174, 97 N. W. 1008; *Miller v. Armstrong*, 123–86, 98 N. W. 561; *State v. Sparegrove*, 134–599, 112 N. W. 83.

It is not error to instruct the jury that by preponderance of evidence is meant that greater and superior testimony which rea-

sonably satisfies the minds of the jurors; but the use of such a form of expression is not to be commended. *Ball v. Marquis*, 122–665, 98 N. W. 496.

Under the practice in this state the court is restricted to a mere statement of the law without suggestion of opinion upon the facts, and the charge of the court should be entirely free from any suggestion as to the weight of the evidence. Reference to any particular fact or kind of evidence as being strong or entitled to great weight is error. *State v. Crofford*, 121–395, 96 N. W. 889.

Therefore, held that it was error to instruct the jury with reference to circumstantial evidence that "men may commit a perjury but a fact cannot." *Ibid.*

Where the evidence is in conflict the weight to be given to it is for the jury. *Hardwick v. Hardwick*, 130–230, 106 N. W. 639.

It is error for the court to single out a class of witnesses or of testimony and give the jury an opportunity to magnify its or their importance. *Simons v. Mason City & Ft. D. R. Co.*, 128–139, 103 N. W. 129.

It is error to submit the concrete facts tending to support the theory of one of the parties and fail to present in a similar way the concrete facts supporting the theory of the other. *Christy v. Des Moines City R. Co.*, 126–428, 102 N. W. 194; *McBride v. Des Moines City R. Co.*, 134–398, 109 N. W. 618.

It is not proper to instruct the jury with reference to an admission of the defendant in a criminal case that it is entitled to great weight. *State v. Willing*, 129–72, 105 N. W. 355.

The court alone determines the competency of witnesses, but their credibility and the weight which shall be given to their testimony is the exclusive province of the jury. *Madden v. Saylor Coal Co.*, 133–699, 111 N. W. 57.

It is error to throw discredit upon the testimony of experts testifying with reference to facts within their knowledge by observation. *Ibid.*

It is error for the trial judge to neutralize the effect of evidence by statements from the bench bearing on its credibility. *Ball v. Skinner*, 134–298, 111 N. W. 1022.

The court may instruct the jury that testimony with regard to verbal statements should be received with great caution. *Ellis v. Republic Oil Co.*, 133–11, 110 N. W. 20.

The court may properly instruct that expert testimony as to handwriting is of slight value as against the positive and unequivocal testimony of credible witnesses speaking of their personal knowledge *Ayrhart v. Wilhelmy*, 135–290, 112 N. W 782.

While it is not error to instruct the jury that expert evidence as to genuineness of signatures is entitled to less consideration than the positive evidence of credible witnesses speaking from personal knowledge, yet the court should not instruct the jury in general with reference to expert evidence that the jurors are not to substitute for their own conclusions upon the evidence the opinions of expert witnesses. Expert testimony is to be given consideration like all other testimony which the court allows to go to the jury, and accorded such weight as, in view of all the evidence of every kind and nature and its reasonableness and the apparent candor and competency of the witness, fairness demands. *Ball v. Skinner*, 134–298, 111 N. W. 1022.

It is improper for the court to emphasize the circumstances from which negligence may be inferred and omit any reference to other circumstances shown by the evidence tending to support the opposite inference *Christy v. Des Moines City R. Co.*, 126–428, 102 N. W. 194; *McBride v. Des Moines City R. Co.*, 134–398, 109 N. W. 618.

It is error for the court in referring to testimony to say that "some testimony has been introduced tending to show." Such reference has the effect of minimizing the importance of the testimony referred to. *State v. Rutledge*, 135–581, 113 N. W. 461.

While it is not proper in general to instruct as to the relative weight of different items of evidence, it is proper not only to tell the jury for what purposes evidence which has been admitted may be considered, but also to explain the rules of law governing the relative value of different classes of evidence. *In re Kah's Estate*. 136–116, 113 N. W. 563.

It is not usually advisable for the trial court in framing its instructions to make specific mention of the evidence bearing upon any particular issue. *Kelly v. Chicago, R. I. & P. R. Co.*, 138–273, 114 N. W. 536.

An instruction may be erroneous in giving undue prominence to a single evidentiary fact and thereby tending to mislead the jury as to the force and effect which should be given to such fact. *Doyle v. Burns*, 138–439, 114 N. W. 1.

The practice of embodying in an instruction a recitation of the facts on which a party relies is not to be encouraged. *Van Norman v. Modern Brotherhood of America*. 143–536, 121 N. W. 1080.

Construed together: Words in instructions are not to be considered with reference to their technical accuracy, but relatively, and that meaning is to be credited to them which such a consideration shows to have been intended. *In re Allison's Estate*, 104–130, 73 N. W. 489.

It is not usually safe in a complicated case to attempt to give all the law on all the branches of the case, and all questions

which may be involved, in one statement. The different questions involved may be discussed in separate instructions which will be construed together. *Phinney v. Illinois Cent. R. Co.*, 122–488, 98 N. W. 358; *State v. Sheets*, 127–73, 102 N. W. 415; *Mitchell v. Pinckney*, 127–696, 104 N. W. 286; *State v. Mitchell*, 130–697, 107 N. W. 804; *Breiner v. Nugent*, 136–322, 111 N. W. 446.

No one instruction may contain all the law applicable to the entire case, and for this reason all should be considered together in passing upon the issues, but this does not obviate the rule that one instruction may contain the law as applied to some hypothesis or given state of facts. *Swanson v. Allen*, 108–419, 79 N. W. 132.

Instructions should be taken together in determining whether error has been committed in giving any one of them. *Templin v. Boone*, 127–91, 102 N. W. 789; *Jensen v. Damm*, 127–555, 103 N. W. 798; *German Ins. Co. v. Chicago & N. W. R. Co.*, 128–386, 104 N. W. 361; *Huggard v. Glucose Sugar Ref. Co.*, 132–724, 109 N. W. 475.

Instructions should be construed together and if, when so construed, they announce correct principles, a verdict based thereon will not be disturbed, although considered singly they might be held erroneous. *Faust v. Hosford*, 119–97, 93 N. W. 58.

The fact that one instruction standing alone might be misleading will not require reversal if the instruction is sufficient when read with other instructions relating to the same subject. *Whittlesey v. Burlington, C R. & N. R. Co.*, 121–597, 90 N. W. 516, 97 N. W. 66.

Instructions are to be construed as a whole and if when so construed they are not misleading, and announce correct propositions of law, there will not be a reversal because a single paragraph deals with but part of the propositions presented. *Montrose Sav. Bank v. Claussen*, 137–73, 114 N. W. 547.

The instructions must be considered as a whole, and if when so considered it can be said that the jury was not misled, there will not be a reversal because of language in a single paragraph which standing alone might not be a correct statement of the law. *Hawkins v. Young*, 137–281, 114 N. W. 1041.

Where an instruction free from ambiguity is affirmatively erroneous the error is not cured by a contradiction contained in another instruction which is correct. *McDivitt v. Des Moines City R. Co.*, 141–689, 118 N. W. 459.

Where the entire charge, read as a whole, is clear and unmistakable in its meaning, the supreme court will not be justified in resorting to possible misunderstanding of a particular phrase. *State v. Baker*, 143–224, 121 N. W. 1028.

Instructions should be considered as a whole and those relating to the same subject matter should be read in connection with each other. *Lauer v. Banning*, 152–99, 131 N. W. 783.

In the light of the evidence: The instructions must be construed in the light of the evidence. *State Bank v. Young*, 140 N. W. 376.

Conflicting: Contradictory and conflicting instructions are almost uniformly held to be erroneous except in cases where the court can say there was no prejudice. *Ford v. Chicago, R. I. & P. R. Co.*, 106–85, 75 N. W. 650.

It is error to give instructions which are in conflict. *Gibson v. Burlington, C. R. & N. R. Co.*, 107–596, 78 N. W. 190; *Loomis v. Des Moines News Co.*, 110–515, 81 N. W. 790.

The giving of conflicting instructions is error if they are calculated to confuse the jury and present matters for determination which should not have been considered. *Beaver v. Porter*, 129–41, 105 N. W. 346.

Where the court in explaining circumstances entitling the plaintiff to recover for negligence omits one of the grounds of negligence presented under the issues as set forth in the instructions stating the issues, there is such prejudicial conflict in the instructions as to require a reversal. *Christy v. Des Moines City R. Co.*, 126–428. 102 N. W. 194.

Although the law on a particular question is correctly stated in one instruction, yet, if in another instruction the direction as to whether the jury shall find a verdict is made to depend on facts which do not include nor relate to such question, the instructions are in conflict and erroneous. *Quinn v. Chicago, R. I. & P. R. Co.*, 107–710, 77 N. W. 464.

In such case the latter instruction would tend, by giving undue prominence to one question, to withdraw the attention of the jury from the other question, and to nullify the effect of the former instruction. *Ibid.*

When conflicting instructions are given, one of which announces a correct and the other an incorrect rule, the case must be reversed, for there is no means of knowing which one the jury followed. *Kerr v. Topping*, 109–150, 80 N. W. 321.

Where an instruction can properly be so read as to be consistent with the other instructions, it will be assumed on appeal that it was given such construction by the jury. *State v. Seery*, 129–259, 105 N. W. 511.

Prejudicial error in the giving of one instruction is not cured by stating the

correct rule in another. *Rudd v. Dewey*, 121–454, 96 N. W. 973; *Thayer v. Smoky Hollow Coal Co.*, 121–121, 96 N. W. 718.

Where the instructions are irreconcilable in a material matter, the judgment should be reversed. *Latta v. Illinois Cent. R. Co.*, 151–244, 130 N. W. 1059.

Misleading: An instruction in an action to recover for personal injuries on account of negligence which makes the right to recover depend upon a collateral fact, omitting the necessary element of negligence on the part of defendant and the want of contributory negligence on the part of plaintiff, is erroneous. *Meyer v. Boepple Button Co.*, 112–51, 83 N. W. 809.

In a particular case held that an instruction relating to fraud should not have been confused by introducing into it reference to want of consideration. *Frick v. Kabaker*, 116–494, 90 N. W. 498.

Complicated instructions with reference to technical matters which are not readily brought within the comprehension of the jury should not be given. *Williams v. Iowa Central R. Co.*, 121–270, 96 N. W. 774.

Jurors are presumed to understand the English language and the meaning of words in common use, and if in view of such understanding an instruction is not misleading it will not be ground for reversal. *State v. Krug*, 136–231, 113 N. W. 822.

The action of the trial court in granting a new trial on account of error in an instruction tending to mislead the jury under the evidence will not be interfered with if the record indicates that the trial judge might reasonably have found that under the circumstances and conditions involved in the trial there was reason to believe that the jury was misled. *Doyle v. Burns*, 138–439, 114 N. W. 1.

While it is not advisable to give instructions in a stereotyped form which have no application to the issues in the case, it is not reversible error to do so if the instructions are not calculated to mislead the jury with reference to the case in which they are given. *Swisher v. Interurban R. Co.*, 151–384, 130 N. W. 404.

Where, by taking the instructions together, the jury could not have been misled, a failure to fully state a legal proposition in one instruction will not constitute reversible error. *State v. Wangler*, 151–555, 132 N. W. 22.

A correct statement of a rule of law having no application to the case will only be ground for reversal if it appears to have been calculated to mislead the jury. *McCaskey v. Ft. Dodge, D. M. & S. R. Co.*, 154–652, 135 N. W. 6.

Withdrawal or modification after given: Where after the case was submitted to the jury by the judge who tried it, he ceased to hold the term of court and turned the business of the court over to another judge of the same district, and at the time of doing so directed the succeeding judge to withdraw from the jury certain instructions which he had concluded were erroneous, and the second judge did so, held that the proceeding did not constitute error requiring a reversal. *Renner v. Thornburg*, 111–515, 82 N. W. 950.

Where, after the jury had been instructed and had retired, counsel for plaintiff called the attention of the court to what he thought to be an error in one of the instructions, and upon the attention of counsel for defendant being called to the matter, the latter consented that a modification should be given which was objected to by plaintiff, held that the error thus called to the attention of the court would not be a ground for reversal. *Mester v. Zaiser*, 143–623, 120 N. W. 466.

Mere verbal errors: A mere clerical error or error occurring by inadvertence in the giving of an instruction may constitute prejudicial error, where it appears that it was such as to be likely to mislead the jury. *Atkins v. Ellis*, 118–76, 91 N. W. 829.

Where instructions are in conflict or misleading by reason of a clerical error in one of the instructions, such error is ground for reversal. *Rich v. Moore*, 114–80, 86 N. W. 52.

Mere clerical omissions or verbal inaccuracies are not sufficient to constitute reversible error where it appears that no prejudice could have resulted to the complaining party. *Young v. People's Gas & Elec. Co.*, 128–290, 103 N. W. 788; *Bussell v. Ft. Dodge*, 126–308, 101 N. W. 1126; *State v. Sheets*, 127–73, 102 N. W. 415.

The inadvertent use of the word "defendant" where "plaintiff" was intended held not such error as to require reversal where it appears from the language of the instructions that the jury could not have been misled. *Reupke v. Stuhr & Son Grain Co.*, 126–632, 102 N. W. 509.

The use of the pronoun "his" instead of "her" in framing an instruction which was evidently a slip of the pen and not calculated to mislead a juror of average mental capacity, was held not to be ground for reversal. *State v. Steen*, 125–307, 101 N. W. 96.

A mere clerical mistake in an instruction which cannot have been misleading is not a ground for reversal. *McBride v. McBride*, 142–169, 120 N. W. 709.

Where the whole trend and substance of the charge is clear, a mere verbal inaccuracy not tending to mislead the jury will not be ground for a reversal. *Brown v. West Riverside Coal Co.*, 143–662, 120 N. W. 732.

Mere verbal error which in view of the court's instructions given could not have misled the jury will not be ground for re-

versal. *Engvall v. Des Moines City R. Co.*, 145–560, 121 N. W. 12.

A verbal error in an instruction which might have misled the jury, held sufficient ground for the granting of a new trial by the lower court. *Andrews v. Chicago, R. I. & P. R. Co.*, 151–166, 130 N. W. 918.

A slight defect in the spelling of defendant's name in the title of the case prefixed to the instructions, held not to constitute ground for reversal. *State v. Rogers*, 156–570, 137 N. W. 819.

A mere verbal error which could not have been prejudicial to the appellant will not be a ground for reversal. *State v. Thomas*, 157– —, 138 N. W. 864.

Curing error as to evidence: Error in the admission of evidence may be cured by an instruction explicitly advising the jury not to consider such evidence. *Keyes v. Cedar Falls*, 107–509, 78 N. W. 227; *Osborne v. Ringland*, 122–329, 98 N. W. 116; *State v. Scroggs*, 123–649, 96 N. W. 723; *Coine v. Chicago & N. W. R. Co.*, 123–458, 99 N. W. 134.

Error in the admission of evidence may usually be cured by striking such evidence from the record on motion at the close of all the evidence. *Gray v. Central Minn. Immigration Co.*, 127–560, 103 N. W. 792.

Error in overruling a motion to strike evidence may be cured by instructing the jury not to consider the evidence which should thus have been stricken out. *Winkler v. Hawkes*, 126–474, 102 N. W. 418.

Where evidence has been admitted on the promise of counsel to make it relevant by the subsequent introduction of other evidence, and no such connection is afterwards made, any prejudice from its admission may usually be removed by instructing the jury to disregard it. *State v. Nowells*, 135–53, 109 N. W. 1016.

Where a transcript of evidence on a former appeal was introduced by one party against the objection of the other, but afterwards the court, at the request of the party furnishing the transcript, directed the jury not to consider it, and the witnesses themselves were produced and examined, held that there was not such error as to require a reversal. *Bell v. Clarion*, 120–332, 94 N. W. 907.

The erroneous admission of evidence may be so fundamentally prejudicial that an instruction not to consider it will not sufficiently counteract the error. *Brown Land Co. v. Lehman*, 134–712, 112 N. W. 185; *Flinders v. Bailey*, 133–616, 111 N. W. 27.

Error in the admission of testimony may be cured by instructions as to the consideration which is to be given to such testimony. *Mills v. Flynn*, 157– —, 137 N. W. 1082.

Curing misconduct of counsel: Improper argument of counsel may be so far prejudicial that the prejudice therefrom cannot be removed by an instruction directing the jury not to consider the matter referred to. *State v. Hogan*, 115–455, 88 N. W. 1074.

A direction to disregard improper statements of counsel in argument will ordinarily be presumed sufficient to negative any presumptions of prejudice arising therefrom. *State v. Donavan*, 125–239, 101 N. W. 122.

And further, see notes to code § 3755 in this supplement.

Jury must follow instructions: It will be presumed that in the allowance of items of damage in an action for personal injuries, the jury followed the directions of the court. *Vedder v. Delaney*, 122–583, 98 N. W. 373.

Where the instructions are not complained of, they will be regarded as the law of the case in determining an appeal. *Greenlee v. Eggert*, 137–120, 113 N. W. 849.

The jurors are bound to follow the instructions as given, and where, if they had done so, a different verdict must have been reached than that rendered, a new trial should be granted. *Dempsey v. Dubuque*, 150–260, 132 N. W. 758.

The jury is bound to follow the instructions given, whether right or wrong, and failure to do so is a ground for reversal on appeal. *Seevers v. Cleveland Coal Co.*, 157– —, 138 N. W. 793.

SEC. 3705-a. **Requests for—presentation to counsel—objections before reading to jury—motion for new trial.** All requests for instructions must be presented to the judge before the argument to the jury is commenced and before reading his charge to the jury. The judge, before reading his charge to the jury, shall present all instructions to counsel on either side, each of whom shall have a reasonable time in which to examine the same. All objections or exceptions thereto must be made before the instructions are read to the jury and must point out the grounds thereof specifically and with reasonable exactness; but upon a showing in a motion for a new trial that an error in such instructions was not discovered by the party claiming the error at the time of trial, such objections or exceptions may be made in the same manner in such motion for a new trial

and no other objection or exception to the instructions shall be considered by the supreme court on appeal, except those made as above provided. The objections or exceptions must point out specifically the exact grounds thereof, and no other objections or exceptions shall be considered by the trial court upon motion for a new trial or otherwise, or by the supreme court upon appeal. [35 G. A., ch. 289, § 3.]

SEC. 3705-b. **Not retroactive.** This act shall not apply to any proceedings had or be given a retroactive effect, save as to actions pending which have not yet been submitted to a jury. [35 G. A., ch. 289, § 4.]

SEC. 3705-c. **Acts in conflict repealed.** All acts or parts of acts in conflict with the provisions hereof are hereby repealed. [35 G. A., ch. 289, § 5.]

SEC. 3707. Record—exceptions.

An exception taken at the time of the giving of all the instructions is sufficiently specific. *First Nat. Bank v. Robinson*, 105–463, 75 N. W. 334.

This section expressly provides that exceptions to instructions may be noted by the shorthand reporter without reason for such exception being made. *White v. Elgin Creamery Co.*, 108–522, 79 N. W. 283.

An entry on the margin of an instruction, "Given, plaintiff excepts," signed by the judge, is sufficient when the exception is taken at the time that the instruction is given. *Clement v. Drybread*, 108–701, 78 N. W. 235.

Where instructions are duly excepted to when given, it is not necessary to again except with reference thereto in the motion for a new trial. *Lingle v. Lingle*, 121–133, 96 N. W. 708.

Instructions are not to be reviewed where no exceptions thereto have been preserved. *Jamison v. Ranck*, 150–5, 129 N. W. 325.

Section applied. *Decatur v. Simpson*, 115–348, 88 N. W. 839.

SEC. 3708. Numbered—given or refused.

Where the omission to number paragraphs of the instructions does not appear to have worked to the prejudice of the unsuccessful party, it will not be a ground for reversal on appeal. *Johnson v. Sioux City*, 114–137, 86 N. W. 212.

The fact that the court fails to number the paragraphs of instructions is not ground for new trial. *In re Evans' Estate*, 114–240, 86 N. W. 283.

The provision for marking instructions as "given" is directory, and a failure to so mark them will not constitute error. *Turley v. Griffin*, 106–161, 76 N. W. 660.

The instructions are sufficiently identified in a skeleton bill of exceptions by referring to them as filed in a case by their numbers and as duly indorsed by the presiding judge. *Manatt v. Scott*, 106–203, 76 N. W. 717.

Where no exception is taken to the failure of the court to number the paragraphs in the instructions, such failure cannot be taken advantage of on appeal. *Payne v. Waterloo, C. F. & N. R. Co.*, 153–445, 133 N. W. 781.

SEC. 3709. Exceptions after verdict.

Exceptions taken to instructions in a motion for a new trial must point out the defects complained of *State v. Williams*, 115–97, 88 N. W. 194; *Tyler v. Bowen*, 124–452, 100 N. W. 505.

Exception to instructions in a particular case taken in writing, but not at the time the instructions were read, held not sufficiently specific. *Lacy v. Kossuth County*, 106–16, 75 N. W. 689.

Where by agreement of the parties leave is granted for delay in filing a motion for a new trial, it does not authorize the incorporation in such motion of exceptions to the instructions which were not taken at the proper time. *Turley v. Griffin*, 106–161, 76 N. W. 660.

The fact that exceptions taken to the instructions in a motion for a new trial are not sufficiently specific will not defeat a consideration of exceptions properly taken at the time the charge is given. *Ellis v. Leonard*, 107–487, 78 N. W. 246.

A general assertion in a motion for a new trial that "the court having erred in determining the effect of the written lease should correct the error by setting aside the verdict," held not a sufficient exception to instructions. *American Sav. Bank v. Shaver Carriage Co.*, 111–137, 82 N. W. 484.

The exception in a motion for a new trial that the court erred in giving certain instructions, which are specified, but the objection to which is not pointed out, is not sufficient. *Rule v. McGregor*, 115–323, 88 N. W. 814.

A general exception to instructions embodied in a motion for a new trial is not sufficient. *Knopp v. Chicago, R. I. & P. R. Co.*, 139–644, 117 N. W. 970.

Where no exception is taken to the instructions a general complaint as to their correctness made in a motion for a new trial raises no question for consideration on appeal from the action of the court in overruling such motion. *State v. Burns*, 145–588, 124 N. W. 600.

This rule is applicable in criminal as well as in civil cases. *Ibid.*

A general exception to an instruction in a motion for new trial is not sufficient. *Hardenburgh v. Roberts*, 146–696, 125 N. W. 818.

A general recital in the certificate of the trial judge and the reporter attached to the report of the trial that exceptions were preserved to instructions is not sufficient, it not appearing that any exceptions were noted by the reporter at the time the instructions were given. *Black v. Miller*, 138 N. W. 535.

Where exceptions are properly taken to instructions, it is not necessary to raise objections to such instructions by motion for new trial in order to secure a review thereof on appeal. *Scott v. Chicago, R. I. & P. R. Co.*, 141 N. W. 1065.

SEC. 3710. View of premises by jury.

Premises may be viewed by the jury only for the purpose of better applying the evidence introduced in the course of the trial. *Mier v. Phillips Fuel Co.*, 130–570, 107 N. W. 621.

The purpose of viewing the premises is to enable the jury better to understand the testimony of the witnesses respecting the same, and more intelligently apply such testimony to the issues before them, and not to make them silent witnesses in the case. The jury is properly instructed, therefore, if it is directed to determine the facts from the evidence and not to base its verdict in any degree upon an examination of the premises. *Guinn v. Iowa St. L. R. Co.*, 131–680, 109 N. W. 209.

The conduct of the jurors, viewing the premises in an action to recover possession of land, in measuring distances between points referred to in the testimony, held not to be such misconduct as to require a new trial. *Keller v. Harrison*, 151–320, 128 N. W. 851, 131 N. W. 53.

And, under the circumstances in a particular case, held that it was not reversible error to fail to instruct the jurors more fully as to the purpose of such view. *Ibid.*

SEC. 3717. What jury may take with them.

It is error to allow a map not introduced in evidence to go to the jury at their request to be used by them in construing the evidence. *DeWulf v. Dix*, 110–553, 81 N. W. 779.

It is not error to allow the jury to take the pleadings with them to the jury room, the jury being properly cautioned against making any improper use of the pleadings or the exhibit attached thereto. *Mayo v. Halley*, 124–675, 100 N. W. 529.

The statutory provision that the jury may take with them on retiring books of account and other papers which have been received as evidence is not mandatory; but when requested by either party, the papers and books received in evidence should be sent out with the jury, and a refusal to make an order to that effect is error. *State v. Young*, 134–505, 110 N. W. 292.

The statutory language as to what instruments of evidence shall be sent out with the jury is merely permissive. It is not made the duty of the court in the first instance to send out the instruments, but when requested by either party or by the jury, the papers should be sent out and the failure to do so constitutes error. *McMahon v. Iowa Ice Co.*, 137–368, 114 N. W. 203.

Where the affidavit of a witness has been introduced in evidence, the exercise of discretion on the part of the court in refusing to send it to the jury will not be interfered with where it appears that no prejudice could have resulted from such action. *Hraha v. Maple Block Coal Co.*, 154–710, 135 N. W. 406.

SEC. 3719. Further testimony to correct mistake.

Where it does not appear that the omission of evidence occurred from oversight, the action of the court in refusing to allow the introduction of further evidence will not be overruled on appeal. *Banning v. Purinton*, 105–642, 75 N. W. 639.

It is not error after the closing of the case to permit the introduction of evidence which is necessary in order to secure a decision on the merits and deprive the opposite party of a technical advantage acquired by evident oversight of his adversary. *Independent School Dist. v. Hewitt*, 105–663, 75 N. W. 497.

Where the judge indicated his intention to rule against a party on the ground that there was no evidence of a material fact, held error to refuse to receive additional evidence of witnesses then present in court to prove such fact. *Cathcart v. Rogers*, 115–30, 87 N. W. 738.

It is within the discretion of the court to reopen the case for the introduction of additional evidence on the part of the

plaintiff even after the defendant has demurred to the evidence or moved to dismiss or moved for the direction of a verdict. *Hill v. Glenwood*, 124–479, 100 N. W. 522.

The matter of reopening the case after the close of the evidence is within the sound discretion of the trial court, and the judgment will not be reversed for failure to permit it, unless it appears that there has been an abuse of discretion. *State v. Crayton*, 138–502, 116 N. W. 597.

The matter of reopening a case for the purpose of receiving testimony rests largely in the discretion of the trial court. *Carr v. Way*, 141–245, 119 N. W. 700.

After the remanding of a case for proceedings not inconsistent with the opinion, the court may in the exercise of reasonable discretion permit the introduction of new evidence. *Kossuth Co. State Bank v. Richardson*, 141–738, 118 N. W. 906.

It is not an abuse of discretion to refuse to reopen a case for the purpose of permitting the introduction of newly discovered evidence which is only impeaching in character. *Bartlett v. Illinois Surety Co.*, 142–538, 119 N. W. 729.

The action of the court in the exercise of its discretion in opening the case for further testimony before argument or submission to the jury will not be interfered with on appeal. *In re Estate of Carroll*, 149–617, 128 N. W. 929.

Even during the closing argument to the jury, the court may in its reasonable discretion reopen the case to enable a witness to explain testimony already given, with leave to the opposing party to make further argument. *State v. Thomas*, 157– —, 138 N. W. 864.

SEC. 3720. Additional instructions.

Held not error, after the jury had been out deliberating for more than thirty-six hours, to give an instruction to the effect that the case must be determined by some jury, that it must be determined on the same pleadings and evidence, that a disagreement would simply add to the burden of the successful party, and that it should again retire for deliberation and try to arrive at a verdict. *Delmonico Hotel Co. v. Smith*, 112–659, 84 N. W. 906.

Where the jury asked the court whether they could agree to disagree, and the court answered simply "no" without explaining the effect of failure to agree, held that a new trial was properly granted. *Rodgers v. Farmers' Nat. Bank*, 117–511, 91 N. W. 773.

This provision as to additional instructions is no doubt applicable to cases where the court calls in the jury on his own motion to give them further instructions. But the requirement that such additional instructions be in writing is not applicable to a mere cautionary instruction as to the duty of the jury to reach an agreement if possible. *Burton v. Neill*, 140–141, 118 N. W. 302.

It is not error, when the jury returns special findings in a matter not in accordance with the instructions, to call attention to that fact without embodying what is said to the jury in written form. *Erwin v. Fillenwarth*, 137 N. W. 502.

SEC. 3722. Verdict—how signed and rendered.

Defective verdict: Informalities, inaccuracies and technical defects in the verdict are to be disregarded and where the unsuccessful party has treated the verdict as being rendered against him, he cannot afterwards on appeal insist that by reason of uncertainty in the form it was in fact in his favor. *Gillespie v. Ashford*, 125–729, 101 N. W. 649.

Correcting verdict: If in an action to recover double damages for the killing of stock it appears on inquiry of the jury that the verdict was rendered for the value of the animals only, the jury may be permitted to correct the verdict by making it for double the amount of the value found. *Campbell v. Iowa Cent. R. Co.*, 124–248, 99 N. W. 1061.

Where an informal or defective verdict has been returned, it is proper to recall the jury for its correction if the same can be done promptly or within a reasonable time. *Cohen v. Sioux City Traction Co.*, 141–469, 119 N. W. 964.

So held where the court submitted two forms of verdict, one for plaintiff and the other for defendant, and both forms were returned signed by the foreman. *Ibid.*

Separate grounds for recovery may be submitted to the jury for a general verdict; and as to one ground of recovery thus submitted the court may grant a new trial if it is clear from the record that the jury included such claim in finding its verdict and the amount allowed is apparent. The verdict may be allowed to stand as to the other claims. *Case Threshing Machine Co. v. Fisher*, 144–45, 122 N. W. 575.

Where it appears by affidavits of jurors that the verdict as signed is not the verdict of the jury on account of mistake of the foreman in attaching his name to the wrong form of verdict, the mistake may be corrected by the court when correction is practicable without prejudice to innocent parties; and even if the correction is not practicable the verdict will not be allowed

to stand. *Carlson v. Adix*, 144–653, 123 N. W. 321.

If it appears under the evidence that the jury was authorized to return a verdict either for a certain sum or for nothing, and it returns a verdict for a less sum, the only power of the court is to set aside the verdict. Such a verdict does not amount to a special finding that the plaintiff was entitled to recover the full amount of the claim. *Rueber v. Negles*, 147–734, 126 N. W. 966.

The court cannot consider affidavits as to statements made by jurors in determining whether a verdict should be reformed. *Waltham Piano Co. v. Freeman*, 141 N. W. 403.

Further as to correction of verdict, see notes to code § 3732 in this supplement.

Directing verdict: Where there is a total failure of proof as to a claim made in the petition, the court should, on the request of defendant, direct a verdict for him at the close of plaintiff's evidence. *Saatoff v. Scott*, 103–201, 72 N. W. 492.

Where the evidence in favor of the party having the burden of proof on an issue is in no way contradicted or its credibility affected by impeachment, the court may assume the fact relied upon to be proven and need not submit the question to the jury. *Johnson v. Buffalo Center State Bank*, 134–731, 112 N. W. 165.

A verdict should be directed for the defendant where the evidence for the plaintiff is as consistent with the conclusion which does not involve defendant's liability as it is with the conclusion supporting such liability. *Neal v. Chicago. R. I. & P. R. Co.*, 129–5, 105 N. W. 197.

A motion to direct a verdict should be sustained when it clearly appears to the trial judge that it would be his duty to set aside a verdict in favor of the party on whom the burden of proof rests. *Cherry v. Des Moines Leader*, 114–298, 86 N. W. 323.

Where the evidence is such that it would be error to direct a verdict in favor of the plaintiff, it will be error for the trial court to set aside a verdict against the plaintiff on the ground of insufficiency of the evidence. *Hensley v. Davidson Bros. Co.*, 135–106, 112 N. W. 227.

It is not proper to direct a verdict for defendant on account of the failure of plaintiff to allege and prove some essential fact of his cause of action as to which no issue has been raised. *Knapp v. Brotherhood*. 128–566, 105 N. W. 63.

Failure to allege a necessary fact in the petition is not sufficient ground for directing a verdict for the defendant, if leave to amend is granted and the proper allegation is made. *Jones v. Shelby County*, 124–551, 100 N. W. 520.

A motion to direct a verdict simply challenges the sufficiency of the record to make out a case as against a defendant who has been compelled to submit to a trial and the overruling of such motion made by one who has been refused a right to be heard on a cross petition does not constitute error which may be reviewed on appeal. *Bussell v. Ft. Dodge*, 126–308, 101 N. W. 1126.

Where evidence has actually been received and then erroneously stricken out, the supreme court may on appeal consider such evidence as should have been allowed to go to the jury in passing upon the correctness of the action of the court in directing a verdict. *Campbell v. Park*, 128–181, 101 N. W. 861.

In applying the rule as to taking the case from the jury and directing a verdict, the trial court cannot pass upon the question as to whether or not the preponderating weight of the evidence is in favor of or against a party, nor upon the weight of the evidence or the credibility of the witnesses; all these matters are for the consideration of the jury. *McLeod v. Chicago & N. W. R. Co.*, 104–139, 73 N. W. 614.

The court cannot on a motion to direct a verdict determine as to the weight of the evidence, nor pass upon the credibility of the witnesses. It must take the evidence most favorable to the plaintiff, and if that makes a case for the jury he is entitled to have it passed upon by them. *Scott v. St. Louis, K. & N. W. R. Co.*, 112–54, 83 N. W. 818.

Where there is a real conflict of evidence the case is for the jury, and the supreme court is not authorized to determine whether the preponderance is in favor of one or the other, nor to pass upon the credibility of the witnesses. *In re Betts' Estate*, 113–111, 84 N. W. 975.

To sustain a ruling of the trial court in directing a verdict, the facts essential to show a valid cause of action must be so apparent from the evidence that reasonable men could not differ as to the facts which it establishes. *Morey v. Laird*, 108–670, 77 N. W. 835.

On a motion to direct a verdict the party against whom it is asked is entitled to the most favorable construction which the facts will bear. The making of such a motion amounts to an admission of all matters which the testimony tends to prove. *Degelau v. Wight*. 114–52, 86 N. W. 36.

On a motion to direct a verdict the opposite party is entitled to have taken as established every fact which his evidence fairly tended to prove. *Hartman v. Chicago. G. W. R. Co.*, 132–582, 110 N. W. 10.

The fact that the court has at the conclusion of plaintiff's evidence refused to sustain a motion to direct a verdict in defendant's favor is not conclusive as to the right to do so at the conclusion of all the evidence. *In re Stufflebeam's Will*, 135–338, 112 N. W. 815.

A party who has asked for a directed verdict and on the overruling of his motion

has rested his case cannot insist that the court should have submitted the issues to the jury and not directed a verdict for the opposite party. A request for a directed verdict is an election to treat the case as presenting a question of law only and is a waiver of a verdict on the facts. *Gray v. Central Minn. Immigration Co.*, 127–560, 103 N. W. 792.

Where each party moves for a verdict at the conclusion of the evidence and there is not sufficient evidence to justify the court in directing a verdict for the party in whose favor judgment is entered, the case will be reversed on appeal. As to whether the party securing judgment in such case has thereby waived the right of submission of the case to a jury, *quaere*. *First Nat. Bank v. Mt. Pleasant Milling Co.*, 103–518, 72 N. W. 689.

The fact that each party asks the court to direct the verdict in his favor does not constitute a waiver by either of the right to have the case submitted to the jury in the event that his motion is not sustained. *German Sav. Bank v. Bates Addition Imp. Co.*, 111–432, 82 N. W. 1005.

A motion to direct a verdict is not provided for in the code. It is in effect a demurrer to evidence, and not to be resorted to for the purpose of reaching defects in the pleadings. *Howerton v. Augustine*, 130–389, 106 N. W. 941.

For the purpose of a motion to direct a verdict, the rulings of the court in connection with the introduction of the evidence are the law of the case. *Hamilton v. Schlitz Brewing Co.*, 129–172, 105 N. W. 438.

In an action to recover the statutory penalty for selling intoxicating liquor to a minor, the sale being conceded and the undisputed testimony being that the person to whom the sale was made was in fact a minor, held that a verdict for the plaintiff might be directed by the court. *Fielding v. La Grange*, 104–530, 73 N. W. 1038.

Where the allegations of the pleadings, though supported by proof, would not warrant a recovery and the defect in the pleadings could not be cured by any amendment, it is not error to direct a verdict for the defendant. *Austin Western Co. v. Weaver Twp.*, 136–709, 114 N. W. 189.

After the granting of a new trial, the moving party is not entitled, on motion, to a judgment on the record notwithstanding the special and general verdict. *Hamill v. Schlitz Brewing Co.*, 138–138, 115 N. W. 943.

Defendant cannot, by moving for a directed verdict on the ground that plaintiff is not authorized to sue, raise an objection which has not already been raised in the case and which, if sooner raised, might have been met by proper pleading. *Hendrix v. Letourneau*, 139–451, 116 N. W. 729.

After it has been held on one appeal that the evidence is sufficient to take the case to the jury, it is error on a retrial of the case on substantially the same evidence to direct a verdict. *Hanson v. Cline*, 142–187, 118 N. W. 754.

Where each party asks a directed verdict and it is agreed that there are no disputed facts, it is not error to direct a verdict. *Wells v. Western Union Tel. Co.*, 144–605, 123 N. W. 371.

Where under the evidence it would have been the duty of the trial court to grant a new trial had the jury found for the plaintiff, a direction of the verdict for the defendant on motion will not be interfered with on appeal. *Blossi v. Chicago & N. W. R. Co.*, 144–697, 123 N. W. 360.

Uncontradicted evidence is not sufficient to demand a directed verdict where the inference drawn from all the circumstances is open to different conclusions by reasonable men. *Arnd v. Aylesworth*, 145–185, 123 N. W. 1000.

Failure to move for a directed verdict and a request for a special finding as to facts, constitute a practical concession that the case is one for the jury. *Mileham v. Montagne*, 148–476, 125 N. W. 664.

On questions of value as to which there is no evidence of an agreement, but only an expression of an opinion on the part of witnesses qualified to speak as to reasonableness, the jury is not bound by the testimony of such witnesses but may exercise its own judgment in view of the general knowledge which all men are presumed to have in a greater or less degree in such matters, and the court is not justified therefore in accepting as conclusive, in the absence of contradiction, the testimony of witnesses as to the reasonable value of services rendered. *Converse v. Morse*, 149–454, 128 N. W. 344.

Where the court has on motion directed a verdict against the plaintiff and ordered judgment in favor of defendant for costs, it may subsequently set aside such order and permit plaintiff to amend. *Holtz v. Smith-Morgan Printing Co.*, 150–91, 129 N. W. 328.

After the court has indicated its conclusion as to a motion to direct a verdict, but before the final direction of such verdict and entry of judgment thereon, the plaintiff may of right dismiss his action. *Arpy v. Iowa Brick Mfg. Co.*, 150–431, 130 N. W. 393.

The action of the court in erroneously directing and receiving a verdict may be a ground for new trial. *Bottineau Land & Loan Co. v. Hintze*, 150–646, 125 N. W. 842.

Where under the evidence it appears that it would have been the duty of the trial court to set aside a verdict had one been rendered, there is no error in directing a verdict after all the testimony has been introduced. *Sevening v. Smith*, 153–639, 133 N. W. 1081.

Where the unsuccessful party has made no motion to have the case withdrawn from the jury, he cannot upon appeal contend that the evidence is not sufficient to sustain the verdict. *Cash v. Dennis*, 139 N. W. 920.

The supreme court will uphold the action of the trial court in refusing to send a case to the jury wherever that court in the performance of its functions would have been justified in setting aside the verdict had one been rendered in favor of the complaining party. *Wendt v. Foss*, 140 N. W. 881.

A mere scintilla of evidence is not sufficient to take a case to the jury. *Ellis v. Oliphant*, 141 N. W. 415.

SEC. 3724. Sealed verdict.

Where a sealed verdict is returned, in pursuance of an agreement, it is not error for the court to refuse to poll the jury and allow a juror to dissent from the verdict in which he concurred at the time it was sealed. *Dunbauld v. Thompson*, 109–199, 80 N. W. 324.

After a sealed verdict has been returned, the court may recall the jurors to correct a manifest error in form or supply an omission of some matter necessary to the verdict as found, and thus complete it. *Oxford Junction Sav. Bank v. Cook*, 134–185, 111 N. W. 805.

SEC. 3726. Special defined.

A special verdict must present the ultimate facts as established by the evidence. The fact to be found must be one inhering in and necessary to determine in arriving at the general verdict, and the method or elements considered in reaching the ultimate facts cannot be called for by special interrogatories. *Read v. State Ins. Co.*, 103–307, 72 N. W. 665.

A special verdict covers all the issues in the case, and is a substitute for a general verdict, while answers to interrogatories do not supersede the necessity for a general verdict. *Morbey v. Chicago & N. W. R. Co.*, 116–84, 89 N. W. 105.

SEC. 3727. Findings.

Ultimate facts: Findings in answer to special interrogatories should relate to ultimate facts inhering in the verdict, deciding issues more or less important, necessarily to be passed upon in making up the general verdict. Where the fact is absolutely essential to recovery, a finding negativing its existence will be conclusive without more, but when the interrogatories do not include all the issues essential to reach a legal conclusion, then it becomes of the utmost importance to know what extrinsic matters, if any, may be resorted to in aid of these findings. Every reasonable presumption is to be indulged in favor of the general verdict. All the essential facts inhere therein, when the contrary is not made to appear from the special findings. Therefore the evidence may not be resorted to in aid of the special findings as against the general verdict. *Schulte v. Chicago, M. & St. P. R. Co.*, 114–89, 86 N. W. 63.

While it is the better practice not to submit interrogatories which do not call for ultimate facts, nevertheless submission of interrogatories as to matters which are relevant may be error without prejudice. *Nodle v. Hawthorn*, 107–380, 77 N. W. 1062.

Where an issue is submitted a party has the right to have the jury answer interrogatories for the purpose of ascertaining the grounds upon which a verdict is rendered. *Trumble v. Happy*, 114–624, 87 N. W. 678.

Interrogatories not requiring ultimate facts for answers may properly be refused. *Ibid.*

Special interrogatories calling for ultimate facts material to the issues in the case should be propounded to the jury when properly requested. *In re Townsend's Estate*, 122–246, 97 N. W. 1108.

Special interrogatories calling for ultimate facts inhering in and necessarily to be determined in reaching a verdict, should be submitted if requested. *Decatur v. Simpson*, 115–348, 88 N. W. 839.

Findings of fact in answer to interrogatories do not dispense with a general verdict. *Morbey v. Chicago & N. W. R. Co.*, 116–84, 89 N. W. 105.

The question submitted to the jury for answer should be controlling and call for the ultimate facts necessary to be determined in finding a general verdict. In a particular case held that the court properly refused to submit interrogatories which could not be categorically answered. *Ibid.*

Interrogatories which do not call for ultimate facts determinative of the case may properly be refused. *Wilder v. Great Western Cereal Co.*, 130–263, 104 N W. 434.

It is not error to refuse interrogatories which do not call for ultimate or controlling facts nor for facts of such importance that a finding thereon against the weight of the testimony would necessarily indicate pas-

sion or prejudice. *Kuehl v. Chicago, M. & St. P. R. Co.*, 126–638, 102 N. W. 512.

It is not proper to submit special findings as to facts which bear only remotely upon the real question in issue. *Goldstein v. St. Paul F. & M. Ins. Co.*, 124–143, 99 N. W. 696.

It is not error to submit for special finding the question whether at the place of accident to a railroad train the ties were old and rotten, although the question whether there was an accident is in issue. *Cronk v. Wabash R. Co.*, 123–349, 98 N. W. 884.

It is not error to submit an interrogatory in an action for personal injuries calling for a finding of the jury as to whether the plaintiff could, in the exercise of ordinary care and diligence, have seen the danger from which the injury resulted. *Buchholtz v. Radcliffe*, 129–27, 105 N. W. 336.

In an action against a railroad company to recover for stock killed by reason of getting upon the right of way through a defective fence, held that the court was not required to submit to the jury a special interrogatory with reference to the manner in which the stock got through the fence. *Saar v. Chicago, B. & K. C. R. Co.*, 119–60, 93 N. W. 66.

Special interrogatories not determinative of the case, but relating solely to the extent of the injury complained of, may properly be refused. *Heinmiller v. Winston*, 131–32, 107 N. W. 1102.

Requests for findings which call for answers upon evidential rather than ultimate facts should not be submitted. *Haney-Campbell Co. v. Preston Creamery Assn.*, 119–188, 93 N. W. 297.

Special interrogatories should not be submitted which are likely to mislead the jury into the belief that the matter inquired about is controlling. *Boddy v. Henry*, 126–31, 101 N. W. 447.

Where separate and distinct claims are involved in the same action, special interrogatories bearing directly on the determination of any one of the issues should be submitted although answers thereto would not be determinative of the entire case. *Brown Land Co. v. Lehman*, 134–712, 112 N. W. 185.

Special interrogatories, calling for ultimate and material facts, should be submitted. *Rutherford v. Iowa Cent. R. Co.*, 142–744, 121 N. W. 703.

The practice of subjecting the jury to a minute cross-examination on its verdict under the guise of special interrogatories is not to be encouraged. *Cinkovitch v. Thistle Coal Co.*, 143–595, 121 N. W. 1036.

It is not error to refuse to submit special findings which do not call for ultimate facts. *Payne v. Waterloo, C. F. & N. R. Co.*, 153–445, 133 N. W. 781.

Calling for conclusions: An interrogatory should not be submitted for a finding which is in the nature of a conclusion of law derived from several facts. *Boddy v. Henry*, 126–31, 101 N. W. 447.

It is not reversible error to submit an interrogatory calling for an answer by way of a conclusion, where the general verdict necessarily covers the special finding. There is a manifest distinction between holding that the trial court may refuse to submit such question, and holding that there was prejudicial error in submitting it. *Taylor v. Wabash R. Co.*, 112–157, 83 N. W. 892.

Special interrogatories ambiguous in their nature and calling for conclusions of the jury based upon the findings of several facts need not be submitted. Nor is it necessary to submit questions calling for an answer as to matters practically undisputed or which would not affect the general verdict. *Morrow v. National Masonic Acc. Assn.*, 125–633, 101 N. W. 468.

Interrogatories calling for special findings on the material and ultimate questions in the case should be refused. *Haase v. Morton*, 138–205, 115 N. W. 921.

A request for findings involving the conclusion of the jury upon all the facts involved in the evidence should be refused. *McGuire v. Chicago, B. & Q. R. Co.*, 138–664, 116 N. W. 801.

It is not error to refuse to submit a special interrogatory as to a conclusion from facts which must inhere in the general verdict. *Luisi v. Chicago G. W. R. Co.*, 155–458, 136 N. W. 322.

Not as to the ultimate issue: It is not error to refuse to submit a special interrogatory calling for an answer as to the mental capacity of a testator where that is the very question to be determined by the general verdict. *Conway v. Murphy*, 135–171, 112 N. W. 764.

The court is not required to submit to the jury special interrogatories which are in the nature of a cross-examination and which call for evidentiary rather than ultimate facts. *Strand v. Grinnell Automobile Garage Co.*, 136–68, 113 N. W. 488.

Special findings not ultimate in their nature, answers to which are necessarily inherent in the general verdict, need not be submitted. *Engvall v. Des Moines City R. Co.*, 145–560, 121 N. W. 12.

It is not error to refuse to submit special interrogatories, answers to which would not be determinative of the case under the issues. *Ottoway v. Milroy*, 144–631, 123 N. W. 467.

If the answer to an interrogatory would not be determinative in view of the case, the refusal to give it will not be a ground for reversal. *Neidy v. Littlejohn*, 146–355, 125 N. W. 198.

It is not error to refuse to submit interrogatories not calling for findings determinative of any issue submitted. *Jones v. Ford*, 154–549, 134 N. W. 569.

An interrogatory may be rightfully refused if it calls for a fact which inheres in the general verdict. *Brooks v. Van Buren County*, 155–282, 135 N. W. 1110.

Form: A special interrogatory should be couched in simple and direct language calling if possible for a categorical answer. Repetition of the same question in different language necessarily tends to confusion and should be avoided. *Hanousek v. Marshalltown*, 130–550, 107 N. W. 603.

Special interrogatories which are in the nature of a cross-examination of the jury should be refused. *Greenlee v. Mosnat*, 126–330, 101 N. W. 1122.

Compound questions should not be submitted for special findings. *Jones v. Shelby County*, 124–551, 100 N. W. 520.

A compound interrogatory, calling for findings on several distinct propositions, should not be submitted. *Brier v. Davis*, 122–59, 96 N. W. 983.

The interrogatory should call for the ultimate facts upon which the right of recovery depends. *Ibid.*

It is not error for the court to divide a special interrogatory asked. *Pratt v. Chicago, R. I. & P. R. Co.*, 107–287, 77 N. W. 1064.

Special interrogatories which call for a finding of the jury as to ultimate and important facts bearing upon the issues may be proper, though calling for answers somewhat in the nature of conclusions. *Ibid.*

On an appeal from a judgment rendered on the second trial of the case, the supreme court cannot review the action of the trial court in refusing to give effect to special findings made on the first trial of the case, in the absence of the record of the trial in which such special findings were made. *Doyle v. Burns*, 138–439, 114 N. W. 1.

An interrogatory to the jury should not be introduced with the phrase, "Is it not a fact?" *Romans v. Thew*, 142-89, 120 N. W. 629.

It is not proper to specifically point out in connection with the submission of special interrogatories particular instructions which are to be considered in answering such interrogatories. *Larson v. Thoma*, 143–338, 121 N. W. 1059.

It is error to so present special interrogatories as to indicate to the jury what the answer should be. *Ibid.*

Where two interrogatories are so far dependent on each other that an answer to one will be of no value without an answer to the other, the fact that one of them is improper is sufficient reason for refusal to give either. *In re Will of Brown*, 143–649, 120 N. W. 667.

Where two or more interrogatories submitted to the court are on the same sheet of paper and the court marks one of them as submitted to the jury and the others as rejected, it is not prejudicial error to allow such sheet of paper to go to the jury, no objection at the time being made. *Brooks v. Van Buren County*, 155–282, 135 N. W. 1110.

Time: The mere formal opening of the address to the jury by counsel for plaintiff does not preclude the court from suspending the argument and allowing the counsel for defendant to request the submission of special interrogatories to the jury. *Wilson v. Wapello County*, 129–77, 105 N. W. 363.

Error without prejudice: Refusal of interrogatories asked will constitute error without prejudice where it appears from answers to other interrogatories taken in connection with the court's charge that there could have been no finding under the evidence favorable to the party complaining. *Livingston v. Stevens*, 122–62, 94 N. W. 925.

The refusal of an interrogatory will constitute error without prejudice where it appears that had it been submitted and answered either in the affirmative or negative it could not have affected the result. *Brooks v. Van Buren County*, 155–282, 135 N. W. 1110.

Where the answer to a special interrogatory which has support in the testimony is sufficient in itself to determine the verdict, a judgment in accordance with such special verdict will not be reversed for error which could not have had any effect in bringing about such special finding. *Stokes v. Sac City*, 155–334, 136 N. W. 207.

Failure to answer: Where an interrogatory is such in form that it would not have been error to refuse to submit it, the failure of the jury to answer it is not a ground for a new trial. *Correll v. Cedar Rapids*, 110–333, 81 N. W. 724.

Where a special interrogatory remains unanswered it must be presumed in support of the general verdict that the jury found such facts as were necessary to sustain it. Failure to answer does not amount to failure to find the facts inquired about. *Huss v. Chicago G. W. R. Co.*, 113–343, 85 N. W. 627.

Failure to answer an interrogatory is not a good ground for a motion to render judgment notwithstanding the general verdict. *Connell v. Keokuk Elec. R. & P. Co.*, 131–622, 109 N. W. 177.

Failure to answer interrogatories is not a ground of reversal where the counsel for the unsuccessful party has not taken steps at the proper time to require answers to be made. *Mayo v. Halley*, 124–675, 100 N. W. 529.

Failure of the jury to answer a special interrogatory upon a material fact is to be taken as a finding against the party having the burden of proving such fact. *Mulvaney v. Burroughs*, 152–439, 132 N. W. 873.

Where no objection is made to receiving the verdict of a jury without answer to an interrogatory submitted, the fact that no such answer was given cannot be raised as an objection on appeal. *Strever v. Woodard*, 141 N. W. 931.

On court's own motion: The court may propound special interrogatories on its own motion without submitting them to counsel before they are presented to the jury. *Miles v. Schrunk*, 139–563, 117 N. W. 971.

SEC. 3728. Findings inconsistent with general verdict.

To warrant a judgment upon special findings against the general verdict such findings must be absolutely inconsistent therewith. *Crynes v. Independence*, 115–448, 88 N. W. 937.

On motion for a judgment as against a general verdict based on special findings every issue raised by the pleadings and not eliminated by the instructions will be presumed to have been found for the party in whose favor the general verdict is returned, and it will be presumed that such findings are supported by sufficient evidence; but the special findings cannot be added to or supported by the evidence and must be given effect only so far as they necessarily negative the findings which might otherwise be assumed in support of the general verdict. Therefore, in an action to recover damages for personal injuries, held that as the special findings did not negative all the allegations of negligence in plaintiff's petition, which were by the court submitted to the jury, and on which the jury might have predicated its general verdict in plaintiff's favor, a judgment for defendant based on the special findings was erroneous. *Conwell v. Tri-City R. Co.*, 135–190, 112 N. W. 546.

Where the special finding is in the nature of a conclusion of law, rather than a finding of fact, it may be disregarded by the court. *Fishbaugh v. Spunaugle*, 118–337, 92 N. W. 58.

Although there is apparent inconsistency between special findings and the general verdict, yet if, upon taking them as a whole, such inconsistency is not necessarily to be implied, the general verdict must stand. The question is not to be determined by singling out some one special finding for consideration, but all must be considered together in the light of the pleadings, and the findings will, if possible, be so construed as to support the verdict. *Ibid.*

The general verdict is controlling as to any issue of fact properly submitted to the jury, not covered by the special findings. *Connell v. Keokuk Elec. R. & P. Co.*, 131–622, 109 N. W. 177.

A special finding as to an immaterial matter will not defeat the general verdict. *Burk v. Walsh*, 118–397, 92 N. W. 65.

An answer to a special interrogatory, decisive of an important, though not determinative, fact in issue, when without support in the evidence, but in conflict with it, constitutes a showing of passion and prejudice on the part of the jury such as to call for a new trial; but a special finding not supported by the evidence, but not in conflict with it, when not essential to the verdict, will not furnish ground for interference by the court. *Spicer v. Webster City*, 118–561, 92 N. W. 884.

Judgment on special findings, notwithstanding the verdict, must rest on facts found by the jury, rather than those which it is thought might or ought to have been found. *Schulte v. Chicago, M. & St. P. R. Co.*, 114–89, 86 N. W. 63.

If the findings, though inconsistent with the general verdict, are not sufficient to sustain judgment for the party against whom the general verdict is rendered, then the court cannot render judgment for the unsuccessful party, but may set aside the general verdict because inconsistent with the special findings. *Schulte v. Chicago, M. & St. P. R. Co.*, 124–191, 99 N. W. 714.

If a special finding is itself sufficient to determine the right to a judgment under the issues, judgment should be rendered accordingly; and it is not within the discretion of the court in such a case to grant a new trial instead of entering judgment on the special finding. *House v. Steffy*, 135–505, 113 N. W. 321.

Where the foreman of the jury without dissent of any of the members explained to the court, when attention was called to a discrepancy between the general verdict and a special finding, that the latter was made by mistake, held that the party who had called attention to the discrepancy could not afterwards insist that judgment should have been in accordance with the special finding. *Hetland v. Bilstad*, 140–411, 118 N. W. 422.

There cannot be a judgment upon answers to special interrogatories as against the general verdict unless such answers cover every issue in the case and, when taken in connection with the pleadings (and possibly with the instructions), are in themselves sufficient to enable the court to determine which party is entitled to judgment without referring to the testi-

mony. *Farmers Sav. Bank v. Forbes*, 151–627, 132 N. W. 59.

On account of inconsistency between the answers to interrogatories and the general verdict, a new trial may be granted; and where it was found on appeal that the court had erred in rendering a judgment on special findings, held that the case should be remanded to enable the court to pass upon the motion for new trial. *Ibid.*

SEC. 3732. Entered of record.

A judgment upon a verdict which has never been filed and made of record should be set aside on motion. *Heim Brewing Co. v. Hamilton*, 137–376, 114 N. W. 1039.

In an action for breach of promise of marriage, held that the addition of the words "not guilty" to the form of verdict for the defendant as submitted by the court was not such irregularity as to vitiate the verdict. *Wilson v. McCarty*, 156–660, 137 N. W. 920.

It is the duty of the court to put the verdict of the jury in form if necessary, but it has no authority to reform a verdict which is too indefinite to justify such reformation. *Hunter v. Empire State Surety Co.*, 140 N. W. 194.

And see notes to code § 3722 in this supplement.

SEC. 3734. Reference—by consent.

It may be mutually agreed by the parties to the reference that each shall become responsible for one half of the fees of the referee and reporter. *Cole v. Gates Lumber Co.*, 131–189, 108 N. W. 235.

An order sending a case to a referee cannot be questioned on appeal where no objection to the order was made at the time. *West v. Fry*, 134–675, 112 N. W. 184.

Error in ordering a reference is waived if the court offers to set aside the reference and the party afterwards complaining objects to such proposed action. *Stroup v. Bridger*, 124–401, 100 N. W. 113.

If the report of the referee is set aside as a whole, the court has no right to try the issues of fact, and should either refer the case again, if the parties so agree, or submit the issues to a jury. *Ibid.*

A reference is always to find the facts or the facts and the law and not simply to take testimony. *In re Cherokee County Printing*, 156–282, 136 N. W. 765.

SEC. 3735. Without consent.

The cases involving accounts in which reference may be made without consent of parties are those of mutual accounts, such as were formerly cognizable in equity. *Tufts v. Norris*, 115–250, 88 N. W. 367.

An account consisting substantially of successive entries of amounts of money loaned does not constitute a mutual account justifying a compulsory reference in an action to recover the total amount due. *Frick v. Kabaker*, 116–494, 90 N. W. 498.

There is no right to a compulsory reference where the items of indebtedness sued upon do not constitute portions of a continuous account. *Mayo v. Halley*, 124–675, 100 N. W. 529.

The court having authority to order a reference may set the reference aside and resubmit the case to another referee. *Poitevin v. Binnall*, 148–249, 125 N. W. 653.

SEC. 3738. Powers.

A referee cannot treat as valid and give consideration to pleadings not filed with the clerk and entered on the appearance docket. *Johnson v. Berdo*, 131–524, 106 N. W. 609.

For the time being, so far as the particular case is concerned, the referee stands in place of the court and has the same powers so far as is necessary to discharge his duty. *Poitevin v. Binnall*, 148–249, 125 N. W. 653.

SEC. 3739. Method of trial—proceedings.

This section does not limit the power conferred on the referee by the preceding section in regard to the pleadings, and the referee has power to permit the filing of original as well as of amended pleadings. *Poitevin v. Binnall*, 148–249, 125 N. W. 653.

SEC. 3740. Report—judgment.

An order setting aside the referee's report is in effect the granting of a new trial, and in such matters the court has a discretion, and its action will not be reversed on appeal unless it appears that the discretion has been abused. *Van Wagenen v. Parsons*, 106–263, 76 N. W 675.

While the findings of a referee are not

conclusive on the supreme court in an appeal from the decree based on such report, yet they are entitled to consideration. *McCormick Har. Mach. Co. v. Pouder*, 123–17, 98 N. W. 303.

The exception to the report of the referee should point out wherein it is claimed that the report is erroneous. *Kossuth County State Bank v. Richardson*, 132–370, 106 N. W. 923, 109 N. W. 809.

No exception being taken to the finding of fact made by a referee, it must be assumed that such finding is correct, and it will not be presumed, in order to sustain a judgment of the court inconsistent with the finding of facts made by the referee, that other evidence as to the facts was introduced on the hearing. *Weitnaur v. Weitnaur*, 117–578, 91 N. W. 815.

Where the finding of the referee has been found to be erroneous, the court may in an equitable case make a new finding of facts or of conclusions of law and enter such a decree as the referee should have recommended, without sending the case back to the referee for a new finding. *Kossuth Co. State Bank v. Richardson*, 141–738, 118 N. W. 906.

SEC. 3741. Finding of facts.

In the absence of exception of any kind to the referee's report, it should not be rejected, but is to be given the effect of a special verdict. Even though objected to when offered, such report is presumed to have been acceptable to both parties if not excepted to. *Rankin v. Chariton*, 139 N. W. 560, 141 N. W. 424.

SEC. 3746. Procedure.

After the time has expired within which reports are to be made, the referee ceases to have authority to act and is without jurisdiction. *Manning v. Nelson*, 107–34, 77 N. W. 503.

SEC. 3749. Exceptions—how taken.

Exceptions necessary: A party should except to special findings with which he is not content even though the court renders judgment in his favor; otherwise on appeal such findings will be held conclusive as to him. *Aldrich v. Paine*, 106–461, 76 N. W. 812.

An exception to the judgment itself is not necessary where exception has been duly taken to the conclusion of law upon which the judgment is founded. *Clement v. Drybread*, 108–701, 78 N. W. 235.

In order to secure a review of the action of the trial court it must appear not only that there was a valid exception to the trial court's ruling, but also that the court's attention was called to the matter by a proper objection excepting to the judgment. *Gillespie v. Ashford*, 125–729, 101 N. W. 649.

In the original proceeding by certiorari to test the validity of the action of a court in entering judgment, it is not necessary that the taking of exception to such judgment be shown. *Coffey v. Gamble*, 117–545, 91 N. W. 813.

Rulings on the introduction of evidence properly excepted to when made and rulings on motion for new trial, also excepted to, may be reviewed on appeal although no exception is taken to the judgment. *Hoyt v. Hoyt*, 137–563, 115 N. W. 222.

No ruling will be considered to which exception has not been duly taken. *Barnes v. Century Sav. Bank*, 147–267, 126 N. W. 174.

In a special proceeding not equitable in character, the supreme court will not on appeal review a ruling of the court to which no exception has been taken and preserved. *In re Estate of Culver, Gould v. Morrow*, 153–461, 133 N. W. 722.

An exception to the argument of counsel preserves no question for consideration on appeal. Misconduct of counsel is a ground for new trial, but unless the objection on that ground is in some way presented to the trial court, it cannot be considered by the supreme court. *Cedar Rapids Nat. Bank v. Carlson*, 156–343, 136 N. W. 659.

A recital in the certificate of the trial judge and the reporter attached to the report of the trial in shorthand that "all instructions given were duly excepted to by the party adversely affected or interested," it not appearing that any exception was noted by the reporter in his notes, is not sufficient to show exceptions to instructions. *Black v. Miller*, 138 N. W. 535.

Time for taking: An exception must be entered at the time the decision is made, unless it be on motion or demurrer, and cannot be preserved by means of a subsequent motion unless there is ground for having a *nunc pro tunc* entry of the exception made. *Young v. Rann*, 111–253, 82 N. W. 785.

Time for filing: In the absence of express agreement or consent the judge has no power to sign a bill of exceptions after the final adjournment of the term, and if consent is given the bill must be filed within the time agreed upon or it will not be considered. *Hershey v. Nyenhuis*, 103–195, 72 N. W. 510.

The filing of an amendment to the abstract for the purpose of making the abtract correspond to the record does not estop the appellee from claiming that the bill of exceptions was not filed within the proper time and cannot be considered. *Ibid.*

Where at the time of overruling a motion for a new trial which was at a term subsequent to that of the trial of the case, time for filing bill of exceptions was fixed and the bill was filed within that time, held that it was sufficient. *National Horse Imp. Co. v Novak*, 105–157, 74 N W. 759.

Where it appears that the bill of exceptions was signed and filed after the time fixed by the court therefor had expired, a motion to strike it from the record in the supreme court will be sustained. *Honkins Fine Stock Co. v. Reid*, 106–78, 75 N W. 656.

Shorthand report: This section simply declares that when the shorthand notes are duly certified and filed a formal bill of exceptions shall not be required, but the perfection of the record within the time limit must be made in one way or the other, and either the bill of exceptions or the report must be on file within such time in order to preserve the evidence as a part of the record. *In re Tobey's Estate*, 112–581, 84 N. W. 666.

Evidence taken down in shorthand, may, after being transcribed, when duly certified by the trial judge, become a part of the record without the certificate of the official reporter. *Philbrick v. University Place*, 106–352, 76 N. W. 742.

The translation of the stenographer's notes should be certified by the reporter who reports the proceedings, and not necessarily by the official reporter. *Spinney v. Halliday*, 115–420, 88 N. W. 939.

Prior to the adoption of code § 3675 the certificate of the reporter to his notes was not essential in connection with their incorporation by reference into a skeleton bill of exceptions. *Sigler v. Murphy*, 107–128, 77 N. W. 577.

A skeleton bill incorporating the shorthand notes by reference is sufficient. It is not necessary that the clerk be directed to copy into the bill the original notes, but a recital that they were filed and that all the evidence, objections and exceptions having been extended and transcribed in longhand and certified and filed in due time after such trial by such shorthand reporter, are as follows, to wit, etc., is sufficient. The clerk in extending the skeleton bill is expected to copy the transcript made by the reporter, which will be sufficiently identified if properly entitled and duly certified and filed in the case. *Manatt v. Scott*, 106–203, 76 N. W. 717.

The instructions are sufficiently identified by referring to them as filed in the case by their numbers and as duly endorsed by the presiding judge. *Ibid.*

The evidence may be preserved by a skeleton bill of exceptions, signed by the judge and filed in due time, wherein the reporter's shorthand notes, duly certified by the judge and reporter and filed, are made a part of the bill by unmistakable reference. *Shaulis v. Buxton*, 109–355, 80 N. W. 397.

A certification in shorthand characters of the shorthand notes is not sufficient to constitute a bill of exceptions; and a certification of the transcript of such notes not filed within the time required by statute is not sufficient. *Howerton v. Augustine*, 153–17, 132 N. W. 814; *Wiggins v. Swayze*, 139 N. W. 1075.

SEC. 3750. Form—grounds.

An exception "to the giving of each and every of said instructions" is sufficient to constitute an exception to each instruction given. *Ellis v. Leonard*, 107–487, 78 N. W. 246.

An exception to a decree questions every finding included therein which entered into the conclusion expressed by the decree, and therefore includes a ruling on demurrer to a cross bill. *Warner v. Norwegian Cemetery Assn.*, 139–115, 117 N. W. 39.

SEC. 3752. Writings identified—skeleton bill.

The shorthand reporter's notes filed with the clerk become a part of a bill of exceptions by reference although not certified by the reporter and not entered on the clerk's record as filed. *In re Guardianship of Holscher*, 127–369, 101 N. W. 759, and see notes to § 3675.

SEC. 3753. Signing.

In criminal cases a bill of exceptions signed by bystanders in a case where such form of bill of exceptions is proper may be filed within the time allowed by the court for filing a bill of exceptions. *State v. Taylor*, 103–22, 72 N. W. 417.

Bystanders cannot certify a bill of exceptions unless the judge has refused to do so, and the bill which they sign must show affirmatively that the judge has refused to indorse the correctness of its statements. *Chew v. O'Hara*, 110–81, 81 N. W. 157.

The embodiment of affidavits in a bill of exceptions does not make them competent evidence of a fact which should appear by the recital of the bill of exceptions itself, such as the misconduct of an attorney which occurred, if at all, in the presence or within the knowledge of the court. *State v. Burton*, 103–28, 72 N. W. 413.

When a bill of exceptions is signed and filed it becomes a part of the record. It is not competent for the judge to change or modify it by a contradictory written statement or certificate filed with the papers of the case. *State v. Smith*, 107–480, 78 N. W. 224.

The fact that the statutory directions as to the drawing of jurors were not followed must be shown by bill of exceptions, and not by affidavit, it being presumed that the drawing was in the presence of the court, as required by the statute. *Moss v. Appanoose County*, 109–671, 81 N. W. 159.

Affidavits in support of a motion for a new trial cannot be considered on appeal unless they are made a part of the record by being embodied in the bill of exceptions or otherwise. *Ricker v. Davis*, 139 N. W. 1110.

As to embodying the shorthand report of the evidence in a skeleton bill, see notes to code § 3749 in this supplement.

SEC. 3754. Must be on material point.

Where the errors are such that in view of the entire record the supreme court can fairly say that no actual prejudice has resulted to appellant, a reversal should not be ordered. *In re Bradley*, 117–472, 91 N. W. 780.

Where material and competent testimony is ruled out, prejudice will be presumed, in the absence of a showing in the record of something which the court can say serves to cure the error. *Lundy v. Lundy*, 118–445, 92 N. W. 39.

Where, after evidence has been admitted over objection, the witness is allowed, without objection, to give substantially the same evidence as that objected to, and the opposite party enters upon the same field of inquiry, the latter cannot be heard to complain. *Hamilton v. Mendota Coal Co.*, 120–147, 94 N. W. 282.

Where evidence, though erroneously admitted, is afterwards by the direction of the court withdrawn from the consideration of the jury, and the complaining party makes no request to have the jury specially instructed to disregard such evidence, the error may be deemed cured where the matter referred to in the evidence has no vital relation to the essential elements of the action. *State v. McKnight*, 119–79, 93 N W. 63.

And see notes to § 3705.

That errors not prejudicial will not be ground for reversal on appeal, see notes to code § 4139 in this supplement.

SEC. 3755. New trial—grounds for.

I. In General.

Discretion: The court interferes with reluctance with the trial court when a new trial is granted. Much latitude is allowed for the exercise of discretion, but it is a legal discretion that should control, and where the precise ground on which the court based its action appears, the supreme court has no hesitation in determining whether such discretion has been abused. *Turley v. Griffin*, 106–161, 76 N. W. 660; *Snyder v. Thompson*, 134–725, 112 N. W. 239.

The supreme court does not hesitate to review an order granting a new trial where the record discloses the situation as fully in all respects as it was presented to the trial court. *Busse v. Schaeffer*, 128–319, 103 N. W. 947.

The action of a trial court in granting or refusing a new trial is largely one of discretion, and in the absence of an abuse of discretion the supreme court will not interfere. *Van Wagenen v. Parsons*, 106–263, 76 N. W. 675.

Where a motion for a new trial presents several grounds but it does not appear on what one or more of these grounds the granting of a new trial is based, it must appear, in order to warrant interference on appeal, that there was an unjust exercise of discretion as to all of the grounds. *Ibid.*

A large discretion is vested in the trial court in granting a new trial, and the supreme court is slow to reverse where a new trial is granted. *Mally v. Mally*, 114–309, 86 N. W. 262.

A motion for new trial is addressed to the sound discretion of the court, and the sustaining of such motion will not be interfered with on appeal except in case of abuse of discretion. *Marr v. Burlington, C. R. & N. R. Co.*, 121–117, 96 N. W. 716; *Hunter v. Porter*, 124–351, 100 N. W. 53; *Chambliss v. Hass*, 125–484, 101 N. W 153; *Armstrong v. Stewart*, 130–162, 106 N. W. 512.

Trial courts are necessarily vested with a large discretion in the matter of granting new trials, and the supreme court is more reluctant in interfering when a new trial is granted than when it is denied. *Werthman v. Mason City & Ft. D. R. Co.*, 128–135, 103 N. W. 135.

The supreme court interferes reluctantly with the action of the lower court in rul-

ings on motions for a new trial, and especially where a new trial has been granted, but the trial judge may not substitute his judgment as to the credibility of the witness in place of the judgment which the jury has exercised. *Tathwell v. Cedar Rapids*, 122–50, 97 N. W. 96.

The discretion of the trial court in setting aside a verdict on account of the introduction of erroneous evidence which it finds to have been prejudicial will not be interfered with on appeal. *King v. Chicago. M. & St. P. R. Co.*, 138–625, 116 N. W. 719.

The granting of a new trial is so largely within the discretion of the trial court that its order granting a new trial will not be disturbed on appeal except on the showing that such discretion has been abused. *White v. Chicago & N. W. R. Co.*, 145–389, 124–162.

The supreme court is reluctant on appeal to interfere with the large discretion vested in the trial court as to granting a new trial where a new trial has been granted. *Eggert v. Interstate Inv. & Dev. Co.*, 146–481, 125 N. W. 246.

Some latitude of discretion is conferred on the trial court in the matter of granting a new trial and the supreme court is reluctant to interfere with an order granting such new trial. *Royer v. King's Crown Plaster Co.*, 147–277, 126 N. W. 168.

An order granting a new trial will not be reversed on appeal unless it affirmatively appears that in granting a new trial the court has abused its discretion. This is especially true where the motion is sustained generally upon numerous grounds, on the merits of some or all of which the trial court is in a better position to pass than is the supreme court upon appeal. *Holland v. Kelly*, 149–391, 128 N. W. 338.

The supreme court may on appeal sustain the exercise of discretion by the judge of the lower court in granting a new trial although, had a new trial been refused, the court might have affirmed such action. *Andrews v. Chicago, R. I. & P. R. Co.*, 151–166, 130 N. W. 918.

The supreme court will affirm an order for a new trial whenever it has any reasonable support in the record, and to that end will give the evidence the most favorable construction of which it is reasonably susceptible in support of the ruling assailed. *Bottineau Land Co. v. Hintze*, 150–646, 125 N. W. 842.

The supreme court has seldom reversed an order granting a new trial. Every favorable presumption will be entertained in support of such action. *Crider v. McColley*, 154–671, 135 N. W. 364.

Although the evidence is conflicting and the case is properly submitted to the jury, the trial court may, in the exercise of a sound discretion and on reasonable grounds of belief that an erroneous verdict has been reached, grant a new trial in order that the facts might be passed upon by another jury. But some force should reasonably be given to the concurrence of two or more juries in reaching the same result. *Porter v. Madrid State Bank*, 155–617, 136 N. W. 666.

It has been repeatedly held that the supreme court will not interfere with the action of the lower court in granting a new trial where there are reasonable grounds to believe that an unjust result has been reached which may be obviated on a trial to another jury. *Ibid.*

The supreme court is reluctant to interfere with the action of the lower court in its conclusion based upon the entire trial of the case if no prejudice or improper influence has affected the verdict. *Kennis v. Ogden Coal Co.*, 157– —, 138 N. W. 467.

An order granting a new trial will not be reversed unless it affirmatively appears that the trial judge has abused his discretion in granting it. *Post v. Dubuque*, 139 N. W. 471.

The discretion of the court in sustaining a general motion for a new trial without giving specific grounds therefor is to be supported on the broad presumption that if, in view of the course of the trial, the verdict does not respond to the issues tendered and the testimony adduced, a new trial should be granted in the interests of justice. *Maynard v. Des Moines*, 140 N. W. 208.

The action of the trial court in granting a new trial will not be reversed on appeal unless it is clearly shown that such discretion has been abused. *Smith v. Smith*, 140 N. W. 659.

Motion: In order to obtain a new trial the aggrieved party must apply therefor. A new trial will not be granted to him under a motion for judgment notwithstanding the verdict. *Hooker v. Chittenden*, 106–321, 76 N. W. 706.

The purpose of a motion for a new trial is to bring before the court errors which without it would not be called to its attention, and the filing of a motion of this kind on certain grounds stated does not waive errors with reference to other matters to which the court's attention has been previously directed and as to which exceptions have been saved. *Stewart v. Equitable Mut. L. Assn.*, 110–528, 81 N. W. 782.

An appeal lies from a judgment notwithstanding the pendency of motion for a new trial. *McLaughlin v. J. C. Hubinger Bros. Co.*, 135–595, 113 N. W. 475.

Effect: A new trial as authorized by this section involves a reëxamination of the issue of fact or some part or portion thereof, and differs from an examination of all the issues involved in the action. Therefore the ruling on such an applica-

tion does not bar a subsequent application for a new trial within a year after judgment in an action for the recovery of real property as authorized by code § 4205. *Bevering v. Smith*, 121–607, 96 N. W. 1110.

After a new trial has been ordered, the case stands as though no verdict had been rendered; and the party in whose favor such new trial has been granted may not by motion obtain judgment notwithstanding the verdict. *Hamill v. Schlitz Brewing Co.*, 138–138, 115 N. W. 943.

Where several claims have been submitted for general verdict, a new trial may be granted as to one of such claims if it is apparent that it was included in the verdict and the amount allowed on that account is definitely ascertainable from the record. *Case Threshing Mach. Co. v. Fisher*, 144–45, 122 N. W. 575.

Where by inadvertent mistake of a foreman his name is attached to the wrong form of verdict, a new trial should be granted if it is not practicable to so correct the mistake as to render judgment on the corrected verdict. *Carlson v. Adix*, 144–653, 123 N. W. 321.

In an action against several defendants where a verdict has been rendered in plaintiff's favor against all, a new trial may be granted to one on the ground of insufficiency of evidence to sustain the verdict as against him. *Pearse v. Balm*, 152–422, 132 N. W. 821.

Several grounds: Where a motion for new trial, based on several grounds, is sustained generally, the party complaining on appeal must show that none of the grounds were good in order to justify a reversal. *Hydinger v. Chicago, B. & Q. R. Co.*, 126–222, 101 N. W. 746.

Where the motion for new trial in which there are several grounds is sustained generally, the appellant complaining of such ruling must show that there was no warrant for the exercise of the discretion which is given the trial court and there will be no reversal except on the showing that none of the grounds for reversal were good. *Murray v. Chicago, R. I. & P. R. Co.*, 145–212, 123 N. W. 954.

Matters not of record: In determining a motion for new trial the judge is not justified in taking into account matters which have come to his knowledge outside of the record; but it will not be presumed that the court has considered any matters which cannot be properly considered. *Miller v. Miller*, 123–165, 98 N. W. 631.

Change of theory: A party is not entitled to a new trial on another and materially different theory from that on which the case was presented. *Thyssen v. Davenport Ice & Cold Storage Co.*, 134–749, 112 N. W. 177.

Counterclaim: A new trial of the issues raised in a counterclaim alone may sometimes be granted. *Schmidt v. Posner*, 130–347, 106 N. W. 760.

Waiver: Where motion for judgment on the special findings is sustained, a motion for new trial is thereby waived, but if both the motion for judgment and for new trial are overruled, the unsuccessful party may appeal as to each of such rulings. *Schulte v. Chicago, M. & St. P. R. Co.*, 124–191, 99 N. W. 714.

In contempt proceedings: The statutory provisions as to new trial in civil cases are sufficiently comprehensive to include new trial in contempt proceedings and are applicable to them. *State v. Stevenson*, 104–50, 73 N. W. 360.

II. Grounds.

(a) *Misconduct of court or jury.*

Misconduct of judge: A trial court should not as a rule interfere with the examination of witnesses when the examination is being fairly conducted, except to rule upon objections and motions, but it is not required to remain silent when unwilling witnesses persist in such a course as will conceal the truth and make the trial a travesty on justice. *State v. Spiers*, 103–711, 73 N. W. 343.

It is not improper to say to a jury, especially where a case is on trial for the third time after two disagreements, that it is very important that a verdict should be arrived at, and send them out for further consideration, although they have already been out for quite a long time, and to ask them to make an earnest effort to arrive at a verdict. *State v. Olds*, 106–110, 76 N. W. 644.

Remarks made by the court in ruling on objections interposed by a party, held not to be objectionable as prejudicing the case of such party. *Crowell v. McGoon*, 106–266, 76 N. W. 672.

Remarks of the court in the presence and hearing of the jury relating to the sufficiency of the evidence may be ground for a new trial. *In re Will of Knox*, 123–24, 98 N. W. 468.

On appeal the supreme court will not review the action of the trial court in overruling a motion for new trial supported by affidavits and stating that the court gave undue emphasis to such portions thereof as were important to the adverse party and minimized such portions as were favorable to the appellant. *Hickey v. Webster County*, 148–337, 127 N. W. 658.

Remarks of the court in ruling upon objections to evidence, held not prejudicial as tending to discredit counsel or to mislead the jury into assuming that facts had been established of which no evidence had been offered. *Lomack Home v. Iowa Mut. Tornado Ins. Assn.*, 155–728, 133 N. W 725, 137 N. W. 936.

Absence from court room: In the absence of affirmative showing of want of prejudice the absence of the judge from the court room beyond the hearing of the proceedings during the arguments of counsel is error sufficient to warrant reversal. *State v. Carnagy*, 106–483, 76 N. W. 805.

Absence of the judge from the court room during the arguments to the jury will not be a ground for a new trial where it appears that no prejudice resulted. *Allen v. Ames & College R. Co.*, 106–602, 76 N. W. 848.

By consent in advance, objection to absence of the judge during argument may be waived, even in a criminal case. *State v. Hammer*, 116–284, 89 N. W. 1083.

In civil cases absence of the judge from the court room during the argument to the jury will be presumed to have been with consent of the parties, and where this is the case, his absence is not alone ground for reversal. *Gorham v. Sioux City Stock Yards Co.*, 118–749, 92 N. W. 698.

It is not necessarily erroneous or prejudicial for one judge to take the place of another, even during the trial of a criminal case. *State v. Hogan*, 145–352, 124 N. W. 178.

Misconduct of jury does not require the granting of a new trial unless it may be said to have influenced the result. A large discretion in passing upon such question is necessarily lodged in the trial court. *State v. Baughman*, 111–71, 82 N. W. 452.

Quotient verdict: Where the jurors after determining to render a verdict for plaintiff, and while considering the amount of the verdict, set down each the amount he was willing to allow, and these amounts were added up and the aggregate divided by twelve, which the jurors did not then agree to adopt but proceeded further to consider, and then subsequently agreed on as the proper amount, held that this conduct was not such as to vitiate the verdict. *Owen v. Christensen*, 106–394, 76 N. W. 1003.

A quotient verdict is a ground for a new trial. *Ward v. Marshalltown L. P. & R. Co.*, 132–578, 108 N. W. 323.

Where the jury returns a verdict, even though at the time the amount of the verdict is arrived at there is no express agreement to be bound by the result reached, if there is a fair inference from all that is said that there was a tacit understanding among the jurors that they would abide the result, this is sufficient to avoid the verdict. Nor is it necessary that every member of the jury be a party to the agreement. It is enough to vitiate the verdict if the greater number so agree. A verdict reached by adding together the estimates of the various jurors and dividing the total amount by twelve and a subsequent assent to it is not alone sufficient to purge it of illegality, although such an illegal verdict may be repudiated and a valid one found as the result of due deliberation. *Sylvester v. Casey*, 110–256, 81 N. W. 455.

Where there is a conflict in the statements of the jurors as to whether there was any previous agreement to be bound by the result reached by adding together the amounts voted for and dividing the total amount by twelve, the supreme court will not interfere with the holding of the trial court as to the legality of the verdict. *Hoover v. Mapleton*, 110–571, 81 N W. 776.

In the absence of an agreement that the jurors shall be bound to the amount of verdict determined by adding together the estimates of the individual jurors and dividing the total by twelve, such a proceeding does not vitiate the verdict. *McElhone v. Wilkinson*, 121–429, 96 N W. 868.

Drinking intoxicating liquors: Under some circumstances the taking of intoxicating liquors by jurors from a witness might be such misconduct as to necessitate a new trial, but the mere indulgence in this social custom without anything more will not warrant the inference of wrong doing. *State v. Minor*, 106–642, 77 N. W. 330.

Where, during the progress of a trial, but before final submission of the case, a juror indulges in the use of intoxicating liquors, the verdict should not be disturbed unless prejudice is shown, and the fact alone that liquor was taken is not enough to vitiate the verdict. On the other hand, the rule is established that prejudice will be presumed if the liquor has been drunk after the jury has retired to consider the case. If the liquor is taken after the jury has reached a conclusion and put the verdict in form, the verdict will not thereby be affected. *State v. Reilly*, 108–735, 78 N. W. 680.

The fact that a juror has drunk intoxicating liquor in moderate quantity when not on duty is not a ground for a new trial. *State v. Smith*, 132–645, 109 N. W. 115.

The admission of a juror that while he was serving as a member of the jury he took a dose of quinine and whiskey for a severe cold will not alone justify the setting aside of the verdict. *Gorham v. Sioux City Stock Yards Co.*, 118–749, 92 N. W. 698.

The act of the jury in sending out for refreshments while deliberating on their verdict does not constitute misconduct such as to authorize the granting of a new trial. *Long v. Davis*, 136–734, 114 N. W. 197.

Where the alleged misconduct of a juror is that he has been, during the trial, under the influence of intoxicating liquors, the granting of a new trial by the lower

court will not be interfered with on appeal. *Carlisle v. Council Bluffs*, 151–181, 130 N. W. 813.

Improper statements and conversations: Remarks made by a juror derogatory to a witness but sustained by evidence in the case do not constitute misconduct of a juror. *State v. Copeland*, 106–102, 76 N. W. 522.

Improper statements made by some jurors to others while they are deliberating will not authorize a new trial unless it appears that prejudice resulted from the statements or that they were of a character to cause prejudice and the presumption of prejudice has not been overcome. *State v. Olds*, 106–110, 76 N. W. 644.

The action of a juror during the progress of the trial in indicating his conviction at the time as to what his final conclusion will be, does not necessarily require the setting aside of the verdict. *State v. Baughman*, 111–71, 82 N. W. 452.

Statements by a juror to his fellow jurors while in the jury room as to facts within his personal knowledge relating to the subject matter of the suit will constitute prejudicial error, requiring a new trial. *Wilberding v. Dubuque*, 111–484, 82 N. W. 957.

A new trial should be granted where it appears that jurors while deliberating upon the case stated their personal knowledge of facts relevant to the issues, and that outsiders discussed the case in the presence of the jurors in such manner as to create prejudice. *Hydinger v. Chicago, B. & Q. R. Co.*, 126–222, 101 N. W. 746.

The mere fact that a juror during a recess of the court was present at a conversation between outsiders relating to the merits of the case will not require the setting aside of the verdict, no prejudice appearing and no impropriety of conduct on the part of the juror being shown. *Montgomery v. Hanson*, 122–222, 97 N. W. 1081.

Affidavits of jurors tending to show that in their deliberations members of the jury stated facts heard outside of court which were discussed while the verdict was being considered, held not sufficient ground for setting aside the verdict, it not appearing that the result was influenced by such discussion. *Ibid.*

If extrinsic or irrelevant matter is introduced into the deliberations of the jury in such a manner as to raise any reasonable question whether it did not influence the verdict, the court may properly set it aside; but a casual remark or statement made by a juror to his associates derogatory to one of the contesting parties ought not to be so regarded in the absence of any showing that heed was given to such statement or that the verdict was influenced thereby. *Ayrhart v. Wilhelmy*, 135–290, 112 N. W. 782.

While due regard for the propriety of conduct dictates that the jurors and parties should avoid familiar intercourse pending the trial and disposition of the case, yet casual and public intercourse does not necessarily indicate such misconduct as to require the setting aside of the verdict. *Ibid.*

The fact that a juror casually spoke to the prosecutrix during the course of the trial without having conversation with her, held not to constitute such misconduct as to warrant a new trial. *State v. Dudley*, 147–645, 126 N. W. 812.

Where it appears that one juror has made improper statements to his fellow jurors calculated to influence their action, the presumption of prejudice is not sufficiently overcome by showing that some of the other jurors did not hear the statement before the verdict was agreed upon. *Cresswell v. Wainwright*, 154–167, 134 N. W. 594.

Further as to misconduct of jury in criminal cases as ground for new trial, see notes to code § 5424 in this supplement.

Taking improper papers: It is error for the jury to have a map brought before them which has not been introduced in evidence and use it in construing the evidence. *De Wulf v. Dix*, 110–553, 81 N. W. 779.

Unauthorized view of premises: The fact that a juror during an intermission of the trial observes the premises with relation to the condition of which there is a controversy does not necessarily constitute misconduct. *Caldwell v. Nashua*, 122–179, 97 N. W. 1000.

The action of members of the jury in going on their own motion to view premises to which the testimony relates will not necessarily constitute such misconduct as to require a new trial. So held where it appeared that no reference to the results of the jurors' observations was made in the jury room, and each testified that what he saw had nothing to do with his verdict. *State v. Crouch*, 130–478, 107 N. W. 173.

How misconduct shown: It is not competent to show by affidavits what transpires by way of misconduct of the jury in the presence of the court or judge unless the judge refuses to certify to the facts as they are claimed to be by the party desiring the certificate. *State v. Olds*, 106–110, 76 N. W. 644.

Affidavits of jurors are admissible to show a statement by one of the jurors to another of a fact not shown in evidence calculated to exercise some influence on the result. *Douglass v. Agne*, 125–67, 99 N. W. 550.

The statute provides that the showing in support of a motion for a new trial based on the misconduct of the jurors shall be by affidavits. *Harrison v. Ayrshire*, 123–528, 99 N. W. 132.

And further, see notes to next section.

(b) *Misconduct of opposite party or attorney.*

Misconduct of a party, such as the introduction of testimony known to be false, while a ground for a new trial under this section, is not a ground which may be first presented by a petition for a new trial filed within a year under code § 4091. *Guth v. Bell*, 153–511, 133 N. W. 883.

Misconduct of counsel: Remarks of counsel made as of his own knowledge in connection with the testimony of a witness may constitute misconduct. *Goldthorp v. Goldthorp*, 106–722, 77 N. W. 471.

Counsel are not to be closely limited in their opening statements and misconception on their part as to the competency of evidence should not be ground for a new trial, unless so gross or made under such circumstances as that prejudice may be inferred. *State v. Todd*, 110–631, 82 N. W. 322.

The question of granting a new trial on account of misconduct of counsel is left very largely to the good sense of the trial court, and the supreme court will not interfere on appeal unless it appears likely that a different result would have been reached but for such misconduct. *Hannestad v. Chicago, M. & St. P. R. Co.*, 132–232, 109 N. W. 718.

Misconduct of counsel may be such as to require the granting of a new trial on appeal. *See v. Wabash R. Co.*, 123–443, 99 N. W. 106.

The setting aside of a verdict on account of misconduct of counsel in the trial is left largely to the discretion of the trial court. *Wissler v. Atlantic*, 123–11, 98 N. W. 131.

It is not misconduct on the part of counsel to offer testimony which he believes to be admissible, and to preserve a record of such offer and the exception thereto. If the offer is made in good faith it does not constitute misconduct such as to authorize a new trial, although the evidence thus offered is not admissible. *Hammer v. Janowitz*, 131–20, 108 N. W. 109.

It does not constitute misconduct for counsel in opening the case to state an intention to prove matters as to which evidence is subsequently rejected when offered, such statement not being unreasonable in itself, and made in good faith. But counsel should not in the argument to the jury, after the evidence has been introduced, comment upon objections made to the introduction of evidence on the theory that such objections amounted to a practical admission that the facts as to which the evidence was excluded were true and would have been proven had the objection not been made. *Potter v. Cave*, 123–98, 98 N. W. 569.

On a finding by the court of misconduct of counsel of the successful party in his argument to the jury, the verdict should be set aside. *Heim Brewing Co. v. Hamilton*, 137–376, 114 N. W. 1039.

The exercise of discretion by the trial court in refusing a new trial on the ground of prejudicial misconduct of counsel in the court's presence will be interfered with on appeal only where an abuse of discretion is clearly made to appear. *State v. Norman*, 135–483, 113 N. W. 340.

Attempts of a party and his counsel during the progress of the trial or preliminary thereto to influence public sentiment and arouse passion and prejudice in his favor as against his adversary may be sufficient to justify the granting of a new trial, even though it does not appear that such improper influences actually reached members of the jury or influenced their action. *Doyle v. Burns*, 138–439, 114 N. W. 1.

The question whether a new trial should be granted on account of alleged misconduct of counsel is one intrusted largely to the discretion of the trial court. *Swanson v. Fort Dodge, D. M. & S. R. Co.*, 153–78, 133 N. W. 351.

In argument: The supreme court will not interfere with the discretion of the trial court in refusing to grant a new trial on account of alleged misconduct of counsel in argument, unless it is made to affirmatively appear that such discretion has been abused to the prejudice of the appellant. *In re Will of Wharton*, 132–714, 109 N. W. 492.

Error of counsel in stating a proposition of law to the jury to which attention is not called at the time cannot be taken advantage of in a motion for a new trial. *Bray v. Bray*, 128–234, 103 N. W. 477.

When counsel are guilty of misconduct in arguing a case to the jury, whether in the presence of the judge or in his absence, there ought to be at least an attempt made to correct the error at the time, and when this is not done, the supreme court will not, in a civil case, disturb the ruling of the trial court on the motion for new trial based on such misconduct, unless prejudice clearly appears. *Gorham v. Sioux City Stock Yards Co.*, 118–749, 92 N. W. 698.

An objection on account of misconduct of counsel in addressing the jury is addressed primarily to the sound discretion of the trial judge, and his ruling will not be interfered with on appeal in the absence of a showing of the abuse of such

discretion. *Brusseau v. Lower Brick Co.*, 133–245, 110 N. W. 577.

It is not to be presumed that the jury has been influenced by statements of the counsel which the court has directed not to be considered, and where the misconduct of counsel is not flagrant, the direction of the court is sufficient to negative the inference of prejudice. *State v. Donavan*, 125–239, 101 N. W. 122.

Persistence on the part of counsel in referring to matters not proper for the consideration of the jury after being warned by the court to desist, is sufficient ground for granting a new trial. *Belcher v. Ballou*, 124–507, 100 N. W. 474.

Where counsel is promptly stopped by the court in pursuing an improper line of argument, and it does not appear that he acted wilfully or in disregard of the admonition of the court in that respect, there is no occasion for granting a new trial on that ground. *Bettis v. Chicago, R. I. & P. R. Co.*, 131–46, 108 N. W. 103.

Statements of the county attorney in a criminal prosecution that defendant was not only charged with crime, but was guilty of it and that there were witnesses (referring to defendant's wife who was incompetent to testify against him) who knew that he was not at home as claimed at the time the crime was committed, held not to be such as to call for a new trial. *State v. Millmeier*, 102–692, 72 N. W. 275.

Statements of counsel made by way of inference from matters appearing of record do not generally constitute misconduct requiring a new trial. *State v. Thomas*, 135–717, 109 N. W. 900.

Objections on account of misconduct of counsel in argument should be made at the time and not withheld until the conclusion of the argument. *Ibid.*

Affidavits of jurors are admissible to show that statements of counsel relied upon as constituting misconduct had no influence on the action of the jurors. *Ibid.*

The judge who hears the case is better able to determine whether misconduct of counsel in argument was prejudicial than the supreme court on appeal. *Ibid.*

Counsel should omit all appeals to the jury calculated to arouse prejudice against a party on account of his character, wealth, etc. *Rietveld v. Wabash R. Co.*, 129–249, 105 N. W. 515.

Reference in argument to the fact that the plaintiff suing for injuries received while working in defendant's mine probably had not a bank account held not error as tending to create sympathy with plaintiff as a poor man against the defendant corporation, it appearing that the argument was not made for that purpose, but for the purpose of explaining why plaintiff, after the injury, returned to his work sooner than he should have done, resulting in an aggravation of his injury. *Cook v. Smith-Lowe Co.*, 135–31, 109 N. W. 798.

The improper conduct of counsel for plaintiff in an action against a corporation in calling attention to the fact that the defendant is a corporation, operating extensive lines of railway, earning large sums of money, and inferentially, at least, able to pay any amount, however large, that the jury may see fit to award as damages, may constitute such misconduct as to require the granting of a new trial. *Sullivan v. Chicago, R. I. & P. R. Co.*, 119–464, 93 N. W. 367.

It does not always follow that the direction by a court to disregard certain improper matters, to which attention has been called by counsel during the trial, has the effect to cure the error involved therein. *Ibid.*

An argument though outside the record, if made in response to a similar argument by opposing counsel, does not necessarily require reversal. *Goldstein v. Morgan*, 122–27, 96 N. W. 897.

The fact that counsel for one party refers in his argument to matter not properly subject to comment may prevent comment on the same matter by the counsel of the other party from constituting misconduct on his part. *State v. Hart*, 140–456, 118 N. W. 784.

It is error to allow counsel to refer to the fact that if an excessive verdict is rendered it may be corrected by the trial court or on appeal, and that from the amount of recovery allowed the plaintiff all of the fees of his counsel must be paid. *White v. Chicago & N. W. R. Co.*, 145–408, 124 N. W. 309.

Reference to the failure of the defendant to establish a good character where no question as to such character has been properly raised, constitutes such misconduct as to require the granting of a new trial. *State v. Dudley*, 147–645, 126 N. W. 812.

In a particular case held that the arguments of counsel were not so far outside of the record that prejudice to the opposite party could have been possible. *Poli v. Numa Block Coal Co.*, 149–104, 127 N. W. 1105.

It is only such improper argument by counsel as is likely to influence the action of the jury in view of the record which will require the granting of a new trial on that ground. *State v. Leek*, 152–12, 130 N. W. 1062.

While impropriety in argument tending to the prejudice of the opposite party must be avoided, too great nicety in the choice of words in an argument to the jury ought not to be exacted. *Myers v. Chicago, B. & Q. R. Co.*, 152–330, 131 N. W. 770.

The conduct of attorneys in the course of argument is a matter peculiarly within the discretion and power of the trial court. *State v. McKinnon*, 157– —, 138 N. W. 523.

While it is not necessary for the defendant in a criminal case to make repeated objections to the argument of the county attorney as to impropriety therein, it is necessary that in some way and at some time specific complaint be made as to alleged misconduct in order to save the question for review on appeal. *Ibid.*

Objection: While misconduct of counsel may be so flagrant that no action of the court can be presumed to have been sufficient to remove the prejudice and therefore no objection would have been sufficient, yet if the misconduct might have been prevented or the resulting prejudice removed by action of the trial court, there should not be a reversal on account of misconduct unless proper objection appears to have been made and proper relief asked. *Gregory v. Wabash R. Co.*, 126–230, 101 N. W. 761.

Alleged misconduct of counsel in argument not made to appear by the bill of exceptions cannot be considered. *Kinney v. McFaul*, 122–452, 98 N. W. 276.

Where no exception to argument of counsel is taken at the time affording the trial court opportunity to obviate the effect of misconduct in such argument, a reversal will not be ordered on appeal unless prejudice clearly appears. *Streeter v. Marshalltown*, 123–449, 99 N. W. 114.

The entry of an objection or exception to argument of counsel not calling upon the court for any ruling is not sufficient to preserve a question as to misconduct of counsel in such argument. *Renshaw v. Dignan*, 128–722, 105 N. W. 209.

Remarks of counsel made in running comment during the trial, as well as those made in argument, may be ground for a new trial if improper and prejudicial, and in such case it is not necessary to show objections made to every question asked or statement made. *Welch v. Union Cent. L. Ins. Co.*, 117–394, 90 N. W. 828.

Error cannot be assigned on misconduct of counsel in argument to the jury where no objection to such argument appears to have been made. *Beans v. Denny*, 141–52, 117 N. W. 1091.

A mere objection to argument of counsel on the ground that it is improper and an exception to such argument does not raise any question as to the correctness of the action of the lower court in that respect. *State v. Matheson*, 142–414, 120 N. W. 1036.

In the absence of objection to argument of counsel any objectionable statements, the effect of which might have been obviated by their withdrawal or by the direction of the court that they be not considered, will not be ground for a new trial on appeal. *Cinkovitch v. Thistle Coal Co.*, 143–595, 121 N. W. 1036.

Where the court is not asked at any time to make any ruling with reference to the alleged misconduct of counsel or misconduct of the jury, no question with reference thereto can be made on appeal. *Aken v. Clark*, 146–436, 123 N. W. 379.

Where no question is raised in the trial court with reference to improper argument of counsel such question cannot be presented on appeal. *Cedar Rapids Nat. Bank v. Carlson*, 156–343, 136 N. W. 659.

Where the opposite party is fully advised as to the misconduct complained of and makes no objection thereto until after the submission of the case to the jury, he cannot rely on such misconduct as a ground for a new trial. *Ricker v. Davis*, 139 N. W. 1110.

Courts cannot be too careful in avoiding all suspicion of partiality and unfairness and counsel should be scrupulously free from any conduct which would seem to place a jury under any obligation to him, either express or implied. *Ibid.*

Where no objection to the argument of counsel is made during the argument, nor was the matter brought to the attention of the trial court in any way until in a motion for a new trial, it cannot be raised on appeal. *Carter v. Sioux City Service Co.*, 141 N. W. 26.

How shown: Charges of the misconduct of an attorney as a ground for reversal on appeal will not be considered unless shown by the bill of exceptions where it appears that such misconduct, if it occurred at all, was in the presence or within the knowledge of the court. Such fact cannot be shown by affidavits, even though they are embodied in the bill of exceptions but must appear from the recital of the bill of exceptions itself. *State v. Watson*, 102–651, 72 N. W. 283; *State v. Burton*, 103–28, 72 N. W. 413; *Frank v. Davenport*, 105–588, 75 N. W. 480; *De Wulf v. Dix*, 110–553, 81 N. W. 779; *State v. Keenan*, 111–286, 82 N. W. 792.

It may be that when the misconduct is in the absence of the trial judge and therefore not within his knowledge, it may be shown by affidavits, but in such a case counter affidavits also are admissible. *Faulk v. Iowa County*, 103–442, 72 N. W. 757.

A mere exception at the end of an argument is not enough to raise the question whether counsel has in the argument complied with the direction of the court as to the course to be pursued in such argument. *Klos v. Zahorik*, 113–161, 84 N. W. 1046.

Incorporation of alleged language used in argument by way of recital in a motion for new trial is not sufficient to make such language, not a matter of record, a basis

for an exception thereto. *Swanson v. Fort Dodge, D. M. & S. R. Co.*, 153–78, 133 N. W. 351.

An unverified statement made in a motion for a new trial as to improper remarks of counsel will not be considered on appeal where a new trial has been refused. *Wilson v. McCarty*, 156–660, 137 N. W. 920.

Affidavits in support of a motion for a new trial on the ground of misconduct of counsel, which are not made of record by bill of exceptions or otherwise, cannot be considered on appeal. *Ricker v. Davis*, 139 N. W. 1110.

Misconduct of counsel in argument cannot be shown by the testimony of jurors. It must appear by bill of exceptions or certificate of the judge. *Estes v. Chicago, B. & Q. R. Co.*, 141 N. W. 49.

Objections to improper argument will not be considered on appeal where they are not made at the time and preserved as a part of the record of the trial. *Ellis v. Barkley*, 142 N. W. 203.

Prejudice must appear: The action of the trial court in overruling a motion for new trial, based on misconduct of counsel, will be interfered with only where its discretion appears to have been abused. *State v. Newhouse*, 115–173, 88 N. W. 353.

Prejudice cured: Where objection was made to a statement of counsel in the opening of the case as to matters which could not properly be shown in evidence and the objection was sustained, and the jury was instructed not to consider anything except the evidence received on the trial, held that no prejudicial error was shown. *Taylor v. Pacific Mut. L. Ins. Co.*, 110–621, 82 N. W. 326.

While it is not proper to base an argument on facts not shown to have existed, error in doing so is cured by prompt action of the court in requiring the withdrawal of such remarks. *Mackerall v. Omaha & St. L. R. Co.*, 111–547, 82 N. W. 975.

Although counsel may have resorted to improper practices in argument, it will be presumed that the jury followed the instructions of the court to disregard such argument. *Wilson v. Big Joe Block Coal Co.*, 142–521, 119 N. W. 604.

In a particular case, held that misconduct of counsel for the state in argument to the jury in a criminal case was such that it required a reversal of the conviction, although objection to the argument had been sustained and the jury had been instructed to disregard such evidence. *State v. Fuller*, 142–598, 121 N. W. 3.

Where improper language used by the county attorney with reference to witnesses was withdrawn when objection was made and the court instructed the jury that such language was improper, held that it was to be presumed that the jury was in no way influenced by it in view of the action of the trial court in overruling a motion for new trial on that ground. *State v. Krumm*, 148–631, 127 N. W. 985.

In a particular case held that the action of the court in directing the jury not to consider improper argument of counsel was sufficient to negative prejudice and warrant his refusal of a new trial. *Kennis v. Ogden Coal Co.*, 157– —, 138 N. W. 467.

In a particular case, held that the withdrawal by counsel, on objection, of particular remarks to the jury and a caution by the court that such matter should be disregarded, was sufficient to remove the prejudice of such improper remarks. *Thompson v. Chicago & N. W. R. Co.*, 139 N. W. 557.

Where it appears that promptly upon the making of an improper statement in argument the court holds it to be improper and counsel in the presence of the jury admit the impropriety, it may well be assumed that the jurors have not been influenced by such statement. *Ellis v. Barkley*, 142 N. W. 203.

Further as to misconduct of counsel as a ground for new trial in criminal cases, see notes to code § 5424 in this supplement.

(c) *Accident or surprise.*

When a party is taken by surprise by evidence admitted against him he should apply for a continuance, and not having done so, cannot ask for a new trial on that ground. *Patton v. Sanborn*, 133–650, 110 N. W. 1032.

The party who is taken by surprise by the introduction of evidence by his adversary should ask for a continuance, and on failing to do so is not entitled to relief by a motion for new trial as against a verdict. *DeMers v. Rohan*, 126–488, 102 N. W. 413.

(d) *Excessive or deficient verdict.*

Excessive verdict: It is the well-established rule in this state that the trial court, when of opinion that a verdict for an excessive amount has been returned, may give the successful party the option to accept judgment for the amount which the court believes to be just or to submit to a new trial. *Baxter v. Cedar Rapids*, 103–599, 72 N. W. 790.

But the fact that the court requires the successful party to elect between such remission and a new trial does not show that the court finds the verdict to have been the result of passion or prejudice. *Ibid.*

It is error to reduce a verdict and render judgment for the reduced amount in favor of the successful party without giving him an option to accept that amount or submit to a new trial. *Barber v. Maden*, 126–402, 102 N. W. 120.

If the trial court finds the verdict to be excessive, it may order a new trial in case the successful party refuses to accept a reduction fixed by the court, but cannot, without giving the option of a new trial, reduce the amount for which judgment shall be rendered. *Stanley v. Core*, 119–417, 93 N. W. 343.

The defendant cannot complain that the court in reducing the amount of the verdict as against him did not give to the plaintiff the option of accepting a new trial instead of submitting to the reduction of the verdict. *Shockley v. Tucker*, 127–456, 103 N. W. 360.

The return of an excessive verdict does not necessarily show such passion and prejudice as to require the setting aside of the verdict. *Knowlton v. Des Moines Edison Light Co.*, 117–451, 90 N. W. 818.

Where the jury had returned a verdict for the defendant for substantial damages on a counterclaim, held that it was not proper to overrule the plaintiff's motion for a new trial and at the same time set aside the verdict for defendant and enter judgment for the defendant for costs only. *Keniston v. Todd*, 139–287, 117 N. W. 674.

Where exemplary damages are included in the verdict, the court cannot cure an excessive verdict by remittitur. *Waltham Piano Co. v. Freeman*, 141 N. W. 403.

Where it appears that the jury has not followed the instructions of the court in estimating the amount of recovery and has returned a verdict in a larger amount than is warranted by the evidence, the verdict will be set aside. *Thompson v. National Cable & Mfg. Co.*, 141 N. W. 912.

Inadequate verdict: The inadequacy of the verdict as to the damages awarded may be such as to justify the granting of a new trial. The court has a large discretion in determining whether a new trial should be granted on this ground. *Ward v. Marshalltown L. P. & R. Co.*, 132–578, 108 N. W. 323.

The court may set aside a verdict when manifestly inconsistent with the evidence in that it is for an inadequate amount of damage, as well as where it is excessive. *Tathwell v. Cedar Rapids*, 122–50, 97 N. W. 96.

The statutory provisions relating to new trial do not necessarily cover the whole ground, nor prevent the exercise by the trial court of the powers in this respect which have generally been exercised under the common-law system. *Ibid.*

The provision that a new trial may be granted if a verdict is not sustained by sufficient evidence justifies the setting aside of a verdict on account of inadequacy of the damages allowed. *Ibid.*

If the verdict for the plaintiff in an action for personal injuries is compensatory and substantial and the trial court has declined to grant a new trial, the supreme court will not interfere on appeal. *Palmer v. Cedar Rapids & M. C. R. Co.*, 124–424, 100 N. W. 336.

Where there is uncontroverted proof of substantial damages and the jury returns a verdict of only one dollar, it should be set aside on motion. *Strever v. Woodard*, 141 N. W. 931.

Passion and prejudice: Where the amount of plaintiff's recovery is not limited by the instructions, it cannot be said from the size of the verdict alone that it is the result of passion or prejudice. *Connors v. Chingren*, 111–437, 82 N. W. 934.

The mere fact that the verdict is for an amount which the court finds to be excessive does not in itself show such passion and prejudice as to require the entire setting aside of the verdict. *Doran v. Cedar Rapids & M. C. R. Co.*, 117–442, 90 N. W 815.

In a particular case held that the verdict was not the result of an intelligent and honest exercise of discretion by the jury and that it was the result of passion or prejudice, and judgment based thereon was reversed. *Eastman v. Miller*, 113–404, 85 N. W. 635.

Remarks of a juror to his fellows during the trial indicating a state of mind on the part of the juror unfitting him to give fair consideration to the evidence and decide the case on its merits may be sufficient ground for granting a new trial. *Doyle v. Burns*, 138–439, 114 N. W. 1.

The allowance of exemplary damages being wholly within the discretion of the jury in a case where there is a legal basis for the allowance of such damages the finding of the jury can only be interfered with on the ground of passion and prejudice; and if the allowance is so grossly excessive as not to be allowed to stand, the verdict should be set aside. In such a case the trial court has not power to reduce the amount of exemplary damages allowed. *Ahrens v. Fenton*, 138–559, 115 N. W. 233.

Where a verdict for damages on account of pain and suffering is found to be grossly excessive, it should be set aside and a new trial granted. *Reynolds v. McManus*, 139–242, 117 N. W. 667.

Where an allowance for pain and suffering is so excessive under the evidence as to indicate passion and prejudice a new trial should be granted. A reduction of the amount of the verdict is not sufficient. *Chapman v. Pfarr*, 145–196, 123 N. W. 992.

Inadequacy of the verdict for defendant on a counterclaim cannot be relied upon by plaintiff on appeal as showing passion and prejudice in the verdict as rendered. *Bell v. Kearns*, 153–62, 133 N. W. 347.

(e) *Verdict against the evidence or the law.*

Verdict against the evidence: Where the evidence is conflicting, it is the province of the jury to pass upon the conflict and the courts will not interfere with the verdict. *Inghram v. National Union*, 103–395, 72 N. W. 559.

In such case the conflict must be resolved in favor of the party against whom the motion for a new trial is made, and if there is not sufficient evidence to sustain a verdict for that party the motion should be sustained, otherwise it should be overruled. *Ibid.*

The function of the court with reference to the evidence is not fully and completely discharged when it determines the admissibility of the different items of evidence offered. It may still look into the whole case to see whether these items of evidence together constitute any substantial proof of the fact sought to be established. *Brooks v. Brotherhood of American Yeomen*, 115–588, 88 N. W. 1089.

The jury is to determine the facts and if there is any substantial support in the evidence for its finding, a new trial will not be granted. *Johnson v. Chicago, St. P. M. & O. R. Co.*, 123–224, 98 N. W. 642.

The insufficiency of evidence to support the verdict should be raised by motion for a new trial and if not so raised cannot be urged on appeal. *Schulte v. Chicago, M. & St. P. R. Co.*, 124–191, 99 N. W. 714.

The court has the inherent right to set aside a verdict and grant a new trial; but when such action is taken without a motion being made the grounds therefor should be made to appear of record. *Hensley v. Davidson Bros. Co.*, 135–106, 112 N. W. 227.

A verdict should not be set aside and a new trial granted for insufficiency of the evidence after the supreme court has held on appeal that substantially the same evidence submitted on a former trial should have been submitted to the jury for a verdict. *Ibid.*

The finding of the trial court that a new trial should be granted because the verdict does not correspond to the evidence and conform to the instructions may be sustained, although the evidence was properly submitted to the jury. *Werthman v. Mason City & Ft. D. R. Co.*, 128–135, 103 N. W. 135.

The trial judge has a distinct function to perform with respect to the question as to the sufficiency of the evidence to support the verdict. *Maynard v. Des Moines*, 140 N. W. 208.

Where there is dispute in the evidence or where it appears from the evidence that honest minds searching for the truth might on the whole record reach different conclusions, the case is for the jury and a new trial will not be granted on account of insufficiency of the evidence. *Pekarek v. Myers*, 140 N. W. 409.

(f) *Newly discovered evidence.*

Discretion of court: Considerable discretion is vested in the lower court in passing upon an application for a new trial on the ground of newly discovered evidence; and the supreme court will not interfere with the exercise of that discretion unless it appears to have been abused. *Trimble v. Tantlinger*, 104–665, 69 N. W. 1045, 74 N. W. 25.

While the granting of new trial on the ground of newly discovered evidence is a matter resting in the discretion of the trial court, yet this is a legal discretion and for an abuse thereof the action of the court in refusing a new trial may be reversed. *State v. Lowell*, 123–427, 99 N. W. 125.

The granting of a new trial on the ground of newly discovered evidence is largely discretionary with the trial court, and its ruling granting such new trial and holding the showing of diligence to be sufficient, will be upheld on appeal unless an abuse of discretion is shown. *Woerdehoff v. Muekel*, 131–300, 108 N. W. 533.

Where the newly discovered evidence, as shown by the affidavit, might or might not be of controlling weight as affecting the result, the action of the lower court in granting a new trial on that ground will not be interfered with. *Bullard v. Bullard*, 112–423, 84 N. W. 513.

The motion for new trial on the ground of newly discovered evidence is addressed to the sound discretion of the court and should not be granted unless a meritorious case is shown and it appears that the new evidence is of a character calculated to produce a different verdict. *Clements v. Stapleton*, 136–137, 113 N. W. 546.

Whether a new trial should be granted on account of newly discovered evidence is largely discretionary with the trial court, and the refusal to grant a new trial will not ordinarily be reversed on appeal where it does not appear that a different result would be reasonably probable. *Rockwell v. Ketchum*, 149–507, 128 N. W. 940.

An application for a new trial on the ground of newly discovered evidence may be made within a year although not raised by motion filed within three days after the verdict. *Guth v. Bell*, 153–511, 133 N. W. 883.

In support of such application, acts and declarations of the successful party subsequent to the trial in question may be shown as a ground for a new trial. *Ibid.*

Must be material: Newly discovered evidence which, had it been introduced, could not have affected the result is not

ground for a new trial. *Buchholtz v. Radcliffe*, 129–27, 105 N. W. 336.

Where it does not appear that the newly discovered evidence would bear on the issue in the case as tried, it will not be error to refuse to grant a new trial on account of such newly discovered evidence. *Carlson v. Hall*, 124–121, 99 N. W. 571.

A new trial should not be granted on the ground of newly discovered evidence where the evidence referred to would, if offered, be immaterial. *Long v. Davis*, 136–734, 114 N. W. 197.

If the newly discovered evidence relied upon relates to matters occurring subsequent to the trial, it is not a ground for new trial. *Johnson v. Waterloo*, 140–670, 119 N. W. 70.

A petition for a new trial under code § 4092 on the ground of newly discovered evidence may be supported by a showing of inconsistency between the testimony of the plaintiff on such trial and his testimony on a subsequent trial of a different case, such inconsistency relating to a material matter. *Guth v. Bell*, 153–511, 133 N. W. 883.

The omitted evidence ought to be definite and substantial and sufficient to warrant a fair probability of a different result. *Colwell v. Urbana Const. Co.*, 154–623, 135 N. W. 76.

Admissions of a party against his interest may be a ground for a new trial. Such admissions are material and not cumulative with other evidence. *Smith v. Smith*, 140 N. W. 659.

Cumulative evidence: A new trial will not be granted on the ground of newly discovered evidence which is merely cumulative. *Dunbauld v. Thompson*, 109–199, 80 N. W. 324; *Hemmer v. Burger*, 127–614, 103 N. W. 957; *Renshaw v. Dignan*, 128–722, 105 N. W. 209; *Hanousek v. Marshalltown*, 130–550, 107 N. W. 603; *Farrell v. Citizens Light & R. Co.*, 137–309, 114 N. W. 1063.

Evidence tending merely to strengthen the proof as to any one or more particular facts will be cumulative, but evidence of some other fact as to which there is no proof, but which would aid to the same general conclusion indicated by evidence which is introduced, will not be deemed cumulative. *Bullard v. Bullard*, 112–423, 84 N. W. 513.

While the trial court may be sustained in granting a new trial upon newly discovered testimony which is cumulative in character, yet it has a large discretion in such cases and ordinarily its action will not be interfered with on appeal. *Clark v. Van Vleck*, 135–194, 112 N. W. 648.

The overruling of a motion for a new trial on a showing of newly discovered evidence will not be reversed on appeal where such evidence is substantially cumulative; and it is immaterial that the newly discovered evidence is cumulative of that given by a party rather than that of another witness. *Rockwell v. Ketchum*, 149–507, 128 N. W. 940.

Ordinarily a new trial will not be granted to enable a party to examine a witness on a matter not referred to when on the witness stand, for presumptively the omission to elicit from the witness all material testimony amounts to negligence. *Ibid.*

In a particular case held that newly discovered evidence relied upon as a ground for new trial was not in its nature cumulative but was of a distinctly different probative character from that introduced on the new trial. *Guth v. Bell*, 153–511, 133 N. W. 883.

Where there is a conflict in the evidence, a showing for a new trial on account of the discovery of new witnesses will not necessarily be rejected on the ground that the evidence thus discovered is cumulative. *Smith v. Smith*, 140 N. W. 659.

Impeaching: Newly discovered evidence of an impeaching character is not a ground for new trial. *Witt v. Latimer*, 139–273, 117 N. W. 680.

A new trial will not be granted on account of newly discovered evidence which tends only to impeach the credibility of witnesses on the trial. *State v. Pell*, 140–655, 119 N. W. 154.

Diligence: Lack of diligence to procure the newly discovered evidence for use on the trial will be a proper ground for refusing to entertain a motion for a new trial based on such newly discovered evidence. *Baxter v. Cedar Rapids*, 103–599, 72 N. W. 790; *Renshaw v. Dignan*, 128–722, 105 N. W. 209.

A new trial should not be granted for newly discovered evidence which might have been discovered by inquiry before the close of the trial. *Benjamin v. Flitton*, 106–417, 76 N. W. 737.

Where there is nothing to put the party on inquiry as to the evidence on which he subsequently asks for a new trial, he is not to be deemed negligent in not having discovered such evidence in time to introduce it on the trial. *Bullard v. Bullard*, 112–423, 84 N. W. 513.

Facts which a corporation should have known by reason of information in the possession of its officers cannot be made the ground of an application for new trial on the basis of newly discovered evidence. A new trial should not be granted when the party seeking such relief has been negligent in acquiring the information on which the relief is asked. *Robins v. Modern Woodmen*, 127–444, 103 N. W. 375.

Under the circumstances of a particular case held that there was not such want of diligence in discovering the new evidence as to prevent the granting of a new trial

on that ground. *National Horse Imp. Co. v. Novak*, 105–157, 74 N. W. 759.

A new trial will not be granted on account of the failure of the unsuccessful party to ascertain, from a witness who testified on the trial, facts which though not known to such party might have been discovered by reasonable diligence or which if proven would be merely cumulative. *Buswell v. Buswell*, 146–52, 124 N. W. 770.

To warrant the granting of a new trial on the ground of newly discovered evidence, reasonable diligence in endeavoring to discover such evidence before the trial must be shown. *McCaulley v. Case Threshing Mach. Co.*, 151–305, 131 N. W. 1.

Being surprised in the testimony of a witness will not justify a new trial for the purpose of securing evidence to meet such testimony where the party had knowledge of a witness by whom such testimony might be met without attempting to secure his attendance. *Mulvaney v. Burroughs*, 152–439, 132 N. W. 873.

Where the occasion for introduction of additional evidence to meet that introduced by the opposite party is apparent at the time and the witnesses by which it may be furnished are known to the party, he should then ask for a continuance or postponement of the trial for the purpose of securing such evidence and cannot afterwards make the existence of such evidence a ground for a motion for new trial. *Heim v. Resell*, 153–356, 133 N. W. 881.

Where the unsuccessful party had information regarding the testimony of a witness who might have been procured before the trial was concluded, the absence of such witness is not a ground for motion to set aside the verdict on the ground of new evidence. *Sevening v. Smith*, 153–639, 133 N. W. 1081.

A showing as to newly discovered evidence in a particular case held sufficient to indicate that the unsuccessful party was not lacking in due diligence in not sooner becoming aware of its existence. *Smith v. Meeker*, 153–655, 133 N. W. 1058.

An affidavit for a new trial on the ground of newly discovered evidence is not sufficient which does not show that the party asking a new trial was not aware of the evidence until after the trial and that he was free from negligence in not discovering the existence of such evidence in preparing for the trial. *Woods v. Case Threshing Mach. Co.*, 155–177, 135 N. W. 399.

Witness in fact used: The case must be a very strong one which will justify a new trial on the ground of newly discovered evidence where the witness was in fact used upon the trial of the case. *Marengo Savings Bank v. Kent*, 135–386, 112 N. W. 767.

Sufficiency of showing: In a particular case held that the showing as to newly discovered evidence was sufficient. *Mally v. Mally*, 114–309, 86 N. W. 262.

Newly discovered evidence relied on in a particular case as the ground for a new trial held to be sufficient though to some extent cumulative, being also such as counsel in the exercise of reasonable diligence had not discovered. *Schnee v. Dubuque*, 122–459, 98 N. W. 298.

The showing in a particular case of newly discovered evidence held sufficient to authorize a new trial, although some of the new evidence would have been cumulative in character. *Sullivan v. Chicago, R. I. & P. R. Co.*, 119–464, 93 N. W. 367.

The showing of newly discovered evidence in a particular case held sufficient to require the granting of a new trial. *McCoy v. Nuese*, 154–563, 134 N. W. 531.

In a particular case, held that the showing of diligence was sufficient. *Smith v. Smith*, 140 N. W. 659.

When available: Application for new trial on the ground of newly discovered evidence may be made at any time either at or after the term at which the verdict sought to be set aside was rendered and until the expiration of one year from the entry of judgment on such verdict. (See code § 4092.) *Hunter v. Porter*, 124–351, 100 N. W. 53.

(g) *Error of law.*

Where the court erroneously allowed the transcript of the evidence on a former trial to be introduced in evidence, and subsequently directed the jury not to consider such evidence and allowed the party to introduce the witnesses, held, in the absence of some special showing of prejudice, the error in the admission of the transcript was cured. When an error occurs and soon after is corrected by the action of the court, the proper administration of justice does not require, unless it may be in extreme cases, that the court shall grant a new trial because of the error. *Bell v. Clarion*, 120–332, 94 N. W. 907.

The giving of an erroneous instruction not duly excepted to will not, it seems, be proper grounds for granting a new trial. *Turley v. Griffin*, 106–161, 76 N. W. 660.

Errors of law committed during the trial may be grounds for a motion for a new trial although it may not be necessary under code § 4106 to thus raise them in order to have them reviewed on appeal. *Mueller Lumber Co. v. McCaffrey*, 141–730, 118 N. W. 903; *Cox v. American Express Co.*, 147–137, 124 N. W. 202.

Error of law occurring at the trial, duly excepted to, may be raised by motion for new trial after judgment and the ruling of the lower court on the motion as to such error may be reviewed by appeal taken within six months after the ruling on the motion, although the time for appealing

on the judgment has expired. *Powers v. Des Moines City R. Co.*, 143–427, 121 N. W. 1095.

The ruling on the motion for new trial involves only a ruling on questions presented on the motion for new trial and not on the right to recover generally in the action. An appeal from the ruling on a motion for new trial does not involve interlocutory rulings on other questions. *White v. Chicago & N. W. R. Co.*, 145–389, 124 N. W. 162.

The action of the court in improperly ordering and receiving a directed verdict is a ground for a new trial. In the construction of this section such a directed verdict is a verdict by the jury. *Bottineau Land Co. v. Hintze*, 150–646, 125 N. W. 842.

Erroneous rulings of the court to which no exceptions have been taken during the trial cannot be made the ground for a motion for new trial. *Payne v. Waterloo, C. F. & N. R. Co.*, 153–445, 133 N. W. 781.

In ruling on a motion for a new trial after the entry of judgment, the court may in a proper case set aside a judgment already rendered and order the entry of a new judgment. *Staley v. Forest*, 157–188, 138 N. W. 441.

SEC. 3756. Application—affidavits.

By motion: A motion for a new trial may be ruled on after the entry of judgment if the motion is made in time, and the fact of the entry of judgment is no indication that a motion for a new trial has been disposed of. *In re Estate of Bishop*, 130–250, 106 N. W. 637.

An amendment to a motion for a new trial may be presumed to have been considered by the court in ruling on the motion, although not made until after the original motion was submitted. *Hawk v. Mulhall*, 133–695, 110 N. W. 1026.

The motion for new trial on account of misconduct of jurors should be supported by affidavits and it is not competent for the moving party, without presenting any excuse for not filing affidavits, to ask that witnesses be subpoenaed to testify as to the alleged misconduct. *State v. Foster*, 136–527, 114 N. W. 36.

A second application for a new trial under the same conditions as those existing when a former application was denied will be considered, if at all, only under exceptional circumstances. *State v. Bulecheck*, 137–158, 114 N. W. 891.

If by reason of accident or surprise which ordinary prudence could not have guarded against, the defendant, who has appeared, is not present or represented at the trial, his remedy is by motion under this section and not by motion to set aside the default under code § 3790. *Acheson v. Inglis*, 155–239, 135 N. W. 632.

During the term the court has inherent authority to grant a new trial on that ground and the strictness of proof exacted to warrant the setting aside of a default or in support of a petition for a new trial filed after the term is not required. *Ibid.*

Where the amendment to a motion for a new trial has reference to the same subject matter as the original motion, it may be interposed after the time allowed for filing such motion. *Smith v. Smith*, 140 N. W. 659.

Where the opposing party does not attack an amendment to a motion on the ground that it is filed too late, he may not be allowed to do so on appeal. *Ibid.*

When filed: In computing the three days within which the motion is to be filed, Sunday or Decoration day or other day on which judicial business is not required to be transacted, is not to be excluded. *German Sav. Bank v. Cady*, 114–228, 86 N. W. 277.

Objection that a motion for a new trial was not filed within the time authorized by statute may be waived by failing to raise it in the proper manner. *In re Assignment of Wilson*, 138–225, 114 N. W. 551.

A motion for a new trial may be amended after the time limited by statute for the filing of such motion, if no new grounds are therein presented. *Guth v. Bell*, 153–511, 133 N. W. 883.

Where the motion for new trial filed within the time allowed was without any showing in its support, held that the court might properly decline to consider affidavits filed at a later date without its leave. *Smith v. Suechting*, 156–712, 137 N. W. 905.

Grounds for new trial not set up by motion within three days after judgment cannot be interposed by petition under the provisions of code § 4091. *Andres v. Schlueter*, 140–389, 118 N. W. 429.

After time for filing motion for new trial has expired the only relief which can be afforded by the lower court with reference to the judgment is that authorized under code § 4091. *Dumbarton Realty Co. v. Erickson*, 143–677, 120 N. W. 1025.

A motion for a new trial on the ground of newly discovered evidence made after three days from the rendering of the verdict can only be considered if it constitutes in effect a petition for new trial under code § 4092, and it must be supported by evidence and not by affidavits, in accordance with the provisions of that section. *Heim v. Resell*, 153–356, 133 N. W. 881.

Newly discovered evidence is a ground for new trial which may be presented by a petition under code § 4091, although no

motion for new trial is made on that ground within three days after verdict. *Guth v. Bell*, 153–511, 133 N. W. 883.

Matters inherent in verdict: Affidavits of jurors cannot be considered as to matters which inhere in the verdict. *Noble v. White*, 103–352, 72 N. W. 556.

The affidavits of jurors showing the arguments or reasons which were urged among themselves tending to increase the amount of the recovery are not admissible; such matters inhere in the verdict. *Baxter v. Cedar Rapids*, 103–599, 72 N. W. 790.

Affidavits of jurors are not admissible to show what their understanding was of the instructions. *Christ v. Webster City*, 105–119, 74 N. W. 743.

The question as to what the jury considered in making an allowance of damages for personal injuries inheres in the verdict itself, and affidavits of jurors are not competent to show that the jury violated the directions of the court and disregarded the evidence by taking into account items that should not have been considered. *Clark v. Van Vleck*, 135–194, 112 N. W. 648.

Affidavits of jurors to show that they did consider and give weight to evidence not properly before them for consideration are admissible. *Brown Land Co. v. Lehman*, 134–712, 112 N. W. 185.

Affidavits of jurors in support of the verdict are competent. *Davis v. Huber Mfg. Co.*, 119–56, 93 N. W. 78.

Affidavits of jurors cannot be received to impeach their verdict where the subject matter referred to in such affidavits inheres in the verdict itself, as that the jury did not assent to it, or that they misunderstood the instructions, or that they were unduly influenced or mistaken. *State v. Steidley*, 135–512, 113 N. W. 333.

The affidavits of jurors that improper statements made by one juror to the others were not made until after a verdict had been agreed upon and that they had no influence upon the verdict are admissible, and the court's ruling in refusing to grant a new trial under such circumstances will be sustained. *Strand v. Grinnell Automobile Garage Co.*, 136–68, 113 N. W. 488

Affidavits of jurors as to what was taken into account in reaching the verdict cannot be received for the purpose of impeaching the verdict. *McMahon v. Iowa Ice Co.*, 137–368, 114 N. W. 203.

It is not competent to impeach a verdict by affidavit showing that a juror was unduly influenced by statements of his fellow jurors outside of the record of the case. *Hoyt v. Hoyt*, 137–563, 115 N. W. 222.

The grounds upon which the jurors assent to the verdict, where there has been no misconduct in bringing extraneous matters to their attention, cannot be shown to impeach it, nor is it competent in this way to show that the jury misunderstood the law. *Porter v. Whitlock*, 142–66, 120 N. W. 649.

Affidavits of jurors are admissible to show that by inadvertent mistake the foreman attached his name to the wrong form of verdict so that the verdict as signed does not embody the conclusion of the jury. *Carlson v. Adix*, 144–653, 123 N. W. 321.

Affidavits of the jurors that in violation of the direction of the court they considered evidence for an improper purpose are not admissible. *State v. Dudley*, 147–645, 126 N. W. 812.

Affidavits of jurors as to discussions in the jury room are incompetent to show misconduct of the jury. *Alexander v. Crosby*, 150–239, 129 N. W. 959.

Where by inadvertence an instruction which had not been read to the jury was sent with other instructions to the jury room, held that affidavits of jurors that the instructions thus improperly sent to the jury room were not read to the jurors were admissible to show that no prejudice resulted. *Vernon v. Iowa State Traveling Men's Assn.*, 157– —, 138 N. W. 696.

An affidavit of jurors is not admissible to show a misunderstanding of the instructions given by the court. *State v. Teale*, 142 N. W. 235.

Misconduct: Where the court refuses to sign a bill of exceptions reciting the misconduct complained of as a ground for new trial and the alleged facts are set out in a bystander's bill of exceptions, which is controverted by affidavits, the presumption will be entertained on appeal that the court's finding against granting a new trial is correct. *State v. Steen*, 125–307, 101 N. W. 96.

The court may refuse a new trial on the ground of misconduct of jurors where there are conflicting affidavits as to the fact of misconduct. *Hoyt v. Hoyt*, 137–563, 115 N. W. 222.

Where conflicting affidavits are presented as to the matter relied on as a ground for new trial, the trial court is in a much better situation to determine the facts than the supreme court can be on appeal. *State v. McClure*, 140 N. W. 203.

As to affidavits as showing misconduct of jury or counsel, see notes to preceding section.

SEC. 3757. Judgment notwithstanding verdict.

Under a motion for a judgment notwithstanding the verdict, grounds cannot be considered which should properly be presented in a motion for a new trial, nor can

such a motion be treated as a motion for a new trial. *Hooker v. Chittenden*, 106–321, 76 N. W. 706.

Where a petition shows on its face that there is no cause of action, the objection may be taken by the defendant after a verdict against him by motion as here provided. *Ary v. Chesmore*, 113–63, 84 N. W. 965.

Motion for judgment notwithstanding the verdict does not waive the right to complain of errors on appeal. *Cullison v. Lindsay*, 108–124, 78 N. W. 847.

The sustaining of a motion for judgment notwithstanding the verdict is a waiver of a motion for new trial. *Schulte v. Chicago, M. & St. P. R. Co.*, 124–191, 99 N. W. 714.

SEC. 3758. Arrest of judgment.

Although a demurrer to a petition to recover damages for personal injuries based on the failure of plaintiff to allege freedom from contributory negligence is overruled, nevertheless the same objection may be made by motion in arrest of judgment. If plaintiff does not cure the defect as provided in code § 3760 the motion on that ground may be properly sustained. *Decatur v. Simpson*, 115–348, 88 N. W. 839.

A motion in arrest of judgment is allowable when the pleadings of the prevailing party wholly fail to state a cause of action or defense. *Lacey v. Davis*, 126–675, 102 N. W. 535.

Where the objection is one which could not be cured by any amendment of the pleadings, it is not error to direct a verdict without waiting to have the objection raised by a motion in arrest of judgment. *Austin Western Co. v. Weaver Twp.*, 136–709, 114 N. W. 189.

Failure of plaintiff in an action for negligence to allege freedom from contributory negligence is a ground for motion in arrest of judgment; but as the technical omission to make such allegation might be cured by amendment, it is not open to the defendant to object on that ground after verdict. *Cahill v. Illinois Cent. R. Co.*, 137–577, 115 N. W. 216.

SEC. 3759. Filing of motion.

The provision that a filing of either a motion for new trial or for judgment notwithstanding the verdict or in arrest of judgment shall not be a waiver of the right to file either or both of the others does not apply to a motion for judgment on special findings and the party who has relied upon such motion for judgment and succeeds in having the general verdict set aside thereby waives the motion for a new trial. *Schulte v. Chicago, M. & St. P. R. Co.*, 124–191, 99 N. W. 714.

The filing of a motion for judgment on the special findings is not a waiver of a motion for a new trial. *Farmers Savings Bank v. Forbes*, 140 N. W. 216.

SEC. 3760. Amendment to cure defect.

After motion in arrest of judgment for defect in the pleading, the opposite party may amend by alleging the omitted fact, and such fact will be deemed to be true unless controverted. So held as to the allegation of freedom from contributory negligence in an action to recover for personal injuries. *Beard v. Guild*, 107–476, 78 N. W. 201; *Decatur v. Simpson*, 115–348, 88 N. W. 839.

The arrest of judgment on motion of the unsuccessful party is a waiver of motion for new trial. *Schulte v. Chicago, M. & St. P. R. Co.*, 124–191, 99 N. W. 714.

Where plaintiff suing a telegraph company for negligence in delivering a message fails to allege the notice required by code § 2164 and does not offer to supply such allegation by amendment, judgment for the plaintiff should be arrested on motion, although the court has erroneously and against the objection of the defendant received in evidence written notice of such claim. *Heald v. Western Union Tel. Co.*, 129–326, 105 N. W. 588.

SEC. 3763. Conditions.

The court may require the successful party to submit to a modification of the verdict in order that it shall conform to the evidence. *Smith v. Ellyson*, 137–391, 115 N. W. 40.

SEC. 3764. Dismissal of action.

After the announcement of the court's conclusion on a motion to direct a verdict, the plaintiff may dismiss his action. *Oppenheimer v. Elmore*, 109–196, 80 N. W. 307.

After the direction of a verdict it is too late to dismiss the action. *Duffy v. Glucose Sugar Refining Co.*, 141 Fed. 206.

Plaintiff cannot dismiss after the case

has been submitted to the court for decision. *Carney v. Reed*, 117–508, 91 N. W. 759.

After submission of the case plaintiff is not entitled to a dismissal on his own motion, and a dismissal thus improperly entered may be subsequently set aside by the court and the case reinstated. *Costello v. Costello*, 112–578, 84 N. W. 687.

Dismissal of an action being shown it will be presumed to have been without prejudice, unless the contrary appears. *Citizens' Bank v. Whinery*, 110–390, 81 N. W. 694.

On failure of plaintiff to appear, the cause should be dismissed without prejudice, unless there is a counterclaim on which judgment may be rendered against the plaintiff in favor of the defendant. *Stewart v. Gorham*, 122–669, 98 N. W. 512.

Where the dismissal of an action is by the court, without the consent of the plaintiff, it is a determination of the action adversely to the plaintiff, and no subsequent action on the same cause can be maintained. If the dismissal is voluntary, then the plaintiff may maintain another action, but if the statute of limitations has already run against such action, he must not only bring it within six months after the dismissal of the first action, but must allege and prove that such dismissal was not the result of negligence on his part. See code § 3455. *Ceprley v. Paton*, 120–559, 95 N. W. 179.

Dismissal of an action voluntarily by the plaintiff because of want of means to prosecute it and in the absence of material witnesses will not be ground for refusing plaintiff the right to proceed in a second action until the payment of the costs of the first. *Camp v. Chicago, G. W. R. Co.*, 124–238, 99 N. W. 735.

An intervener may by dismissing his petition of intervention withdraw from the case so as not to be bound by subsequent proceedings. *Guinn v. Iowa & St. L. R. Co.*, 125–301, 101 N. W. 94.

After dismissal as to certain defendants in a proceeding to establish a lost corner, held that the judgment was not effectual as to the parties thus dismissed from the proceeding. *Dittmer v. Mierandorf*, 129–643, 106 N. W. 158.

Where an action is dismissed as to one of the parties a judgment subsequently rendered does not constitute an estoppel as to such party. *Atlee v. Bullard*, 123–274, 98 N. W. 889.

SEC. 3766. Counterclaim tried.

When dismissal of the case is properly announced and brought to the court's knowledge, the case is in fact dismissed, although the court may proceed further before entering the fact of dismissal on the record. *Bardes v. Hutchinson*, 113–610, 85 N. W. 797.

A voluntary dismissal of a suit for injunction does not constitute an adjudication of the issues in favor of the defendant such as to sustain a recovery by him on the bond given in connection with the issuance of a temporary injunction. *Ft. Madison St. R. Co. v. Hughes*, 137–122, 114 N. W. 10.

The power to dismiss a case for want of prosecution is inherent in the court. *Loose v. Cooper*, 141–377, 118 N. W. 406.

Where upon failure of defendant to appear, the court dismissed his counterclaim and rendered judgment for plaintiff on the admissions of defendant in the pleadings, held that there was no error of which defendant could complain, as the dismissal of the counterclaim was without prejudice. *Brown-Hurley Hdw. Co. v. Cohen*, 149–396, 128 N. W. 348.

Where an order for a directed verdict against plaintiff and for judgment thereon has been set aside and permission to amend has been given, the plaintiff has the right without leave to dismiss his action. *Holtz v. Smith-Morgan Ptg. Co.*, 150–91, 129 N. W. 328.

The plaintiff may dismiss his action after the court has indicated its intention to sustain a motion for a directed verdict against him, but before such verdict has, in fact, been directed and judgment entered thereon. *Arpy v. Iowa Brick Co.*, 150–431, 130 N. W. 393.

An action should not be dismissed by the court for delay in its prosecution where by apparent consent of both parties it has been allowed to remain undisposed of pending the determination of questions involved in an appeal in an action involving the same questions. *Wiltsey v. Wiltsey*, 153–455, 133 N. W. 665.

This section by implication prohibits the right of plaintiff to dismiss an action after final submission. But a cause is not finally submitted until the jury proceeds or is directed to proceed with its consideration after the instructions have been read. *Inman Mfg. Co. v. American Cereal Co.*, 155–651, 136 N. W. 932.

While ordinarily a dismissal is available to the plaintiff, even after reversal on appeal, if the case is remanded for further proceedings, there is no right to such dismissal after remanding for final judgment in accordance with the opinion of the supreme court. *Ibid.*

When the action is dismissed by plaintiff, defendant is not entitled to have the court proceed further, unless his answer presents a proper counterclaim. *Ibid.*

The provision as to the trial of a counterclaim notwithstanding the dismissal of the original action has no application to

the dismissal by plaintiff of one count of the petition. *Houtz v. Sioux City Brass Works*, 134–484, 110 N. W. 166.

To justify a judgment in favor of the defendant against the plaintiff, on failure of the plaintiff to appear, there must be such counterclaim or cross bill by the defendant against the plaintiff as to show in itself the essential elements of a cause of action. If the allegations in behalf of the defendant are defensive in character judgment should not be rendered against the plaintiff on the merits. *Stewart v. Gorham*, 122–669, 98 N. W. 512.

On the dismissal of an action to set aside the probate of a will, the court has no jurisdiction to proceed to the hearing of a counterclaim on which it is asked that the will be confirmed. *Davis v. Preston*, 129–670, 106 N. W. 151.

The plaintiff may dismiss without prejudice and thus prevent the subsequent interposition of a counterclaim, although he has notice of intention to interpose such a counterclaim. *Hickman v. Hunter*, 140 N. W. 425.

SEC. 3768. Dismissal in vacation.

A communication to the clerk of a dismissal of an action or counterclaim is effectual without any order by the court and operates as an immediate dismissal which cannot be set aside by a subsequent communication recalling the previous direction. *Luse v. Luse*, 144–396, 122 N. W. 970.

SEC. 3769. Judgment—final adjudication.

Jurisdiction: A defendant served with notice outside the state, and not appearing in the action, is not bound by the adjudication. *Smith v. Moore*, 112–60, 83 N. W. 813.

Confusion or mistake in the name by which the defendant is designated will not necessarily be fatal to the judgment in case of actual service, but such defect will prevent constructive or substituted service being sufficient to confer jurisdiction. *Thornily v. Prentice*, 121–89, 96 N. W. 728.

Where the final decree properly names the parties and recites that defendant appeared by attorney, the fact that the defendant is incorrectly named in the original notice and petition must be deemed to have been waived. *Richardson v. King*, 157– —, 135 N. W. 640.

Error in the name of the defendant held not sufficient to justify a collateral attack on a decree of divorce. *Ibid.*

What constitutes: Technically speaking, a judgment is the decision or sentence of the court, pronounced by the court in the action or on the question before it, and may consist of a written announcement of the decision of the court, filed with the clerk, although not yet formally entered on the record. So held in a proceeding to punish for contempt in violating a temporary injunction which had been dissolved by a written decision of the court, filed with the clerk. *Coffey v. Gamble*, 117–545, 91 N. W. 813.

A judgment cannot be deemed as rendered so as to become a lien or support an execution until it is entered of record. The mere signature of a judgment form, and the indorsement and filing thereof by the clerk is not a judgment. *Callanan v. Votruba*, 104–672, 74 N. W. 13.

The oral announcement by the judge of his conclusion does not constitute a judgment. A judgment cannot be said to be entered until it is spread by the clerk upon the record book. A memorandum thereof made by the judge is for the information and guidance of the clerk, but until such entry is made there is nothing from which an appeal will lie. *Kennedy v. Citizens' Nat. Bank*, 119–123, 93 N. W. 71.

Final: A judgment determining the amount due may be final, although a subsequent order as to the application of funds in the hands of a receiver may be necessary. *Applegate v. Applegate*, 107–312, 78 N. W. 34.

The fact that in an action for the foreclosure of a lien the court has rendered an interlocutory decree for the specific enforcement of such lien does not preclude a subsequent final decree for a money judgment. *American Trading & Storage Co. v. Gottstein*, 123–267, 98 N. W. 770.

A final adjudication may consist of many judgments, or when plaintiff's claim consists of several parts or items, such judgments may be entered as to either of the parts or any specific part or item of the aggregate claim. *Frohardt v. Duff*, 156–144, 135 N. W. 609.

Presumption: Every presumption must be indulged in favor of the correctness of a judgment. *State v. Gifford*, 111–648, 82 N. W. 1034.

As evidence: While the pleadings in a case are part of the record, a duly authenticated copy of the judgment is a specific item of evidence, admissible in itself without regard to the record in the case. *Alexander v. Grand Lodge A. O. U. W.*, 119–519, 93 N. W. 508.

Former adjudication: Where a former adjudication is relied upon, it must appear either by the record or by extrinsic evidence that the particular matter in controversy was necessarily tried and deter-

mined in the former action. The burden is with the party relying upon a former adjudication to make it appear that the case was thus determined. *Griffith v. Fields*, 105–362, 75 N. W. 325.

Where in an action on a promissory note brought by a holder thereof, the maker sought to interpose as a defense damages for breach of contract in the transaction in which the note was given, and claimed that the holder was not an innocent purchaser, held that in a subsequent action by the maker of the note against the original payee for damages for breach of the contract the prior judgment in favor of the holder of the note would not constitute an adjudication unless it was shown by parol evidence that the case was decided on account of the defense to the note and not on account of the holder having been found to be an innocent purchaser. *Ibid.*

A party cannot re-litigate in a second action matters which were incident to or involved in or might have been litigated in a former action. *Prouty v. Matheson*, 107–259, 77 N. W. 1039.

Parties cannot engage in re-litigation of matters which were, or might have been, determined in a former action. *Murphy v. Cuddihy*, 111–645, 82 N. W. 999.

A judgment cannot be deemed an adjudication of the question which the court expressly does not determine, although it might have been determined. *Owen v. Higgins*, 113–735, 84 N. W. 713.

To be available as a former adjudication the judgment in the former suit must be for the same cause of action and between the same parties or their privies, and the former judgment must be on the merits of the case, rendered by a court having jurisdiction. *In re Dille*, 119–575, 93 N. W. 571.

Judgments *in personam* conclude only the immediate parties and their privies, and to be effective the bar must be mutual. *Brown v. Lambe*, 119–404, 93 N. W. 486.

A judgment of a court of competent jurisdiction is binding between the parties to a particular action litigated regarding the subject thereof, and on their privies, as to questions actually decided. Therefore held that a judgment on an appeal from a board of review that certain land contracts were not assessable for a particular year was *res adjudicata* as to the right to assess the same contracts for a subsequent year. *Defries v. McMeans*, 121–540, 97 N. W. 65.

A judgment is conclusive between the parties in a subsequent action either as a plea in bar or evidence in estoppel not only as to every question actually in issue and decided, but every question within the issues which might have been presented and decided. And it is likewise binding on privies of such parties. But in general the relation of surety and principal does not create privity in the sense in which the law of estoppel is applied. *Beh v. Bay*, 127–246, 103 N. W. 119.

The judgment against a plaintiff who has stood on his petition and refused to amend after ruling against him on demurrer is a final adjudication. *Gregory v. Woodworth*, 107–151, 77 N. W. 837.

The general rule, subject to some exceptions, is that a judgment is conclusive, not only as to all matters actually in issue, but as to those which might or should have been alleged in the pleadings. *Fulliam v. Drake*, 105–615, 75 N. W. 479.

Any defense which might have been set up in a previous action will be deemed adjudicated by the judgment thereon. *Talbot v. First National Bank*, 106–361, 76 N. W. 726.

One of the recognized tests in determining whether the plea of another action pending is good, lies in ascertaining whether the judgment, when obtained, would necessarily be *res adjudicata* of the issues of the action wherein the plea is interposed. *Valley Bank v. Shenandoah Nat. Bank*, 109–43, 79 N. W. 391.

Where the very right to recover is based on precisely the same ground in both actions, the judgment in the one will be conclusive in the other. It is not essential that the causes of action be the same, but the right or title on which they rest must be identical. *Watson v. Richardson*, 110–698, 80 N. W. 416.

The provisions of code § 4128 with reference to supersedeas bond indicate an intention to preserve to the prevailing litigant the fruits of his judgment, even though an appeal has been taken, and a judgment pending on appeal to the supreme court may be relied on as a prior adjudication in another case involving the same right or title. *Ibid.*

When a person is responsible over to another, either by operation of law or by express contract, and he is duly notified of the pendency of a suit and requested to take upon himself the defense of it, he is no longer regarded as a stranger, because he has the right to appear and defend the action, and has the same means and advantages of controverting the claim as if he was a real and nominal party upon the record. In every such case, if due notice is given to such person, the judgment, if obtained without fraud or collusion, will be conclusive against him whether he has appeared or not as to every fact established by it. But, in general, judgment cannot be entered against a person so notified. *Citizens' Nat. Bank v. City Nat. Bank*, 111–211, 82 N. W. 464.

An adjudication as between a city or town and a property owner as to the ex-

istence of a street adjoining the premises of the latter, is not binding upon another property owner not made party to the action. *Long v. Wilson*, 119–267, 93 N. W. 282.

An adjudication in an action to recover against a bank the proceeds of certain notes and securities does not bar a subsequent action against the bank by the plaintiff who has failed in the other action, for the embezzlement of such notes and securities by the cashier. *Lemon v. Sigourney Savings Bank*, 131–79, 108 N. W. 104.

A determination in a federal court as to the validity of interest coupons on county bonds as against the defense that the bonds were issued in excess of the constitutional limitation of indebtedness is binding in an action on the bonds themselves and their coupons in the state court. *Reynolds v. Lyon County*, 121–733, 96 N. W. 1096.

Dismissal: Voluntary dismissal of an action does not constitute an adjudication. *Brown v. Holden*, 120–191, 94 N. W. 482.

Where, after removal of a case from a state to the federal court at the instance of defendant, plaintiff dismisses his action without prejudice, he is not thereby barred from again prosecuting an action for the same cause in a state court. *Foley v. Cudahy Packing Co.*, 119–246, 93 N. W. 284.

Where a suit in equity is dismissed on its merits, such dismissal constitutes a bar to a subsequent suit presenting the same question. *Madison v. Garfield Coal Co.*, 114–56, 86 N. W. 41.

A decree dismissing plaintiff's petition in equity without specifying that such dismissal is "without prejudice" and without stating any ground of dismissal, is presumed to be on the merits. *Black v. Miller*, 138 N. W. 535.

SEC. 3771. In abatement.

Where it does not clearly appear that the judgment was on matter in abatement only, the presumption is that it was on the merits and conclusive on a subsequent suit on the same cause of action. *Reeves v. Lamm*, 135–201, 112 N. W. 642.

Where judgment is rendered on account of a matter in abatement, the facts should be recited in the judgment. *Hanley v. Elm Grove Mut. Telephone Co.*, 150–198, 129 N. W. 807.

SEC. 3773. Several judgment.

If plaintiff maintains his action against one of several defendants he may have judgment against that one, and the other defendants may have judgment against plaintiff for costs. This rule is alike applicable to actions *ex contractu* and *ex delicto*. *Lull v. Anamosa Nat. Bank*, 110–537, 81 N. W. 784.

Although the defendants are sued jointly, judgment may be rendered against one and a general verdict for the plaintiff may be set aside as to others. *Pearse v. Balm*, 152–422, 132 N. W. 821.

SEC. 3775. What relief granted.

Where there is an answer the court may grant plaintiff any relief consistent with the case made by the petition and embraced within the issue. *Stubblefield v. Gadd*, 112–681, 84 N. W. 917; *Hogueland v. Arts*, 113–634, 85 N. W. 818.

The judgment must follow the prayer for relief and cannot be extended beyond it. *Browne v. Kiel*, 117–316, 90 N. W. 624.

The relief must be consistent with the facts pleaded; for the defendant is entitled to his day in court on the issues joined. *Johnston v. Meyers*, 138–497, 116 N. W. 600.

SEC. 3777. Judgment on verdict.

So far as motion for a new trial under code § 3755 is concerned, it is immaterial whether judgment be entered forthwith upon the return of the verdict or be suspended until the determination of the motion. *Bevering v. Smith*, 121–607, 96 N. W. 1110.

The opinion and judgment of a presiding judge given in an oral announcement or in a memorandum entered on his calendar, or in a written form of entry, even though signed by him, does not constitute a judgment, and not until the record is made is there any competent evidence of such judgment; and the limitation as to time of appeal does not begin to run until the judgment is recorded. This rule is not superseded by the provision of 33 G. A., ch. 205, preserving appeals which have been taken before the judgment has been spread on the record. *Sievertsen v. Paxton-Eckman Chem. Co.*, 133 N. W. 744, 142 N. W. 424.

SEC. 3778. When verdict is special.

When a court is called upon to rule on a motion for judgment on special verdict it should consider what the law is, and is not bound by instructions previously given. *Connell v. Keokuk Elec. R. & P. Co.*, 131–622, 109 N. W. 177.

SEC. 3779. Principal and surety—order of liability.

The provision as to order of liability of principal and surety has reference to the relation of principal and surety to the original indebtedness, and has no application to the rendition of judgment against a surety on a bond for discharge of an attachment. *Andres v. Schlueter*, 140–389, 118 N. W. 429.

SEC. 3781. Judgment by agreement.

To make a judgment by consent or agreement, the fact must appear of record. *Cooper v. Disbrow*, 106–550, 76 N. W. 1013.

SEC. 3783. Court acting as jury.

The decision of the court on a question of fact in a law case tried without a jury is entitled to the same effect and force as the verdict of a jury. *Brown v. Curtis*, 111–542, 82 N. W. 945.

Where a law case is tried to the court without a jury its finding has the force and effect of a verdict, and will not be interfered with unless it be the result of passion or prejudice, or so clearly against the evidence as to justify the conclusion that it was not the result of an honest and fair discretion. *Roe v. McCaughan*, 113–274, 85 N. W. 21.

SEC. 3784. Judgments and orders entered.

The record book, and not the judgment docket, is the best evidence of the judgment, and it, or a certified copy, is alone admissible to show the judgment where no foundation is laid for introducing secondary evidence. *Baxter v. Pritchard*, 113–422, 85 N. W. 633.

Where an order of court is essential to sustain the action of a guardian, such order must be entered on the record of the court. *In re Manning's Estate*, 134–165, 111 N. W. 409.

Ordinarily the record is the best and only proof of a judgment. An order of court, to be of any validity, must be entered of record. *Bristol Sav. Bank v. Judd*, 116–26, 89 N. W. 93. See also notes to code § 288 in this supplement.

SEC. 3786. Discharge of judgment—on motion.

An action to enjoin the enforcement of a judgment on the ground that it has been discharged or satisfied, or that the debtor has been discharged in bankruptcy subsequent to the rendition of the judgment, can, under code § 4364, be maintained only in the county where the judgment was rendered. *Brunk v. Moulton Bank*, 121–14, 95 N. W. 238.

If by reason of matters transpiring subsequent to the entry of a decree, the party entitled to relief under the decree has been partially or fully satisfied, that fact may be brought to the attention of the court and determined in a proceeding relating to the enforcement of the decree. The power of the court to entertain such a proceeding is not taken away by the fact that the decree has been appealed from, and on appeal affirmed without a new decree in the supreme court or an order for remand. *Dunton v. McCook*, 120–444, 94 N. W. 942.

SEC. 3788. Default—when made and entered.

A judgment by default is conclusive as against collateral attack, even though the petition is vulnerable to demurrer. *Miller Brewing Co. v. Capital Ins. Co.*, 111–590, 82 N. W. 1023.

A party may be concluded by judgment on default, even though the facts stated in the petition do not constitute a good cause of action at law, or the petition is so defective as to be vulnerable to a demurrer. Nor will the fact that the judgment is excessive in amount be available to a defendant in default. *Warthen v. Himstreet*, 112–605, 84 N. W. 702.

It is not proper to render judgment on sustaining a motion striking an amended petition from the files without giving plaintiff the statutory time for amending. *Williams v. Williams*, 115–520, 88 N. W. 1057.

At any time before application for judgment on default for failure to amend or plead over a party in default may amend or plead so as to entitle himself to be heard. *Redhead v. Iowa Nat. Bank*, 123–336, 98 N. W. 806.

A default is the failure to take the steps required in the progress of an action and a judgment by default is a judgment

against the party who has failed to take such steps. Such judgment is interlocutory and not final in form. *Peterson v. Kissel*, 148–516, 125 N. W. 808.

Where the defendant has appeared by counsel and an answer has been filed but no assignment for trial has been made, the defendant may assume that his failure to be present in person or by counsel involves no other risk than that of the dismissal of the case or its continuance over the term. *Thorn v. Hambleton*, 149–214, 128 N. W. 393.

The right of the court to enter a decree on failure of defendant to maintain his defense should not depend upon statements made to or private conversations with, the trial judge out of court. *Ibid.*

While a mere denial of indebtedness is not a well pleaded defense, failure to verify such an answer, which remains unassailed, does not warrant a default for a failure to defend. *Ibid.*

A default is the failure of a party to take a step required by law in the progress of the action. If the party enters an appearance and fails to plead, by reason of accident or surprise which ordinary prudence could not have guarded against, the remedy is by motion for new trial under code § 3756 and not by motion to set aside a default. *Acheson v. Inglis*, 155–239, 135 N. W. 632.

The jurisdiction which the court acquires on default is to do the thing or hear the cause disclosed by the notice, and, if the plaintiff takes advantage of defendant's default to obtain other and additional adjudication beyond the fair scope of the notice, then the adjudication to that extent is void as without jurisdiction. *Blain v. Dean*, 142 N. W. 418.

SEC. 3789. Notice must appear.

A judgment by default rendered upon notice by publication which is defective as to proof of service, is not void but only voidable. *Belknap v. Belknap*, 154–213, 134 N. W. 734.

The insufficiency of the service to sustain a judgment cannot be raised on appeal without a motion to set aside the judgment on that ground having been made in the lower court. *Ibid.*

SEC. 3790. Setting aside default—terms.

Where no jurisdiction: Where a court has no jurisdiction to enter a default by reason of want of service, such judgment may be set aside on motion without pleading forthwith or filing affidavits of merits. *Spencer v. Berns*, 114–126, 86 N. W. 209.

Where the return of substituted service erroneously states the township or town in which the service was made, default entered upon such service should be set aside as rendered without jurisdiction. *Bradley Mfg. Co. v. Burrhus*, 135–324, 112 N. W. 765.

An affidavit of merits is required as a condition precedent to the setting aside of a default only when the defendant was actually in default. Such an affidavit is not necessary where the default was erroneously entered, the court being without jurisdiction. *Culbertson v. Salinger*, 122–12, 97 N. W. 99.

The statutory provisions as to setting aside a default are not applicable where no default whatever should have been granted. *First Nat. Bank v. Flynn*, 117–493, 91 N. W. 784.

Where after default the assignee in bankruptcy of the defendant applied for leave to make defense, held that the default should have been set aside in order to enable him to do so. *Ibid.*

Without moving to set aside a judgment by default on the ground of insufficiency of service of notice, such objection cannot be raised on appeal from the judgment. *Belknap v. Belknap*, 154–213, 134 N. W. 734.

Where an adjudication on default goes beyond the claim of plaintiff as reasonably disclosed by the notice, it is to that extent void and subject to collateral attack. *Blain v. Dean*, 142 N. W. 418.

What grounds: The courts will relieve from accident, mistake and misfortune not brought about through neglect or inactivity, and if the failure to secure a trial on the merits is not due to such negligence or inactivity, but to a default entered by reason of a misunderstanding as to appearance, such default should be set aside. *Barto v. Sioux City Elec. Co.*, 119–179, 93 N. W. 268.

Mutual mistake or misunderstanding is a good ground for setting aside a default. *Ibid.*

A mere denial of the ownership of a note on which judgment by default has been rendered, such denial being based on want of information, is insufficient to sustain an application for setting aside the default. *Tullis v. McClary*, 128–493, 104 N. W. 505.

Where the defendant has appeared in the case but has failed to be present at the term and make defense on account of accident or surprise which ordinary prudence could not have guarded against, his remedy is not by motion to set aside the default but by motion for new trial under code § 3756. *Acheson v. Inglis*, 155–239, 135 N. W. 632.

While negligence of the defendant or his attorney will not be a ground for setting aside a default rendered, circumstances

and conditions may be accepted as sufficient to warrant relief on account of the oversight of the attorney, although he is not wholly blameless with respect thereto; it is for the trial court to judge of the merits of the excuse in such a case and when the action is for a money demand and failure to enter appearance and defend for his client was due to the misplacement of the papers in the case under circumstances to some extent excusing such oversight, held that the action of the trial court in setting aside the default would not be reversed on appeal. *Klepfer v. Keokuk*, 126–592, 102 N. W. 515.

In a proceeding to set aside a default rendered in an action for the recovery of damages for personal injuries against a city, held that an affidavit of the city attorney to the effect that he had made an investigation into the facts and circumstances of the accident complained of and therefrom believed that such accident was not caused by any negligence on the part of the city or its officers, but was due solely to the negligence of the plaintiff, was sufficient statement of a meritorious defense. *Ibid.*

Affidavit in a particular case held not sufficient to require the setting aside of a default, as it disclosed merely carelessness and inattention to duty on the part of the party against whom the judgment was rendered. *Byrnes v. American Mut. F. Ins. Co.*, 114–738, 87 N. W. 699.

When an attorney relies upon information derived from the clerk of the court as to the filing of pleadings he is not chargeable with negligence such as to defeat his application to set aside default after the term where he has been misled by the information received. *Logan v. Southall*, 137–372, 115 N. W. 19.

The showing in a particular case of diligence as an excuse for not appearing to defend, held sufficient. *Norman v. Iowa Cent. R. Co.*, 149–246, 128 N. W. 349.

The setting aside of a default is a matter in which the trial court is vested with a very considerable discretion and its action in affording an opportunity for a trial on the merits has been sustained wherever there was a reasonable ground for doing so; but the court has always been held more strictly to account on appeal where it has overruled a motion to set aside a default denying an opportunity for a trial on the merits. *Ibid.*

In showing that defendant, against whom judgment has been rendered by default, has a defense to the action, it is not necessary to introduce the evidence which would be relied upon if the default should be set aside, nor to state in detail what the witnesses for defendant would testify to in support of his defense. *Ibid.*

Affidavit of merits in connection with motion to set aside default held sufficient in a particular case. *Barto v. Sioux City Elec. Co.*, 119–179, 93 N. W. 268.

The party asking to have default set aside must plead issuability and also present a reasonable excuse for the default. *Martin v. Reese*, 105–694, 75 N. W. 496.

Counter affidavits cannot be considered on a motion to set aside a default, for to do so would result in a trial upon affidavits which the statute does not contemplate; but where such counter affidavits have been considered without objection in the lower court, they may be considered by the supreme court on appeal in determining the correctness of the action of the lower court. *Bradshaw v. Des Moines Ins. Co.*, 154–101, 134 N. W. 628.

The supreme court will be more reluctant to interfere with the action of the lower court where the motion to set aside the default is sustained than where it is denied; but even when denied there must be a showing of abuse of discretion. *Ibid.*

Time: Relief by motion to set aside default must be asked not later than the first day of the next term. After expiration of the period thus contemplated relief should be asked by petition under code §§ 4091, 4094. *Wallace v. Wallace*, 141–306, 119 N. W. 752.

Discretionary: The supreme court on appeal will not interfere with the action of the trial court in refusing to set aside a default except in clear case of abuse of discretion. *Martin v. Reese*, 105–694, 75 N. W. 496; *Carver v. Seevers*, 126–669, 102 N. W. 518; *Cowell v. City Water Supply Co.*, 130–671, 105 N. W. 1016.

A very large discretion is vested in the trial court in the matter of setting aside default, and its action in allowing a trial on the merits will not be interfered with unless in a manifest case of abuse. The trial court may even rest such action upon matters within its own knowledge. *Foley v. Leisy Brg. Co.*, 116–176, 89 N. W. 230.

A fair trial on the merits is the object sought in all judicial proceedings, and, in the absence of negligence on the part of him who is in default, is to be encouraged and secured by the court. When the right to such trial is granted an appellate court is loath to interfere and will do so only in case of abuse of discretion on the part of the trial court. *Sitzer v. Fenzloff*, 112–491, 84 N. W. 514.

To justify interference on appeal with a ruling on motion to set aside default, a much stronger showing of abuse of discretion in the trial court must be made when the default has been set aside than where it has been denied. *Barto v. Sioux City Elec. Co.*, 119–179, 93 N. W. 268.

On condition: One who has complied with the conditions imposed for setting

aside a default judgment cannot afterward complain of the conditions thus imposed. *Doyle v. Burns*, 123–488, 99 N. W. 195.

In superior courts: Provisions as to setting aside judgments by default are applicable in superior courts, although a transcript of the default judgment may have been filed in the district court. *Klepfer v. Keokuk*, 126–592, 102 N. W. 515.

SEC. 3791. Clerk to compute amount.

The clerk is only authorized to assess when the action is for a money demand and the amount a mere matter of computation. *Sitzer v. Fenzloff*, 112–491, 84 N. W. 514.

Where defendant answers setting up an affirmative defense and fails to appear at the trial and introduce any evidence in support of such defense, the court may enter judgment on plaintiff's admitted cause of action without other evidence. *Andres v. Schlueter*, 140–389, 118 N. W. 429.

SEC. 3792. Appearance to cross-examine witnesses.

The provision that a party in default may appear and cross-examine witnesses as to assessment of damages does not authorize the party in default to interpose a motion in arrest of judgment. *Free v. Western Union Tel. Co.*, 135–69, 110 N. W. 143.

SEC. 3793. Judgment on default in equitable proceeding.

Notwithstanding default by defendant in an equity case, the plaintiff should not be allowed any greater relief than he appears to be entitled to under the allegations of the pleadings and the facts as ascertained from the evidence. *Skvor v. Weis*, 153–720, 134 N. W. 85.

SEC. 3794. Setting aside, if on notice by publication.

Where the assignee in insolvency for a foreign corporation appeared in an attachment proceeding against such corporation in this state commenced by publication only, but afterwards failed to make defense, and judgment was rendered against the corporation, held that a receiver of the corporation subsequently appointed could not have default set aside under this section. *State Bank v. McElroy*, 106–258, 76 N. W. 715.

SEC. 3796. New trial after judgment, on publication.

A judgment rendered on service by publication may be set aside and a retrial granted on application of defendant within two years, but such judgment cannot be attacked in an independent action. *Co-operative Sav. & L. Assn. v. McIntosh*, 105–697, 75 N. W. 520.

The judgment on service by publication in a proper case remains valid and binding until set aside in a proper proceeding, and the application to set it aside cannot be removed to the federal courts. *Davis v. Harris*, 124 Fed. 713.

The final judgment on notice by publication cannot be attacked collaterally on the ground that security for costs was not given as required. *English v. Otis*, 125–555, 101 N. W. 293.

Within the time authorized by this section a defendant served by publication only may appear and file a motion to set aside the judgment and with it an answer to the petition in the original action. *Provident Bank Stock Co. v. Schafer*, 110–440, 81 N. W. 689.

Under a contract to convey, contemplating the quieting of title in the vendor such as to enable him to make a good abstract of title, it is sufficient that a decree quieting title has been rendered, although the right to a new trial on application of a nonresident served by publication only still exists. *Bales v. Williamson*, 128–127, 103 N. W. 150.

The provisions of this section do not apply where personal service of the notice has been made out of the state on a nonresident defendant. *Clark v. Tull*, 113–143, 84 N. W. 1030.

The provision as to new trial on motion of a nonresident defendant served by publication only has no application where the judgment is void for want of jurisdiction. *Gaar v. Taylor*, 128–636, 105 N. W. 125.

Where the defendant in a divorce proceeding served with notice by publication only, appears to ask for a new trial under this provision, he does not thereby confer on the court jurisdiction to enter a valid decree against him unless a new trial is granted. *Rea v. Rea*, 123–241, 98 N. W. 787.

The provision for granting a new trial within two years where judgment has been rendered by default has no application in divorce proceedings. *Tollefson v. Tollefson*, 137–151, 114 N. W. 631.

SEC. 3797. Title to property not affected.

Something more is contemplated as within the power of the court on an application for new trial after service by publication, than simply an order for the restoration of any money or property remaining in the possession of the adverse party. The court setting aside the prior judgment may also set aside and cancel any title derived under a sheriff's sale in pursuance of such judgment unless it has passed into the hands of a purchaser in good faith. *English v. Otis*, 125–555, 101 N. W. 293.

The mere fact of purchasing the certificate of sale under a judgment rendered on default by publication only does not entitle such purchaser to protection against the setting aside of the judgment in a proceeding for new trial such as is authorized by the statute. *Ibid.*

SEC. 3800. Personal judgment.

A decree in a divorce proceeding on service by publication will be binding as to the marital status of the parties, but not as to alimony or costs. *Rea v. Rea*, 123–241, 98 N. W. 787.

Personal service outside the state, although upon a resident of this state, does not confer jurisdiction *in personam*. So far as this section contemplates such service in a proceeding *in personam*, it is unconstitutional. *Raher v. Raher*, 150–511, 129 N. W. 494.

SEC. 3801. Liens of judgments.

Commencement and continuance: One who seeks to enforce payment of a judgment out of the real estate of one deceased, must do so before the lien of his judgment expires. The filing of a claim against the estate of the deceased will not preserve the right to enforce such judgment against real estate. *Hansen's Empire Fur Factory v. Teabout*, 104–360, 73 N. W. 875.

A judgment is not "rendered" so as to become a lien until it is entered of record. *Callanan v. Votruba*, 104–672, 74 N. W. 13.

After the expiration of the lien, execution under the judgment may be levied on the land within twenty years from the date of rendition. *Mudge v. Livermore*, 148–472, 123 N. W. 199.

After the lien of a judgment has expired, land cannot be sold on execution under such judgment if before issuance of the execution the judgment debtor has transferred the property to a third person. *Ritz v. Rea*, 155–181, 135 N. W. 645.

Upon what property: Judgments are liens upon equitable titles. *Kelliher v. Sutton*, 115–632, 89 N. W. 26.

A judgment rendered against the holder of an equitable title will not be a lien against the property in such sense as to charge subsequent bona fide purchasers of the legal title without notice. *Block & Pollak Iron Co. v. Holcomb-Brown Iron Co.*, 105–624, 75 N. W. 499.

While ch. 129, acts 17 G. A. (now embodied in this section), requiring the filing of transcripts in the federal courts in counties where the property is situated in order to make such judgments liens on such property was not valid when enacted, nevertheless, when Congress in 1888 provided that federal judgments should be liens throughout the state where rendered, in the same manner and to the same extent and under the same conditions only as if said judgments and decrees had been rendered by a court of general jurisdiction of the state, this statutory provision became effectual. *Blair v. Ostrander*, 109–204, 80 N. W. 330.

A judgment becomes a lien on any present interest of the judgment defendant in real estate owned by him as soon as entered of record. Such lien is not lost by the act of any creditor in taking an assignment of a prior judgment lien, although under such judgment there has been an execution sale, if his act amounts to a redemption from such sale. *People's Sav. Bank v. McCarthy*, 119–586, 93 N. W. 583.

A judgment plaintiff in lawful possession of land on which his judgment is a lien has not the right to apply the rents and profits derived therefrom to the satisfaction of his judgment as against the owner thereof not a judgment defendant. *Boggs v. Douglass*, 105–344, 75 N. W. 185.

A judgment is a lien only on the interest of the judgment defendant. *Moore v. Scruggs*, 131–692, 109 N. W. 205.

A judgment lien holder is not affected by a decree quieting title in a proceeding to which he is not made a party. *Jasper County v. Sparham*, 125–464, 101 N. W. 134.

Where the uncertainty of a contingent remainder involves solely the question of who shall take the real estate, it is not such an interest that a judgment lien attaches thereto or that execution under a judgment can be levied thereon. *Taylor v. Taylor*, 118–407, 92 N. W. 71.

A judgment becomes a lien on both the legal and equitable interest of the defendant in land but it does not attach to the land itself. If the debtor's interest be subject to any infirmities or conditions by reason of which it ceases to exist, the lien ceases with it. *Hunter v. Citizens' Sav. & Trust Co.*, 157–168, 138 N. W. 475.

Notice: A judgment rendered against a debtor described therein as "Sheffey" held not to constitute a lien as against the

grantee of the same person described in the conveyance as "Cheffey". *Boyd v. Boyd*, 128–699, 104 N. W. 798.

A judgment recorded as against Wm. M. Thornily held not a lien on the property of Willis H. Thornily. *Thornily v. Prentice*, 121–89, 96 N. W. 728.

Failure to docket or index a judgment does not prevent its being a lien as to persons having actual knowledge. *State Savings Bank v. Shinn*, 130–365, 106 N. W. 921.

Redemption: While a judgment ceases to be a lien after the expiration of ten years, nevertheless the judgment creditor may thereafter, within twenty years, cause execution to be levied on the property of the defendant and thereby acquire a lien thereon which will entitle him to redeem such property from execution sale. *Hawkeye Ins. Co. v. Maxwell*, 119–672, 94 N. W. 207.

A junior judgment lien holder can recover from execution and sale under a prior judgment only as provided by statute. He has no equitable right to make redemption from such sale. *Wood v. Rankin*, 119–448, 93 N. W. 387.

One who acquires a judgment lien on premises, pending a foreclosure, has only the statutory right of redemption from the foreclosure sale. *Cooney v. Coppock*, 119–486, 93 N. W. 495.

Priority: As between the judgment liens the one which has precedence in order of time should be accorded precedence in right, unless good reason be shown for a different result. *Bennett v. First National Bank*, 128–1, 102 N. W. 129.

Enforcement in equity: The judgment lien holder having an adequate remedy at law by levy and sale on the property under general execution to satisfy his judgment is not entitled to maintain an action in equity to have determined the question whether his judgment is a lien on the property. *Kalona Savings Bank v. Eash*, 133–190, 109 N. W. 887.

SEC. 3802. When attach—filing transcript in another county—judgments of U. S. courts and supreme court of Iowa. When the land lies in the county wherein the judgment was rendered, the lien shall attach from the date of such rendition, but if in another it will not attach until an attested copy of the judgment is filed in the office of the clerk of the district court of the county in which the land lies. The lien of judgments of the district or circuit courts of the United States, and the supreme court of Iowa, shall not attach to any real estate until an attested copy of the judgment is filed in the office of the clerk of the district court of the county in which the land lies. [35 G. A., ch. 290, § 1.] [17 G. A., ch. 129, § 2; C. '73, §§ 2883–4; R. §§ 4106–7; C. '51, §§ 2486–7.]

To make a judgment from another county a lien, the judgment must be indexed, as here required. *State Ins. Co. v. Prestage*, 116–466, 90 N. W. 62.

Execution on a judgment, a transcript of which has been filed in the office of the clerk of the district court in another county, can only issue from the county where such judgment was originally rendered. *Brunk v. Moulton Bank*, 121–14, 95 N. W. 238.

Levy and sale under execution from a district court of another county may be made without the filing of a transcript, and will be effective as against those having actual notice, or notice by the recording of the sheriff's deed. *Drahos v. Kopesky*, 132–497, 109 N. W. 1021.

A judgment for costs in a probate proceeding may be made a lien on the property involved in such proceeding although situated in another county. The grantee of the property in such proceeding and those claiming under him are bound by such lien, having no greater rights than the claimant would have had. *In re Estate of Brandes, Hoyer v. Buchholz*, 145–743, 122 N. W. 954.

The filing of the transcript in another county may create a lien on land in such county, but does not operate as a judgment, and execution can only issue out of the office of the clerk where the judgment was rendered. *Mudge v. Livermore*, 148–472, 123 N. W. 199.

CHAPTER 10.

OF JUDGMENT BY CONFESSION.

SECTION 3815. Statement.

Although judgment on confession by a warrant of attorney is not recognized in this state, such a judgment rendered in another state where it is authorized may be enforced in this state. *Cuykendall v. Doe*, 129–453, 105 N. W. 698.

The authority of an officer of a corporation to confess judgment for it may be inferred from the fact that the act was known to the corporation and that the officer was in the habit of practically exercising the whole power of the corporation with the knowledge of the other persons interested therein. *Gilman v. Heitman*, 137–336, 113 N. W. 932.

SEC. 3816. Judgment—execution.

When the confession of judgment is filed, the clerk should enter up a judgment thereon, and if he fails to do so the court may subsequently order judgment to be entered *nunc pro tunc* as of the date of the filing of the confession, thereby supporting an execution which has in the meantime been issued. *Doughty v. Meek*, 105–16, 74 N. W. 744.

A judgment entered on confession is deemed to have been entered by the court and is entitled to the same faith and credit in another state as any other judgment. *Miller Brg. Co. v. Capital Ins. Co.*, 111–590, 82 N. W. 1023.

SEC. 3818. After action brought.

Even though the paper is headed "an offer to compromise", if in fact it is an offer to confess judgment, it should be so treated. *Benson v. Chicago & N. W. R. Co.*, 113–179, 84 N. W. 1028.

If on appeal the amount of recovery is reduced to a less amount than that for which a confession of judgment is offered, costs should be taxed against the successful party, unless subsequently accruing interest has increased the amount for which recovery is allowed beyond the amount offered to be confessed. *Castner v. Chicago, B. & Q. R. Co.*, 134–648, 112 N. W. 88.

CHAPTER 11.

OF OFFER TO COMPROMISE.

SECTION 3819. Offer of judgment.

One who is authorized to collect a claim has authority to accept a confession of judgment for such claim. *Briggs v. Yetzer*, 103–342, 72 N. W. 647.

The law requires that the confession concisely state the facts so as to direct the attention of third parties to the nature and character of the consideration. Such statement must be brief and need not be specific or particular. *Ibid.*

If the statement is full enough to enable third parties to investigate and judge of the good faith of the transaction and sufficiently definite for this purpose, then the object of the statute in requiring such statement has been met. *Ibid.*

The jurat of the notary showing that the statement has been subscribed and sworn to is sufficient to show that it was subscribed and sworn to by the persons signing it, without the names of such persons being stated therein. *Ibid.*

An offer to confess judgment after an action is brought may be made in the presence of the plaintiff or after notice to him, and may be established by parol testimony; but it is a part of the court proceedings and when made before a justice of the peace should be entered on his docket. *Sloss v. Bailey*, 104–696, 74 N. W. 17.

SEC. 3820. Conditional offer.

The offer here contemplated is different from that provided for under code § 3818 with reference to offer to confess judgment. That section contemplates an acceptance or refusal of the offer when made; but even if the offer is one of compromise instead of confession of judgment, the party to whom it is made may so act during the period allowed for signifying acceptance as to bind himself by an election not to accept. *Benson v. Chicago & N. W. R. Co.*, 113–179, 84 N. W. 1028.

CHAPTER 12.

OF RECEIVERS.

SECTION 3822. When and how appointed.

Where a corporation, organized to carry on a work of public improvement, had become insolvent and unable to prosecute the work so that a foreclosure of its franchises would follow and the value of its property would largely depreciate and the public interests be jeopardized, held that the case was a proper one for the appointment of a receiver on the application of creditors. *Boston Inv. Co. v. Pacific Short Line Bridge Co.*, 104–311, 73 N. W. 839.

In such a case, held that it was not error to order the sale of the property immediately upon the appointment and qualification of a receiver. *Ibid.*

And held that an officer of the company who did not make his objection until after the appointment of the receiver and the sale of the property had been ordered was too late to be heard. *Ibid.*

The appointment of a receiver for a corporation limits the power of the corporation only to the extent that it is deprived of its property. *Weigen v. Council Bluffs Ins. Co.*, 104–410, 73 N. W. 862.

An order of court appointing the clerk of the court as receiver, although improper, cannot be questioned in an action by the receiver to recover a debt owing to the insolvent debtor. *Metropolitan Nat. Bank v. Commercial State Bank*, 104–682, 74 N. W. 26.

One may be a receiver *de facto* although he has not given any bond, and the fact that where the clerk is appointed receiver he cannot properly approve a bond given by himself will not render his acts as receiver invalid on collateral attack. *Ibid.*

The general rule seems to be that a receiver will be appointed in creditors' suits when the property is in danger of waste, almost as a matter of course. *Hirsch v. Israel*, 106–498, 76 N. W. 811.

A mortgagee may be entitled to the appointment of a receiver in case of levy on the mortgaged property under a claim senior to that of the mortgagee, it appearing that delay in sale of the property in due course of business would result in irreparable injury. Whether a receiver should be appointed is usually a matter within the sound judicial discretion of the court. *Valley Nat. Bank v. Claflin Co.*, 108–504, 79 N. W. 279.

Where the only assets of a partnership consisted of property which has been used in carrying on the partnership, the purpose of which is ended, a receiver should be appointed to close up its affairs. *Taylor v. Wells*, 113–326, 85 N. W. 30.

A person agreed upon between the parties to a suit for dissolution of a partnership as the substitute for the receiver already appointed is subject to the jurisdiction of the court and may be directed as to the distribution of the proceeds of the partnership property with reference to the payment of claims. *Johnson v. Johnson*, 132–457, 107 N. W. 802.

The appointment of a receiver in vacation is expressly authorized. *McKee v. Murphy*, 138–322, 113 N. W. 499.

A receiver may be appointed in a law action and it is not necessary to show than an absolute right to recover exists. It is enough if a probable right appears. If the court making the order has jurisdiction of the subject matter and of the parties, its action in appointing a receiver on the showing made cannot be collaterally attacked. *Paine v. Mueller*, 150–340, 130 N. W. 133.

For the purpose of determining whether the court has jurisdiction to appoint a receiver, the action is deemed commenced when notice is served. *Ibid.*

These provisions relate to the appointment of a receiver as an auxiliary remedy in an action otherwise properly brought, but do not create grounds for the application to a court of equity for a receiver in cases in which no equitable ground for such appointment as the principal foundation for the relief asked is made to appear. *Stockholders v. Jefferson County Agricultural Assn.*, 155–634, 136 N. W. 672.

SEC. 3824. Power of.

When rights attach: The right to dispose of property is not affected by an application for the appointment of a receiver, and such right continues at least until the making of the order of appointment. *Smith v. Sioux City Nursery & Seed Co.*, 109–51, 79 N. W. 457.

Powers: The extent of a receiver's authority is always to be measured by the order of appointment and such subsequent directions as may from time to time be given. The receiver must stand indifferent between the parties, though appointed on the application of one of them, and prudently preserve and protect the property intrusted to him as an officer of the court. *State Central Sav. Bank v. Fanning Ball-Bearing Chain Co.*, 118–698, 92 N. W. 712.

The object of the receiver's appointment should be kept in mind in adjusting his

accounts, and the court will not approve of the dissipation of the property in useless expenses not authorized by the order of appointment or subsequent direction. The tests to be applied are (1), was the act under investigation within the authority conferred by the order of court; (2), if so, was it performed with reference to the preservation of the estate as a man of ordinary sagacity and prudence would have performed it under like circumstances; (3), if without authority, was it beneficial to the estate. *Ibid.*

Subsequent instructions or orders of the court should be in writing and entered of record. *Ibid.*

A receiver may deposit the funds of the estate coming into his hands as such in a bank of good standing and repute, exercising that degree of prudence and care which is ordinarily exercised by reasonably cautious men in the transaction of their own business of like importance. *State v. Corning State Savings Bank*, 128–597, 105 N. W. 159.

Such a deposit is not unlawful though made in a bank which is a creditor of the insolvent. *Ibid.*

A receiver has no authority to execute a negotiable instrument for the corporation of which he is receiver. *Peoria Steam Marble Works v. Hickey*, 110–276, 81 N. W. 473.

While the act of the receiver in buying in the property at his own sale is irregular and voidable, such a sale is not void, and cannot be collaterally attacked in the absence of fraud. *Groeltz v. Cole*, 128–340, 103 N. W. 977.

As a receiver is subject to the order of the court and the property and funds in his hands are in court, it is proper for the court to give direction to the receiver as to priority of claims. *Hart v. Nonpareil Printing & Publishing Co.*, 109–82, 80 N. W. 217.

In the proceedings by the state auditor under statutory provisions to wind up a banking corporation, the court may require the payment by stockholders (under their double liability as fixed by statute) of an assessment deemed reasonably sufficient to meet the liabilities of the bank, without waiting for the final distribution of the assets. *State v. Union Stock Yards State Bank*, 103–549, 70 N. W. 752, 72 N. W. 1076.

If the statute makes stockholders liable to the extent of their respective shares of stock for debts due at the time of the dissolution of the corporation, a receiver appointed in an action brought to wind up the corporation may enforce this liability against the shareholders. Where the law contemplates a fund for distribution, such distribution is to be made by the receiver. *Ibid.*

Report: The setting aside of the receiver's final report after an order of discharge has been made is within the discretion of the trial court appointing the receiver. *Williams v. Des Moines Loan & Trust Co.*, 126–22, 101 N. W. 277.

The report may be set aside on the application of one of the creditors without requiring other creditors or the original parties to the litigation to be brought in. *Ibid.*

As party in litigation: The receiver of the property of a party to a litigation is not a necessary party to such litigation if no attempt is made thereby to interfere with the right of the receiver to the property intrusted to his care. *State Bank v. McElroy*, 106–258, 76 N. W. 715.

While the right of a receiver to appear in an action brought outside the state in which he was appointed is generally denied, yet he is frequently permitted to do so as a matter of comity. *Ibid.*

While it is the general rule that before suit is brought against the receiver, leave should be obtained from the court by which he was appointed, yet where the receiver has appeared and defended and invoked the affirmative judgment of the court, he cannot after an adverse decision question the jurisdiction. *Manker v. Phoenix Loan Assn.*, 124–341, 100 N. W. 38.

An action will not lie against the receiver of a railroad company, appointed simply to preserve the property pending litigation, for a personal injury sustained before the road passed into the control and possession of the receiver. *Fountain v. Stickney*, 145–167, 123 N. W. 947.

Foreign receivers: A receiver appointed by a court of foreign jurisdiction cannot maintain suit in this state to enforce recovery of a claim due under the laws of his state against a citizen of this state. *Wyman v. Eaton*, 107–214, 77 N. W. 865.

A foreign receiver appointed as ancillary receiver in a proceeding in the courts of this state, and duly qualifying and giving bond as such, may maintain an action in this state. *Seymour v. Aultman*, 109–297, 80 N. W. 401.

While a foreign receiver will not be allowed as such to bring action in the courts of this state, yet, if he has a right of action by assignment, and not merely by virtue of his appointment as receiver, he may maintain the action. *Hale v. Harris*, 112–372, 83 N. W. 1046.

A receiver appointed by a foreign court has no standing in a court of this state and is not a necessary party in an action by a stockholder in behalf of all the stockholders of the corporation against the directors. *Reed v. Hollingsworth*, 157–94, 135 N. W. 37.

Even if the receiver is a proper party in such case he is not an indispensable party and the court having jurisdiction of the defendants can proceed and award any appropriate relief. *Ibid.*

Costs: Fees and expenses of the receivership should be paid out of the funds in the hands of the receiver. *Harrington v. Foley*, 108–287, 79 N. W. 64.

The costs and expenses of the receivership are to be paid out of the property and such claims take priority over existing liens thereon. *Gallagher v. Gingrich*, 105–237, 74 N. W. 763.

Where the object of receivership is to preserve the property pending a determination of the rights of the parties with reference thereto, the successful party availing himself of the fruits of litigation must take subject to the burden of costs of the receivership regardless of the litigation as between the parties; but one who attempts to establish a claim against the receivership cannot have the cost of the litigation satisfied out of the property itself, and on the other hand the receiver must look for his compensation to the portion of the fund properly brought within his jurisdiction or to the party on whose application the receivership was secured. *Frick v. Fritz*, 124–529, 100 N. W. 513.

An expert accountant employed by a receiver under authority of the court is subject to the direction of the receiver, and is not entitled to compensation for services performed in excess of or in opposition to the instructions of the receiver. *Grabbe v. Moffit*, 133–54, 110 N. W. 142.

SEC. **3825. Priority of liens—taxes.** Persons having liens upon the property placed in the hands of a receiver shall, if there is a contest as to their priority, submit them to the court for determination. Provided that when the assets of any corporation, partnership or person shall be placed in the hands of a receiver, all taxes against said corporation, partnership or person, whether levied under the laws of the state or ordinances of municipal corporations, shall be entitled to priority and be first paid in full by the receiver and claims therefor need not be filed with said receiver. [29 G. A., ch. 140, § 1.]

The receiver takes the debtor's property subject to the payment of all valid prior liens, but preferences orally agreed upon at the time of the receiver's appointment, not based on existing liens, will be disregarded. *Smith v. Sioux City Nursery & Seed Co.*, 109–51, 79 N. W. 457.

A claim for false representations in the sale of corporate stock or for money paid in the purchase thereof by a minor on a contract which has been disaffirmed, or a claim by an indorsee of such contract who is denied recovery thereon because of such disaffirmance, is not entitled to priority in a receivership proceedings. To sustain such priority there must be some showing that the estate has been augmented by the trust fund, or that it has been so benefited by the misappropriation of the fund that its removal will be without prejudice to creditors. *Seeley v. Seeley-Howe-LeVan Co.*, 128–294, 103 N. W. 961.

SEC. **3825-a. Claims entitled to priority.** When the property of any person, partnership, company or corporation has been placed in the hands of a receiver for distribution, after the payment of all costs the following claims shall be entitled to priority of payment in the order named:

First. Taxes or other debts entitled to preference under the laws of the United States.

Second. Debts due or taxes assessed and levied for the benefit of the state, county or other municipal corporation in this state.

Third. Debts owing to employes for labor performed as defined by section four thousand and nineteen of the code. [31 G. A., ch. 156, § 1.]

CHAPTER 13.

OF SUMMARY PROCEEDINGS.

SECTION 3826. Judgments on motion.

This section has no application where one attorney seeks to compel another to pay over a share of the fees received by the latter under a contract between them. *Downs v. Davis*, 113–529, 85 N. W. 781.

The remedy under this section against

an attorney is not limited to cases of bad faith; nor is the power of the court to act precluded by the fact that there is a controversy as to whether the relation of client and attorney existed when the money was received. *Union Bldg. & Sav. Assn. v. Soderquist*, 115–695, 87 N. W. 433.

The fact that the client has a legal remedy for the recovery of the money does not affect the right of the court to entertain the proceeding. *Ibid.*

In this summary proceeding the court has the power to adjust any set-off which the attorney may have on account of fees or other charges due to him in connection with the proceeding in which he received the money in question, or as the result of any other services for which he has a lien on money of his client coming into his hands. *Ibid.*

The court may, upon proper showing, render judgment summarily against the clerk for money received by him or make such order as would protect the rights of parties to the fund. *Hornish v. Ringen Stove Co.*, 116–1, 89 N. W. 95.

The remedy provided for in this section is available as against an attorney in the county of his residence although no action is there pending in which money has been received by him. *Emanuel v. Cooper*, 153–572, 133 N. W. 1064.

SEC. 3830. No written pleadings.

The ground of jurisdiction is the misconduct of the officer. The court is simply called upon to enforce the plain duty of the attorney without the aid of a jury or written pleadings, and the remedy relates exclusively to an accounting between the attorney and the client. *Downs v. Davis*, 113–529, 85 N. W. 781.

CHAPTER 14.

OF MOTIONS AND ORDERS.

SECTION 3831. Motion defined.

A judge may in vacation entertain a motion supported by affidavits to set aside the appointment of a temporary guardian previously made by him. *Holly v. Holly*, 157– —, 138 N. W. 445.

SEC. 3833. Proof by affidavit.

A motion in the final settlement of an estate to set aside an allowance already made to the administrator may be supported by affidavits. *Rabbett v. Connolly*, 153–607, 133 N. W. 1060.

A motion for allowance of suit money in a divorce proceeding may be supported by affidavits; and on an appeal from a ruling on such motion, the affidavits may be considered as testimony upon the hearing. *Mengel v. Mengel*, 157– —, 138 N. W. 495.

SEC. 3834. Notice of motion.

An order in an *ex parte* proceeding can be made only after notice to the party against whom the order is asked. *McConkie v. Landt*, 126–317, 101 N. W. 1121.

SEC. 3842. "Order" defined.

Judges are authorized to make orders in vacation, which are defined to be directions made in writing, and when so made are to be filed with the clerk. *In re Guardianship of Kimble*, 127–665, 103 N. W. 1009.

SEC. 3843. May issue in vacation.

This provision authorizes the judge to direct the sheriff with reference to the issuance of a deed in pursuance of execution sale. *Hawkeye Ins. Co. v. Maxwell*, 119–672, 94 N. W. 207.

As code § 4057 points out the specific manner of raising a question as to redemption of property from execution sale, such question cannot be raised by a general motion under this section. *Iowa Loan & Trust Co. v. Kunsch*, 156–91, 135 N. W. 426.

SEC. 3846. Filed and entered.

Orders made upon motion must be entered of record. *In re Manning's Estate*, 134–165, 111 N. W. 409.

Where there is a record of an order made by a judge in vacation, such record is the best evidence of the order. *Bristol Sav. Bank v. Judd*, 116–26, 89 N. W. 93.

CHAPTER 15.

OF SECURITY FOR COSTS.

SECTION **3847. When required.** If a defendant, at any time before answering, shall make and file an affidavit stating that he has a good defense in whole or in part, the plaintiff, if he is a nonresident of this state, or a private or foreign corporation, before any other proceedings in the action, must file in the clerk's office a bond, with sureties to be approved by the clerk, in an amount to be fixed by the court, for the payment of all costs which may accrue in the action in the court in which it is brought, or in any other to which it may be carried, either to the defendant or to the officers of the court. The application for such security shall be by motion, filed with the case, and the facts supporting it must be shown by affidavits annexed thereto, which may be responded to by counter affidavits on or before the hearing of the motion, and each party shall file all his affidavits at once, and none thereafter. And a nonresident intervener shall be required in like manner, to give a bond on motion of any party required to answer his petition of intervention. [27 G. A., ch. 100, § 1; C. '73, § 2927; R. §§ 3442, 3448.]

Failure to give security for costs as ordered does not preclude a nonresident defendant served with notice by publication only from applying to have the default set aside within the time allowed by the statute therefor. *English v. Otis*, 125–555, 101 N. W. 293.

Until amended by 27 G. A., ch. 100, § 1, the provisions of this section had no reference to a case of intervention by a nonresident. *Petty v. Hayden*, 115–212, 88 N. W. 339.

The provision as to security for costs has no application to the prosecution of claims in probate. *Wise v. Outtrim*, 139–192, 117 N. W. 264.

Under this section as amended the party moving for security for costs must present all of his proof at the time of filing his motion, and cannot, by withdrawing such motion and filing a new motion, become entitled to make a further showing. *Beans v. Denny*, 141–52, 117 N. W. 1091.

SEC. **3848. Dismissal for failure to furnish.**

The court may extend the time given for filing bond for security for costs, and may treat a bond filed after the expiration of the time fixed as filed in proper time, and may refuse to dismiss for the default. *Funk v. Church*, 132–1, 109 N. W. 286.

SEC. **3849. When plaintiff or intervener becomes nonresident.** If the plaintiff or any intervener in an action, after its institution and at any time before its final determination, becomes a nonresident of this state, he may be required to give security for costs in the manner provided in the preceding sections of this chapter. [27 G. A., ch. 100, § 2; C. '73, § 2929; R. § 3444.]

By 27 G. A., ch. 100, if the plaintiff after the institution of suit becomes a nonresident, he may be required to give security for costs although the defendant has already filed his answer. *Vohs v. Shorthill Co.*, 124–471, 100 N. W. 495.

SEC. **3851. Attorney or other officer not received.**

An attorney is not competent as surety on appeal from a justice of the peace. *Valley Nat. Bank v. Garretson*, 104–655, 74 N. W. 11; *Hudson v. Smith*, 111–411, 82 N. W. 943.

The sufficiency of an administrator's bond cannot be questioned in a collateral proceeding on the ground that it is signed by an attorney as surety. *Beresford v. American Coal Co.*, 124–34, 98 N. W. 902.

A bond for appeal in a drainage case having no other security than one of the appellant's attorneys, held void. *Collins v. Board of Supervisors*, 138 N. W. 1095.

SEC. **3852. Judgment on bond rendered on motion.**

The court has jurisdiction to render a judgment on a cost bond against the sureties although they are not parties to the action. Therefore, the sureties, though residents of another county, are not entitled on a motion for judgment against

them on the bond after judgment is rendered against the principal in the action, to have the proceeding transferred to the other county of which they are residents. *Rogers v. Western Mut. Life Assn.*, 123–722, 99 N. W. 589.

SEC. **3852-a. Cash deposit in lieu of bond.** In all cases in which a bond for security for costs is required, the party required to give such security may deposit in cash the amount fixed in said bond with the clerk of the district court or justice of the peace in lieu of said bond. [33 G. A., ch. 203, § 1.]

CHAPTER 16.

OF COSTS.

SECTION **3853. Recoverable by successful party.** Costs shall be recovered by the successful against the losing party; the losing party, however, shall not be assessed with the cost of mileage of any witness for a distance of more than seventy miles from the place of trial, unless otherwise ordered by the court at the time of entering judgment. But where the party is successful as to a part of his demand, and fails as to part, unless the case is otherwise provided for, the court on rendering judgment may make an equitable apportionment of costs. [32 G. A., ch. 166, § 1; C. '73, § 2933; R. § 3449; C. '51, § 1811.]

The general rule is that costs shall be recovered by the successful party and the fact that a defense has been made in good faith and upon reasonable grounds does not relieve such defendant if unsuccessful from the payment of costs. *In re Proctor's Estate*, 103–232, 72 N. W. 516.

The judgment may provide for interest on costs and attorneys' fees as well as on the principal sum for which the judgment is rendered. *Hoyt v. Beach*, 104–257, 73 N. W. 492.

Unnecessary expenses of counsel in taking depositions made necessary by the act of the opposite party in giving notice to take depositions at different places, before such depositions were finally secured, cannot be taxed as costs. *Grapes v. Grapes*, 106–316, 76 N. W. 796.

The expense of making an abstract of the evidence for use in the trial court is not so taxable. *Ibid.*

Without any prayer therefor in the petition costs follow the judgment. *Mountain v. Low*, 107–403, 78 N. W. 55; *Reed v. Corrigan*, 114–638, 87 N. W. 676.

The provision of this section that costs shall be recovered by the successful against the losing party is applicable in a criminal case. *Hayes v. Clinton County*, 118–569, 92 N. W. 860.

Therefore in a criminal case, held that the state was entitled to enforce as against the defendant, who is convicted, the payment of costs, and that an order made on appeal that the county pay the costs of defendant's printing, while it entitled defendant to recover the amount thus taxed against the county, did not authorize an assignment afterwards made to his attorney of the amount thus taxed, which would take priority over the claim of the state to subject such amount to the payment of the other costs in the case properly taxed to defendant. *Ibid.*

In an appeal from the action of the board of supervisors upon a petition for the construction of a ditch, costs may be taxed to the unsuccessful party, although by code § 1940 it is required that the petitioners in such an application shall give bond to cover the costs. *In re Bradley*, 117–472, 91 N. W. 780.

The ordinary provision as to costs is applicable in a proceeding to probate a will where the proponent is claiming as beneficiary under the will and the heirs are contesting on the ground of testamentary incapacity and undue influence. *In re Hendershott's Estate*, 134–320, 111 N. W. 969.

As a rule the successful party recovers costs against the losing party. *McDonald v. Benge*, 138–591, 116 N. W. 602.

SEC. 3854. Apportionment.

Where there was recovery by the plaintiff on his cause of action and by the defendant on his counterclaim and it appeared that the time occupied and the number of witnesses was substantially equal as to the two issues, held that the costs should have been equally apportioned between the two parties. *White v. Ledbetter*, 104–71, 73 N. W. 610.

Where plaintiff brought suit to collect

two distinct and separate claims, one upon a contract and the other upon a *quantum meruit* for extra work, and the sole question of fact actually litigated was the issue upon plaintiff's claim for extra work and the counterclaim of defendant for deduction therefrom of the amount due him for unfinished work, held that the costs should be apportioned. *Palmer v. McGinness*, 127–118, 102 N. W. 802.

While the plaintiff is successful as to several distinct and separate items of his claim and unsuccessful as to others, the case is one for the apportionment of costs. *Dorr v. Dudley*, 135–20, 112 N. W. 203.

The fact that, in an action for equitable relief with reference to the conveyance of property, the plaintiff, although denied other relief, is given a judgment for the amount of money advanced by him under the contract, the repayment of which had been tendered by defendant, and as to which there had been no controversy, held not sufficient to require taxation of any portion of the costs to defendant. *Saunders v. King*, 119–291, 93 N. W. 272.

Where an action is properly commenced, the plaintiff is not to be held liable for all the costs although by reason of a change of circumstances pending trial a final judgment is necessarily rendered against him. *Mock v. Chalstrom*, 121–411, 96 N. W. 909.

Defendant is not to be charged with all the costs in an action involving recovery on different items of charge when the judgment against him is founded on one item only, and he is successful as to the others. *Krause v. Redman*, 134–629, 112 N. W. 91.

An order as to apportionment of costs will not be interfered with on appeal unless it is clear that the trial court's discretion has been abused. Where there are various items of claim and counterclaim and plaintiff recovers under each count of his petition, it is not necessarily error to refuse to tax a part of the costs against the plaintiff although the defendant has recovered on some items of counterclaim, it not appearing that any costs were incurred in sustaining the items of counterclaim which would not have been involved in the trial of the issues on the claims of the plaintiff. *Mayo v. Halley*, 124–675, 100 N. W. 529.

Where the intervener was successful as to the principal issue raised by him, held that no portion of the costs should be taxed to him, although on another issue not involving any additional costs he was unsuccessful. *Jacobs v. Jacobs*, 130–10, 104 N. W. 489.

While the provisions of this section are applicable to the trial of appeals in condemnation proceedings, there is no provision for the assessment or apportionment of attorney's fees on such appeal, except as authorized by code § 2007, which provides for the allowance of attorney's fees to the property owner only when the damages awarded are at least equal to those allowed by the commissioners. *Wormely v. Mason City & Ft. D. R. Co.*, 120–684, 95 N. W. 203.

In a criminal case, there being but the simple issue of guilt or innocence on the part of the defendant, there is no authority for apportionment of costs between the state and the defendant. *Hayes v. Clinton County*, 118–569, 92 N. W. 860.

In a proceeding to establish a disputed corner and boundary, held that an apportionment of the costs in proportion to the number of acres belonging to each party was proper. *Brett v. Clark*, 136–544, 114 N. W. 28.

The apportionment of the costs rests largely in the sound discretion of the court. *Ashdown v. Ely*, 140–739, 117 N. W. 976.

In a law action where plaintiff's claim is indivisible and he succeeds in recovering damages, costs ordinarily should not be apportioned; but in an equitable action the court has a large discretion in taxing costs and such discretion will not be interfered with except in a case of manifest injustice. *Johnson v. Ruth*, 144–693, 123 N. W. 326.

In a particular case, held that apportionment of costs was proper. *Rater v. Shuttlefield*, 146–512, 125 N. W. 235.

Where the court awards partial relief to plaintiff, its discretion in taxing all the costs against the defendant will not be interfered with on appeal. *Lane-Moore Lumber Co. v. Bradford*, 148–578, 126 N. W. 944.

The apportionment of costs in proceedings to establish lost corners is specially provided for in code § 4238. *Russ v. Townsend*, 150–163, 129 N. W. 840.

SEC. 3855. Collection.

The party against whom judgment is rendered is primarily liable for all costs to the parties entitled thereto, but the successful party has no right to enforce judgment for costs, except so far as such costs have been paid by him. *Hidy v. Hanson*, 116–8, 89 N. W. 36.

To entitle a claimant for costs to recover against the successful party, it is only necessary to show that such costs accrued at the instance of such party, and cannot be collected of the other party. *Cole v. Gates Lumber Co.*, 131–189, 108 N. W. 235.

Where the referee and reporter in a case were selected by mutual agreement, held that each party was liable for his proportion of the compensation to such officers,

and that neither was liable for the proportion taxed to the other. *Ibid.*

Attorneys procuring a judgment have no lien thereon for the costs taxed in their favor under an attorney's fee clause of the contract on which the judgment is rendered. *Van Buren County Sav. Bank v. Rockwell*, 154–26, 134 N. W. 424.

SEC. 3862. Clerk to tax.

A motion to retax costs may cover taxation of attorney's fees fixed by the court, for the clerk taxes these as well as other costs, although the court determines the amount. *Bankers' Iowa State Bank v. Jordan*, 111–324, 82 N. W. 779.

The losing party may be taxed with costs for witnesses who were properly subpoenaed and attended the trial, although not called as witnesses, and it is immaterial that the attorney of the party subpoenaing such witnesses who have in fact been in attendance subject to call has concealed from the other party the fact that such witnesses are in attendance. The concealment of the fact that such witnesses are in attendance is material only on the question whether they were subpoenaed in good faith with the purpose of calling them if necessary. *Parsons Band Cutter, Etc. Co. v. Sciscoe*, 129–631, 106 N. W. 164.

The taxation of costs in a criminal case is conclusive as against the county. *Climie v. Appanoose County*, 125–292, 101 N. W. 98.

A judgment for costs is not invalid because the amount is left to be subsequently determined. *In re Estate of Brandes, Hoyer v. Buchholz*, 145–743, 122 N. W. 954.

SEC. 3864. Retaxation.

A motion to retax costs may be considered without any proceedings to set aside, modify or correct the judgment. The costs are properly no part of the judgment. *Fisher v. Burlington, C. R. & N. R. Co.*, 104–588, 73 N. W. 1070.

A motion to retax costs covers error of the court in fixing the amount of attorney's fees to be allowed under code § 3869 in action on written contract. *Bankers' Iowa State Bank v. Jordan*, 111–324, 82 N. W. 779.

Error in allowance of attorney's fee on foreclosure of mortgage cannot be corrected by such motion since the right to the attorney's fee is determined by the judgment. *Perry v. Kaspar*, 113–268, 85 N. W. 22.

It is only when a mistake has been made by the clerk in the taxation of costs that a motion to correct is essential before a review may be had on appeal. Where an attorney's fee has been taxed in the judgment, the correctness of the action of the court may be reviewed without raising the question by motion to retax costs. *Ainley v. American Mut. F. Ins. Co.*, 113–709, 84 N. W. 504.

Where costs are occasioned by the improper action of the court in reopening the case and receiving new evidence, the court on motion should retax the costs. *Hagerle v. Beebe*, 123–620, 99 N. W. 303.

Error in entering a judgment against a party for costs may be reviewed on appeal without a motion for retaxation. Such motion relates to the correctness of the taxation and not to the entry of judgment. *Guinn v. Iowa & St. L. R. Co.*, 125–301, 101 N. W. 94.

While an appeal is pending, the district court has no jurisdiction in an equity case to pass upon a motion to retax costs; and it cannot in any way control the costs to be taxed in the supreme court which are incident to the appeal. *Berkey v. Thompson*, 126–394, 102 N. W. 134.

No doubt a party is bound to take notice of a motion to retax costs, made after final rendition of judgment, but there must be some limit to the time within which the final determination of the case with reference to the costs may be assailed in this manner, and after the costs have been fully paid and satisfied, there can no longer be any necessity for requiring the parties to be on their guard against motions of this character. After that time the court can have jurisdiction to revise its action as to taxation of costs only upon notice to the party. *Iowa Sav. & L. Assn. v. Chase*, 118–51, 91 N. W. 807.

There is no provision in this section for rendering judgment against the successful party for the payment of costs which have been fully settled and satisfied by the other party. *Ibid.*

The right to recover costs is determined by the judgment, and not on motion to retax. *Fairbairn v. Dana*, 68–231, 26 N. W. 90.

While no time limit is specified within which a motion to retax may be filed, there may be such laches in asking relief that the court will properly refuse to interfere. *Brett v. Clark*, 136–544, 114 N. W. 28.

As to the amount allowed as attorney's fees where attorney's fees are taxable as costs, the remedy of the complaining party is by motion to retax, and after the overruling of such motion without appeal, he cannot raise the question as to the propriety of the taxation of such fees. *Rogers v. Crandall*, 143–249, 121 N. W. 1092.

When the judgment itself contains provisions as to costs and is properly excepted to, error therein may be taken advantage

of on appeal from the judgment without the question as to the correctness of the judgment in this respect being specifically raised in the lower court. *McCaskey v. Ft. Dodge, D. M. & S. R. Co.*, 154–652, 135 N. W. 6.

SEC. 3869. Attorneys' fees—when taxed as costs—amount.

In an action on a written contract the court may fix the attorney's fees without taking evidence, and the clerk may tax up the amount fixed by the court with the other costs. The correctness of the taxation of the fee by the court may be raised in a motion for retaxation of costs. *Bankers' Iowa State Bank v. Jordan*, 111–324, 82 N. W. 779.

Where several notes are sued on in the same action which might separately have been the basis of different actions, the attorney fee is to be fixed with reference to the several amounts, and not on the basis of the recovery of one lump sum. *Ibid.*

Attorney's fees may be allowed on the foreclosure of a note and mortgage, although such fees have also been allowed in an action *in rem* in another state in which a portion only of the indebtedness was collected. *Smith v. Moore*, 112–60, 83 N. W. 813.

Where the attorney's fee is fixed and allowed by the judgment, it is not necessary to move to retax the costs in order to raise on appeal the correctness of the judgment in that respect. Such a fee is not necessarily a part of the judgment, but it, as well as other costs, may be made so. *Ainley v. American Mut. F. Ins. Co.*, 113–709, 84 N. W. 504.

The "return day" is the second day of the term, or default day. *Bankers' Iowa State Bank v. Jordan*, 111–324, 82 N. W. 779.

Attorney's fees taxed as provided in a written contract are a part of the costs incidental to the action and not a part of the amount in controversy, and they belong to the persons in whose favor they are taxed. *Van Buren County Sav. Bank v. Rockwell*, 154–26, 134 N. W. 424.

The bankruptcy act does not contemplate the allowance of attorney's fees as costs, or otherwise, upon proving claim against a bankrupt estate, and in a bankruptcy court, the contract provisions for attorney's fees are not, therefore, enforceable. *In re Hersey*, (D. C.) 171 Fed. 1004.

SEC. 3871. Opportunity to pay.

Attorney's fees provided for in a mortgage are not taxable where the mortgage is declared due by the mortgagee on account of failure to comply with conditions as to keeping the premises insured. In such case tender is impracticable, since the maker has not been afforded a reasonable opportunity to pay before maturity. *Moore v. Crandall*, 146–25, 124 N. W. 812.

SEC. 3875. Of reporters and clerks for transcripts.

The translation of the shorthand reporter's notes, which is necessary only for the presentation of the appeal in the supreme court, is not to be taxed as costs in the district court. *Berkey v. Thompson*, 126–394, 102 N. W. 134.

TITLE XIX.

OF ATTACHMENTS, GARNISHMENT, EXECUTIONS AND SUPPLEMENTARY PROCEEDINGS.

CHAPTER 1.

OF ATTACHMENTS.

SECTION 3877. Proceedings auxiliary.

An attachment, save to preserve some specific lien, is always auxiliary to the main suit. *Ames v. Chirurg*, 152–278, 132 N. W. 427.

SEC. 3878. Grounds—not stated in alternative.

The statute permits amendments of the petition to show that a legal cause of attachment existed at the time the writ was issued. *Citizens' Nat. Bank v. Converse*, 105–669, 75 N. W. 506.

An attachment is a summary proceeding, and before a writ is issued on an application therefor, one or more of the statutory grounds must be stated and sworn to. An allegation or statement which does not substantially comply with the statutory requirements is insufficient. *Upp v. Neuhring*, 127–713, 104 N. W. 350.

An allegation that the defendant is about to remove permanently out of the state is not sufficient to authorize the issuance of an attachment unless it is also made to appear that he has refused to pay or secure the debt due to the plaintiff. *Ibid.*

The statement that the defendant is about to leave the state and defraud his creditors cannot be construed as an allegation that he is about to remove his property out of the state without leaving sufficient remaining for the payment of his debts. *Ibid.*

In determining the right to sue out an attachment, the question as to the amount due on the claim has reference to the claim itself rather than balance of indebtedness as between the parties, and the attachment may be rightfully sued out, although it shall afterwards appear that plaintiff is not entitled to judgment against the defendant. *Smeaton v. Cole*, 120–368, 94 N. W. 909.

Malice and want of probable cause will not necessarily be inferred from a finding, as the result of a counterclaim, that nothing was actually due the plaintiff. In such a case the writ has been wrongfully issued, but this alone does not necessarily entitle the defendant to the recovery of damages on the bond. *Ibid.*

The mere fact that one who is indebted is about to leave the state is not ground for an attachment. To furnish such ground it must appear that he was about to remove his property from the state without leaving sufficient remaining for the payment of his debts, or that he was about to remove permanently from the state and refused to pay or secure plaintiff's debts. *Tyler v. Bowen*, 124–452, 100 N. W. 505.

It is sufficient to establish fraud as to sales or conveyances of the debtor's property that they were made with intent to hinder, delay or defraud his creditors. *Meyer v. Baird*, 120–597, 94 N. W. 1129.

A landlord, claiming that a sale by a tenant of exempt property is fraudulent, cannot proceed by landlord's attachment, but only under the general provisions for attachment. *Hillman v. Brigham*, 110–220, 81 N. W. 451.

SEC. 3880. On contract—amount due.

This section has reference to the statement to be made in the petition as to the amount due where the action is upon contract. It differs from the corresponding section, 4579, relating to attachments in justice's court, and does not have any reference to the amount recovered. *Ames v. Chirurg*, 152–278, 132 N. W. 427.

SEC. 3883. For debts not due—grounds.

The obligation to pay rent is created when a valid lease is entered into between the parties, and ordinarily nothing but time is wanting to fix an absolute indebtedness. *Brown v. Cairns*, 107–727, 77 N. W. 478.

SEC. 3885. Bond.

If the action be founded on contract and there is in fact no indebtedness the attachment is wrongful. *Peters v. Snavely-Ashton*, 144–147, 120 N. W. 1048, 122 N. W. 836.

And see notes to code § 3887 in this supplement.

SEC. 3887. Action on bond.

Independently of statute: An action will lie for the wrongful and malicious institution of a civil suit where an attachment has been issued as auxiliary to the main action, and such action need not be by counterclaim on the attachment bond, nor need it be on the bond. *Carraher v. Allen*, 112–168, 83 N. W. 902.

The cause of action for wrongful attachment irrespective of the bond accrues when the property is taken, or at least when it is sold under the writ. *Smyth v. Peters Shoe Co.*, 111–388, 82 N. W. 898.

A counterclaim for wrongfully suing out the attachment, but not founded on the attachment bond, cannot be interposed in the original case. *Tyler v. Bowen*, 124–452, 100 N. W. 505.

But the abandonment of such a counterclaim will not prevent the interposition of a proper counterclaim on the bond. *Ibid.*

In an action for wrongful suing out of an attachment, not brought upon the bond, plaintiff must establish both want of probable cause and malice. *Richards v. Jewett*, 118–629, 92 N. W. 689.

In an action for malicious prosecution in wrongfully suing out an attachment, plaintiff must not only show that the action complained of was wrongfully brought, *i. e.*, without probable cause, but also that it was malicious. The malice required may be inferred by the jury from want of probable cause, but if circumstances are proved showing reasonable ground of belief as to the existence of a cause of action, the question of malice is for the jury. *Connelly v. White*, 122–391, 98 N. W. 144.

Advice of counsel is not sufficient to rebut the presumption of malice from want of probable cause, if the facts are not fully and fairly presented to the counsel whose advice has been taken. *Ibid.*

An attachment is wrongful if sued out when there is, in fact, no indebtedness, but the remedy in such case is for abuse of process or malicious prosecution which will lie in this state independently of the bond. That fact alone is not sufficient to justify a recovery of damages on the bond. *Ames v. Chirurg*, 152–278, 132 N. W. 427.

Want of ground: It will not render the attachment wrongful that it is sued out against the principal debtor who is insolvent, although there is a surety who is solvent but who is not made party to the action. *Richardson v. Probst*, 103–241, 72 N. W. 521.

On a question whether an attachment was wrongfully sued out on the ground that the debtor was about to dispose of his property, mortgages by the debtor subsequent to the levy but on the same day, and the fact that another creditor telegraphed to attaching plaintiff that the debtor was sure to fail, etc., were held admissible. *Citizens' Nat. Bank v. Converse*, 105–669, 75 N. W. 506.

The question as to reasonable cause of belief relates to the ground upon which the attachment was issued. *Ringen Stove Co. v. Bowers*, 109–175, 80 N. W. 318.

If the ground of the attachment is true in point of fact, or if the attaching plaintiff had reasonable grounds for believing the fact to be true, there can be no recovery of damages on the attachment bond. *Lord, Owen & Co. v. Wood*, 120–303, 94 N. W. 842.

The mere finding that plaintiff is not entitled to judgment for any amount, by reason of the interposition of a counterclaim by the defendant, does not show that the suing out of the attachment was malicious and without probable cause. *Smeaton v. Cole*, 120–368, 94 N. W. 909.

It is the reasonable ground of belief on the part of the attachment creditor and not the intent of the debtor which is controlling in determining the liability on the bond. *Peters v. Snavely-Ashton*, 144–147, 120 N. W. 1048, 122 N. W. 836.

There can be no recovery of attorney's fees unless it appears that the attaching plaintiff had no reasonable cause for believing that the grounds for attachment were true. *Ibid.*

Under a bond providing for payment of damages for wrongful attachment to the defendant in his individual capacity the liability under the bond cannot be extended so as to allow recovery of damages in a representative capacity. *Ibid.*

In a counterclaim for damages for wrongfully suing out of an attachment on account of the disposal of property with the intent to defraud creditors, it must

be shown not only that the defendant in the attachment had no such intent but also that plaintiff had no reasonable ground for believing that defendant had disposed of his property with such intent. *Chismore v. Van Roden*, 151–270, 130 N. W. 1090.

It is not enough to show in an action on the bond that the attachment was wrongful, for example, that there was no indebtedness, for it must also be shown before there can be recovery on the bond that there was no reasonable cause to believe the ground of attachment true. *Ames v. Chirurg*, 152–278, 132 N. W. 427.

Even if the defendant be indebted to the attaching creditor, the latter may be liable on his bond if the writ is wrongfully sued out. *Baker v. Bennett Auto Supply Co.*, 152–563, 132 N. W. 945.

A defendant who interposes a counterclaim upon an attachment bond has the burden of proving a negative and no presumption comes to his aid as in many other forms of action that he was not, in fact, guilty of any fraud or misconduct authorizing the attachment. *Ricker v. Davis*, 139 N. W. 1110.

Right to recover: Where two writs of attachment were sued out by different creditors against the same debtor, held that release of liability of one creditor would not discharge the other. *Miller v. Beck*, 108–575, 79 N. W. 344.

Assignment of claim on bond: The statutory provision that a claim for wrongful attachment may be interposed in the attachment proceeding does not authorize the defendant in an action on a judgment to set up by way of counterclaim a claim which he has acquired by assignment after the bringing of the action, for damages suffered by his assignor by the suing out of an attachment. *Morrison Mfg. Co. v. Rimerman*, 127–719, 104 N. W. 279.

Measure of damages: Where sale of the property at auction was made within a few weeks after the levy of the attachment, held that evidence as to what the property sold for, the number of bidders and the offers made at the time the goods were exposed for sale was admissible. *Citizens' Nat. Bank v. Converse*, 105–669, 75 N. W. 506.

The mere issuance and levy of a writ of attachment upon real estate, without other evidence of actual injury, will not sustain a recovery of substantial damages on the bond. *New Sharon Creamery Co. v. Knowlton*, 132–672, 108 N. W. 770.

An attachment creditor is not liable for damages in case of wrongful suing out of an attachment for the depreciation in value of real estate levied upon, which occurs while the attachment is in force. The mere issuing and levying of a writ of attachment on real estate cannot ordinarily cause it to depreciate in value. *Tisdale v. Major*, 106–1, 75 N. W. 663.

Mental suffering resulting from the wrongful and malicious suing out and levying of a writ of attachment does not afford ground for recovery of compensatory damages. *Ibid.*

A second attaching creditor who does not cause the seizure of the property (which remains in the custody of the officer under the prior attachment in pursuance of which it is sold) is not usually liable for more than interest on the surplus of the proceeds over the amount of the first attachment debt. Liability in such case is usually no more than it would have been if the sheriff in possession under the first writ had been garnished for the surplus. *Emerson v. Converse*, 106–330, 76 N. W. 705.

If it appears by the finding of the jury that the attachment was properly issued, error in the charge of the court with reference to the damages to be assessed in the event that attachment was wrongful will be error without prejudice. *Crowell v. McGoon*, 106–266, 76 N. W. 672.

It is error to instruct the jury with reference to damages by interruption or destruction of trade due to seizure of stock of goods under attachment where it appears that the goods levied on were not of such a nature as that their seizure could materially affect the trade or interrupt the business; and where it appears that by reason of such instruction the jury has made a large allowance of exemplary damages the judgment on the verdict will be reversed. *Hooker v. Chittenden*, 106–321, 76 N. W. 706.

In an action for wrongful attachment not brought on the bond the plaintiff is entitled to recover at least nominal damages if the attachment was sued out maliciously and without probable cause, but he is not entitled to recover for injuries to his credit. *Dorr Cattle Co. v. Des Moines Nat. Bank*, 127–153, 98 N. W. 918, 102 N. W. 836.

The right to recover damages for injury to credit is to be determined by the law of the state where the action is brought and not by that of the state in which the cause of action arises. *Ibid.*

The measure of damages is necessarily the same whether the action be upon the bond or on the case independent of the bond. In neither action can the plaintiff recover for injury to credit; and this rule will be applied in the courts of this state regardless of where the cause of action arose. *Ibid.*

In determining the damages to be recovered against an attaching creditor who has wrongfully caused a stock of goods to be levied upon, which the owner was engaged in selling in pursuance of his regular business, the owner, in recovering for loss of

time due to the wrongful attachment, must be limited to the value of his time in the particular business in which he was engaged. *Lord v. Wood*, 120–303, 94 N. W. 842.

The fact that the attachment defendant objects to the sale of attached property, under the provisions of 27 G. A., ch. 101, relating to the sale of such property when it is in danger of serious and immediate waste and decay, or when the keeping of the same will necessarily be attended with such expense as greatly to depreciate the amount of proceeds to be realized therefrom, such objection being on the ground that the attachment is unlawful, does not estop him from afterwards claiming, by way of damages for unlawful attachment, that the property has been injured by reason of depreciation in its value while held by the sheriff under his levy. *Ibid.*

Time and money expended in securing the release of the property by the execution of a delivery bond are proper elements of damage in an action on the bond. *Tullis v. McClary*, 128–493, 104 N. W. 505.

In a counterclaim on the bond the defendant is not entitled to show consultations with lawyers and time and expense in tending court not reasonably necessary in the defense of the suit. *Massena Sav. Bank v. Garside*, 151–168, 130 N. W. 918.

Exemplary damages: In determining the damages under a counterclaim on the attachment bond, it appearing that the attachment was sued out for the purpose of harassing and annoying the defendant and that the claim was not made in good faith, the jury has wide discretion. *Tyler v. Bowen*, 124–452, 100 N. W. 505.

The facts as disclosed by the evidence may be taken into account in determining whether the allowance by way of exemplary damages is excessive. *Ahrens v. Fenton*, 138–559, 115 N. W. 233.

The fact of suing out the attachment without reason to believe the grounds stated therein to be true will in itself tend to show malice; but malice is not to be inferred from the mere finding that nothing was due to plaintiff by reason of a counterclaim. *Ibid; Welsh v Haleen*, 157– —, 138 N. W. 502.

The jury is justified in allowing exemplary damages if there is evidence tending to show that the attaching plaintiff had no reasonable ground to believe that the ground alleged was true, but acted maliciously in suing out the attachment. *International Har. Co. v. Iowa Hdw. Co.*, 146–172, 122 N. W. 951.

To constitute the malice necessary to sustain the allowance of exemplary damages, it is not necessary to prove more than that the attaching plaintiff acted with the intention, design or set purpose of injuring the defendant. *Ibid.*

Although the amount of real damage may be small, yet the jury has a wide discretion in the allowance of exemplary damages where the attachment was sued out for the purpose of harassing and annoying the defendant. *Ibid.*

The matter of allowing exemplary damages and the amount thereof rests with the jury. *Welsh v. Haleen*, 157– —, 138 N. W. 502.

Attorney's fees: It is the defendant in attachment who recovers the attorney's fees provided for in this section, and they are to be taxed in his favor as costs. The attorney cannot recover these fees in an independent suit. The defendant in the attachment has the right to satisfy the judgment for attorney's fees, and if the attorney collects such fees he is responsible to his client. *Schnitker v. Schnitker*, 109–349, 80 N. W. 403.

The only authority given the district court to allow attorney's fees in an action on an attachment bond, is to allow a reasonable fee for the prosecution of the action on the bond in that court. That section does not permit the court to allow an additional amount for prosecuting an appeal in the supreme court. The allowance is to be limited to the fee earned at the time final judgment is rendered. Nor is there any authority for allowance by the supreme court of a fee for the trial of the appeal in that court. *Kilmer v. Gallaher*, 120–575, 95 N. W. 180.

The district court, in fixing the attorney's fee, is not bound to allow such fee as the testimony may show to be reasonable, but may, guided by his own judgment, allow what is a reasonable fee after hearing the case tried. *Ibid.*

Where the action in which the attachment was procured was to recover an indebtedness which did not in fact exist, and the want of probable cause relied upon consists of that fact, fees of counsel for defending the action and establishing the absence of any cause of action are properly included in the recovery for malicious prosecution. *Connelly v. White*, 122–391, 98 N. W. 144.

The attorney's fees referred to in this section are not allowed as damages for securing the release of the attachment, but as part of the costs of the action to recover damages, and it is on this theory that they may be fixed by the court. The attorney's fees for securing the release of the attachment or of the attached property may be properly considered as part of the damages sustained by the attachment defendant. *Peters v. Snavely-Ashton*, 144–147, 120 N. W. 1048, 122 N. W. 836.

Where a jury allows exemplary damages the court should fix the attorney's fees with reference to the amount recovered on the bond including such exemplary dam-

ages. *International Har. Co. v. Iowa Hdw. Co.*, 146–172, 122 N. W. 951.

If there be a right of recovery upon the bond, attorney's fees for securing the release of the attached property may be recovered and the court may also tax a fee for prosecuting the action on the bond, whether that action be by counterclaim or by an independent suit on such bond; but there cannot be a recovery for expense and attorney's fees in defending against the main action. *Ames v. Chirurg*, 152–278, 132 N. W. 427.

To entitle the attachment defendant to recover, as damages on the bond, the attorney's fees incurred in securing the dissolution of the attachment, he must show not only that the services were reasonably necessary but also the reasonable value of such services. *Waltham Piano Co. v. Freeman*, 141 N. W. 403.

It cannot be assumed that the jurors are familiar with the proper charges of attorneys in procuring the release of attached property. *Ibid.*

Costs: It is not necessary in a counterclaim on a bond to ask recovery of costs. The costs of levying the writ and selling the property, which are unnecessary if the writ of attachment is wrongfully sued out, are to be taxed in such case, like the attorney's fees, by the court. *Ringen Stove Co. v. Bowers*, 109–175, 80 N. W. 318.

SEC. 3888. Remedy for falsely suing out.

The assignee for the benefit of creditors, to whom the right of action on an attachment bond has been transferred, may intervene in the original action and set up a claim upon the bond. *Ringen Stove Co. v. Bowers*, 109–175, 80 N. W. 318.

SEC. 3889. Writ to sheriff.

A writ of attachment from a district or superior court cannot be directed to a constable. *Freeman v. Lind*, 112–39, 83 N. W. 800.

SEC. 3891. Property attached.

By an attachment and levy the plaintiff obtains a right to the property levied upon paramount to that of an assignee in insolvency subsequently appointed. *State Bank v. McElroy*, 106–258, 76 N. W. 715.

The attaching creditor of an agent cannot acquire a lien upon funds of the principal deposited in a bank in the name of the agent, simply as a matter of convenience. *Anderson v. Taylor*, 131–485, 108 N. W. 1051.

An officer may amend his return so as to show the facts. *Foster v. Davenport*, 109–329, 80 N. W. 404.

SEC. 3894. Corporation stock.

Indorsements by the officer on stubs of certificates of stock are ineffectual to constitute a levy. *Croft v. Colfax E. L. & P. Co.*, 113–455, 85 N. W. 761.

A notice to the proper officer of the corporation may be sufficient to constitute a levy, although it constitutes notice to the debtor and occupant of real estate, as well. *Ibid.*

SEC. 3895. Judgments—money—things in action.

Promissory notes are property and are capable of manual delivery, and the proper method for attaching such notes is for the officer to take them into his actual possession. Garnishment in such case is not the only method of effecting an attachment. *Nordyke v. Charlton*, 108–414, 79 N. W. 136.

The situs of a judgment for the purpose of levying an attachment thereon is that of the county seat where the judgment appears of record. *Gilman v. Heitman*, 137–336, 113 N. W. 932.

SEC. 3896. Property in possession of another.

Property fraudulently transferred may be levied on by an attaching creditor. The creditor is not limited to his remedy by garnishment of the purchaser. *Jordan v. Crickett*, 123–576, 99 N. W. 163.

SEC. 3898. When property bound.

Where an attachment was levied on all the goods, wares, merchandise, furniture and fixtures contained in a certain building belonging to the defendant company, held that such levy was sufficient to cover a cash register in use on the premises together with other furniture and fixtures. *National Cash Register Co. v. Broeksmit*, 103–271, 72 N. W. 526.

A levy on books of account does not create any lien on the indebtedness evidenced by such books. The debts due the

owner of the books can be reached only by garnishment. *Cedar Rapids Pump Co. v. Miller*, 105–674, 75 N. W. 504.

The levy of a writ of attachment on the books of account of a debtor does not create an inchoate lien on the debts included therein. *Smith v. Sioux City Nursery & Seed Co.*, 109–51, 79 N. W. 457.

There is a distinction between the return of a levy and the notice of a levy. When the property is in custody under a levy, a second attachment may be levied without overt act. The officer can treat the property as seized and make his levy accordingly. *German Savings Bank v. Capital City Oatmeal Co.*, 108–380, 79 N. W. 270.

SEC. 3899. Real property—lien—entry on incumbrance book.

The creditor must show that his remedy at law would not be adequate before a proceeding in equity can be maintained. *Hill v. Denneny*, 106–726, 77 N. W. 472.

By attaching the debtor's property, a creditor abandons any equitable lien he may have thereon. *City National Bank v. Crahan*, 135–230, 112 N. W. 793.

The attaching creditor takes no more than the interest of the debtor, and does not acquire priority over the equitable lien of another on the property. *Ibid.*

These provisions relating to the attachment of equitable interests in real property were enacted for the purpose of giving constructive notice for the protection of a creditor from subsequent conveyances, and for no other purpose. Therefore the levy of an attachment on an equitable interest, which does not appear of record, does not impart constructive notice to a vendee or mortgagee of the person holding the legal title. *Byers v. McEniry*, 117–499, 91 N. W. 797.

The lien of an attachment in an action in which judgment is not rendered before the death of the attachment defendant does not have priority over the widow's right to dower in the attached property, nor as against her right to have such property subjected to the payment of an allowance made to her as widow. *Tetzloff v. May*, 151–441, 131 N. W. 647.

In the absence of fraud, the right of an attaching creditor in property is no greater than that of his debtor. Therefore, an attachment of real property does not take priority over a completed contract of sale. *Frantz v. Vincent*, 152–680, 133 N. W. 121.

SEC. 3900. Notice—return.

Where a defendant has elected to counterclaim for damages on account of wrongful suing out of an attachment, he cannot be heard to say that there was no valid levy on account of want of notice. *Schoonover v. Osborne*, 108–453, 79 N. W. 263.

Notice to the person in possession, who is not the attachment defendant, is not for the benefit of the defendant but the party in possession, and if such party in possession has actual notice, and receipts for the property, he cannot object for want of the notice required by statute. *Foster v. Davenport*, 109–329, 80 N. W. 404.

An officer may amend his return so as to show the facts. *Ibid.*

The notice provided for is not essential to the levy itself, but is for the purpose of enabling the property owner in apt time to guard any interest he may have in the property attached. Therefore held that where the levy was duly made it took priority over a mortgage executed before notice was served, the service of notice having been within a reasonable time. *Schoonover v. Osborne*, 111–140, 82 N. W. 505; *Stickley v. Widle*, 122–400, 98 N. W. 135.

SEC. 3901. Examination of defendant.

One who institutes proceedings auxiliary to an attachment for the purpose of securing the enforcement thereof, adopts the affidavit made by his attorney as the basis of such proceeding, and the court acquires jurisdiction. *Carpenter v. Clements*, 122–294, 98 N. W. 129.

Even if there is not a sufficient verification of the application, an order made thereon is not without jurisdiction, and the party complaining must raise the defect at the proper time and in the proper manner. *Ibid.*

SEC. 3902. Money paid clerk.

The property received by the sheriff in a garnishment proceeding should be disposed of as directed by the court or judge, and in the absence of any such direction, should be safely kept subject to the order of the court. *Gutschenritter v. Whitmore*, 139 N. W. 567.

SEC. 3905. Mortgaged personal property.

An attachment levied on chattel property covered by mortgage, such levy being made with a view to contest the validity of the mortgage, becomes an apparent lien upon all the property seized and not merely upon sufficient of said property to satis-

fy the mortgage; and if the mortgage is found to be invalid the attachment is effectual. In such case a junior mortgagee has no preference as to any part of the property necessary to pay the attachment claims. *Geiershofer v. Nupuf*, 106–374, 76 N. W. 745.

SEC. 3906. Indemnifying bond.

See notes under code § 3991 in this supplement.

SEC. 3907. Bond to discharge.

As the release bond is for the protection of the plaintiff the object of the requirement for its approval must be to assure plaintiff security corresponding in value to that which might have been attained by the levy of the attachment. It is a condition to the acceptance of the bond by the officer without which, in the absence of a waiver, the attachment is not dissolved; and without approval the bond cannot be deemed statutory, whatever its efficacy as a common-law obligation. If formal approval is waived and the bond is accepted as a compliance with the statute, the sureties are bound. *Fidelity & Deposit Co. v. Bowen*, 123–356, 98 N. W. 897.

The surety on such bond does not become bound to indemnify the surety on a subsequent appeal bond where the appeal bond is not given in the interest or on the procurement of the sureties on the release bond. *Ibid.*

The liability of the surety on a bond to discharge an attachment is not affected by failure of the attaching creditor to give notice of his intention to appeal from a judgment discharging the attachment as provided for in code § 3931, if in fact the officer does not release the discharged property until the appeal has been taken. *Sheldon v. Bigelow*, 124–566, 100 N. W. 502.

Judgment may be entered against the surety on a discharge bond on default of the defendant without further notice to such surety. *Andres v. Schlueter*, 140–389, 118 N. W. 429.

The surety on such bond cannot question the validity of the judgment on any ground which might have been interposed by way of defense before the judgment was rendered. *Ibid.*

SEC. 3909. Delivery bond.

The duty to deliver devolves upon the person giving the bond within twenty days after judgment is rendered against defendant in the original action. Even if there is no order for condemnation of the attached property the action on the bond may be maintained. *Valley Bank v. Shenandoah Nat. Bank*, 109–43, 79 N. W. 391.

SEC. 3912. Sale of perishable property—repealed. [27 G. A., ch. 101, § 1.]

[See § 3912-a.]

After a sale of property levied on as perishable one who intervenes in the attachment proceeding under a claim of right to the property is limited to a recovery of the proceeds of the sale. *Paris v. Sheppard*, 125–255, 101 N. W. 114.

SEC. 3912-a. Perishable property—when to be sold. That section thirty-nine hundred twelve of the code be repealed and the following enacted in lieu thereof:

"When the sheriff thinks the property attached in danger of serious and immediate waste and decay, or when the keeping of the same will necessarily be attended with such expense as greatly to depreciate the amount of proceeds to be realized therefrom, or when the plaintiff makes affidavit to that effect, the sheriff may summon three persons having the qualifications of jurors to examine the same. The sheriff shall give the defendant, if within the county, three days' notice of such hearing, and he may appear before such jury and have a personal hearing. If they are of the opinion that the property requires soon to be disposed of, they shall specify in writing a day beyond which they do not deem it prudent that it should be kept in the hands of the sheriff. If such day occurs before the trial day, he shall thereupon give the same notice as for sale of goods on execution, and for the same length of time, unless the condition of the property

renders a more immediate sale necessary. The sale shall be made accordingly. If the defendant gives his written consent, such sale may be made without such finding." [27 G. A., ch. 101, § 1; C. '73, § 2999; R. § 3222; C. '51, § 1881.]

[The above section is made applicable to proceedings under § 1452-a by § 1452-b. EDITOR.]

SEC. 3924. Judgment—satisfied from proceeds.

Where plaintiff moved for an order for sale of attached property or for the disposition of the proceeds of the same, which motion was denied, held that the ruling operated to discharge the attached property and concluded the rights of parties thereto under the judgment. *Second Nat. Bank v. Haerling*, 106–505, 76 N. W. 826.

SEC. 3926. Expenses for keeping.

When the sheriff places the property in the hands of another for safe-keeping, that other becomes the agent of the sheriff, and has no claim which can be taxed as costs. In such case the plaintiff in attachment is not jointly responsible with the sheriff to the person who keeps the property under the sheriff's direction for the expense incident to its care. There is no privity in such a case between the custodian and the plaintiff in attachment. *Hurd v. Ladner*, 110–263, 81 N. W. 470.

It would be otherwise if the property were taken into possession by the officer under a mortgage clause in a lease, and not in virtue of writ of attachment. *Ibid.*

SEC. 3928. Intervention.

An intervention under this section is in time, if applied for after the sale of the property and deposit of the proceeds with the clerk under order of the court, to abide further determination of the rights of the parties. *Petty v. Hayden*, 115–212, 88 N. W. 339.

The intervener who has given a delivery bond may contest recovery on the bond on the ground that the property did not belong to the attachment defendant, and the judgment in the principal action for a sale of the property will not be an adjudication in the intervention proceedings, but the intervention will not suspend the bar of limitations on the right to sue on the bond. *Valley Bank v. Shenandoah Nat. Bank*, 109–43, 79 N. W. 391.

One who intervenes in an attachment proceeding claiming the property, with knowledge that it has been sold as perishable and that the proceeds are in the hands of the sheriff, thereby elects not to recover the value of the property and is entitled only to the proceeds. *Paris v. Sheppard*, 125–255, 101 N. W. 114.

The entry of judgment against the garnishee, who has answered with reference to the claim of plaintiff against defendant and is not a party to the intervention, is not essential to the protection of the rights of the intervener. *Lake Park State Bank v. Rood*, 152–47, 131 N. W. 55.

A judgment as between intervener and plaintiff merely determines that the garnishee should pay his debt to the one or the other as determined and should not be so entered as to be an adjudication against the garnishee with reference to his liability. *Ibid.*

Ordinarily a third party claiming the property must proceed under this section and not under the provisions of the following section. *Union County Inv. Co. v. Messix*, 152–412, 132 N. W. 823.

SEC. 3929. Discharge on motion.

The defendant may stand upon his motion to discharge the attachment on account of want of notice, but if he elects to counterclaim for damages on account of wrongful levy he cannot insist on failure to give notice of the levy. *Schoonover v. Osborne*, 108–453, 79 N. W. 263.

This section provides only for discharge of attached property on motion before the trial, and has no application where there has been a final adjudication and a sale under special execution. *Clark v. Tull*, 113–143, 84 N. W. 1030.

Where the attachment debtor does not avail himself of the remedy for securing release of his property from excessive levy, it cannot be assumed that he has been damaged by the levy made. *Anderson v. Thero*, 139–632, 118 N. W. 47.

Where the property is claimed to be exempt, a party to the action may move to discharge the attachment under the provisions of this section. *Union County Inv. Co. v. Messix*, 152–412, 132 N. W. 823.

The alleged grounds of attachment cannot be controverted by evidence for the purpose of quashing the writ. They can be controverted in the main action only by a counterclaim on the bond. *Peters v. Snavely-Ashton*, 157– —, 134 N. W. 592.

If an excessive levy be made or if exempted property be attached, the defend-

ant may move for a discharge of the attachment to that extent. *Ibid.*

If the property of a third party be wrongfully attached such party may also appear and move for a discharge or a release. *Ibid.*

SEC. 3931. Time for appeal from order of discharge.

The object of announcing intention to appeal from an order discharging the attachment is simply to require the officer to retain possession of the property until such appeal is taken, and if in fact the possession is thus retained, failure to give notice of intention does not render the appeal ineffectual. *Sheldon v. Bigelow*, 124–566, 100 N. W. 502.

A plaintiff whose attachment has been dissolved, failing to reserve his rights by pursuing the statutory method for appeal in such cases, loses the benefit of his attachment. *Conkling v. Young*, 141–676, 120 N. W. 353.

SEC. 3933. Liberal construction—amendments.

Although a new ground of attachment may under some circumstances be properly set up in an amendment to the petition, yet, where such amendment was not filed until during the trial, held that the court did not abuse its discretion in striking such amendment from the files on motion. *Emerson v. Converse*, 106–330, 76 N. W. 705.

SEC. 3934. Sheriff—constables.

A writ of attachment directed to a constable from a district or superior court is not valid. *Freeman v. Lind*, 112–39, 83 N. W. 800.

SEC. **3934-a. Certificate of release.** When real estate or an equitable interest therein is attached in any county other than that in which the action is commenced, or is pending, and the action is dismissed, or the attachment is dissolved and discharged or satisfied, the clerk of the court of the county wherein such action is pending must issue a certificate directed to the clerk of the court in which the land is situated giving date of release and setting forth a true copy of the order or release and he shall be allowed as compensation for such service the sum of fifty cents, to be taxed as a part of the costs in the case. [30 G. A., ch. 123, § 1.]

SEC. **3934-b. Filing and recording.** The clerk of the court receiving such certificate shall file and record the same upon the margin of the incumbrance book at place where the original entry of attachment is found. [30 G. A., ch. 123, § 2.]

CHAPTER 2.

OF GARNISHMENT.

SECTION 3935. How effected—notice.

Debts due an attachment defendant can be reached only by garnishment, and not by levying the writ of attachment upon the books of account in which such debts are recorded. *Cedar Rapids Pump Co. v. Miller*, 105–674, 75 N. W. 504; *Smith v. Sioux City Nursery & Seed Co.*, 109–51, 79 N. W. 457.

An assignment of a debt is good as against a garnishment. *Kuhnes v. Cahill*, 128–594, 104 N. W. 1025.

A garnishee having notice of an assignment of a chose in action from the defendant, his creditor, to a third person, should set up that fact in defense, and not doing so he cannot rely upon judgment in the garnishment proceeding as a defense against the assignee of the chose in action. *Seymour v. Aultman*, 109–297, 80 N. W. 401.

Garnishment of an assignee for the benefit of creditors, who has taken possession of notes and book accounts of the debtor before the assignment has become effectual, will take priority over such assignment. *Mills v. Miller*, 109–688, 81 N. W. 169.

The garnishing creditor acquires no higher right to a fund sought to be reached by garnishment than had the garnishee at the time of the garnishment. Thus where a bank was garnished for funds of a depositor, held that as against the gar-

nishing creditor it might be shown that the fund sought to be reached consisted of money belonging to an undisclosed principal, deposited by the debtor as his agent, but in his own name. *Packer v. Crary*, 121–388, 96 N. W. 870.

The execution creditor cannot by garnishment get any higher or better right as against the garnishee than the execution defendant himself at that time possessed. *Streeter v. Gleason*, 120–703, 95 N. W. 242.

The liability of the garnishee cannot be presumed; it must be affirmatively shown. To charge him upon his own answer his liability must clearly appear, and, if there be any reasonable doubt of such liability, he should be discharged. *Ibid.*

Where a garnishee had, after the filing of one answer admitting his liability, filed a second answer in which such liability was sufficiently denied, held that it was error to render judgment against him. *Ibid.*

It is the garnishee's duty to hold the property in the condition in which it was at the time of garnishment, and failing to do so, he is guilty of conversion, and judgment may be rendered against him for the amount of the claim. *Dunning v. Bailey*, 120–729, 95 N. W. 248.

Where appearance on the day specified in the notice is waived, judgment should not be rendered against the garnishee without notice to him as to the time when and place where he may answer. *Bower v. Hansen*, 129–148, 105 N. W. 394.

Default may be entered against the garnishee who fails to personally appear and answer in response to notice, unless his answers have been taken by the sheriff. *Lingenfelter v. Iowa Telephone Co.*, 132–211, 109 N. W. 722.

A garnishee is not bound to disclose at his peril what has been done with the property in the purchase of which the indebtedness sought to be reached was created. *Bitzer v. Washburn*, 121–462, 96 N. W. 978.

Lack of notice to plaintiff in a garnishment proceeding that the garnishee's debt to the defendant has been assigned, until after the service of notice of garnishment, does not give him priority over the assignment. It is sufficient that the garnishee has knowledge of the assignment in order to protect himself from liability by interposing the fact of the assignment in his answer. *Steltzer v. Condon*, 139–754, 118 N. W. 39.

The debt to be reached by the garnishment must be of such nature that the defendant could have maintained an action thereon in his own right, and the garnishee is not bound to retain funds due to an executor or trustee, under a garnishment specifying debts due to such executor or trustee in his individual right. *Peters v. Snavely-Ashton*, 144–147, 120 N. W. 1048, 122 N. W. 836.

The right of the garnishing creditor against the garnishee is measured by the right of the debtor. And if as between themselves, the debtor has no right to demand and receive the fund from the garnishee, then the creditor cannot acquire such right by the garnishment. *What Cheer Sav. Bank v. Mowery*, 149–114, 128 N. W. 7.

Where the attempt is to reach goods of the defendant in the hands of the garnishee, the latter cannot, without having some lien or claim to the goods legal or equitable, set up as against the garnishment a claim of his own by way of set-off or recoupment; but if the garnishee is liable to the defendant for the conversion of goods, then as against the garnishment he may set up any claim which he would have had if sued by the defendant. *Smith Lumber Co. v. Scott County Garbage Co.*, 149–272, 128 N. W. 389.

Under the present statutes, a garnishee is not held for money coming into his hands after the garnishment is run. *Ames v. Chirurg*, 152–278, 132 N. W. 427.

Where there is insufficiency of notice of garnishment, the garnishee not having made appearance, the defendant cannot make objection on that ground. *Union County Inv. Co. v. Messix*, 152–412, 132 N. W. 823.

A defective notice to the garnishee may be waived and neither the principal defendant nor a stranger may take advantage of the defect. *Ibid.*

Where a bank deposit is made to meet checks already drawn and with notice to the bank of such purpose, it becomes a special deposit to which the check holders for whose benefit it is made have a right superior to that of a garnishing creditor of the depositor. *Dolph v. Crosse*, 153–289, 133 N. W. 669.

The statutory provisions as to garnishment were not designed to subject the garnishee to the liability of twice paying his debt or to deprive him, after paying it under the attachment, of a legal defense to the claim of his creditor. The design of the statute is to place the attaching creditors in the place of the original creditors of the garnishee. Therefore held that a garnishee against whom judgment had been rendered for his debt in another state was not liable to garnishment for the same debt in this state. *Elson v. Chicago, R. I. & P. R. Co.*, 154–96, 134 N. W. 547.

Judgment in a garnishment proceeding in another state against the same garnishee is conclusive as against an assignee of the claim in this state. *Steltzer v. Chicago, M. & St. P. R. Co.*, 156–1, 134 N. W. 573.

SEC. 3936. Of officer, judgment debtor, executor, municipal corporation.

The assignee of a judgment cannot complain as against an officer on account of a levy on and sale of a judgment subject to the assignment on an execution against the assignor. *Baker v. Mills*, 108–490, 79 N. W. 268.

An administrator cannot be garnished for a portion of the property of the estate to which he is entitled personally on a claim due by him. *Cassady v. Grimmelman*, 108–695, 77 N. W. 1067.

An administrator who has been garnished on a claim against the estate and defeats such garnishment by securing a settlement and discharge as administrator without payment or disposition of such claim renders himself individually liable. *Geiger v. Gaige*, 134–197, 111 N. W. 804.

There is no provision for the garnishment of a guardian, and his immunity continues after the death of his ward until his guardianship has been settled. *Pugh v. Jones*, 134–746, 112 N. W. 225.

The municipal corporation alone can plead exemption from garnishment proceedings. *Tone v. Shankland*, 110–525, 81 N. W. 789.

An action under code § 4087 to subject an equitable interest to execution may have the effect of a garnishment proceeding, but is not controlled by the provisions of this section with reference to the garnishment of a municipal corporation. *Ibid.*

A defendant against whom judgment has been rendered in another state is not subject to garnishment for the indebtedness in a proceeding in this state. *Elson v. Chicago, R. I. & P. R. Co.*, 154–96, 134 N. W. 547.

SEC. 3939. Sheriff may take answers.

The answers of the garnishee do not constitute a pleading, but evidence, and should be made of record by proper bill of exceptions to be considered on appeal. *Dolan v. Sammons*, 147–466, 124 N. W. 880.

SEC. 3940. Garnishee required to appear.

The garnishee cannot by amendment to his answer change his position to the prejudice of the plaintiff. *Heaton v. Lee*, 143–21, 119 N. W. 697.

SEC. 3941. Examination.

It is the duty as well as the right of the garnishee to disclose all facts within his knowledge bearing upon the ownership of the fund sought to be reached. *Dolph v. Cross*, 153–289, 133 N. W. 669.

SEC. 3943. Failure to appear or answer—cause shown.

A much slighter showing of diligence or excuse is needed to warrant the setting aside of a default against a garnishee than in ordinary cases of default. *Bower v. Hansen*, 129–148, 105 N. W. 394.

SEC. 3944. Paying or delivering.

A draft which has so come into the possession of the sheriff as to be treated as money should be turned over or the proceeds thereof paid to the clerk. It is not competent for the garnishee to impose upon the sheriff conditions upon which he may receive property or money in exoneration of the garnishee's liability. *Gutschenritter v. Whitmore*, 139 N. W. 567.

The acts of the sheriff in garnishment proceedings are purely ministerial and his relation to the plaintiff is like that of an agent. *Ibid.*

SEC. 3945. Answer controverted.

The trial of the issue of fact raised by the answer of a garnishee which is controverted should be by ordinary proceedings. *Neff v. Manuel*, 121–706, 97 N. W. 73.

SEC. 3946. Judgment.

No judgment can properly be rendered against a garnishee until judgment has been rendered against the defendant. *Hawarden State Bank v. Hessler*, 131–691, 109 N. W. 210.

To charge the garnishee on his answer alone, no issue having been raised with reference thereto and no trial had, there must be in it a clear admission of a debt due to, or the possession of money or attachable property of, the defendant. If the answer does not authorize a judgment

under such a rule the plaintiff should take issue on the answer so that a trial may be had and the rights of the parties determined. *Kerr v. Edgington*, 106–68, 75 N. W. 669.

Where the answer of the garnishee is not controverted, his liability is to be determined as a matter of law from the statements of the answer alone without regard to the facts which may be brought to the attention of the court in another proceeding to which the garnishee is not a party. *Bolton v. Bailey*, 122–729, 98 N. W. 560.

Where a fund is deposited for the purpose of paying a judgment, the one receiving it for that purpose may be held liable for its payment in a garnishee proceeding brought under the judgment. *Lingenfelter v. Iowa Telephone Co.*, 132–211, 109 N. W. 722.

Garnishment does not create a lien on the property in the hands of the garnishee, but gives the plaintiff a specific right, over and above that of a mere general creditor, to the indebtedness or property for the payment of his claim. *Bowen v. Port Huron E. & T. Co.*, 109–255, 80 N. W. 345.

From the time of the service of notice, the garnishee is liable to plaintiff for the value of defendant's property in his hands subject to execution, and to the amount of all debts owing by him to the defendant and a judgment against the garnishee is *prima facie* a satisfaction *pro tanto* of plaintiff's claim against the defendant, and precludes subsequent proceedings by plaintiff against the defendant to that extent without a showing that plaintiff has obtained no valuable right by virtue of the garnishment, or has released the garnishee with the defendant's consent. *Ibid.*

On dismissal of garnishment proceedings, the garnishee is relieved of any liability sought to be enforced under such proceeding. *O'Melia v. Hoffmeyer*, 119–444, 93 N. W. 497.

SEC. 3947. Notice to defendant. Judgment against the garnishee shall not be entered until the principal defendant shall have had ten days' notice of the garnishment proceedings, to be served in the same manner as original notices. [27 G. A., ch. 102, § 1; 18 G. A., ch. 58; C. '73, § 2975; R. § 3195; C. '51, § 1861.]

[The above section is made applicable to proceedings under § 1452-a by § 1452-b. EDITOR.]

The garnishee may waive the notice to the defendant which is required to be given before judgment is entered against the garnishee, but he cannot waive the original notice necessary to give the court jurisdiction in the original action. *Schaller v. Marker*, 136–575, 114 N. W. 43.

While judgment cannot be entered against the garnishee without notice to the particular defendant, the lack of such notice is not a reason for discharging the garnishee or dismissing the proceedings. Such notice is not jurisdictional. *Smith Lumber Co. v. Scott County Garbage Co.*, 149–272, 128 N. W. 389.

While notice must be given to the garnishee before judgment can be taken against him, delay in giving such notice does not affect the garnishment unless such delay be so long as to indicate an abandonment of the proceedings. *Union County Inv. Co. v. Messix*, 152–412, 132 N. W. 823.

SEC. 3948. Pleading by defendant—discharge of garnishee. The defendant in the main action may, by a suitable pleading filed in the garnishment proceedings, set up facts showing that the debt or the property with which it is sought to charge the garnishee is exempt from execution, or for any other reason is not liable for plaintiff's claim, and if issue thereon be joined by the plaintiff, it shall be tried with the issues as to the garnishee's liability. If such debt or property, or any part thereof, is found to be thus exempt or not liable, the garnishee shall be discharged as to that part which is exempt or not liable. [27 G. A., ch. 103, § 1.]

[The above section is made applicable to proceedings under § 1452-a by § 1452-b. EDITOR.]

[Concerning wage exemption of nonresident and pleading by him, see § 4071-a. EDITOR.]

That the garnishee has never been served with notice, or that the situs of the debt is in another state, may be urged as grounds for discharge of the garnishee. The right to ask for a discharge under this section cannot be tested by earlier decisions of the court under a statute not containing the provision as to discharge "for any other reason" than exemption from execution. *Greaves v. Posner*, 111–651, 82 N. W. 1022.

The defendant in the main action may proceed under this section to have his claim of exemption tried and determined with the issue as to the garnishee's liability. *Union County Inv. Co. v. Messix*, 152–412, 132 N. W. 823.

SEC. 3950. Negotiable paper.

It is a general rule that the indorsee for value before maturity of a negotiable promissory note takes it free from any previous garnishment of which he did not have notice, but the attachment may be effected by levy upon the note directly. *Nordyke v. Charlton*, 108–414, 79 N. W. 136.

SEC. 3952. Docket to show garnishments.

The form of entry of judgment against the garnishee is not material, as judgment on service of notice on a garnishee is not regarded as final like a personal judgment, nor is it evidence of anything owing or a bar against a subsequent action unless satisfied by the garnishee. *Gutschenritter v. Whitmore*, 139 N. W. 567.

SEC. 3953. Appeal.

Proceedings by garnishment are discharged by reversal on appeal of the judgment under which the garnishment was issued, and are not restored by the recovery of another judgment on a new trial. *Decatur v. Simpson*, 119–488, 93 N. W. 496.

Where the attachment is dissolved and the plaintiff fails to preserve his rights by appeal as provided in code § 3931, he loses all the advantage of his garnishment. *Conkling v. Young*, 141–676, 120 N. W. 353.

This provision is applicable to garnishments under execution. *Dolph v. Cross*, 153–289, 133 N. W. 669.

CHAPTER 3.

OF EXECUTIONS.

SECTION 3954. On judgments or orders—attachment for contempts.

Where a judgment has been rendered by the court, or a confession of judgment has been filed on which the clerk should have entered judgment, the failure of the clerk may be cured by an order of the court for the entry of judgment *nunc pro tunc*, so as to support an execution which is issued in the meantime. *Doughty v. Meek*, 105–16, 74 N. W. 744.

Obedience to a self-executing judgment may be coerced by attachment as for contempt. *State v. Cahill*, 131–286, 108 N. W. 453.

Where judgment has been recovered against an insane person defended by a guardian, the plaintiff may have an order upon the guardian to pay, which can be enforced by attachment for contempt, or for an execution for the sale of the property belonging to the insane person. *Gressly v. Hamilton County*, 136–722, 114 N. W. 191.

SEC. 3955. Within what time—to other counties—but one. Executions may issue at any time before the judgment is barred by the statute of limitations; and upon those in the district and supreme courts, into any county which the party ordering may direct, but only one shall be in existence at the same time. When the plaintiff in judgment shall file in any court in which a judgment has been entered an affidavit made by himself, his agent or attorney, or by the officer to whom the execution was issued, that an outstanding execution has been lost or destroyed, the clerk of such court may issue a duplicate execution as of the date of the lost execution, which shall have the same force and effect as the original execution, and any levy made under the execution so lost shall have the same force and effect under the duplicate execution as under the original. When the lost execution shall have expired by limitation and such affidavit is filed, an execution may issue as it might if such lost execution had been duly returned. [32 G. A., ch. 167; C. '73, §§ 3025, 3027; R. §§ 3246, 3248; C. '51, §§ 1886, 1888.]

The filing of a transcript of a judgment in another county than that in which it was rendered does not make the judgment a judgment in the county where such transcript is filed, and execution can only issue from the county where the judgment was rendered. *Brunk v. Moulton Bank*, 121–14, 95 N. W. 238.

This section relates only to general executions, and does not render it improper for a court decreeing foreclosure of a chattel mortgage to direct a special execution into another county for the sale of a portion of the mortgaged property there situated. *King v. Nelson*, 120–606, 94 N. W. 1095.

A lien may be effected by the levy of execution within twenty years although the lien of judgment on the property has expired. *Mudge v. Livermore*, 148–472, 123 N. W. 199.

SEC. 3958. **Entries in another county—duplicate returns.** In case execution is issued to a county other than that in which judgment is rendered, and is levied upon real estate in such county, an entry thereof shall be made upon the incumbrance book of that county by the officer making it, showing the same particulars as are required in case of the attachment of real estate, which shall be bound from the time of such entry. And if real estate is sold under said execution said officer shall make return thereof in duplicate, one of which shall be appended to the execution and returned to the court from which it is issued, the other with a copy of the execution to the district court of the county in which said real estate is situated, which shall be filed by the clerk who shall make entries thereof in the sale book in the same manner as if such judgment had been rendered and execution issued from said court. [28 G. A., ch. 122, § 1; C. '73, § 3031; R. § 3249.]

Transcripts of judgments in a superior court cannot be first filed in the district court of another county than that in which the superior court is held, but can only be transferred to another county after having been filed in the district court of that county. *Drahos v. Kopesky*, 132–497, 109 N. W. 1021.

[The first note under this section in the code is inaccurate in its reference to the section as it now stands. The cases cited refer to the language of the corresponding section of code of '73 which was different.]

SEC. 3960. **Form of execution.**

Where the judgment is against a partnership, as such, and the execution follows the judgment, there can be no sale of the individual property of a member of the partnership. *Lansing v. Bever Land Co.*, 157– —, 138 N. W. 833.

An execution cannot issue against a member of the partnership under a judgment against the partnership as such, although the member was present at the trial and participated therein, it appearing that judgment against the individual member was denied. *Ibid.*

SEC. 3964. **Officer to receipt for—return.**

The return of the execution does not affect the validity of garnishment proceedings already commenced thereunder. *Dunham v. Bentley*, 103–136, 72 N. W. 437.

SEC. 3965. **Indorsement by officer.**

Parol evidence is admissible to show facts not appearing by the officer's return. *Weaver v. Stacey*, 105–657, 75 N. W. 640.

SEC. 3966. **Against principal and surety—order of liability.**

Liability of the homestead in satisfaction of a purchase-money indebtedness should be exhausted before resort is had to a surety therefor. *Guiher v. Huffman*, 136–509, 109 N. W. 469.

SEC. 3967. **Surety subrogated.**

The statutory remedy provided for in this section is not exclusive. *Bankers' Surety Co v. Linder*, 156–486, 137 N. W. 496.

SEC. 3968. Levy—how made and indorsed.

A creditor who has secured a levy on personal property cannot subsequently release such levy and rely on other property to the prejudice of other creditors. *Valley Nat. Bank v. Des Moines Nat. Bank*, 116–541, 90 N. W. 342.

SEC. 3969. What acts necessary.

To make a valid levy on the property the officer must do something amounting to a change of possession or which is equivalent to a claim of dominion over the property, coupled with the power to enforce it. He must do something which would make him a trespasser but for the protection of the writ. *Peppers v. Harris*, 145–635, 124 N. W. 625.

SEC. 3970. What property—no lien on personalty.

Where a remainder is contingent as to who shall take the property thereunder, it is not, before becoming vested, the subject of levy and sale under execution. *Taylor v. Taylor*, 118–407, 92 N. W. 71.

A contingent interest in land is not subject to levy and sale under execution. *McDonald v. Bayard Sav. Bank*, 123–413, 98 N. W. 1025.

It constitutes fraud for the judgment creditor to insist on the sale of an entire tract of land which is reasonably capable of subdivision, for a trifling sum. An enormous disproportion between the value of the property sold and the sum to be raised is in itself ground from which the inference of fraud may be drawn. *Fortin v. Sedgwick*, 133–233, 110 N. W. 460.

Where a contract to convey has not become binding upon the vendee, and it is still optional with him whether or not he will accept conveyance thereunder, the vendor remains the owner of the land, and it is subject to execution for his debts. *Sheehy v. Scott*, 128–551, 104 N. W. 1139.

The interest of a purchaser in land under a contract to convey may be levied on under execution. *Thomassen v. De Goey*, 133–278, 110 N. W. 581.

To sustain a levy on real property standing in the name of one person under an execution issued against another, the burden is on the execution creditor to show that the debtor has some interest in the land which is subject to execution. *Bahnsen v. Qualley*, 142–282, 120 N. W. 625.

A judgment creditor may levy on property which has been fraudulently conveyed by the debtor; and after securing a deed in pursuance of such levy he may attack the fraudulent conveyance. *Kingman Plow Co. v. Knowlton*, 143–25, 119 N. W. 754.

This section should not be construed too narrowly as applied to a case of incumbered real estate. *Copper v. Iowa Trust & Sav. Bank*, 149–336, 128 N. W. 373.

SEC. 3974. Corporation stock—debts—property in hands of third persons.

Without notice to the defendant of the garnishment, the court cannot rightfully enter judgment against the garnishee. *Reed v. Racine Boat Co.*, 156–12, 137 N. W. 458.

SEC. 3976. Expiration or return of execution—return of garnishments.

Under a garnishment on execution, issue may be raised as to the respective rights of the claimants to the fund in the hands of the garnishee. *Dolph v. Cross*, 153–289, 133 N. W. 669.

SEC. 3978. Lien—equitable proceeding—receiver.

The only method provided by statute for reaching the individual interest of a partner in satisfaction of a debt due by him is that pointed out in this section and sections 3904 and 3977, authorizing the levy of an attachment or execution by equitable proceedings to ascertain the nature and extent of the partner's interest. *Hoaglin v. Henderson*, 119–720, 94 N. W. 247.

SEC. 3979. Levies upon mortgaged personal property—payment or deposit.

An attachment levied on chattel property covered by mortgage, such levy being made with a view of contesting the validity of the mortgage, becomes an apparent lien upon all the property seized and not merely upon sufficient of said property to satisfy the mortgage; and if the mortgage is found to be invalid the attachment is ef-

fectual. In such case a junior mortgagee has no preference as to any part of the property necessary to pay the attachment claim. *Geiershofer v. Nupuf*, 106–374, 76 N. W. 745.

The procedure here provided for by tendering the amount of the chattel mortgage is not exclusive. When it is claimed that chattel mortgages on property which is being levied on under execution are fraudulent, a judgment creditor may proceed by garnishment when the property is in the hands of a third person, or by creditor's bill or other equitable proceedings when the property is in the possession of the judgment defendant; and when he does proceed by creditor's bill or other action in equity, he acquires such a right to or apparent lien upon the property as will support an application for the appointment of a receiver. *Hirsch v. Israel*, 106–498, 76 N. W. 811.

The statute provides for paying, or tendering payment, not for an assignment or purchase of the mortgage, but the attaching or execution creditor may purchase a prior mortgage and then pay off the mortgage debt, and hold subject to his attachment or execution any surplus there may be. *Webster City Grocery Co. v. Losey*, 108–687, 78 N. W. 75.

The statutory provisions permitting levy on property covered by chattel mortgage under execution against the mortgagor do not require the mortgagee to take any steps for the purpose solely of shielding the mortgagor's property. It is only the mortgagee who can complain that the statutory provisions are not complied with. *Collins v. Gregg*, 109–506, 80 N. W. 562.

The provisions of these sections, relating to levies upon mortgaged chattels, are for the benefit of the mortgagee alone, and the mortgagor cannot take advantage of the failure of the execution creditor to comply with such provisions. *Tollerton & Stetson Co. v. Skelton*, 118–543, 92 N. W. 651.

In a receivership proceedings as to property which is subject to a chattel mortgage, in the absence of redemption from the mortgagee, the cost of receivership should not be taxed against the property so as to be taken out of the interest of the mortgagee who does not derive any advantage from the receivership proceeding. *Frick v. Fritz*, 124–529, 100 N. W. 513.

The statutory provision (code § 4087) for proceedings auxiliary to execution to discover property of the debtor may be resorted to although such property might have been reached by levy under the provisions for levying upon mortgaged property. *McKee v. Murphy*, 138–322, 113 N. W. 499.

These provisions as to levying execution on mortgaged property are cumulative and the plaintiff may challenge the mortgage by equitable proceedings under code § 4087, *et seq.* In such case there is no necessity for giving bond as provided in code § 3988, until the property is placed in the hands of a receiver. *Rankin v. Schultz*, 141–681, 118 N. W. 383.

The trial of questions raised under these statutory provisions is by ordinary proceedings and the finding of the court is conclusive if there is evidence in its support. *Worley v. Sheppard*, 143–1, 121 N. W. 567.

As the mortgagor has an equity of redemption which may be levied on and sold, the mortgagee may in an action on the mortgage debt levy upon the property without waiving his mortgage lien. *Stein v. McAuley*, 147–630, 125 N. W. 336.

SEC. 3987. Statement of indebtedness.

No stated limit is fixed to the time within which the mortgagee is to furnish the written statement of his claim after demand is made therefor, and if the statement is furnished within a reasonable time after demand and before any sale under the levy has been made, it is sufficient. *Becken v. Keystone Mfg. Jewelry Co.*, 130–208, 106 N. W. 622.

If the creditor within the ten days begins the necessary steps to secure the statement and make the proper payment or deposit, his right to proceed will not be lost if by no fault of his the matter is not consummated until after the expiration of that period. *Ibid.*

The omission from a statement of the amount of interest which is a matter of mere arithmetical computation is immaterial. *Ibid.*

A judgment creditor levying upon mortgaged property cannot claim subrogation to the rights of the mortgagee unless he has proceeded in the method pointed out in this section. *Peppers v. Harris*, 145–635, 124 N. W. 625.

SEC. 3988. Contest as to validity or amount. If the right of the mortgagee to receive such or any sum is for any reason questioned by the levying creditor, he may, within ten days after levy, or after demand is made for a statement of the amount due as above provided, commence an action in equity or contest such right upon filing a bond in a penalty double the amount of such mortgage, or double the value of the property levied upon, conditioned either for the payment of any sum found due on said

mortgage to the person entitled thereto, or for the value of the property levied upon, as the party ordering the levy may elect, with sureties to be approved by the clerk; and if such mortgagee is a nonresident or his residence is unknown, service may be made by publication as in other actions, but if such residence becomes known before final submission, the court may order personal service to be made. If commenced at law, the court may transfer the same to the equity side as in other cases. The court may appoint a receiver, and shall determine the amount due on the mortgage, the value of the property levied upon, and all other questions properly presented, and may continue and preserve or dismiss the lien of the levy, the costs to be taxed to the losing party as in other cases. If there are two or more mortgages, the creditor may admit the validity of one or more, and make the required deposit as to such, and contest the other, and where there are two or more such mortgages, each of which is questioned, a failure to establish the invalidity of all shall not defeat the rights of the levying creditor, but in such case the decree shall determine the priority of liens, and direct the order of payment out of the proceeds of the property which shall be sold under special execution to be awarded in said cause; but nothing in this chapter contained shall be construed to forbid or in any way affect the right of a creditor to contest in any other way the validity of any mortgage. [27 G. A., ch. 104, § 1; 21 G. A., ch. 117, § 4.]

The remedy provided in these sections is not exclusive. *Worley v. Sheppard*, 143–1, 121 N. W. 567.

SEC. 3991. Indemnifying bond—notice of claim to property.

The officer is bound to levy execution on any personal property in the possession of defendant, unless he has received notice in writing, under oath, from some other person, his agent or attorney, that such property belongs to him, stating the nature of his interest therein, etc., and if the notice is insufficient, the claimant has no remedy as against the officer for the sale of the property. *Donnelly v. Mitchell*, 119–432, 93 N. W. 369.

A notice not signed or sworn to by the person claiming the property, or by any one authorized to act as his agent or attorney, and wholly misdescribing the interest of the claimant, held insufficient. *Ibid.*

Notice, however, is waived by the execution of an indemnifying bond, and insufficiency of notice is no defense to an action on the bond. *Ibid.*

The officer is protected from liability unless he has received notice in writing under oath from some other person that the property belongs to him, stating the nature of his interest, etc. The manner of receiving this notice is immaterial. It is enough if the officer making the levy actually receives it, but it is not sufficient to merely read the notice to the officer. It should be delivered to and receipted for by him. *Frazier v. Hill*, 123–116, 98 N. W. 569.

Such defect in service of the notice is not waived in an action of replevin to recover possession of the property by a third person claiming the right thereto if it is not made part of the petition. *Ibid.*

The provision that the claimant of the property levied on must give written notice of his claim thereto has no application to a case where the defendant claims the property levied on as exempt. *Whitney v. Gammon*, 103–363, 72 N. W. 551.

Notice of ownership is wholly immaterial if the owner of the goods, seeking to replevy them from the possession of the officer, has no right to the goods on the ground that they are exempt from execution. *Young v. Evans*, 118–144, 92 N. W. 111.

Notice of ownership on the part of the execution defendant is not necessary in order to enable him to maintain an action of replevin against the officer for the recovery of property unlawfully seized. *Upp v. Neuhring*, 127–713, 104 N. W. 350.

The sworn notice of ownership must state the consideration for the chattel mortgage under which the plaintiff seeks to take the property from the sheriff in replevin. *McIver v. Davenport*, 110–740, 81 N. W. 585.

While the giving of an indemnifying bond may be a waiver of notice, a party who alleges the giving of notice cannot prove the fact by proving the execution of the bond. Waivers must be pleaded. *Murray v. Thiessen*, 114–657, 87 N. W. 672.

Notice in a particular case held sufficient as to description of the property and of the party from whom plaintiff acquired it, and the consideration paid therefor. *Ibid.*

Where the sheriff acknowledged service on the back of the original and received a copy, held that the service of the notice was sufficient. *Ibid.*

A person other than the execution defendant, suing to recover possession of the property levied on from the officer, must plead the giving of the notice, requiring an indemnity bond. *Shaw v. Tyrell*, 129–556, 105 N. W. 1006.

The notice is not for the benefit of the execution plaintiff. The purpose of such notice is to enable the sheriff to secure a proper indemnifying bond. When that purpose has been accomplished defects in the form or substance of the notice are waived. *Mitchell v. McLeod*, 127–733, 104 N. W. 349.

The execution defendant may institute proceedings to recover from the officer property unlawfully levied upon under the writ, and is not required to bring his action on the indemnifying bond. *Ibid.*

An indemnifying bond given the sheriff in an attachment suit covers the attorney's fees which the sheriff is compelled to pay in defending a suit for the conversion of the property levied upon. *Cousins v. Paxton Co.*, 122–465, 98 N. W. 277.

[The note of *Glover v. Narey*, 92–286, on page 1592 of the code (2d column) is erroneous. The case has reference to the corresponding section of code of '73 which was in different language.]

The provision as to notice of ownership has application solely to third parties claiming to own the property. In the absence of such notice a replevin suit cannot be maintained by such persons for possession of the property levied on. *Chicago, B. & Q. R. Co. v. Pierce*, 138–508, 116 N. W. 594.

The notice must state the consideration paid for the interest in the property on which the claimant relies. *Gray v. Carroll*, 144–68, 120 N. W. 1035.

It is essential that the notice state the source of the claimant's title and the consideration paid for his interest. *McFarlane v. Dick*, 145–89, 123 N. W. 1005.

The fact that the officer receives the paper, supposing it to be the indemnifying bond, which is in fact void, will not in itself constitute a waiver of the statutory notice, though such waiver might arise if he represented to the appellant that he had such a bond and that notice was therefore not required. *Ibid.*

Where the owner of property had by proper notice advised the sheriff of the sale of such property to another, held that a subsequent notice by the purchaser was sufficient without stating the consideration paid, where the amount of consideration to be paid was stated in the first notice. *Childs v. Ross*, 148–744, 127 N. W. 1020.

The requirement as to stating the extent of interest and from whom acquired and the consideration paid relates only to cases where a third person—that is, a person other than the defendant—is claiming to be owner of the property to be levied upon, and does not apply to cases where the defendant, admitting his ownership, seeks to have the property released on the ground that it is exempted from execution. *Sterman v. Hann*, 141 N. W. 934.

An exemption may properly be claimed in property which is owned in common with another. *Ibid.*

SEC. 3992. Conditions of bond—return.

As the object of the statute is to compel the officer to levy on property pointed out by the execution plaintiff and to protect him from liability for so doing, neither he nor the sureties on the bond can be held liable for exemplary damages for making such levy. *Constantine v. Rowland*, 147–142, 124 N. W. 189.

The officer being compelled to make the levy when the bond is given cannot be fully indemnified unless he be permitted to recover the expenses and attorney's fees for defending such levy; but the claimant of property recovering on the bond is not entitled to recover attorney's fees. *Ibid.*

In an action on an indemnifying bond against the party and his sureties there can be no recovery of attorney's fees and exemplary damages for the wrongful issuing out of the writ. *Constantine v. Rowland*, 154–115, 134 N. W. 549.

SEC. 4007. Exemption of public property.

The private property of a citizen cannot be taken to pay the debts of a municipal or public corporation in which his property is situated; and the bonds of a city or school district are not liens upon the property of private individuals within such city or district. *Condit v. Johnson*, 139 N. W. 477.

SEC. 4008. Other exemptions.

One who claims the property as exempt from execution has the burden of showing the facts constituting such exemption. *Hays v. Berry*, 104–455, 73 N. W. 1028.

The owner of three teams of horses, any one of which might be claimed as exempt, has the privilege of determining which one he shall claim as exempt, and by executing a chattel mortgage on one of them he elects not to claim that one as exempt property. Therefore such mortgage is not required, under code § 2906, to be joined

in by the wife. *Grover v. Younie*, 110–446, 81 N. W. 684.

A bicycle habitually used by the debtor in earning his living is exempt. *Roberts v. Parker*, 117–389, 90 N. W. 744.

One whose business is to travel from stand to stand with a stallion, which he uses for breeding purposes at the different places to which he is taken, and who takes care of such stallion, is a laborer, and the harness and cart used by him as a means of conveyance during such trips are exempt to him as the means with which he habitually earns his living. *Krebs v. Nicholson*, 118–134, 91 N. W. 923.

A cream separator is a tool or instrument of a farmer within the statutory provisions as to exemption of property from levy under execution. *In re Hemstreet*, 139 Fed. 598.

Where the defendant in an attachment proceeding makes no selection of exempt property as against the claim of an intervening landlord asserting a lien, and it appears that the attachment plaintiff may be satisfied out of the property without impairment of the landlord's security, it is not error to order the sale of the attached property without the satisfaction of the lien. *Stoaks v. Stoaks*, 146–61, 124 N. W. 757.

Where the debtor is entitled to the exemption of feed for animals which are exempted from execution, the widow of such debtor is, under code § 3312, entitled to have such exempt animals and the feed therefor set apart to her as exempt. *In re Estate of Irwin, Conkey v. Irwin*, 152–323, 131 N. W. 57.

The proceeds of exemption property resulting from a voluntary sale thereof are not exempt, in the absence of a statute providing therefor. *Union County Inv. Co. v. Messix*, 152–412, 132 N. W. 823.

The exemption of an interest in a public or private burying ground is to secure to the deceased owner and his family a place of final earthly repose which shall be sacred against the intervention of the sheriff or the creditor. *Swisher v. Swisher*, 157–55, 137 N. W. 1076.

Under the exemption to a physician of tools, instruments and books used in his profession, a physician may claim as exempted a safe which is owned by him in common with his wife and which is in his possession and under his control. *Sterman v. Hann*, 141 N. W. 934.

SEC. 4009. Pension money.

Pension money paid to the guardian of an insane pensioner remains under the jurisdiction and control of the United States and is therefore exempt from taxation and from execution, under the provisions of § 4747 of the Revised Statutes of the United States. *Manning v. Spry*, 121–191, 96 N. W. 873.

The statute, as it now stands, operates to exempt property for which that acquired by pension money has been exchanged, but it does not exempt the increase or produce derived from the property which is exempt as procured with pension money. But where property acquired by pension money subject to an incumbrance is freed from incumbrance by the application of the proceeds of a portion of the property itself, the remainder thus freed from incumbrance continues exempt. *Smyth v. Hall*, 126–627, 102 N. W. 520.

A party cannot be heard to say that the avails of a homestead are exempt because of his purpose to pay the purchase price with pension money, it not appearing that any part of the pension money was invested in the homestead. *Lee v. Teeter*, 106–37, 75 N. W. 655.

Matured crops which have been raised on the homestead procured with pension money are not exempt from execution. (Affirming S. C., 142 Fed. 620.) *In re Sullivan*, 148 Fed. 815.

Interest derived from the investment of pension money is not exempt from execution. *Bednar v. Carroll*, 138–338, 116 N. W. 315.

The exemption of property purchased with pension money from a sale under execution is not applicable as to taxation. *Beers v. Langenfeld*, 149–581, 128 N. W. 847.

Pension money of a ward in the possession of his guardian is not liable to execution. Such funds are exempt in the hands of the legal representative of the pensioner. *State v. Cole*, 155–654, 136 N. W. 887.

SEC. 4010. Homestead bought with pension money.

Property purchased with pension money of the husband, but at his direction conveyed to the wife and subsequently occupied by them as a homestead, is not exempt from debts of the wife contracted prior to its acquisition. *Whinery v. McLeod*, 127–11, 102 N. W. 132.

The exemption of property acquired with pension money does not inure to the benefit of the heirs of the pensioner to whom such property descends. *Beatty v. Wardell*, 130–651, 105 N. W. 357.

Although a homestead procured with the husband's pension money is in fact conveyed to the wife, it is nevertheless exempt from execution for the antecedent debts of the husband or wife if the husband remains the equitable owner. *Ratliff v. Elwell*, 141–312, 119 N. W. 740.

SEC. 4011. Personal earnings.

There is no indication in this section of any intention to exclude from the time during which earnings shall be exempt the period of time during which litigation to recover such earnings may be pending. *Chadwick v. Stout*, 112–167, 83 N. W. 901.

By inducing his creditor to bring action as assignee against one who owes a claim to the debtor, the latter waives the right to set up an exemption on the ground that the claim is for earnings. *Dowling v. Wood*, 125–244, 101 N. W. 113.

SEC. 4014. Persons starting to leave the state.

The exemptions provided by the statute are for residents of the state only, but the party claiming the exemption need not show that he has been a resident for any particular period. *Union County Inv. Co. v. Messix*, 152–412, 132 N. W. 823.

SEC. 4015. Purchase money.

From the fact that the exemption as to personal property is not available as against a claim for the purchase money, it does not follow that the vendor of personal property has an equitable lien for the purchase price. *Haggard v. Scott*, 142–682, 121 N. W. 375.

SEC. 4016. Absconding debtor.

The wife of a debtor who is a nonresident cannot claim an exemption through him. *Union County Inv. Co. v. Messix*, 152–412, 132 N: W. 823.

SEC. 4017. Failure to claim exemption.

While the owner of property cannot waive the exemption thereof by surrendering the same to the sheriff, or failing to object to its levy, the owner is not precluded from making a selection before the levy of execution, or even before the rendition of judgment, and held that where the owner of three teams, any one of which might be claimed as exempt, gave a chattel mortgage on one of them, he thereby elected not to claim that team as exempt, and therefore the mortgage was valid, although the wife did not join therein. *Grover v. Younie*, 110–446, 81 N. W. 684.

Failure to insist upon the exemption at the time of levy does not defeat the right to such exemption. *In re Hemstreet*, 139 Fed. 958.

The widow becomes entitled on the death of the husband to property held by him exempt as head of the family, and does not waive her right by failing to object to the appraisement of such property as a part of the estate of her deceased husband. *In re Estate of Ring*, 132–216, 109 N. W. 710.

[Change last note under this section in the code to read as follows:

Notice by the debtor to the officer that the property was exempt from execution was not required by the provisions of code of '73 to be under oath, nor signed by the debtor. *Glover v. Narey*, 92–286. But now see code § 3991.]

SEC. 4019. Debts owing for labor preferred. When the property of any company, corporation, firm or person shall be seized upon by any process of any court, or placed in the hands of a receiver, trustee or assignee, or their property shall be seized by the action of creditors, for the purpose of paying or securing the payment of the debts of such company, corporation, firm or person, the debts owing to employes for labor performed within the ninety days next preceding the seizure or transfer of such property, to an amount not exceeding one hundred dollars to each person, shall be a preferred debt and paid in full, or if there is not sufficient realized from such property to pay the same in full, then, after the payment of costs, ratably out of the fund remaining, but such preference shall be junior and inferior to mechanics' liens for labor in opening and developing coal mines. [33 G. A., ch. 204, § 1.] [23 G. A., chs. 47, 48.]

The claims of laborers under this section have preference over mortgage liens. *In re Byrne*, 97 Fed. 762.

The provisions of code §§ 4019, 4020 have no application to the proceeds of a sale of mortgaged personal property on foreclosure of the mortgage by advertisement and sale. *Wells v. Kelley*, 121–577, 96 N. W. 1104.

The statute does not limit the rights of

a laborer to those arising from labor performed in the betterment of property. *Goodenow v. Foster*, 108–508, 79 N. W. 288.

As to whether a creditor having a contract lien upon property acquired prior to the time labor is performed in or upon it has the right to insist that the labor claims be paid out of other property, which is subject to such lien, and not covered by the contract lien, *quaere*. *Hart v. Nonpareil Printing & Pub. Co.*, 109–82, 80 N. W. 217.

The statute does not provide that laborers shall be creditors of a common debtor before being entitled to the preference here provided for. As between a mechanic's lien and the laborer's lien the laborer's is preferred, and it is immaterial that the mechanic's lien antedates the laborer's claims. *Haw v. Burch*, 110–234, 81 N. W. 460.

Where in an attachment proceeding a portion of the property of the debtor has been seized and laborers' claims have been filed which are liens upon such property under the statute, an intervening mortgagee of the property is not in a situation to claim on a subsequent intervention that other property of the debtor, not covered by the mortgage, has been released and put beyond reach as to such laborers' claims, there being no allegations of collusion as between the attaching creditor and the holders of such liens. *Anundsen v. Standard Printing Co.*, 129–200, 105 N. W. 424.

The provisions of this section have no application to the payment of claims against the estate of a decedent. *Moss v. Williams*, 152–686, 133 N. W. 120.

SEC. 4020. **Statement of claim—allowance.** Any employe desiring to enforce his claim for wages, at any time after the seizure of the property under execution or writ of attachment or under any other authority, and before sale thereof is ordered, shall present to the officer levying on such property or to such receiver, trustee or assignee, or to the court having custody of such property or from which such process issued, or person charged with such property, a statement under oath, showing the amount due after allowing all just credits and set-offs, and the kind of work for which such wages are due, and when performed; and unless objection be made thereto as provided in the following section, such claim shall be allowed and paid to the person entitled thereto, after first paying all costs occasioned by the proceeding out of the proceeds of the sale of the property so seized or placed in the hands of a receiver, trustee, or assignee, or court, or person charged with the same, subject, however, to the provisions of the preceding section. [33 G. A., ch. 204, § 2.] [23 G. A., chs. 47, 48.]

Where labor claimants procure execution to be levied on the property of a bankrupt on judgment recovered on their claims, which executions were dissolved by the bankruptcy adjudication, and the claimants failed to present any statement of their claims as required by the Iowa statute, held that they were not entitled to payment from the bankrupt's estate as against unsecured creditors. *In re Burton Bros. Mfg. Co.*, 134 Fed. 157.

SEC. 4021. **Contest.** Any person interested may contest any claim or part thereof by filing objections thereto, supported by affidavit, with such court, receiver, trustee or assignee, and its validity shall be determined in the same way the validity of other claims are which are sought to be enforced against such property, provided that where the claim is filed with a person charged with the property other than the officers above enumerated and a contest is made, [1]the cause shall be transferred to the district court, and there docketed and determined. [33 G. A., ch. 204, § 3.] [23 G. A., chs. 47, 48.]

[1]"that the cause" in enrolled bill. EDITOR.]

SEC. 4022. **Priority.**

In attachment proceedings by a landlord against his tenant a lien of the tenant's employe on the crops for wages is superior to that of the landlord. *Stuart v. Twining*, 112–154, 83 N. W. 891.

Labor claims are superior to the landlord's lien for rent and to the lien of a chattel mortgage, and one who acquires property which is subject to such claims by foreclosure after it has been seized under a writ of attachment takes subject to such claims. *Snyder v. Carson*, 155–552, 136 N. W. 653.

SEC. 4024. **By posting or publication—compensation.** Notice shall be given by posting up in at least three public places of the county, one of which shall be at the place where the last district court was held. In addition to which, in case of the sale of real estate, or where personal property to the amount of two hundred dollars or upwards is to be sold, there shall be two weekly publications of such notice in some newspaper printed in the county, to be selected by the party causing the notice to be given, and the compensation for such publication shall be the same as is provided by law for legal notices. [31 G. A., ch. 9, § 11; C. '73, §§ 3080, 3872; R. § 3311; C. '51, § 1906.]

Failure to publish notice may be taken into consideration as a circumstance of excuse for failure to redeem in an action for equitable relief against the sale. *Copper v. Iowa Trust & Sav. Bank*, 149–336, 128 N. W. 373.

SEC. 4025. **Notice to defendant—sale set aside.** If the debtor is in actual occupation and possession of any part of the land levied on, the officer having the execution shall, at least twenty days previous to such sale, serve him with written notice, stating that the execution is levied on said land, and mentioning the time and place of sale, which notice shall be served in the manner provided by section thirty-five hundred eighteen of the code; and sales made without the notice required in this section may be set aside on motion made at the same or the next term thereafter. [31 G. A., ch. 157; C. '73, § 3087; R. § 3318.]

SEC. 4027. **Penalty for selling without notice.** An officer selling without the notice prescribed in sections four thousand and twenty-three, four thousand and twenty-four, and four thousand and twenty-six of the code shall forfeit one hundred dollars to the defendant in execution, in addition to the actual damages sustained by either party; but the validity of the sale is not thereby affected. [28 G. A., ch. 123, § 1; C. '73, § 3081; R. § 3312; C. '51, § 1907.]

The validity of the sale is not affected by failure of the officer to give notice by publication in the manner required in code § 4024. *Bowden v. Hadley*, 138–711, 116 N. W. 689.

The penalty for making an execution sale without the prescribed notice has relation only to the sale of real property. *Coad v. Schaap*, 144–240, 122 N. W. 900.

This section subjects the officer to a penalty and damages for failure to publish the required notice, but the validity of the sale is not thereby affected. Failure to publish notice may, however, be taken into account as a circumstance in determining whether equitable relief shall be granted as against a sale made without such notice. *Copper v. Iowa Trust & Sav. Bank*, 149–336, 128 N. W. 373.

SEC. 4028. **Time and manner.**

In general: A judgment creditor may cause an execution to be issued and the interest of the judgment debtor to be sold before that interest has been judicially ascertained. *Sheppard v. Messenger*, 107–717, 77 N. W. 515.

One who is in possession of land claiming a title thereto may maintain an injunction to prevent the sale of such land under an execution against one having no interest therein. The plaintiff in such case is not required to make out a perfect title in himself. *Moore v. Kleppish*, 104–319, 73 N. W. 830.

Laches on the part of creditors in bringing action to set aside an execution sale as fraudulent or irregular will bar their rights. *Hansen's Empire Fur Factory v. Teabout*, 104–360, 73 N. W. 875.

Evidence held insufficient to show that the purchaser at a sheriff's sale was a purchaser in trust for the debtor. *Severson v. Gremm*, 124–729, 100 N. W. 862.

Irregularities in the method of conducting the sale do not render the sale void and cannot be taken advantage of in a proceeding by injunction to restrain the issuance of a deed. *Thomassen v. De Goey*, 133–278, 110 N. W. 581.

Where a decree and execution bear the same date it will be presumed that the execution was not issued until after entry of the decree. To overcome such presumption the evidence must be clear and satisfactory. *Iowa Loan Co. v. O'Connell*, 138–361, 116 N. W. 137.

Caveat emptor: One who bids in the property at execution sale under full

knowledge of all the material facts cannot afterwards have the sale set aside. The rule of *caveat emptor* applies to such sales, and they will not be disturbed if there be nothing more than a mistake of law or forgetfulness on the part of the bidder. *Crawford v. Foreman*, 127–661, 103 N. W. 1000.

A purchaser under judicial sale, even though he has received a deed, is subject as to the validity of his title to an attack on the validity of the judgment in pursuance of which the deed is executed. *English v. Otis*, 125–555, 101 N. W. 293.

The maxim of *caveat emptor* applies to a sale under execution and the purchaser ordinarily acquires no better title than the debtor could have conveyed at the time the lien of the judgment attached. On the other hand the purchaser is ordinarily to be protected against outstanding equities of which he had no notice, actual or constructive, before the sale. *Rippe v. Badger*, 125–725, 101 N. W. 642.

Thus the purchaser of the interest of one tenant in common takes such interest free from the obligation to contribute to expenses previously incurred by the cotenant of which the purchaser had no knowledge. But if he has knowledge of such previous expenditures the duty to contribute attaches to his purchase. *Ibid.*

Sale en masse—inadequacy of price: A sale of a tract of one hundred acres of land without being subdivided and offered in separate tracts is subject to be set aside on proper application. *State Bank v. Brown*, 128–665, 105 N. W. 49.

In general, inadequacy of the consideration alone is not sufficient evidence of fraud to justify the setting aside of an execution sale on that ground. *Jonas v. Weires*, 134–47, 111 N. W. 453.

It is not a ground for setting aside the sale that the interest of the execution debtor in the real property levied upon greatly exceeds in value the amount of the judgment, and that the property is not offered in subdivisions. The purchaser is not required to bid upon the undivided interest of the execution debtor in a portion of the property in which he has such undivided interest. *Ibid.*

Where the property is indivisible the fact that the bid is for a small amount as compared with its value does not render the sale invalid, nor require that it be set aside on motion; a judgment creditor having a lien on property much greater in value than the amount of his judgment is not bound to bid more than his judgment in order to render the sale valid. *State Savings Bank v. Shinn*, 130–365, 106 N. W. 921.

The objections that the sale was *en masse* and for a grossly inadequate consideration are not specifically recognized by the statute as grounds even for setting aside the sale, much less for attacking the validity of the title of a purchaser who has acquired a deed in pursuance of such sale. Such objections may justify equitable relief, but only when other equitable grounds are made to appear. *Bowden v. Hadley*, 138–711, 116 N. W. 689.

Mere inadequacy of price will not justify interference by a court of equity with a sale made in accordance with the provisions of the statute. *Tharp v. Kerr*, 141–26, 119 N. W. 267.

If land cannot be sold in separate tracts for want of bidders, it is proper to sell *en masse* and this is especially true in case of real estate which is incumbered. *Copper v. Iowa Trust & Sav. Bank*, 149–336, 128 N. W. 373.

Mere inadequacy of price is not usually sufficient in itself to avoid an execution sale. *Ibid.*

But where there is irregularity as to publication of notice and a sale, for a price grossly inadequate, to the execution creditors, no other bidders appearing, and the execution debtor has failed to redeem by reason of a want of knowledge of the sale, a court of equity may grant relief. *Ibid.*

After properties have been offered separately without bidders, the sheriff may sell them together. He is not bound to adjourn the sale where there is no demand that such properties shall be separately sold. *Dickinson v. Johnson*, 142 N. W. 407.

SEC. 4029. Officer may postpone.

Where property which is indivisible is bid for by a judgment creditor in the amount of his judgment, which is much less than the value of the property, the sheriff may adjourn the sale for want of bidders, but he is not bound to do so where all the proceedings are in strict conformity to the law. *State Savings Bank v. Shinn*, 130–365, 106 N. W. 921.

The discretion vested in the sheriff to postpone the sale should be exercised with a fair and impartial attention to the interest of all parties concerned, and a failure to exercise such discretion may be, with other circumstances, a ground for setting a sale aside in equity. *Copper v. Iowa Trust & Sav. Bank*, 149–336, 128 N. W. 373.

SEC. 4033. When purchaser fails to pay.

No one but the judgment holder or his attorney may proceed against a bidder at an execution sale who fails to pay the amount of his bid when demanded. If neither of these persons do so, then it is the duty of the sheriff to resell the prop-

erty. At any rate, the sheriff has some discretion in the matter, and unless the judgment creditor objects may refuse a bid, or having accepted it, may, before the transaction is closed, repudiate the same, or authorize its withdrawal and resell the property. *State Bank v. Brown*, 128–665, 105 N. W. 49.

One who has purchased property from the mortgagor and assumed to pay the mortgage indebtedness is not entitled to question the right of the sheriff to refuse to enforce a bid made by the mortgagee at the foreclosure sale. *Ibid.*

There may be cases where the costs should be required to be paid as a condition to the annulment of a bid, but where no additional costs are involved in a resale the payment of costs should not be imposed as a condition for setting aside the bid. *Ibid.*

SEC. 4034. Sales vacated.

To authorize the setting aside of a sale of real estate on which the judgment was not a lien at the time of levy it is sufficient that the fact was unknown to the purchaser. Actual knowledge is contemplated. *Rosenberger v. Hawker*, 127–521, 103 N. W. 781.

The existence of a homestead interest which renders property exempt from sale will be sufficient ground for setting aside the sale if the purchaser has no knowledge of the material facts on which the homestead exemption is claimed. *Ibid.*

SEC. 4036. Subjecting real estate of deceased judgment debtor.

An execution issued after the death of the judgment plaintiff is void unless there is an indorsement of the death of the plaintiff as required by statute. The failure of the defendant to complain for want of such indorsement will not be a waiver of the objection. *Dunham v. Bentley*, 103–136, 72 N. W. 437.

On the death of the judgment debtor the execution creditor is required to have his right to an execution renewed, which can only be done in the court where the judgment was rendered. *Hansen's Empire Fur Factory v. Teabout*, 104–360, 73 N. W. 875.

Creditors who have filed their claims against the estate cannot bring action to set aside a conveyance by the deceased as fraudulent; such action must be brought by the administrator. *Ibid.*

A judgment creditor does not lose his lien by not filing his judgment as a claim for payment by the administrator. *Boyd v. Collins*, 70–296, 30 N. W. 574.

SEC. 4040. Mutual judgments—set off.

Mutual judgments, executions from which are in the hands of the same officer, may be set off, the one against the other, except as to costs. *Schnitker v. Schnitker*, 109–349, 80 N. W. 403.

The statutory provision with reference to setting off mutual executions which are in the hands of the same officer has no application to a case where a judgment debtor acquires by assignment a judgment against his creditor, the first judgment having already been assigned to a third person for a valuable consideration. *Miller v. Rosebrook*, 136–158, 113 N. W. 771.

SEC. 4045. Redemption—by debtor—appeal or stay.

Where an execution for a partnership debt is levied on the real property of one partner, an agreement by another partner that the purchaser at execution sale shall immediately take possession of the premises and hold them during the period for redemption, is not binding on the partner whose property is sold, in the absence of express or implied authority to make such contract. *Heins v. Tamblyn*, 110–478, 81 N. W. 698.

The right of redemption and the right of possession in the judgment defendant are separate or independent rights, the one not being necessarily involved in the other, and the sale of the right of redemption made under an execution in another case does not entitle the purchaser at such sale of the right of redemption to the right of possession, which remains in the execution defendant, and may be transferred by him as an independent right. *Hartman Mfg. Co. v. Luse*, 121–492, 96 N. W. 972.

Where the very object of the appeal is to secure a right of redemption, the taking of the appeal does not waive the right. *Kilmer v. Gallaher*, 116–666, 88 N. W. 959.

An equitable right of redemption in the mortgagor continues until cut off by the expiration of the statutory period of redemption under a foreclosure sale, and during the period for redemption the mortgagor may maintain an action in equity to require the mortgagee to account for profits which should be applied to the satisfaction of the mortgage debt. If the mortgagee buying in the property at the sale has taken possession without the assent of the redemptioner and received rents and profits, or has converted the property to his own use, he may be compelled to account in an equitable ac-

tion for redemption. *Dolan v. Midland Blast Furnace Co.*, 126–254, 100 N. W. 45.

The debtor may transfer his right to redeem so as to authorize his grantee to make the same redemption which the debtor himself might have made, and such right to redeem passes by a sale under execution as effectually as by a voluntary conveyance. *Kendig v. McCall*, 133–180, 110 N. W. 458; *Gustafson v. Durst*, 124–203, 99 N. W. 738.

The debtor may, pending the period of redemption, assign his right to redeem and the assignee making redemption acquires title free from the claims of junior lien holders who have been made parties to the proceeding and have failed to redeem within the time prescribed therefor. This rule is applicable to a grantee taking title from a mortgagor after foreclosure and before sale. *Cooper v. Maurer*, 122–321, 98 N. W. 124.

A creditor to whom the real estate has been conveyed by an absolute deed for the purpose of securing a debt, is not a vendee in such sense as to be allowed to make redemption during the last three months of the year succeeding the sale. *Robertson v. Moline-Milburn-Stoddard Co.*, 106–414, 76 N. W. 736.

Statutory redemption may be made only in accordance with the statutory provisions authorizing such redemption. *Howard v. Kelly*, 137–76, 114 N. W. 544.

The right to redeem from sheriff's sale is statutory and must be exercised within the statutory time. *Tharp v. Kerr*, 141–26, 119 N. W. 267.

SEC. 4046. By creditors.

The provision for redeeming by one creditor from another has no application to a case where there is but one creditor. A person though holding different claims against the debtor cannot redeem from himself. *Stephens v. Mitchell*, 103–65, 72 N. W. 434.

Where a creditor procures an assignment of a certificate of sale and obtains a sheriff's deed thereon, he no doubt holds the property absolutely, but if he simply takes an assignment of the certificate at a time when he has no right to make redemption therefrom, and thereby extinguishes in his own interest the lien of the judgment under which the sale is made, the property remains subject to other judgment liens. *People's Sav. Bank v. McCarthy*, 119–586, 93 N. W. 583.

The judgment creditor, in order to acquire the right of the certificate holder by taking an assignment of the certificate, must do so within nine months from the sale, and on failure to do so his lien may be divested by a sheriff's deed. If, after the time allowed to him for making redemption, he discharges the sale by taking an assignment of the certificate, he does not thereby acquire title to the property free from other judgment liens. *Ibid.*

A judgment creditor having no lien is not entitled to make redemption, and a junior judgment creditor failing to redeem from a sale by a senior creditor loses his right to redeem from a subsequent foreclosure sale under a mortgage which is prior to the liens of both judgments. *Francestown Sav. Bank v. Silver*, 122–685, 98 N. W. 498.

A lien holder whose right to redeem from execution sale has expired cannot, by taking an assignment of the certificate of sale, acquire any other right as against another lien holder entitled to redeem than that which the holder of the certificate had to receive the redemption money. *Gustafson v. Durst*, 124–203, 99 N. W. 738.

A junior judgment creditor has no right to redeem after the expiration of the lien of his judgment. *Hansen's Empire Fur Factory v. Teabout*, 104–360, 73 N. W. 875.

One who has caused an execution to be levied on real property under a judgment which has ceased to be a lien thereon, is by virtue of such levy entitled to make statutory redemption of the property from a prior foreclosure sale. *Hawkeye Ins. Co. v. Maxwell*, 119–672, 94 N. W. 207.

A junior judgment lien holder has no redress as against a sale of the property under a senior judgment, save by statutory redemption. He cannot allow the sale to proceed to a deed without making such redemption and afterwards exercise any right of redemption. *Wood v. Rankin*, 119–448, 93 N. W. 387.

Those who are made parties in an action of foreclosure are required to protect their claims either by bidding up the property to a fair value at the sale or by redemption from such sale within the prescribed period, and a lien holder who neglects to avail himself of such opportunity to enforce his lien thereby abandons any further claim to the property, and the mortgagor may convey his equity or right of redemption unburdened by the claims of any party to the suit save only the right and claim of the holder of the certificate of sale. *Witham v. Blood*, 124–695, 100 N. W. 558.

Creditors who fail to redeem from a sale by another creditor lose the right to question a fraudulent conveyance of the property. *Kingman Plow Co. v. Knowlton*, 143–25, 119 N. W. 754.

SEC. 4048. Senior creditor.

One holding a valid certificate of tax sale superior to the claims of the execution creditor may be made a party defendant in the proceeding to foreclose. *Browne v. Kiel*, 117–316, 90 N. W. 624.

SEC. 4050. Terms.

Where the purchaser at execution sale, pending the time for redemption, takes the fee simple title by warranty deed from the debtor, he merges in such title his right as holder of the certificate of purchase and also any right which he might have on account of an unsatisfied portion of his judgment. *German Bank v. Iowa Iron Works*, 123–516, 99 N. W. 174.

SEC. 4051. By holder of title—where made. The terms of redemption, when made by the title holder, shall be the payment into the clerk's office of the amount of the certificate, and all sums paid by the holder thereof in effecting redemptions, added to the amount of his own lien, or the amount he has credited thereon, if less than the whole, with interest at contract rate on the certificate of sale from its date, and upon sums so paid by way of redemption from date of payment, and upon the amount credited on his own judgment from the time of said credit, in each case including costs. All redemptions made under the provisions of this chapter shall be made in the county where the sale is had. [28 G. A., ch. 124, § 1; 26 G. A., ch. 65; C. '73, § 3106; R. § 3336; C. '51, § 1930.]

A creditor can only redeem by payment to the clerk as provided in code § 4056, and the acquisition of certificates of sales or other liens does not amount to redemption. *Jack v. Cold*, 114–349, 86 N. W. 374.

SEC. 4056. Credit on judgment.

In case of redemption by a creditor within nine months from the date of the sale no affidavit stating the amount still unpaid and due on the redemptioner's claim, under the provisions of § 3118 of the code of '73, was required. That section had relation to redemptions made after the expiration of nine months. *Fry v. Warfield-Howell-Watt Co.*, 105–559, 75 N. W. 485.

Under the provisions of the code of '73, held that there was no requirement as to any other notice of the amount for which the creditor was willing to hold the land than the entry in the sale book, and therefore no warrant for the substitution of any other notice, though it might seem better than that fixed. *Meredith v. Peterson*, 108–551, 79 N. W. 351.

Under this section as it now stands redemption can only be made by payment to the clerk, and a lien holder purchasing certificates of sale or acquiring other liens does not thereby make redemption except by such payment as is here contemplated. *Jack v. Cold*, 114–349, 86 N. W. 374.

Under the statutes as they existed before the adoption of the present code, a creditor who had by acquiring liens become a redemptioner at the expiration of the six months during which the debtor had the exclusive right to redeem, thereby effected redemption, and held that the effect of this redemption was not destroyed by the subsequent adoption of the code. *Ibid.*

The method of redemption of a lien holder must be in accordance with the provisions of the statute. *Howard v. Kelly*, 137–76, 114 N. W. 544.

The clerk may properly refuse to treat a deposit of the money as contemplated in this section as sufficient to effect redemption without the filing of the required affidavit. *Iowa Loan & Trust Co. v. Kunsch*, 156–91, 135 N. W. 426.

SEC. 4057. Contest determined.

This provision is not exclusive of the remedy previously existing under which the person entitled to redeem might tender the necessary amount and then assert the right resulting from such redemption in a court by proper proceedings. The purpose of the statute is to enable the person desiring to redeem to test his right in a summary way. *Kendig v. McCall*, 133–180, 110 N. W. 458.

The provisions of this section have no application where equitable relief in the way of redemption is asked, but in such case there should be prompt notification of the mistake relied upon and tender of the amount necessary to make such redemption. *Tharp v. Kerr*, 141–26, 119 N. W. 267.

The issue raised in the proceeding provided for in this section may be ordered tried as an action in equity and if so tried

without objection, it should be so considered on appeal. *Bradford v. Helsell*, 150–732, 130 N. W. 908.

The summary proceeding provided for in this section is exclusive of any remedy by motion under the provisions of code § 3843. *Iowa Loan & Trust Co. v. Kunsch*, 156–91, 135 N. W. 426.

The amount necessary to redeem must be deposited with the clerk. A mere tender of the amount and demand of redemption is not sufficient. *Ibid.*

A withdrawal of the amount deposited terminates any existing right predicated on the making of such deposit. *Ibid.*

SEC. 4058. Assignment of certificate.

Transfer of the certificate of sale may be made by assignment, but an attorney has no implied authority to assign such certificate which is in possession of his client. *Howard v. Kelly*, 137–76, 114 N. W. 544.

SEC. 4061. Transfer of debtor's right.

This provision is applicable to a conveyance of the mortgaged premises by the mortgagor after foreclosure decree and before sale. *Cooper v. Maurer*, 122–321, 98 N. W. 124.

And see notes to § 4045.

SEC. 4062. Deed.

Where the purchaser understands that an entire tract of land is being sold and takes possession thereof under his deed, his occupancy is adverse as to the entire tract, although it appears that under the description by metes and bounds contained in the return of the writ reciting the levy a small portion of the tract is not included. *Severson v. Gremm*, 124–729, 100 N. W. 862.

The holder of a sheriff's deed does not acquire an independent title, but a derivative one, immediately from the sheriff, but mediately from the debtor, and generally speaking he gets no other or greater title than the judgment debtor had. An agreement entered into between the creditor and the debtor whose right of redemption has not yet expired, that the creditor shall take title as security for the judgment debt, although made in parol, may be enforced, as it gives rise to an implied or resulting trust. *McElroy v. Allfree*, 131–112, 108 N. W. 116.

The description by which property is sold under execution need not be as accurate as that required where lands are sold for taxes. Every reasonable intendment is made in favor of judicial sales in order to secure the objects which they are intended to accomplish. *McCormick v. McCormick Harv. Mach. Co.*, 120–593, 95 N. W. 181.

The sheriff's deed is presumptive evidence of the issuance of a certificate of sale. The sheriff may issue a deed, although the certificate has been lost, without waiting to be compelled by suit to do so. *Mahaska County v. Bennett*, 150–216, 129 N. W. 838.

A description which is so indefinite as not to identify the property renders the deed void. *Ibid.*

Under code § 3843, relating to the power of a judge to direct an officer of the court in relation to the discharge of his duties, a judge may, in vacation, make an order with reference to the execution of a deed in pursuance of a sale. *Hawkeye Ins. Co. v. Maxwell*, 119–672, 94 N. W. 207.

A judgment creditor may sell the land of his debtor upon which there is a mortgage, and after getting a deed may maintain an action to set aside the mortgage as fraudulent. Other creditors not redeeming from the sale lose the right to participate in the advantage which accrues from the setting aside the mortgage for fraud. But if after acquiring the property by execution sale the creditor joins with other creditors in procuring the setting aside of the fraudulent mortgage, he holds title in trust for all. *Kingman Plow Co. v. Knowlton*, 143–25, 119 N. W. 754.

The creditor purchasing the property as that of his debtor cannot afterwards question a prior mortgage thereon without showing that the mortgage was such that had he brought a creditor's bill before subjecting the property to sale he would have been entitled to the relief demanded. *Ibid.*

SEC. 4063. Recording.

Although the deed is not placed on record until more than sixty days after the expiration of the full time for redemption, one who is not a subsequent purchaser in good faith for value cannot complain. *Hannan v. Seidentopf*, 113–658, 86 N. W. 44.

SEC. 4064. Presumption.

The deed is presumptive evidence of the issuance of a certificate of sale. *Mahaska County v. Bennett*, 150–216, 129 N. W. 838.

SEC. 4071-a. **Exemption from garnishment—wages—nonresidents.** Wages earned outside of this state by a nonresident of this state, and payable outside of this state, shall in all cases where the garnishing creditor is a nonresident of this state, be exempt from attachment or garnishment where the cause of action arises outside of this state; and it shall be the duty of the garnishee in such cases to plead such exemption, unless the defendant shall be personally served with original notice in this state. [30 G. A., ch. 124.]

CHAPTER 4.

OF PROCEEDINGS AUXILIARY TO EXECUTION.

SECTION 4072. Debtor examined.

The proceedings provided for in this and following sections are summary and contemplate no pleadings or formal issue. Their principal purpose is to discover property. If the examination results in no discovery of property, the court or judge has no further duty to perform. He has no authority to order a debtor to convey his interests in real estate, either legal or equitable, whether it be within the jurisdiction or beyond. *Bennett v. Valley Mining Co.*, 142–53, 120 N. W. 654.

SEC. 4077. Disposition of property.

This section has reference to personal property which cannot be reached by levy of execution in the ordinary way. If when the property is pointed out it may be reached by ordinary process the creditor is not entitled to a summary order. *Bennett v. Valley Mining Co.*, 142–53, 120 N. W. 654.

SEC. 4079. Equitable interest.

The power to appropriate equitable interests in real property to the payment of a judgment against the debtor is confined to real estate located in the county where the order was made. *Bennett v. Valley Mining Co.*, 142–53, 120 N. W. 654.

A judgment creditor cannot by pleadings filed in such a proceeding raise an equitable issue authorizing the court to grant relief by subjecting to the payment of a judgment property situated in another jurisdiction. *Ibid.*

SEC. 4084. Compensation of officers and witnesses.

The compensation of a receiver should be based upon the value of his services in connection with the property subject to the receivership, and not on their value generally. *Stearns Paint Mfg. Co. v. Comstock*, 121–430, 96 N. W. 869.

SEC. 4087. Equitable proceedings.

These sections of the code with reference to an equitable levy are applicable to a case where the defendant has possession of the property, as well as to a case where it is in possession of a third person, and a receiver may be appointed in such case. Even if the sections are not applicable in such a case a creditor has a right to bring a suit in equity, independent of statute, for the purpose of subjecting property to the payment of his judgment, and such a suit would be a sufficient basis for the appointment of a receiver. *Hirsch v. Israel*, 106–498, 76 N. W. 811.

The provisions of this and following sections as to subjecting equitable interests in real estate are declaratory of the common law and should be construed with reference to the established rules thereof. Therefore, held that a creditor seeking relief must first have recovered judgment which would be a lien on real estate. *Peterson v. Gittings*, 107–306, 77 N. W. 1056.

An equitable proceeding auxiliary to execution cannot be maintained to enforce a liability which has not become perfect in favor of the debtor as against the one sought to be charged in the proceeding. *Cushman v. Carbondale Fuel Co.*, 122–656, 98 N. W. 509.

A creditor's bill is not maintainable unless legal remedies have proven ineffectual, or there is an affirmative showing of insolvency. *Kalona Savings Bank v. Eash*, 133–190, 109 N. W. 887.

As garnishment cannot be maintained against an administrator to subject property of deceased in his hands, in which he is entitled to share personally, to the payment of a personal judgment against him,

equitable proceedings to subject the property to the payment of such judgment may be maintained. *Cassady v. Grimmelman*, 108–695, 77 N. W. 1067.

A municipal corporation may be made defendant in such proceedings. *Tone v. Shankland*, 110–525, 81 N. W. 789.

The remedy provided by proceedings auxiliary to execution may be resorted to, although the property sought to be reached might have been levied upon under the provisions of code § 3979 authorizing levy on mortgaged property. *McKee v. Murphy*, 138–322, 113 N. W. 499.

The auxiliary proceeding may be resorted to without actual levy upon the property sought to be reached. *Ibid.*

SEC. 4088. Answers verified—petition taken as true.

While the statute requires such answers as the court may direct, the remedy for failure to make them is not by motion to strike but by process of contempt. If an answer be informal, redundant or otherwise, the remedy is not by motion to strike but by motion for more specific statement or by demurrer. *Jordan Co. v. Sperry*, 141–225, 119 N. W. 692.

SEC. 4089. Lien created.

Under this section it is not necessary to serve notice of such proceedings against the judgment debtor, where the creditor had actual notice of the filing of the petition. *Shumaker v. Davidson*, 116–569, 87 N. W. 441.

The finding of a proceeding auxiliary to execution is not binding on one who has no notice thereof. *Green v. Forney*, 134–316, 111 N. W. 976.

The rule announced in the last annotation to this section in the code, citing *Ware v. Purdy*, 60 N. W. 526, was changed on rehearing of said case. See S. C. 95–667, 64 N. W. 640.

Failure to serve copy of the petition where the notice has been properly served will not defeat the proceeding if no issue as to the sufficiency of the service is raised. *McKee v. Murphy*, 138–322, 113 N. W. 499.

One who acquires a lien by proceedings under this section is protected against an unrecorded conditional sale under code § 2906 *Rankin v. Schultz*, 141–681, 118 N. W. 383.

TITLE XX.

OF PROCEDURE TO REVERSE, VACATE OR MODIFY JUDGMENTS.

CHAPTER 1.

OF PROCEEDINGS TO REVERSE, VACATE OR MODIFY JUDGMENTS IN THE TRIAL COURTS.

SECTION 4091. Judgment vacated or modified—grounds.

In general: Under these sections a proceeding to vacate a judgment because of irregularity in obtaining it must be by motion made before the second day of the next succeeding term. (See code § 4093.) *Priestman v. Priestman*, 103–320, 72 N. W. 535.

In a proceeding to annul a judgment the parties to the judgment should be made parties to the proceeding. *Day v. Goodwin*, 104–374, 73 N. W. 864; *Fulliam v. Drake*, 105–615, 75 N. W. 479.

A petition for new trial after the term does not constitute a statement of a new cause of action but merely an application for the opportunity to retry the issues as presented in the original suit. *Wood v. Wood*, 136–128, 113 N. W. 492.

The legal representative or successor of a deceased litigant may institute such proceedings. *Ibid.*

While the inherent power of a court of equity to grant a new trial on account of the loss of the record of the evidence rendering an appeal for trial *de novo* in an equity case impracticable is considered to be still an open question, held that the inability of the unsuccessful party to prosecute such appeal on account of the death of the reporter before a transcript of the evidence had been secured did not justify the granting of a new trial in the case. *Dumbarton Realty Co. v. Erickson*, 143–677, 120 N. W. 1025.

In a proceeding after the term attacking a decree of divorce in favor of the plaintiff, the defendant who is a resident of the county is a necessary party. *Richardson v. King*, 157– —, 135 N. W. 640.

The relief herein provided for can be secured only in accordance with the statutory method, and so long as such relief is obtainable at law equity will not interfere. *Johnson v. Nash-Wright Co.*, 121–173, 96 N. W. 760.

The proceeding provided for is a proceeding in the original action, and not by a new action. *Ibid.*

A modification of a judgment, secured as the result of proceedings under this section, will not defeat an appeal already taken from the judgment as first rendered. *Culbertson v. Salinger*, 111–447, 82 N. W. 925.

An appeal from an order for a new trial made under the provisions of this and the following sections is not triable *de novo*, but on assignments of error, and if there be any conflict in the evidence, or in the inferences fairly deducible therefrom, the supreme court will assume such a state of facts, reasonably consistent with the evidence, as will support the conclusion reached. *Sitzer v. Fenzloff*, 112–491, 84 N. W. 514.

It is not competent for a trial court to proceed, after final judgment has been entered on one application for a new trial, to entertain another on identically the same grounds and reach a different result. *State v. Bulecheck*, 137–158, 114 N. W. 891.

The provisions of this and the following sections are not recognized in the federal courts. *Manning v. German Ins. Co.*, 107 Fed. 52.

The causes for a new trial recognized in this section are in general of the nature of those errors which could have been corrected by the use of a writ of error *coram vobis*. *Ibid.*

Must be after term: A motion to correct a decree already entered and made at the same term does not come within the provisions of this and the following sections. *McConnell v. Avey*, 117–282, 90 N. W. 604.

The provisions of this section with reference to relief against a judgment after the close of the term at which it was rendered have no reference to a case where application to set aside a judgment or order

is made during the term at which the judgment is entered. *Streeter v. Gleason*, 120–703, 95 N. W. 242.

It is not until after the term at which judgment is entered that application can be made under this section on account of accident or surprise which ordinary prudence could not have guarded against. *Acheson v. Inglis*, 155–239, 135 N. W. 632.

During the term the court continues in control of its own record and has inherent authority to enter such orders as may be essential to afford litigants opportunity to be heard on issues raised by the pleadings, notwithstanding temporarily deprived thereof by unavoidable mistake or misunderstanding, casualty or misfortune. *Ibid.*

And further see notes to code § 244 in this supplement.

Discretionary: The granting of a new trial on petition is peculiarly a matter of discretion with the trial court, and in the absence of a showing of abuse the ruling will not be disturbed. *Tschohl v. Machinery Mut. Ins. Assn.*, 126–211, 101 N. W. 740.

The matter of granting a new trial under this section is left largely to the sound discretion of the trial court, and unless an abuse of such discretion is shown its finding will not be disturbed on appeal. *Bank of Stratton v. Dixon*, 112–621, 84 N. W. 690.

The proceeding with reference to new trial is at law and the finding of the trial court will be sustained if there be substantial testimony in its support. *Kelly v. Cummens*, 143–148, 121 N. W. 540.

The finding of the court on the evidence that there is a sufficient showing of unavoidable casualty and misfortune will not be interfered with on appeal, especially where the court has awarded a new trial. *Farmers' Exch. Bank v. Trester*, 145–665, 124 N. W. 793.

In criminal case: The provision with reference to petition for a new trial after judgment has no application in criminal cases. *State v. Hayden*, 131–1, 107 N. W. 929.

Grounds—fraud: A motion to vacate a judgment without charging fraud or illegality in obtaining it cannot be made under this section. *Manning v. Nelson*, 107–34, 77 N. W. 503.

Fraud in procuring a judgment by default without having obtained jurisdiction may be taken advantage of otherwise than by application for a new trial within one year. *Culbertson v. Salinger*, 122–12, 97 N. W. 99.

Under the evidence in a particular case, held that the facts did not show fraud in procurement of the original judgment such as to require the granting of a new trial. *McCormick v. McCormick*, 109–700, 81 N. W. 172.

Where judgment is entered on default against a party who has been induced to refrain from making defense on the assurance that judgment was sought only as against his codefendants, he may have relief in equity, even after the expiration of the year. *Beck v. Juckett*, 111–339, 82 N. W. 762.

Where fraud relied upon as a ground for a new trial is not discovered within a year after the rendition of judgment, courts of equity have jurisdiction to grant a new trial or modification of the decree; but the grounds for such an application must be such as would have warranted the new trial had application been made within a year. *Graves v. Graves*, 132–199, 109 N. W. 707.

Fraud in pleading a statement of facts on which relief is asked may be so flagrant as to require the setting aside of a judgment by default, but a mere misstatement of facts alone will not warrant the setting aside of a judgment for fraud. *Ruppin v. McLachlan*, 122–343, 98 N. W. 153.

The statutory provisions for setting aside a judgment by application within one year do not control proceedings to enjoin the enforcement of a judgment on the ground that it is void for want of jurisdiction. *Lindberg v. Thomas*, 137–48, 114 N. W. 562.

An equitable proceeding to set aside a judgment for fraud in obtaining it may be maintained without regard to the provisions of this section. *Tollefson v. Tollefson*, 137–151, 114 N. W. 631.

The mere prosecution of an unfounded claim or an erroneous allegation as to a fact does not constitute fraud within the provisions of this section. *Hedrick v. Smith*, 137–625, 115 N. W. 226.

If the fraud relied upon was in fact discovered within such time as to enable the complaining party to take advantage thereof within the statutory period he is not entitled to relief after the time fixed for demanding relief has expired. *Ibid.*

Taking judgment by default in violation of an agreement with opposing counsel may constitute such fraud as to authorize the setting aside of the default by petition for new trial. *Wallace v. Wallace*, 141–306, 119 N. W. 752.

The action of counsel in taking judgment in a case pending without trial notice or assignment of the case for trial, and without the knowledge of adverse parties or counsel, constitutes such fraud as to authorize the vacating of the judgment thus secured. *Fogarty v. Battles*, 145–61, 123 N. W. 952.

Fraud preventing the defeated party from pleading and proving his defense is extrinsic and the judgment may be set aside for such fraud. *Griffith v. Merchants' Life Assn.*, 148–727, 127 N. W. 1079.

A decree may be set aside because its result is to perpetrate a legal fraud on the unsuccessful party, whether actual fraud was intended by the successful party or not. *Skvor v. Weis*, 153–720, 134 N. W. 85.

A showing of an attempt to suborn witnesses is not sufficient to require the granting of a new trial where it does not appear that the result of the trial was influenced by such fraudulent act. *Sullivan v. Herrick*, 140 N. W. 359.

False testimony: The fraud which will justify the setting aside of a judgment in a collateral proceeding must be something extrinsic and collateral to the question examined and determined in the action. Perjury or false swearing committed in procuring the judgment will not be sufficient. *Graves v. Graves*, 132–199, 109 N. W. 707; *Mahoney v. State Ins. Co.*, 133–570, 110 N. W. 1041; *Dooley v. Gladiator Consol. Gold Mines & M. Co.*, 134–468, 109 N. W. 864; *Mengel v. Mengel*, 145–737, 120 N. W. 72, 122 N. W. 899; *Guth v. Bell*, 153–511, 133 N. W. 883.

That the judgment may have been procured through false testimony is not ground for a new trial. *Kelly v. Cummens*, 143–148, 121 N. W. 540; *Sullivan v. Herrick*, 140 N. W. 359; *Gelwicks v. Gelwicks*, 142 N. W. 409.

While a decree will not be set aside on the sole ground that an issue directly raised by the pleadings has been decided on perjured testimony, yet if there is a relation of confidence and trust as between the parties, as for instance between a husband and his insane wife, the mere fact of falsehood and fraud, although inhering in the decree itself, may constitute ground for setting it aside. So held in the case of a decree for a divorce. *Wood v. Wood*, 136–128, 113 N. W. 492.

Proceedings against infant or insane person: A judgment against an infant without defense by a guardian is clearly erroneous, and that fact may be made the ground for granting a new trial under this section. *Wise v. Schloesser*, 111–16, 82 N. W. 439.

If the fact of insanity is brought to the court's attention, the mental condition of the party as well as the error in failing to require appearance by guardian, appears in the record, and the correction must be by appeal. But if the fact of insanity exists without being brought to the attention of the court, a judgment by default involves error within the meaning of the statute, which will be a ground for setting aside the judgment. *Hawley v. Griffin*, 121–667, 92 N. W. 113, 97 N. W. 86.

A person is of unsound mind, within the provisions of this subdivision, when so weak and infirm mentally as not to be capable of exercising the judgment necessarily required in the management of his ordinary affairs. *Garretson v. Hubbard*, 110–7, 81 N. W. 174.

The right of an insane person to have a judgment against him set aside on petition within a year after regaining mental capacity is an absolute right which no one can waive for him, nor can such right be affected or abridged by decree or judicial proceedings. *Pollock v. Milburn*, 112–528, 84 N. W. 521.

A second application for new trial will not be granted when the condition of the party is practically the same as when the first application was denied. *McBride v. McClintock*, 108–326, 79 N. W. 83.

If the guardian *ad litem* colludes with the adverse party to suppress the facts, or is grossly negligent in interposing a defense for the infant, judgment may be set aside. But in the absence of fraud, actual or constructive, the discovery that the guardian did not introduce evidence of facts which were ascertainable on the trial is not a ground for setting aside the judgment. *Harris v. Bigley*, 136–307, 111 N. W. 432.

Judgment cannot be set aside on account of the mental incapacity of the defendant represented by a guardian *ad litem* duly appointed. *Wood v. Wood*, 136–128, 113 N. W. 492.

A judgment in an action against a minor in which a guardian *ad litem* has been appointed and an answer by way of general denial has been filed, is not without jurisdiction and it is not subject to collateral attack. *Ringstad v. Hanson*, 150–324, 130 N. W. 145.

Casualty and misfortune: A new trial will not be granted on the ground of casualty and misfortune in a case where judgment was rendered by default against a corporation, where it appears that the secretary of the corporation, upon whom service was made, was not charged with the management of its affairs and did not take steps to have a defense made to the action. *Sioux City Vin. Mfg. Co. v. Boddy*, 108–538, 79 N. W. 350.

A client is only chargeable with the negligence of his attorney when that negligence may be imputed to him, that is, when by the exercise of care on his part he could have avoided the consequences of such negligence. The client has a right to rely on the attorney to inform him as to the time of the trial and as to anything required for the purpose of making a defense, and if, by reason of the negligence of the attorney in failing to give such information, and without fault on his part, he is prevented from making defense, there is such unavoidable casualty or misfortune as to entitle him to a new trial. *Peterson v. Koch*, 110–19, 81 N. W. 160.

An allegation of sickness of counsel at the time of a trial will not be sufficient ground for setting aside the judgment of a petition for a new trial, where it does not appear that a continuance might not have been had if the facts had been presented in proper time and found sufficient. *Tschohl v. Machinery Mut. Ins. Assn.*, 126–211, 101 N. W. 740.

The mere fact that a party is beyond the reach of his attorneys so that he does not receive notice of the time when the case is set for hearing, and a judgment is entered against him by default, the court having afforded counsel reasonable opportunity to secure the attendance of their client, held not to entitle such party to a new trial after judgment by default, where he had, with knowledge that the case was likely to be called for trial, omitted to advise his counsel of his whereabouts so that they could notify him as to the time when the case would be heard. *Iowa Savings & Loan Assn. v. Kent*, 134–444, 109 N. W. 773.

The matter of granting a new trial under such circumstances rests peculiarly within the sound discretion of the trial court, and its action will not be interfered with on appeal save where a manifest abuse of discretion is made to appear. *Ibid.*

It is doubtful whether the misfortune incident to the reporter's failure to furnish a transcript of the evidence in an equity case in time to enable the appellant to make his appeal is such unavoidable casualty as to require the granting of a new trial in order that the evidence may be taken and preserved. At any rate negligence of appellant in attempting to procure such transcript will be a ground for denying relief. *McKinley v. McKinley*, 123–574, 99 N. W. 162.

Where judgment was rendered against a married woman on substituted service made by leaving a copy with her husband at his place of residence during a time when she was not actually residing with him, although her abandonment was temporary only, and it appeared that on her return he failed to notify her of the fact of such service, held that there was such casualty and misfortune as to warrant the granting of a new trial. *Galvin v. Dailey*, 109–332, 80 N. W. 420.

The fact that defendant's wife, with whom a copy of the original notice was left, was unable to understand the English language will not constitute such casualty as to entitle the defendant to a new trial. *Hass v. Leverton*, 128–79, 102 N. W. 811.

A judgment entered on written stipulation of the parties cannot be set aside under this section on account of unavoidable casualty and misfortune. *Mains v. Des Moines Nat. Bank*, 113–395, 85 N. W. 758.

A party may properly rely on information derived from the clerk of the court as to the filing of papers. *Logan v. Southall*, 137–372, 115 N. W. 19.

To justify relief on account of the failure of attorney to make defense it must appear that there was a plain breach of duty or something in the nature of unavoidable calamity. *Hedrick v. Smith*, 137–625, 115 N. W. 226.

While the unexpected withdrawing of appearance by attorney without sufficient notice to his client to take proper steps for appearance by person or other attorney may constitute a casualty or misfortune within the statutory provision, yet if the client had notice of the attorney's withdrawal in time to have appeared or to have procured counsel to protect his interests, he cannot have any relief on that ground. *Andres v. Schlueter*, 140–389, 118 N. W. 429.

It is only casualty or misfortune preventing the party from prosecuting or defending the action which is made a ground for new trial as provided by this section. The fact that by the death of the shorthand reporter before making a transcript of his notes it has become impossible to prosecute an appeal does not constitute such casualty or misfortune as to authorize the granting of a new trial. *Dumbarton Realty Co. v. Erickson*, 143–677, 120 N. W. 1025.

Showing as to casualty and misfortune due to reliance on counsel and resulting in default for failure to interpose defense, held sufficient. *Farmers' Exch. Bank v. Trester*, 145–665, 124 N. W. 793; *Tuefel v. Wilson*, 152–559, 132 N. W. 846.

Newly discovered evidence: Regardless of whether application for new trial on the ground of newly discovered evidence made after the term should be by petition or by motion, held that a petition containing all the essential allegations of a motion was sufficient. *Hunter v. Porter*, 124–351, 100 N. W. 53.

Application for new trial on the ground of newly discovered evidence may be made at any time either at or after the term at which the verdict sought to be set aside was rendered and until the expiration of one year from the entry of judgment on such a verdict. *Ibid.*

The granting of a new trial on petition on the ground of newly discovered evidence is peculiarly within the discretion of the trial court and will not be interfered with on appeal where an abuse of discretion does not appear. *Chambliss v. Hass*, 125–484, 101 N. W. 153.

A new trial on account of newly discovered evidence should not be denied on the ground that such evidence is cumulative if it tends to show a new and important fact in the case. *State v. Lowell*, 123–427, 99 N. W. 125.

In the absence of any showing of accident, fraud, mistake or casualty in the presentation of the evidence on the trial, there cannot be a new trial on account of newly discovered evidence. *Kringle v. Kringle*, 123–365, 98 N. W. 883.

Reasonable diligence must be alleged and proved in order to obtain a new trial on petition, and if the ground is newly discovered evidence the allegations of the petition should show the facts constituting reasonable diligence, but a general allegation of diligence will be sufficient as against a demurrer. If the defendant desires more specific statement of the diligence used he should move therefor. *Scott v. Hawk*, 105–467, 75 N. W. 368.

No other grounds: The specification herein of the grounds for setting aside a judgment and granting a new trial covers the whole ground of vacating or modifying judgments after the term at which they are rendered, and is applicable to the granting of such relief in courts of equity as well as in courts of law. *Ruppin v. McLachlan*, 122–343, 98 N. W. 153.

It is questionable whether equity will grant relief from a judgment on any grounds excepting those enumerated in this section, although it might, upon a proper showing, entertain an application after the expiration of the year within which, by the terms of code § 4094, proceedings at law must be commenced. *Mains v. Des Moines Nat. Bank*, 113–395, 85 N. W. 758.

The grounds for new trial after the term are only such as enumerated, although the time within which a trial may be granted may be extended by a court of equity on a showing that the proceeding was prosecuted with reasonable diligence after the discovery of the ground relied upon. *Hedrick v. Smith*, 137–625, 115 N. W. 226.

The trial court has no statutory authority to set aside or vacate a judgment or decree duly entered at a prior term other than is contained in this section. *Dumbarton Realty Co. v. Erickson*, 143–677, 120 N. W. 1025.

SEC. 4092. New trial after term.

A petition in the nature of a bill of review asking a modification of an injunction previously granted does not stand denied by operation of law, as would a petition to reverse, vacate or modify the judgment. *Denby v. Fie*, 106–299, 76 N. W. 702.

In an action in which the sole relief asked is that a judgment be set aside and the proceedings under it annulled, the relief is wholly equitable and the proceeding is properly treated as in equity and not as one asking a new trial. *Mengel v. Mengel*, 145–737, 120 N. W. 72, 122 N. W. 899.

Where a party relies on a motion for new trial on the ground of newly discovered evidence made after the expiration of the period of three days permitted for the filing of such motion under code § 3756, he must support such application by evidence and not by affidavits, which would be sufficient in support of the motion if filed in time. *Heim v. Resell*, 153–356, 133 N. W. 881.

An amendment to a petition for a new trial may be made after the time limited by statute for the filing of such petition if no new grounds are therein presented. *Guth v. Bell*, 153–511, 133 N. W. 883.

A party having knowledge of the occasion for additional evidence and not seeking a postponement on that ground or a new trial on motion, cannot take advantage of the absence of such evidence by petition for a new trial after term. *Sullivan v. Herrick*, 140 N. W. 359.

An appeal from an order made in pursuance of this section is not triable *de novo*, but on errors only, although the judgment which it is sought to set aside was rendered in equity. *Gelwicks v. Gelwicks*, 142 N. W. 409.

As to sufficiency of showing of diligence where the ground relied upon is newly discovered evidence, see notes to preceding section.

SEC. 4093. Motion to correct mistake or irregularity.

Under this section the remedy is by motion filed within a year; otherwise relief is to be sought by petition in equity. *Manning v. Nelson*, 107–34, 77 N. W. 503.

Motion to retax attorney's fee allowed in a judgment on foreclosure of a mortgage does not come within the provisions of this section. *Perry v. Kaspar*, 113–268, 85 N. W. 22.

The provision that proceedings to correct mistakes or omissions of the clerk must be instituted within one year has no application to a motion to correct the record for the purpose of an appeal which is governed by code § 4127. *Thompson v. Great Western Acc. Assn.*, 136–557, 114 N. W. 31; *Puckett v. Gunther*, 137–647, 114 N. W. 34; *First Nat. Bank v. Eichmeier*, 153–154, 133 N. W. 454.

A judgment which is irregular only on account of defect of parties should be attacked by motion or petition filed within one year. *Stewart v. Hall*, 150–744, 130 N. W. 993.

SEC. 4094. Petition.

Where the application for a new trial is made after the time allowed for granting new trials on motion it should be by petition, but if no objection on that ground is made the form of application will be immaterial. *State v. Stevenson*, 104–50, 73 N. W. 360.

Proceedings for correction of a judgment on grounds enumerated under § 4091, are to be by petition under this section, and the proceedings are to be commenced as those in any other original action. *Perry v. Kaspar*, 113–268, 85 N. W. 22.

After the expiration of the statutory period within which the party may have relief by asking for a new trial, a court of equity may give such relief as the party may show himself entitled to. *Johnson v. Nash-Wright Co.*, 121–173, 96 N. W. 760.

The provisions of this section relating to the setting aside of judgments and granting new trials, for grounds not available or discovered during the term, has no relation to an action in equity to set aside a void judgment constituting an apparent lien on plaintiff's real property. *Iowa Sav. & Loan Assn. v. Chase*, 118–51, 91 N. W. 807.

While in an ordinary action it is held that a motion for new trial after the term cannot be based on grounds that have been raised by an appeal in which the appellant has been unsuccessful on account of defect in his method of procedure, this rule has no application to new trial applied for within one year after the judgment in an action for the recovery of real property as authorized by code § 4205. *Bevering v. Smith*, 121–607, 96 N. W. 1110.

The pendency of an appeal from a judgment will not deprive the trial court of the right to entertain a petition for a new trial on the ground of newly discovered evidence, nor will an affirmance of appeal prevent the granting of such new trial. If the ruling on appeal is not determinative of the rights of the parties as disclosed in the proceedings for a new trial, failure to procure a continuance or stay of the appellate proceedings will not affect the right to a new trial. *Chambliss v. Hass*, 125–484, 101 N. W. 153.

A new trial cannot be granted on petition after the term where the grounds relied on were known to the petitioner before the trial of the original action. *Connell v. Connell*, 119–602, 93 N. W. 582.

The action must be commenced within the year by service of the notice on the defendant, as provided in code § 3514, relating to the commencement of actions, and not merely by placing the notice in the hands of the sheriff with intent that it be immediately served, as provided by code § 3450 with reference to the commencement of an action under the provisions of the general statute of limitations. *Hawley v. Griffin*, 121–667, 92 N. W. 113, 97 N. W. 86.

While the grounds specified for a new trial are exclusive, relief may be granted in a court of equity after the time fixed by statute has expired. *Wood v. Wood*, 136–128, 113 N. W. 492.

In the case of an insane person the petition for a new trial must be filed within a year after the removal of the disability. And such disability is removed by death, so that the personal representative has one year within which to institute the proceeding. *Ibid.*

Where a motion for new trial contains all the allegations necessary to a new petition, the objection that the remedy should have been asked by petition rather than by motion may be disregarded. *Wallace v. Wallace*, 141–306, 119 N. W. 752.

One who does not raise the question of duress within a reasonable time, as might be done under these statutory provisions, cannot afterwards have relief on account of such duress as against a decree affecting title to real property. *Kwentsky v. Sirovy*, 142–385, 121 N. W. 27.

A court of equity may grant relief as against a judgment after the expiration of the year, if the party seeking such relief has not been negligent. *Tuefel v. Wilson*, 152–559, 132 N. W. 846.

Newly discovered evidence is a ground for new trial which may be presented by petition under the provisions of this section although not made by motion filed within three days after the verdict. *Guth v. Bell*, 153–511, 133 N. W. 883.

Acts and declarations of the successful party subsequent to the trial inconsistent with his right to recover may be shown on such application. *Ibid.*

SEC. 4095. Proceedings.

The trial of a petition for new trial is to be as an ordinary action, whether the original case is at law or in equity, unless the parties in some way assent to a trial in equity. *Markley v. Owen*, 102–492, 71 N. W. 431; *Scott v. Hawk*, 105–467, 75 N. W. 368.

SEC. 4096. Valid defense.

The proper inquiry on an application to set aside a judgment is not whether defendant had a technical defense to plaintiff's action in that form, but rather wheth-

er he could show facts reasonably indicating that he was not indebted to the plaintiff. The purpose of the statute is to avoid opening up a judgment unless it appears to be in the interests of justice to do so. *Bank of Stratton v. Dixon*, 105–148, 74 N. W. 919.

Before setting aside the judgment under the statutory provision for vacating a judgment and granting a new trial after the term and within one year, the party seeking relief from the judgment must make a prima-facie showing of facts stating a defense to the cause of action on which judgment was rendered. *Johnson v. Nash-Wright Co.*, 121–173, 96 N. W. 760.

The party seeking to set aside the judgment must make it appear that he was not defeated in the original action by reason of any negligence on his part or on the part of his attorney. *Ibid.*

As alleging matters constituting a defense to the action, a mere general denial of liability is not sufficient. *Ibid.*

The statute does not contemplate the introduction of a new cause of action by the plaintiff nor of a counterclaim by the defendant. If a new trial is granted the defendant has the right to interpose any defense he may have had to plaintiff's cause of action, but not to interpose a counterclaim or cross demand not set up in the original action. *Hawley v. Griffin*, 121–667, 92 N. W. 113, 97 N. W. 86.

To secure the setting aside of a judgment by default on application made after the term and within one year, the applicant must show that he has a defense to the cause of action. *Culbertson v. Salinger*, 122–12, 97 N. W. 99.

The showing of defense must be such a state of facts as will likely defeat the claim upon which the judgment was based. *Ibid.*

It is a sufficient reason for upholding the order refusing a new trial after term, if the applicant makes no showing of a good defense to the cause of action. *Tschohl v. Machinery Mut. Ins. Assn.*, 126–211, 101 N. W. 740.

Minority of the defendant in an action for damages is no ground for defense, and although no defense was interposed in the original action by a guardian for such minor, the judgment will not be set aside at the suit of the minor without a showing of defense. *Reints v. Engle*, 130–726, 107 N. W. 947.

A defense to the action which would not have been available to the defendant at the time judgment was rendered cannot be interposed as a sufficient showing of defense when a new trial is asked. *Dooley v. Gladiator Consol. Gold Mines & M. Co.*, 134–468, 109 N. W. 864.

To justify the setting aside of a judgment under this section there must be something more than the mere allegation of a defense. *Andres v. Schlueter*, 140–389, 118 N. W. 429.

The application is to be determined as at law and the finding of the court is entitled to the same weight as the finding of a jury. *Ibid.*

The final merits of the defense pro and con are only to be determined upon a final trial, and in determining whether there is a sufficient showing of defense to warrant the granting of a new trial the court will not weigh the evidence with too great exactness but will take into account the clear tendency of the evidence and the apparent probability of the result of the trial on the merits. *Farmers' Exch. Bank v. Trester*, 145–665, 124 N. W. 793.

In a particular case, held that there had not been such want of diligence in failing to secure the evidence during the trial as to defeat the unsuccessful party relying on such evidence, newly discovered, as a ground for a new trial under this section. *Guth v. Bell*, 153–511, 133 N. W. 883.

SEC. 4098. Injunction.

Where the sole relief asked in an action to set aside a judgment is that it be declared null and void and the proceedings under it invalid, the injunction prayed for is not to be treated as merely auxiliary. *Mengel v. Mengel*, 145–737, 120 N. W. 72, 122 N. W. 899.

CHAPTER 2.

OF PROCEDURE IN THE SUPREME COURT.

SECTION 4100. Appellate jurisdiction over judgments.

Jurisdiction: Generally speaking, appellate tribunals derive their jurisdiction over any case from the law, and the parties cannot by consent confer jurisdiction. Moreover, when the legislature prescribes the method for the exercise of the right of appeal or supervision, such method is exclusive, and the appellate court cannot modify the action of the trial court except as thus authorized. *Home Sav. & T. Co. v. District Court*, 121–1, 95 N. W. 522.

Where there is no other remedy for re-

viewing the action of the trial court, appellate tribunals may investigate the validity of the action of the lower court in a certiorari proceeding. *Ibid.*

After the affirmance of a judgment on appeal the trial court has no authority or jurisdiction to tax as costs attorney's fees for services in prosecuting the case in the supreme court. Such attorney's fees, if taxable as part of the costs, must be so taxed in the supreme court. *Woodcock v. Wabash R. Co.*, 135–559, 113 N. W. 347.

The fact that by reason of some unavoidable casualty or misfortune a party is not able to present his case on appeal will not be a ground for awarding him a new trial. *Dumbarton Realty Co. v. Erickson*, 143–677, 120 N. W. 1025.

The original jurisdiction of the supreme court in a habeas corpus proceeding is limited to cases which involve a review of the action, order or judgment of an inferior court. *Ware v. Sanders*, 146–233, 124 N. W. 1081.

From what judgments: Statutes giving the right to appeal are uniformly held to apply to such judgments only as are rendered subsequent to their enactment. *Richardson v. Fitzgerald*, 132–253, 109 N. W. 866.

Abstract questions: The supreme court will not entertain an appeal for the purpose of deciding merely abstract questions. *Berry v. Des Moines*, 115–44, 87 N. W. 747.

Error in rendering a judgment for costs against one of several parties will not be reviewed on appeal where the costs have been paid by other parties before the taking of the appeal. *Arnold v. Wapello County*, 154–111, 134 N. W. 546.

Right no longer existing: An injunction denied in the lower court will not be granted on appeal where the right to be protected no longer exists, although it may have existed and the injunction may have been a proper remedy at the time of the trial. *Davis v. Boyer*, 122–132, 97 N. W. 1002.

A right of an official to an office after the expiration of the term involved, no property rights remaining to be determined, is not a question which the supreme court will consider. *Bethany Congregational Church v. Morse*, 151–521, 132 N. W. 14.

A court will not consider an appeal for the mere purpose of determining a question of taxation of costs. *Ibid.*

A case will not be reversed in order to have the lower court determine issues which were entirely dead. *Ibid.*

A case will not be reversed where the reversal would be of no practical effect with reference to the existence of future conditions. *Babbitt v. Alger*, 141 N. W. 915.

There must be real, present questions involving actual interests and rights of the parties to authorize the supreme court to consider an appeal. It will not settle questions which were involved in rights no longer existing. Therefore held that after the dismissal of a case in which a temporary injunction was granted, the court would not entertain an appeal for the purpose of determining whether the injunction was rightly granted as affecting the liability of appellant on the injunction bond. *Horrabin v. Iowa City*, 142 N. W. 212.

Findings of fact: The supreme court has no jurisdiction to correct the findings of fact made by the jury, and it cannot consider the sufficiency of evidence to support the verdict unless that question has been raised in the lower court. *Schulte v. Chicago, M. & St. P. R. Co.*, 124–191, 99 N. W. 714.

Final judgment: Where expressly or by implication the relief asked by plaintiff is denied in the judgment such judgment is against the plaintiff so that he has a right to appeal. *Floete v. Brown*, 104–154, 73 N. W. 483.

Where a judgment provided that it should not go into effect until five days after its date, and notice of appeal was served before the expiration of this period, held that the appeal was properly taken, as the stay, if it had any effect, only served to suspend enforcement and did not suspend the judgment itself. *Meredith v. Peterson*, 108–551, 79 N. W. 351.

The action of the court in improperly overruling a motion to dismiss an appeal from a justice of the peace on the ground that there is no competent surety to the appeal bond is a final judgment with reference to the jurisdiction of the court to entertain such appeal, and therefore the order overruling the motion is appealable. *Hudson v. Smith*, 111–411, 82 N. W. 943.

A modification of a final judgment, secured by appellee after the appeal is taken, does not operate to merge the judgment from which the appeal is taken so as to defeat such appeal. *Culbertson v. Salinger*, 111–447, 82 N. W. 925.

Although no final judgment can be entered in a proceeding to assess damages for railroad right of way, nevertheless the court may enter a judgment for costs and attorney's fees and from such a judgment an appeal will lie. *Klopp v. Chicago, M. & St. P. R. Co.*, 142–474, 119 N. W. 373.

On an appeal from the final judgment all interlocutory orders to which exceptions were taken may be reviewed. *Miller v. Kramer*, 148–460, 126 N. W. 931.

Entry of judgment: A memorandum of a judgment made by the judge is for the information and guidance of the clerk in making the proper entry; until such entry is made there is nothing from which an appeal will lie. *Kennedy v. Citizens' Nat. Bank*, 119–123, 93 N. W. 71.

While for some purposes a judgment or decree is held to have been made when the decision is announced by the judge or other presiding officer, or when reduced to writing and signed by the judge, yet for the purpose of appeal a judgment or decree is not rendered until entered of record as provided by statute. The abstract must show affirmatively the entry of an appealable judgment. *Martin v. Martin*, 125–73, 99 N. W. 719.

The transcribing of the judge's minutes of his decision into the court record by the clerk constitutes the entry of judgment. *Kuhlman v. Weiben*, 129–188, 105 N. W. 445.

An appeal will not lie from the judgment until that judgment has been entered of record. The memorandum of the judge on his calendar and the abstract of the judgment entered on the judgment docket do not constitute an appealable judgment. *Hoffman-Bruner Granite Co. v. Stark*, 132–100, 108 N. W. 329.

In the entry of a judgment the clerk should follow the memorandum made by the judge on his calendar not only with reference to the substance thereof, but also to the date; but for the purposes of appeal, the judgment has no validity until actually entered of record, and the record should show the date of entry. If the date of entry is not thus shown, the lower court on motion, even after an attempted appeal, should correct it so as to show the actual date. *Ibid.*

And see notes to §§ 288 and 4110.

Objection to the jurisdiction of the supreme court on the ground that there was no appealable judgment or decree may be first suggested on rehearing, and the appellant will not be allowed to amend the record so as to show jurisdiction. *Martin v. Martin*, 125–73, 99 N. W. 719.

There is no judgment from which an appeal can be taken until entry thereof has actually been spread upon the records of the court. *Thompson v. Great Western Acc. Assn.*, 136–557, 114 N. W. 31.

An entry upon the court journal dated and signed by the judge, reciting the granting of a decree to the plaintiff as prayed and judgment against the defendant for costs, with an exception by defendant, held an appealable judgment, although the formal decree was not entered on the court record until after the appeal was taken. *Owen v. National Hatchet Co.*, 147–393, 121 N. W. 1076, 126 N. W. 333.

Second appeal: After the dismissal of appeal by appellant, he may within the statutory period take a second appeal. *Stutsman v. Sharpless*, 125–335, 101 N. W. 105.

The dismissal of one appeal does not prevent the taking of a second appeal within the period prescribed by statute. *Snyder v. Richey*, 150–737, 130 N. W. 922.

After appellant has voluntarily dismissed his appeal, he may, within the statutory period, institute a second appeal. *In re Estate of Clark*, 151–511, 131 N. W. 700.

This is so even though the appellee has filed a motion to affirm before the appeal is dismissed. *Ibid.*

Who may appeal: After an adjudication of bankruptcy the bankrupt may in his own name by the consent of the trustee prosecute an appeal from a judgment rendered against him in an action in which he had sought to recover damages for personal injuries. *Christy v. Des Moines City R Co.*, 126–428, 102 N. W. 194.

An intervener has the right to appeal from a judgment entry prejudicial to his interest although the judgment does not specifically refer to the intervener. *In re Estate of Anderson*, 125–670, 101 N. W. 510.

An appeal will not lie from a finding of fact or law where the judgment is in favor of the party appealing. *In re Assignment of Jenks*, 129–139, 105 N. W. 396.

One who is not a party to a proceeding cannot appeal from an unauthorized judgment taxing him with the costs of such proceeding. *Yockey v. Woodbury County*, 130–412, 106 N. W. 950.

A county has no interest entitling it to appeal, in the absence of express statutory authority, in a drainage ditch case. *Gish v. Castner-Williams Etc. Drainage Etc.*, 136–155, 113 N. W. 757.

Party not appealing: The court has no jurisdiction to consider the correctness of the action of the lower court as affecting the rights of persons who have not appealed. *Moore v. Price*, 125–353, 101 N. W. 91.

The rights of parties who have not appealed or been made parties to an appeal cannot be affected by the decision of the appeal. *King v. Raab*, 123–632, 99 N. W. 306.

Waiver: Performance by a party of a judgment which would not be affected by the appeal will not constitute waiver of the appeal. *Mountain v. Low*, 107–403, 78 N. W. 55.

The action of the executor in settling the claims of attorneys for the guardian *ad litem* of the proponents of the will is not a waiver of the right to an appeal from the order admitting the will to probate. *Stutsman v. Sharpless*, 125–335, 101 N. W. 105.

Motion for judgment *non obstante veredicto* does not waive the right to complain of errors on appeal. *Cullison v. Lindsay*, 108–124, 78 N. W. 847.

Voluntary payment of a judgment waives the right of appeal, and payment in re-

demption will be voluntary if the party by asking a restraining order might have saved his rights, pending the appeal, without making redemption. *Manning v. Poling*, 114–20, 83 N. W. 895, 86 N. W. 30.

The payment of a judgment on execution is not a waiver of the right to have restitution if the judgment is reversed on appeal. *Chambliss v. Hass*, 125–484, 101 N. W. 153.

Where plaintiff, after rendition of judgment in his favor, accepts the amount of the judgment, a portion of which is in dispute, such plaintiff thereby waives the right to appeal from the judgment. *Ballinger v. Connecticut Mut. L. Ins. Co.*, 118–23, 91 N. W. 767.

The facts in a particular case held not sufficient to show waiver of the appeal by performance of the judgment. *Schoonover v. Osborne*, 108–453, 79 N. W. 263.

The fact that the jurisdiction of the court to enter an order has been questioned by certiorari does not operate as a waiver of the right to appeal from such order. *Porter v. Butterfield*, 116–725, 89 N. W. 199.

Accepting the provision of a decree in his favor does not waive the right of appellant to a review of the provisions of the decree which are against him. *In re Estate of Youngerman*, 136–488, 114 N. W. 7.

The payment of costs taxed on account of witnesses for the appellant will not constitute a waiver of the right of appeal. *Smith v. Ellyson*, 137–391, 115 N. W. 40.

Where a party is brought into the case to avoid multiplicity of suits he cannot, by accepting the benefits of the adjudication so far as he is concerned, deprive other parties of the right to prosecute an appeal. *Bennett v. Emmetsburg*, 138–67, 115 N. W. 582.

The fact that the attorney for appellant approved the form of the decree against him when it was presented by opposing counsel does not constitute such acquiescence in the decree as to estop such party from appealing. *Moore v. Crandall*, 146–25, 124 N. W. 812.

One who has not performed a judgment against him, nor accepted the benefit of such judgment, does not lose his right to appeal by prosecuting another action with reference to the same subject matter. *Smith v. Meeker*, 153–655, 133 N. W. 1058.

An acceptance of the amount of the judgment, about which there is no controversy on the appeal, does not waive the appeal as to a right of recovery which is in controversy. *Globe Machinery & Supply Co. v. Des Moines*, 156–267, 136 N. W. 518.

The acceptance by the county treasurer of the amount of an assessment made on appeal to the district court, with the reservation of the right to appeal to the supreme court, is not a waiver of such right. *In re Lightner, Lightner v. Board of Supervisors*, 156–398, 136 N. W. 761, 137 N. W. 462.

The fact that the successful party has issued execution will not bar an appeal by him after the unsuccessful party has appealed. *Boice v. Coffeen*, 157– —, 138 N. W. 857.

Payment of costs taxed against a party to a litigation is not a waiver of his right to have reviewed, on appeal, any one or more of the issues which the trial court has determined. *Boone v. Boone*, 137 N. W. 1059, 141 N. W. 938.

SEC. 4101. Appeals from orders.

In general: It is not the policy of the law to permit either party to a controversy to prolong litigation and embarrass the course of justice by prosecuting an appeal from every interlocutory ruling of the trial court. *State v. Des Moines City R. Co.*, 135–694, 109 N. W. 867.

As a general rule an appeal does not lie directly from a ruling denying a motion for verdict or from the verdict itself, or from a ruling denying a motion in arrest. The appeal should be from the judgment. *Bussell v. Ft. Dodge*, 126–308, 101 N. W. 1126.

Where, after the making of an order, the situation of the parties is materially changed by the presentation of new issues, the fact that the parties proceed to trial on the merits will not preclude an appeal from the order thus made. *Stewart v. Pierce*, 116–733, 89 N. W. 234.

The right to have an intermediate ruling reviewed on appeal from final judgment is not waived by failure to appeal from such ruling although an appeal therefrom is allowable. *Des Moines Sav. Bank v. Morgan Jewelry Co.*, 123–432, 99 N. W. 121.

Where an order is entered *nunc pro tunc*, the period within which an appeal may be taken from such order does not commence to run until the date of the *nunc pro tunc* entry. *In re Estate of Bishop*, 130–250, 106 N. W. 637.

An appeal from an intermediate order, although accompanied by the filing of a supersedeas bond, does not deprive the trial court of jurisdiction to proceed with the trial of the case. *First National Bank v. Dutcher*, 128–413, 104 N. W. 497.

An order made in probate proceedings that the executor file inventories of the real property, on application of the state treasurer, insisting that such property passing by devise was subject to collateral inheritance tax, held to be such intermediate order affecting a substantial right and involving the final decision as that an

appeal therefrom might be taken by the executor. *In re Estate of Stone*, 132–136, 109 N. W. 455.

Appeals may be taken from final orders in special actions affecting substantial rights therein. *Porter v. Butterfield*, 116–725, 89 N. W. 199.

The trial of an issue raised on an application for a permit to sell intoxicating liquors is a special proceeding and the granting or refusal to grant a permit is a final order from which an appeal may be taken. *In re Application of Smith*, 126–128, 101 N. W. 875.

No appeal lies from an order sustaining an application for the inspection of books and papers and directing the production of such documents. *Devier v. Economic L. Assn.*, 106–682, 77 N. W. 454.

No appeal can be taken from an entry of judgment against a garnishee which is not effectual for the reason that no judgment has yet been rendered against the principal defendant. *Hawarden State Bank v. Hessler*, 131–691, 109 N. W. 210.

When the time has passed within which an appeal may be taken from the judgment before an appeal is taken from the ruling on a motion for new trial, the supreme court has no jurisdiction to review any of the proceedings which culminated in the judgment and necessarily inhere therein. *McLaughlin v. Hubinger Bros. Co.*, 135–595, 113 N. W. 475.

On an appeal from a ruling on a motion for new trial taken within time after the ruling, the supreme court may review errors of law committed during the trial and raised by such motion, although the time for appealing from the final judgment has expired. (Overruling *McLaughlin v. Hubinger Bros. Co.*, 135–595.) *Mueller Lumber Co. v. McCaffrey*, 141–730, 118 N. W. 903; *Cox v. American Express Co.*, 147–137, 124 N. W. 202.

No appeal lies from a ruling on evidence. Such ruling can only be reviewed where the error inheres in the judgment and the appeal is brought to secure a reversal or modification of such judgment. *Siemonsma v. C., M. & St. P. R. Co.*, 137–607, 115 N. W. 230.

The lower court retains its jurisdiction to proceed with the trial of the case notwithstanding an appeal from an interlocutory ruling. *Wapello State Sav. Bank v. Colton*, 143–359, 122 N. W. 149.

Until there is a judgment to be appealed from or such ruling of the court as to prevent a final judgment against the party complaining, there can be no appeal from such intermediate order. *Eggert v. Interstate Inv. & Dev. Co.*, 146–481, 125 N. W. 246.

The action of the court in overruling a motion to direct a verdict in favor of a party cannot be reviewed on appeal where a verdict against him has been set aside and a new trial granted. *Ibid.*

Ruling on motion: An appeal may be taken from a ruling on a motion for new trial notwithstanding judgment has theretofore been entered. *In re Estate of Bishop*, 130–250, 106 N. W. 637.

A party is not obliged to appeal directly from a ruling on a motion, but may proceed to judgment and present his exceptions to intermediate orders on an appeal from the final result. *Parker v. Des Moines L. Assn.*, 108–117, 78 N. W. 826.

Where application for leave to amend after reversal and remand for a new trial is sustained, there is no right to appeal from the order as affecting a substantial right, but such a ruling is appealable as an intermediate order involving the merits or materially affecting the final decision if the amendment offered introduces a new and distinct cause of action. *Allen v. Davenport*, 115–20, 87 N. W. 743.

Action of the trial court in sustaining a motion to direct a verdict is an order from which an appeal may be taken. *Clark v. Van Loon*, 108–250, 79 N. W. 88.

An appeal lies from a ruling refusing to set aside an assignment of a cause for trial by jury, and to set it down for trial to the court. *In re Bradley*, 108–476, 79 N. W. 280.

Where the court sustained a motion striking from an answer as immaterial or redundant matter which constituted a defense, held that such ruling materially affected the final decision of the case and that an appeal therefrom was properly taken. *Mast v. Wells*, 110–128, 81 N. W. 230.

The sustaining of a motion to set aside default is not such an intermediate order as that an appeal may be prosecuted therefrom. *Odell v. Coquolette*, 103–435, 72 N. W. 670.

An order for a continuance is not appealable. *Suddeth v. Boone*, 121–258, 96 N. W. 853.

An order granting or refusing a new trial is expressly made appealable. *Powers v. Des Moines City R. Co.*, 143–427, 121 N. W. 1095.

No appeal will lie from action of the court granting a continuance, and on an appeal from the judgment the granting of such continuance will not be a ground of reversal if the case was finally tried on its merits. *Tisdale v. Ennis*, 144–306, 122 N. W. 959.

As a rule an appeal will not lie from a ruling on a motion to strike or for more specific statement. *Barnes v. Century Sav. Bank*, 147–267, 126 N. W. 174.

A ruling on a motion to strike out matter from a pleading is an appealable order. *Barnes v. Century Sav. Bank*, 149–367, 128 N. W. 541.

Where a motion to strike is resorted to merely as a pruning hook, a ruling on such motion is not subject to an independent appeal. *McNamara v. McAllister*, 150–243, 130 N. W. 26.

Ruling on demurrer: The action of the court in ruling on a demurrer is not a final judgment, and although the defeated party may appeal from such ruling as an intermediate order, he is not bound to do so and may wait until final judgment is rendered, and even though the ruling has been waived by pleading over, the trial court may allow the party to withdraw such pleading and elect to submit to final judgment on the ruling as to the demurrer. *Farmers & Merchants State Bank v. School Township*, 118–540, 92 N. W. 676.

A ruling sustaining a demurrer cannot be reviewed on an appeal expressly taken from such ruling, unless an exception has been preserved. *Hewes v. Stonebreaker*, 132–608, 109 N. W. 1092.

Temporary injunction: An appeal will lie from a refusal to grant a temporary injunction. *State v. Roney*, 133–416, 110 N. W. 604.

Appeal will lie from the action of the court in refusing a preliminary writ of injunction. *Donnelly v. Smith*, 128–257, 103 N. W. 776.

An order granting a temporary injunction is appealable. *Young v. Preston*, 131–292, 108 N. W. 463.

The ruling of the court on an application for a temporary injunction or on a motion to dissolve such injunction may be reviewed on appeal. *Swan v. Indianola*, 142–731, 121 N. W. 547.

An appeal lies from an order denying an application to continue a temporary restraining order restraining the enforcement of an execution and sustaining a motion to discharge a temporary order recalling execution. *Jefferson v. Rust*, 155–133, 135 N. W. 613.

In criminal cases: Under this section the action of the trial judge, under the provisions of code § 254 as to ordering a transcript of the shorthand notes in a criminal case at the expense of the county, is subject to review. *State v. Wright*, 111–621, 82 N. W. 1013.

An appeal will lie from an order in a criminal case denying the defendant a transcript at the expense of the county. *State v. Steidley*, 133–31, 110 N. W. 147.

No appeal lies in a criminal case from the granting or refusal of an intermediate order, or from a ruling which does not in itself state a final judgment. Under code § 5448, no appeal is authorized in a criminal case save from the final judgment. *State v. Sloan*, 131–676, 109 N. W. 190.

SEC. 4105. Motion to correct error.

In law actions the trial court must have had an opportunity to pass upon the matter as to which complaint is made, and the ruling when made must be excepted to and properly assigned as error. *Goldstein v. Morgan*, 122–27, 96 N. W. 897.

The insufficiency of evidence to support the verdict must be raised in the lower court and cannot for the first time be presented on appeal. *Schulte v. Chicago, M. & St. P. R. Co.*, 124–191, 99 N. W. 714.

A defendant, against whom judgment has been entered by default on service by publication which is defective, must raise the objection to the sufficiency of the service in the lower court, and if he does not do so, cannot rely upon the error on appeal. *Belknap v. Belknap*, 154–213, 134 N. W. 734.

This section applies only to such errors as, without motion, would not be called to the attention of the lower court. It is not necessary to urge by motion for new trial errors in instructions which have been duly excepted to on the trial. *Scott v. Chicago, R. I. & P. R. Co.*, 141 N. W. 1065.

SEC. 4106. Motion for new trial.

The fact that an exception to an instruction in a motion for a new trial is too general will not avail to defeat an exception properly taken at the time the instructions were given. *Ellis v. Leonard*, 107–487, 78 N. W. 246.

A motion for a new trial is not necessary to secure a review in the supreme court of exceptions that have otherwise been properly preserved. *Clement v. Drybread*, 108–701, 78 N. W. 235.

Errors in rulings on the admission of evidence are not waived by a failure to urge them in a motion for a new trial on other grounds. *Stewart v. Equitable Mut. L. Assn.*, 110–528, 81 N. W. 782.

The refusal of instructions asked, which refusal is relied upon as error, may be considered on appeal although not urged before the trial court on a motion for new trial. *Schulte v. Chicago, M. & St. P. R. Co.*, 124–191, 99 N. W. 714.

While the motion for new trial is not necessary to enable one unsuccessful party to secure a review of any order or judgment of the trial court, it is necessary in order to enable the trial court to review the question of sufficiency of evidence to support the verdict. Such a question must be presented to the lower court and a ruling thereon secured in order to justify a review on appeal. *Ibid.*

The correctness of any ruling made during the trial may be raised by motion for

new trial and the party interposing such motion is entitled to a ruling thereon, although the motion may not be necessary to entitle appellant to a reviewal of the rulings complained of. *Mueller Lumber Co. v. McCaffrey*, 141–730, 118 N. W. 903; *Cox v. American Express Co.*, 147–137, 124 N. W. 202.

There is no occasion for a motion for new trial in order to raise, in an equitable case, the validity of a decree as against one who is not a party to the proceedings. *State v. Kelly*, 151–264, 130 N. W. 1088.

Insufficiency of the service on which a judgment by default is rendered cannot be raised on appeal from the judgment unless the objection has in some form been made in the trial court. *Belknap v. Belknap*, 154–213, 134 N. W. 734.

Where objections to the action of the lower court have been otherwise properly raised, it is not necessary that objections be again raised by a motion for new trial in order to authorize the supreme court on appeal to pass upon such objections. *Underwood v. Oskaloosa Traction & Light Co.*, 157– —, 137 N. W. 933.

It is unnecessary to file a motion for a new trial in order to secure a consideration on appeal of errors based on exceptions taken at the trial. *Scott v. Chicago, R. I. & P. R. Co.*, 141 N. W. 1065.

SEC. 4107. Finding of facts—evidence certified.

Findings of fact are no longer essential to a review of a judgment or order, and when made may be assailed by the appellee as not warranted by the evidence in order to sustain the judgment of the trial court. *Commercial Nat. Bank v. Gilinsky*, 142–178, 120 N. W. 476.

SEC. 4108. Title of cause.

Where no prejudice appears from error in entitling the case as docketed, an error in docketing will be immaterial. *In re Application of Dugan*, 129–241, 105 N. W. 514.

SEC. 4109. Process.

The supreme court has authority to enter orders to preserve the status with respect to property litigation until the determination of the appeal. *Manning v. Poling*, 114–20, 83 N. W. 895, 86 N. W. 30.

As to power of the supreme court to issue restraining orders, see notes to code § 4128 in this supplement.

SEC. 4110. Time for appealing—amount in controversy—certificate.

Time for taking: In a law action, in which nothing but a claim for money is involved, there is no final disposition of the case until the amount is ascertained and fixed. *Baird v. Omaha & C. B. R. & B. Co.*, 111–627, 82 N. W. 1020.

The time for taking an appeal runs from the entry of the judgment of record regardless of when the judgment is orally announced or indicated by a signed decree. For some purposes the judgment may relate back, but not in respect to procedure essential to procuring a review. *Stutsman v. Sharpless*, 125–335, 101 N. W. 105.

There is no appealable judgment until an entry thereof is made of record, and the time for taking the appeal commences to run from the date of the entry of the judgment as recited in the record. *Greazel v. Price*, 135–364, 112 N. W. 827.

The time for appeal dates from the time of the entry of the judgment as shown by the record entry thereof. *Groendyke v. Musgrave*, 123–535, 99 N. W. 144.

And see notes to §§ 288 and 4100.

Where the clerk enters judgment on the verdict of the jury without express direction, the time for taking appeal runs from the date of such entry, although the attorneys subsequently ask the court to approve a different form of judgment entry. *Burlington v. Fear*, 116–299, 89 N. W. 1074.

The fact that a party has attempted to perfect an appeal within the proper time, and by reason of the failure to take proper steps has subsequently dismissed such appeal, does not preclude the perfecting of a subsequent appeal within the time allowed. *Groendyke v. Musgrave*, 123–535, 99 N. W. 144.

Failure of the official reporter to furnish the appellant the transcript of the evidence in an equity action in time to file the same within six months of the entry of the decree is not a ground for new trial where it appears that the appellant was not diligent in procuring such transcript. *McKinley v. McKinley*, 123–574. 99 N. W. 162.

The time of taking an appeal is a jurisdictional fact and must affirmatively appear. The court will determine for itself whether the case is one of which it has jurisdiction, in view of the time at which the appeal is taken. *McLaughlin v. Hubinger Bros. Co.*, 135–595, 113 N. W. 475.

On a timely appeal from a ruling on a motion for new trial the court may consider the questions thus raised, although the same questions might have been raised in an appeal from the judgment, the time for such appeal having expired. (Overruling *McLaughlin v. Hubinger Bros. Co.*, 135–595.) *Mueller Lumber Co. v. McCaffrey*, 141–730, 118 N. W. 903; *Powers v. Des Moines City R. Co.*, 143–427, 121 N. W. 1095; *Cox v. American Express Co.*, 147–137, 124 N. W. 202.

Failure to appeal until near the expiration of the period allowed for appeal does not constitute laches as against another party who might also have protected himself by appeal. *Jefferson v. Century Sav. Bank*, 143–83, 120 N. W. 308.

The act of 33 G. A., ch. 205, relating to premature appeals, has no application in a case where the right to appeal had already expired when the act took effect. *Ford v. Lenander*, 145–106, 123 N. W. 746.

Notwithstanding the amendment of § 4114 by 33 G. A., ch. 205, the time for taking appeal does not begin to run from the announcement of the judgment but from the time that it is spread on the record. *Sievertsen v. Paxton-Eckman Chem. Co.*, 133 N. W. 744, 142 N. W. 424.

Amount in controversy: To defeat the jurisdiction it must appear from the pleadings that the case is one in which the amount in controversy does not exceed one hundred dollars. Where no amount is shown the appellate jurisdiction exists. *First Nat. Bank v. Bourdelais*, 109–497, 80 N. W. 553.

The amount in controversy is determined by the pleadings, and not by the judgment appealed from. *Hancock v. Hancock*, 134–475, 109 N. W. 1009.

If the amount claimed is more than one hundred dollars there is a right of appeal though the judgment is for only one hundred dollars. The amount of judgment rendered does not determine the jurisdiction on appeal. *Wald v. Wald*, 124–183, 99 N. W. 720.

Where actions brought by different plaintiffs against the same defendant are by consent of parties or order of court consolidated and tried together, the amount in controversy is the aggregate of the claims made in the separate actions. *Comstock v. Eagle Grove*. 133–589, 111 N. W. 51.

Where instead of bringing separate actions all the parties having a like interest join in the bringing of one action, the amount in controversy is the aggregate of the amounts claimed by the parties so joining. *Ibid.*

Where the amount claimed by the plaintiff exceeds one hundred dollars the defendant, who has resisted plaintiff's claim and interposed a counterclaim, may appeal from a judgment in plaintiff's favor although the amount of his counterclaim does not exceed one hundred dollars. *Schultz v. Ford*, 133–402, 109 N. W. 614.

A remittitur filed after judgment has been entered is too late to affect the amount in controversy, so far as the right of appeal is concerned. *Kennedy v. Citizens' Nat. Bank*, 128–561, 104 N. W. 1021.

The provisions of this section, preventing a party from reducing by remittitur the amount in controversy for the purpose of defeating appeal to the supreme court, have no application to appeals from justices of the peace under code § 4547. *Rust v. Olson*, 113–571, 85 N. W. 799.

Where the appeal involved only the validity of certain acts of township trustees as fence viewers, determining an indefinite liability as to the maintenance of a partition fence, held that it did not appear that the amount in controversy was less than one hundred dollars and that the appeal would lie. *Miles v. Tomlinson*, 110–322, 81 N. W. 587.

The amount of plaintiff's claim and that of defendant's counterclaim may be considered together in determining whether the amount in controversy exceeds one hundred dollars. *Davis v. Laughlin*, 147–478, 124 N. W. 876.

Where a permanent injunction is asked to restrain the payment of indefinite sums of money in the future, the case is not one in which it appears that the amount in controversy does not exceed one hundred dollars. *Ibid.*

Where the plaintiff has prayed for and obtained a judgment in a justice's court for one hundred dollars, he cannot, without certificate, appeal from the refusal of the district court to dismiss the appeal from the justice's court. *Griggs v. Norman*, 155–132, 135 N. W. 576.

If the amount in controversy in a justice's court is not in excess of one hundred dollars, so that the justice has jurisdiction, then there can be no appeal without a certificate to the supreme court from the judgment of the district court on appeal from the justice's judgment; while if the amount in controversy in the justice's court is in excess of one hundred dollars, then the judgment was entered without jurisdiction and the supreme court acquires no jurisdiction on such an appeal. *Orchard v. Kirk*, 156–374, 136 N. W. 666.

Certificate: Under the code of '73 it was held that the certificate must set out the very point to be determined, without requiring the examination of the record and the proceedings. *Sloss v. Bailey*, 104–696, 74 N. W. 17.

While this section dispenses with many things previously required in the certificate of appeal where the amount in controversy is less than one hundred dollars, it does not dispense with the assignment

of errors and other matters essential to a proper presentation of the appeal to the supreme court. *Kistner v. Conery*, 109–439, 80 N. W. 522.

Although the certificate attempts to recite the question to be decided, nevertheless if it in effect allows an appeal it is sufficient. *Percival v. Strathman*, 112–747, 84 N. W. 929.

The certificate is required to be made during the trial term. *Pollock v. Milburn*, 112–528, 84 N. W. 521.

The trial judge should not grant a certificate for appeal where the amount in controversy does not exceed one hundred dollars unless the questions raised by the records are of such a character as to call for adjudication by the supreme court. *Wood v. Griffith*, 141–314, 119 N. W. 745.

The certificate required for an appeal in cases involving an amount in controversy not exceeding one hundred dollars, is of the cause and not of the questions to be decided. *Fritz v. Snider*, 147–352, 126 N. W. 336.

A certificate granted by the court is sufficient under this section. *Salinger v. Western Union Tel. Co.*, 147–484, 126 N. W. 362.

SEC. 4111. Appeal by coparties.

Service of notice of appeal on a coparty is not required to give the supreme court jurisdiction where the interests of such coparty are wholly separate from those of appellant and would not be affected by the decision of the appeal. *Mason v. Des Moines*, 108–658, 79 N. W. 389; *Ward v. Walker*, 111–611, 82 N. W. 1028.

A failure to serve notice of appeal upon coparties is not jurisdictional, but the court cannot in such case consider any question the determination of which would work prejudice to the parties upon whom notice is not served. *Clayton v. Sievertsen*, 115–687, 87 N. W. 412; *Bowman v. Besley*, 122–42, 97 N. W. 60; *Ewart v. Ewart*, 126–219, 101 N. W. 869; *Oliver v. Perry*, 131–654, 109 N. W. 183; *Beem v. Farrell*, 135–670, 113 N. W. 509; *Westcott v. Sioux City*, 141–453, 119 N. W. 749; *Snyder v. Richey*, 150–737, 130 N. W. 922.

Failure to serve notice of appeal upon coparties does not deprive the court of jurisdiction, although it may constitute a reason why the appeal should not be considered. *Reed v. Cunningham*, 121–555, 96 N. W. 1119.

Failure to serve notice of appeal on a party whose rights would be affected by a reversal of the judgment below will deprive the appellate court of jurisdiction. *Dillavou v. Dillavou*, 130–405, 106 N. W. 949.

In partition suits, where there are several parties plaintiff and defendant, and one of these appeals, notice of appeal must be served on the coparties. But failure to give such notice is not jurisdictional and the supreme court can consider such questions in the case as do not affect the rights or interests of the other parties. *Lippold v. Lippold*, 112–134, 83 N. W. 809.

Where but one ruling has been made on demurrers of different defendants to plaintiff's petition, and a joint judgment has been rendered against the parties thus demurring, they may join in one notice of appeal from such judgment. *Thornburg v. Cardell*, 123–313, 95 N. W. 239, 98 N. W. 791.

Notwithstanding this provision one notice of appeal may be served in behalf of two or more parties against whom a judgment has been rendered, although they do not have a common interest. *Ibid.*

The statute only requires service on such coparties as may be prejudicially affected by a reversal of the judgment or ruling from which the appeal is taken. *Sullivan v. Sullivan*, 139–679, 117 N. W. 1086.

While the failure to serve coparties does not prevent the supreme court from acquiring jurisdiction if there is a notice of appeal which is sufficient as to adverse parties, nevertheless the court will, on proper objection being made, refuse to entertain the appeal if the coparties not served might be prejudicially affected by a reversal of the judgment from which the appeal is taken. *In re Will of Downs*, 141–268, 119 N. W. 703.

The statutory rule is that coparties not joined in an appeal must be served with a notice thereof, and the exception has no application unless it has been made to appear that the interest of such parties cannot be prejudicially affected. *Ibid.*

Notice on the appearance docket of the return of service as provided by code § 290 is not necessary to charge an appealing party with notice as to what parties are entitled to notice of appeal. *Ibid.*

One whose rights are not involved in the issues raised in the lower court and who therefore cannot be affected by a review of the judgment need not be served with notice of the appeal. *Capital Food Co. v. Globe Coal Co.*, 142–134, 120 N. W. 704.

Where the rights of all parties are so interwoven that the determination of the rights of one will of necessity determine the rights of others, a judgment on demurrer should not be reversed on appeal without notice to all parties interested in sustaining such judgment. *Dillavou v. Dillavou*, 142–291, 120 N. W. 628.

An appeal cannot be maintained in which coparties whose interests will be affected by a reversal of the decree do not join, unless notice has been served on

such parties. *Black v. Chase*, 145–715, 122 N. W. 916.

Where notice of appeal is addressed to and served on the attorneys representing all the defendants and appellees, this is a sufficient notice within the provisions of this section. *Hickey v. Webster County*, 148–337, 127 N. W. 658.

The fact that the defendant was served with notice of the suit outside the state will not obviate the necessity of serving notice of appeal on him as a coparty if his interest in the matter may be affected by the result of the appeal. *Tukey v. Foster*, 138 N. W. 862.

Without proper notice on coparties, the supreme court is without jurisdiction to pass on issues the decision of which may prejudicially affect the interest of parties not served with notice of the appeal. *Ibid.*

In an action against two partners in which judgment is rendered against one by default and against the other as the result of a trial, the latter may appeal without serving notice upon the defaulting partner, as the adjudication, whatever it may be, will not be binding as between such partners with reference to the settlement of their partnership affairs. *First Nat. Bank v. Casey*, 138 N. W. 897.

SEC. 4113. Part of judgment or order.

An appeal from a portion of a decree in no way affects the portion not appealed from. *State v. Fidelity L. & T. Co.*, 113–439, 85 N. W. 638.

These provisions permitting an appeal from a part of a judgment or decree carry the clear implication that he who avails himself of that right and appeals from a distinct part of the adjudication against him may conform to all other parts thereof without waiving his appeal. *Boone v. Boone*, 137 N. W. 1059, 141 N. W. 938.

SEC. 4114. Notice. An appeal is taken and perfected by the service of a notice in writing on the adverse party, his agent, or any attorney who appeared for him in the case in the court below, and also upon the clerk of the court wherein the proceedings were had, stating the appeal from the same, or from some specific part thereof, defining such part. When such service cannot be made the trial court or judge on application shall direct what notice shall be sufficient. Notice of appeal shall not be held insufficient because served before the clerk of the trial court has spread the judgment entry upon the court record if it shall appear that such entry has been made in proper form before the appellant's abstract was filed in the office of the clerk of the supreme court. [33 G. A., ch. 205, § 1.] [31 G. A., ch. 158; C. '73, § 3178; R. § 3509; C. '51, § 1974.]

Sufficiency: A notice of appeal advising the opposite party that appellant appeals from the "rulings and judgments" of the district court rendered on certain specified dates, is sufficient to admit a review of the final judgment, although the date given is erroneous by reason of mistake. *Parker v. Des Moines L. Assn.*, 108–117, 78 N. W. 826.

The court is limited on appeal to the consideration of the judgment or order specified in the notice of appeal. *Yockey v. Woodbury County*, 130–412, 106 N. W. 950.

A notice of appeal "in the above cause" held to be sufficient to give the supreme court jurisdiction to determine the correctness of the final judgment rendered in such case. *Augustine v. McDowell*, 120–401, 94 N. W. 918; *Merrill v. Timbrell*, 123–375, 98 N. W. 879.

A notice of appeal will be liberally construed, and if it is sufficiently definite for a reasonably certain identification of the judgment, order or decision appealed from, it is good. *In re Application of Dugan*, 129–241, 105 N. W. 514.

A clerical error in reciting the name of the party taking the appeal will not render the notice fatally defective where the identity of the party is made clear by the language of the notice taken as a whole. *Heinz v. Roberts*, 135–748, 110 N. W. 1034.

The notice of appeal must be addressed to the person upon whom it is served in order to make the service on him effectual. *In re Estate of Anderson*, 125–670, 101 N. W. 510.

No particular form of notice is required, and the fact that it is headed "In the supreme court of Iowa" will not render it insufficient although as it is to be filed with the clerk of the district court it should properly be entitled as in the district court. *Douglass v. Agne*, 125–67, 99 N. W. 550.

Parties against whom a single judgment is rendered may appeal by serving one notice in behalf of all of them, although they have not a common interest. *Thornburg v. Cardell*, 123–313, 95 N. W. 239, 98 N. W. 791.

Where the abstract of the appellant states the fact of appeal in general terms

but does not set out the notice, and the appellee does not make the terms of the notice appear in an amended abstract, the appellee cannot object that it does not appear that the notice was in writing nor that the appeal was from any particular order or judgment nor that the notice was served as required by law. *Dolan v. Midland Blast Furnace Co.*, 126–254, 100 N. W. 45.

It is not essential to the notice that any date of the judgment be specified, there being but one judgment in the case; nor will a mere mistake in specifying the wrong date of the judgment operate to defeat the jurisdiction of the supreme court. *Henderson v. Board of Supervisors*, 153–283, 153–470, 133 N. W. 671, 672.

A clerical error in entitling a notice "in the supreme court" held immaterial, there being enough in the notice to indicate the case and the judgment or order appealed from. *In re Lightner, Lightner v. Board of Supervisors*, 156–398, 136 N. W. 761, 137 N. W. 462.

The notice need not be addressed to the clerk of the district court by name. *Ibid.*

The acceptance of service by the clerk of the district court and the filing of the notice by him are sufficient to constitute the service upon such clerk. *Ibid.*

A minor defendant against whom judgment has been rendered without defense by guardian may, by service of notice of appeal, give the supreme court jurisdiction to entertain such appeal although the minor may subsequently disaffirm his action. The fact that the notice is not by guardian is not a ground for dismissing the appeal. *First Nat. Bank v. Casey*, 138 N. W. 897.

Signature: A notice of appeal not signed by the appellant or attorneys for him is without validity and confers no jurisdiction, even though service of such notice is accepted by attorneys for appellee. *State Sav. Bank v. Ratcliffe*, 111–662, 82 N. W. 1011.

Where by the caption of the notice of appeal and the description of the judgment therein it appeared that the appeal was by a railroad company, defendant properly named, held that the signature of the notice of appeal by attorneys designating themselves as attorneys for the company described only by the initials of its name was sufficient. *Rickel v. Chicago, R. I. & P. R. Co.*, 112–148, 83 N. W. 957.

An attorney may act for his client in giving notice of appeal, and a notice signed by appellant's attorney for and on behalf of his client is sufficient. *Hogueland v. Arts*, 113–634, 85 N. W. 818.

There is no requirement that the notice be signed by the appellant in person, nor that his name be signed by his attorney or agent. It is sufficient if it be signed by his attorney as such. *In re Oldfield's Estate, Bowie v. Trowbridge*, 157– —, 138 N. W. 846.

Service on attorney: Where a notice of appeal is in fact served upon an attorney who has appeared in the case below and whom the record shows to be still an attorney in the case, it is sufficient to give the supreme court jurisdiction of the appeal. *American Emigrant Co. v. Long*, 105–194, 74 N. W. 940.

Service on clerk: Service on the deputy clerk is sufficient. *Cullison v. Lindsay*, 108–124, 78 N. W. 847.

Securing clerk's fees: Under § 3179 of the code of '73, held that the provision relating to security for clerk's fees was for the benefit of that officer and might be waived by him. *Varnum v. Winslow*, 106–287, 76 N. W. 708.

A second notice of appeal served while the case is pending in the supreme court under a previous notice is of no effect. *Newberry v. Getchell & Martin L. & M. Co.*, 106–140, 76 N. W. 514.

Effect as to jurisdiction of lower court: After appeal from a final judgment the district court has no further right to proceed in the case. *Stillman v. Rosenberg*, 111–369, 82 N. W. 768.

The trial court has jurisdiction to correct the record, even after an appeal has been taken to the supreme court. *Porter v. Butterfield*, 116–725, 89 N. W. 199.

After an appeal the district court has no right to entertain a motion to correct an error in the proceedings. *Guinn v. Iowa & St. L. R. Co.*, 131–680, 109 N. W. 209.

Failure to file the case for the term specified in the notice is not ground for dismissal of the appeal. *Hoff v. Shockley*, 122–720, 98 N. W. 573.

Party not served: Where a party to the record is not served with notice of appeal, the appeal cannot be prosecuted as to him, and no relief based on the reversal of the judgment against him can be granted in the appellate court. *Baxter v. Rollins*, 110–310, 81 N. W. 586.

Attorneys who have become interested in the judgment by agreeing to present the case upon appeal for a contingent fee are not parties in such sense as to be entitled to notice of appeal. *Harrison v. Palo Alto County*, 104–383, 73 N. W. 872.

In an appeal by a minor represented by a next friend it is not necessary that notice of appeal be served on the next friend. *Douglass v. Agne*, 125–67, 99 N. W. 550.

Where in an action against two defendants there has been an amendment to the petition so that the claim is against one defendant alone, a notice of appeal served on such defendant in whose favor an individual judgment has been rendered will be

sufficient. *Padden v. Clark*, 124–94, 99 N. W. 152.

Persons interested but who are not parties to the record need not be served with notice of appeal. *In re Estate of Sawyer*, 124–485, 100 N. W. 484.

In an action against an unincorporated association as such, service of notice of appeal on one member does not give the court jurisdiction, either as to the association or as to other members. *Hanley v. Elm Grove Mut. Telephone Co.*, 150–198, 129 N. W. 807.

Time: Notwithstanding the amendment of this section by 33 G. A., ch. 205, the time for taking appeal does not begin to run from the announcement of the judgment but from the time that it is spread on the record. *Sievertsen v. Paxton-Eckman Chem. Co.*, 133 N. W. 744, 142 N. W. 424.

SEC. 4115. Service.

The signature to the acknowledgment of service of notice of appeal, when dated and in proper form, will be presumed genuine. *Black v. Chase*, 145–715, 122 N. W. 916.

The fact that the notice of appeal is not addressed to the clerk of the court does not render it insufficient where it appears that it has been filed with him. *Bloom v. Sioux City Traction Co.*, 148–452, 126 N. W. 909.

Where an attorney authorized to represent one of two defendants who has answered, accepts service of the notice of appeal as "attorney for defendants," the service will be regarded as sufficient as to the defendant not answering, where it is not made to appear that the attorney had no authority to act for him. *First Nat. Bank v. Eichmeier*, 153–154, 133 N. W. 454.

SEC. 4116. Term for submission.

The first term to which the appeal can be taken in the absence of an agreement must necessarily begin thirty days or more after the notice of appeal has been served. *Hanson v. Hammell*, 107–171, 77 N. W. 839.

SEC. 4118. Abstracts.

Form: Under rule 30 of the supreme court, the decree may be affirmed where the appellant does not present a proper abstract. It is improper to embody in the abstract the entire evidence, or a greater portion of it by questions and answers copied from the transcript of the evidence, setting out irrelevant matter. *Phillips v. Crips*, 108–605, 79 N. W. 373.

Where appellant's abstract is a complete transcript of the evidence, setting out every question and answer, the court will affirm the judgment below on that ground alone. *Hurley v. Hurley*, 117–621, 91 N. W. 895.

A disregard of the rule as to printing abstracts, consisting in the presentation of the evidence by question and answer, as contained in the transcript of the reporter's notes, is a ground for affirmance. *Cressey v. Lochner*, 109–454, 80 N. W. 531.

Under rule 53, the testimony of each witness should be presented in narrative form so far as practicable, and there is no occasion in the argument to repeat by condensed statement the testimony of each witness separately. *In re Wiltsey's Will*, 135–430, 109 N. W. 776.

Brevity in an abstract is not only a commendable quality, so long as all material matters are presented, but it is expressly enjoined by rules 30 and 31 of the supreme court. *Howard v. Pratt*, 110–533, 81 N. W. 722.

An abstract is an abbreviated or condensed statement in narrative form where possible of the material parts of the record, and it is not necessary that it disclose the cross-examination of the witnesses. Therefore, the fact that an abstract does not specifically show such cross-examination is not enough to indicate that the entire record is not before the court. *Wolf v. Des Moines Elevator Co.*, 126–659, 98 N. W. 301, 102 N. W. 517.

It is not necessary that the names of appellant's counsel be affixed at the end of the abstract where it appears to have been made in the usual way and the names of counsel in the case appear on the first page. *Alston v. Alston*, 114–29, 86 N. W. 55.

The rule as to numbering the lines of the abstract will be strictly enforced where timely objection is made and it appears that its enforcement would be of practical advantage to the appellee or to the court. But some discretion is reserved as to its enforcement when the case is before the court for final adjudication. *Iowa City v. Glassman*, 155–671, 136 N. W. 899.

Where the appellant moves to strike out an amendment to the abstract on the ground that it is not indexed and the lines thereof are not numbered as required by the rules, the court may tax the costs to the appellee. *In re Oldfield's Estate, Bowie v. Trowbridge*, 157– —, 138 N. W. 846.

Should contain what: Jurisdictional facts, such as service of notice of appeal, must appear in the abstract. *Clayton v. Sievertsen*, 115–687, 87 N. W. 412.

It is unnecessary to set out the notice of appeal in full in the abstract, and an allegation of due service of notice of appeal if undenied is sufficient. *Stearns Paint Mfg. Co. v. Comstock*, 121–430, 96 N. W. 869.

The statement in the abstract that appellant "served due, legal and timely notice of appeal" is sufficient, without setting out the formal notice. *Oxford State Bank v. Holscher*, 115–196, 88 N. W. 360.

An amended abstract showing that some of the parties have not been served with notice of appeal does not raise a jurisdictional question. *Reed v. Cunningham*, 121–555, 96 N. W. 1119.

Where the abstract contains a statement that judgment was duly entered, which statement is undenied, appellee cannot complain that the record entry is not set out in full. *Hawkeye Ins. Co. v. Huston*, 115–621, 89 N. W. 29.

When the abstract recites the rendition of a judgment or decree it will be presumed, in the absence of a showing to the contrary, that it is such a one as is appealable, but where the abstract recites just what was done and affirmatively shows no appealable judgment or decree, there is no room for presumption of jurisdiction to entertain the appeal. *Martin v. Martin*, 125–73, 99 N. W. 719.

If the abstract shows that there was no appealable judgment the objection to the jurisdiction of the court may be suggested for the first time in a petition for rehearing, and the appellant will not be entitled then to present an additional abstract showing an appealable judgment, as the rehearing must be determined on the record presented on the first submission. *Ibid.*

Where it appears that the material evidence of a witness has not in any manner been preserved, the abstract presenting such evidence should be stricken from the files. *Monroe County v. Abegglen*, 129–53, 105 N. W. 350.

A recital in an abstract as to the appearance and characteristics of instruments introduced in evidence, which the jury was authorized to take into account and which must be taken into account in understanding the weight which should be given to the evidence, should not be stricken out on motion. *Porter v. Madrid State Bank*, 155–617, 136 N. W. 666.

Additional abstract—when proper: Additions which the appellee thinks necessary may be made to appellant's abstract by way of amendment; but unless they are so numerous or so fundamental as to justify a new abstract of the entire evidence, the appellee's additional abstract should only contain such additional matter as is necessary to suppply the omissions in the appellant's abstract. *Dale v. Colfax Consolidated Coal Co.*, 131–67, 107 N. W. 1096.

Under particular circumstances, held that an amendment to the abstract by the appellee filed after appellee's argument would not be stricken from the files. *Hickey v. Davidson*, 129–384, 105 N. W. 678.

It is proper to set out in an amended abstract the report of a referee on which the decree appealed from is based. *McCormick Har. Mach. Co. v. Pouder*, 123–17, 98 N. W. 303.

An amendment which supplies a part of the record proper for consideration by the supreme court will not be stricken from the files on motion. *Loesche v. Goerdt*, 123–55, 98 N. W. 571.

While ordinarily the abstract should be complete before the adverse party is required to argue, yet it often happens that an amendment is made necessary by the presentation in argument of a question not raised in the lower court, and in such case it is the rule to permit an amendment which will show the true record on the point thus made. *Biglow v. Ritter*, 131–213, 108 N. W. 218.

An amended abstract which sets out only immaterial matters may be stricken from the files. *Leathers v. Oberlander*, 139–179, 117 N. W. 30.

An amendment presenting the record so as to show that the appeal is premature will not be stricken from the files, although filed after the time prescribed by the rules, as a question of jurisdiction may be raised at any time. *Ford v. Lenander*, 145–106, 123 N. W. 746.

The appellee may in an amendment to his abstract set up portions of the record which have not apparently become important until after the filing of appellant's argument. *De Lashmutt v. Chicago, B. & Q. R. Co.*, 148–556, 126 N. W. 359.

The setting up of additional portions of the record in an amended abstract with a specific statement that the record in the original abstract as amended in the additional abstract is not sufficient to warrant an appeal, is not a waiver of the objection that under the record the appeal cannot be considered. *Doyle v. Duckworth*, 149–623, 129 N. W. 59.

An amendment to the abstract for the purpose of making clear the record as to a matter not apparently of importance until appellee's argument is filed, should not be stricken out on motion. *Zenor v. Smith*, 150–424, 130 N. W. 382.

Where a question is raised as to the preservation of the shorthand notes so as to constitute a bill of exceptions, and the appellant then proceeds in the trial court to have a correction of the record so as to

show that the record was properly preserved, he may in an amended abstract filed after the time provided by the rules for filing such abstract, present the record as thus amended. *Swanson v. Ft. Dodge, D. M. & S. R. Co.*, 153–78, 133 N. W. 351.

A party is not required to waive the contention that the evidence has not been duly certified or amend the abstract, but may both amend and deny and if the denial is unavailing, may enjoy the advantage of having the omitted testimony before the court. *First Nat. Bank v. Eichmeier*, 153–154, 133 N. W. 454.

Appellee's amendment to the abstract not served upon appellant should be stricken on motion. *Chismore v. Van Roden*, 151–270, 130 N. W. 1090.

Costs: Where the appellee without any occasion for doing so made an abstract of the evidence in the case, the abstract presented by the appellant being proper and sufficient for all purposes, held that on motion in the supreme court the costs of the additional abstract should be taxed to appellee. *McWhirter v. Crawford*, 104–550, 72 N. W. 505, 73 N. W. 1021.

An amended abstract which is proper to supply omissions in the original abstract will not be taxed to the appellee if he is the successful party. *Wilkie v. Sassen*, 123–421, 99 N. W. 124.

An amended abstract containing needless repetition of matter sufficiently set forth in appellant's abstract may be stricken from the files on motion and the costs thereof taxed to the appellee. *Wissler v. Atlantic*, 123–11, 98 N. W. 131.

The costs of an abstract presenting matters which cannot be considered will be taxed to the party filing such abstract. *Farmers' Sav. Bank v. Independent School District*, 122–99, 97 N. W. 988.

An abstract or amendment which unnecessarily sets out questions and answers may be properly taxed in part to the party filing it. *Deering v. Beatty*, 107–701, 77 N. W. 325; *Plagge v. Mensing*, 126–737, 103 N. W. 152; *Ostenson v. Severson*, 126–197, 101 N. W. 789.

Where appellee in an amended abstract set out with unnecessary particularity, and by way of question and answer, large portions of the evidence which had been sufficiently stated in appellant's abstract, held that a portion of the costs of appellee's amendment should be taxed to him. *In re Bradley*, 117–472, 91 N. W. 780; *Kirsher v. Kirsher*, 120–337, 94 N. W. 846.

An additional abstract presenting only an acknowledgment of a mortgage about which there was no question and which was therefore wholly unnecessary, held taxable to appellee. *Fox v. Gray*, 105–433, 75 N. W. 339.

Cost of printing an amended abstract of testimony on an issue not involved in the appeal should be taxed to the appellee. *Collins v. Collins*, 139–703, 117 N. W. 1089.

Where the abstract consists almost entirely of testimony in the form of questions and answers for which there is no justification in the nature of the case, the cost of printing such abstract may properly be taxed to the party presenting it. *Huntley v. Chicago, B. & Q. R. Co.*, 142–697, 121 N. W. 377.

Where the abstract is unnecessarily voluminous in setting out and repeating with captions, signatures of counsel and verifications, the pleadings, affidavits and documents in the case, the court may refuse to tax costs involved in such unnecessary elaboration. *Hawk v. Day*, 148–47, 126 N. W. 955.

Where an amended abstract is unnecessarily voluminous, setting out the evidence by question and answer, a portion of the cost thereof will be taxed to the party filing it. *State v. Johnson*, 149–462, 128 N. W. 837.

An amendment to the abstract which is unnecessarily voluminous may be taxed in part to the appellee. *Schlader v. Strever*, 157– —, 138 N. W. 1105.

Where an amended abstract includes considerable unnecessary matter the court, though overruling a motion to strike, may in case of affirmance refuse to tax a portion of the costs thereof in favor of the appellee filing such amendment. *Peters v. Snavely-Ashton*, 157– —, 134 N. W. 592.

When the appellant is successful only in securing a reversal as to one portion of his claim, he may be taxed with the costs of printing the abstract so far as it was not necessary for the presentation of that point. *Lefebure v. American Express Co.*, 139 N. W. 1117.

Time for filing: An additional abstract will not be stricken from the files because not filed within the time fixed by rule 22 (new rule 31) of the supreme court, if it does not appear that the submission of the case was delayed by the filing of such additional abstract, nor that prejudice has resulted from it. *Clark v. Ellsworth*, 104–442, 73 N. W. 1023; *Frank v. Levi*, 110–267, 81 N. W. 459; *Sanders v. O'Callaghan*, 111–574, 82 N. W. 969; *Tucker v. Carlson*, 113–449, 85 N. W. 901; *Foley v. Cudahy Packing Co.*, 119–246, 93 N. W. 284.

An abstract or amendment thereto filed after the submission of the cause and without express permission of court will not be considered and will be stricken from the files on motion. *Watson v. Burroughs*, 104–745, 73 N. W. 866.

An abstract may be amended even after the time for filing by the addition of assignments of error, and if the appellee has had reasonable opportunity to argue such assignments he cannot have the amendment stricken out on motion because

not filed in time. *Salvador v. Feeley*, 105–478, 75 N. W. 476.

Where an amendment to an abstract is filed within a reasonable time after the defect therein is called to the attention of the appellant, such amendment will not be stricken from the files. *Steckel v. Standley*, 107–694, 77 N. W. 489.

Under rule 31, the amended abstract should be filed ten days after the filing of appellant's abstract, but the court will not in all cases strictly enforce such rule, as it is often impracticable for the appellee to determine whether an amendment is necessary until he has received appellant's argument and has ascertained on what portion of the record appellant relies. *Baker v. Oughton*, 130–35, 106 N. W. 272.

An amended abstract correcting a misstatement in the record if presented before the submission of the appeal should not be stricken out on motion. *Sheffield v. Hanna*, 136–579, 114 N. W. 24.

In the absence of any showing of excuse for delay in filing an amended abstract, such abstract may be stricken if filed long after the time specified by the rule. *Bohstedt v. Shanks*, 138–686, 116 N. W. 812.

A slight delay in filing an amended abstract beyond the time specified by the rules of the court may be excused. *Collins v. Collins*, 139–703, 117 N. W. 1089.

Where the amended abstract is filed too late but no motion is made to strike it until after appellee has started to prepare his argument in reliance upon such amendment, a motion to strike will be overruled. *Aga v. Harbach*, 140–606, 117 N. W. 669.

Where an amended abstract, though filed out of time, is so filed before argument for appellant is made and no prejudice appears from the delay, it will not be stricken from the files. *Fallen v. Amond*, 153–504, 133 N. W. 771.

Where the grounds of motion to dismiss the appeal founded upon the record appearing in the abstract are cured by amendment to the abstract, the motion to dismiss will be overruled. *State v. Fairmont Creamery Co.*, 153–702, 133 N. W. 895.

Where delay in filing an amendment to the abstract is due to no fault on the part of the appellee and no prejudice results therefrom to appellant, it will not be stricken from the files. *First Nat. Bank v. Eichmeier*, 153–154, 133 N. W. 454.

All the evidence: To enable the appellate court to review the trial court's ruling directing a verdict, the abstract must contain all the material evidence. *Kitzman v. Kitzman*, 115–227, 88 N. W. 341.

Under rule 31 a judgment will be affirmed where appellee denies that the abstract contains all the material evidence and the transcript shows that it does not contain all the testimony, so that the court cannot determine whether or not the abstract does contain the evidence material for consideration in the determination of the appeal. *Ibid.*

Where the appellee has set out in an additional abstract portions of the evidence which he avers to be a part of the record, he cannot raise the question whether the evidence was properly preserved in an equity case. *Sarvis v. Caster*, 116–707, 89 N. W. 84.

A certificate of the reporter to the effect that the abstract is a true rendering into longhand of his shorthand notes and contains all the testimony offered or introduced will not entitle the appellant to a trial *de novo*. The reporter has nothing to do with the preparation of the abstract and his certificate thereto is of no effect. *Gibbs v. Oskaloosa*, 103–734, 72 N. W. 416.

Where the record on appeal does not contain all the material evidence, it will be presumed that instructions and rulings upon the evidence were correct. *State v. Thompson*, 125–499, 101 N. W. 109.

The office of certification of the record or of a transcript is solely to settle disputes developed in printing the record. All the evidence to be considered on the appeal must be included in the abstracts. *Palmer v. Clark*, 114–558, 87 N. W. 502.

An abstract will not be stricken from the files on the ground that it does not contain all the evidence when it appears that all the evidence that is material to the case is contained therein. *Coldren Land Co. v. Royal*, 140–381, 118 N. W. 426.

Presumed to contain record: Under this section the abstract is presumed to contain all the evidence, in the absence of any denial, correction or statement therein to the contrary, with sufficient completeness to enable the court to pass on every question raised. It is not necessary in an equity case in order to secure trial *de novo* that the abstract contain the statement that it is a full and correct abstract of the record or that it contains all the evidence introduced or offered. *McGillivary v. Case*, 107–17, 77 N. W. 483.

Under this section, embodied in rule 31 (old rule 22), the presumption is that the steps necessary to make the evidence of record have been properly taken. *Kirchman v. Standard Coal Co.*, 112–668, 84 N. W. 939.

A general allegation in appellee's abstract that appellant's abstract, together with matter presented by the appellee, does not show the entire evidence no longer makes it necessary for the court to go to the transcript. *Ibid.*

It is no longer necessary in order to secure a trial *de novo* that appellant formally allege in his abstract that it is an abstract of all the evidence, and that the evidence was preserved in the proper manner. *Alston v. Alston*, 114–29, 86 N. W. 55.

Under rule 31 a general denial will not raise an issue or present a dispute with

reference to the correctness of appellant's abstract. *Palmer v. Clark*, 114–558, 87 N. W. 502.

The abstract of appellant, with the additional abstract of appellee, is presumed to contain all the record necessary for the determination of the questions presented on appeal. *Woerdehoff v. Muekel*, 131–300, 108 N. W. 533.

The record is conclusively presumed to contain everything essential to the determination of all points raised in argument on the appeal. *Hensley v. Davidson Bros. Co.*, 135–106, 112 N. W. 227.

The printed abstract will be presumed to contain the record, unless denied or corrected by a subsequent abstract. *Van Rees v. Witzenburg*, 112–30, 83 N. W. 787.

It is not necessary to include in the abstract evidence relating to an issue not involved in the appeal. *Ibid.*

Corrections made by the appellee in his additional abstract will be taken as true where appellant's denial thereof is not confessed nor sustained by certification of the record. *Mosgrove v. Zimbleman Coal Co.*, 110–169, 81 N. W. 227.

Where the correctness of appellant's abstract was not denied, and it appeared from the record as presented that the amount of damages allowed to the appellant as plaintiff was too small, held that although the instructions did not appear in the abstract, it would still be presumed that the court had before it all of the record necessary to enable it to pass on the question of the inadequacy of the damages allowed. *King v. Hart*, 110–618, 81 N. W. 769.

Where it does not appear that appellant's abstract contains all the evidence and appellee files an additional abstract setting out other evidence which it is claimed was omitted by appellant, and does not deny that the abstracts together contain all the evidence it will be presumed that all the evidence is before the court. *First Nat. Bank v. Robinson*, 105–463, 75 N. W. 334.

The abstract is presumed to contain the entire record and the court is not required to go to the transcript for any purpose other than to settle controversies raised as to the correctness of the abstract. *State v. Steidley*, 135–512, 113 N. W. 333.

In the absence of specific denial or correction by amendment, the abstract is presumed to contain all the record necessary for the determination of the questions presented. *Fordyce v. Humphrey*, 152–76, 131 N. W. 686; *State v. Poder*, 154–686, 135 N. W. 421.

Under the present statutory provisions and rules of court, the presumption obtains that appellant's abstract contains all the evidence necessary for the consideration of the errors presented unless appellee shall supply alleged omissions by an amended abstract. *Ek v. Phillips Fuel Co.*, 157– —, 138 N. W. 547.

Denial: Under rule 31 a general denial that appellant's abstract contains all the evidence is of no effect. *Bradley v. Iowa Cent. R. Co.*, 111–562, 82 N. W. 996; *Raher v. Raher*, 130–743, 107 N. W. 810.

The appellee's denial of the appellant's abstract must be specific in order to require certification of the record. *Dolan v. Midland Blast Furnace Co.*, 126–254, 100 N. W. 45.

The appellee cannot by a bare denial put in issue correctness of instruments set out in the abstract. *Schneider v. Schneider*, 125–1, 98 N. W. 159.

The mere general denial of the correctness of appellant's abstract will not justify the filing of an amended abstract by appellee, setting out in different form the same matter which the appellant's abstract was forced to retain. To justify the examination of an amended abstract the denial of the correctness of the matters set out in the appellant's abstract should be specific. *See v. Wabash R. Co.*, 123–443, 99 N. W. 106.

To entitle the appellee to have the court examine the transcript as to the correctness of appellant's abstract, the denial must specify the pages of the transcript to which reference is made, or otherwise identify the portions relied upon. *Lundvick v. National Union Fire Ins. Co.*, 128–347, 103 N. W. 970.

Under rule 31 the denial of the correctness of the abstract should point out as specifically as the case will permit the defects alleged to exist. In the absence of such a denial, the abstract with amendments and additions is presumed to contain the record with sufficient completeness to enable the court to pass upon every question raised. *Kossuth County State Bank v. Richardson*, 132–370, 106 N. W. 923, 109 N. W. 809.

Failure to specifically deny the appellant's abstract is not an admission that all the evidence was in fact made of record by being duly certified and filed within the statutory limit of time. *Oskaloosa Nat. B. L. & I. Assn. v. Bailey*, 129–287, 105 N. W. 417.

If any questions are to be presented as to the sufficiency of the steps by which the record has been preserved, the issue must be raised by specific denial, otherwise the objection is waived. *Shebeck v. National Cracker Co.*, 120–414, 94 N. W. 930.

Where appellant has not had the record certified, appellee's denial as to the correctness of any specific matters set up in the abstract will be deemed true. *Rule v. McGregor*, 115–323, 88 N. W. 814.

Under rule 31 of the supreme court, a denial of appellant's abstract by the appellee is to be taken as true unless appellant sustains his abstract by a certification of the record; and a denial by appellant of an amended abstract filed by appellee, un-

less confessed, must be disregarded when not sustained by a certification of the record. *Foley v. Cudahy Packing Co.*, 119–246, 93 N. W. 284.

It is not necessary for appellant to set out in his abstract the certificate to the evidence in order to secure a trial *de novo* in an equity case, but unless the sufficiency of the certificate is raised by specific denial, it will be presumed that the proper steps to preserve the evidence were taken. *Burget v. Greenfield*, 120–432, 94 N. W. 933.

If the appellee is not satisfied with the appellant's abstract because all his material evidence is not contained therein, he should make timely objection so that the submission of the cause will not be delayed, and if he fails to do so his failure will be treated as a waiver and an acceptance of the abstract which has been made and filed. *Watson v. Dilts*, 124–344, 100 N. W. 50.

Where it does not appear that the shorthand notes have been extended into longhand and such transcript filed in the district court, and the attorney for the appellee denies that the evidence has been properly preserved and made of record, the appellant is required to furnish a transcript from the clerk establishing the fact. Without that the court cannot consider any question depending upon the evidence adduced. *State v. Owens*, 109–143, 80 N. W. 226.

Where the abstract of appellant purports to present the evidence, the appellee cannot by a mere denial of its correctness compel the appellant to substantiate it by a certificate of a transcript; and the fact that no translation of the reporter's notes has been made and filed is not in itself a reason for refusing to consider errors of law duly presented, even though it may be necessary for the determination to refer to the abstract of the evidence. *Howerton v. Augustine*, 145–246, 121 N. W. 373.

The remedy for an incomplete abstract is not by moving to strike it, but by a specific allegation denying that particular evidence has been abstracted, and thus force the appellants to supply the omitted evidence, or by including it in an additional abstract. *Fordyce v. Humphrey*, 152–76, 131 N. W. 686.

The objection that the abstract does not contain all the record essential to a decision of the appeal can only be raised by specific denial. *Wilbur v. Buckingham*, 153–194, 132 N. W. 960.

Opinion of lower court: It is not improper to include in the abstract, or an additional abstract, the written opinion of the lower court in the case. *Richardson v. Carlton*, 109–515, 80 N. W. 532.

On second appeal: Where a case is reversed and a second trial had on the same evidence as that which was introduced on the first trial, the appellant is not entitled to have the abstract of the evidence presented on the first trial considered as an abstract on the second appeal. *State v. Wolf*, 118–564, 92 N. W. 673.

Where there are two appeals in the same cause, though presented in separate abstracts and arguments, they should be disposed of together. *Keller v. Harrison*, 151–320, 128 N. W. 851, 131 N. W. 53.

SEC. 4120. Dismissal or affirmance.

While the court may extend the time for filing the abstract upon application, such application must be made before the time given by statute for filing abstracts has expired. In other words, neither the supreme court nor a judge thereof can grant to the appellant the right which has once been lost to file an abstract; but while that right exists the time may be extended by the court or by one of its judges. Where there is no waiver or estoppel the appellee has the right to insist upon a dismissal or affirmance when he brings himself within the terms of the statute, even though the abstract be already filed when the motion is made. In this respect the statute is mandatory. Section 37 of the rules of the supreme court does not give to the appellant the right to delay filing of abstract until thirty days before the second term after the appeal is taken, but merely provides that if not filed thirty days before such term and further time is not given, the appellee may have the appeal dismissed or the judgment or order from which it was taken affirmed by pursuing the method pointed out. The requirement as to time of filing abstract being statutory cannot be modified by the rules of the court. *Newberry v. Getchell & Martin L. & M. Co.*, 106–140, 76 N. W. 514.

Notice of the application to extend the time for filing an abstract should be served on the adverse party or his attorney. *Ibid.*

Failure of appellant to file his abstract within the time required, without the securing of an extension before the expiration of the statutory period, cannot be remedied by the entry of an order *nunc pro tunc* granting an extension of time. *Ibid.*

The time for filing an abstract cannot be extended by serving a second notice of appeal. *Ibid.*

The requirement that the abstract shall be filed by the time here specified is mandatory. Application for extension of time must be made before the period allowed has expired and upon notice to adverse party. *Hanson v. Hammell*, 107–171, 77 N. W. 839.

The first term contemplated is that to which the appeal might have been taken by serving the proper notice thirty days

before its first day and the second term is that immediately following. *Ibid.*

The time within which appellant's abstract is required to be filed under rule 37 of the supreme court cannot be extended by an amendment attempting to bring before the court on appeal rulings and orders made subsequent to the decree appealed from. *Ruby v. Downs*, 113–574, 85 N. W. 808.

Under the facts of a particular case held that there was no sufficient excuse shown for failing to file an abstract within the time required by the rules, and that appellant's reliance on the oral agreement of counsel for appellee not to object would not prevent the court from affirming on a motion of appellee for failure of appellant to file his abstract within the time required. *Brown v. Farmers L. & T. Co.*, 109–440, 80 N. W. 525.

Where appellee has made no objection on account of delay of appellant in filing his abstract until appellant has prepared and filed his argument, the appeal will not be dismissed on appellee's motion. on account of the delay in the filing of the abstract. *McDermott v. Hacker*, 109–239, 80 N. W. 338.

In some cases there may be a material difference between the effect of dismissing the appeal and affirming the order or judgment from which the appeal is taken, but the appellee does not have an absolute right to elect which remedy he will have. It is proper for him to ask in the alternative for one relief or the other, and when that is done the court grants that form of relief which seems to be best calculated to do justice. *Newbury v. Getchell & Martin L. & M. Co.*, 106–140, 76 N. W. 514.

Rule 37 of the supreme court based on this section does not give the appellee the right of affirmance, as distinguished from the right of dismissal. In the exercise of its discretion, the supreme court might in a proper case order an affirmance rather than a dismissal and thus preclude a second appeal. But the pendency of a motion to affirm will not prevent a dismissal of the appeal by appellant. *In re Estate of Clark*, 151–511, 131 N. W. 700.

SEC. 4122. Transcript—when required.

Where the clerk certifies the transcript of the record, the requirement that his fees therefor must be paid or secured will be deemed to have been waived and it cannot be objected on that ground that the appeal has not been perfected. *Harrison v. Palo Alto County*, 104–383, 73 N. W. 872.

The provisions of this section, authorizing the translation of the original notes of the shorthand reporter when certified to by him to be sent up in lieu of a transcript, were intended simply to avoid the expense of transcribing the translation of the notes of evidence, and does not by implication or otherwise repeal the requirement of code § 3652, that all the evidence taken in equitable cases shall be certified by the judge within the time allowed for appeal. *Sloan v. Davis*, 105–97, 74 N. W. 922.

The provision of the rules of the supreme court for waiving or modifying such rules so far as they relate to the abstract, preparation and argument of causes, has no application to a case where the record is not authenticated as required by statute. *Ibid.*

No time is specified within which the translation of the shorthand reporter's notes shall be filed in law actions. The appellee's denial of the appellant's abstract should point out specifically the objections to the abstract in order that the appellant may have time to support it by filing a transcript. *Watson v. Dilts*, 124–344, 100 N. W. 50.

No certification of the evidence is necessary until the correctness of appellant's abstract has been denied with sufficient particularity to require the supreme court to examine the transcript for the purpose of determining some controversy as to what it contains. *Howerton v. Augustine*, 145–246, 121 N. W. 373.

SEC. 4123. What sent up.

The office of the certificate of the clerk of the lower court is only to identify the record and in an equity case there must also be filed a certificate of the trial judge to the evidence in order to secure trial *de novo*. *Bauernfiend v. Jonas*, 104–56, 73 N. W. 500.

Notices filed with the clerk are required to be transmitted with the record, but in order to determine who are coparties to be served with notice the party appealing is not entitled to depend upon the record of the filing of notice of appeal with the clerk of the lower court. *In re Will of Downs*, 141–268, 119 N. W. 703.

Certification of proceedings in another case not made of record in the case appealed cannot be considered. *Hemmer v. Dunlavey*, 143–265, 121 N. W. 1024.

SEC. 4124. Original paper.

The fact that exhibits offered in evidence cannot be conveniently transmitted to the supreme court on appeal is not a sufficient ground for refusing to receive them in evidence. *Pascal v. Chicago, R. I. & P. R. Co.*, 141 N. W. 920.

SEC. 4127. Perfecting record.

The trial court may, after the taking of an appeal and filing of notice of appeal, correct the record so as to show that at the time service of notice of appeal was accepted by appellee it was not signed by appellant's attorneys. *State Sav. Bank v. Ratcliffe*, 111–662, 82 N. W. 1011.

A lost record may be substituted by proceedings in the lower court and the mere fact of the loss of the record making it impracticable to prosecute an appeal will therefore not be ground for a new trial. This applies to the loss of the record of the evidence in an equity case. *Ormsby v. Graham*, 123–202, 98 N. W. 724.

If the proceeding for the substitution of the record be commenced before the expiration of the time allowed for an appeal, the final order of substitution may be made after the time for appeal has expired. *Ibid.*

The time within which application may be made to have the fact made to appear of record as to when the judgment was actually entered, for the purpose of determining whether an appeal is premature or has been taken too late, is not limited by code § 4093 relating to the time within which motion may be made to correct mistakes or omissions of the clerk. *Puckett v. Gunther*, 137–647, 114 N. W. 34.

Under proceedings for correction of the record and to supply missing exhibits, the trial judge has no authority to grant a new trial, even though it appears that the exhibits cannot be supplied. *Lowery v. Lowery*, 139–363, 115 N. W. 1035.

If the trial court or judge is unable to make or secure the substitution of a lost record, the supreme court on appeal from the action of the lower court cannot order a new trial. *Ibid.*

Where by the death of the reporter a transcript of the evidence taken on the trial in an equity case cannot be procured, the lower court has authority to provide for a substitution of the missing record even to the retaking of the testimony. Therefore such casualty is not a ground for granting a new trial. *Dumbarton Casualty Co. v. Erickson*, 143–677, 120 N. W. 1025.

The lower court may correct the record by showing evidence introduced in addition to that shown by the record. The time within which a record may thus be corrected is not limited and only laches or equitable considerations will obviate the granting the relief asked. *Dowling v. Webster County*, 154–603, 134 N. W. 870.

SEC. 4128. Stay of proceedings—supersedeas bond.

In general: Where the party has secured possession by service of the writ of possession before the giving of an appeal bond he is not affected by the subsequent filing of the bond. *Hyatt v. Clever*, 104–338, 73 N. W. 831.

An appeal from a judgment against a county or other municipal corporation does not operate as a stay of proceedings thereon without the filing of a supersedeas bond. Such municipal corporations are not contemplated by the statutory provision that no security shall be required in actions maintained by the state. *Harrison v. Stebbins*, 104–462, 73 N. W. 1034.

A supersedeas bond on an appeal from a decree granting an injunction will not cover damages resulting from a violation of the injunction. Such violation is to be reached by proceedings for contempt. *Cole v. Edwards*, 104–373, 73 N. W. 863.

The judgment appealed from remains in full force for all purposes, subject only to determination on appeal. Therefore a judgment from which an appeal has been taken may be relied on as a prior adjudication in another action involving the same right or title. *Watson v. Richardson*, 110–698, 80 N. W. 416.

A defendant who has appealed from a judgment in plaintiff's favor without giving a supersedeas bond is not entitled, on petition alleging his inability to file such bond, to have plaintiff give bond to refund in case of reversal, the judgment otherwise to be stayed. *Watson v. Niles*, 112–655, 84 N. W. 702.

A supersedeas bond on an appeal from an order of the district court directing the secretary of the school district to certify a tax will be effectual to stay enforcement of the judgment. *Loesche v. Goerdt*, 123–55, 98 N. W. 571.

On an appeal from an order appointing a receiver, the supersedeas bond should be for an amount sufficient to cover the value of the property. *Home Sav. & T. Co. v. District Court*, 121–1, 95 N. W. 522.

In such a case the bond should contain the conditions required by code § 4134, that the appellee should be saved harmless from the consequence of taking the appeal. *Ibid.*

Under the provisions of code § 4133 with reference to requiring additional security on a supersedeas bond, application may be made either to the supreme court or to the court rendering the judgment from which the appeal is taken, and if on application the judge of the lower court makes an order as to additional security, such order cannot be reviewed on motion in the supreme court, nor by appeal (no appeal in such case being provided for), but the action may be reviewed by certiorari. *Ibid.*

A supersedeas bond does not stay further proceedings under an order of a court which is self-executing. *In re Estate of Acken*, 144–519, 123 N. W. 187.

An appeal does not operate to stay proceedings on the judgment appealed from save on the execution of a supersedeas bond. *Boynton v. Church*, 148–197, 127 N. W. 210.

The general policy that no stay shall be allowed upon an appeal except upon filing a bond to pay the judgment in case of affirmance, is applicable in certiorari proceedings to test the validity of punishment for contempt in violating a liquor injunction. *Muscatine County v. Oliver*, 139 N. W. 1105.

Liability of sureties: Sureties on a supersedeas bond cannot avail themselves of a defense which their principal might have interposed to the affirmance of the judgment. *Jewett v. Shoemaker*, 124–561, 100 N. W. 531.

The surety on a supersedeas bond does not become subrogated to the claims of judgment plaintiff against prior sureties on a bond given to release an attachment, such prior sureties not having procured or requested the giving of the supersedeas bond. *Fidelity & Deposit Co. v. Bowen*, 123–356, 98 N. W. 897.

In the absence of some specific condition in the bond, the surety on a supersedeas bond, conditioned on the return of property, is not liable for waste, loss of rents or depreciation in value. *Nourse v. Weitz*, 120–708, 95 N. W. 251.

A court of equity has power to reform a supersedeas or other bond given in a judicial proceeding if a mistake has been made in its execution. *Ibid.*

The liability of the surety on a supersedeas bond is primary and operates to the benefit of sureties on an executor's bond on which judgment has been rendered. *Bankers' Surety Co. v. Wyman*, 141–574, 120 N. W. 116.

The liability of sureties on a bond required in connection with the issuance of a restraining order terminates when the order is dissolved. *Chicago, A. & N. R. Co. v. Whitney*, 143–506, 121 N. W. 1043.

Where the appeal relates to a portion only of the judgment, the surety on the supersedeas bond does not become bound for the payment of other portions of the judgment than those appealed from. *Russell v. Russell*, 156–674, 137 N. W. 925.

Restraining order: An order of a judge of the supreme court restraining the enforcement of an execution pending appeal is a valid exercise of authority, although not expressly provided for by statute. *Norris v. Tripp*, 111–115, 82 N. W. 610.

A supersedeas bond will not continue in force a temporary writ of injunction. The continuance of the injunction pending the determination of the appeal can only be secured by a restraining order in the supreme court. *Manning v. Poling*, 114–20, 83 N. W. 895, 86 N. W. 30.

The giving of a supersedeas bond does not deprive the court of jurisdiction to proceed in the trial of the case where the appeal is from an interlocutory order. The court doubtless has in such cases inherent power to order a stay of proceedings pending a disposition of the appeal. *First Nat. Bank v. Dutcher*, 128–413, 104 N. W. 497.

Sureties on a bond in connection with the issuance of a restraining order are not liable for attorney's fees involved in the presentation of the appeal. *Chicago, A. & N. R. Co. v. Whitney*, 143–506, 121 N. W. 1043.

It is the duty of the clerk of the lower court to obey the mandate of the supreme court embodied in a restraining order. Any error in the issuance of such order should be corrected by application to the court issuing it. *Staples v. Hobbs*, 145–114, 123 N. W. 935.

The court cannot in determining the appeal take into account the showing made for a restraining order concerning matters not presented to the lower court as bearing on the disposition of the case. *Drew v. School Township*, 146–721, 125 N. W. 815.

SEC. 4130. Execution recalled.

The supersedeas bond becomes effectual to prevent further action of the sheriff under an execution already in his hands only when the countermand from the clerk reaches the sheriff, and a sale by the sheriff before the receipt of the countermand is valid. *Edwards v. Olin*, 121–143, 96 N. W. 742.

SEC. 4132. Conditions of bond—how fixed.

The district court has power to supervise the execution of supersedeas bonds and therefore is not without jurisdiction in ordering a stay of proceedings under a decree pending appeal, although it may err in doing so; and certiorari will not lie to annul such an order. *Boynton v. Church*, 148–197, 127 N. W. 210.

SEC. 4134. Penalty of bond. If the judgment or order is for the payment of money, the penalty shall be in at least twice the amount of the judgment and costs. If not for the payment of money, the penalty shall be sufficient to save the appellee harmless from the consequences of taking the appeal, but in no case shall the penalty be less than one hundred dollars. [30 G. A., ch. 125; C. '73, § 3190; R. § 3531; C. '51, § 1984.]

SEC. 4136. **No assignment of errors required.** That sections forty-one hundred thirty-six and forty-one hundred thirty-seven of the code be and they are hereby repealed, and in lieu thereof is enacted the following: "No assignment of errors shall be required in any case at law or in equity now pending or hereafter docketed in the supreme court." [30 G. A., ch. 126.]

Since the repeal of the statutory provisions as to the assignment of errors by 30 G. A., ch. 126, there is no occasion to apply the somewhat technical rules formerly followed by the court in determining whether errors are sufficiently assigned. Under § 54 of the rules it is not necessary that the appellant shall do more than point out the errors relied upon for a reversal with such definiteness that the appellee and the court may ascertain without searching through the entire abstract or argument the precise errors relied upon. *Dale v. Colfax Consolidated Coal Co.*, 131–67, 107 N. W. 1096.

While under this section as amended assignments of error as such are no longer essential, the supreme court is entitled to know the errors relied on for reversal (see rule 54), and the record will not be searched to find the rulings hinted at but not stated. The particular ruling complained of must be indicated and where it may be found in the record. *Cooper v. Oelwein*, 145–181, 123 N. W. 955.

(The following decisions were made under the statutory provisions as to assignment of errors now repealed.)

When necessary: An assignment of errors is essential on the presentation of an appeal upon certificate of the judge in a case where the amount in controversy is less than one hundred dollars. *Kistner v. Conery*, 109–439, 80 N. W. 522.

An equity case cannot be tried on assignment of errors, except that such assignments are necessary to enable the court to consider rulings on motions or demurrers in such cases. *Smith v. Wellslager*, 105–140, 74 N. W. 914.

No assignment of errors is required where the case is tried below as in equity. *Clearfield Bank v. Olin*, 112–476, 84 N. W. 508.

In an equity case appellant cannot make assignments of error in rulings on the admission or rejection of evidence and have them considered as in an action at law. *Foy v. Armstrong*, 113–629, 85 N. W. 753; *Spinney v. Halliday*, 115–420, 88 N. W. 939.

On trial *de novo* the supreme court may consider questions raised by motion, demurrer or objections to evidence which affect the merits of the case, but without an assignment of errors it cannot review rulings which prevent a determination of the case on its merits. *Lessenich v. Sellers*, 119–314, 93 N. W. 348.

Rulings upon questions of pleading cannot be reviewed even in an equity case unless specially assigned as error. *Scribner v. Taggart*, 123–321, 98 N. W. 798.

What sufficient: An assignment is sufficient which mentions the particular ruling objected to in the introduction of evidence, as well as the name of the witness and the page of the abstract where the ruling is found. *Manatt v. Scott*, 106–203, 76 N. W. 717.

An assignment of error in the sustaining of a general demurrer to an equitable petition is sufficiently specific. *Williams v. Williams*, 115–520, 88 N. W. 1057.

Assignment of error in sustaining or overruling a demurrer or a motion based on several grounds is not sufficient. *Sisson v. Kaper*, 105–599, 75 N. W. 490; *Phelps D. & P. Co. v. Samson*, 113–145, 84 N. W. 1051; *Jamison v. Jamison*, 113–720, 84 N. W. 705; *Brewster v. Chicago & N. W. R. Co.*, 114–144, 86 N. W. 221; *Shoemaker v. Turner*, 117–340, 90 N. W. 709.

Where several grounds are stated in a motion for a new trial errors should be separately assigned as to the ruling with reference to each particular ground, so far as it is desired to have such rulings reviewed on appeal. *Huss v. Chicago G. W. R. Co.*, 113–343, 85 N. W. 627.

An assignment that "the court erred in its rulings upon the evidence, to which plaintiff excepted, as shown in this abstract," is not sufficient. Nor is an assignment sufficient that the court erred in sustaining a motion based on several distinct grounds. Nor is it sufficient to assign error in "not submitting the case to the jury." *Dairy v. Iowa Cent. R. Co.*, 113–716, 84 N. W. 688.

Assignments that the court erred "in rendering judgment for plaintiffs and against defendants upon the evidence adduced" and "in not rendering judgment for the defendants" held not sufficient. *Creager v. Johnson*, 114–249, 86 N. W. 275.

An assignment of error covering instructions given and refused must point out specifically the error relied upon in the court's ruling. *Fitch v. Mason City & C. L. T. Co.*, 116–716, 89 N. W. 33.

An assignment that the court erred in giving of its own motion certain instructions, described by numbers, "to the giving of each and every one of which instructions the defendants then and there duly excepted," is not sufficient. *Faivre v. Manderscheid*, 117–724, 90 N. W. 76

Assignments of error in a particular case, set out at length, held not sufficient. The assignment must clearly and specifically point out the very error complained

of, and, among several points made by exceptions to instructions, the one or those relied upon must be separately stated. *Copeland v. Ferris*, 118–554, 92 N. W. 699.

An assignment of errors in ruling on objections to evidence which does not point out what the objection was, and which collects in one assignment several different objections, is not sufficient. *Grapes v. Sheldon*, 119–112, 93 N. W. 57.

If the appellant desires to insist that the court erred as to each ground of a motion for a new trial he must properly assign the error as to each ground in a separate assignment. *Reeves v. Lamm*, 120–283, 94 N. W. 839.

A general statement that the court erred in refusing to give and in giving instructions asked and refused is not sufficient. *Borden v. Isherwood*, 120–677, 94 N. W. 1128.

An omnibus assignment of errors is not sufficient. *Suddeth v. Boone*, 121–258, 96 N. W. 853; *Mallory Com. Co. v. Elwood*, 120–632, 95 N. W. 176.

An assignment which does not point out the exact error complained of is not sufficient. *McMillan v. American Express Co.*, 123–236, 98 N. W. 629.

Assignments in particular cases held not sufficient. *Geiser Mfg. Co. v. Krogman*, 111–503, 82 N. W. 938; *Field v. Eastern B. & L. Assn.*, 117–185, 90 N. W. 717; *Goldstein v. Morgan*, 122–27, 96 N. W. 897.

Although two parties not having a common interest may unite in assignment of error, such assignments may be treated as joint and several and errors thus assigned may be taken advantage of by one although not available to the other. *Thornburg v. Cardell*, 123–313, 95 N. W. 239, 98 N. W. 791.

Amendment: Defects in the assignment of errors may be cured by amendment. *Roberts v. Parker*, 117–389, 90 N. W. 744.

An amended assignment of errors which does not delay the submission of the cause or result in prejudice will not be stricken from the files because not made within the time allowed for filing the assignment of errors. *Salvador v. Feeley*, 105–478, 75 N. W. 476.

In argument: An assignment made in connection with appellant's argument may be sufficient to bring up the ruling for review. *Hogueland v. Arts*, 113–634, 85 N. W. 818.

SEC. **4137. Failure to assign errors—repealed.** [30 G. A., ch. 126.]

[See § 4136.]

SEC. **4139. Arguments—submission—decision—objections to jurisdiction.** The parties to an appeal may be heard orally and in writing, subject to such rules as the court may prescribe; and all causes docketed, not continued by consent or upon cause shown, shall be submitted in the order assigned, unless otherwise directed by the court or the judges thereof. The court may reverse, modify or affirm the judgment, decree or order appealed from, or render such as the inferior court should have done. No cause is decided until the written decision is filed with the clerk. All objections to the jurisdiction of the court to entertain an appeal must be made in printed form stating specifically the ground thereof and served upon the appellant or his attorney of record not less than ten days before the date assigned for the submission of the cause. [33 G. A., ch. 206, § 1.] [C. '73, §§ 3194, 3204–5; R. §§ 3536, 3548, 3550; C. '51, § 1989.]

I. ARGUMENTS.

Failure to argue: Errors not argued will not be considered. *Thompson v. Brown*, 106–367, 76 N. W. 819.

Questions raised by an assignment of error, but which are not argued, will not be considered, nor will the mere statement of a point entitle it to consideration. *Ottumwa v. Hodge*, 112–430, 84 N. W. 533.

A case will not be reversed for failure to present a defense to the jury when the appellant does not consider it substantial enough to discuss it on appeal. *Bradley v. Iowa Cent. R. Co.*, 111–562, 82 N. W. 996.

Assignments of error argued for the first time in a reply will be disregarded. *Fink v. Des Moines*, 115–641, 89 N. W. 28; *Schoonover v. Osborne*, 117–427, 90 N. W. 844.

While elaborate argument is not essential, every person invoking the jurisdiction of the supreme court must state the grounds of his objection to the judgment or order appealed from. *McCormick Harv. Mch. Co. v. McCormick*, 128–155, 103 N. W. 204.

When the reasons for appellant's contention appear in the points or propositions contained in his brief, subsequent elaboration by way of argument is optional; but if the contentions of appellant are not submitted either by brief or argument, the judgment should be affirmed. *Ibid.*

When the statement of a point amounts to nothing more than an assignment of error it is entitled to no consideration unless followed by argument. *Kopecky v. Benish*, 138–362, 116 N. W. 118.

The particular ruling complained of must be indicated and the place where it may be found in the record. *Cooper v. Oelwein*, 145–181, 123 N. W. 955.

The mere specification of alleged error without argument will not be considered. *Mulvaney v. Burroughs*, 152–439, 132 N. W. 873.

Where the defendant as appellant in an equity case has assumed the burden of argument before any argument or notice is due from the appellee, the appellant cannot complain of the failure of the appellee to open the case. *Miller v. Kramer*, 148–460, 126 N. W. 931.

Time for filing argument: Under rule 44, if appellant's argument is not filed by the time required, and no sufficient excuse is shown for the delay, the appellee may have the case submitted as of the day of default, and as thus submitted without argument for appellant, the supreme court will affirm the case. *Harrington v. Hubinger*, 112–90, 83 N. W. 812.

A slight delay in the filing of appellant's argument which could not have been materially prejudicial to appellee will not support a motion to submit the case as of date when appellant's argument ought to have been filed, and to affirm for want of the argument. *Buehner v. Creamery Pkg. Mfg. Co.*, 124–445, 100 N. W. 345.

Additional abstracts and arguments will not be stricken from the files because not filed in time when the submission of the cause has not been thereby delayed. *Ft. Madison v. Moore*, 109–476, 80 N. W. 527.

Under rule 55 it is within the discretion of the court to consider the appellee's argument, although filed at a later time than is required by the rule. *Baker v. Oughton*, 130–35, 106 N. W. 272.

Where in an equity case the appellee has the opening and closing, but does not serve notice on the appellant waiving his right to open, the appellant may treat the appellee's failure to file argument within thirty days before the hearing as a waiver of the right to open, and file his own argument ten days before the hearing, and if he does so, appellee may respond by serving a reply three days before the hearing and have the cause submitted. *Busch v. Hall*, 119–279, 93 N. W. 356.

In the absence of a showing of prejudice an argument for appellee will not usually be stricken from the files because not filed in time. *Flickinger v. Farmers' Mut. F. & L. Ins. Assn.*, 136–258, 113 N. W. 824.

The supreme court does not ordinarily strike briefs and arguments because not filed in order. *Wood v. Hall*, 138–308, 110 N. W. 270.

After reasonable excuse for delay in filing argument for the appellee is made to appear, the court may refuse the request of appellant that the cause be submitted as of the date when appellee's argument should have been filed. *Caldwell Co. v. Steckel*, 143–564, 122 N. W. 376.

An amendment to appellant's argument filed before appellee's argument is served will not be disregarded, no prejudice to the appellee appearing. *Moore v. Crandall*, 146–25, 124 N. W. 812.

The failure of appellant to file his argument within the time prescribed by the rules is not a jurisdictional matter and cannot be raised after an opinion has been filed which has subsequently been set aside on petition for rehearing. *Salinger v. Western Union Tel. Co.*, 147–484, 126 N. W. 362.

Should contain what: It is unnecessary to reprint in the argument the testimony of the witnesses as shown by the abstract. *Steele v. Crabtree*, 130–313, 106 N. W. 753.

Under rule 54 the appellant should not set out in his argument an abstract of the testimony of each witness, but if the insufficiency of the evidence to sustain the verdict or finding is relied upon he should give the substance of the evidence in narrative form. *In re Wiltsey's Will*, 135–430, 109 N. W. 776.

The arguments should not contain a statement at length of the testimony of each witness. No such statement is authorized under rule 54, which relates to the statement of facts which is to be embodied in the argument. *Vial v. Larson*, 132–208, 109 N. W. 1007.

The argument should have reference to the specific points of error relied upon. *Jones v. General Construction Co.*, 150–194, 129 N. W. 830.

Form: The court will not usually strike appellant's argument from the files on the motion of appellee on the ground that it does not strictly comply with the rules of court. *Schultz v. Ford*, 133–402, 109 N. W. 614.

The argument should refer specifically to the portion of the abstract where the alleged error is made to appear. *Moyers v. Fogarty*, 140–701, 119 N. W. 159.

Rule 53 of the supreme court as to the method of argument will be enforced with discretion when objection to the form or sufficiency of the printed argument is raised on final submission. *Iowa City v. Glassman*, 155–671, 136 N. W. 899.

Failure of appellant's argument to comply with the requirements of the rules of court may be obviated by the filing of an amended brief and argument fully meeting the objections. *Ek v. Phillips Fuel Co.*, 157– —, 138 N. W. 547.

Where the central and vital questions in the case are covered by the argument and there is no flagrant disregard of the rules, the court will not strike or ignore

the briefs of counsel. *Melody v. Des Moines U. R. Co.*, 141 N. W. 438.

Where the negligence of counsel in the preparation of argument has imposed unnecessary labor on the court, the costs may be taxed to him although he is successful in the appeal. *Lake Park State Bank v. Rood*, 152–47, 131 N. W. 55.

Formal noncompliance with the rules as to argument prescribed in supreme court rule 54 will not prevent the court from determining the questions in fact presented. The rule as to the method of argument is not jurisdictional. *Blackett v. Ziegler*, 147–167, 125 N. W. 874.

There is no longer any necessity of assigning errors and about all that is exacted is that the particular error of which complaint is made be clearly stated and the reasons for challenging the rule be presented in argument or authorities be cited in its support. *Fisher v. Trumbauer*, 138 N. W. 528, 141 N. W. 419.

Scandalous argument: While the supreme court has power to strike out a scandalous argument, it will exercise discretion in doing so, and, save in an extreme case, will not feel inclined to use its power in such a way as to defeat ultimate justice. *Knight v. Hawkeye L. & B. Co.*, 121–74, 95 N. W. 273.

Reply: Although in an equity case the appellee having the burden of proof is entitled to make the opening argument and waives the right, he is not thereby precluded from replying to the argument of appellant. *Flickinger v. Farmers Mut. F. & L. Ins. Assn.*, 136–258, 113 N. W. 824.

Counsel for applicant cannot in reply argument raise a question not presented in the original brief and argument. *Richardson v. Centerville*, 137–253, 114 N. W. 1071.

Where the correctness of a decree is in one respect conceded in the opening argument, its correctness in that respect cannot be subsequently questioned in a reply argument. *Dashner v. Dashner*, 142–348, 120 N. W. 975.

The appellant cannot in reply argument raise questions not presented in the opening argument. *Hutchinson v. Olberding*, 150–604, 130 N. W. 139.

Answer to reply argument: After the filing of the reply argument for the appellant, the appellee may be allowed to make an additional argument for the purpose of pointing out in the record the testimony upon which the statements in the reply argument are based. *State v. Smith*, 124–334, 100 N. W. 40.

Where the appellee had the opening argument and the appellant in his reply to appellee's closing argument failed to discuss any matters not sufficiently presented in appellee's opening argument to enable appellant to respond thereto in his main argument, held that the costs of appellant's reply should be taxed to him. *Schoonover v. Petcina*, 126–261, 100 N. W. 490.

There is no authority for filing in behalf of appellee an answer to appellant's reply, and such argument may be stricken upon motion and the costs thereof taxed to the appellee. *Anundsen v. Standard Printing Co.*, 129–200, 105 N. W. 424.

By waiving the opening argument and fully arguing the case in response to the argument by appellant, the appellee does not deprive the appellant of the opportunity for reply. *Platner v. Kirby*, 138–259, 115 N. W. 1032.

II. What Question Will Be Considered On Appeal.

(a.) *Question not raised in court below.*

New objections not considered: An objection urged for the first time in the supreme court will not be considered on appeal. *Paine v. Lettsville*, 103–481, 72 N. W. 693; *State v. Olds*, 106–110, 76 N. W. 644; *Talbot v. First Nat. Bank*, 106–361, 76 N. W. 726; *Hough v. Gearen*, 110–240, 81 N. W. 463; *Easton v. Somerville*, 111–164, 82 N. W. 475; *Reeves v. Howard*, 118–121, 91 N. W. 896; *Mitchell v. Pinckney*, 127–696, 104 N. W. 286; *Mahaska County v. Whitsel*, 133–335, 110 N. W. 614; *State v. Brown*, 135–40, 109 N. W. 1011; *First Nat. Bank v. City Council*, 136–203, 112 N. W. 829; *Conkling v. Standard Oil Co.*, 138–596, 116 N. W. 822.

A question not raised and presented to the lower court in a timely and proper manner cannot be presented to the supreme court on appeal. *Smith v. McQuiston*, 108–363, 79 N. W. 130; *Mallory Commission Co. v. Elwood*, 120–632, 95 N. W. 176.

The district court must be given an opportunity to pass upon all questions before they can be considered in the supreme court on appeal. *In re Moore's Estate*, 103–474, 72 N. W. 674.

A party will not be heard in an appellate court until his grievance has been presented to and acted upon by the trial court. *Cloud v. Malvin*, 108–52, 75 N. W. 645, 78 N. W. 791.

The appellate court will on its own motion, where justice to the trial court demands it, refuse to review a question raised for the first time on appeal. *Houts v Sioux City Brass Co.*, 134–484, 110 N. W. 166.

The very objection which is urged in the supreme court should have been called to the attention of the trial court to enable the appellant to take advantage of it on appeal. *Sisson v. Kaper*, 105–599, 75 N. W. 490.

The constitutionality of a statute cannot be raised for the first time in the supreme court. *Hass v. Leverton*, 128–79, 102 N. W. 811.

When parol evidence of a contract within the statute of frauds is introduced upon the trial without objection it cannot afterwards be objected to upon appeal. *Marr v. Burlington, C. R. & N. R. Co.*, 121–117, 96 N. W. 716.

Errors relating to the introduction of evidence not based on any ruling will not be considered. *Philbrick v. University Place*, 106–352, 76 N. W. 742.

A party cannot complain for the first time on appeal that after his pleading was held defective the court proceeded without allowing him until noon of the next day in which to amend or plead over. *Chase v. Wright*, 116–555, 90 N. W. 357.

Defect of parties not objected to on the trial cannot be first raised on appeal. *West Side Lumber Co. v. Hathaway*, 115–654, 89 N. W. 35.

The supreme court will not on a trial *de novo* determine a question not raised by the pleadings in the trial court. *Zion Church v. Parker*, 114–1, 86 N. W. 60.

A question which might have been raised in the lower court by demurrer or answer, but which has not been so raised, will not be considered on appeal, even in a case triable *de novo*. *Schoening v. Schwenk*, 112–733, 84 N. W. 916.

The objection that the action is prematurely brought cannot be made for the first time on appeal. *Petty v. Mutual F. Ins. Co.*, 111–358, 82 N. W. 767.

A party must except to special findings with which he is not content even though judgment is rendered in his favor; otherwise on appeal such special findings will be conclusive. *Aldrich v. Paine*, 106–461, 76 N. W. 812.

The objection that in an action against a city for injuries due to defects in a street, not brought within six months from the happening of the injury, written notice of the claim is not alleged or shown, is one which must be made in the lower court and cannot be considered for the first time on appeal. *Reed v. Muscatine*, 104–183, 73 N. W. 579.

On an appeal from the ruling on motion for new trial interlocutory rulings cannot be reviewed which are not alleged as grounds for granting such new trial. *White v. Chicago & N. W. R. Co.*, 145–389, 124 N. W. 162.

Matter in abatement not relied upon in the trial court will not be considered on appeal. *Bohanan v. Bohanan*, 150–182, 129 N. W. 819.

Where the case is triable *de novo*, error in rendering a decree against one not made a party to the proceedings may be raised on final appeal without having been heard in the trial court. *State v. Kelly*, 151–264, 130 N. W. 1088.

The supreme court will not on appeal in a law case or in a special proceeding, not equitable in character, consider a question which is not presented to the lower court. *In re Estate of Culver, Gould v. Morrow*, 153–461, 133 N. W. 722.

Objections to pleadings: The insufficiency of a petition to entitle plaintiff to the relief granted cannot be raised for the first time on appeal. *Preston v. Peterson*, 107–244, 77 N. W. 864.

The objection that the petition does not state a cause of action cannot be made for the first time in the supreme court. *Iowa Stone Co. v. Crissman*, 112–122, 83 N. W. 794.

Where the petition states a cause of action and is not assailed in the trial court no question as to the sufficiency of its allegations can be raised on appeal. *Newburn v. Lucas*, 126–85, 101 N. W. 730.

The provisions of 25 G. A., ch. 96, to the effect that a pleading shall not be held sufficient on account of the failure to demur thereto (see code § 3564) has no application to proceedings on appeal and an objection which might have been raised by demurrer in the trial court cannot for the first time be urged in the supreme court. *Reed v. Muscatine*, 104–183, 73 N. W. 579; *Boyd v. Watson*, 101–214, 70 N. W. 120; *Wood v. Dunham*, 105–701, 75 N. W. 507; *Lacy v. Kossuth County*, 106–16, 75 N. W. 689.

It is not proper to amend a pleading on appeal in the supreme court. *Ottumwa Brick & Cons. Co. v. Ainley*, 109–386, 80 N. W. 510.

Where objection is not made in the lower court to the sufficiency of the petition and a case has been made out on the theory that such petition is sufficient, its sufficiency cannot be attacked on appeal. *Hoppes v. Des Moines City R. Co.*, 147–580, 126 N. W. 783.

The point that the petition does not allege a cause of action or that there is a variance between the allegations in the petition and the proof cannot be first raised on an appeal. *Schaffhauser v. Hemmer*, 152–200, 131 N. W. 6.

No change of base: A party cannot on appeal take a different position than that which was taken by him on the trial of the case. *Himmelman v. Des Moines Ins. Co.*, 132–668, 110 N. W. 155.

The appellant cannot on appeal change the position taken by him in the trial court and insist even as matter of law on a different conclusion than that conceded by him to be correct on the trial of the case. *Board of Park Commissioners v. Taylor*, 133–453, 108 N. W. 927.

The appellant cannot rely on a different right in the supreme court from that on which he relied in the lower court. *Willis v. Weeks*, 129–525, 105 N. W. 1012.

The appellant will not be permitted to shift his ground on appeal and raise a point not presented in the trial court. *Long v. Garey Inv. Co.*, 135–398, 112 N. W. 550.

A party cannot on appeal seek relief on a theory of the case not presented to

the court below. *Battles v. Roberts*, 120–747, 95 N. W. 247.

New issues: The court may properly submit to the jury the precise issue that was presented by the pleadings and on which the case was tried, and it cannot be contended on appeal that the case should have been submitted on a different theory than that on which it was in fact submitted, without objection, in the lower court. *Steele v. Crabtree*, 128–65, 102 N. W. 808.

Where the case has been tried by consent of both parties on one theory the appellant cannot complain that another theory was not considered by the trial court. *Stelpflug v. Wolfe*, 127–192, 102 N. W. 1130.

Where error is committed in the trial in the submission of the case to the jury on the theory on which it is tried, it is not open to appellee to insist that the question as to which error was thus committed is not in fact involved in the case. *Overhouser v. American Cereal Co.*, 128–580, 105 N. W. 113.

An equity case will be tried on appeal on the same issues on which it was tried in the lower court. A new question cannot be raised for the first time in the supreme court. *Ormsby v. Graham*, 123–202, 98 N. W. 724.

New reason: If the objection relied on in the appellate court has actually been made in the trial court, appellee is not precluded from giving a reason in support thereof which was not assigned on the trial. *Cooper v. Cedar Rapids*, 112–367, 83 N. W. 1050.

Motion for new trial: Where the trial is to the court and the controlling question is as to the sufficiency of the evidence, the supreme court may consider that question on appeal although it has not been directly asked to give a new trial on account of the insufficiency of the evidence. *Alpha Checkrower Co. v. Bradley*, 105–537, 75 N. W. 369.

A motion for a new trial filed too late, or a motion for a judgment notwithstanding verdict, will not be deemed a waiver of errors which might have been presented without such motion. *Hooker v. Chittenden*, 106–321, 76 N. W. 706.

A motion for new trial is not necessary. See notes to § 4106.

Taxation of attorney's fees: A motion to retax costs is not necessary in order to secure a review of the judgment of the lower court as to taxation of attorney's fees made in the judgment itself. *Ainley v. American Mut. F. Ins. Co.*, 113–709, 84 N. W. 504.

In criminal cases: The rule that the supreme court will not on appeal consider an objection not raised in the lower court is not applicable in criminal cases. *State v. Nine*, 105–131, 74 N. W. 945.

(b.) *What the record must show in order that a question may be reviewed.*

Where the evidence is not all before the supreme court it cannot determine whether the trial court did or did not err in sustaining a motion for a verdict. *Dungan v. Iowa Cent. R. Co.*, 96–161, 64 N. W. 762.

But in such case it is only necessary that the record show all the evidence received. It is not necessary that all the evidence offered be shown. *Goring v. Fitzgerald*, 105–507, 75 N. W. 358.

The error complained of must be made to appear by the record. *Carlson v. Hall*, 124–121, 99 N. W. 571.

The supreme court cannot on appeal review the rulings of the trial court based on evidence not appearing in the record. *In re Estate of Smith*, 133–142, 109 N. W. 196.

Where a question related to a certain exhibit and was objected to as incompetent and immaterial, held that a ruling sustaining the objection could not be reviewed in the absence from the record of the exhibit referred to. *Liefheit v. Schlitz Brewing Co.*, 106–451, 76 N. W. 730.

Where a complaint is made of the rejection of testimony, it must appear, to warrant reversal, that the rejected testimony would have been relevant and competent. *Gibson v. Burlington, C. R. & N. R. Co.*, 107–596, 78 N. W. 190.

Where the appellant's abstract states that upon the issue raised by the pleadings the evidence was conflicting, and this statement is not denied, the court may consider errors assigned in giving instructions with reference to such evidence. *Jerolman v. Chicago G. W. R. Co.*, 108–177, 78 N. W. 855.

In an action at law, where the appellate court is not asked to determine the sufficiency of the evidence to sustain a verdict or judgment, it is proper to state in the abstract what the evidence submitted tended to prove. *Shumway v. Burlington*, 108–424, 79 N. W. 123.

If the errors assigned are based entirely on rulings on the admissibility of evidence or its effect, it is sufficient if the evidence offered and received, together with the objections, rulings and exceptions, is duly certified and filed. *State v. Welsh*, 109–19, 79 N. W. 369.

To pass upon the validity of a directed verdict the record need only show the evidence on the part of the person against whom the verdict is directed. *Scott v. St. Louis, K. & N. W. R. Co.*, 112–54, 83 N. W. 818.

Where the evidence is not preserved in the record it will be assumed that there was evidence justifying the giving of instructions so far as they are correct expressions of the law. *Monson v. Carlstrom*, 141–183, 119 N. W. 606.

That the abstract is presumed to show all the evidence, see rule 31 and notes to § 4118.

When the want of indispensable parties is apparent on the record the appellate court may on its own motion raise the question. *Tod v. Crisman*, 123–693, 99 N. W. 686.

III. WHAT WILL WARRANT REVERSAL.

(a.) *Presumption of regularity.*

Presumption in favor of trial court: Where a motion for a new trial is sustained generally, the action of the court will not be reversed on appeal if any one of the grounds stated in support of the motion is sufficient to warrant the ruling. *Moore v. Horton*, 105–376, 75 N. W. 195.

Where a motion for a new trial is sustained on one ground thereof, but is not expressly overruled as to the other grounds, the action of the trial court will not be reversed unless it appears that the motion should not have been sustained on any of the grounds stated therein. *Holman v. Omaha & C. B. R. & B. Co.*, 110–485, 81 N. W. 704.

Where a motion for new trial is sustained on some of the grounds set up and expressly overruled upon all others, the appellee not having appealed, the court cannot consider whether the motion might not properly have been sustained on other grounds than those specified by the trial court. A different question would be presented if the court, instead of overruling the motion on all other grounds but those sustained, had made no ruling as to such grounds. *Loomis v. Des Moines News Co.*, 110–515, 81 N. W. 790.

Every presumption is to be indulged in favor of the correctness of the rulings of the lower court which are complained of. *Carlson v. Hall*, 124–121, 99 N. W. 571.

In the absence of a showing to the contrary, it will always be presumed that the court has acted properly. *Cox v. Burnham*, 120–43, 94 N. W. 265.

Where the court overrules a motion it will be presumed that the ruling was on a ground which is tenable, although another ground which is not tenable is also urged. *German Sav. Bank v. Cady*, 114–228, 86 N. W. 277.

Where it does not affirmatively appear that the court overruled some of the grounds of a motion for new trial there should not be a reversal because other grounds alleged are not in themselves sufficient to sustain the action of the court in granting a new trial. To establish error in such a case it must affirmatively appear that a new trial should not have been granted on any of the grounds stated. *Boyd v. Western Union Tel. Co.*, 117–338, 90 N. W. 711.

New reasons: If there is any ground appearing in the record on which the trial court's ruling can be sustained it will be affirmed, though such a ruling may have in fact been based on some other ground. *Cotton v. Southwestern Mut. L. Assn.*, 115–729, 87 N. W. 675.

Where a demurrer is sustained to a petition in an action for mandamus, the judgment will be affirmed if on the whole the petition fails to state a cause of action, even though the reasons indicated for the ruling by the trial court are not sufficient. *Vincent v. Ellis*, 116–609, 88 N. W. 836.

Error cannot be presumed; it must affirmatively appear on the record. *Collins v. Keokuk*, 147–605, 125 N. W. 231.

(b.) *Prejudicial error.*

Error without prejudice: One party is not prejudiced by a ruling that the other must prove more than the law requires to be proved under the issues. *Read v. State Ins. Co.*, 103–307, 72 N. W. 665.

The sustaining of a motion to make a petition more specific will be error without prejudice where the petition, having been amended by the addition of new matter in response to such motion, is held insufficient on demurrer on the ground that it does not state facts sufficient to show cause of action. *Sigmond v. Bebber*, 104–431, 73 N. W. 1027.

Where under the evidence and instructions there could be no dispute as to the amount of recovery, held that error in refusing to strike out items of plaintiff's claim, as to which final recovery was not allowed, was error without prejudice. *Gwinn v. King*, 107–207, 77 N. W. 834.

Error in overruling a challenge for cause will not be deemed prejudicial where it does not appear in the record that the juror could not have been dismissed peremptorily. *Haggard v. Peterson*, 107–417, 78 N. W. 53.

Where the verdict is in accordance with the interpretation which the court should have given to a written instrument, the action of the court in leaving the interpretation to the jury will be error without prejudice. *Hasbrouck v. Western U. Tel. Co.*, 107–160, 77 N. W. 1034.

Error in submitting to the jury an issue on which the court should have found as a matter of law in favor of the successful party, is error without prejudice. *Mace v. Boedker*, 127–721, 104 N. W. 475.

The erroneous admission of evidence to establish a fact which is conceded by the complaining party is without prejudice and will not justify a reversal. *State v. Wagner*, 123–271, 98 N. W. 763.

The withholding of rulings on objections to evidence is error without prejudice where the court subsequently sustains a motion to direct a verdict. *American Soda Fountain Co. v. Dean Drug Co.*, 136–312, 111 N. W. 534.

A party cannot complain on account of passion and prejudice of the jury where it appears that the action of the jury was more favorable to such party than the evidence would justify. *Landreth v. Carey*, 136–61, 113 N. W. 545.

Error in overruling a challenge to a juror is not ground of reversal where it does not appear that the challenged juror sat in the case or that the appellant exhausted his peremptory challenges. *Furlong v. American Central F. Ins. Co.*, 136–499, 113 N. W. 1087.

The rejection of evidence as to a matter fully established without conflict with other testimony is error without prejudice. *Hibbets v. Threlkeld*, 137–164, 114 N. W. 1045.

Although both parties at the close of the evidence move for a directed verdict, the party in whose favor the verdict is directed is not entitled to insist on appeal that the court be limited to the consideration of the correctness of the finding on the law if there is any evidence to support the finding. *Teeple v. Hawkeye Gold Dred. Co.*, 137–206, 114 N. W. 906.

It would usually be presumed that the jury followed the instructions of the court, directing them not to consider testimony improperly offered, and therefore, that the action of counsel in attempting to get before the jury incompetent testimony was not prejudicial. *Richardson v. Centerville*, 137–253, 114 N. W. 1071.

Not every error occurring during the course of the trial is to be given force *ex necessitate* to work a reversal of the judgment. If the error be such in character or has so occurred as that upon the whole record it can be said that no substantial injustice was done it should be ignored. So held in regard to the refusal of the court to send an instrument of evidence to the jury which related only to an admission on cross-examination. *McMahon v. Iowa Ice Co.*, 137–368, 114 N. W. 203.

The excluding of evidence of a particular fact will be error without prejudice where the same fact is established by other uncontradicted evidence. *Baker v. Mathew*, 137–410, 115 N. W. 15.

Error in the admission of evidence will not be sufficient ground for reversal where the verdict does not involve the determination of the issue to which the evidence relates. *Hoyt v. Hoyt*, 137–563, 115 N. W. 222.

In a particular case held that on account of the decision on the merits it was not necessary to review rulings on a motion to strike and upon a demurrer. *Jenkins v. Hawkeye Com. Men's Assn.*, 147–113, 124 N. W. 199.

A ruling striking evidence from the record is without prejudice if the same evidence is subsequently introduced without objection and is before the jury for consideration. *Rockwell v. Ketchum*, 149–507, 128 N. W. 940.

Errors in rulings on challenges to jurors are without prejudice where the court has directed a verdict. *Parr v. Union Electric Co.*, 150–70, 129 N. W. 301.

The supreme court will not reverse a case on a ruling sustaining an objection to a question asked of a witness unless it appears in some manner what the answer of the witness would have been. *Arnold v. Livingstone*, 155–601, 134 N. W. 101.

It is doubtful if a reversal will be justified in any case because of the trial court's refusal to strike an irresponsive answer where the matter testified to has a legitimate bearing upon the issue being tried. *Lomack Home v. Iowa Mut. Tornado Ins. Assn.*, 155–728, 133 N. W. 725, 137 N. W. 936.

Where there is nothing in the evidence improperly received which is calculated to prejudice the jury in the decision of the case or divert their minds from the issues, the error will not justify the granting of a new trial on appeal. *Miller v. Wagner*, 141 N. W. 1052.

Cumulative evidence: Error in exclusion of cumulative evidence which could add nothing to the weight of the evidence already given will be deemed to be without prejudice. *Owen v. Christensen*, 106–394, 76 N. W. 1003.

The wrongful exclusion of cumulative evidence is not error without prejudice where there is a sharp conflict in the evidence, and the number and the character of the witnesses is important. *Crago v. Cedar Rapids*, 123–48, 98 N. W. 354.

Erroneous reason: An erroneous reason for a correct ruling does not furnish a ground for reversal. *State v. Crofford*, 133–478, 110 N. W. 921.

Prejudice must appear: A ruling as to the right to open and close, that matter being left to the discretion of the court, cannot be questioned on appeal, no affirmative prejudice appearing. *Shaffer v. Des Moines Coal & Hay Co.*, 122–233, 98 N. W. 111.

Prejudice is not to be presumed from an error in a ruling on a matter of procedure as to which the trial court has a discretion, and unless prejudice is shown to have resulted to the complaining party, such error will not be ground for reversal. *Farmer v. Norton*, 129–88, 105 N. W. 371.

Before a case will be reversed on the ground of exclusion of evidence, it must appear in some way that the evidence, if it had been admitted, would have tended to support the contention of the party for whom it was offered. *Porter v. Moles*, 151–279, 131 N. W. 23.

Prejudice presumed: When error appears prejudice will be presumed until the contrary affirmatively appears. *Ford v.*

Chicago, R. I. & P. R. Co., 106–85, 75 N. W. 650.

Contradictory and conflicting instructions are almost uniformly held to be erroneous except in cases where the court can say there was no prejudice. *Ibid.*

Where an instruction given is erroneous it will be presumed to be prejudicial and to have been the ground of the verdict unless it affirmatively appears that the verdict was based on some other ground. *Strever v. Chicago & N. W. R. Co.*, 106–137, 76 N. W. 513.

From error in the giving of an instruction prejudice is presumed which must be overcome by the record in order to show that the error was without prejudice. *Loughran v. Des Moines St. R. Co.*, 107–639, 78 N. W. 675.

Without an appeal or an assignment of error appellee may protect a judgment in his favor, if entitled thereto on the face of the record, by showing from the record that the errors of which appellant complains were without prejudice. *Voorhees v. Arnold*, 108–77, 78 N. W. 795.

Absence of judge from the court room and beyond hearing of the proceedings when not shown affirmatively to have been without prejudice is in itself error alone sufficient to warrant reversal of judgment. *State v. Carnagy*, 106–483, 76 N. W. 805.

But by affirmative consent to such absence error therein will be waived, even in a criminal case, unless prejudice appears. *State v. Hammer*, 116–284, 89 N. W. 1083.

Where the character of the answers expected in response to questions asked is evident, the appellant, complaining of a ruling sustaining objections to such questions, is entitled to the presumption that the evidence, if received, would have been favorable to him. *Swanson v. Allen*, 108–419, 79 N. W. 132.

Where the object for which the question is asked is not apparent, but it is sought thereby to establish collateral facts, the materiality of which is to be afterwards shown, counsel asking the question must state what he expects to prove and in what way the facts sought to be elicited will become material, otherwise the sustaining of an objection to his question will be error without prejudice. But where the question calls for evidence, the materiality and competency of which is plainly apparent, an error in sustaining an objection to the question will be presumed to be prejudicial. *Quinlan v. Chicago, R. I. & P. R. Co.*, 113–89, 84 N. W. 960.

Where error is shown in a case not triable *de novo*, it is presumed to be prejudicial and to call for a reversal unless lack of prejudice is affirmatively shown. It is not necessary for the appellant to bring up any more of the record than to show the error complained of. If appellee claims that the erroneous ruling was without prejudice, he must make that fact appear. *In re Cherokee County Printing*, 156–282, 136 N. W. 765.

Where error is shown it will be presumed to have been prejudicial unless the contrary appears. *Stanley v. Taylor*, 142 N. W. 81.

Slight error: Where plaintiff was erroneously allowed to introduce evidence of an element of damage for which recovery should not have been permitted, but the damage thus proven was of an inconsiderable amount, and no request to have that amount remitted from the verdict was made in the lower court, held that the judgment would not be interfered with on appeal. *Frohs v. Dubuque*, 109–219, 80 N. W. 341.

Error of a few cents in computing the amount of recovery will not be ground for reversal. *Perin v. Cathcart*, 115–553, 89 N. W. 12.

The supreme court will refuse to reverse a case because of a slight excess in the allowance of interest. *Colwell v. Urbana Const. Co.*, 154–623, 135 N. W. 76.

The supreme court will not reverse on account of error in permitting an element of damage to be considered which could not in any event have been more than trifling. *Scott v. O'Leary*, 157– —, 138 N. W. 512.

No other result: Where no other conclusion than that embodied in the judgment appealed from could reasonably be anticipated on another trial, the error complained of may be disregarded. *Schaefer v. Anchor Mutual Fire Ins. Co.*, 133–205, 100 N. W. 857, 110 N. W. 470.

The supreme court will not reverse for failure to submit a question to the jury where no other result could have been properly reached had the question been submitted. *Haggard v. Independent Sch. Dist.*, 113–486, 85 N. W. 777.

Error in refusing to transfer an action from the equity to the law docket will be error without prejudice where the issues would in any event be triable without a jury. *McCormick Har. Mach. Co. v. Markert*, 107–340, 78 N. W. 33.

Error in transferring an action to the equity docket will be without prejudice if the same judgment must necessarily have been rendered under the evidence had no transfer been made. *Rattray v. Talcott*, 124–398, 100 N. W. 36.

A case will not be reversed because of the improper admission of evidence where the result could not have been different had such evidence been excluded. Such error is without prejudice. *In re Wiltsey's Will*, 135–430, 109 N. W. 776.

Errors in the admission of evidence are without prejudice if the court subsequently reaches the conclusion that there is not sufficient evidence to sustain a finding of

the fact which such evidence was introduced to establish. *Arment v. Arment*, 134–199, 111 N. W. 812.

Where the vendee has sued to recover back the purchase price paid for property, held that his failure to plead and prove an offer to return would not necessitate the reversal of a judgment in his favor where it appeared that such tender, if made, would not have been accepted. *Olson v. Brison*, 129–604, 106 N. W. 14.

The supreme court will not reverse, especially in an equity case, for error of law committed in the trial where it appears that the final result on another trial must be the same. *Tisdale v. Ennis*, 144–306, 122 N. W. 959.

A case will not be reversed where no prejudice appears or where a different result cannot justly be anticipated. *Zappas v. Roumeliote*, 156–709, 137 N. W. 935.

Nominal damages: A judgment will not be reversed for failure to award nominal damages when it does not appear that appellant was entitled to more. *Lippert v. Lippert*, 110–550, 81 N. W. 777; *Milligan v. Owen*, 123–285, 98 N. W. 792; *Castor v. Dufur*, 133–535, 111 N. W. 43.

In the absence of evidence as to the extent of substantial damages, failure to assess nominal damages is not a ground of reversal. *Rice v. Whitley*, 115–748, 87 N. W. 694.

Failure to award nominal damages may be a ground of complaint on appeal where the recovery of such damages would determine and adjudicate a valuable right as to real property. *Harvey v. Mason City & Ft. D. R. Co.*, 129–465, 105 N. W. 958.

Exemplary damages: Error in rulings on evidence with reference to exemplary damages will be error without prejudice if actual damages are not allowed. *McNally v. Arnold*, 127–437, 103 N. W. 361.

Erroneous instruction as to the allowance of exemplary damages will constitute error without prejudice where it appears that no such damages were allowed by the jury. *Security Sav. Bank v. Smith*, 144–203, 122 N. W. 825.

Error cured: Error in overruling a motion to exclude evidence will be error without prejudice where at the end of the examination all evidence of that character is excluded and the jury cautioned to disregard it. *State v. Baker*, 106–99, 76 N. W. 509.

While it is not proper to base an argument on facts not shown to have existed, error in doing so is cured by prompt action of the court in requiring the withdrawal of such remarks. *Mackerall v. Omaha & St. L. R. Co.*, 111–547, 82 N. W. 975.

Error in submitting a ground of recovery of which there is no evidence may be cured by filing an offer to remit that for which verdict should not have been rendered. *Bowsher v. Chicago, B. & Q. R. Co.*, 113–16, 84 N. W. 958.

Error in rejecting testimony will be without prejudice where the fact sought to be established is fully shown by the testimony of other witnesses. *State v. McPherson*, 114–492, 87 N. W. 421.

The admission of incompetent evidence properly objected to cannot be deemed without prejudice because other evidence of the same character was admitted without objection. *Metropolitan Nat. Bank v. Commercial State Bank*, 104–682, 74 N. W. 26.

Prejudice in the erroneous admission of evidence is not removed by the fact that another witness afterwards gives competent testimony as to the same fact. *Bryce v. Chicago, M. & St. P. R. Co.*, 129–342, 105 N. W. 497.

In general, error in the admission of evidence is cured by subsequently striking it out. *Croft v. Chicago, R. I. & P. R. Co.*, 134–411, 109 N. W. 723.

Where the witness has in fact testified as to a matter with reference to which an objection to his testimony is sustained, the error will be without prejudice. *Hofacre v. Monticello*, 128–239, 103 N. W. 488.

The overruling of a motion to strike allegations of damage from the petition will not be a ground of reversal on appeal, though erroneous, if the claim embodied in such allegations is subsequently abandoned and instructions given exclude such claim from the consideration of the jury. *Urdangen v. Doner*, 122–533, 98 N. W. 317.

In general, error in receiving improper evidence may be cured by directing the jury not to consider it. *State v. Moran*, 131–645, 109 N. W. 187; *Smith v. Ellyson*, 137–391, 115 N. W. 40.

And see notes to § 3705.

Error cured by verdict: Where there is an express finding supported by the evidence that a will is invalid by reason of want of mental capacity of testator, a submission to the jury of the question of undue influence, though erroneous, will be without prejudice. *In re Will of Selleck*, 125–678, 101 N. W. 453.

Where by general verdict the plaintiff's cause of action is negatived, error in the exclusion of evidence relating to the measure of damages is without prejudice. *German Savings Bank v. Fritz*, 135–44, 109 N. W. 1008.

Where the jury finds plaintiff not to be entitled to recover anything for the injury for which suit is brought, notwithstanding proof of damage resulting therefrom, the exclusion of evidence relating to the measure of recovery, if error, is without prejudice. *Lush v. Parkersburg*, 127–701, 104 N. W. 336.

Error in instructions as to the measure of damages for wrongful suing out of an attachment will be without prejudice if the

jury finds that the attachment was rightfully sued out. *Crowell v. McGoon*, 106–266, 76 N. W. 672.

Error in rejecting evidence relating to damages is without prejudice where the jury finds no cause of action. *Rosenberger v. Marsh*, 108–47, 78 N. W. 837.

Error in rulings on evidence bearing upon a different issue than that on which the verdict of the jury is based will not warrant a reversal. *Hunter v. Davis*, 128–216, 103 N. W. 373.

(c.) *Review of ruling granting or refusing new trial.*

New trial for insufficient evidence: The verdict of a jury will not be disturbed by the appellate court on the ground that it is not sustained by the testimony unless it is so manifestly against the weight of evidence as to show it to have been the result of passion or prejudice. *Inghram v. National Union*, 103–395, 72 N. W. 559.

A motion for new trial for want of evidence is addressed to the sound discretion of the trial court, and its action thereon will not be interfered with unless it is manifest that such discretion has been improperly exercised, and this rule is especially applicable where the motion is sustained. *Holman v. Omaha & C. B. R. & B. Co.*, 110–485, 81 N. W. 704.

The supreme court is reluctant to interfere with an order granting a new trial. A large discretion in such matters is lodged in the trial court, and its exercise of discretion will be interfered with only in a clear case of abuse. *Loomis v. Des Moines News Co.*, 110–515, 81 N. W. 790.

It requires a clear case to justify setting aside the ruling of a trial court granting a new trial. *Mackintosh v. Locke*, 112–252, 83 N. W. 973.

The supreme court will not interfere with a ruling upon a motion for new trial unless an abuse of discretion is shown, and where a new trial is ordered the abuse must be made to clearly appear. *Rodgers v. Farmers' Nat. Bank*, 117–511, 91 N. W. 773.

While the matter of sustaining a motion for new trial rests largely in the discretion of the trial court, yet this discretion is a legal one, and where improperly exercised will be reviewed and the ruling reversed. However, where justice has been done and the case properly decided on its merits, a new trial cannot be granted. *Stover v. Flower*, 120–514, 94 N. W. 1100.

Where a discretion is confided to an inferior tribunal, the exercise thereof is not subject to review save for an alleged abuse resulting in substantial injustice. *Cox v. Burnham*, 120–43, 94 N. W. 265.

Where the successful party appeals from an order granting a new trial he cannot complain of errors in the instructions with reference to the measure of damages. *Thrush v. Graybill*, 128–406, 104 N. W. 472.

The presumption is strong in favor of the correctness of the action of the court in granting a new trial. *Case Threshing Mach. Co. v. Fisher*, 144–45, 122 N. W. 575.

Further as to review of rulings on motions for new trial, see notes to § 3755.

On appeal from a ruling on a motion for new trial the supreme court may consider errors of law which are made the basis of such motion, although the time for appeal from the judgment has expired. *Powers v. Des Moines City R. Co.*, 143–427, 121 N. W. 1095.

Further, see notes to code § 4110 in this supplement.

(d.) *Review of findings of fact.*

Of jury: A judgment will not be reversed for want of evidence to support it unless there is such a complete lack of support in the evidence as appears by the record as to indicate that the verdict of the jury was the result of passion or prejudice. *Lutz v. Anchor Fire Ins. Co.*, 120–136, 94 N. W. 274.

Under an assignment of error that the verdict is the result of passion and prejudice and not supported by the testimony, the supreme court is bound to accept as established all that the evidence properly tends to prove in appellee's favor. *Pneumatic Weigher Co. v. Burnquist*, 128–709, 105 N. W. 326.

The supreme court has no jurisdiction to correct the findings of fact made by the jury and it cannot consider the sufficiency of evidence to support the verdict unless that question has been raised in the lower court. *Schulte v. Chicago, M. & St. P. R. Co.*, 124–191, 99 N. W. 714.

In a law case the court on appeal does not determine for itself the preponderance of evidence, but the verdict will be sustained if there is any substantial evidence in its support. *Johnson v. Chicago, St. P. M. & O. R. Co.*, 123–224, 98 N. W. 642.

The finding of the jury as to a question of fact will be sustained on appeal although the court would have arrived at a different conclusion under the evidence. *Strand v. Grinnell Automobile Garage Co.*, 136–68, 113 N. W. 488.

Where there is substantial evidence supporting the verdict, the court will not interfere therewith on appeal. *Moore v. Fryman*, 154–534, 134 N. W. 534.

On appeal the verdict of the jury will be considered as a verity unless the verdict is so lacking in substantial evidence in its support as to indicate passion or prejudice on the part of the jury. *In re Law's Estate*, 157– —, 138 N. W. 531.

Insufficiency of evidence to support a verdict cannot be relied upon when the unsuccessful party has made no motion for a directed verdict, but has consented that

the issue be submitted to the jury under the evidence. *Cash v. Dennis*, 139 N. W. 920.

The supreme court will not reverse on account of insufficiency of the evidence to support the verdict where there is a dispute in the evidence or it appears that honest minds searching for the truth might on the whole record reach different conclusions. *Pekarek v. Myers*, 140 N. W. 409.

The jurors are sole judges of the weight of the evidence and the credibility of the witnesses and in the absence of any showing of passion or prejudice, their judgment on the facts is final in all cases where there is evidence in the record supporting their finding. *Lockridge v. Minneapolis & St. L. R. Co.*, 140 N. W. 834.

It is for the jury to pass upon the credibility of the witnesses and the weight to be given to their testimony and where there is evidence, more than a scintilla, to sustain the finding of the jury, the supreme court in the absence of any showing of passion or prejudice on the part of the jury must accept their finding as conclusive on the facts. *Mitchell v. Des Moines City R. Co.*, 141 N. W. 43.

Of trial court: In a law action the finding of the trial court on a question of fact is to be given the same effect as that of the verdict of a jury. *Thistle Coal Co. v. Rex Coal & Mining Co.*, 132–592, 109 N. W. 1094.

The finding of the court in a law case has on appeal the force of a verdict. *In re Estate of Smith*, 133–142, 109 N. W. 196.

The findings and judgment of the trial court upon the facts in a law action tried without a jury are to be treated on appeal as having the force and effect of a verdict of a jury, and are not to be overruled if there is any evidence on which they might reasonably or fairly be based. *Blackledge v. Davis*, 129–591, 105 N. W. 1000.

Where the case is withdrawn from the jury on motion of both parties and a judgment entered on the record made, it is assumed that the issues of fact were all decided against the unsuccessful party and such a finding has the effect of a jury verdict. *Providence Jewelry Co. v. Fessler*, 145–74, 123 N. W. 957.

In a law case tried without a jury, the supreme court will, on appeal, give the evidence the most favorable interpretation of which it was reasonably capable in support of the findings of the lower court. *What Cheer Sav. Bank v. Mowery*, 149–114, 128 N. W. 7.

Where there is a conflict in the evidence and the case is not triable *de novo*, the supreme court will not review the evidence for the purpose of sitting in judgment upon its weight or the credibility of the witnesses. The finding of the court upon the facts submitted to it has the force and effect of the verdict of a jury. So held in a proceeding for the establishment of lost corners. *McGovern v. Heery*, 141 N. W. 435.

Of referee: On an appeal from a decree based on the report of a referee the appellate court is entitled to consider the findings of such referee, although they are not conclusive. *McCormick Harv. Mach. Co. v. Pouder*, 123–17, 98 N. W. 303.

IV. Hearing and Determination of Appeal.

(a.) *Dismissal; affirmance or reversal; remanding; final judgment.*

Jurisdiction: The supreme court may adjudicate the question of its jurisdiction as a matter of fact on a motion to dismiss. *Yockey v. Woodbury County*, 130–412, 106 N. W. 950.

The jurisdiction of the supreme court on an appeal cannot be challenged save as provided in the amendment to this section by act of 33 G. A., ch. 206. *Stein v. McAuley*, 147–630, 125 N. W. 336.

A motion to dismiss on the ground that appellant is no longer entitled to maintain his appeal is not one which goes to the jurisdiction of the court within the meaning of the last sentence added to this section by amendment (33 G. A., ch. 206). *Iowa Loan & Trust Co. v. Kunsch*, 156–91, 135 N. W. 426.

Affirmance on motion: The affirmance of the judgment in an action for the recovery of real property entered in the supreme court on motion by reason of the failure of the appellant to properly prosecute his appeal is not a bar to the granting of a new trial in such an action under the provisions of code § 4205. Such an affirmance adds nothing to the judgment from which the appeal has been taken. *Bevering v. Smith*, 121–607, 96 N. W. 1110.

Where the appellant presents neither points, propositions nor argument in support of his appeal, the judgment will be affirmed on appellee's motion. *McCormick Harv. Mach. Co. v. McCormick*, 128–155, 103 N. W. 204.

After an opinion has been filed on original submission and set aside on petition for rehearing, it is too late to file a motion to affirm on the ground of failure of appellant to file his original argument within the time prescribed by the rules *Salinger v. Western Union Tel. Co.*, 147–484, 126 N. W. 362.

Affirmance by operation of law: In case of equal division of the judges the decision of the lower court is affirmed by operation of law. *Chicago, M & St P. R. Co. v. Davenport*, 127–677, 103 N. W. 996; *Chicago & N. W. R. Co. v. Cedar Rapids*, 127–678, 103 N. W. 997.

Examination of record: On appeal from the action of the court in directing a verdict the correctness of such action must be determined by an examination of the entire evidence material to the issue involved. *Watson v. Dilts*, 124–344, 100 N. W. 50.

Remittitur: The supreme court may affirm on condition that the successful party remit a portion of the judgment, giving to the appellant the option of accepting such remittitur or having a new trial. *Hunter v Davis*, 128–216, 103 N. W. 373.

Where it appears that a judgment erroneously included a specific sum, the court may affirm the judgment on condition that the appellee remit the amount erroneously included. *Govern v. Russ*, 125–188, 100 N. W. 325.

Where the verdict is excessive the court may order an affirmance upon condition that the appellant file a remittitur of the portion of the judgment over and above the amount which the court finds to be supported by the evidence. *Struble v. Burlington, C. R. & N. R. Co.*, 128–158, 103 N. W. 142.

It is not error to refuse a new trial on one count, the plaintiff, pending the motion for new trial, having remitted the amount of recovery on such count. *McElhone v. Wilkinson*, 121–429, 96 N. W. 868.

Upon reaching the conclusion that the verdict is, under the evidence, excessive in the amount of damages allowed, the supreme court may allow the successful party to elect to have another trial or accept a certain specified amount as the largest amount which would seem to the court not open to the objection of being excessive. *Canfield v. Chicago, R. I. & P. R. Co.*, 142–658, 121 N. W. 186.

Where the verdict includes allowance to plaintiff on two causes of action, error as to the measure of damages under one of such causes of action cannot be cured by a remittitur. *In re Oldfield's Estate, Bowie v. Trowbridge*, 157– —, 138 N. W. 846.

Remand: Where a decree is affirmed and no order is made for remanding the case to the lower court, the affirmance is simply a ratification of what has been done in the lower court and leaves the parties in precisely the same situation in the lower court as though no appeal had been taken, and subsequent proceedings with reference to the enforcement of the decree may be had in the lower court without regard to the fact of such appeal. *Dunton v. McCook*, 120–444, 94 N. W. 942.

After a remand of an equity case for decree in the lower court in accordance with the opinion, the case stands precisely as any suit in equity between the submission and the entry of the decree, for such decision as should be entered upon the pleadings and evidence as they stand, unless for good cause shown the trial court permits an amendment to the pleadings or the introduction of additional testimony. *Hogle v. Smith*, 136–32, 113 N. W. 556.

Where a case involving equitable issues was erroneously transferred to the law docket, held that the supreme court would not remand the case for such error if it appeared as the result of a trial substantially in accordance with the practice of equitable proceedings the complaining party was entitled to no relief. *Irwin v. Deming*, 142–299, 120 N. W. 645.

Where other claims have arisen after the judgment, relating to the subject matter of the suit, the case may be remanded for the determination of such claims. *Inman Mfg. Co. v. American Cereal Co.*, 142–558, 119 N. W. 722, 121 N. W. 177.

After a case has been remanded for judgment in accordance with the decision of the supreme court, the unsuccessful party is not entitled to have the verdict set aside and a new trial granted. It is not the policy of the law to permit a case to be tried in piecemeal. *Hensley v. Davidson*, 143–742, 120 N. W. 95.

After an affirmance which determines every question involved in the case and a remand for judgment in accordance with the opinion of the supreme court, the plaintiff has no right to dismiss his action. *Inman Mfg. Co. v. American Cereal Co.*, 155–651, 136 N. W. 932.

Decision binding on second appeal: The rule of law announced by the supreme court on one appeal is to be followed by the lower court on the second trial of the case and will be recognized as the law of the case on a second appeal. *McFall v. Iowa Cent. R. Co.*, 104–47, 73 N. W. 355.

It would be manifestly unjust to reverse the lower court for following the express direction of the supreme court given on the former appeal in the same case. The holding of the court on one appeal is the law of the case for a subsequent trial of the same case in the lower court. *Hendershott v. Western Union Tel. Co.*, 114–415, 87 N. W. 288.

Where the court on appeal has determined that the evidence in an action for negligence should have been submitted to the jury, it is error in the trial court on a second trial to set aside the verdict on the ground that such evidence is not sufficient to support the verdict. *Hensley v. Davidson Bros. Co.*, 135–106, 112 N. W. 227.

The decision on appeal becomes the law of the case and should be followed on a retrial and on a subsequent appeal, unless the facts on the subsequent trial are materially different. *Russ v. American Cereal Co.*, 121–639, 96 N. W. 1092.

On an appeal from the second trial of a case in which the first trial has been reviewed by the supreme court, the decision on the former appeal must be taken as the

law of the case upon the propositions considered on such appeal. *Vogt v. Grinnell*, 133–363, 110 N. W. 603.

Even where the decision of the court on a former appeal is the result of an equal division of the court, it nevertheless constitutes the law of the case. *In re Estate of Blackman*, 143–553, 120 N. W. 664.

The determination of the question involved on appeal becomes the law of the case on a subsequent trial. *In re Estate of Cook*, 143–733, 122 N. W. 578.

One who is represented on an appeal by counsel, although not formally a party, is bound by the decision in subsequent proceedings. *Canal Construction Co. v. Woodbury County*, 146–526, 121 N. W. 556.

Where it has been held on one appeal that the evidence is sufficient to take the case to the jury, such holding becomes the law of the case and is binding on a subsequent trial in which the evidence is substantially the same. *Williams v. Clarke County*, 148–746, 127 N. W. 1030.

Where it has been held on one appeal that the evidence is not sufficient to sustain a verdict for the plaintiff, judgment on a similar verdict rendered in a second trial will be reversed. *Nason v. Chicago, R. I. & P. R. Co.*, 149–608, 128 N. W. 854.

Alleged errors presented to the supreme court on one trial but not made a ground of reversal cannot be relied on as grounds of error in a second trial. *State v. Kimes*, 152–240, 132 N. W. 180.

A wrong reason assigned by the trial court for a ruling which for any reason is correct, does not become the law of the case. *Fountain v. Standard Fire Ins. Co.*, 155–96, 134 N. W. 1090.

The ruling in *Hensley v. Davidson Bros. Co.*, 135–106, 112 N. W. 227, that after the supreme court has on appeal overruled the lower court in deciding that under the evidence a verdict for a party should not have been directed, the lower court should not on its own motion set aside a verdict against such party on substantially the same evidence, does not overrule numerous decisions to the effect that although the lower court has properly submitted an issue to the jury it may, in its sound discretion and on reasonable grounds of belief that an erroneous verdict has been reached, grant a new trial in order that the facts may be passed upon by another jury. *Porter v. Madrid State Bank*, 155–617, 136 N. W. 666.

The decision on one appeal as to the sufficiency of the evidence under the issues to take the case to the jury is binding on a subsequent trial of the case. *White v. International Textbook Co.*, 156–210, 136 N. W. 121.

Effect of decision: The reversal of a judgment annuls garnishment proceedings instituted under such judgment, and the recovery of another judgment on a new trial will not restore the effect of such garnishment. *Decatur v. Simpson*, 119–488, 93 N. W. 496.

The effect of the modification of a decree on appeal to the supreme court is to supersede to that extent the original decree, and until this modification is carried into effect pursuant to the order of the court, the decree originally entered by the lower court is not final and no execution should issue thereon. *Jefferson v. Rust*, 155–133, 135 N. W. 613.

The effect of an order of affirmance does not depend on whether the decision of the supreme court is as to the merits of the case. *In re Culver's Estate, Gould v. Morrow*, 140 N. W. 878.

Final judgment: Where the facts are found by the trial court and the conclusion reached is the result of an erroneous application of the rules of law to such facts, the supreme court may properly direct the lower court to enter judgment on the facts found without a retrial of the case. *Rew v. Independent School District*, 125–28, 98 N. W. 802.

While either of the parties is entitled upon a trial *de novo* to have a final decree entered by the supreme court, yet if the judgment is such as to affect the title of real estate it should properly be entered in the court where the question was tried. *Hogle v. Smith*, 136–32, 113 N. W. 556.

In the absence of an application for final judgment in the supreme court, it is to be presumed that the party in whose favor the decision has been rendered has elected to have such final judgment entered in the lower court, and the issuance of a *procedendo* confers authority on the lower court to enter such judgment as should originally have been entered. *Miller v. Rosebrook*, 144–194, 122 N. W. 837.

Opinion: The language in an opinion must be limited by the subject to which it is applied. *Geiershofer v. Nupuf*, 106–374, 76 N. W. 745.

(d.) *Trial of equity cases de novo.*

What triable de novo: Where the action was properly one at law, but has been treated in the lower court as if in equity, it will be so treated on appeal. *Harrison v Palo Alto County*, 104–383, 73 N. W. 872.

An action commenced in equity and tried in the lower court without objection as an equitable action is triable *de novo* on appeal. *Des Moines Sav. Bank v. Morgan Jewelry Co.*, 123–432, 99 N. W. 121.

A proceeding for admeasurement of dower is triable ordinarily upon assignment of error and not *de novo*. *In re Estate of Lund*, 107–264, 77 N. W. 1048.

Exceptions to rulings on the admission and exclusion of evidence, even though assigned as error, will not be considered on a trial of an equity case *de novo*. *Varnum v. Winslow*, 106–287, 76 N. W. 708.

The supreme court is not required to hear a case *de novo* until there has been a hearing and decision in the lower court. *Novak v. Novak*, 137–519, 115 N. W. 1.

Where the evidence is not all before the supreme court it will be presumed in a trial *de novo* that the decree of the trial court is correct. The fact that by reason of inability to present the record from the lower court on account of loss of exhibits or otherwise, the appellant is without his fault prevented from securing a review of the case *de novo*, will not constitute any reason for remanding for a new trial. *Lowery v. Lowery*, 140–498, 118 N. W. 749.

The right to trial *de novo* must be exercised and worked out in accordance with the methods provided by law. If by reason of the death of the shorthand reporter before a transcript of the evidence is made, it becomes impossible to present the case on appeal, this will not constitute a ground for awarding a new trial. *Dumbarton Realty Co. v. Erickson*, 143–677, 120 N. W. 1025.

While in a trial *de novo* it is not a sufficient answer to a pertinent proposition of fact or law that it was not considered in the court below, yet it is an insuperable objection to its consideration that it is not within the scope of the issues as formulated in the lower court. *Chicago, M. & St. P. R. Co. v. Monona County*, 144–171, 122 N. W. 820.

On a trial *de novo* in a case in which all the evidence offered is made of record it is proper for the court to determine the competency and admissibility of the evidence although no objection thereto was made in the lower court. *Henninger v. McGuire*, 146–270, 125 N. W. 180.

A probate proceeding for the settlement of an estate is not triable *de novo* on appeal. *In re Estate of Clark*, 151–511, 131 N. W. 700.

Probate proceedings involving the right of custody of a child are not triable *de novo* on appeal to the supreme court. In such a case, if the finding of the court is substantially supported by the evidence, it will not be interfered with. *Brem v. Swander*, 153–669, 132 N. W. 829.

Finding of lower court: Even in an equity case triable *de novo* it is not improper to give some weight to the fact that the trial court had before it the witnesses and that it is in a better position than the appellate court to determine the credibility and effect of their testimony. *Berry v. Berry*, 115–543, 88 N. W. 1075; *Mosher v. Goodale*, 129–719, 106 N. W. 195; *Swartwood v. Chance*, 131–714, 109 N. W. 297; *Baily v. Sioux City*, 133–276, 110 N. W. 839; *Sargent v. Owen*, 134–365, 111 N. W. 980; *Whitley v. Johnson*, 135–620, 113 N. W. 550; *Healy v. Hohn*, 157– —, 138 N. W. 551; *Knox v. McMurray*, 140 N. W. 652.

Even in a case triable *de novo* the findings of the trial judge on the testimony of the witnesses before him will be disturbed with reluctance. *Johnson v. Farmers' Ins. Co.*, 126–565, 102 N. W. 502.

Where a case is tried on oral evidence the trial court stands in a better position than the supreme court to arrive at the truth of the disputed facts and its findings will be disturbed with reluctance, although the case is triable *de novo*. *Wilkie v. Sassen*, 123–421, 99 N. W. 124.

In view of the fact that the trial court has heard the evidence as given, and has had opportunities to observe the effect of the evidence, it should exercise greater freedom in granting new trials for insufficiency of the evidence than will be exercised by the supreme court on appeal, and the supreme court will not interfere with the discretion of the lower court in such cases unless it appears that there has been a clear case of abuse of legal discretion. *Brooks v. Brotherhood of American Yeomen*, 115–588, 88 N. W. 1089.

In view of the trial court's superior opportunity of weighing the evidence given orally, the supreme court will be inclined not to interfere with the findings of the trial court on an issue of fact. *Flynn v. Finch*, 137–378, 114 N. W. 1058.

Although a certiorari proceeding to review the action of the trial court in refusing to punish for contempt in violation of an injunction is triable *de novo*, weight will be given to the finding of the lower court when the testimony is conflicting. *Sawyer v. Hutchinson*, 149–93, 127 N. W. 1089.

On a trial *de novo*, the supreme court is justified in giving considerable weight to the conclusions reached by the trial judge who has had the witnesses before him as to the weight to be given to the testimony of such witnesses in case of confiict. *Fulton v. Fisher*, 151–429, 131 N. W. 662.

Even in a case triable *de novo*, the supreme court will not overlook the fact that in cases tried on oral evidence the trial judge was in a better position to arrive at the truth than the supreme court can possibly be; and if it appears that the trial judge has acted without prejudice or bias, it is with reluctance that his findings will be disturbed. Especially is this true where the evidence is close or conflicting and the appearance and manner of the witnesses testifying might have the effect of turning the scales of justice one way or the other. *Harris v. Harris*, 139 N. W. 896.

What abstract must show in trials de novo: Where the abstract of the appellant does not show that the record is such that the case can be tried *de novo* and the case is submitted in that form and appellee insists that the appeal should be dismissed, the appellant cannot subsequently cure the defects in his abstract and secure a trial *de novo* by an amendment.

Watson v. Burroughs, 104–745, 73 N. W. 866.

The fact that the abstract does not appear to contain all the evidence may justify an affirmance of the judgment of the lower court, but not a dismissal of the appeal. *First Nat. Bank v. Robinson*, 105–463, 75 N. W. 334.

Failure of an abstract to show that it contains evidence offered, but not received, as well as that offered and introduced, may be cured by amendment when the defect is pointed out. *Steckel v. Standley*, 107–694, 77 N. W. 489.

After the evidence has on appeal been stricken from the record because not properly preserved and the case has been submitted on the part of appellee, appellant is not entitled to have the evidence reinstated and the case considered as though such evidence was in the record. *Citizens' Bank v. Johnson*, 107–365, 77 N. W. 1046.

The submission of the case on an agreed statement of facts does not render unnecessary the preservation and certification of the evidence in an equity case, it appearing that evidence in addition to the statement of facts was introduced, and the agreed statement of facts itself being a matter of evidence must be thus preserved and certified. *Co-Operative Bank v. Meldrum*, 128–694, 105 N. W. 206.

Remanding case: Even in an equity case triable *de novo* the supreme court may remand the case to the lower court for further proceedings to ascertain the amount for which decree shall be rendered. *Haggerty v. Brower*, 105–395, 75 N. W. 321.

Where in an equity case evidence offered by one party is excluded on the objection of the other, and on appeal the exclusion of such evidence is held to have been erroneous, the case may be remanded in order to enable the party who was successful below to introduce evidence to meet that offered by his opponent, which he would have had an opportunity to offer had his objection been overruled. *Shetler v. Stewart*, 133–320, 107 N. W. 310, 110 N. W. 582.

Even in an equity case the appellee after a reversal may be entitled to a remand of the case to the lower court to enable him to introduce evidence which under the erroneous theory on which the case was tried was not admissible. But a remand of the case for new trial will be granted only in furtherance of justice, and the showing therefor must be such as ordinarily would entitle a party to a new trial. *Chicago, M. & St. P. R. Co. v. Hemenway*, 134–523, 111 N. W. 987.

Where a decree enjoining the maintenance of a business as constituting a nuisance is reversed because the business is not under the evidence *per se* a nuisance, the case should be remanded for further testimony in order that proper conditions may be prescribed as to the conduct of the business. *Hughes v. Scheuerman Bros.*, 134–742, 112 N. W. 198.

Although the trial court loses jurisdiction on an appeal in an equity case which it does not again acquire unless the case is remanded by the supreme court, it still has the chancery power inherent in a court of equity to change or modify its orders relating solely to enforcement of such decree. *Swan v. Harvey*, 123–192, 98 N. W. 641.

Where an equity case is remanded for proceedings in the lower court in harmony with the opinion, the parties may proceed to introduce evidence on issues undetermined in view of the ruling on appeal. *Hogle v. Smith*, 136–32, 113 N. W. 556.

Even in an equity case triable *de novo*, the supreme court may, whenever it is essential to effectuate justice, remand to the trial court for such further proceedings as the circumstances of a particular case may require. *Kossuth County State Bank v. Richardson*, 141–738, 118 N. W. 906.

Where a case is remanded for a specific purpose the lower court has no authority to change the decree save in that particular respect. *Roth v. Boies*, 146–170, 124 N. W. 879.

Where the supreme court finds that a decree inconsistent with that entered in the lower court is proper, it may remand the case to enable the unsuccessful party to bring additional parties into the case for the purpose of effecting justice. *Boynton v. Salinger*, 147–537, 126 N. W. 369.

Where a case is remanded to the lower court for further proceedings, the decree appealed from remains effectual until modified as the result of further proceedings, the opinion of the supreme court being controlled by the decree itself which remains unreversed or not set aside. *Kelley v. Chicago, B. & Q. R. Co.*, 154–87, 134 N. W. 566.

In an equity case reversed for error in sustaining a demurrer to an answer, held that the effect of the reversal was to set aside the entire decree and that, on remand, the case was properly tried on the issues raised. *Miller v. Kramer*, 154–523, 134 N. W. 538.

SEC. 4140. Judgment against sureties on stay bond.

On affirmance, judgment may be entered in the supreme court against the sureties on the supersedeas bond without notice to them of the motion for such judgment. *Jewett v. Shoemaker*, 124–561, 100 N. W. 531.

The sureties may, however, appear and interpose any defense they might have to the rendition of judgment. *Ibid.*

The entry of such judgment to which appearances and objection have been made by the sureties is conclusive in a subsequent action by them to restrain the enforcement of the bond. *Ibid.*

An order for judgment against the surety on a supersedeas bond does not involve any question of the right of such surety to subrogation on payment of the judgment. *Bankers' Surety Co. v. Linder*, 156–486, 137 N. W. 496.

This section is not, by the federal conformity act, applicable to the federal appellate courts, and the practice in such courts is to remand the cause on reversal with directions to the court below to proceed according to right and justice, and the lower court, on receipt of such mandate, has power in conformity to the Iowa statutes to enter summary judgment against the surety on the supersedeas bond for the amount of the judgment stayed, with interest and costs. *Egan v. Chicago G. W. R. Co.*, (C. C.) 163 Fed. 344.

SEC. 4142. Costs taxed. The supreme court must provide by rule for taxing as costs all printing authorized upon the trial of appeals. The court shall also tax the costs of any translation of the shorthand notes filed as provided in this chapter, and also any translation of the shorthand notes which has been made of record in the court below, upon the certificate of the clerk of such court as to the amount of such costs. [27 G. A., ch. 105, § 1; 26 G. A., ch. 64.]

The trial court has no jurisdiction to make any rule as to the taxation of costs of printing or fees of the clerk or other costs incident to a proceeding in the supreme court. *Berkey v. Thompson*, 126–394, 102 N. W. 134.

The translation of the shorthand reporter's notes which is required for no other purpose than the presentation of the appeal should not be taxed in the district court. It is subject to taxation only in the supreme court. *Ibid.*

The costs in a certiorari proceeding are to be taxed in analogy to those on appeal as provided in rule 97 (new rule 105). *Coffey v. Gamble*, 134–754, 94 N. W. 936.

Where attorney's fees for services in the supreme court are to be taxed as a part of the costs in the case, they should be taxed in the supreme court and not in the district court. *Woodcock v. Wabash R. Co.*, 135–559, 113 N. W. 347.

Where only a small portion of the costs of an appeal are incurred in securing partial relief, the court may allow an appellant only a portion of the costs of the appeal. *McCaskey v. Ft. Dodge, D. M. & S. R. Co.*, 154–652, 135 N. W. 6.

As to costs of abstracts see notes to § 4118.

SEC. 4143. Remand—process.

After final decision in the supreme court in an equity case on which the trial court is directed to proceed in accordance with the rules announced in the opinion, no *procedendo* is necessary to authorize the trial court to redocket the case. *Hogle v. Smith*, 136–32, 113 N. W. 556.

SEC. 4145. Restitution of property.

The voluntary payment of money to redeem property, sold under a decree which is afterwards reversed, will not entitle the successful party to recover the money thus paid. *Weaver v. Stacy*, 105–657, 75 N. W. 640.

The amount paid in satisfaction of execution under a judgment may be recovered on a reversal of the judgment. *Manning v. Poling*, 114–20, 83 N. W. 895, 86 N. W. 30.

The restoration required by this section is not limited to property sold, but if money of the judgment defendant is obtained by reason of such judgment, as through a redemption of the property sold, he is entitled to its return upon reversal. *Schoonover v. Osborne*, 117–427, 90 N. W. 844.

An execution issued upon a judgment from which an appeal is taken, and all proceedings had thereunder, are dependent for their validity upon the judgment being sustained. If property has been taken under such execution and the judgment is thereafter reversed, restitution must be made. *Decatur v. Simpson*, 119–488, 93 N. W. 496.

The reversal of a judgment releases a garnishment thereunder, and subsequent recovery of judgment on a new trial will not support or restore the garnishment proceeding. *Ibid.*

One who enforces a judgment which is afterwards reversed on appeal may be required to make restitution to the injured party, and the fact that the judgment has been involuntarily paid on exe-

cution is not a waiver of such right to have restitution made. *Chambliss v. Hass*, 125–484, 101 N. W. 153.

Upon reversal of a foreclosure decree the person claiming title to the property is entitled to restitution plus rents and profits, less taxes, etc. *National Surety Co. v. Walker*, 148–157, 125 N. W. 338.

Where money is paid over under an erroneous order which is afterwards regularly set aside, the power to direct restitution is essential to the integrity and dignity of the court itself. *Orke v. McManus*, 149–685, 129 N. W. 68.

Money which has come into the hands of a party through the order of the court may be directed to be returned into the hands of the court when such order is found to be erroneous. *Ibid.*

SEC. 4146. Title not affected.

This section has no application where the judgment does not affect the present condition, possession or title of real property acquired by the party under the proceeding appealed from. *Central Trust Co. v. Hubinger*, 87 Fed. 3; *Hubinger v. Central Trust Co.*, 94 Fed. 788.

SEC. 4148. Petition for rehearing.

An opinion which has been suspended or withdrawn by the granting of a rehearing cannot properly be quoted as an official pronouncement of the court. *Sioux City & St. P. R. Co. v. O'Brien County*, 118–582, 92 N. W. 857.

The case is to be disposed of on rehearing on the record as it was on the first submission. *Coe College v. Cedar Rapids*, 120–541, 95 N. W. 267.

The rehearing must be determined on the record as presented on the original submission, and if an objection to the jurisdiction of the court is first suggested on the rehearing the original record cannot be amended for the purpose of showing jurisdiction. *Martin v. Martin*, 125–73, 99 N. W. 719.

A new case cannot be made on a petition for rehearing, nor can matters then be insisted upon which were not presented in the original case. *Long v. Garey Inv. Co.*, 135–398, 112 N. W. 550.

On a rehearing the cause must be submitted on the record as it was on the former submission. *Lewis v. Brennan*, 141–585, 120 N. W. 332.

The granting of a rehearing annuls the former opinion and affords the appellee an opportunity for argument. He cannot therefore complain that the argument of appellant on original submission was not filed in time and that he would not have opportunity for argument on such submission. *Salinger v. Western Union Tel. Co.*, 147–484, 126 N. W. 362.

While in civil cases the supreme court will not grant a rehearing on account of matters not urged in the original presentation of the case, this rule does not apply in criminal cases, and a reversal may be ordered on grounds presented for the first time on rehearing. *State v. Phillips*, 119–652, 94 N. W. 229.

A notice of the petition for rehearing has no effect to suspend the decision, and the filing of the petition itself has no such effect unless so ordered by the court or one of the judges upon its presentation. *State v. Cahill*, 131–286, 108 N. W. 453.

Pending a petition for rehearing a *procedendo* to the district court will not, as a rule, be issued. *Berkey v. Thompson*, 126–394, 102 N. W. 134.

Where a petition for a rehearing is overruled generally, the case stands as it stood on the announcement of the original opinion and no new question can be considered as having been determined by the overruling of the petition. *Hogle v. Smith*, 136–32, 113 N. W. 556.

SEC. 4150. Death of party—continuance.

While the substitution of proper parties may be made when asked, the death of a party does not prevent the determination of the appeal, and it is not necessary that there be a substitution where death occurs between the submission and the decision of the appeal. *Williams v. Williams*, 115–520, 88 N. W. 1057.

A civil action does not ordinarily abate by reason of the death of the defendant. On the other hand, a criminal action does so abate from the very nature of the case. *Babbitt v. Corrigan*, 157– —, 138 N. W. 466.

SEC. 4151. Dismissal of appeal.

Where the controversy involved the right to the possession of a farm, which right if it ever existed had terminated, held that the appeal should be dismissed. *Moller v. Gottsch*, 107–238, 77 N. W. 859.

CHAPTER 3.

OF CERTIORARI.

SECTION 4154. When writ may issue.

When will lie: The action of certiorari has several offices, among which is that of supplying defects of justice in cases obviously entitled to redress and yet unprovided for by the ordinary forms of proceedings. It is especially applicable in cases where inferior boards, officers or tribunals exceed their authority and no method of appeal has been provided by statute. *Bremer County v. Walstead*, 130–164, 106 N. W. 352.

The writ of certiorari is never used to correct mere error, but only to test the jurisdiction of an inferior tribunal. *Butterfield v. Treichler*, 113–328, 85 N. W. 19.

The writ of certiorari cannot be properly granted when the error complained of can be fully and speedily corrected by appeal. *Oyster v. Bank*, 107–39, 77 N. W. 523.

Certiorari will lie where the lower court has exceeded its jurisdiction, and in such a case equity has no jurisdiction to interfere by injunction. *Vette v. Byington*, 132–487, 109 N. W. 1073.

A writ of certiorari will not be granted for the annulling of the action of an inferior tribunal unless it be shown that such action was prejudicial to the plaintiff. *Blodgett v. McVey*, 131–552, 108 N. W. 239.

If the trial court has no jurisdiction or has acted illegally, its rulings may be corrected upon certiorari, although the question of jurisdiction might be raised by appeal. *Berkey v. Thompson*, 126–394, 102 N. W. 134.

A complaining party may not select one merely erroneous ruling out of many and have it reviewed in the supreme court by certiorari, but where the action of the lower court embraces several distinct questions upon some of which it has no jurisdiction to act or upon which it acts illegally, such rulings may be reviewed by certiorari. *Ibid.*

The writ of certiorari is not available to correct mere irregularities or errors in the proceedings of the lower court, but where the action complained of is in excess of the jurisdiction of the court, an appeal is not an adequate, plain and speedy remedy, and certiorari will lie. *U. S. Standard Voting Mach. Co. v. Hobson*, 132–38, 109 N. W. 458.

Therefore, held that the action of the court in restraining the use of a voting machine at a public election, being in excess of the equitable powers of the court, should be annulled in certiorari. *Ibid.*

A writ of certiorari should not be granted when the error complained of in the action of the inferior tribunal can be fully and speedily corrected by appeal. *Eels v. Bailie*, 118–519, 92 N. W. 668.

Where a party who had procured judgment in a justice's court, from which an appeal by the opposite party had been taken to the district court, notwithstanding a remittitur which reduced the amount of the judgment to less than twenty-five dollars, appeared in the district court and moved to dismiss for want of jurisdiction of the appeal, and his motion was overruled, held that he could not by certiorari question the correctness of such ruling. *Ibid.*

When a new jurisdiction is created by statute and the court or officer exercising it proceeds in a summary mode, or in a course different from the common law, and a remedy for the revision of its exercise is not given by the statute creating it, certiorari from a court having the general superintendence and control over inferior jurisdictions will lie for its revision. *Home Sav. & T. Co. v. District Court*, 121–1, 95 N. W. 522.

Certiorari is the proper remedy where a council or the officers of a municipal corporation acting judicially are without authority, or are otherwise acting illegally. *Moore v. City Council*, 119–423, 93 N. W. 510.

The board of review for equalization of taxes having acquired jurisdiction to proceed in a particular case as to the correctness of the assessment, its action cannot be declared invalid in certiorari proceedings on the ground that there was not evidence before it justifying an increased assessment. *Ferguson v. Board of Review*, 119–338, 93 N. W. 352.

Where the court acts without jurisdiction in entering a judgment or order, the aggrieved party is not limited to his remedy by appeal, but may have the judgment or order annulled in a proceeding by certiorari. But if the court has jurisdiction an appeal is a plain, speedy and adequate remedy. *Young v. Preston*, 131–292, 108 N. W. 463.

When a want of power is urged in a municipal corporation to vacate a street, a court of equity may pass upon the question, but when the power is conceded and the manner of its exercise is sought to be controlled, the remedy is at law through proceedings by certiorari. *McLachlan v. Gray*, 105–259, 74 N. W. 773.

Where the board of supervisors has jurisdiction to establish a public highway, its action cannot be reviewed in a certiorari proceeding. *Brockway v. Board of Supervisors*, 133–293, 110 N. W. 844.

Certiorari is the proper remedy by which to test the legality of the proceedings of a board of supervisors in changing the location of a courthouse. *Way v. Fox*, 109–340, 80 N. W. 405.

The action of certiorari will not lie to correct a mere irregularity in the procedure of boards of directors with reference to consolidation of school districts. *Molyneaux v. Molyneaux*, 130–100, 106 N. W. 370.

If the court improperly proceeds after a dismissal, there being no counterclaim properly pleaded, the error of the court may be corrected by certiorari. *Bardes v. Hutchinson*, 113–610, 85 N. W. 797.

Certiorari will not lie to question the power of the district court to make an order which is no longer executory but has been fully performed. *Dugane v. Smith*, 140–674, 119 N. W. 73.

While an original proceeding in the supreme court by certiorari is provided for, it is not intended to supplant the ordinary remedy of appeal and will not lie to correct rulings of an inferior tribunal which are simply erroneous. *Finn v. Winneshiek District Court*, 145–157, 123 N. W. 1066.

The omission of a necessary party is not a jurisdictional defect, and while a judgment cannot be enforced against the property of one who is not a party to the proceedings, the fact that it is erroneous in that the necessary parties were not brought in will not justify its being annulled in a proceeding by certiorari. *Denmead v. Parker*, 145–581, 124 N. W. 780.

The writ does not lie to correct a mere error but only to test the jurisdiction of a tribunal and the legality of its action. *State v. Parker*, 147–69, 125 N. W. 856.

The question whether a court properly ordered the continuance of a case pending before it cannot be raised by certiorari. *Coutts v. District Court*, 149–297, 128 N. W. 362.

If the action of the court complained of is merely erroneous and not without jurisdiction, the writ of certiorari will not lie. Therefore held that the order of a court for the production of books and papers in evidence in a particular case would not be reviewed in a certiorari proceeding, the court having jurisdiction to make the order and the presumption obtaining that the books to be produced would not be allowed to be used for any improper purpose. *Iowa Loan & Trust Co. v. District Court*, 149–66, 127 N. W. 1114.

Rulings of the trial court in determining that questions asked of a witness are proper and do not call for incompetent, immaterial and irrelevant testimony can be corrected on appeal and are not subject to review in an independent proceeding by certiorari and the action of the court in judging a witness to be in contempt for failing to answer such questions cannot be reviewed on certiorari. *Witmer v. District Court*, 155–244, 136 N. W. 113.

In a proceeding as to the extension of town limits, no fraud being charged, the court has no authority on certiorari to review the action of the town council in passing upon the necessity for such extension. *Lehigh Sewer Pipe & Tile Co. v. Lehigh*, 156–386, 136 N. W. 934.

The action of the council in receiving or rejecting votes in such proceeding is purely ministerial and cannot be reviewed on certiorari. The complaining party has a plain, speedy and adequate remedy by injunction. *Ibid.*

An action for certiorari cannot be maintained to determine the correctness of the action of the trial court in ruling on a motion to dismiss an appeal from a justice of the peace. *Metropolitan L. Ins. Co. v. Brennan*, 136 N. W. 928.

False and fraudulent testimony introduced in procuring a judgment does not constitute a ground for setting aside the judgment in certiorari. *Miller v. Kramer*, 154–523, 134 N. W. 538.

Certiorari is the proper remedy when a superior court refuses to grant a change of venue when properly applied for under the provisions of code supp. § 261. *Chicago, B. & Q. R. Co. v. Castle*, 155–124, 135 N. W. 561.

A statutory provision making the finding of the board of supervisors conclusive as to a matter within its jurisdiction does not preclude an inquiry as to whether its action was in excess of its jurisdiction. *Jones v. Fisher*, 156–382, 137 N. W. 940.

Where a judgment is void for want of jurisdiction, certiorari will lie. *Hickman v. Hunter*, 140 N. W. 425.

Where a court acts without proper parties and procedure, the validity of its action may be determined by certiorari although there might be a remedy by appeal. *Haddick v. District Court*, 141 N. W. 925.

Contempt: A proceeding by certiorari is available and is the only remedy in behalf of one found guilty of a contempt. *Wells v. District Court*, 126–340, 102 N. W. 106.

The proceeding by certiorari is to determine whether the court acted without jurisdiction; and the error of admission of evidence, where some testimony has been received to sustain the action of the court, will not require the setting aside of an order for punishment for contempt. *Russell v. Anderson*, 141–533, 120 N. W. 89.

In a proceeding by certiorari to review a commitment for contempt the sufficiency of the warrant for commitment is not involved. *Walton v. Hobson*, 146–703, 125 N. W. 805.

In a proceeding by certiorari to review the action of a court in refusing to punish for contempt in the violation of an

injunction on information filed, the supreme court may construe the testimony presented to the lower court and determine whether it reached a proper conclusion under such testimony; but the finding of the trial court on conflicting testimony is entitled to weight where there is fair room for a difference of opinion. *Sawyer v. Hutchinson*, 149–93, 127 N. W. 1089.

A contempt proceeding being quasi criminal in nature, calls for a greater weight of evidence to sustain the charge than is required in an ordinary civil case. A clear case should be made out before an accused will be punished for violating an injunctional decree. *Ibid.*

In a proceeding to punish for contempt of court, a writ of certiorari is the only method of review provided by statute. *Coutts v. District Court*, 149–297, 128 N. W. 362.

In a proceeding for contempt in violating a liquor injunction, the defendant was found guilty. In a subsequent proceeding by habeas corpus, the court refused to discharge such defendant but erroneously ordered his release on bail pending an appeal in the habeas corpus proceeding. Held that the person who instituted the contempt proceeding, though not a party to the habeas corpus proceeding, might maintain an action by certiorari to review the action of the trial judge in admitting the defendant to bail. *Orr v. Jackson*, 149–641, 128 N. W. 958.

A stay of contempt proceedings for violation of an injunction against the illegal sale of liquor does not operate to suspend the injunction nor affect the power of the court to entertain other charges of contempt alleged as of a later date. *Silvers v. Vermilion*, 151–163, 130 N. W. 913.

The plaintiff in a certiorari proceeding to review the action of the trial court in punishing for contempt in violating a decree of injunction is bound by the adjudication in a certiorari proceeding to determine the validity of such order of punishment, although he is not formally made a party to the proceeding in certiorari. *Jones v. Mould*, 151–599, 132 N. W. 45.

Not waiver of appeal: Certiorari and appeal are not necessarily inconsistent remedies, and the fact that the party brings certiorari to test the jurisdiction of the court to enter an order does not constitute a waiver of the right to appeal from such order. *Porter v. Butterfield*, 116–725, 89 N. W. 199.

When a party has been denied a remedy by certiorari on the ground that he has the right of appeal, he cannot then be denied his right to appeal because he has vainly tried to obtain relief by certiorari. *Moon v. Hartsuck*. 137–236, 114 N. W. 1043.

Parties: A citizen and taxpayer as such is not entitled to maintain a proceeding by certiorari to test the validity of a city ordinance where it does not appear that he has any right affected by the ordinance not common to all residents, citizens and taxpayers. *Collins v. Keokuk*, 108–28, 78 N. W. 799.

A taxpayer cannot maintain an action in his own name to determine the validity of the action of the lower court when his only interest is in the expense to the taxpayers involved in such action. *Polk County v. District Court*, 133–710, 110 N. W. 1054.

One who has no individual interest in a proceeding in a court cannot prosecute an action by certiorari to review such proceeding. *Wilson v. Remley*, 106–583, 76 N. W. 843.

The right to an office cannot be determined in a proceeding by certiorari on the part of one not in possession to annul the action of an appointing board in selecting another person to such office. *Daniels v. Newbold*, 125–193, 100 N. W. 1119.

If the petitioner is a party in substance though not in form he may maintain his action for the writ. So also if the matter to be reviewed is one which affects the public generally, an individual citizen may ordinarily invoke the remedy by certiorari. For a still stronger reason the same remedy is open to the individual citizen who suffers peculiar injury by reason of a judgment or order entered in excess of jurisdiction. *Hemmer v. Bonson*, 139–210, 117 N. W. 257.

The proceeding by certiorari is one of the methods whereby the action of the trial court may be reviewed, and as the statute does not require or contemplate the giving of notice to the party in whose favor the ruling was made, such party may be bound by the decision in certiorari although not made a party of record therein. *Brown v. Powers*, 146–729, 125 N. W. 833.

One who is an applicant for an office, which is to be filled by the board of supervisors at their discretion from a particular class of persons, has no such interest as to sustain an action of certiorari brought by him to question the validity of the appointment of another. *Keely v. Board of Supervisors*, 139 N. W. 473.

In the absence of statutes so providing, the action of certiorari is not available to try the title to an office. *Ibid.*

Where the attorney for the party who obtained the judgment which is sought to be annulled in certiorari appears in that action to resist the setting aside of the judgment, the costs may properly be assessed against such party. *Hickman v. Hunter*, 140 N. W. 425.

Return: The return is conclusive as to all matters relating to the procedure which is questioned in the petition and writ. *Carpenter v. Clements*, 122–294, 98 N. W. 129.

The return in certiorari proceedings must be accepted as correct in the absence

of proper attack and affidavits cannot be received to contradict the return. *Hatlestad v. Hardin County*, 137–146, 114 N. W. 628.

Waiver: The right to question the validity of a judgment on the ground that the court is without jurisdiction of the subject matter is not waived by taking exceptions to the judgment. *Davis v. Preston*, 129–670, 106 N. W. 151.

SEC. 4156. Stay of proceedings—bond.

Ordinarily the supreme court will not, in a certiorari proceeding, order a stay without a bond for payment of the judgment in case of affirmance, and the provision of this section as to a bond simply authorizes in addition to such requirement such other reasonable conditions as the court or judge granting the writ may deem wise. *Muscatine County v. Oliver*, 139 N. W. 1105.

Where a bond was given on certiorari to determine the validity of a punishment for contempt imposed in a liquor injunction proceeding, held that on affirmance the surety on the bond was liable for the amount of the fine imposed in the contempt proceeding. *Ibid.*

SEC. 4158. Service and return.

It is not provided that notice be given to the party in whose favor the judgment was entered which is questioned on certiorari for want of jurisdiction. Such party has an opportunity to appear and be heard by counsel if he sees fit. *Davis v. Preston*, 129–670, 106 N. W. 151.

Persons interested in upholding the proceedings assailed are entitled to be heard. *Tod v. Crisman*, 123–693, 99 N. W. 686.

SEC. 4160. Trial—judgment.

It is discretionary with the court to tax the costs in certiorari to the person instituting the proceeding which is held to have been instituted without jurisdiction. *Coffey v. Gamble*, 134–754, 94 N. W. 936.

A board or officer not interested in the controversy, but merely acting in a judicial capacity, will not be mulcted in costs in a certiorari proceeding, unless affirmatively shown to have acted in bad faith. *Ibid.*

On appeal from the finding of the court in a certiorari proceeding, such finding may be corrected in so far as it is erroneous and allowed to stand in so far as it is authorized. *Denmead v. Parker*, 145–581, 124 N. W. 780.

Where a contempt proceeding is brought before the supreme court for review upon a writ of certiorari, although the court is reluctant to interfere with the findings of fact by the trial court upon a fair conflict in the evidence, it may set aside a finding of the lower court releasing the defendant if, under the evidence, such finding is without support. *McNeil v. Horan*, 153–630, 133 N. W. 1070.

SEC. 4162. Limitation.

Where the motion to set aside an order and judgment of the district court is still pending in that court undisposed of, the supreme court will not entertain a proceeding by certiorari to review its action. *Lloyd v. Spurrier*, 103–744, 72 N. W. 688.

An action of certiorari to determine the validity of a special assessment may be brought within one year after the levy of the assessment, although the resolution ordering the improvement for which the assessment is made was passed more than a year before the bringing of the action. *Polk v. McCartney*, 104–567, 73 N. W. 1067.

In a proceeding to determine the liability of a landowner to construct a partition fence, held that any claim on his part that the land was a public common was one which should have been interposed by proceedings under certiorari within one year. *Miles v. Tomlinson*, 110–322, 81 N. W. 587.

TITLE XXI.

OF PROCEDURE IN PARTICULAR CASES.

CHAPTER 1.

OF ACTIONS OF REPLEVIN.

SECTION 4163. Where brought—petition.

Petition: It is not required under the present code, as it was under the code of '51, that the petition shall allege that the defendant wrongfully detains the property in controversy. *Kennedy v. Roberts*, 105–521, 75 N. W. 363.

The requirements of the statute as to what the petition shall contain are not jurisdictional. *Ibid.*

The allegation in an action for replevin of a note that it was "of no value except as a matter of evidence to the plaintiff and for that purpose and that only is of the value of five hundred dollars," held to be sufficient allegation of the actual or apparent value as required by statute. *Ibid.*

Even though plaintiff was not entitled to the possession of the property when the action was commenced, he may have the right to have his interest in the property determined. *Harward v. Davenport*, 105–592, 75 N. W. 487.

Under allegation of absolute and unqualified ownership, plaintiff may prove ownership subject to chattel mortgages. *Ibid.*

The venue of the action may be laid in the county in which the property or some part thereof is situated. *Bummelhart v. Boone*, 147–390, 126 N. W. 338.

What must be shown: Plaintiff must recover on the strength of his own title, and any evidence which tends to show that he did not obtain title to the property or to some part thereof is admissible. *Gevers v. Farmer*, 109–468, 80 N. W. 535.

Where plaintiff alleges that he is the absolute and unqualified owner of the property he must prove such allegation as made, and proof of his right to hold it in trust or under a mortgage will not support his action. *Ibid.*

Plaintiff must recover on the strength of his own title, and if he seeks to recover possession of property levied on under writ of execution on the ground that it is exempt from execution, he must establish that fact. *Hillman v. Brigham*, 110–220, 81 N. W. 451.

An action of replevin is to determine the present possession of the property. *Hillman v. Brigham*, 117–70, 90 N. W. 491.

A landlord who has a lien upon a tenant's personal property, but whose right to possession thereof has not accrued, cannot recover possession by replevin. *Ibid.*

A mortgagee of personal property seeking to recover possession under his mortgage must show that the mortgage covers the property which he seeks to recover. *Martin v. Lesan*, 129–573, 105 N. W. 996.

Where plaintiff in an action of replevin claims solely as absolute owner, he cannot support his right to possession on evidence that he is entitled to such possession under a chattel mortgage. *Powers v. Benson*, 120–428, 94 N. W. 929.

Property seized in an attachment proceeding in which sufficient grounds for attachment are not alleged may be recovered by the owner from the officer as unlawfully detained. *Upp v. Neuhring*, 127–713, 104 N. W. 350.

An action to recover the possession of property from one to whom it has been wrongfully delivered may be maintained without proof of demand. *Smith v. Meeker*, 153–655, 133 N. W. 1058.

An action of replevin may be maintained for the possession of a note obtained from the plaintiff by fraud of such nature as to render it absolutely void, and demand is not necessary under the general rule that where possession of property is wrongful or unlawfully obtained, or where it is obtained by fraud, no demand before suit is necessary. *Sievertsen v. Paxton-Eckman Chem. Co.*, 133 N. W. 744, 142 N. W. 424.

Possession of defendant: Possession in the defendant at the time suit is brought is essential to the maintenance of the action. *Woodling v. Mitchell*, 127–262, 103 N. W. 115.

Where it appears from the allegations of the plaintiff's petition that the property, recovery of which is sought, has passed from the control and possession of the de-

fendant, the petition does not show good cause of action. *Ibid.*

Notwithstanding an allegation of sole and absolute ownership of the property, the plaintiff may recover if he shows a right of possession of the property other than by such sole and absolute ownership. *Richards v. Hellen*, 153–66, 133 N. W. 393.

The question in replevin is the right to the possession of the property at the time the action is brought. The gist of the action is the wrongful detention of the property, and ownership is not essential. *Ibid.*

Notice of ownership: Under code § 3991 an officer is authorized to levy on property under an execution, unless notice of ownership by a third person has been served upon him by delivery of the original, and if such service is defective, such defect may be taken advantage of to defeat an action by the third person to recover the property from the sheriff in replevin. *Frazier v. Hill*, 123–116, 98 N. W. 569.

In an action of replevin brought by an execution defendant to recover property wrongfully levied on under the writ, the notice of ownership provided for in code § 3991 is immaterial. *Mitchell v. McLeod*, 127–733, 104 N. W. 349.

A person other than the execution defendant suing to recover possession of property from an officer on the ground that the levy was unlawful, must show the notice of ownership provided for by code § 3991, with reference to the giving of an indemnity bond. *Shaw v. Tyrell*, 129–556, 105 N. W. 1006.

The owner of goods cannot replevy them from an officer holding them under execution against such owner, without setting up and establishing some facts showing the goods to be exempt from such levy, and where such ground of exemption is not shown, the fact that the owner claiming the goods has not given notice to the officer of a claim to the goods, under the provisions of code § 3991, providing for indemnifying bond in case such notice is given, is wholly immaterial. *Young v. Evans*, 118–144, 92 N. W. 111.

Transfer to equity: If, after plaintiff has brought an action in replevin, it develops that he can only obtain the relief to which he is entitled in chancery and that the issues are properly triable there, he may amend his petition and have the action transferred to the equity calendar. *Cox Shoe Co. v. Adams*, 105–402, 75 N. W. 316.

Instructions: In an action to recover possession of certain described machines, of which plaintiff claimed to be the owner, and the defendant an agent for their sale on commission, while the defendant claimed to be the owner by purchase, the contention being as to the nature of the contract, held that an instruction correct as to the issues with reference to some of the machines was not prejudicially erroneous, though as to others there could be no recovery because of their sale to an innocent purchaser. *DeLaval Separator Co. v. Sharpless*, 129–114, 105 N. W. 384.

SEC. 4164. Ordinary proceedings—no joinder or counterclaim.

In an action of replevin to get possession of property under a chattel mortgage, defendant may by way of cross action ask an injunction restraining the proceeding under the mortgage as to any property not subject thereto. *Brody v. Chittenden*, 106–340, 76 N. W. 740.

An injunction in aid of the proceeding by replevin may be proper. *Ibid.*

A counterclaim cannot be interposed in a replevin suit. *Sylvester v. Ammons*, 126–140, 101 N. W. 782.

The issue in replevin is always which of the parties is entitled to possession at the commencement of the action, and in an action of replevin by the mortgagee to recover possession of the mortgaged property, the mortgagor may set up want of consideration for the mortgage to defeat the action. *Ibid.*

Although in replevin no set-off or counterclaim can be interposed, yet one who has been held liable on a replevin bond having at the same time a claim against the person who has been held to be the owner of the property, who is insolvent, may maintain an equitable action to enjoin the enforcement of the judgment on the bond so far as it is offset by the existing indebtedness. And this right of equitable set-off is available also as against the assignee of the judgment. *DeLaval Separator Co. v. Sharpless*, 134–28, 111 N. W. 438.

Defendant is not allowed in an action of replevin to interpose by way of counterclaim any general demand he may have for damages for trespass committed by animals, possession of which plaintiff seeks to recover in the action. *Holaman v. Marsh*, 116–483, 90 N. W. 82.

The reason for denying the right to interpose a counterclaim in replevin is that it would allow a creditor to forcibly seize the property of the debtor without process and then plead the indebtedness as an offset to an action to recover it back. *Smith Lumber Co. v. Scott County Garbage Co.*, 149–272, 128 N. W. 389.

But one cannot maintain an action of replevin where he shows an actual conversion of the property; and in an action brought for the value of goods, as in conversion or upon an implied promise to pay the value thereof, an indebtedness of the

plaintiff to the defendant may be set up by way of counterclaim. *Ibid.*

A counterclaim cannot be pleaded in an action of replevin. Therefore held that in replevin to recover possession of property under the terms of a contract, defendant could not claim the return of the money paid under the contract. *Richards v. Hellen*, 153–66, 133 N. W. 393.

Section applied. *Wedgewood v. Parr*, 112–514, 84 N. W. 528.

SEC. 4166. New parties.

Where an intervener seeks to establish his right to possession of the property taken by the plaintiff and accepts a judgment for its return, he cannot afterwards sue in damages on the replevin bond for injury to the property. *Newton v. Round*, 109–286, 80 N. W. 391.

SEC. 4167. Bond.

Any error in the ruling of the court as to the sufficiency of the replevin bond will be immaterial where the plaintiff establishes his right to recover. *Kennedy v. Roberts*, 105–521, 75 N. W. 363.

In an action on a replevin bond the sureties are liable under a judgment rendered for the money value of the property, should the plaintiff elect to take such judgment. *Gerlaugh v. Ryan*, 127–226, 103 N. W. 128.

A delivery bond is a security for the judgment where the plaintiff elects to take a money judgment. Tender of return of the property is sufficient to satisfy such bond. *Bank of Defiance v. Ryan*, 144–725, 123 N. W. 940.

The bond given by plaintiff to secure possession of the property takes the place of the property. *Peterson v. Kissell*, 148–516, 125 N. W. 808.

SEC. 4168. Writ issued.

One who claims that his property has been wrongfully taken under a writ or other proceeding against a third person may maintain an action of replevin therefor. *Gluck Co. v. Therme*, 154–201, 134 N. W. 438.

SEC. 4169. Following property.

The expression "commencement of the action" is not here employed in a technical sense but has reference to the issuance of the writ as plainly appears from the following section. *Bummelhart v. Boone*, 147–390, 126 N. W. 338.

SEC. 4172. Delivery bond.

The sureties on the delivery bond are released from liability if the plaintiff elects to take a judgment for the money value of the property. Such election waives the delivery of the goods. *Gerlaugh v. Ryan*, 127–226, 103 N. W. 128.

The sureties on the delivery bond are not liable if the defendant appears and defends the action and judgment is rendered in his favor for the possession of the property, although an incidental judgment for costs in regard to an application for continuance is entered against him. *American Soda Fountain Co. v. Dean Drug Co.*, 136–312, 111 N. W. 534.

In an action on a delivery bond, the court should find the value of the property at the time of the commencement of the action. *Richards v. Hellen*, 153–66, 133 N. W. 393.

SEC. 4175. Assessment of value and damages—right of possession.

An election to take a money judgment for the value of the property at the time of taking precludes the recovery of damages for the subsequent use of the property. *Colean Imp. Co. v. Strong*, 126–598, 102 N. W. 506.

SEC. 4176. Judgment.

Where an intervener, asserting right to the property, takes judgment for its return to him, he cannot afterwards recover on the bond for damages to the property. *Newton v. Round*, 109–286, 80 N. W. 391.

Where the plaintiff elects to take judgment for the money value of the property, he cannot recover damages for expenses in preparing to defend the case. He is entitled only to the value of the property and legal interest. *Becker v. Staab*, 114–319, 86 N. W. 305.

The fact that the judgment is for the return of the property or its value, without statement of the value of defendant's right therein, will not render the judgment void. *Frazier v. Hill*, 123–116, 98 N. W. 569.

On default against plaintiff for failure to make his petition more specific on order

of the court, the action may properly be dismissed and restoration of the property taken or judgment for its value may properly be entered. Such judgment does not determine that defendant is the owner of the property but relates only to the rightfulness of his possession. *Peterson v. Kissell*, 148–516, 125 N. W. 808.

SEC. 4178. Plaintiff's option.

Where a party claiming possession of the property by intervention elects to take judgment for its return, he cannot afterwards recover on the bond for damages to the property. *Newton v. Round*, 109–286, 80 N. W. 391.

In an action on a replevin bond the sureties are liable under a judgment rendered for the money value of the property, should the plaintiff elect to take such judgment. *Gerlaugh v. Ryan*, 127–226, 103 N. W. 128.

Where the injured party in a replevin suit elects to take a money judgment, treating the wrongful taking of his property by the other party as a conversion, he cannot have in addition special damages for its detention. *Powers v. Benson*, 120–428, 94 N. W. 929.

The plaintiff electing to take a money judgment for the value of property which has been detained by the defendant, treating the conversion as taking place at time of trial, does not thereby abandon his right to recover damages for the detention. (Distinguishing *Powers v. Benson*, 120–428.) *Newberry v. Gibson*, 125–575, 101 N. W. 428.

The party found entitled to property not in his possession is given the option to have execution for delivery of the specific property, or for its value, as determined by the jury, as of the time when judgment was rendered. Such provision does not relate to the time when the action was commenced. It is, therefore, erroneous to allow recovery of interest on the value of the property prior to the time of rendering judgment. *Bonnot v. Newman*, 109–580, 80 N. W. 655.

Where the plaintiff elects to take a money judgment for the value of the property in a justice's court, he may, by remitting the amount of his claim in excess of twenty-five dollars, prevent an appeal by the opposite party, under the provisions of code § 4547. *Rust v. Olson*, 113–571, 85 N. W. 799.

If plaintiff elects to take a money judgment, the value of the property is to be estimated as of the date when its possession was originally taken, or at least of the date of suit. *Sheffield v. Hanna*, 136–579, 114 N. W. 24.

The option to take judgment for the return of the specific property or for its value need not be exercised until the court is ready to enter judgment on the verdict. *Ibid.*

Plaintiff, electing to take judgment for the value of the property, is entitled to interest at least from the date of the issuance of the writ. *Ibid.*

The defendant may have damages for detention of property and also the value of the property as found by the jury, electing to take a money judgment instead of a return of the property. *Blaul v. Wandel*, 137–301, 114 N. W. 899.

A judgment for the defendant only determines the rightfulness of his possession. It does not settle the title to the property unless the title has been put in issue. *Peterson v. Kissell*, 148–516, 125 N. W. 808.

SEC. 4179. Judgment on bond.

Two conditions precedent are essential to the entry of judgment for the value of property: failure to deliver the property, and an election to take judgment for its value. If the plaintiff elects to take a money judgment for the value of the property, the sureties on defendant's delivery bond are released from their obligation. *Gerlaugh v. Ryan*, 127–226, 103 N. W. 128.

Where special execution is ordered for the return of the property and no property can be found, the defendant, electing to take a judgment on the bond, may have such judgment for the value of the property at the time of the commencement of the action. *Richards v. Hellen*, 153–66, 133 N. W. 393.

CHAPTER 2.

OF ACTIONS FOR THE RECOVERY OF REAL PROPERTY.

SECTION 4182. By ordinary proceedings—joinder—counterclaim.

Adverse possession and acquiescence are defenses which may be set up in a proceeding to recover possession of real property. *Rattray v. Talcott*, 124–398, 100 N. W. 36.

SEC. 4183. Parties.

An action to recover possession of real property will lie only on behalf of one holding legal title, with the right to immediate possession. *Marks v. McGookin*, 127–716, 104 N. W. 373.

The right of plaintiff cannot be defeated simply by the showing of a contract of purchase on the part of defendant which is executory in character, and under which defendant's right of possession has not yet accrued. *Ibid.*

A mere privilege or license is only an incorporeal hereditament and will not support an action of ejectment. So held as to the ownership of a lot in a cemetery. Equity only can give a full and complete remedy as to infringement of the rights of the owner of such lot. *Anderson v. Acheson*, 132–744, 110 N. W. 335.

The remedy given to a landlord by action of forcible entry and detainer is cumulative only and he may still maintain action to recover possession. *Denecke v. Miller*, 142–486, 119 N. W. 380.

After expiration of the lease the tenant holding over may be dispossessed by an action for the recovery of real property. *Hall v. Henninger*, 145–230, 121 N. W. 6.

SEC. 4184. Title.

Where both parties claim under a common grantor it is only necessary to prove a title from such grantor. *Brown v. Taber*, 103–1, 72 N. W. 416.

The statutory provision that in an action to recover real property plaintiff must recover on the strength of his own title, does not apply to a case where a plaintiff in possession of land under a claim of title is seeking to enjoin the sale thereof under execution against one who has no interest therein. *Moore v. Kleppish*, 104–319, 73 N. W. 830.

In an action to recover possession of land under an unacknowledged, unrecorded and lost deed, as against a title based on recorded instruments, proof of the deed must be clear and satisfactory. *Thorn v. Lister*, 129–223, 105 N. W. 434.

This provision is not applicable in actions to quiet title. *English v. Otis*, 125–555, 101 N. W. 293.

The plaintiff in an action to quiet title must succeed, if at all, on the strength of his own position and not on the weakness of that of his adversary. *Empire Real Est. & Mtg. Co. v. Beechley*, 137–7, 114 N. W. 556.

SEC. 4188. Abstract of title.

An abstract is sufficient under this section which states the character of each instrument in the chain of title, the name of grantor and grantee therein and the book and page where recorded. *Keller v. Harrison*, 139–383, 116 N. W. 327.

The provisions of this section relating to abstract of title have no application in an action to foreclose a contract to convey. *Boynton v. Salinger*, 147–537, 126 N. W. 369.

SEC. 4198. Use and occupation.

The limitation of the right to recover for the use and occupation of the premises has no application in a controversy between tenants in common for accounting. *German v. Heath*, 139–52, 116 N. W. 1051.

SEC. 4205. New trial.

A motion for new trial made during the term is not a bar to the application for a new trial within one year under this section; and the fact that the unsuccessful party has appealed from the ruling denying him a new trial on application made during the term and that the judgment has been affirmed under the rules of the supreme court for failure to present the appeal in the proper manner will not constitute such adjudication as to prevent the presentation of the same question under this section. *Bevering v. Smith*, 121–607, 96 N. W. 1110.

The period of one year allowed for application for such new trial commences to run from the final entry of judgment. *Ibid.*

The procedure in actions of right is prescribed by statute including the right to a second trial of the issues; in such an action the propriety of a second trial is left to the discretion of the court and greater latitude is allowed to such judicial discretion than in ordinary actions. New trials may be ordered for reasons which would be insufficient under an ordinary application for a new trial. *Ibid.*

CHAPTER 3.

OF ACTION FOR FORCIBLE ENTRY OR DETENTION OF REAL PROPERTY.

SECTION 4208. Grounds.

While originally this proceeding was criminal, it is under the statutes of this state a special action. *Herkimer v. Keeler*, 109–680, 81 N. W. 178.

In this action title is not involved, except incidentally for the purpose of showing the extent of the possession, where there is no apparent actual possession of a part of the premises. Nor is the right of possession involved, since the inquiry is limited to the actual peaceable possession of the plaintiff, and the forcible entry and unlawful detainer of the defendant. *Delmonico Hotel Co. v. Smith*, 112–659, 84 N. W. 906.

The right of possession cannot be determined in an action of forcible entry and detainer. The question involved is the fact of possession, not the right. *Cagwin v. Chicago & N. W. R. Co.*, 114–129, 86 N. W. 220.

In an action of forcible entry and detainer, nothing more is presented than the question as to the right of possession. *Chambers v. Irish*, 132–319, 109 N. W. 787.

In such action the tenant cannot be heard to deny his landlord's title, nor can he defeat the action by pleading a pending action instituted by him to settle contract rights. *Ibid.*

The action of forcible entry and detainer is purely possessory, and may be maintained by one tenant in common against a lessee. *Willis v. Weeks*, 129–525, 105 N. W. 1012.

Before resorting to a summary remedy for the ejection of a tenant on account of nonpayment of rent, in accordance with the terms of a lease, the landlord should demand the rent and afford some reasonable opportunity to the tenant to make payment. *Cole v. Johnson*, 120–667, 94 N. W. 1113.

Where a lease provides for forfeiture on account of the nonpayment of rent, the landlord may recover possession of the property on account of such nonpayment without having previously made demand. *Union Scale Co. v. Iowa Machinery & Supply Co.*, 136–171, 113 N. W. 762.

The summary remedy of forcible entry and detainer in favor of the landlord is not exclusive but cumulative with other remedies given him for the protection of his rights as they exist at common law and under the statute. *Chicago, G. W. R. Co. v. Iowa Cent. R. Co.*, 142–459, 119 N. W. 261.

This section authorizes forfeiture for nonpayment of rent and for the holding over by the tenant contrary to the terms of his lease. *Denecke v. Miller*, 142–486, 119 N. W. 380.

As against a tenant holding over after the expiration of his lease, three days' notice to quit must be given before the remedy by action for forcible entry and detainer is available. After thirty days the tenant becomes a tenant at will and to terminate such tenancy thirty days' notice in writing is necessary, unless the land is agriculture land, in which case the tenancy cannot be terminated until March first, under the provisions of code § 2991. *Hall v. Henninger*, 145–230, 121 N. W. 6.

SEC. 4211. Jurisdiction—transfer—appeal.

A justice of the peace may properly be given jurisdiction of an action of forcible entry and detainer. Such action does not necessarily involve the right of possession, as distinct from the fact of possession. *Herkimer v. Keeler*, 109–680, 81 N. W. 178.

The action of forcible entry and detainer is summary and in it the question of title cannot be investigated. Such remedy in behalf of the landlord does not exclude the remedy by action to recover possession. *Denecke v. Miller*, 142–486, 119 N. W. 380.

The fact that the landlord has instituted an action of forcible entry and detainer and abandoned it does not preclude his bringing an action to recover possession. *Ibid.*

SEC. 4212. Petition—venue.

The provision that this action may be maintained before a justice of the peace in an adjoining township where there is none qualified to act in the township where the land is situated, is applicable where in the latter township a justice of the peace has been elected, but has not qualified nor undertaken to act as an officer. *Herkimer v. Keeler*, 109–680, 81 N. W. 178.

Failure to verify the petition in an action for forcible entry and detainer must be taken advantage of in the trial court, otherwise the defect is waived. *Ibid.*

SEC. 4216. Title not investigated—transfer.

This proceeding cannot be made a substitute for an action of right. *Herkimer v. Keeler*, 109–680, 81 N. W. 178.

The right of one in possession after a sale on foreclosure under an alleged agreement to extend the period of redemption may be determined in an action against him for forcible entry and detainer. *Potter v. Ft. Madison L. & T. Bldg. Assn.*, 133–367, 110 N. W. 616.

[The first note under this section in the code should be changed by inserting "not" between "has" and "been" in the first line.]

SEC. 4217. Possession—bar.

Where a tenant holds over after the termination of a written lease, without the assent of the landlord, the thirty days' notice in writing required by code § 2991 to terminate a tenancy at will is not necessary, and if such occupancy continues for more than thirty days, with the knowledge of the landlord, the remedy by action of forcible entry and detainer is barred. *McClelland v. Wiggins*, 109–673, 81 N. W. 156.

After thirty days a tenant holding over after the expiration of his lease becomes a tenant at will, and to terminate such tenancy thirty days' notice is necessary unless the property is agriculture land, in which case it cannot be terminated until March first, under the provisions of code § 2991. *Hall v. Henninger*, 145–230, 121 N. W. 6.

CHAPTER 4.

OF ACTION TO QUIET TITLE.

SECTION 4223. Who may bring action.

What interest will support action: One who has an equitable title only may maintain an action to quiet it. *O'Neill v. Wilcox*, 115–15, 87 N. W. 742.

Without the statutory provision for quieting title, a reversioner out of possession, and with no right to possession, could not maintain an action against one in possession, as a life tenant, to determine his rights in the property; but by this section such action is authorized, and it seems that the intention of the statute is that such questions must be settled within the statutory period of limitation. There can at least be no hardship in holding such to be the rule in cases where there is no disability, and where the facts upon which apprehended litigation will rest are fully known. *Murray v. Quigley*, 119–6, 92 N. W. 869.

A remainderman, although not yet entitled to possession, has such interest as may be made the subject of an action to quiet title. *Hubbird v. Goin*, 137 Fed. 822.

The owner may maintain the action here contemplated for the purpose of removing a cloud upon his title, created by an apparent lien. The action is not limited to the determination of the rights of one who claims title. *Blair v. Hemphill*, 111–226, 82 N. W. 501.

One who trespasses upon real property in the possession of another cannot have relief in equity to enjoin the person rightfully in possession from protecting his possession as against such trespasser. *Currier v. Jones*, 121–160, 96 N. W. 766.

In an action to quiet title against one holding a tax certificate, a tender made to the defendant as soon as his right to a certificate is asserted is sufficient. *Carter v. Cemansky*, 126–506, 102 N. W. 438.

Where a conveyance of the fee is made by one who holds a life estate, the remainderman should bring action within the statutory period to have his rights determined. *Garrett v. Olford*, 152–265, 132 N. W. 379.

This statutory provision enlarges but does not limit the jurisdiction of courts of equity in such cases. *Hounchin v. Salyards*, 155–608, 133 N. W. 48, 136 N. W. 1049.

Where under a conveyance by warranty deed it was stipulated that part payment of the price should be deferred until the title was quieted, and the vendee quitclaimed to a third person in pursuance of a contract by which such third person was to hold the vendee harmless, held that a suit to quiet title being no longer necessary to protect the vendor from liability on his covenant of warranty, he could not maintain an action to quiet title. *Ibid.*

Adverse possession: In an action to quiet title, based on a claim of adverse possession under a deed purporting to convey absolute title, made in good faith and for an adequate consideration, the claim of plaintiff should not be disregarded on the ground that at the time of receiving the conveyance plaintiff knew of the possibility that some adverse claim might be made in

the future. *Wenger v. Thompson*, 128–750, 105 N. W. 333.

Claim of title in good faith accompanied by actual and adverse possession for the period of limitation will support an action to quiet title. *Severson v. Gremm*, 124–729, 100 N. W. 862.

Adverse possession may furnish the title necessary to support an action to quiet title. *Lougee v. Shuhart*, 127–173, 102 N. W. 1125.

Title in plaintiff: Where one asks to have title quieted in him as the owner in fee of the land in controversy, he must prove title, and, failing to do so, is not entitled to relief. *Koch v. West*, 118–468, 92 N. W. 663.

In a particular case, held that plaintiff did not make out such title in himself as to justify the granting of a decree quieting title in him. *Smith v. Thomas*, 120–12, 94 N. W. 259.

Where the description of land is sufficient, without the designation of the state in which it is located, an erroneous designation in that respect will not be material. *Ibid.*

The statutory provision with reference to actions for the recovery of real property that plaintiff must recover on the strength of his own title (code § 4184) is not applicable in actions to quiet title. But plaintiff can have no relief unless he shows such interest in the property that as against the defendant he is entitled to have the title quieted in him. If both plaintiff and defendant claim under the same chain of title, it is unnecessary for plaintiff to do more than establish his own title as derived from the common source. *English v. Otis*, 125–555, 101 N. W. 293.

Where the state intervenes in an action to quiet title, and asks relief against both plaintiff and defendant, claiming title, the state must recover on the strength of its own title, and not on the weakness of that of the other claimants who are in possession. *Rood v. Wallace*, 109–5, 79 N. W. 449.

Plaintiff must recover on the strength of his own title and if he fails to make out any title either by conveyance or adverse possession he must fail. *Hafner v. Chase*, 146–231, 124 N. W. 1087.

The plaintiff in a suit to quiet title must recover upon the strength of his own title and not upon any weakness in defendant's title. *Morrow v. Mutz*, 140 N. W. 896.

Interest of defendant: An action to quiet title presupposes complete title in the plaintiff as against the defendant, and the action will fail if it shall be made to appear that in fact the defendant has some real interest in the property as distinguished from a mere apparent or asserted right. In such a case the court will not stop to measure the extent of the interest of defendant. *Cody v. Wiltse*, 130–139, 106 N. W. 510.

Therefore, the vendor of land under a contract containing no provision for forfeiture on the default of the vendee in making payment cannot maintain an action to quiet his title as against the vendee on account of default in payment. *Ibid.*

One who has made a conveyance of all his alleged interest in land is not a necessary party to an action to quiet title. *Cunningham v. Cunningham*, 125–681, 101 N. W. 470.

In an action to quiet title, based upon a tax deed, one who does not appear to be the owner of the land and entitled to question the validity of the deed cannot set up its invalidity as a defense. *McCash v. Penrod*, 131–631, 109 N. W. 180.

Laches as defense: Laches may be a sufficient ground for refusing to grant relief in an action to quiet title. *Woodward v. Barr*, 128–727, 105 N. W. 207.

Parties—notice: A decree quieting title as against one served by publication is final unless set aside on proper showing made by defendant within the period allowed for new trial in such cases. The court is not bound to require proof of nonresidence before it can proceed to a hearing. If in point of fact the defendants named are nonresidents, the decree is binding upon them, although the fact of nonresidence is not specifically found. *Bales v. Williamson*, 128–127, 103 N. W. 150.

One who is not a party to an action to quiet title is in no way affected by the decree. *Dows Real Estate & Trust Co. v. Emerson*, 125–86, 99 N. W. 724.

SEC. 4224. Petition—notice.

The allegation of an absolute and unqualified title in the plaintiff and that defendant is making a claim of interest in the property without right or merit is enough to raise an issue. *Richards v. Moran*, 137–220, 114 N. W. 1035.

It is not necessary that the original notice show defendant's adverse claim if it refers to the petition which sufficiently describes such claim. *Ibid.*

SEC. 4225. Disclaimer—costs.

Even if the defendant fails to file his disclaimer at the appearance term the costs are at the discretion of the court. *Dolan v. Maxwell*, 144–237, 122 N. W. 923.

SEC. 4226. Demand for quitclaim—attorneys' fees.

The statutory provision imposing attorneys' fees in actions to quiet title is penal in its nature and should be strictly construed. The request for a deed should be made of the party who is to execute the instrument. If it is in any case sufficient to make demand on an agent, it can only be when the agent is vested with power to make the deed. *Lawless v. Stamp*, 108–601, 79 N. W. 365.

The object in exacting the payment of a fee for execution of a quitclaim deed is to cover expenses incident to delivery as well as execution of the deed, and such expenses cover the postage necessary for mailing the deed to the person demanding the same. The person of whom the deed is demanded must, in order to avoid liability for costs and attorney's fees, deliver the deed to the grantee in some manner on the tender of fees provided by statute. *Shay v. Callanan*, 124–370, 100 N. W. 55.

Judgment for costs cannot be rendered against defendants in an action to quiet title who are not served with notice as provided by this section. *Mock v. Chalstrom*, 121–411, 96 N. W. 909.

Refusal to execute a quitclaim deed save on relinquishment of some assumed right or interest, in itself shows that defendant is attempting to assert an adverse interest. *Hurni v. Sioux City Stockyards Co.*, 138–475, 114 N. W. 1074.

In fixing the attorney's fee in such cases the trial court is not required to take testimony as to the reasonable amount of such fee. The judge must be assumed to know what is a reasonable attorney's fee, at least when no issue as to the amount is specifically raised. *Ibid.*

SEC. 4227. Equitable proceedings.

In an action to quiet title under a tax deed, held that the evidence was sufficient to show claim of right and color of title in defendant, coupled with possession so as to justify an attack upon the tax deed and support a right to redeem. *Iowa L. & T. Co. v. Pond*, 128–600, 105 N. W. 119.

A proceeding to vacate a decree quieting title in one claiming under a tax deed against an insane owner who makes no appearance, and for whom no guardian is appointed, instituted by the heirs of said insane owner under code § 3154, differs from a proceeding in equity in the nature of a bill of review in that the former is governed by the limitations contained in the statutory provision while the latter is controlled by the ordinary rules of procedure. *Hawley v. Griffin*, 121–667, 92 N. W. 113, 97 N. W. 86.

Where an action to determine a disputed boundary line has been brought and plaintiff amends the petition so as to change it into an action to quiet title, the court may properly grant a motion to transfer the case to the equity docket for trial. *Boltz v. Colsch*, 134–480, 109 N. W. 1106.

The trial court in an action to quiet title, having determined the question of title and right of possession in favor of the plaintiff, may properly enjoin the defendants from conspiring together to interfere with plaintiff's possession. *Coulthard v. Davis*, 151–578, 131 N. W. 1088.

A writ of possession may be awarded to plaintiff in an action to quiet title. *Ibid.*

CHAPTER 4-A.

OF THE RESTORATION OF LOST OR DESTROYED RECORDS.

SECTION **4227-a. Action in rem.** Whenever the public records in the office of any county official in this state have been or shall hereafter be lost or destroyed in any material part, the said county on relation of said public officer or the owner of any real estate affected thereby, may bring an action in rem in equity in the district court of the state in and for the county in which said real estate is situated against all known and unknown persons, firms or corporations that might have any interest in said real estate affected by said record, to have said lost or destroyed records restored in whole or in part. Any number of parcels of land may be included in the same suit; and whenever said action is brought by the owner, the public official in whose office said lost or destroyed public records are required by law to be kept shall be made a defendant therein. [35 G. A., ch. 291, § 1.]

SEC. **4227-b. Proceedings.** The petition, notice and decree in said action to restore any lost or destroyed records, and all proceedings in said suit, so far as the same relate to unknown defendants, shall conform to the statutes of this state applicable to actions against unknown defendants and unknown claimants; and all known defendants shall be served with notice in the time and manner now provided by law; and whenever said action is brought by the owner of said real estate, all clouds upon said title and defects therein and all adverse claims thereto may be adjudicated in the same suit and title quieted therein. The provisions of section thirty-seven hundred ninety-six of the code shall be applicable to defendants served with original notice in such action by publication. [35 G. A., ch. 291, § 2.]

SEC. **4227-c. Proof required.** No judgment or decree restoring any lost or destroyed record in such action shall be entered by default, but the court must require proof of the facts alleged in reference thereto and the court shall make such finding of facts and decree as may be sustained by the evidence and may order such lost or destroyed record to be prepared by said public official as completely as the circumstances and proof will permit, and said record when so prepared shall be approved by the court and its approval endorsed thereon by the clerk. [35 G. A., ch. 291, § 3.]

SEC. **4227-d. Filing of restored records—effect.** All public records restored as provided by this act shall be filed, bound and indexed the same as original records are required to be, and shall have the same force and effect as the original records before their loss or destruction. [35 G. A., ch. 291, § 4.]

CHAPTER 5.

OF ACTIONS TO ESTABLISH DISPUTED CORNERS AND BOUNDARIES.

SECTION 4228. When allowed.

An adjudication in a proceeding to fix a common corner of four adjacent sections and the boundary lines of such sections as affected by the location of such common corner, is not binding as to the interior dividing lines of such sections. *Muecke v. Barrett*, 104–413, 73 N. W. 880.

A county cannot maintain proceedings to settle boundaries of a county road crossing defendant's land. It is only the owner of the land who may maintain such proceedings. *Dickinson County v. Fouse*, 112–21, 83 N. W. 804.

Where the only dispute is as to the boundary line between two tracts, the court is not authorized, on the report of a commissioner, to establish a corner affecting the boundaries of other property owners not parties to the suit. *Newton v. Templeman*, 115–643, 89 N. W. 24.

Proceedings of this character are not triable *de novo*, and the finding of the commissioner and of the court has the force and effect of the verdict of a jury. *Ibid.*

These provisions as to establishing lost corners do not supersede other remedies. *Keller v. Harrison*, 139–383, 116 N. W. 327.

The finding of the commissioners appointed by the court is not binding upon it. (Overruling *Yocum v. Haskins*, 81–436.) *McGovern v. Heery*, 141 N. W. 435.

SEC. 4235. Exceptions—hearing in court.

If the clear and conclusive testimony is against the finding of the commissioners, the court should sustain an objection thereto and for failure to do so its decision will be reversed. *Dittmer v. Mierandorf*, 139–182, 117 N. W. 12.

The finding of the commissioners and that of the court as to a question involving a conflict in the evidence is as conclusive as the finding of a jury would be. *Leathers v. Oberlander*, 139–179, 117 N. W. 30.

The finding of the trial court as to the facts should be accorded the same effect as the verdict of the jury; but as the trial court is entitled to hear evidence in addition to that reported by the commissioners, the recommendation of such commissioners is not to the same extent binding upon the

lower court. *Weikamp v. Jungers*, 150–292, 129 N. W. 953; *McGovern v. Heery*, 141 N. W. 435.

The lower court has full power to make a finding different from that of the commissioners if it has testimony before it on which to base a different finding. *McGovern v. Heery*, 141 N. W. 435.

The judgment of the trial court, having support in the evidence, will not be interfered with on appeal. *Ibid.*

Where the court finds that the parties have acquiesced in a boundary line it will not proceed to determine where the original government lines and corners were, for such determination would have no effect upon the substantial rights of the parties. *Ibid.*

SEC. 4236. Corners and boundaries established.

A judgment in a proceeding to establish a disputed corner to which the owner of one tract of land involved is not a party, is not binding in a subsequent proceeding by him to establish the same corner. *Dittmer v. Mierandorf*, 129–643, 106 N. W. 158.

SEC. 4237. Appeal.

An appeal will not lie from an order appointing a commissioner to locate a corner at a certain point and taxing the costs up to that time. *Oster v. Devereaux*, 115–724, 87 N. W. 512.

SEC. 4238. Costs.

In a particular case held that an apportionment of costs in proportion to the number of acres in each tract involved in the suit was proper. *Brett v. Clark*, 136–544, 114 N. W. 28.

In exercising its discretion in the taxation of costs, the trial court ought not to be concluded by the mere allegations of the pleadings; and if the real contentions of the parties as disclosed in the evidence are not sustained in full on either side, an apportionment of costs is proper. *Russ v. Townsend*, 150–163, 129 N. W. 840.

The matter of the taxation of the costs is largely in the discretion of the trial court. *McGovern v. Heery*, 141 N. W. 435.

SEC. 4239. Agreements.

The boundary should be established on the line fixed by acquiescence and occupancy for the statutory period. *Fredericksen v. Bierent*, 154–34, 134 N. W. 432.

CHAPTER 6.

OF PARTITION.

SECTION 4240. By equitable proceedings—no joinder or counterclaim.

In general: One of the joint owners of a water power making improvements on the common property may, on partition, have the improvements thus made by him set apart as his share. They do not necessarily become a portion of the common property in such sense that the common owners are entitled thereto. *Forrest Milling Co. v. Cedar Falls Mill Co.*, 103–619, 72 N. W. 1076.

There may be a parol voluntary partition of lands owned in common. *Hayes v. Marsh*, 123–81, 98 N. W. 604.

The interest of the widow may be shown to have been abandoned in consequence of an agreement or settlement so as to defeat her right to have such interest set off to her in a partition proceeding. *Wright v. Breckenridge*, 125–197, 101 N. W. 111.

In an equitable action in the nature of a suit for partition, there may be an assignment of the widow's dower. *Beeman v. Kitzman*, 124–86, 99 N. W. 171.

Judgments against one to whom a share of the property is set aside as the holder of a fee simple or equitable interest therein attach to the share thus set aside. *Atlee v. Bullard*, 123–274, 98 N. W. 889.

A right to inherit as an illegitimate child, recognized under the provisions of code § 3385, may be interposed as a claim in a partition proceeding to which the legitimate heirs of deceased are parties. *Alston v. Alston*, 114–29, 86 N. W. 55.

There may be a parol partition of lands if the agreement therefor be followed by possession in accordance with the agreed division. *Sires v. Melvin*, 135–460, 113 N. W. 106.

Where partition of real estate is desired and suit is brought by one coöwner against the other, a cross suit with the parties reversed to accomplish the same purpose should not be tolerated. *Van Vleck v. Anderson*, 136–366, 113 N. W. 853; and see

Littlejohn v. Bulles, 136–150, 113 N. W. 756.

Parties: Judgment lien holders are necessary parties to a valid adjudication as to the partition of the premises, and if such lien holder is not made a party to such proceeding he is not bound thereby. *Smith v. Piper*, 118–363, 92 N. W. 56.

Where by the provisions of a will a trust is created for the benefit of minors and the legal title vests in the trustee, he is a necessary party in an action for partition, and it is not sufficient that the minors who are beneficiaries under the trust are made parties. *Parkhill v. Doggett*, 135–113, 112 N. W. 189.

While it is a frequent and proper practice to join the spouse of a tenant in common as a party in a partition proceeding, it is well settled that such joinder is not essential to the jurisdiction of the court to proceed to a decree and sale. *Boone v. Boone*, 137 N. W. 1059, 141 N. W. 938.

Right of vendee under contract: The right of a defendant claiming an interest in the property sought to be partitioned, which is founded on a contract to convey, may be defeated by proof of circumstances which would justify the refusal of a specific performance of such contract. *Schneider v. Schneider*, 125–1, 98 N. W. 159.

Where one seeks to have secured to him a right in the property under contract, his action is for specific performance rather than partition. *Noecker v. Wallingford*, 133–605, 111 N. W. 37.

Settlement of estates: Where, in a proceeding to partition the real property of a decedent among his heirs, it was urged that it could not be determined whether the personalty would be sufficient to pay debts of the estate, but it did not appear that the facts from which that question was to be determined could not be ascertained without a continuance, held that a motion to continue on that ground was properly overruled. *Cheney v. McColloch*, 104–249, 73 N. W. 580.

The fact that the estate of a deceased owner has not been fully settled is no defense to an action for partition of his real property among those entitled to share therein. *Smith v. Smith*, 132–700, 109 N. W. 194.

The partition of the homestead among the heirs of a deceased person need not be delayed until the debts of the estate are paid and the estate settled. *Hild v. Hild*, 129–649, 106 N. W. 159.

In an action for partition among heirs, if brought before the estate has been settled, the court may postpone final decree until the estate is settled and need not dismiss the action as prematurely brought. *Shupe v. Bartlett*, 106–654, 77 N. W. 455.

Partition among heirs will not be granted where it would destroy the rights of the widow under an agreement made for her benefit by the heirs that she shall have the use of the premises during her life. *Henderson v. Henderson*, 136–564, 114 N. W. 178.

Joinder of other causes: Where no objection has been made in the trial court to misjoinder or improper interposition of a new cause of action by counterclaim or cross-petition, such objection cannot be raised on appeal. *Kringle v. Rhomberg*, 120–472, 94 N. W. 1115.

Where the statutory provision prohibiting joinder of any other cause of action with an action for partition is ignored and no objection to an equitable counterclaim is interposed, the court may grant such relief as equity requires. *Noecker v. Wallingford*, 133–605, 111 N. W. 37.

Section applied as to joinder of other causes of action. *Watson v. Richardson*, 110–698, 80 N. W. 416.

SEC. 4243. Contingent interests.

While it is a frequent and proper practice to join the spouse of a tenant in common as a party in partition proceedings, such joinder is not essential to the jurisdiction of the court to proceed to a decree and a sale of the property. *Boone v. Boone*, 137 N. W. 1059, 141 N. W. 938.

SEC. 4249. Issue as to incumbrances.

Those who are made parties to the suit must interpose therein any objection they may have to an incumbrance and have the validity of such incumbrance determined. *Bosley v. Stewart*, 140–101, 117 N. W. 1103.

SEC. 4252. Confirmation.

In the final decree an additional accounting may be had as to matters affecting the proper share of the parties subsequent to the preliminary decree. *Moy v. Moy*, 111–161, 82 N. W. 481.

Where improvements were made in good faith, the allowance therefor is not to be limited to such as were needed to preserve the property. *Ibid.*

Where two or more parties in interest are entitled to have their interests considered as constituting one moiety they may unite in an action in partition to have such moiety set off to them without calling for partition of such moiety among themselves. *Bowlsby v. Gregory*, 137–271, 114 N. W. 1060.

SEC. 4253. **Partition — referees appointed — possession — lease.** Upon entering such decree, the court shall appoint referees to make partition, unless the parties agree to a sale of the property, or where it is shown that the property cannot be equitably divided into the requisite number of shares, a sale shall be ordered. Three referees shall be appointed to make partition, unless the parties to the suit agree to a less number, but where it is shown that partition cannot be made and a sale is ordered, the court may fix the number. Where there is a delay in making sale and the owners of the property are not able to agree as to the possession or leasing of the same, the court may make such order as to the possession and leasing of said property by the referee as may be found to be for the best interests of the owners of said property. [33 G. A., ch. 207, § 1.] [C. '73, § 3290; R. §§ 3616, 3618–19; C. '51, §§ 2038, 2040–1.]

The fact that property is not partible is not in itself a ground for denying to joint owners relief in a suit for partition. *Truth Lodge, etc., v. Barton*, 119–230, 93 N. W. 106.

After the referee has reported a proposed partition, the court may modify the report and enter a decree such as is equitable without referring the case back to another referee. *Shearer v. Shearer*, 125–394, 101 N. W. 175.

The shares should be so set off as to be as nearly as possible of equal value under ordinary conditions as between persons having equal interests. *Ibid.*

There is no provision that the report of referees shall be unanimous. *Bowlsby v. Gregory*, 137–271, 114 N. W. 1060.

A referee in partition cannot be made personally liable for the taxes for the reason that he is not holding or using either the property or the contract for its sale with a view to investing, loaning, or in any way deriving any pecuniary profit for himself or the beneficial owners. *In re Assessment of Boyd*, 138–583, 116 N. W. 700.

Partition proceedings are for the purpose of securing a division of the property among the owners, and a sale in such action is simply a method of dividing up such property. Until the proceeds are paid to such owners they still constitute realty for the purpose of taxation. *Ibid.*

The referee may be authorized to make a sale partly on time if necessary. *Brown v. North*, 141–215, 119 N. W. 629.

Where it was impracticable in partition of property among the widow and the heirs to set off the dwelling house at its fair value to any one, held that a court should order a sale of the whole and distribution of the proceeds. *Rice v. Rice*, 147–1, 125 N. W. 826.

Where it appears that the property cannot properly be partitioned, it is not error to order a sale and disposition of the proceeds. *Oziah v. Howard*, 149–199, 128 N. W. 364.

A referee for the sale of land on partition may enter into a contract which, being beyond his power as referee, is binding upon him as an individual. *Jones v. Ford*, 154–549, 134 N. W. 569.

SEC. 4256. **Special allotments.**

Under the facts in a particular case, held that the party claiming to have made improvements and to be entitled to an allowance therefor in case of the sale of the property, had so far enjoyed the rents and profits on an inadequate consideration as to be precluded from having such relief. *Bergman v. Kammlade*, 109–305, 80 N. W. 418.

SEC. 4259. **Judgment—decrees of partition to be recorded.** Upon the report of the referees being approved, a decree shall be rendered confirming the partition and apportioning the costs as herein provided, entering judgment therefor. Upon the rendition of such decree the clerk shall file with the county recorder of the county a duly certified transcript of such part of the entire decree, in the case in which partition has been ordered, as may be necessary to show the volume and page where such decree is recorded, and the confirmation of the shares and interests of the parties in the property of which partition is made, and the names of the parties who are found entitled to such shares, and an accurate description of each of the shares allotted to the several owners; and such transcript shall be presented to the county auditor for transfer and recorded in the deed records of the county where the action was brought and also in the

other counties in the state, if any, where any of the property so partitioned is situated; and in such case the clerk shall transmit to the county recorder of each of such other counties a duplicate of such transcript, and the same shall be there so recorded and transfer so made. Such transcript shall be indexed in the recorder's office the same as conveyances of real estate with the names of the parties so entitled to such shares as grantors, and the name of the party to whom each share is allotted as grantee. The costs of making and recording such transcript shall be taxed as part of the costs in the case. [27 G. A., ch. 106, § 1; C. '73, § 3296; R. § 3642; C. '51, § 2064.]

An admission of the facts alleged by the plaintiff seeking partition without other pleading will entitle plaintiff to judgment on the pleadings. *Caldwell v. Drummond*, 127–134, 102 N. W. 842.

The effect of a decree in partition is simply to segregate and locate the share of each of the common owners as a separate parcel of land allotted to him, and to extinguish his interest in portions thereof allotted to others. The title by which such person holds his allotted share is the same as that by which his individual interest in the estate in common was held. The deed of partition destroys the unity of possession, and thereafter each holds his share in severalty, but the deed confers no new title or additional estate. *Foster v. Hobson*, 131–58, 107 N. W. 1101.

A partition proceeding brings the common property within the jurisdiction of the court and a decree ordering its sale puts it beyond the power of one owner to rebuild a destroyed improvement and impose the cost thereof on his coöwners. *Cooper v. Brown*, 143–482, 122 N. W. 144.

SEC. 4260. Costs.

The discretion exercised by the court in the apportionment of costs in such cases will not be interfered with in the absence of a satisfactory showing of abuse. *McGuire v. Luckey*, 129–559, 105 N. W. 1004.

Where the title to property is put in issue, it was not intended to impose the burden of paying any part of plaintiff's attorney's fees upon the opposing parties who are represented by counsel of their own choosing. *Hawk v. Day*, 148–47, 126 N. W. 955.

Costs created by contest are not taxable against the common property. *Ibid.*

SEC. 4261. Attorneys' fees.

There is no authority for apportioning the attorney's fee here provided for. *Plant v. Fate*, 114–283, 86 N. W. 276.

Where there is a dispute as to the ownership of the property and both parties are represented by counsel, attorney's fees will not be taxed as provided by statute; but taxation of attorney's fees is proper where there is no controversy as to ownership or proportionate shares, and the contest raised in the proceeding is not as to the title but as to a collateral matter. *Smith v. Smith*, 132–700, 109 N. W. 194.

In a particular case, where the object in an action in the nature of a suit for partition brought by the widow of a deceased grantor against his grantee was to secure assignment of dower, attorney's fees were not allowed as in an action for partition. *Beeman v. Kitzman*, 124–86, 99 N. W. 171.

Where different parties in interest instituted two different actions for partition of the same property and notice by publication in one action was commenced but not completed when personal service was secured in the other action, held that attorney's fees should be allowed in the latter as being first commenced. *Littlejohn v. Bulles*, 136–150, 113 N. W. 756.

Where the title of property involved in partition proceedings is put in issue and all parties are represented by counsel, neither may have attorney's fees taxed at the expense of the common property. *Hawk v. Day*, 148–47, 126 N. W. 955; *Lee v. Lee*, 150–611, 130 N. W. 128; *Schoonmaker v. Schoonmaker*, 154–500, 133 N. W. 741, 135 N. W. 599; *Rice v. Rice*, 157– —, 138 N. W. 1111.

Where the right of each party in the real estate to be partitioned or its proceeds is not disputed and the only question is as to whether the sale shall be by referees in partition or by the executor of the estate of the deceased owner, it is proper to allow attorney's fees. *Hanson v. Hanson*, 149–82, 127 N. W. 1032.

Plaintiff cannot, by resorting to a proceeding of partition of property, throw the expense for reasonable attorney's fees upon the proceeds of the property itself if it appears that the real controversy is as to plaintiff's title to or interest in the property. *Oziah v. Howard*, 149–199, 128 N. W. 364.

Where a substantial controversy is submitted as to the share to which the claimant is entitled, he is not entitled to his attorney's fees although he may have some interest in the property. *Convey v. Murphy*, 154–421, 134 N. W. 1065.

If the defendant sets up a hostile claim of title which the court finds to be sham or frivolous, and pleaded simply to cast

upon the plaintiff all the expense of a partition, the issue thus raised will not be allowed to deprive the plaintiff of the right to a taxation of attorney's fees. *Kuhn v. Downs*, 156–247, 136 N. W. 199.

The attorney conducting a partition proceeding has no such interest in the taxation of costs as entitles him to appeal therefrom. The taxation if made is in favor of the party to the action and in the nature of a reimbursement for an expense which he has reasonably incurred and to which the entire property ought in equity to contribute. *Ibid.*

SEC. 4266. Conveyance.

A partition sale is a judicial sale. But a purchaser has a right to demand that the proceedings be such as that he gets the title of the parties to the proceeding; and if it is shown that the proceeding is so defective that the purchaser could not obtain the title, whatever it may be, he is not required to complete the sale. *Perrin v. Chidester*, 139 N. W. 930.

When objections are made to the title, the referees in partition have a reasonable time within which to cure the defect appearing; and if the purchaser gives a reason for refusing to accept the title and plants his objection upon certain grounds, he cannot, after expense has been incurred in obviating these defects, make his objection on other and distinct grounds. *Ibid.*

SEC. **4268. When parties are married.** If the owner of any share thus sold has a husband or wife living, and if such husband and wife do not agree as to the disposition that shall be made of the proceeds of such sale, the court must direct it to be invested in real estate, under the supervision of such person as it may appoint, taking the title in the name of the owner of the share sold as aforesaid. Provided that in case the amount of any share shall not exceed the sum of one thousand dollars the court may in its discretion direct the same to be paid to the owner or two thirds to the owner and one third to the spouse; and provided further, that in all cases when it is shown to the satisfaction of the court that the owner has been abandoned by the husband or wife, the whole amount shall be paid to the owner and no agreement therefor shall be required. [34 G. A., ch. 165, § 1.] [C. '73, § 3303; R. § 3635; C. '51, § 2057.]

SEC. 4269. Sales disapproved.

The court is justified in withholding its approval of the partition sale where minors appear to be interested and no guardian has been appointed and they have in no way been represented in the proceeding. *Brown v. Traul*, 140–728, 119 N. W. 149.

CHAPTER 7.

OF THE FORECLOSURE OF MORTGAGES.

SECTION 4273. Of personal property—by notice and sale.

Where a chattel mortgage is executed to secure a debt past due the mortgagee has the right to foreclose it upon delivery. *Johnston v. Robuck*, 104–523, 73 N. W. 1062.

Where by the terms of the mortgage the mortgagee is authorized to sell at private sale, he may sell the articles separately, in lots or together, as may best suit the convenience of buyers and insure the largest returns. In such case the mortgagee is the trustee for the mortgagor and is required to act in entire good faith and conduct the sale fairly. *Ibid.*

The act of the mortgagee in taking possession of the mortgaged property before the happening of contingencies which are specified by the mortgage as conditions on which the mortgagee is to take possession will constitute a conversion and render the mortgagee liable for the value of the property. *Ibid.*

Where a chattel mortgage gave to the mortgagee the right of possession and use during the continuance of the mortgage, held that it superseded a previous contract by which the mortgagee was holding the property as bailee for hire. *Barnhart v. Hanford*, 105–116, 74 N. W. 742.

A foreclosure by notice and sale in accordance with the stipulations of the mortgage will be valid notwithstanding an agreement between the parties postponing the day of sale, unless the purchaser had actual notice of the agreement to postpone. *Gibson v. McIntire*, 110–417, 81 N. W. 699.

The parties may stipulate for a foreclos-

ure without giving the statutory notice, and may waive damages resulting from the conducting of the sale without such notice. *Geiser Mfg. Co. v. Krogman*, 111–503, 82 N. W. 938.

Where a sheriff acts in making a sale under authority given in the instrument itself, and not under statutory authority, his fees are not controlled by the provisions of code § 4277. In such a case a reasonable compensation may be allowed. *Dowie v. Christen*, 115–364, 88 N. W. 830.

A landlord's lien may be satisfied out of the proceeds of the sale. *Ibid.*

SEC. 4277. Notice of sale.

The provisions of this section do not control the fees to be allowed to the sheriff for selling mortgaged chattels, in pursuance of power given in the instrument itself. *Dowie v. Christen*, 115–364, 88 N. W. 830.

SEC. 4283. How contested.

If the mortgagor has an adequate remedy at law he cannot remove the foreclosure proceeding to the district court by injunction. *McCormick Har. Mach. Co. v. De La Mater*, 114–382, 86 N. W. 365.

SEC. 4285. Sale under pledge.

Foreclosure in court is one method of enforcing a pledge lien. The lien in such case merges in the judgment and there subsists to be made effective by special execution. *Croft v. Colfax E. L. & P. Co.*, 113–455, 85 N. W. 761.

SEC. 4287. Of real property—foreclosure by equitable proceedings.

A mortgage or deed of trust of real estate to secure the payment of a debt cannot be foreclosed by a sale on notice without decree of court. *Varner v. Interstate Exchange*, 138–201, 115 N. W. 1111.

Although the mortgagor is dead so that no action can be maintained against him, still, if the mortgage is not barred, the fact that no claim has been made against his estate does not defeat an action to foreclose against one owning the land by conveyance from such mortgagor. In such action the debtor is not a necessary party. *Fitzgerald v. Flanagan*, 155–217, 135 N. W. 738.

SEC. 4288. Separate suits on note and mortgage.

A suit may be maintained on a note in one county and, in a proper case, an action for the foreclosure of the mortgage in another *McDonald v. Second Nat. Bank*, 106–517, 76 N. W. 1011.

It seems that a foreclosure suit may proceed independently of the action on the note secured by the mortgage. *Smith v Moore*, 112–60, 83 N. W. 813.

The prosecution of an action to foreclose a mortgage does not bar a separate action on the note secured until there is an adjudication or plaintiff has been required to make an election as between such actions. *State Sav. Bank v. Miller*, 146–83, 124 N. W. 873.

SEC. 4289. Judgment—sale and redemption.

The possession of a mere mortgagee is not entitled to protection as against the owner of the fee obtained under a sale made in pursuance of the foreclosure of a prior mortgage. *McDonald v. Second Nat. Bank*, 106–517, 76 N. W. 1011.

A sale of all of the mortgaged premises, under a decree of foreclosure, for a part of the mortgage debt which is due, discharges the premises from the lien of the mortgage for the part of the debt not due, and for which the decree does not provide. But in actions for the foreclosure of mortgages for installments due, jurisdiction may be retained to provide for the collection of the installments not due. It is not proper, however, to provide that the sale for the installments due shall be subject to a lien for the installments not due. *Kilmer v. Gallaher*, 107–676, 78 N. W. 685.

Unless a court retains jurisdiction of a case to provide for future installments, a sale of the mortgaged premises under foreclosure passes to the purchaser all the title and interest of the mortgagor and mortgagee in and to the premises, and the purchaser takes free from the lien of unpaid installments, and it is immaterial that the

The decree of foreclosure of a chattel mortgage is binding, at least as against collateral attack, even though that method of foreclosure is not authorized by the terms of the contract. *King v. Nelson*, 120–606, 94 N. W. 1095.

The foreclosure of a chattel mortgage without judicial proceedings, but in accordance with statutory provisions, does not constitute a seizure by process of court, and therefore the provisions of code §§ 4019, 4020 do not entitle laborers to a lien on the proceeds of such foreclosure. *Wells v. Kelley*, 121–577, 96 N. W. 1104.

unpaid installments are evidenced by separate notes and mortgages. *Wells v. Ordway*, 108–86, 78 N. W. 806.

Where the holder of two mortgages brings action for the foreclosure of the senior of them, without reference to the junior, and bids in the premises at a sale under such foreclosure, and the mortgagor subsequently quitclaims to a third person who redeems from the foreclosure, the lien of the junior mortgage is thereby extinguished. *Henry v. Maack*, 135–84, 110 N. W. 469.

The mortgagor's grantee by quitclaim may rely upon the deed to protect himself against the lien of the junior mortgage. *Ibid.*

The holder of the junior mortgage not thus foreclosed cannot rely as against the mortgagor's grantee on a personal covenant between the mortgagor and his grantee by which the latter has undertaken to pay off such junior mortgage. *Ibid.*

There is a marked difference between redemption by judgment debtor and redemption by his grantee. It is the policy of the law to secure to the debtor, as nearly as practicable, the full value of his property sold on execution. When the grantee of the mortgagor acquires the right to redeem, and a junior lien holder fails to exercise his privilege and is barred by lapse of time, the grantee may redeem without removing such bar, and thus perfect the title in himself. *Co-operative S. & L. Assn. v. Kent*, 108–146, 78 N. W. 911.

After foreclosure and prior to the sale, the right of the mortgagor is an equity of redemption which may be conveyed, and the grantee will, on redeeming from the sale, take the title free from liens of junior creditors who are made parties to the foreclosure proceeding and have failed to exercise the right of redemption. *Cooper v. Maurer*, 122–321, 98 N. W. 124.

A junior judgment creditor failing to redeem from a sale under a senior judgment loses the right to subsequently make redemption from a foreclosure sale under a mortgage which has priority to both judgments. *Francestown Sav. Bank v. Silver*, 122–685, 98 N. W. 498.

After a decree, sale and expiration of the period of redemption in a foreclosure proceeding to which a junior mortgagee is made a party, the latter has no lien which may be enforced in a subsequent foreclosure proceeding against a purchaser of the mortgagor's right of redemption. *Witham v. Blood*, 124–695, 100 N. W. 558.

A lien holder made party to the foreclosure proceeding must satisfy his lien by bidding in the property or redeeming under statutory provisions and cannot enforce his lien in the absence of such purchase on execution or redemption as against one who buys the property from the mortgagor during the redemption period. *Ibid.*

The grantor in a conveyance which is found to be a mortgage is entitled to possession until decree of foreclosure and expiration of the statutory period of redemption. *Harrington v. Foley*, 108–287, 79 N. W. 64.

Where, in foreclosure of a mortgage, a receiver has been appointed he is entitled to his compensation out of the proceeds of the sale of the mortgaged property. *Ibid.*

The statutory right to redeem cannot be cut off by agreement of the parties nor by the mortgagee's possession, and exists until barred by statute. When the right is sought to be exercised the mortgagee or grantee in possession will be required to account for the rents and profits, and for all the proceeds of the land and other securities. *Adams v. Holden*, 111–54, 82 N. W. 468.

A mortgage in this state does not create an estate, but simply a lien or a charge upon the land to secure the debt, and a suit for foreclosure is barred in ten years, and as the rights of mortgagor and mortgagee are reciprocal, redemption under a mortgage will be cut off in the same time. *Ibid.*

The equitable right of redemption which exists independent of the statute may be enforced until taken away in accordance with express statutory enactment. And an equitable action may be maintained to enforce the right of redemption after execution sale and before the expiration of the statutory period for redemption. If it can be shown in such action that the mortgagee is under obligation to account to the mortgagor for receipts from the property sufficient to extinguish the indebtedness, the mortgagor is entitled to have the sale set aside and the mortgage declared satisfied. *Dolan v. Midland Blast Furnace Co.*, 126–254, 100 N. W. 45.

The redemption from a mortgage provided for by law is redemption from foreclosure sale. *First Nat. Bank v. Campbell*, 123–37, 98 N. W. 470.

It is not proper to provide in the decree that the successful party may waive special execution and have a general execution for the amount due. *Moore v. Crandall*, 146–25, 124 N. W. 812.

SEC. 4293. Other liens.

These provisions as to applications of payments apply to the disposition of the overplus in the hands of the mortgagee after his debt is satisfied. *Citizens' Bank v. Whinery*, 110–390, 81 N. W. 694.

Where a senior lien holder, being made

a party to the action to foreclose, takes no steps to secure the application of the surplus to the satisfaction of his claim, and such surplus is applied to the satisfaction of an execution on a judgment in favor of a junior lien holder, the senior cannot, in an action for damages, recover against the clerk of the court or the junior lien holder whose claim has been satisfied, at least without a showing that his claim cannot be satisfied by resort to proper proceedings. *Hoyer v. Graham*, 150–63, 129 N. W. 317.

SEC. 4295. Satisfaction acknowledged.

The penalty provided in this section cannot be enforced where the satisfaction relied on is a decree rendered against an insane mortgagee, the year allowed for applying for new trial after the incapacity is removed not having expired. *Pollock v. Milburn*, 112–528, 84 N. W. 521.

A court of equity has no power to enjoin a proceeding by a justice of the peace to recover the penalty provided for in this section on the ground that the mortgage is not in law and fact satisfied. *Home Sav. & T. Co. v. Hicks*, 116–114, 89 N. W. 103.

SEC. 4297. Foreclosure of title bond.

It may be provided in a contract to convey that on failure to pay as agreed the rights of the vendee shall be forfeited. *Bigler v. Jack*, 114–667, 87 N. W. 700.

Where time is not made of the essence of the contract, and there are no provisions for forfeiture, a mere failure to pay will not in itself work a forfeiture. On breach by the vendee of the stipulations as to payment, the vendor may sue on the contract as at common law to recover the purchase price, or he may proceed under the statute to foreclose; but he cannot by notice effect a forfeiture. The statute relating to forfeitures has application only to those cases where the contract makes a provision for forfeiture. *Cody v. Wiltse*, 130–139, 106 N. W. 510.

No notice to the vendee such as that contemplated in code § 4299 relating to forfeiture is necessary before instituting an action to foreclose. *Clifton Land Co. v. Davenport*, 130–94, 106 N. W. 365.

The statutory provisions as to foreclosure of title bonds have no reference to contracts for options. An option is not a sale, nor even an agreement for a sale. It is at best but a right of election in the party receiving the same to exercise a privilege, and only when that privilege has been exercised by acceptance does it become a contract to sell. *Hopwood v. McCausland*, 120–218, 94 N. W. 469.

In an action to enforce specific performance of a contract to convey and to foreclose the bond, there is no misjoinder of actions, for the vendee may either pay the amount called for under the bond or allow the property to be disposed of to satisfy the claim. *Boynton v. Salinger*, 147–537, 126 N. W. 369.

In such action it is not necessary to allege the tender by the vendor of the deed conveying the property as a condition precedent to the maintenance of the action. Until full payment the vendor is under no obligation to convey and need not tender a deed. *Ibid.*

If as to installments of the purchase price the statute of limitations has run, no action can be maintained with reference to such installments. A cause of action accrues upon maturity of each installment and recovery thereon, either by action at law or by foreclosure, is barred by the statute of limitations. *Ibid.*

SEC. 4298. Vendee deemed mortgagor.

In an action to foreclose a contract for the conveyance of real property the plaintiff is under no obligation to attach an abstract of title, and the fees for such an abstract should not be taxed as part of the costs. *Boynton v. Salinger*, 147–537, 126 N. W. 369.

SEC. 4299. Forfeiture—notice. Any contract hereafter made for the sale of real estate in the state of Iowa, and which provides for the forfeiture of vendee's rights therein upon the happening of certain conditions, shall not be forfeited or canceled unless, thirty days before a declaration of forfeiture is made, a written notice be served on the vendee or assignee, notice of whose rights as assignee has been conveyed to vendor, and on the party in possession of said real estate, which notice shall contain a declaration of an intention to forfeit said contract and the reason therefor and may be served personally or by publication, on the same conditions, and in the same manner as is provided for the service of original notices. If such notice is served by publication no affidavit therefor shall be required and the forfeiture shall not take place until thirty days after the last publication day. [34 G. A., ch. 166, § 1.] [26 G. A., ch. 73, § 1.]

The provision that a land contract shall not be forfeited or canceled unless written notice of such forfeiture be given, relates to a forfeiture of the contract and contemplates its cancellation or termination, while an action to foreclose is based upon the recognition and continuing validity of the agreement between the parties. Therefore, notice to the vendee other than that necessary in instituting the suit is not necessary where the proceeding is for the foreclosure of the bond for a deed. *Clifton Land Co. v. Davenport*, 130–94, 106 N. W. 365.

The vendor cannot effect the forfeiture of the contract on failure of the vendee to make payment of an installment of the purchase price by giving the statutory notice required in case of forfeitures, unless a forfeiture is provided for in the contract. *Cody v. Wiltse*, 130–139, 106 N. W. 510.

A provision as to forfeiture cannot be relied on as defeating an execution sale of the vendee's interest where no steps to enforce such forfeiture have been taken. *Thomassen v. De Goey*, 133–278, 110 N. W. 581.

One who has taken no steps to declare a forfeiture of a contract to convey cannot insist on such right of forfeiture as a defense in an action of specific performance. *Rea v. Ferguson*, 126–704, 102 N. W. 778.

While the acceptance of payment after a declaration of a forfeiture may constitute a waiver of such forfeiture, yet it must satisfactorily appear by the evidence that the payment was accepted under the contract, and not in satisfaction of some other obligation or indebtedness. *Sutphin v. Holbrook*, 122–272, 97 N. W. 1100.

A vendor who, having lost the right to forfeit the contract, wrongfully goes into possession must account to the purchaser for rents and profits. *Nolan v. Foley*, 141–671, 120 N. W. 310.

Where it is provided in a contract for sale of land that the vendor may redeem, in the sense of repurchase, within a specified time, such vendor is not entitled to notice of forfeiture under this section, and after the lapse of the specified time has no further right in the property. *Cold v. Beh*, 152–368, 132 N. W. 73.

The mere fact of serving notice of forfeiture does not estop the vendor from insisting that the contract constitutes an option only, no reliance on such notice being shown on behalf of the vendee. *Low v. Young*, 157– —, 138 N. W. 828.

All that the statute requires is that the notice shall contain a declaration of an intention to forfeit the contract and give the reason therefor. *Gaston v. Horn*, 157– —, 138 N. W. 925.

SEC. 4300. **Performance—notice of forfeiture filed.** For the period of thirty days after service of said notice the vendee, or those claiming under him, may discharge any unpaid payment and costs of service of notice of forfeiture, or perform any condition broken; and, if said payments are made or conditions broken are performed within said period of thirty days, the right to forfeit for defaults occurring before said notice is served is terminated. If said payments are not made, or the conditions broken are not performed within said period of thirty days the vendor may file for record in the recorder's office the notice of forfeiture with the proof of service thereto attached, and if service was by publication also file his affidavit that personal service of the notice could not be had within this state; and when so filed and recorded the record thereof shall be constructive notice to all persons of the declaration of forfeiture and service of notice thereof. The recorder shall receive the same fee therefor as for recording other instruments. [34 G. A., ch. 166, § 2.] [26 G. A., ch. 73, § 2.]

CHAPTER 8.

OF ACTIONS FOR NUISANCE, WASTE AND TRESPASS.

SECTION 4302. Nuisance—what constitutes—action to abate.

Under the evidence in a particular case, held that the use which defendant was making of the river adjoining his premises was a proper one, in view of the business carried on and the conditions existing in the locality, and that defendant was not creating a nuisance. *Bennett v. National Starch Mfg. Co.*, 103–207, 72 N. W. 507.

In the supplemental petition the plaintiff may in the same action set up a continuance of the nuisance for the purpose of recovering additional damages. *Foote v.*

Burlington Gas Light Co., 103–576, 72 N. W. 755.

Where a contract gave one party the right to construct a drain over the land of another, held that it did not confer the right to maintain a nuisance, and that, even if the plaintiff knew of the existence of such nuisance when he bought the premises, he would not be estopped thereby from action to recover damages therefor and abate the same. *Van Fossen v. Clark*, 113–86, 84 N. W. 989.

A nuisance may exist so as to cause special damage to a private person where such damage is not susceptible of direct and positive proof, and in such case it is the rule that where the nuisance is shown to exist the law presumes damage "for an injury to the right," and the jury is given large discretion in fixing the amount thereof. *Ibid.*

The unreasonable obstruction of a street by a railroad company in allowing its trains to stand thereon, is a continuing nuisance. *Gilcrest Co. v. Des Moines*, 128–49, 102 N. W. 831.

Every person has the right to have the air diffused over his premises in its natural state, free from artificial impurities,—that is, as free and pure as reasonably could be expected from the particular location and the business conducted there. But every chimney and smokestack emitting smoke, soot or noisome fumes is not a nuisance *per se*. It will constitute a nuisance if the gases or fumes are emitted in unreasonable manner rendering the occupancy of the premises uncomfortable for the purposes to which devoted. *McGill v. Pintsch Compressing Co.*, 140–429, 118 N. W. 786.

In the absence of injury to the property itself, the measure of damages occasioned to property by a nuisance in the neighborhood is the diminution of its rental value. *Ibid.*

There can be no such thing as a vested right to maintain a public nuisance, nor can such right be acquired by lapse of time or long continued use or prescription. *Waterloo v. Waterloo, C. F. & N. R. Co.*, 149–129, 125 N. W. 819.

As between the property owner and the public, the inquiry as to whether the obstruction of surface water constitutes a nuisance relates to conditions existing at the time when the complaint is made. *Ibid.*

While the breeding of animals is a lawful business, it may be carried on under such circumstances and in such proximity to dwellings as to constitute a nuisance in the residence district of a city. *Williams v. Wolfgang*, 151–548, 132 N. W. 30.

This section provides for abatement of a nuisance in an action brought at law. *Watt v. Robbins*, 142 N. W. 387.

For other cases relating to nuisance, see notes to code § 5078 in this supplement.

SEC. 4306. Treble damages for injury to trees.

In an action for trespass for the removal of timber which is of such size as to have a value independent of the soil, the measure of damages may be estimated on the value of the timber thus removed. *Koonz v. Hempy*, 142–337, 120 N. W. 976.

To warrant a recovery of treble damages under this section it must be shown that the injury was wanton and without reasonable excuse. *Ibid.*

CHAPTER 9.

OF ACTIONS TO TEST OFFICIAL AND CORPORATE RIGHTS.

SECTION 4313. For what causes.

A proceeding by quo warranto cannot be maintained for the purpose of determining the rightfulness of the exercise of power by a corporation with reference to a private trust. *State v. Higby Co.*, 130–69, 106 N. W. 382.

Rights granted to a corporation with reference to the use of the streets of a city for the operation of street cars are in the nature of a franchise, the validity of which may be inquired into by quo warranto. *State v. Des Moines City R. Co.*, 135–694, 109 N. W. 867.

An action of quo warranto is a proper action in which to determine the legality of the incorporation of an independent school district. The remedy by appeal to the county superintendent is not exclusive. *State v. Alexander*, 129–538, 105 N. W. 1021.

The laches of the complaining party may be such as to defeat his action. But where relator shows the illegality of the proceedings complained of he is entitled to the relief asked unless the delay in instituting the proceeding is such that the other party will be prejudiced by the granting of the relief. *Ibid.*

Courts of equity have no jurisdiction to determine the respective rights of claim-

ants to a public office. An injunction will not lie to restrain a person acting as a public officer from exercising the functions pertaining to the office on the ground that he is not entitled to it. *State v. Alexander*, 107–177, 77 N. W. 841.

The proper remedy to determine the right of an office is by quo warranto. The record of election to such office is not conclusive when attacked in such proceeding. *Daniels v. Newbold*, 125–193, 100 N. W. 1119.

A petition for quo warranto to test the right of an incumbent of a county office to hold the same may be entertained, notwithstanding the provision of code § 1198 for election contests. *Haverstock v. Aylesworth*, 113–378, 85 N. W. 634.

While the right of school officers to act in their assumed official capacity may be tested on behalf of the state by an action of quo warranto, the school township within which is located the district for which the officers assume to act, may, in an action in equity for an injunction, have the right to act determined. *School Township v. Wiggins*, 122–602, 98 N. W. 490.

The validity of a patent for land may be inquired into by action of quo warranto. *Murray v. Quigley*, 119–6, 92 N. W. 869.

The provision of this section as to forfeiture of corporate rights does not involve the appointment of a receiver or other exercise of equitable powers. *Platner v. Kirby*, 138–259, 115 N. W. 1032.

Where the board of supervisors has erred, as alleged, in the appointment of a person to an office required to be filled from persons of a particular class, the right of the person appointed to hold his office is to be tested by an action in the nature of quo warranto and not by proceedings in certiorari. *Keely v. Board of Supervisors*, 139 N. W. 473.

SEC. 4315. By county attorney.

Although the proceedings were instituted by private parties, nevertheless the county attorney representing the public may appear therein, and it is immaterial with reference to his action in prosecuting the proceedings that it has been thus commenced by private citizens. *State v. Des Moines City R. Co.*, 135–694, 109 N. W. 867.

SEC. 4316. By private person.

A resident and taxpayer of a city may maintain an action by quo warranto to test the legality of the appointment of waterworks trustees under the provisions of code § 747. *State v. Barker*, 116–96, 89 N. W. 204.

After a proceeding in the nature of quo warranto has been instituted by private citizens as relators, it may be continued in that form, although the county attorney appears and is allowed to act as the representative of the public, and it is not proper in such cases to dismiss the relators from the action. *State v. Des Moines City R. Co.*, 135–694, 109 N. W. 867.

A slight interest only is necessary to sustain the proceeding as brought by private citizens representing the public. *Ibid.*

Leave to private citizens to sue in the interest of the public may be granted without notice to the defendant. *Ibid.*

The leave granted to the applicant for the right to bring the action is not subject to attack in a collateral proceeding. *State v Alexander*, 129–538, 105 N. W. 1021.

The matter of allowing an action of quo warranto to be maintained by a private person in his own interest is addressed to the discretion of the court. An order granting the right is not open to dispute on the trial or on appeal. *State v. Brown*, 144–739, 123 N. W. 779.

SEC. 4318. Costs.

In a quo warranto proceeding to test the validity of an election to office, if the contestant fail to establish his rights, the costs should be taxed as in a criminal proceeding wherein the prosecution fails. *Hull v. Eby*, 123–257, 98 N. W. 774.

SEC. 4335. Penalty for refusing to obey order.

One who refuses to comply with an order of the court in a proceeding by quo warranto may be punished for contempt. *State v. Cahill*, 131–286, 108 N. W. 453.

CHAPTER 10.

OF ACTIONS ON OFFICIAL SECURITIES, FINES AND FORFEITURES.

SECTION 4338. Fines and forfeitures.

In the absence of statutory authority the board of supervisors cannot contract for a percentage of fines belonging to the school fund to a person collecting such fines. The board has the power to provide for the distribution of fines when collected, but cannot contract that a percentage to be collected shall be paid to the person collecting them. *Gunn v. Mahaska County*, 155–527, 136 N. W. 929.

CHAPTER 11.

OF ACTIONS OF MANDAMUS.

SECTION **4341. Definition.** The action of mandamus is one brought to obtain an order commanding an inferior tribunal, board, corporation or person to do or not to do an act, the performance or omission of which the law enjoins as a duty resulting from an office, trust or station. Where discretion is left to the inferior tribunal or person, the mandamus can only compel it to act, but cannot control such discretion. All such actions shall be tried as equitable actions. [32 G. A., ch. 168, § 1; C. '73, § 3373; R. §§ 3761, 3763; C. '51, § 2180.]

Interference with discretion: Where a discretion with reference to the desired action is vested in the inferior tribunal or person, mandamus may be awarded to compel action, but not to control the discretion. *Perry v. Board of Supervisors*, 133–281, 110 N. W. 591.

Where the duty imposed upon a board or tribunal involves an exercise of discretion based on facts to be found by it, mandamus will not lie however erroneous the conclusion reached. *Preston v. Board of Education*, 124–355, 100 N. W. 54.

An action of mandamus will not lie with reference to proceedings of a board of directors of a school district in a matter which is within the discretion of such board. *Kinzer v. Independent School District*, 129–441, 105 N. W. 686.

A writ of mandamus will not ordinarily issue to compel state officers or agents to do an act involving discretion or judicial determination. Therefore held that mandamus would not lie to compel state officers to satisfy a disputed claim against the state. *Wilson v. Louisiana Purchase Exposition Com.*, 133–586, 110 N. W. 1045.

Under code § 2774 relating to the action of school boards as to transportation of children, the board is required to investigate the question of expense and increased advantage to the children and act according to its judgment and discretion, and therefore, mandamus will not lie to compel a particular action. The remedy is by appeal. *Queeny v. Higgins*, 136–573, 114 N. W. 51.

As to a matter resting within the discretion of a school board, its action in the exercise of such discretion cannot be controlled by mandamus. *Kirchner v. Board of Directors*, 141–43, 118 N. W. 51.

The issuance of a writ of mandamus is not a matter of right but rests largely in the discretion of the court, and before it will be awarded with reference to the action of an officer, it must appear that the action complained of was not a matter of discretion. *Drew v. School Township*, 146–721, 125 N. W. 815.

When discretion is left to a person or board, mandamus can only compel action but cannot control discretion. *State v. Parker*, 147–69, 125 N. W. 856.

The action of the county treasurer under code § 1374 in assessing omitted property is judicial and cannot be controlled by mandamus. *Woodbury County v. Talley*, 147–498, 123 N. W. 746.

Mandamus will not lie to compel the engineer and board of supervisors to approve the work done under a contract to construct a drainage ditch, the matter of the approval of the work being left to the discretion and judgment of the proper officers which cannot be controlled by a mandatory writ in the absence of any showing of fraud or collusion. *Federal Contracting Co. v. Board of Supervisors*, 153–362, 133 N. W. 765.

But held in such action, that the case should be remanded to the lower court with leave to complaining party to amend his pleadings so as to secure a trial on the question whether he was entitled to recover under the contract or for *quantum meruit* in a proper form of proceedings. *Ibid.*

The courts have no authority by an action of mandamus to interfere with the exercise of discretion on the part of a school board as to matters over which they are given control, with a right of appeal to the county superintendent and from him to the state superintendent. *Templer v. School Township*, 141 N. W. 1054.

Appointment to office: Mandamus will lie to compel the appointment to office of one who is entitled to such appointment under the soldiers' preference law, if the facts entitling him to such appointment are conceded. *Shaw v. Marshalltown*, 131–128, 104 N. W. 1121.

But the appointing officer or tribunal is charged with the determination of the question whether the qualifications of the applicant under the law are equal to those of the other applicants, and mandamus will not lie to review the finding as to such fact. *McBride v. City Council*, 134–501, 110 N. W. 157.

A court will not in an action for mandamus control the exercise of discretion on the part of a board or officer in determining the respective qualifications of applicants for appointment to an office, even though an applicant for such office is within the provisions of the soldiers' prefer-

ence law. *Ross v. City Council*, 136–125, 113 N. W. 474; *Arnold v. Wapello County*, 154–111, 134 N. W. 546.

Corporate duties: Mandamus will lie to compel railroad companies to construct suitable crossings for one owning lands on both sides of the railroad track without the prior submission of the matter to the board of railroad commissioners. *Swinney v. Chicago, R. I. & P. R. Co.*, 123–219, 98 N. W. 635.

A school corporation for whose benefit a contract to supply water is made between the city and a water company may maintain an action of mandamus to compel specific performance thereof. *Independent School Dist. v. LeMars City W. & L. Co.*, 131–14, 107 N. W. 944.

This action may be maintained to compel the officers of a private corporation to issue certificates of stock or transfer them on the books of the company. *Hair v. Burnell*, 106 Fed. 280.

Mandamus is the proper action for compelling the board of supervisors to canvass corrected election returns. *Rummel v. Dealy*, 112–503, 84 N. W. 526.

One who claims to be the lowest bidder for work to be done for a public corporation, under a statute providing for an award of such contract to the lowest bidder, has not such interest as to authorize him to maintain an action of mandamus to compel the awarding to him of the contract, nor is the awarding of such contract so far a ministerial act that the action of the public authorities can be controlled by such action. *Vincent v. Ellis*, 116–609, 88 N. W. 836.

The granting of a writ of mandamus is not a matter of right and rests very largely within the discretion of the court. *Ibid.*

Mandamus is the proper remedy to compel a railroad company to comply with valid city ordinances requiring it to install and operate gates at street intersections. *Council Bluffs v. Illinois Cent. R. Co.*, 157– —, 138 N. W. 891.

Official duties: An action of mandamus may be maintained to compel compliance on the part of a school board with the order of the state superintendent in a matter over which he has exclusive jurisdiction on appeal. *State v. Thomas*, 152–500, 132 N. W. 842.

SEC. 4343. Extent of remedy.

Mandamus will not be granted in anticipation of a supposed omission of duty. Plaintiff must show that defendant is actually in default in the performance of a legal duty then due, and no threats not to perform can take the place of such default. *Mystic Milling Co. v. Chicago, M. & St. P. R. Co.*, 131–10, 107 N. W. 943.

Where the right involved is a private one, there must be a demand and refusal before the writ will issue. *Ibid.*

Something more than error in judgment must be found to justify the issuance of a writ of mandamus to control the actions of public officers. *Littell v. Webster County*, 152–206, 131 N. W. 691, 132 N. W. 426.

An action of mandamus will not lie to enforce purely contractual rights. *Ibid.*

Procedure: A demurrer to the petition for mandamus does not constitute an admission that the facts alleged give the court jurisdiction to review the proceeding on account of which mandamus is asked. *Preston v. Board of Education*, 124–355, 100 N. W. 54.

Although the statute authorizes the recovery of damages in an action of mandamus, the nature of the action is not thereby changed, and such action is not removable to the federal courts. *Mystic Milling Co. v. Chicago, M. & St. P. R. Co.*, 132 Fed. 289.

A proceeding to recover money due under a written contract in which a mandatory order is asked in aid of such recovery is essentially an action at law and the demand for a writ of mandamus does not convert it into an action in equity. Mandamus itself is a law remedy. *Ford v. Manchester*, 136–213, 113 N. W. 846.

In an action by mandamus to compel the board of supervisors to order the refunding of taxes erroneously levied, as provided in code § 1417, held that the board could not be compelled to order the payment of interest on the amount to be refunded. *Home Savings Bank v. Morris*, 141–560, 120 N. W. 100.

As the action of mandamus is now triable as an equitable action the court may take equitable causes into consideration in determining whether relief shall be granted. *Funck v. Farmers' Elev. Co.*, 142–621, 121 N. W. 53.

The amendment to this section providing for trial in equity held applicable to proceedings pending when the amendment was enacted in which issues had not yet been joined. *Kitterman v. Board of Supervisors*, 145–22, 123 N. W. 740.

The fact that the petition in an action of mandamus designates the action as at law instead of in equity will not warrant the court in refusing to try the issues. *Klopp v. Chicago, M. & St. P. R. Co.*, 156–466, 136 N. W. 906.

SEC. 4344. Other remedy.

An application for a writ of mandamus will not lie if the applicant has any other remedy in the ordinary course of law which is plain, speedy and adequate. *Kin-*

zer v. Independent School District, 129–441, 105 N. W. 686.

The right to appeal to the county superintendent from the action of the board of supervisors of a school district does not preclude an application for mandamus with reference to such action to determine whether the board in the matter complained of acted within the scope of its powers as defined by statute. *Ibid.*

The validity of the action of the board of supervisors in vacating a highway may be tested by certiorari and an action by mandamus will not lie for that purpose. *Sullivan v. Robbins*, 109–235, 80 N. W. 340.

An action of mandamus may be maintained by voters to compel the board of supervisors to canvass returns of election not properly certified, when the certificate is corrected by the officers making the return. *Rummel v. Dealy*, 112–503, 84 N. W. 526.

SEC. 4345. Who may bring action.

One of the signers of a petition to the board of supervisors, asking submission of a question to the vote of the people, may maintain mandamus to compel the board to perform its duty in the submission of such question. *Windsor v. Polk County*, 115–738, 87 N. W. 704.

SEC. 4346. Petition.

A mandatory order by way of auxiliary relief may be made in the final decree, although asked in an amendment and without showing of a previous demand. *Davenport Gas & E. Co. v. Davenport*, 124–22, 98 N. W. 892.

CHAPTER 12.

OF INJUNCTIONS.

SECTION 4354. When allowed.

In actions at law: The provision for injunction in actions brought by ordinary proceedings does not apply where the claimant to an office is seeking to get possession thereof. *State v. Alexander*, 107–177, 77 N. W. 841.

While an injunction in some circumstances will be awarded as auxiliary relief in an action at law, yet where injunction is the sole relief asked and sufficient ground therefor is not shown, it is error to grant relief on the theory that the objection is waived by a failure to ask for a transfer of the case to the law docket. *Hall v. Henninger*, 145–230, 121 N. W. 6.

Adequate remedy at law: A court of equity will not interfere by injunction where the party asking relief has a plain, speedy and adequate remedy in the ordinary course of law, nor will an injunction lie to test the validity of a criminal statute. *Ewing v. Webster City*, 103–226, 72 N. W. 511.

But a court of equity may enjoin an act, even though it be punishable as a crime, if it is one which would cause irreparable injury. *Ibid.*

Therefore, held that the enforcement of an ordinance providing a penalty for buying or selling within the city limits without the commodity being weighed at the public scales might be enjoined if it should be found to be void and would cause irreparable injury to the party complaining, without plain, speedy and adequate remedy at law. But, held that the ordinance in question was valid and its enforcement would not be enjoined. *Ibid.*

Where a plaintiff has a plain, speedy and adequate remedy at law, he cannot have relief by injunction. *Forbes v. Carl*, 125–317, 101 N. W. 100.

Therefore, held that a tenant could not, before the commencement of his term, have an injunction to restrain the landlord's threatened interference with the rights of the tenant under his lease. *Ibid.*

Where acts may cause irreparable injury, where a multiplicity of suits will be avoided or where acts of trespass are constantly repeated but the injury resulting from each act is trifling, relief in equity will be granted because of the inadequacy of the legal remedy. *Dumont v. Peet*, 152–524, 132 N. W. 955.

Mandatory: While the office of an injunction primarily is to restrain and not to compel the performance of an act, yet if it be necessary in order to make the restraining order effectual, the party against whom it is issued may be required to perform some affirmative act which will make effectual the main and controlling purpose of the order. *Falcon v. Boyer*, 142 N. W. 427.

Use of counterfeit label: Under the provisions of code § 5050, that every person, association or union adopting a label, trade-mark or other form of advertisement may proceed by action to enjoin the manu-

facture, use, display or sale of any counterfeits or imitations thereof, held that a wholesale dealer in cigars could be enjoined from selling boxes of cigars bearing a counterfeit union label, and that good faith in making the sale, as, for instance, where it was made by a clerk in violation of instructions, would constitute no defense. But held that no damages could be recovered in such action by the labor union whose label was counterfeited unless actual damage was shown, and further, that damages by way of penalty could not be allowed in the absence of any evidence as to the amount of such damage. *Beebe v. Tolerton*, 117–593, 91 N. W. 905.

Unlawful combinations: A competitor in business with a farmers' coöperative association organized in part to restrain its members under penalty from dealing with such competitor may enjoin the association from carrying out its unlawful purposes. *Reeves v. Decorah Farmers' Co-op. Society*, 140 N. W. 844.

To restrain trespass: A threatened trespass of a continuing character may be restrained by injunction. *Halpin v. McCune*, 107–494, 78 N. W. 210.

An injunction will lie to prevent repeated trespasses on plaintiff's property by the domestic fowls of defendant, without proof of defendant's insolvency. *Keil v. Wright*, 135–383, 112 N. W. 633.

To restrain wrongful acts as to real property: An injunction will lie to prevent the act of the tenant in violation of the covenants of his lease, whether constituting waste or not. *Kraft v. Welch*, 112–695, 84 N. W. 908.

The removal of a building which is an interference with real estate such as to absolutely deprive the plaintiff of the beneficial enjoyment of its present use may be restrained if such threatened removal is without lawful authority. *Lemmon v. Guthrie Center*, 113–36, 84 N. W. 986.

Injunction is a proper remedy to restrain injury to real property by the removal therefrom of fixtures which are a part of the realty. *State Security Bank v. Hoskins*, 130–339, 106 N. W. 764.

The bringing of a sidewalk to grade and the destruction of trees in a street which would be caused thereby may be enjoined where proper action to establish the grade has not been taken by the council. The property owner is not limited to testing the validity of a tax imposed on his premises by reason of such unlawful action. *Burget v. Greenfield*, 120–432, 94 N. W. 933.

Legal remedies are usually adequate for the protection of interests in land, and equity will not as a general rule interfere to change the possession from one to another or to transfer it to one whose rights have not been established at law. *Hall v. Henninger*, 145–230, 121 N. W. 6.

Therefore a court of equity will not interfere by injunction with the possession of land unless there is some peculiar ground for equitable relief. *Ibid.*

The lessor of property for mining purposes may have an injunction to prevent the use of entries for purposes not contemplated in the lease. *Beck v. Economy Coal Co.*, 149–24, 127 N. W. 1109.

In an action to quiet title, defendants may be enjoined from conspiring together to interfere with plaintiff's possession which had been found to be rightful. *Coulthard v. Davis*, 151–578, 131 N. W. 1088.

Possessory title will support: Where the threatened wrong is to a possessory title, it is sufficient as against a wrongdoer to allege and prove possession. *Blennerhassett v. Forest City*, 117–680, 91 N. W. 1044.

To abate nuisance: The owner of land who is specially damaged by the establishment and maintenance of a cemetery constituting a nuisance may maintain an injunction for the abatement thereof. *Payne v. Wayland*, 131–659, 109 N. W. 203.

The owner of an uninclosed lot should not be enjoined from permitting the use of his lot for the playing of ball, although such use causes annoyance and damage to adjoining property owners, where it does not appear that he has encouraged nor affirmatively permitted such use of his premises to be made. *Spiker v. Eikenberry*, 135–79, 110 N. W. 457.

An injunction to abate a nuisance may properly be denied where it appears that the nuisance complained of has been permanently abated. *Perry v. Howe Co-op. Creamery Co.*, 125–415, 101 N. W. 150.

The jurisdiction of a court of equity by injunction to restrain the obstruction of a public highway as a nuisance is not defeated by the fact that such obstruction constitutes a crime. The ground of equitable jurisdiction is the ability of a court of equity to give more complete and adequate relief than is obtainable at law, and to prevent irreparable mischief and vexatious litigation. *Gilcrest Co. v. Des Moines*, 128–49, 102 N. W. 831.

Courts of equity will not interfere by injunction or otherwise for the prevention or punishment of criminal or immoral acts unless connected with the violation of public or private rights, nor will injunction lie, save in pursuance of special statutory provisions, at the suit of an individual to restrain a public nuisance which affects him only as one of the general body of citizens. *Campbell v. Jackman*, 140–475, 118 N. W. 755.

In an action brought at law to enjoin or abate a nuisance, the plaintiff may in the same cause pray for and have a writ of injunction against the repetition of such nuisance. *Watt v. Robbins*, 142 N. W. 387.

Fraudulent condemnation of land: Injunction will lie to prevent a fraudulent resort to proceedings for the condemnation of lands for public purposes; but in general, objections which can be interposed in the proceeding itself cannot be made the ground of application for equitable relief against such proceedings. *LaPlant v. Marshalltown*, 134–261, 111 N. W. 816.

Questions as to the right to condemn land in a condemnation proceeding, which could have been raised on appeal in such proceeding, cannot be raised in a proceeding for an injunction. *Davis v. Des Moines & Ft. D. R. Co.*, 155–51, 135 N. W. 356.

To restrain illegal tax: A taxpayer may maintain an action to enjoin the carrying out of a resolution increasing the number of wards in a city, there being no authority to change the wards by resolution. *Cascaden v. Waterloo*, 106–673, 77 N. W. 333.

Equity will interfere by way of injunction to prevent the enforced collection of taxes illegally assessed, but a threatened assessment alone cannot be enjoined. *Security Sav. Bank v. Carroll*, 128–230, 103 N. W. 379.

Where a tax is void, equity will grant relief against its enforcement. *Chicago, M. & St. P. R. Co. v. Phillips*, 111–377, 82 N. W. 787.

A court of equity will not enjoin the collection of a tax on account of excessive assessments fraudulently made. The remedy afforded to the taxpayer by application for relief to the board of review, under code § 1373, is exclusive. *Crawford v. Polk County*, 112–118, 83 N. W. 825.

If a tax is illegal and void, its collection may be enjoined in equity, even if there be a tribunal provided for reviewing the same. It is only where the tax is irregular or erroneous that the remedy by appeal is exclusive. *Security Sav. Bank v. Carroll*, 131–605, 109 N. W. 212.

Where a city council has no authority whatever to assess property for street improvements, the owner of property illegally assessed may enjoin the enforcement of the assessment without resorting to an appeal. *Ft. Dodge Elec. L. & P. Co. v. Ft. Dodge*, 115–568, 89 N. W. 7.

Equity will not grant relief by enjoining the collection of a tax imposed by the treasurer under the proceeding for the assessment of taxes on omitted property (code supp. § 1407-a). Parties to such proceeding are bound by the assessment made and if dissatisfied therewith their remedy is by appeal. *Saar v. Carson*, 145–525, 124 N. W. 204.

To restrain official action: An injunction will lie to restrain the removal of the county records from the place where the courthouse is legally established to a place unlawfully selected by the board of supervisors as a county seat. *Way v. Fox*, 109–340, 80 N. W. 405.

A court of equity will not by injunction restrain the proceeding of a justice of the peace on the ground that he is without jurisdiction, as that objection may be interposed in the proceeding itself. *Home Sav. & T. Co. v. Hicks*, 116–114, 89 N. W. 103.

Courts of equity will grant an injunction to restrain an attempted wrong when it clearly appears that in no other proceeding can public or private interests be protected; and the writ will issue at the instance of a private individual who shows that he may suffer financial injury if the contemplated wrong be not enjoined, even though it be made to appear that a part of the public will suffer in the same way or to the same extent. *Semones v. Needles*, 137–177, 114 N. W. 904.

Right to public office: An injunction will not lie to restrain a person acting as a public officer from exercising the functions of the office on the grounds that he is not entitled to the office; but it seems that an injunction will lie in favor of the incumbent of an office to protect him in the discharge of the duties of the office against an adverse claimant until the latter shall have established his right to the office by an action at law. *State v. Alexander*, 107–177, 77 N. W. 841.

An injunction will not lie to restrain a person acting as a public officer from exercising the functions pertaining to the office on the ground that he is not entitled to such office. In such case the legal remedy is adequate. *District Twp. v. Myles*, 109–541, 80 N. W. 544.

Equity will not interfere by injunction to determine the title to an office. *Vette v. Byington*, 132–487, 109 N. W. 1073.

The right to vote at an election is a political right which equity will not interfere to protect. *Shoemaker v. Des Moines*, 129–244, 105 N. W. 520.

Nor can a taxpayer resort to injunction to restrain the county officers from carrying out a contract for the purchase of voting machines which have been approved by the commission as provided for that purpose. *Ibid.*

The right to vote is a political and not a civil right, and a court of equity will not exercise its extraordinary power of injunction to protect such right. *U. S. Standard Voting Mch. Co. v. Hobson*, 132–38, 109 N. W. 458.

Sale of a business: A valid contract for the sale of a business with an agreement not to reëngage therein at a particular place for a specified period is enforceable by injunction against a vendor who is insolvent, even though the contract also contains a provision for stipulated damages. *Heinz v. Roberts*, 135–748, 110 N. W. 1034.

Personal services: Equity will not undertake to decree specific performance of contracts for personal services nor in the absence of an express negative covenant will it aid the enforcement of such contract by injunction; and even where there is an express negative covenant, injunction will not be granted save in those exceptional cases where by reason of the peculiar or extraordinary character of the promised services a violation of the agreement will cause injury to the other party, for which an action at law will afford no adequate remedy. *Gossard Co. v. Crosby*, 132–155, 109 N. W. 483.

To restrain mortgagee: It is proper in an action of replevin based on rights claimed under a chattel mortgage for defendant to ask an injunction restraining plaintiff from enforcing any claim under such mortgage with reference to property not subject thereto. *Brody v. Chittenden*, 106–340, 76 N. W. 740.

Enjoining void judgment: Where a judgment is rendered without jurisdiction its enforcement may be enjoined. The injured party is not bound to prosecute his remedy by appeal. *McConkie v. Landt*, 126–317, 101 N. W. 1121.

A court of equity may enjoin the enforcement of a judgment which is void for want of jurisdiction. Neither appeal nor certiorari, though available, constitutes an adequate and speedy remedy. *Worrall v. Chase*, 144–665, 123 N. W. 338.

To be entitled to equitable relief in such case the complaining party is not bound to disprove the alleged indebtedness for which the judgment is alleged to have been rendered. *Ibid.*

An action to enjoin the enforcement of a judgment and set aside levy and sale thereunder is an equitable action. *Mengel v. Mengel*, 145–737, 120 N. W. 72, 122 N. W. 899.

To restrain legal proceedings: An action cannot be maintained for an injunction to restrain the defendant from prosecuting or defending an action on the ground that it would cause expense to the individual complaining and the public generally. *Hall v. Chicago, B. & Q. R. Co.*, 146–225, 124 N. W. 1073.

An injunction will lie to restrain a resident of this state from prosecuting fraudulent, collusive or unlawful proceedings in the courts of another jurisdiction. *Reed v. Hollingsworth*, 157–94, 135 N. W. 37.

A court of equity will not interfere by injunction to restrain proceedings in a probate court having jurisdiction to allow claims against the estate of a decedent, the grounds of equitable relief being available by way of defense to the claim in the probate court. *McIntosh v. Brown*, 139 N. W. 926.

To enjoin enactment of ordinance: A court has no power to enjoin the anticipated enactment of an ordinance which would, if enacted, be void as *ultra vires*. *Majestic Theatre Co. v. Cedar Rapids*, 153–219, 133 N. W. 117.

A court of equity may, in a proper case, enjoin the enforcement of a void ordinance, but not unless it appear that the party complaining has no adequate protection or redress at law. Usually the invalidity of the ordinance is a perfect defense to any prosecution for its violation. *Ibid.*

Right no longer existing: An injunction will not issue to protect a right which no longer exists, although it might have existed and injunction may have been a proper remedy when applied for. *Davis v. Boyer*, 122–132, 97 N. W. 1002.

Formal writ: The issuance of a formal writ of injunction is not necessary to bind a party who was represented in the case by attorney when the final decree was rendered. *Hawks v. Fellows*, 108–133, 78 N. W. 812.

See also notes to code § 4372 in this supplement.

SEC. 4356. Temporary—when allowed.

To entitle plaintiff to an order of temporary injunction restraining the enforcement of a judgment, he must affirmatively show that the judgment is invalid. *Hawkeye Ins. Co. v. Huston*, 121–393, 96 N. W. 895.

The matter of continuing or dissolving a temporary injunction when there has been an answer filed denying the allegations of the petition rests largely within the discretion of the trial court. *LaPlant v. Marshalltown*, 134–261, 111 N. W. 816.

The judge may issue a temporary writ in vacation. *Young v. Preston*, 131–292, 108 N. W. 463.

The refusal to grant a temporary injunction will not be reviewed on appeal where it appears that the final merits of the case remain to be tried in the lower court and the appellant has not maintained the *status quo* by a staying order. *Gilman v. Talley*, 140–718, 119 N. W. 144.

On appeal from the dissolution of a temporary injunction the supreme court will not try the merits of the case. *Jewel Tea Co. v. Stewart*, 142–353, 120 N. W. 962.

If upon final hearing the trial court should find that plaintiff was entitled to a temporary injunction at the time it was secured, such finding will be a defense in an action on the injunction bond notwithstanding the dissolution of the temporary injunction. *Ibid.*

Courts will not undertake to change the possession of real property by the issuance of a temporary injunction; and where that has been done either intentionally or inadvertently the temporary writ will be

dissolved on motion. *Chicago G. W. R. Co. v. Iowa Cent. R. Co.*, 142–459, 119 N. W. 261.

The discretion of the trial court in granting or refusing to dissolve a temporary injunction may be reviewed on appeal and reversed if not based on sufficient grounds. *Swan v. Indianola*, 142–731, 121 N. W. 547.

The only purpose to be subserved by the temporary injunction is to preserve the rights of parties until a trial can be had on the merits, and if it is manifest that the rights of plaintiff can be fully safeguarded by a final decree, it is not error to deny an application for temporary injunction. *Chamberlain v. Brown*, 144–601, 123 N. W. 161.

Where the plaintiff might, by prosecution of his case to a final decree, have had his rights determined, the supreme court will not reverse an order denying a temporary injunction. *Ibid.*

Some latitude of discretion must be permitted the trial court in allowing or refusing a temporary injunction; and if it is not essential to the maintenance of the *status quo* of the parties the denial of the application will not be reviewed on appeal. *Snodgrass v. McDaniel*, 144–674, 123 N. W. 336.

A preliminary injunction should not be granted terminating the occupancy of land before a trial of the issues. *Ibid.*

One who has had opportunity by prosecuting his case in the lower court to secure a final determination of his rights cannot complain on appeal of the action of the court in refusing a temporary injunction. *Ibid.*

Where plaintiff has the right to have the *status quo* preserved pending litigation, it is error to dissolve the preliminary writ. *Bankers' Surety Co. v. Linder*, 156–486, 137 N. W. 496.

Where the granting of a permanent injunction as sought involves the question as to the respective rights of the parties, and each asks a temporary injunction for the protection of his rights, there can hardly be an abuse of discretion in granting a temporary injunction to the party ultimately successful. *Cantril Telephone Co. v. Fisher*, 157–203, 138 N. W. 436.

In granting temporary writs of injunction against the usual and ordinary processes of law, courts should exercise great care. *Snouffer v. Tipton*, 142 N. W. 97.

It is unusual for courts of equity to restrain either criminal or quasi criminal proceedings. Exceptions are made in cases where plaintiff's property would be placed in jeopardy or taken without due process of law, and perhaps in other cases. *Ibid.*

A temporary injunction can issue only as an incident to some case pending in court; and when the case itself is dismissed or otherwise disposed of, the temporary injunction falls with it; and the supreme court will not review the case solely for the purpose of determining whether the preliminary injunction was properly granted in order to furnish to the appellant a defense to an action on the injunction bond. *Horrabin v. Iowa City*, 142 N. W. 212. And see *Bethany Cong. Church v. Morse*, 151–521, 132 N. W. 14.

The granting or refusal of a temporary injunction is not always a matter of right, even where the petition shows a probable right of relief on final hearing. The application is addressed to the discretion of the court, to be guided according to the circumstances of the particular case. *Beidenkopf v. Des Moines L. Ins. Co.*, 142 N. W. 434.

Even where a technical right to relief is otherwise clearly established, a temporary injunction will be denied if the issuance of the writ may cause inconvenience to the public and serious loss to the defendant, while the injury to the plaintiff can be readily compensated by damages. *Ibid.*

SEC. 4357. By whom granted.

This section is permissive only as to the use of affidavits on such a hearing. The fact that witnesses are produced and subjected to cross-examination furnishes no ground of complaint. While the trial court may for its own convenience require the parties to submit their proofs in the form of affidavits, it is not bound to do so. *Chamberlain v. Brown*, 144–601, 123 N. W. 161.

SEC. 4359. Notice in other cases.

The words "operations of a railway" mean the operation of a constructed railway, and not the construction of a railway. *Johnston v. Chicago, M. & St. P. R. Co.*, 58–537, 12 N. W. 576.

A temporary injunction to stop a railroad company from proceeding with the work of building its road, or the operation of a part already constructed, should not be issued without notice. *Minneapolis & St. L. R. Co. v. Chicago, M. & St. P. R. Co.*, 116–681, 88 N. W. 1082.

A preliminary injunction restraining the city from levying an improvement assessment and issuing certificates based thereon does not stop the ordinary business of the municipality within the provision that no injunction of that character shall be granted except on reasonable notice. *Wingert v. Snouffer*, 134–97, 108 N. W. 1035, 111 N. W. 432.

A temporary injunction granted without notice, interfering with the general and ordinary business of a railroad company,

will be dissolved on motion. *Chicago G. W. R. Co. v. Iowa Cent. R. Co.*, 142–459, 119 N. W. 261.

The design of this statutory provision as to notice to a municipal corporation is that the ordinary business of the municipality shall not be interrupted without the opportunity of being heard. Should a temporary writ issue through oversight without such notice the court will on application set it aside or dissolve the writ on motion. *Bowman v. Waverly*, 155–745, 128 N. W. 950.

SEC. 4363. Bond.

A right of action does not accrue upon a bond given for the issuance of a temporary injunction until the main action has been tried and determined. *Lacey v. Davis*, 126–675, 102 N. W. 535.

To sustain an action for damages on the bond it must be made to appear that the injunction was wrongful in its inception, or at least was continued owing to some wrong on the part of plaintiff. If rightfully awarded but afterwards properly dissolved because of matters done or arising subsequent to its issuance, there can be no recovery of damages. *Scott v. Frank*, 121–218, 96 N. W. 764.

The final decree dissolving the injunction is *res adjudicata* as to the issues decided, but the entire record, including the pleadings, may be examined to determine precisely what was decided by a decree. *Ibid.*

A preliminary injunction should not be dissolved because of the inadequacy of the bond, except on failure to comply with an order for additional security. *Wingert v. Snouffer*, 134–97, 108 N. W. 1035, 111 N. W. 432.

The dissolution of an injunction against the exercise of a technical right which defendant had no desire or intention to exercise gives rise to no cause of action upon the bond. But if it involves a substantial right and is the sole relief sought, there may be recovery on the bond, although the damages are nominal. *Weierhauser v. Cole*, 132–14, 109 N. W. 301.

Where an injunction is the sole relief sought, the dissolution of the temporary injunction either by interlocutory order or upon the final hearing entitles the party enjoined to recover his attorney's fees in resisting the writ. But where the injunction sought is merely collateral or auxiliary to the principal controversy and its maintenance is not decisive of the very question at issue, attorney's fees are not recoverable. *Ibid.*

Where in a suit for an injunction defendant admits the allegations of the petition and pleads a counterclaim, and upon trial judgment is entered for plaintiff which is stayed by defendant, whereupon the injunction is dissolved, the order dissolving the injunction is not an adjudication that it was wrongfully issued. *Gray v. Bremer*, 122–110, 97 N. W. 991.

The issuance of the writ without notice may be waived by putting in issue the allegations of the petition and submitting the cause on the merits with or without a motion to dissolve. But it does not follow that a decree of permanent injunction should be entered upon the overruling of the motion to dissolve. If it appears in support of the motion to dissolve that the temporary writ restrains the municipality only from doing unlawful acts, then the municipality has no ground to complain of the granting of the temporary writ. *Ibid.*

The dissolution of the temporary writ on motion of the defendant without contest and the voluntary dismissal of the main suit make out a prima-facie case of wrongful issue of the injunction. *Williams v. Ballinger*, 125–410, 101 N. W. 139.

Where an injunction is the only remedy sought and the temporary injunction is dissolved, the necessary costs and expenses of procuring the dissolution are recoverable in an action on the bond. *Ibid.*

If after the preliminary injunction has served its purpose the entire action is dismissed, it appearing that defendant to the action has no right to do the things which he was temporarily enjoined from doing, he must, in order to be entitled to recover damages on the bond, show that he had not threatened to do such acts. *Ft. Madison Street R. Co. v. Hughes*, 137–122, 114 N. W. 10.

When an injunction is asked and granted in an action, auxiliary to other relief, attorney's fees and expense in procuring the relief are not recoverable; but where the injunction is the only relief sought and dissolution is procured upon final hearing, the necessary cost and expense in procuring the dissolution are recoverable. *Chicago, A. & N. R. Co. v. Whitney*, 143–506, 121 N. W. 1043.

Where an injunction is the sole relief sought and a temporary writ is issued and afterwards dissolved, the defendant is entitled to recover upon the injunction bond his necessary costs and expense in obtaining such dissolution, including attorney's fees; but where an injunction is not the sole relief sought, but is auxiliary and external to the main action, then in an action on the injunction bond attorney's fees cannot be allowed for defending the suit as a whole. In such case if no expense is incurred in obtaining the dissolution of the injunction except such as is incident to the case as a whole and a dissolution is had upon a final hearing, there can be no recovery of attorney's fees. *Burnett v. Stark*, 155–588, 136 N. W. 670.

Where plaintiff has ceased to have any right which can be protected by an injunction, his petition may be dismissed by the court. He is not entitled to have its merits determined with reference solely to the effect upon his liability under a bond for a temporary injunction. *Bethany Cong. Church v. Morse*, 151–521, 132 N. W. 14; *Horrabin v. Iowa City*, 142 N. W. 212.

Where the defendant has not suffered damage nor been interfered with by the granting of a preliminary injunction, there can be no recovery on the injunction bond. *Chicago, A. & N. R. Co. v. Whitney*, 152–520, 132 N. W. 840.

SEC. 4364. When to restrain proceedings or judgment.

Remedy by injunction to stay execution in a case pending in the supreme court should be sought in that court. *Hyatt v. Clever*, 104–338, 73 N. W. 831.

The district court of another county than that in which judgment is rendered cannot entertain an action to have such judgment set aside and declared void, even though the contention is that it is absolutely without validity for want of jurisdiction to render it. *Hawkeye Ins. Co. v. Huston*, 115–621, 89 N. W. 29.

An action to restrain the enforcement of the judgment of a justice of the peace, a transcript of which has been filed in the office of the clerk of the district court, should be brought in the county in which such transcript is filed. *Brunk v. Moulton Bank*, 121–14, 95 N. W. 238.

The provision that when it is sought to enjoin proceedings on a judgment, the suit must be in the same county and court in which such judgment was rendered, applies to a proceeding in which it is sought to enjoin the enforcement of the judgment because it has been paid or otherwise satisfied, or the debtor has been discharged in bankruptcy. *Ibid.*

The provisions of this section are not applicable to a judgment of a justice of the peace, no transcript of such judgment having been filed in the district court. *Gregory v. Howell*, 118–26, 91 N. W. 778.

In an action to restrain the enforcement of a judgment, the presumption is in favor of the validity of the judgment and the jurisdiction of the court rendering it, and the plaintiff must affirmatively show its invalidity. *Hawkeye Ins. Co. v. Huston*, 121–393, 96 N. W. 895.

Proceedings to enjoin enforcement of a judgment must be brought in the county and court in which the judgment was obtained. So held where it was sought to enjoin the enforcement, on transcript, of a judgment of a justice of the peace rendered in another county. *Ulber v. Dunn*, 143–260, 119 N. W. 269.

A judgment by default is conclusive as against the defense of fraud, and an action to restrain its collection in another county than that in which it was rendered cannot be maintained without proof that there was fraud in obtaining it. *Lang v. Dunn*, 145–363, 124 N. W. 192.

SEC. 4365. Bond in such case.

It is only when the collection of a judgment because invalid is enjoined that the bond should be conditioned for the payment of the judgment if the injunction is not made permanent. Such condition does not apply if the only relief demanded is to restrain the enforcement of the judgment against particular property. *Lindberg v. Thomas*, 137–48, 114 N. W. 562.

SEC. 4369. Notice—showing.

While the dissolution of a temporary injunction may sometimes be ordered upon the filing of an answer denying all the equities asserted in the petition, the statute provides that the motion may be made either before or after the answer and that it may be supported by affidavits, and therefore the filing of an answer denying the equities of the bill does not necessarily result in such dissolution. And on the other hand, there may be a dissolution without the filing of such answer. *Gossard Co. v. Crosby*, 132–155, 109 N. W. 483.

The dissolution as well as the granting of a temporary writ is so much a matter of discretion in the trial court that a very clear case of prejudicial error must be made out in order to require a reversal on appeal. *Ibid.*

Where a motion to dissolve presents the questions involved on a trial on the merits, it is not error to refuse the motion for dissolution. *Wingert v. Snouffer*, 134–97, 108 N. W. 1035, 111 N. W. 432.

A temporary injunction will as a general rule be dissolved where all the material allegations of the petition are fully and satisfactorily denied in the answer. *Swan v. Indianola*, 142–731, 121 N. W. 547.

SEC. 4370. Dissolution.

A large discretion is vested in the trial court in dissolving or refusing to dissolve a temporary writ of injunction. Such rulings do not usually amount to a *res adjudicata*. They simply preserve a *status quo* pending a final hearing on the merits. *Chicago G. W. R. Co. v. Iowa Cent. R. Co.*, 142–459, 119 N. W. 261.

SEC. 4372. Proceedings for violation.

A party who has knowledge that an order for an injunction has been granted, restraining him from the performance of some act, is bound from the time he receives such knowledge, although the formal entry of the order may not at that time have been made, nor any writ issued or served. On the other hand, one who with knowledge of the decision of the court filed with the clerk, dissolving a temporary injunction, acts in reliance on such order of dissolution, is not subject to punishment therefor. *Coffey v. Gamble*, 117–545, 91 N. W. 813.

An application for an order to punish for contempt in violating an injunction is properly made in the injunction case and should not be the subject of an independent action commenced in the name of the state. In such auxiliary proceeding the court may take notice of the records of prior proceedings in the case. *Ferguson v. Wheeler*, 126–111, 101 N. W. 638.

The remedy for violation of an injunction is a proceeding to punish for contempt, and where the party against whom an injunction was granted gave a supersedeas bond on appeal from the decree, held that in a suit on the supersedeas bond the opposite party could not recover damages for violation of the injunction. *Cole v. Edwards*, 104–373, 73 N. W. 863.

As to a party, the decree is as effectual, so far as it is self-enforcing, as though a formal writ had been issued and served. This is not true in regard to a writ not self-enforcing, as one providing for the abatement of a nuisance, and process is required to authorize an officer to do acts required to accomplish the abatement. *Bartel v. Hobson*, 107–644, 78 N. W. 689.

In a proceeding for contempt in violating a preliminary injunction, the supreme court will assume, on certiorari, that the order granting the temporary injunction was rightfully made, and it may find a violation of the order, although the district judge may have found that no contempt had been committed. *Lake v. Wolfe*, 108–184, 78 N. W. 811; see also, *Hawks v. Fellows*, 108–133, 78 N. W. 812.

It is no excuse for the violation of an order of injunction that at the time the violation was committed the defendant had on file a motion to modify the terms of the injunction order. Such fact might be considered in mitigation as showing good faith, but not in bar. *Young v. Rothrock*, 121–588, 96 N. W. 1105.

Proceedings for the violation of an injunction to abate a liquor nuisance are governed by the provisions of code § 2407. *Brennan v. Roberts*, 125–615, 101 N. W. 460; *McGlasson v. Scott*, 112–289, 83 N. W. 974.

In a contempt proceeding for violating a liquor injunction it is not open to the defendant to show that the injunction was erroneously granted unless it is absolutely void. *Ohlrogg v. District Court*, 126–247, 99 N. W. 178.

One who violates an injunction may be proceeded against for contempt in the injunction proceeding without instituting an independent proceeding against him for contempt. *Hatlestad v. Hardin County Dist. Court*, 137–146, 114 N. W. 628.

A temporary mandatory order issued by a court with jurisdiction must be obeyed until set aside or reversed, and one who is charged by way of contempt with a violation of such order cannot show that it was erroneous. *Ibid.*

The provisions of this section are not applicable to a proceeding under code § 2407 for violation of a liquor injunction. *Haaren v. Mould*, 144–296, 122 N. W. 921.

The defendant in an injunction proceeding is bound to obey the orders and decrees of the court even if erroneous. *Carr v. District Court*, 147–663, 126 N. W. 791.

One who has actual notice of the granting of a writ of injunction is as much bound by the order as if he had been duly served with the writ. *Ibid.*

Courts will not permit the violation of an injunctional order by any device or subterfuge constituting a substantial violation of the injunction. *Ibid.*

One who is not a party to the proceeding in which the injunction is granted and who has no interest in it or knowledge of its existence cannot be punished for contempt in its violation. *Harris v. Hutchison*, 140 N. W. 830.

As to taking judicial notice of the injunction decree by the court in a contempt proceeding for its violation, see notes to code § 2407 in this supplement.

CHAPTER 14.

OF ARBITRATION.

SECTION 4386. Written agreement.

A general agent without express authority may not submit a claim of his principal to arbitration, nor does a special administrator, in the administration of the estate, have such power. *Sullivan v. Nicoulin*, 113–76, 84 N. W. 978.

Either party has the right to demand that the arbitrators chosen shall have the competency of jurors, and a litigant cannot be expected to consent that his case shall be tried to his antagonist, in person or by agent. Therefore it is a good ground of objection that the arbitrator selected by one party is the agent of that party. *Goodwin v. Merchants' & Bankers' Mut. Ins. Co.*, 118–601, 92 N. W. 894.

An omission to specify particularly what demands are to be submitted or to name the arbitrators may be cured by subsequent stipulations complying with the statute. Stipulations in the submission as to matters not required to be included may be changed or omitted by subsequent agreement either in writing or in parol. *Wilkinson v. Prichard*, 145–65, 123 N. W. 964.

Where jurisdiction has been conferred by agreement to arbitrate and continued by the pendency of the action, a judgment on the award without attempt to rescind the submission will be binding although the award was made at a later date than that required by the statute. *Ibid.*

SEC. 4388. Action pending.

An agreement to arbitrate the subject matter of litigation is equivalent to an agreement to dismiss a pending suit for a good consideration, and itself operates as a dismissal. *Goodwin v. Merchants' & Bankers' Mut. Ins. Co.*, 118–601, 92 N. W. 894.

Where an agreement to arbitrate has been entered into and also that judgment shall be entered by the court in which the action is pending, the only fair inference is that the parties intended the continuance of the action for the filing of the award and the entry of judgment thereon. *Wilkinson v. Prichard*, 145–65, 123 N. W. 964.

SEC. 4389. Procedure.

Where the agreement for arbitration provides for two arbitrators, who may select an umpire in case of disagreement, notice to the umpire of the hearing is not essential. *Vincent v. German Ins. Co.*, 120–272, 94 N. W. 458.

Failure to give notice to a party of the hearing may be waived by him. *Ibid.*

Mistake of judgment on the part of the arbitrators is not ground for setting aside the award, unless such mistake be so great as to indicate partisan bias. *Ibid.*

In order to justify a court in setting aside an award, the misconduct or other ground for impeachment must be made out by clear and satisfactory evidence. *Ibid.*

Arbitrations are favored in law, and an award, when made, will be upheld unless the evidence clearly shows such misconduct or mistake on the part of the arbitrators as will justify the court in setting it aside. *Ibid.*

To appraise is to estimate value, and where arbitrators are selected to make an appraisement they are not required to hear evidence, although they may do so. *Ibid.*

SEC. 4390. Revocation.

An agreement to arbitrate, included in a policy of fire insurance is revocable by either party, notwithstanding the provisions of this section, and the bringing of suit constitutes such revocation. *Harrison v. Hartford F. Ins. Co.*, 112–77, 83 N. W. 820.

SEC. 4392. Time for award.

If the time within which the award is to be made is fixed in the submission, any subsequent change in time must be effected by writing duly acknowledged. *Wilkinson v. Prichard*, 145–65, 123 N. W. 964.

CHAPTER 15.

OF ACTIONS AGAINST BOATS OR RAFTS.

SECTION 4402. Seizure.

A lien given by a state statute for labor done in the original construction of a vessel even after she is launched is not enforceable in the federal admiralty courts as the contract is not of a maritime nature, the vessel not yet having become engaged in commerce. *The William Windom*, 73 Fed. 496.

CHAPTER 16.

OF HABEAS CORPUS.

SECTION 4417. Petition—grounds.

Although the defendant in a criminal case may be entitled to discharge on habeas corpus because he has not been given a speedy trial as required by the constitution, such objection cannot be made a ground for dismissal in the supreme court on appeal from a judgment of conviction. *State v. Sloan*, 131–676, 109 N. W. 190.

SEC. 4419. Writ allowed—service.

In the exercise of its appellate powers the supreme court has authority to entertain an original proceeding for habeas corpus without restriction to any particular locality within the state. *Ware v. Sanders*, 146–233, 124 N. W. 1081.

SEC. 4420. Application—to whom made—inmates of state institutions. Application for the writ must be made to the court or judge most convenient in point of distance to the applicant, and the more remote court or judge, if applied to therefor, may refuse the same unless a sufficient reason be stated in the petition for not making the application to the more convenient court or a judge thereof. When the applicant is an inmate of or confined in a state institution the provisions of this section relating to the court to which or the judge to whom applications must be made are mandatory, and the convenience or preference of an attorney or witness or other person interested in the release of the applicant shall not be a sufficient reason to authorize a more remote court or judge to assume jurisdiction. [35 G. A., ch. 293, § 1.] [C. '73, § 3452; R. § 3805; C. '51, § 2217.]

It is not expressly provided that a judge who is not the one to whom application is directed to be made shall be without jurisdiction to entertain the application. *Ware v. Sanders*, 146–233, 124 N. W. 1081.

Therefore held that in a proper case for the exercise by the supreme court of its supervisory powers a judge of that court was not without jurisdiction to grant the writ. *Ibid.*

SEC. 4449. Demurrer or reply—trial.

Finding of lower court: On appeal in a habeas corpus proceeding, the supreme court does not try the cause anew, but will affirm the finding of the lower court if there is any evidence in its support. *Dunkin v. Seifert*. 123–64, 98 N. W. 558.

The finding of the trial judge as to the facts is entitled to the same presumption in its favor as the finding of facts by a jury. *Myers v. Clearman*, 125–461, 101 N. W. 193.

In a habeas corpus proceeding involving the right of custody of a child, the findings of the court have the effect of the verdict of a jury; but a finding which is clearly contrary to the evidence and without support will be disregarded. *Smiley v. McIntosh*, 129–337, 105 N. W. 577.

The finding of the trial court in a cause of habeas corpus has the force and effect of a finding by a jury and will not be disturbed if there be evidence in its support. *Smidt v. Benenga*, 140–399, 118 N. W. 439; *Morrison v. Dwyer*, 143–502, 121 N. W. 1064; *Hall v. Wintermute*, 154–520, 134 N. W. 425.

SEC. 4451. Action of grand jury—result of trial.

It is not competent in a habeas corpus proceeding to question the validity of a conviction on the ground that the grand jury returning the indictment on which the conviction was based was not properly selected, the defendant having had opportunity at the proper time to raise the question as to the sufficiency of the indictment. *Busse v. Barr*, 132–463, 109 N. W. 920.

Where it appears that the applicant is properly imprisoned as a punishment adjudged against him in a judicial proceeding, his application for habeas corpus should be dismissed. There is no authority in such case for ordering that he be admitted to bail pending an appeal from the ruling in the habeas corpus proceeding. *Orr v. Jackson*, 149–641, 128 N. W. 958.

SEC. 4453. Plaintiff held.

In a proceeding to secure release from a commitment of an indictable offense, the judge seems not to have authority to hold the accused to bail for trial before a justice of the peace for an offense not indictable. *Myers v. Clearman*, 125–461, 101 N. W. 193.

SEC. 4455. Plaintiff retained in custody.

Where the court in the habeas corpus proceeding finds the imprisonment by way of punishment for contempt to be lawful, it has no authority to admit the applicant for habeas corpus to bail pending an appeal in such proceeding. *Orr v. Jackson*, 149–641, 128 N. W. 958.

SEC. 4459. Costs.

In the proceeding by habeas corpus to secure a discharge from a hospital for the insane, the superintendent of the hospital, who is made defendant, should not be taxed with the costs, but they should be taxed to the county where the commitment is had. *Hughes v. Applegate*, 123–230, 98 N. W. 645.

CHAPTER 17.

OF CONTEMPTS.

SECTION 4460. What punishable as.

A proceeding to punish a contempt of court may be in its nature criminal, but the statutory provision with regard to new trial in criminal cases is not applicable in such a proceeding. *State v. Stevenson*, 104–50, 73 N. W. 360.

The power to punish for contempt is recognized as inherent in all courts and essential to the preservation of order in judicial proceedings and to the due administration of justice. *Field v. Thornell*, 106–7, 75 N. W. 685.

A witness cannot be punished for contempt for not responding to a subpoena issued from a court in which no proceeding is pending. *Chambers v. Oehler*, 107–155, 77 N. W. 853.

The statutory definition of contempt excludes contempt at common law not included within the statute. *Drady v. District Court*, 126–345, 102 N. W. 115.

A contempt proceeding may be tried by any judge of the court in which the offense was committed. *Ibid.*

Proceedings to punish for contempt in violating an order or decree of court are so far identified with the action in which the order or decree was entered that the court may take judicial notice without proof or profert of the record; and it is immaterial that the decree was entered at a term of court presided over by a judge other than the one presiding in the contempt proceedings. *Haaren v. Mould*, 144–296, 122 N. W. 921.

In a proceeding to punish for contempt, the applicant is not entitled as a matter of right to an order for commitment of the person charged. In such case the application is in the sound discretion of the court. *Carr v. District Court*, 147–663, 126 N. W. 791.

While the advice of counsel is no defense in a proceeding for contempt, it may be considered in mitigation and ignorance may be considered where criminality depends on the intent with which the act was committed. *Ibid.*

Public officers relying upon the validity of a legalizing act should not be punished for contempt in such action although the legalizing act may be in fact unconstitutional. *Ibid.*

SEC. 4461. In courts of record.

Provisions regulating the procedure for the punishment of constructive contempts are not unconstitutional as depriving courts of their inherent power. *Drady v. District Court*, 126–345, 102 N. W. 115.

Evidence in a particular case held sufficient to show the person accused to have been guilty of contempt in attempting to influence a juror as to the verdict. *Ibid.*

Contempt proceedings are in their nature criminal, and before a conviction is had the proof of guilt should be clear and satisfactory. So held where the charge was of attempting to influence a juror. *Wells v. District Court*, 126–340, 102 N. W. 106.

The provision for the punishment of an attempt to influence a juror as contempt is applicable to such an attempt with reference to a juror of the general panel be-

fore he is drawn and sworn as one of the trial jurors in the case. *Marvin v. District Court*, 126–355, 102 N. W. 119.

In a proceeding to punish for contempt in attempting to influence a juror, it is erroneous to receive in evidence a transcript of the testimony before a committee of the bar association investigating the charge, the defendant being entitled to a trial under the statute on evidence introduced as in other cases. *Hunter v. District Court*, 126–357, 102 N. W. 156.

SEC. 4464. When affidavit necessary.

The presentation to the court of a subpoena against the person charged with failing to respond thereto, even though the return of such subpoena is irregular in form, will be a sufficient basis for proceeding as for a contempt coming officially to the knowledge of the court, the failure of the witness to appear being necessarily manifest. *Coutts v. District Court*, 149–297, 128 N. W. 362.

SEC. 4465. Notice to show cause.

Where the party in contempt advised the court that he was ready for punishment and challenged the court to inflict such punishment, held that it was not error to proceed without giving opportunity for written explanation. *Hardin v. Silvari*, 114–157, 86 N. W. 223.

The person proceeded against for contempt is entitled to have the opportunity to file his explanation before the assessment of punishment, and a reasonable time should be allowed for that purpose. *State v. District Court*, 124–187, 99 N. W. 712.

A denial by the accused of the contempt charged does not operate as at common law to purge the offense, but the court is to determine by a trial the facts put in issue by the answer. This is the express rule as to contempt in violating an injunction against the sale of intoxicating liquors. See code § 2407. *Drady v. District Court*, 126–345, 102 N. W. 115.

SEC. 4466. Testimony reduced to writing.

The provision that the evidence must be taken in writing and preserved indicates that a trial is contemplated upon a denial of guilt by the defendant. *Drady v. District Court*, 126–345, 102 N. W. 115.

The defendant put on trial for contempt, on his denial of the charge, has a right to have the testimony taken under the issue made by his answer, as in other cases. Evidence taken against him in an investigation before a bar association is not admissible. *Hunter v. District Court*, 126–357, 102 N. W. 156.

Where the contemptuous conduct complained of is committed in the presence of the court, or judge, and the order punishing for contempt is based upon personal knowledge, the statement of the facts upon which the order is founded must be entered on the record or filed and preserved. It is not sufficient that such statement is embodied in the shorthand notes of the reporter which have not been transcribed and filed. *State v. District Court*, 133–450, 110 N. W. 592.

Where the facts are not within the knowledge of the court or judge, an order of commitment for contempt made before the evidence is reduced to writing and filed is void. *Walker v. Kennedy*, 133–284, 110 N. W. 581.

Where the court proceeds upon its own knowledge, a failure to preserve a record of the facts on which the court acts is sufficient ground for setting aside the conviction on certiorari. *State v. District Court*, 124–187, 99 N. W. 712.

Where two proceedings, one of which is for contempt, are tried together, the filing of the shorthand notes in one of the proceedings is a sufficient making of record of the evidence in the other. *Hatlestad v. Hardin County Dist. Court*, 137–146, 114 N. W. 628.

The fact that the warrant of commitment does not expressly recite whether the particular facts and circumstances on which the court acted were within the knowledge of the court or were proved by witnesses does not render the finding of the court erroneous. In passing upon the validity of the sentence the sufficiency of the warrant of commitment is not involved. *Walton v. Hobson*, 146–703, 125 N. W. 805.

An order of punishment in contempt must be annulled if the evidence in shorthand or in extended transcript is not filed of record until after the judgment assessing the punishment is entered. *Gibson v. Hutchinson*, 148–139, 126 N. W. 790.

The fact that the evidence relied upon to show a contempt has not yet been made of record is not ground for dismissing the proceedings. *Sawyer v. Hutchinson*, 148–449, 126 N. W. 798.

SEC. 4468. Review by certiorari.

The revision by certiorari in a proceeding in which a punishment is inflicted for contempt involves a review of the evidence so far at least as to determine whether the act shown to be committed was sufficient at law to constitute contempt. *Wells v. District Court*, 126–340, 102 N. W. 106.

The costs in a certiorari proceeding to

review an order punishing for contempt should be taxed in analogy to the taxation of costs on appeal. They may be taxed to the person instituting the proceeding if the order is annulled. *Coffey v. Gamble*, 134–754, 94 N. W. 936.

As the proceeding for punishment for contempt is quasi criminal, a conviction should not be sustained unless the proof of guilt is clear and satisfactory; but if there is clear and satisfactory evidence the action of the trial court should not be set aside merely because some of the evidence was improperly admitted. *Russell v. Anderson*, 141–533, 120 N. W. 89.

The decision in certiorari to review the action in punishing for contempt of an injunction is binding upon the party at whose instance the injunction was procured, although the certiorari proceeding is against the judge of the court and no notice is served on the plaintiff in the injunction suit. A party to the injunction proceeding is without further notice bound by the decision in a certiorari proceeding brought to question the decision of the court in such case. *Jones v. Mould*, 151–599, 132 N. W. 45.

A decision of the court dismissing a charge of contempt may be reviewed by certiorari if a substantial right, either public or private, is involved which can only be protected or enforced by the contempt proceeding. *Ibid.*

The finding in favor of the defendant in the contempt proceeding for violation of an injunction does not constitute an adjudication of a former jeopardy such as to preclude further proceedings where the finding of the court in favor of the defendant has been annulled in a proceeding by certiorari. *Ibid.*

A commitment for contempt in refusing to answer questions propounded to a witness has for its object only the securing of testimony in the trial of the case and does not constitute a punishment for an offense against the dignity of the court. Such an order is reviewable on appeal and not in a proceeding by certiorari. *Witmer v. District Court*, 155–244, 136 N. W. 113.

SEC. 4469. Indictment.

The object and purpose of the contempt proceeding is not to punish a public offense but to compel obedience to and respect for an order of the court. The rule that no person shall be twice put in jeopardy for the same offense has no application in contempt proceedings. *Gibson v. Hutchinson*, 148–139, 126 N. W. 790.

CHAPTER 18.

OF CHANGING NAMES.

SECTION **4471. By courts—repealed.** [30 G. A., ch. 127, § 1.]

[See § 4471-a.]

SEC. **4471-a. Repeal.** Chapter eighteen, title twenty-one, of the code is hereby repealed and the following enacted in lieu thereof: [30 G. A., ch. 127, § 1.]

SEC. **4471-b. Who authorized.** Any person, under no civil disabilities, who has attained his or her majority and is unmarried, if a female, desiring to change his or her name, may do so as provided in this chapter. [30 G. A., ch. 127, § 2.]

SEC. **4471-c. Statement—what to contain.** Such person shall make and subscribe to a statement under oath showing that he or she is a resident of the county where such application is made and of the state of Iowa for a period of not less than one year; his or her place of residence, giving lot and block if in a city, town or village and street number and business address if any, and the section, township, range and name of civil township if not in a city or town; the different places of residence and times of such residence for the past five years; place and date of birth, and, if of foreign birth, the date of immigration to the United States; legal name and name or names by which such person is usually known and new name as changed or adopted; name of parents of such person, his or her height and color of hair and eyes; the reason or cause for change of

name briefly and concisely stated, and there shall be incorporated in such statement or attached thereto a concise description of all real estate within this state the title to which is in the person making such statement. [30 G. A., ch. 127, § 3.]

SEC. **4471-d. Affidavit of freeholder.** An affidavit of a[1] freeholder of the county shall be attached to such statement to the effect that affiant has personally investigated the facts set out in same and that the same are true; that the person filing such statement is an actual resident of the county and the identical person he or she is represented to be. [30 G. A., ch. 127, § 4.]

[1]"the" in 30 G. A. session laws. EDITOR.]

SEC. **4471-e. Statement filed and recorded.** Such statement shall be presented to the clerk of the district court who shall file same if it is found to be in substantial compliance with all of the provisions of this chapter and not otherwise, and enter same of record in a book kept for that purpose and index same both under the former name and new name, and shall enter upon the back the date of filing, the book and page where recorded and serial number thereof and file same in his office. [30 G. A., ch. 127, § 5.]

SEC. **4471-f. Reindexing real estate.** When such statement shall have been filed and recorded as herein provided, the clerk shall, if the description of any real estate of that county be contained therein, deliver it to the county recorder who shall index the same, both under the former name and under the new name as changed or adopted, in the manner of indexing transfers of real estate, and enter opposite thereto the description of real estate as found in such statement; such indexing shall be in the index of transfers of land or town property according to the description of said real estate, or both as the case may be. The index shall also show the serial number of such statement and book and page where same is recorded in the office of the clerk of the district court, and the words, "change of name" shall be written on said index in red ink, at or opposite to the name. [30 G. A., ch. 127, § 6.]

SEC. **4471-g. Fees.** The clerk shall receive a fee of one dollar for his services, and shall also collect ten cents for each separate description of real estate in the statement, which sum shall be paid to the recorder for indexing same. The clerk shall, upon demand of any party and the payment of the fee of one dollar, furnish a certified copy of such statement showing the serial number thereof, date of filing and the book and page of record of same; and, upon the payment of twenty-five cents, shall compare and certify to any correct copy of such statement furnished him for that purpose. [30 G. A., ch. 127, § 7.]

SEC. **4471-h. New name—when effective.** Upon the expiration of thirty days from the time of filing the statement herein provided for, the new name as changed or adopted therein shall become the legal name of the party filing such statement, and the surname of such new name shall become the legal surname of the wife and minor children of such person. No person shall change his or her name more than once under the provisions of this act. [30 G. A., ch. 127, § 8.]

SEC. **4471-i. Certified copy—indexing real estate in other counties.** Within one year after the filing of such statement, the party changing his or her name shall cause a certified copy thereof to be presented to the recorder of each county in Iowa where there is real estate the legal title to which is in such party, and pay such recorder ten cents for each separate description in such county, and such recorder shall index same in

the manner prescribed in this chapter and return same. [30 G. A., ch. 127, § 9.]

SEC. **4471-j. Failure to comply.** Any person failing or neglecting to comply with the provisions of the preceding section shall be guilty of a misdemeanor and punished accordingly. [30 G. A., ch. 127, § 10.]

SEC. **4472. Petition—repealed.** [30 G. A., ch. 127, § 1.]

[See § 4471-a.]

SEC. **4473. Order—repealed.** [30 G. A., ch. 127, § 1.]

[See § 4471-a.]

SEC. **4474. Publication—repealed.** [30 G. A., ch. 127, § 1; 30 G. A., ch. 2, § 12.]

[See § 4471-a. The text of the above section as amended by ch. 2, 30 G. A., appears in the prior supplement, but is omitted here because of the repeal by ch. 127, 30 G. A. EDITOR.]

SEC. **4475. Proof filed—repealed.** [30 G. A., ch. 127, § 1.]

[See § 4471-a.]

TITLE XXII.

OF JUSTICES OF THE PEACE AND THEIR COURTS.

CHAPTER 1.

OF JUSTICES OF THE PEACE AND THEIR COURTS.

SECTION 4476. Jurisdiction.

A judgment against one who is an actual resident of another county, unless founded on a contract payable in the county, is void although defendant appeared without objection. *Heath v. Halfhill*, 106-131, 76 N. W. 522; *Thompson v. Thompson*, 117-65, 90 N. W. 493; *Porter v. Welsh*, 117-144, 90 N. W. 582.

The residence of the parties, in the absence of any showing to the contrary, is presumed to have been such as to confer jurisdiction on the justice. *Little v. Devendorf*, 109-47, 79 N. W. 476.

A justice of the peace has no jurisdiction to entertain an action for an accounting or settlement of partnership affairs. *Erret v. Pritchard*, 121-496, 96 N. W. 963.

In a case in which the justice of the peace has jurisdiction to render judgment, any defenses which might have been interposed in such action must be interposed and cannot afterwards be available in an action to enjoin the enforcement of the judgment in another county. *Ulber v. Dunn*, 143-260, 119 N. W. 269.

SEC. 4477. Amount in controversy.

No objection having been made before the justice of the peace to his jurisdiction, the court on an appeal from his judgment in an action involving more than one hundred dollars and less than three hundred dollars is authorized to presume that the parties gave their consent to a trial before the justice. *Hopkins Fine Stock Co. v. Reid*, 106-78, 75 N. W. 656.

No action of the parties can authorize a justice of the peace to assume jurisdiction for a greater amount than three hundred dollars. Want of jurisdiction on this account cannot be waived by the parties, but the defect may be urged at any stage of the proceeding. *Wedgewood v. Parr*, 112-514, 84 N. W. 528.

In an action on two promissory notes, each for less than one hundred dollars but in the aggregate exceeding the amount of one hundred dollars, consent in each note that the justice may have jurisdiction of an action thereon for an amount not exceeding three hundred dollars does not authorize the justice to entertain jurisdiction. *Hannasch v. Hoyt*, 127-232, 103 N. W. 102.

The consent embodied in a promissory note that a justice of the peace shall have jurisdiction in an action thereon does not give a justice jurisdiction of an action for breach of the contract in connection with which such note is executed. *Leathers v. Geitz*, 135-145, 112 N. W. 191.

The amount claimed, not that alleged to be due or for which judgment is entered, is the criterion to determine whether the justice has jurisdiction. If the pleadings are oral, the original notice is decisive as to the amount claimed. *Evans v. Murphy*, 133-550, 110 N. W. 1025.

Although the justice erroneously enters an order transferring the case to the district court because of interposition of a counterclaim involving more than one hundred dollars, such disposition of the case terminates his jurisdiction and he cannot without a new notice proceed against the party who does not appear. Mere information to the attorney of the party that the justice intends to take some further proceeding in the case will not be sufficient to give him further jurisdiction. *Schiele v. Thede*, 126-398, 102 N. W. 133.

A jurisdictional defect cannot be cured or avoided by the expedient of dismissing a part of plaintiff's claim; nor can two causes of action upon written instruments in which consent to jurisdiction is separately expressed, but neither of them for more than one hundred dollars, be united in one action where the combined amount thereby recovered exceeds one hundred dollars. *Nauman v. Nauman*, 137-233, 114 N. W. 1068.

If on account of the amount in controversy not exceeding one hundred dollars there is jurisdiction in the justice's

court and an appeal is taken to the district court, there can be no jurisdiction in the supreme court of an appeal from the judgment of the district court on such appeal without a certificate *Orchard v. Kirk*, 156-374, 136 N. W. 666.

SEC. 4480. In replevin or attachment—against nonresidents.

Where the defendant is a nonresident of the state, the plaintiff may bring the action before a justice of the peace of the township in which he resides if he secures service on the defendant within the county. *Jonas v. Weires*, 134-47, 111 N. W. 453.

An action aided by attachment brought against a nonresident must be brought in the township where the property levied on is situated. *Gilman v. Heitman*, 137-336, 113 N. W. 932.

The situs of a judgment levied on by attachment in such action is that of the township in which is situated the county seat where the judgment appears of record. *Ibid.*

SEC. 4481. **Contracts in writing—fraud in the inception of contract—change of venue.** On written contracts stipulating for payment at a particular place, action may be brought in the township where the payment was agreed to be made. Provided that should action be brought under the provisions of this section in any county other than that of the residence of the defendant and the plaintiff shall fail to appear at the time fixed for the trial in the original notice, the justice of the peace before whom said action is brought, shall, upon presentation of the copy of the original notice served upon the defendant, docket said cause and enter judgment therein against the plaintiff in favor of the defendant for all costs in the action, which costs shall include all reasonable expenses of the defendant in attending the place of trial and an attorney's fee not to exceed fifteen dollars for defendant's attorney; and should any action brought under the provisions of this section for any cause, except upon trial upon the merits, be dismissed, the defendant shall recover like costs and expenses and attorney fees. Provided, however, that where an action is brought relying upon the foregoing provisions to fix the venue in a township in a county other than the residence of the signer of a written contract, and the defendant files a verified answer setting forth a legal defense alleging fraud in the inception of the contract, and he files therein a motion asking to have said cause transferred to the county of his residence, accompanied by a cost bond of fifty dollars to be approved by the court where the action is brought, the justice before whom such action is brought shall thereupon order the same transferred to such county upon the defendant paying fees of transcript and postage, and all papers and transcript shall forthwith be mailed, by registered letter, to the clerk of the district court of the county of defendant's residence, and said cause shall be docketed for trial. If two or more defendants in the same cause apply for change of venue as herein provided the justice shall transmit said papers to the county of the defendant making first application. If, upon trial, the defendant shall establish his defense of fraud, then he shall be entitled to recover, as a part of his costs, the reasonable expense, including attorney's fees, for securing the change of place of trial, but if he shall fail to establish said defense, then he shall be liable to plaintiff, as a part of the costs, for the reasonable additional expense caused to him by reason of such change. [33 G. A., ch. 202, § 4.] [30 G. A., ch. 128, § 1; C. '73, § 3513; R. § 3855; C. '51, § 2267.]

Where the jurisdiction of the justice of the peace depends upon the fact that a contract is made payable at a particular place it is competent to show in a collateral attack on such judgment that the contract did not so provide. *Cooley v. Barker*, 122-440, 98 N. W. 289.

This provision does not authorize the suing of the defendant in a county where by implication merely he is to make payment under a contract. *Baily v. Birkhofer*, 123-59, 98 N. W. 594.

As a justice of the peace may entertain jurisdiction of a suit on a written con-

tract stipulating for payment at a place within the township, although the defendant is a nonresident of the county, misnaming the township in the notice will not render the judgment void where it appears that defendant served in another county makes no effort to appear and defend. *Ulber v. Dunn*, 143–260, 119 N. W. 269.

Where the action is begun in a county other than that of defendant's residence, the justice of the peace is without jurisdiction unless the case is within the provisions of this section; and held that under a contract between plaintiff, a resident of one county, and defendant, a resident of another, in which the former agreed to pay a certain sum on the delivery of property or give an approved note payable in the county of the residence of the latter, this section had no application as by the terms of the agreement it was not stipulated that the note should be executed or the money paid in the county of the residence of the other contracting party. *Wayt v. Meighen*, 147–26, 125 N. W. 802.

SEC. 4482. In adjoining township.

Where there is no justice in the proper township qualified or able to act, the suit may be commenced in any adjoining township in the same county, without making a record of the reason for not instituting the suit in the proper township. *Jonas v. Weires*, 134–47, 111 N. W. 453.

Another township having a common corner with the township in which the suit should have been instituted is an adjoining township within the language of the statute. *Ibid.*

In support of the jurisdiction it will be presumed where suit was brought in a township adjoining that in which it should have been commenced that there was the statutory reason for not bringing it in the proper township. *Ibid.*

SEC. 4484. Entries on docket.

It is not necessary that the justice enter of record a finding as to the residence of the parties. *Little v. Devendorf*, 109–47, 79 N. W. 476.

A recital in the record of a judgment by a justice of the peace that due and legal notice of the time of the trial was given is sufficient. *Tomlin v. Woods*, 125–367, 101 N. W. 135.

The statute does not require that the cause or ground on which an adjournment is made shall be recorded; and it will be presumed in support of the action of the justice in granting a continuance that the application was based upon sufficient grounds. *Gilman v. Weiser*, 140–554, 118 N. W. 774.

SEC. 4485. Parties—proceedings.

Trials in justices' courts are less formal and more speedy, as a rule, than are trials in courts of record. *Gates v. Knosby*, 107–239, 77 N. W. 863.

SEC. 4486. How commenced.

A justice of the peace acquires jurisdiction in an action of forcible entry and detainer, although no petition is filed until the return day. *Herkimer v. Keeler*, 109–680, 81 N. W. 178.

SEC. 4488. Form of notice.

The fact that the notice is signed with the name of the justice affixed by a stencil or stamp and that it is filled out by the one to whom it is given for service, does not render the judgment rendered in pursuance of such notice subject to collateral attack. *Loughren v. Bonniwell*, 125–518, 101 N. W. 287.

SEC. 4489. What to state.

If the pleadings are oral, the original notice is decisive as to the amount of plaintiff's claim in determining whether it is in excess of the jurisdiction of the justice. *Evans v. Murphy*, 133–550, 110 N. W. 1025.

SEC. 4491. Service and return.

Determination of the sufficiency of service is within the jurisdiction of the justice, and his judgment with reference thereto, though erroneous, will not be void. *Little v. Devendorf*, 109–47, 79 N. W. 476.

SEC. 4493-a. Security for costs. If a defendant in any cause of action in the justice court at any time within two days before the commencement of the trial of the cause, shall make and file an affidavit stating that

he has a good defense in whole or in part, the plaintiff, if he is a nonresident of this state, or a private or foreign corporation, before any other proceedings in the action, must file with the justice of the peace before whom such action is pending, a bond with sureties to be approved by such justice in an amount to be fixed by the justice for the payment of all costs which may accrue in the action in the court in which it is brought, or in any other justice court to which it may be carried, either to the defendant or to the officers of the court. The application for such security shall be by motion, filed with the case, and the facts supporting it must be shown by affidavit annexed thereto, which may be responded to by counter affidavits on or before the hearing of the motion, and each party shall file all his affidavits at once and none thereafter. [34 G. A., ch. 167, § 1.]

[For money deposited in lieu of bond, see § 3852-a. EDITOR.]

SEC. 4495. Postponement.

This section does not authorize the postponement of judgment beyond the period provided for in code § 4522. *Worrall v. Chase*, 144–665, 123 N. W. 338.

SEC. 4496. Adjournment.

A justice of the peace will not lose jurisdiction of the case, by granting a continuance for an indefinite time by consent of parties, to subsequently try the case upon new notice. *Cedar Rapids v. Rall*, 115–335, 88 N. W. 826.

An adjournment for more than three days without the consent of the party deprives the justice of jurisdiction. *Schiele v. Thede*, 126–398, 102 N. W. 133.

A disregard of the limitations as to the adjournment of the case to a future time deprives the justice of the peace of jurisdiction to further proceed. *Gilman v. Weiser*, 140–554, 118 N. W. 774.

An adjournment for more than three days without consent deprives the justice of jurisdiction. *Simmons v. Dolan*, 141–177, 119 N. W. 690.

SEC. 4497. Showing for.

This section contemplates a continuance on the motion of either party for a longer period than that authorized by code § 4496 on the motion or for the convenience of the justice himself. *Gilman v. Weiser*, 140–554, 118 N. W. 774.

There is nothing in the statute which requires the motion for continuance to be made in writing. *Ibid.*

SEC. 4502. Change of place of trial.

The ruling on a motion to strike portions of the answer and to require it to be made more specific constitutes commencement of the trial, which terminates the right to apply for change of venue. *Columbus Junction Tel. Co. v. Overholt*, 126–579, 102 N. W. 498.

By proceeding with the trial error in refusing change of venue is not waived. *Ibid.*

SEC. 4513. Judgment set aside.

A justice of the peace may set aside a default judgment notwithstanding a filing of the transcript of such judgment in the district court. *Klepfer v. Keokuk*, 126–592, 102 N. W. 515.

SEC. 4519. Discharge of jury.

The statute does not provide for notice to a party of the issuing of a precept for a new jury where one jury has been discharged for failure to agree; but where such precept was not issued for two days, held that the justice was without jurisdiction to try the case without further notice. *Gates v. Knosby*, 107–239, 77 N. W. 863.

SEC. 4522. Judgment entered.

It is not essential to the validity of the judgment that it be signed by the justice. *Parks v. Norton*, 114–732, 87 N. W. 698.

A judgment entered by a justice of the peace at a later time than authorized by this section is void. *Worrall v. Chase*, 144–665, 123 N. W. 338.

Although appeal or certiorari or both may be available to the complaining party in such case, they are neither adequate nor

speedy in the sense required to exclude equitable jurisdiction. *Ibid.*

The recital in a judgment that "the court took the case under advisement" on a specified date, held not sufficient to show that the cause was "submitted to the justice for final action" on that date. *Moir v. Bourke*, 156–612, 137 N. W. 921.

The parties may agree upon a longer continuance than contemplated by the statute after the cause is submitted, or even to an indefinite continuance subject to proper notice of the time of trial to be subsequently fixed by the justice, without depriving the justice of jurisdiction. *Ibid.*

The judgment of a justice of the peace is as conclusive on the parties as is the judgment of any other court. And it is conclusive as to all points and questions adjudicated. *Worrall v. Des Moines Retail Grocers' Assn.*, 157– —, 138 N. W. 481.

The provision requiring judgment to be entered within three days after the cause is submitted for final action is intended for the protection of litigants and may be waived without the loss of jurisdiction by the justice. *Ibid.*

SEC. 4537. Transcripts filed in clerk's office.

The provision for filing a transcript of the judgment in the district court relates only to the enforcement of the judgment and does not prevent further proceedings in the court in which the judgment was rendered in respect to other matters. *Klepfer v. Keokuk*, 126–592, 102 N. W. 515.

The act of the justice in certifying a judgment is purely ministerial, and the fact that he was a party to the proceeding in which such judgment was rendered by his predecessor in office does not disqualify him from giving such certificate. *Hass v. Leverton*, 128–79, 102 N. W. 811.

SEC. **4538. Effect.** The clerk shall file the transcript as soon as received, and enter a memorandum thereof and the time of filing in the judgment docket and lien index, and from such entry it shall be treated in all respects and in its enforcement as a judgment obtained in the district court. No execution shall issue from the justice's court after the filing of such transcript. [27 G. A., ch. 107, § 1; C. '73, § 3568; R. § 3910; C. '51, § 2321.]

With the filing of the transcript in the district court the justice loses control of his judgment and it is treated thereafter as are those of the district court; but there is nothing warranting the conclusion that the judgment of the justice is thereby canceled or a new one rendered. *Little v. Devendorf*, 109–47, 79 N. W. 476.

The mere filing of a transcript from a justice of the peace does not make it a judgment of the district court. A memorandum thereof, with the date of filing, must be entered on the judgment docket and lien index. *State Ins. Co. v. Prestage*, 116–466, 90 N. W. 62.

A judgment of a justice of the peace, a transcript of which has been filed in the office of the clerk of the district court, becomes a judgment of the district court in such sense that under code § 4364 an action to enjoin the proceedings on the judgment must be in the same county and court in which such judgment was obtained. *Brunk v. Moulton Bank*, 121–14, 95 N. W. 238.

The time within which action may be brought on a judgment of a justice of the peace transcripted to the district court is determined by the statutory provisions with reference to judgments of the district court. *Haugen v. Oldford*, 129–156, 105 N. W. 393.

The statutory period within which an action may be brought on a judgment of a justice of the peace which has been duly entered in the records of the district court commences to run from the date of such entry, and the judgment creditor has twenty years within which to maintain an action on such judgment. *Miller v. Rosebrook*, 136–158, 113 N. W. 771.

In an action to enforce a judgment of a justice of the peace no ground of attack can be raised by action for an injunction which could have been interposed by way of defense in the action. *Ulber v. Dunn*, 143–260, 119 N. W. 269.

SEC. **4544. Garnishment.** Garnishment proceedings under execution shall be the same as in the district court, except, upon return of the garnishment being made to the justice who issued the execution, he shall docket a cause, fix a time, and cite the garnishee then to appear and answer. Judgment against the garnishee shall not be entered until the principal defendant shall have had five days' notice of the garnishment proceedings to be served in the same manner as original notices. [29 G. A., ch. 141, § 1.]

SEC. 4546. Appeal.

If the subject matter of the action brought before the justice of the peace is such that he has no jurisdiction thereof, the district court acquires no jurisdiction of the case by appeal, and the appeal should be dismissed on motion. *Erret v. Pritchard*, 121–496, 96 N. W. 963.

Parties to an action pending in justice's court cannot confer jurisdiction on the district court by consent to the transfer of the case to such court. But if in pursuance of such agreement the parties appear in the district court and submit the controversy to determination, the court acquires jurisdiction. *Farmers' Mut. Telephone Co. v. Howell*, 132–22, 109 N. W. 294.

An appeal will lie from a justice's judgment discharging a garnishee if the amount in controversy is sufficient. *Simitz v. Schaapveld*, 140 N. W. 423.

SEC. 4547. Amount in controversy.

Where before judgment but after the hearing of the evidence the plaintiff remits a portion of his claims so as to reduce the amount thereof to less than twenty-five dollars, there is no right of appeal, although the justice of the peace erroneously enters judgment for the amount of the original claim which is in excess of twenty-five dollars. *Young v. Stuart*, 104–597, 73 N. W. 1045.

A fictitious counterclaim, interposed solely for the purpose of giving the district court jurisdiction on appeal, may be disregarded by the latter court and the appeal may be dismissed on motion. *Chicago & N. W. R. Co. v. Weaver*, 112–101, 83 N. W. 795.

Where plaintiff in an action of replevin elects to take judgment for the value of the property, he may, by remitting his claim in excess of twenty-five dollars, prevent an appeal by the opposite party. *Rust v. Olson*, 113–571, 85 N. W. 799.

Ordinarily the amount in controversy is determined by the pleadings or by the respective oral claims of the parties and their remittitur made before entry of judgment of all claims in excess of twenty-five dollars precludes an appeal even though the justice in fact enters judgment for more than that amount. *Henry v. Chicago, R. I. & P. R. Co.*, 127–577, 103 N. W. 793.

Such remittitur may be shown in the district court by way of supplying the omission of the justice to enter it of record. *Ibid.*

Where the notice fixed the amount sued for as twenty-five dollars with interest thereon from a specified date, which was subsequent to the date of the notice but prior to the date of the judgment, held that the amount in controversy exceeded twenty-five dollars and that the fact that the interest thus claimed was an insignificant amount would not defeat the right of appeal. *Noland v. Sickler*, 149–193, 128 N. W. 340.

SEC. 4552. Form of bond.

The bond on appeal from the judgment of the justice of the peace is jurisdictional. The statute so provides. *Beresford v. American Coal Co.*, 124–34, 98 N. W. 902.

An appeal bond signed by the attorney of the appellant is not sufficient (see code § 3851), and in the district court the case should be dismissed on motion of the appellee. Such bond should not be accepted. *Valley Nat. Bank v. Garretson*, 104–655, 74 N. W. 11.

An attorney is not competent as a surety on an appeal bond (code § 3851), nor is a party against whom the judgment is entered competent to become such surety, the signature of the party not changing his liability as a defendant under the judgment. *Hudson v. Smith*, 111–411, 82 N. W. 943.

An appeal bond signed only by the appellant is of no validity and the district court acquires no jurisdiction on such appeal. The defect cannot be cured by amendment in the district court. *Minton v. Ozias*, 115–148, 88 N. W. 336.

It is not required that sureties upon the appeal bond make affidavit to their financial responsibility. The provision of code § 359 for affidavits of qualification by sureties on bonds is intended for the protection of the officer, and if the bond is accepted without such affidavit the appeal is perfected and the district court acquires jurisdiction. *Porter v. Western Union Tel. Co.*, 133–747, 111 N. W. 322.

A bond which names as obligee a party different than the party to the action against whom the appeal is prosecuted, does not confer jurisdiction on the district court as to such appeal and the court has no authority to permit the filing of a new bond after the expiration of the statutory period allowed for perfecting the appeal. *Sutton v. Bower*, 124–58, 99 N. W. 104.

SEC. 4553. Proceedings suspended.

Upon the appeal the judgment of the justice of the peace is vacated and the entire jurisdiction in further proceedings is in the district court. *Fogarty v. Battles*, 145–61, 123 N. W. 952.

SEC. 4557. Mistakes corrected.

Evidence in a particular case held sufficient to show that there was an omission or mistake necessitating the correction of the justice's docket. *First Nat. Bank v. Bourdelais*, 109–497, 80 N. W. 553.

Although the justice of the peace has entered judgment for more than twenty-five dollars and omitted to enter of record a remittitur by the successful party of all in excess of that amount, his omission to enter of record the remittitur may be supplied by oral evidence, and if thus supplied the appeal should be dismissed. *Henry v. Chicago, R. I. & P. R. Co.*, 127–577, 103 N. W. 793.

SEC. 4558. Return—when made.

The appeal is perfected by the giving of bond and certifying the papers and record to the district court. The provision for notice seems to be for the purpose of advising appellee when the case will be brought on for trial, and failure to give such notice does not deprive the court of jurisdiction. *Durand v. Northwestern L. & Sav. Co.*, 112–296, 83 N. W. 972.

SEC. 4559. Affirmance—trial.

If the appellant in an appeal from a justice's court fails to cause the same to be docketed by noon of the second day of the term to which the same is returnable, appellee may procure the case to be docketed and will thereupon be entitled to have the judgment below affirmed; and the appellant in such case will not be entitled to have the default set aside without a showing of excuse. *Hodowal v. Yearous*, 103–32, 72 N. W. 294.

For similar provisions see code § 3660.

Where an appeal has been taken from the judgment of a justice of the peace, the appellee may have the judgment affirmed on appellant's failure to pay the docket fee and have the case docketed; unless appellant is in default in both particulars there is no right to an affirmance. *Vasey v. Parker*, 118–615, 92 N. W. 708.

The clerk is not required to docket any appeal without being paid the fee which the law exacts for such services, but if he concludes to waive the fee and places the case upon the docket for trial, the mere failure to pay the fee will not be a ground for affirmance. *Ibid.*

Where the appellant fails to docket his appeal as required by code § 3660 the appellee may have it docketed and have the judgment affirmed. *Stephens v. City Council*, 132–490, 107 N. W. 614.

A motion to dismiss for failure to pay the docketing fee should be overruled where the appeal has already been docketed before the motion is made. *Dye v. Augur*, 138–538, 110 N. W. 323.

The trial court has discretion to set aside an affirmance procured by the appellee by paying the filing fee and causing the appeal to be docketed. *Simons v. Mason City & Ft. D. R. Co.*, 128–139, 103 N. W. 129.

Where notice of appeal is not filed ten days before the next term of court to which the appeal is taken, the appellee is not required to file any formal motion for continuance or to make any appearance whatever in order to prevent the case being brought on for trial at that term. In such case the cause properly stands for continuance by operation of law, unless there be a waiver or voluntary appearance. *Insell v. Kennedy*, 120–234, 94 N. W. 456.

SEC. 4562. Trial of appeal.

If the justice of the peace has no jurisdiction of the case, the appellate court acquires none by the appeal. *Erret v. Pritchard*, 121–496, 96 N. W. 963.

Where a justice does not acquire jurisdiction, the district court cannot on appeal proceed to a determination of the case. *Baily v. Birkhofer*, 123–59, 98 N. W. 594.

By appearing before the justice of the peace the defendant does not estop himself from urging on appeal that the justice was without jurisdiction of defendant resident in another county. *Ibid.*

In an appeal to the district court from a justice of the peace an amendment may be introduced which does not set up any new demand or counterclaim. *Boos v. Dulin*, 103–331, 72 N. W. 533.

Where an action brought by a minor in his own name in justice court was appealed to the district court, held that the district court might properly allow the substitution of a next friend and proceed with the case. *Parkins v. Alexander*, 105–74, 74 N. W. 769.

The law favors trial on the merits, and all errors, irregularities and illegalities in the trial before the justice of the peace are to be disregarded. *Edwards Loan Co. v. Skinner*, 127–112, 102 N. W. 828.

The jurisdiction of the justice of the peace is suspended by the appeal. *Fogarty v. Battles*, 145–61, 123 N. W. 952.

SEC. 4563. New demand.

In the district court the pleading may be amended, but no new cause of action or counterclaim can be introduced. *Boos v. Dulin*, 103–331, 72 N. W. 533.

The appellant cannot by amended pleadings set up a different cause of action than that on which the suit before the justice of the peace was based. *Leathers v. Geitz*, 135–145, 112 N. W. 191.

SEC. 4568. Appeal from default—pleadings.

The provision as to the time of filing answer by the defendant is not mandatory, and in the discretion of the trial court the defendant may be allowed to file such answer after the expiration of the time fixed by the statute. *Edwards Loan Co. v. Skinner*, 127–112, 102 N. W. 828.

SEC. 4569. Writs of error—when allowed.

The complaint that there is not sufficient evidence to warrant the judgment rendered by a justice is not one which can be considered on writ of error. *Anthes v. Booser*, 112–511, 84 N. W. 516.

Only an erroneous decision in a matter of law or other irregularity can be corrected on writ of error. Jurisdiction will be presumed in support of the justice's judgment in the absence of anything made to appear in the record to the contrary. *Herald Printing Co. v. Walsh*, 127–501, 103 N. W. 473.

Where there is no controversy as to the facts as found by the justice of the peace and the only question for the justice to determine is whether, the facts being conceded, there is liability under such facts as a matter of law, the decision of the justice can be reviewed on a writ of error. *Doolittle v. Porter*, 145–385, 124 N. W. 180.

SEC. 4574. Amended return.

The provision as to an amendment of the return of the justice of the peace does not imply that a hearing may be had upon affidavits instead of upon such amended return. *Schaefer v. Whitman*, 146–64, 124 N. W. 763.

SEC. 4576. Judgment.

Where the justice of the peace had by delay lost jurisdiction to issue a precept for a new jury, held that the district court reversing on writ of error the judgment thus rendered without jurisdiction, might direct further proceedings upon proper notice. *Gates v. Knosby*, 107–239, 77 N. W. 863.

On writ of error this court is not authorized to sit in direct review of the proceedings before the justice. *Simmons v. Chicago, B. & Q. R. Co.*, 128–306, 103 N. W. 954.

Errors committed in the entry of judgment after the trial upon the merits are to be cured by appeal. *Ibid.*

Final judgment on writ of error from a justice of the peace is only to be entered where the writ of error has been sustained and no further trial is necessary to a complete determination of the case. The court should not enter the identical judgment from which the writ of error is taken. *Ibid.*

The order to be entered in the district court is that which is essential to the correction of the errors in the rulings complained of which are asserted in the affidavit and established by the record and proceedings. An issue of fact as to the jurisdiction of the justice cannot be raised on writ of error. *Herald Printing Co. v. Walsh*, 127–501, 103 N. W. 473.

SEC. 4579. Attachment.

It is the amount of the claim, and not the amount recovered, which is the test of the right to sue out a writ of attachment, and if less than five dollars is recovered, the penalty is the payment of the costs thus occasioned. It cannot be said, as a matter of law, that because the jury finds the actual indebtedness to be less than five dollars the attachment is therefore wrongful and the plaintiff liable to damages for suing out the attachment. *Insell v. Kennedy*, 120–234, 94 N. W. 456.

SEC. 4585. Or county auditor—transcripts by clerk. If his office becomes vacant before his successor is elected, the said docket and papers shall be placed in the hands of the county auditor, and by him turned over to his successor when elected and qualified. That during the time of the vacancy in said office, and while the docket and papers are in the

hands of the auditor, the clerk of the district court of said county, on the filing of a written request and payment of the fee required by law for the filing of transcripts, by the plaintiff, his agent, or attorney, in any case in which a judgment appears in said docket, shall make a transcript and certify to the same, as provided by law, noting said fact on said docket with date thereof, which transcript, when so made and filed in the office of the clerk of the district court, shall have the same force and effect as though made by a justice of the peace rendering said judgment. [35 G. A., ch. 294, § 1.] [C. '73, § 3626; R. § 3968; C. '51, § 2378.]

SEC. 4589. Special constables.

By virtue of appointment as a special constable one may become entitled to carry concealed weapons. *State v. Abrams*, 131-479, 108 N. W. 1041.

A special constable is not required to give bond where he is appointed to serve a search warrant. *Hoeg v. Pine*, 143-243, 121 N. W. 1019.

SEC. 4591. Sheriff and constable.

The sheriff receives fees for service rendered by him in a justice's court not as a constable, but as sheriff, and is bound to the county therefor as fees of his office. *Jones County v. Arnold*, 134-580, 111 N. W. 973.

SEC. 4597. Fees of justice.

Where tax lists were placed in the hands of a justice of the peace for collection of the taxes included therein, held that he took such lists as agent for collection and not in his official capacity, and therefore was entitled only to the compensation agreed upon and not to his legal fees. *Peters v. Davenport*, 104-625, 74 N. W. 6.

SEC. 4599. In criminal cases.

To entitle the constable to fees in prosecutions before a justice of the peace which have been dismissed, the facts must be certified by the justice, verified by affidavit of himself or some other person cognizant of the facts. *McGuire v. Iowa County*, 133-636, 111 N. W. 34.

SEC. 4600. **Accounting for fees—repeal.** That section forty-six hundred of the code, relative to the accounting for fees and compensation of justices of the peace and constables be and the same is hereby repealed and the following enacted in lieu thereof: [32 G. A., ch. 169, § 1.]

SEC. 4600-a. **Accounting for fees—compensation.** Justices of the peace and constables in townships having a population of twenty thousand shall pay into the county treasury all criminal fees collected in each year. Justices of the peace and constables in townships having a population of under twenty thousand shall pay into the county treasury all fees collected each year in excess of the following sums: In townships having a population of ten thousand and under twenty thousand, justices, one thousand dollars; constables, eight hundred dollars; [in] those having a population of four thousand and under ten [thousand], justices, eight hundred dollars; constables, six hundred dollars; in all townships having a population of under four thousand, justices six hundred dollars; constables, five hundred dollars. In townships having a population of twenty thousand or more, justices of the peace and constables shall receive in full compensation for their services performed in criminal cases during the year, the following sums which shall be paid quarterly out of the county treasury: In townships having a population of twenty-eight thousand or more, justices, fifteen hundred dollars; constables, twelve hundred dollars; in townships having a population of twenty thousand and under twenty-eight [thousand], justices, twelve hundred dollars; constables, one thousand dollars. Justices and constables in all townships having a population

of twenty thousand and over shall retain such civil fees as may be allowed by the board of supervisors, not to exceed five hundred dollars per annum, for expenses of their offices actually incurred, and shall pay in to the county treasurer all the balance of the civil fees collected by them. [33 G. A., ch. 208, § 1.] [32 G. A., ch. 169, § 2; 25 G. A., ch. 74.]

The auditing of claims of justices and constables for fees implies a hearing or examination of the account or claim with the power to adjust, allow or reject, according to the nature of the claim. *McGuire v. Iowa County*, 133–636, 111 N. W. 34.

Evidence as to the good faith of the constable in filing information and serving warrants is admissible. *Ibid.*

SEC. **4600-b. Annual report to board of supervisors.** All justices of the peace and constables shall under oath make an annual report to the board of supervisors, upon blanks furnished by the county auditor, of all criminal fees taxed and collected during the year, which report shall also show that all criminal fees and fines collectible by law have been received, such annual report to be made on the first Monday in January, and before the annual settlement shall be made, and accompanied with the receipts of the treasurer for all money paid in to him. [32 G. A., ch. 169, § 3.]

SEC. **4600-c. Quarterly report to county auditor.** Justices of the peace shall make, under oath, quarterly reports, upon blanks furnished by the county auditor, and shall file the same with the county auditor, which reports shall contain a true and correct transcript of all criminal proceedings which have been instituted or adjudicated in their courts, with the names of all attending witnesses and jurors and fees taxed in their favor. [32 G. A., ch. 169, § 4.]

TITLE XXIII.

OF EVIDENCE.

CHAPTER 1.

OF GENERAL PRINCIPLES OF EVIDENCE.

SECTION 4601. Witnesses—who competent.

In a criminal case a new trial should be granted where one of the witnesses for prosecution, giving material evidence, was not sworn and the omission was not discovered until after the verdict. *State v. Lugar*, 115–268, 88 N. W. 333.

A child of sufficient maturity and intelligence to receive correct impressions from its surroundings and to remember and correctly narrate transactions is a competent witness if he also comprehends the meaning and obligation of an oath. *Clark v. Finnegan*, 127–644, 103 N. W. 970.

And held that a child seven years of age shown by his examination to be of more than average intelligence and to understand the difference between truth and falsehood, was a competent witness. *Ibid.*

A child six years of age having an adequate sense of the impropriety of falsehood is competent as a witness. *State v. Meyer*, 135–507, 113 N. W. 322.

The judge is to pass upon the capacity of the witness to testify and, save upon a clear abuse of discretion, his decision will not be disturbed on appeal. *Ibid.*

In determining the competency of a witness of immature years the trial court has a large discretion. *State v. Gregory*, 148–152, 126 N. W. 1109.

If one understands the nature of an oath and assumes to take it as binding upon him, he is a competent witness. Objection to the form of the oath must be made previous to its administration or it will be deemed waived. *State v. Browning*, 153–37, 133 N. W. 330.

A deaf mute, if of sufficient mental capacity to be able to communicate his ideas by signs or in writing, is a competent witness. *State v. Butler*, 157–163, 138 N. W. 383.

SEC. 4602. Credibility.

Conviction in a federal court of an offense not infamous cannot be shown in a state court as affecting the credibility of a witness. *Palmer v. Cedar Rapids & M. R. Co.*, 113–442, 85 N. W. 756.

The intention of this section is to allow proofs of facts as affecting credibility which at common law would have rendered the witness incompetent, and at common law a conviction did not render the witness incompetent unless it was for an infamous offense. *Ibid.*

An attorney is a competent witness for his client and his testimony is to be weighed in the light of his interest as an attorney, but his conduct as an attorney is not to be minimized before the jury because he is a witness in the case. *Fletcher v. Ketcham*, 141 N. W. 916.

SEC. 4604. Transaction with person since deceased.

Objection goes to competency of the witness: The statutory provision does not exclude evidence of personal communications or transactions between a party to a claim against the estate of a deceased person and the deceased in his lifetime, but merely declares certain witnesses incompetent to make the proof. *Campbell v. Collins*, 133–152, 110 N. W. 435.

Matters of inference: Evidence which of itself is not obnoxious to the statute is not rendered so by the fact that an inference as to what was done between the witness and deceased may be drawn therefrom. *Ibid.*

Those interested in the litigation are not under this section prohibited from testifying to facts from which inferences may be drawn. *Furenes v. Eide*, 109–511, 80 N. W. 539.

A witness testifies in regard to a personal transaction no less when he denies than when he affirms it. *In re Will of Winslow*, 146–67, 124 N. W. 895.

Testimony which is not in itself obnoxious to the prohibition of the statute may

be received although inferentially it tends to show what the transactions between the witness and the deceased actually were. *Graham v. McKinney*, 147–164, 125 N. W. 840.

A witness may not be allowed to testify indirectly as to a transaction or communication with the deceased as to which he is incompetent to testify directly. *Sheldon v. Thornburg*, 153–622, 133 N. W. 1076.

Where the person who has received the benefit of services rendered subsequently dies and claim is made against the estate to recover therefor upon an implied promise, the claimant is not competent to testify as to the facts relied upon to support the implication of indebtedness. *Ibid.*

A fact ascertainable by mere observation may be testified to as against the estate of the deceased by one making a claim against such estate, even though inferences may fairly be drawn therefrom tending to support his claim. *Yoder v. Engelbert*, 155–515, 136 N. W. 522.

Testimony of a witness as to what he saw or did on his own account, although in the presence of the deceased, is not necessarily incompetent as showing a communication or transaction. *Erwin v. Fullenwarth*, 137 N. W. 502.

Nonexperts: The circumstance that witnesses are incompetent to testify to personal transactions or communications with a deceased furnishes no ground for excluding their opinions as nonexperts as to the mental capacity of the deceased involved in a will contest. *Ibid.*

To what action applicable: This section has no application in an action not against either of the classes of persons contemplated. *McClintic v. McClintic*, 111–615, 82 N. W. 1017.

This section does not apply to proceedings in the federal court inasmuch as there are provisions of the federal statute on the subject. *Travis v. Nederland L. Ins. Co.*, 104 Fed. 486.

Witness in behalf of administrator not incompetent: A witness in an action against an administrator called on behalf of the administrator may testify to transactions with the deceased. *Dean v. Carpenter*, 134–275, 111 N. W. 815.

In an action brought by the executor on a note alleged to have been executed to the decedent in his lifetime, the signer of the note is not incompetent to testify that the note was executed after the death of the decedent. *Van Sickle v. Staub*, 155–472, 136 N. W. 546.

In a contest as to the good faith of the allowance of claims by the administrator of an estate such administrator is not incompetent to testify to conversations with deceased on the subject of such claims. *In re Estate of Baumhover*, 151–146, 130 N. W. 817.

Where it appeared that the decedent had given a check to defendants in settlement of a partnership account, held that both defendants were incompetent to testify as to transactions or communications with the deceased in an action by the executor to recover an amount claimed to have been included in such check by mistake. *Nothem v. Londergan*, 157–146, 137 N. W. 927.

Who excluded as parties: A surviving partner is within both the letter and the spirit of the statute. As he cannot have the benefit of the testimony of his deceased partner as to what the conversation really was, he is not liable on the testimony of his adversary respecting such conversation. The fact that the representative of the deceased partner is not a party to the action is immaterial. *Salyers v Monroe*, 104–74, 73 N. W. 606.

The fact that a witness was the secretary of plaintiff corporation, it not appearing that he had any interest in the suit, held not to disqualify him as witness to testify to personal transactions with decedent against whose estate the claim is made. *University of Chicago v. Emmert*, 108–500, 79 N. W. 285.

A party defendant in an action by an heir to quiet title to inherited land, where the defense is made that the land was inherited by an illegitimate child, is not competent to testify to transactions, conversations and illicit relations with the deceased. *McCorkendale v. McCorkendale*, 111–314, 82 N. W. 754.

It is only a person who is connected with the proceedings by service of notice, or by consent through voluntary appearance, who can be deemed a party to the proceeding under the provisions of this section. *Hicks v. Williams*, 112–691, 84 N. W. 935.

While a party to the suit is precluded from testifying regardless of interest in the result, held that in a proceeding by intervention in which no relief was asked against the defendant in the original suit it was so far a distinct proceeding that the defendant, having no interest in the intervention proceeding, might testify. *Hogan v. Sullivan*, 114–456, 87 N. W. 447.

In an action to reform and cancel a mortgage given by a son to his father, brought after the death of the father, held that the son was an incompetent witness to an agreement with the father that he should only be required to pay interest during the father's life, and that upon his death the mortgage should be canceled. *Sauer v. Nehls*, 121–184, 96 N. W. 759.

In a partition suit, to which the widow is a party, relating to the property of a deceased person, the widow is incompetent to testify as to transactions or communications between herself and the deceased. *Ellis v. Newell*, 120–71, 94 N. W. 463.

A party is disqualified under this section, although he is merely a nominal party or has no substantial interest in the action, if he is in fact a party at the time of giving testimony. *Clinton Sav. Bank v. Underhill*, 115–292, 88 N. W. 357.

One through whom plaintiff derives an interest is disqualified. *Ibid.*

The statute excludes all parties, whether interested or not, from testifying as to transactions or communications with the party deceased. *Culbertson v. Salinger*, 131–307, 108 N. W. 454.

The fact that the administrator of a person deceased is a party is immaterial if he is in fact an indifferent party in the suit, and the statutory provision has no application in such a case. *City National Bank v. Crahan*, 135–230, 112 N. W. 793.

The statute is not limited in its exclusion of testimony to those persons whose rights may be affected by the transaction or communication referred to. *Stolenburg v. Diercks*, 117–25, 90 N. W. 525.

Those who remain proper parties to the suit cannot by disclaimer of interest render their testimony as to transactions and communications with deceased admissible. *Frye v. Gullion*, 143–719, 121 N. W. 563.

One who, though made a party, is subsequently dismissed by plaintiff is not incompetent to testify under the provisions of this section. *Currier v. Clark*, 145–613, 124 N. W. 622.

A party to a claim against the deceased is not precluded from calling as a witness the agent of the deceased who transacted the business involved in the suit. *Ibid.*

This section has no application to one who was a mere agent of the real party in interest. *Barnett v. First Nat. Bank*, 148–667, 127 N. W. 1012.

What interests disqualify: The interest which will prevent a person from testifying is such an interest in the event as would at common law disqualify the witness, and if such interest is collateral merely, the competency of the witness may be restored by a release or transfer of it at any time before testifying. *Dubuque Lum. Co. v. Kimball*, 111–48, 82 N. W. 458.

The interest must be such as would have disqualified the witness at common law. *Hicks v. Williams*, 112–691, 84 N. W. 935.

One who is adversely interested in the action cannot testify as to transactions or conversations with one who is deceased. *Grimes v. Ellyson*, 130–286, 105 N. W. 418.

The disqualifying interest must be in the event of the case itself, and not in the question to be decided. *German American Sav. Bank v. Hanna*, 124–374, 100 N. W. 57.

The witness to be disqualified under this section on account of interest must have a legal, certain and immediate interest in the suit, and one who is interested only as prospective heir is not disqualified on that account. *Bird v. Jacobus*, 113–194, 84 N. W. 1062.

The interest of the witness, to disqualify him, must be present, certain and vested. It is not sufficient that he at a former time had an interest. *Clinton Sav. Bank v. Underhill*, 115–292, 88 N. W. 357.

In a proceeding to establish the claim of a bank against the estate of a deceased officer of the bank for misappropriation of funds, one who was jointly liable with the deceased to the bank for such misappropriation is an interested party whose testimony as to conversations and transactions with the deceased is not admissible as against the bank. *McElroy v. Allfree*, 131–518, 108 N. W. 119.

A mortgagee is incompetent to testify to a conversation with a deceased mortgagor which led up to the execution of the mortgage. *Whitley v. Johnson*, 135–620, 113 N. W. 550.

In an action against the executor under a will, an interested party cannot give testimony as to any personal communication or transaction with the deceased. *Ross v. Ross*, 140–51, 117 N. W. 1105.

The disqualifying interest must be in the event of the case and not in the question to be decided. *Mollison v. Rittgers*, 140–365, 118 N. W. 512.

An agent through whom property is acquired is not rendered incompetent by this section. *Stiles v. Breed*, 151–86, 130 N. W. 376.

The grantor of a party in an action involving title to land cannot testify as to personal transactions or communications between himself and his deceased parent through whom he claims title. *Kerr v. Yager*, 157– —, 138 N. W. 905.

Where it is apparent in a will contest that the decision of the case will not affect the interest of a witness, he may be allowed to testify although he is interested in the estate. *Erwin v. Fillenwarth*, 137 N. W. 502.

When it is shown that the witness is interested in the event of the suit, that interest being a present, tangible and valuable one which may be increased or diminished by the result of the action, the prohibition of the statute applies. *In re Martin's Will*, 142 N. W. 74.

Assignee: Three elements must exist in order to exclude testimony as to a personal transaction with deceased: (1) the matter must be in the nature of a personal transaction or communication; (2) the witness must be a party to the suit or interested in the event thereof; (3) the action must be against the executor, administrator, assignee, etc. And held that the appointee of a decedent as beneficiary of an insurance policy was not an assignee within the provisions of the statute. *Shuman v. Supreme Lodge K. of H.*, 110–480, 81 N. W. 717.

Where a right asserted by a claimant against an estate depends for its existence and validity upon a transaction between the deceased and a third person, the evidence of such third person is not competent to prove such transaction. *McClanahan v. McClanahan*, 129–411, 105 N. W. 833.

Although a donee may be an assignee within the meaning of this statutory provision, it must appear that there has been in fact a gift or assignment in order to render the witness incompetent. *McAleer v. McNamara*, 140–112, 117 N. W. 1122.

A substituted beneficiary in an insurance policy is not an assignee thereof so as to be precluded from testifying to a communication with the deceased respecting a transfer of the policy as security for premiums advanced. *Crowell v. Northwestern Nat. Life Ins. Co.*, 140–258, 118 N. W. 412.

In an action against the assignee of a judgment to enjoin its enforcement, a party to such action cannot testify to the payment of the judgment to the deceased assignor. *Ritz v. Rea*, 155–181, 135 N. W. 645.

Deceased agent: The statute has no application to transactions with a deceased agent. *Jamison v. Auxier*, 145–654, 124 N. W. 606.

What deemed personal transaction: Where a certificate of deposit taken in the name of deceased was indorsed by the administrator of deceased in his individual capacity and the money drawn thereon from the bank, held that such fund *prima facie* belonged to the estate and that the administrator was not competent to testify in a proceeding in which it was sought to subject real property to the payment of the debts of the estate, that by a personal transaction with deceased he had become the owner of the certificate of deposit, so that the proceeds thereof were not subject to the payment of the debts of deceased. *Duffield v. Walden*, 102–676, 72 N. W. 278.

An indorsee cannot testify in a suit against his immediate indorser who is deceased with reference to the condition of the paper when transferred, as that would be a personal transaction. *Benton County Sav. Bank v. Strand*, 106–606, 76 N. W. 1001.

While one who has become a holder of a note may not, in the case governed by this section, testify to the personal transaction of the transfer of the instrument to the deceased, he may testify that he never transferred it to anyone else. *Walkley v. Clarke*, 107–451, 78 N. W. 70.

Competent testimony as to a conversation with a third person involving a statement of what has taken place between the witness and the deceased person is not prohibited by this section. *Ibid.*

The testimony of the payee of a note that he saw the payor, who is deceased, sign the note, is testimony as to a personal transaction. *Watters v. McGreavy*, 111–538, 82 N. W. 949.

A witness cannot by testimony as to a transaction of a third person with the deceased, in which the witness himself takes part, evade the rule as to testimony of personal transactions. He cannot by indirection do that which the law says may not be done. *Ibid.*

In a controversy as to whether a son was entitled to recover damages against the estate of his deceased father for failure of the father to comply with a contract to convey, held that evidence of the son with reference to the taking possession of the farm and making improvements thereon was not incompetent as relating to a personal transaction with the deceased. *Hutton v. Doxsee*, 116–13, 89 N. W. 79.

Testimony as to information or knowledge or the want of it is not testimony as to a personal transaction or communication. *In re Townsend's Estate*, 122–246, 97 N. W. 1108.

It is only as to personal transactions and communications between persons who are interested and the deceased that the testimony of such interested persons is rendered incompetent. *Jacobs v. Jacobs*, 130–10, 104 N. W. 489.

The rule of the statutory provision does not operate to close the mouth of a witness as to any matter of fact coming to his knowledge in any other way than through personal dealings with the deceased or communications made by the deceased to the witness in person. *Shetler v. Stewart*, 133–320, 107 N. W. 310, 110 N. W. 582.

Transactions in a particular case held not to constitute personal transactions within the provisions of this section. *Curd v. Wisser*, 120–743, 95 N. W. 266.

Conversations or transactions in presence of witness: A witness may testify to a conversation heard by him between deceased and another in which he took no part. Such testimony does not relate to a personal transaction. *Allbright v. Hannah*, 103–98, 72 N. W. 421; *Mallow v. Walker*, 115–238, 88 N. W. 452; *Wright v. Reed*, 118–333, 92 N. W. 61; *Foreman v. Archer*, 130–49, 106 N. W. 372; *Powers v. Crandall*, 136–659, 111 N. W. 1010.

The statutory provision does not exclude the testimony of an interested witness as to a transaction or communication between the deceased and another person in which the witness was not a participant. *Barto v. Harrison*, 138–413, 116 N. W. 317; *Wise v. Outtrim*, 139–192, 117 N. W. 264; *Mollison v. Rittgers*, 140–365, 118 N. W. 512.

Even though the interested witness testifies that he did not participate in the conversation between another and the deceased in his presence, nevertheless if it appears from the circumstances and language employed that he was a party to the

conversation his testimony should be excluded. *Tebbs v. Jarvis*, 139–428, 116 N. W. 708.

It is not improper for counsel to call the attention of the witness by questions to the fact that the conversation referred to was one in which the witness took no part. *McBride v. McBride*, 142–169, 120 N. W. 709.

A motion made at the conclusion of the witness's testimony to strike out the portion thereof relating to a communication with deceased but not pointing out the particular portion of the evidence objected to is insufficient. *Ibid.*

Husband or wife of disqualified person: The wife of a person prohibited by this section from testifying may herself testify as to what took place in her presence. *Dettmer v. Behrens*, 106–585, 76 N. W. 853.

The husband or wife of a party to the action may testify to a conversation between such party and one who is then deceased, in which the witness did not participate. *Allison v. Parkinson*, 108–154, 78 N. W. 845; *Lucas v. McDonald*, 126–678, 102 N. W. 532; *McElroy v. Allfree*, 131–112, 108 N. W. 116.

A wife, not a party to the proceedings nor interested therein, may testify for the purpose of identifying letters written by her husband. *In re Estate of Murray, Scrimgeour v. Chase*, 145–368, 124 N. W. 193.

Letters: Testimony by a witness as to the receipt of a letter from the deceased is as to a personal transaction or communication, within the terms of this section. *McCorkendale v. McCorkendale*, 111–314, 82 N. W. 754.

Letters by a witness to a deceased, if material and admissible as declarations of the witness, are not excluded by the terms of this section. *Howe v. Richards*, 112–220, 83 N. W. 909.

Where letters were relied on as a recognition of an illegitimate child, held that the testimony of the child to whom the letters were written with reference to the receipt of such letters and the signature of the writer was not excluded by the provisions of this section, inasmuch as the genuineness of the letters and not the communication involved therein was the material matter of inquiry. *Britt v. Hall*, 116–564, 90 N. W. 340.

Removal of prohibition: Where plaintiff sought to recover against an estate for work and labor performed for deceased under an implied contract, and the administrator testified as to the physical needs and condition of deceased at the time when such services were rendered, held that the claimant might, under the exception contained in the statute, testify as to the same facts. *Ridler v. Ridler*, 103–470, 72 N. W. 671.

The fact that the executor testifies in his own behalf does not in itself remove the prohibition as to testimony of the opposite party. It is only removed as to communications or transactions with the deceased as to which the executor has testified. *Boardman v. Brown*, 114–678, 87 N. W. 674.

If when the testimony is given the witness is incompetent, and that objection is properly insisted upon, the objecting party does not waive the error by subsequently testifying concerning the same transaction. *Brandes v. Brandes*, 129–351, 105 N. W. 499.

The fact that the party suing on a note given to one who is deceased testifies as to how he acquired his right to the notes does not make competent the evidence of the maker of the notes as to conversations with the deceased with reference thereto. *Chapman v. Chapman*, 132–5, 109 N. W. 300.

The admission of a receipt, or deed, or contract, or other writing of a deceased person is not sufficient to admit the testimony of a living witness otherwise incompetent under the statute, and this rule applies to the books of account of deceased. *Whisler v. Whisler*, 117–712, 89 N. W. 1110.

Where in an action by the administrator no evidence of a transaction with the deceased is offered, the defendant cannot by his own act in putting in evidence a letter written by him to the deceased thereby render himself competent to testify to the transactions referred to in such letter. *Ross v. Kirkwold*, 123–668, 99 N. W. 562.

Where a witness who is not competent to testify in direct examination as to conversations and transactions with a deceased person is asked with reference thereto on cross-examination, he may be questioned on redirect examination with reference to the same subject matter. *In re Will of Wharton*, 132–714, 109 N. W. 492.

A witness not competent to testify as to conversation with a person deceased cannot be inquired of with reference to such conversations on cross-examination, not having been asked to testify with reference thereto in the examination in chief. *Stutsman v. Sharpless*, 125–335, 101 N. W. 105.

The fact that by a stipulation filed after the testimony of a party is given, but before the case is determined, judgment is entered as to him, does not render his testimony already given competent. The interest to disqualify such witness must be legal, certain and immediate, such as at common law would have disqualified him. *Culbertson v. Salinger*, 131–307, 108 N. W. 454.

Objection to the testimony of an interested witness as to a transaction with the deceased is waived by calling for such testimony on cross-examination. *Mollison v. Rittgers*, 140–365, 118 N. W. 512.

The fact that a will is offered in evidence does not constitute a waiver of objection to the testimony of contestants as to

transactions with the deceased. *In re Will of Winslow*, 146–67, 124 N. W. 895.

Where objection to the competency of a witness to speak of a communication between him and the deceased is not challenged, the objection must be deemed waived. *Coleman v. Coleman*, 153–543, 133 N. W. 755.

How objection raised: Under this section the witness is made incompetent to testify as to personal transactions or communications with deceased, and an objection to a question, calling for testimony as to such transactions or communications, that the evidence is incompetent does not raise the question as to the competency of the witness. *Burdick v. Raymond*, 107–228, 77 N. W. 833; *Hanrahan v. O'Toole*, 139–229, 117 N. W. 675.

The objection of incompetency, without more, goes to the evidence and not to the witness, and does not raise the question whether the witness is competent to testify under this section. *McDonald v. Young*, 109–704, 81 N. W. 155.

The objection that the witness cannot testify as to personal transactions is not to be made when he is first sworn, but when he is asked to testify as to such transactions, and if objection is not then made it must be deemed as waived. *Chew v. Holt*, 111–362, 82 N. W. 901.

Objection to the competency of the witness to testify as to a conversation with a person deceased should be made when such testimony is first called for. *Davis v. Hall*, 128–647, 105 N. W. 122.

The objection to the witness should be made when his testimony is offered, and if the evidence is received without objection, it should not afterwards be stricken out. *Slattery v. Slattery*, 120–717, 95 N. W. 201.

A general objection to the competency of a witness, made at the close of his evidence, comes too late. *Ibid.*

It is not proper to receive evidence which is objected to on the ground that it relates to a personal transaction or communication and at the end of the introduction of the evidence to instruct the jury that they shall not consider so much thereof as relates to such communications and transactions. *In re Hull's Will*, 117–738, 89 N. W. 979.

Objection to the competency of a witness who testifies as to transactions or communications with deceased need not necessarily be made when the witness is sworn, but should be interposed when the witness is interrogated concerning matters as to which he is by statute declared incompetent to testify. *Erwin v. Fillenwarth*, 137 N. W. 502.

Testimony on previous trial: The evidence of one party to a suit with reference to personal transactions with the other which is taken down in shorthand on the trial, and which would otherwise be competent on a second trial under the provisions of code supplement § 245-a, cannot be used on such second trial if in the meantime the opposite party has died. *Greenlee v. Mosnat*, 136–639, 111 N. W. 996.

In particular cases: Section applied. *Nordman v. Meyer*, 118–508, 92 N. W. 693; *Huit v. Huit*, 122–338, 98 N. W. 123; *In re Will of Wiltsey*, 122–423, 98 N. W. 294; *Beechley v. Beechley*, 134–75, 108 N. W. 762; *Creveling v. Brown*, 147–45, 125 N. W. 807; *Woodbury v. Henning*, 148–23, 126 N. W. 912.

Under the evidence in a particular case, held that proof of insanity of the person with whom the conversation was held to which the witness was asked to testify was not such as to justify the exclusion of such testimony. *Percival-Porter Co. v. Oaks*, 130–212, 106 N. W. 626.

SEC. 4605. Depositions taken conditionally.

The provision that a person may have his own deposition taken with reference to a personal transaction with another and read in evidence where his testimony becomes incompetent by reason of the death of the other party to the transaction does not authorize the introduction in evidence on the second trial of a case of the testimony of a party given on the first trial with reference to a personal transaction with the opposite party if in the meantime such opposite party has died. The provision of code supplement § 245-a for use on a second trial of testimony taken in shorthand on the first trial does not make such report of the evidence equivalent to a deposition taken on notice before the trial of the case. *Greenlee v. Mosnat*, 136–639, 111 N. W. 996.

SEC. 4606. Husband or wife as witness. Neither the husband nor wife shall in any case be a witness against the other, except in a criminal prosecution for a crime committed one against the other, or in a civil action or proceeding one against the other, or in a civil action by one against a third party for alienating the affections of the other; or in any civil action brought by a judgment creditor against either the husband or the wife, to set aside a conveyance of property from one to the other on the ground of want of consideration or fraud, and to subject the same to the

payment of his judgment; but in all civil and criminal cases they may be witnesses for each other. [27 G. A., ch. 108, § 1; 15 G. A., ch. 33; C. '73, § 3641; R. § 3983; C. '51, § 2391.]

Scope of provision: The statutory provision forbidding husband or wife to be a witness against the other has no application to the question as to the admissibility of privileged communications between them. *Sexton v. Sexton*, 129–487, 105 N. W. 314.

Proof of marriage: Where the evidence is sufficient to make out a prima-facie case of former marriage not dissolved by death or divorce, the question of the competency of one of the parties to the alleged marriage to testify against the other is a question for the jury. It is not essential in order to establish such disqualification that the fact of the former marriage shall be proven by record evidence. *State v. Rocker*, 130–239, 106 N. W. 645.

Testimony as to crime prior to marriage: In a prosecution for rape committed upon a female child to whom the defendant has been united in marriage after the commission of the crime and before the trial, the female cannot testify as a witness against her husband. *State v. McKay*, 122–658, 98 N. W. 510.

The provisions of this section do not make the wife a competent witness in prosecution for rape committed upon her by the husband prior to the marriage. The crime is, in such case, not by the husband against the wife as such and is condoned by the subsequent marriage. *Ibid.*

A marriage, though not regularly solemnized, is valid under the provisions of code § 3147, which renders the wife incompetent as a witness against her husband. *Ibid.*

After marriage has been dissolved: This section does not apply if the marriage relation has been severed when the witness is offered. *Hitt v. Sterling-Goold Mfg. Co.*, 111–458, 82 N. W. 919.

The objection to the testimony of the wife against the husband as to a crime committed by him is removed if between the commission of the crime and the trial the wife has been divorced from her husband. *State v. Mathews*, 133–398, 109 N. W. 616.

Declarations: In an action against both husband and wife a declaration of either against interest is admissible, although it would be incompetent as against the other. *Chaslavka v. Mechalek*, 124–69, 99 N. W. 154.

Before grand jury: The fact that the wife is examined as a witness before the grand jury on the finding of an indictment against her husband is not a ground for setting aside the indictment. *State v. De Groate*, 122–661, 98 N. W. 495; *State v. Brown*, 128–24, 102 N. W. 799.

Fraudulent conveyance: The provisions added to this section by § 1, ch. 108, acts 27 G. A., with reference to actions to set aside fraudulent conveyances, are not unconstitutional as being class legislation. The act applies to every person coming within the relation and circumstances provided for. *Burk v. Putnam*, 113–232, 84 N. W. 1053.

Nor is the statute unconstitutional as requiring answers to incriminating questions. In view of the statutory provision on that subject (code § 4612) it must be assumed that the witness is not required to answer questions which would tend to incriminate him. *Ibid.*

This section is not retroactive. *Cedar Rapids Nat. Bank v. Lavery*, 110–575, 81 N. W. 775.

Declarations of the wife as to her title to real property previously conveyed by her to her husband are not admissible for the purpose of impeaching the title of the husband. *Ibid.*

SEC. 4607. Communications between husband and wife.

Where it was claimed that a conveyance was joined in by the wife in pursuance of threats made to the husband, and by him communicated to the wife, held that the fact of such communication might be proved by the testimony of the husband. *Giddings v. Iowa Sav. Bank*, 104–676, 74 N. W. 21.

The statutory prohibition extends in express terms to cases where the marriage relation has ceased to exist. *Shuman v. Supreme Lodge K. of H.*, 110–480, 81 N. W. 717.

The provisions of this section absolutely close the mouth of husband or wife as to any communication made by one to the other during marriage. Such a communication is not merely privileged, but evidence of the parties with reference thereto is against public policy. *Hertrich v. Hertrich*, 114–643, 87 N. W. 689.

Where the question at issue was whether the husband had deserted and abandoned his wife, held that she as a witness might be allowed to testify as to conversations between them so far as they were explanatory of the treatment she received from her husband. *Wright v. Wright*, 114–748, 87 N. W. 709.

The statutory provision excluding evidence as to privileged communications between husband and wife is intended to protect only marital communications, and in an action for the alienation of the husband's affections, the wife may testify to acts, statements and declarations of the

husband addressed to her in proof of former affections and subsequent loss thereof. *Sexton v. Sexton*, 129–487, 105 N. W. 314; *Hardwick v. Hardwick*, 130–230, 106 N. W. 639.

The wife may testify as to the contents of letters written by her husband. *In re Estate of Murray, Scrimgeour v. Chase*, 145–368, 124 N. W. 193.

SEC. **4608. Communications in professional confidence.** No practicing attorney, counselor, physician, surgeon, or the stenographer or confidential clerk of any such person, who obtains such information by reason of his employment, minister of the gospel or priest of any denomination shall be allowed, in giving testimony, to disclose any confidential communication properly intrusted to him in his professional capacity, and necessary and proper to enable him to discharge the functions of his office according to the usual course of practice or discipline. Such prohibition shall not apply to cases where the party in whose favor the same is made waives the rights conferred. [28 G. A., ch. 125, § 1; C. '73, § 3643; R. §§ 3985–6; C. '51, §§ 2393–4.]

Privileged communications to attorney: An attorney acting as a mere scrivener in the preparation of instruments under directions given to him is not within the scope of the statutory provisions excluding the testimony of an attorney as to privileged communications. *Mueller v. Batcheler*, 131–650, 109 N. W. 186.

To constitute a privileged communication to an attorney there must be some element of confidence imposed or presumed to be imposed in the attorney himself. The privilege does not apply to a case where two or more persons consult an attorney for their mutual benefit. *Ibid.*

An attorney is not disqualified from testifying to statements by his client made in his presence to the court. *Foreman v. Archer*, 130–49, 106 N. W. 372.

An attorney should not be allowed in a criminal case to testify that the defendant consulted him with reference to a subject matter having relation to the commission of the crime charged. *State v. Blydenburg*, 135–264, 112 N. W. 634.

The statutory provision excluding evidence of an attorney as to communications made to him in the course of his employment is broad enough to exclude statements made to a county attorney with a view to a criminal prosecution. *Gabriel v. McMullin*, 127–426, 103 N. W. 355.

The statutory provision as to communications to an attorney was intended to accomplish a beneficent purpose and is to be given a liberal construction in favor of the parties intended to be protected. *Hanson v. Kline*, 136–101, 113 N. W. 504.

Communications looking to an employment, although no employment in fact follows, are protected by the statute. But the relation of attorney and client must exist at the time of the communication either prospectively or in fact. After the termination of the relation communications between the parties are not privileged. *Ibid.*

One who, although an attorney, prepares a deed as a scrivener is not excluded from testifying with reference to communications made to him in that connection. *Conway v. Rock*, 139–162, 117 N. W. 273.

An attorney who acts as a scrivener in the drawing of a will is not incompetent to testify with reference to the circumstances thereof, although he may be at the time or may previously have been counsel in litigation for the proponents of the will. *Ross v. Ross*, 140–51, 117 N. W. 1105.

The mere fact that the person preparing a will is an attorney does not render his testimony as to communications to him with reference to the transaction incompetent where he has not been consulted as an attorney with reference to the subject matter. *Stoddard v. Kendall*, 140–688, 119 N. W. 138.

The fact that the relation of attorney and client exists as to other matters does not render a communication with the attorney not having reference to such matters, necessarily a privileged communication. *Moyers v. Fogarty*, 140–701, 119 N. W. 159.

Where objection of privilege is raised and the record already made does not clearly state the alleged confidential relation, the burden is on the objector to show it. *Ibid.*

An attorney is not disqualified from testifying as to a communication in his presence where it does not appear that he was consulted or acting as attorney for the person against whom the communication is sought to be proved. *State v. Stafford*, 145–285, 123 N. W. 167.

The defendant in a prosecution for adultery cannot question the competency of evidence of communications between his wife and the county attorney with reference to the institution of the prosecution. *State v. Leek*, 152–12, 130 N. W. 1062.

And in such case, held that the testimony of the county attorney relating to the fact of the filing of the information by the wife was not privileged. *Ibid.*

Communications made by a prosecutrix to the county attorney in the presence of the grand jury, as to which the prosecutrix

had testified, may be testified to by the county attorney. *State v. Hector*, 157– —, 138 N. W. 930.

To physicians: Where the question in an action on a policy of life insurance is whether the insured consulted a physician, otherwise than as disclosed in his answers in the application, a physician may without violating the provisions of this section testify to attending insured as a physician and prescribing for him. Such evidence has no reference to communications between the physician and patient. *Nelson v. Nederland L. Ins. Co.*, 110–600, 81 N. W. 807.

But the physician cannot testify as to the advice given to his patient, because this must have been based upon information derived from the patient. The statute does not permit a disclosure of information so derived, though indirectly made. *Ibid.*

This section does not prescribe any rule of professional conduct, nor prohibit a physician from disclosing otherwise the secrets of his patient. It relates only to the giving of testimony in a judicial proceeding, either by evidence directly given, or by affidavits, or otherwise. *Ibid.*

Facts learned by a physician while in the discharge of his duties as such cannot be testified to by him in view of the provisions of this section. *Finnegan v. Sioux City*, 112–232, 83 N. W. 907.

Whenever an injured party consults a physician as physician and discloses to him his physical condition, and thus enables him to obtain information, which as an ordinary person he would not have obtained, such physician is prohibited from testifying with reference to the knowledge thus obtained, except with the consent of the injured party. So held where a physician, to whom the injured person had disclosed his physical condition for the purpose of having such physician act as a witness in his behalf, was called as a witness by the opposite party. *Doran v. Cedar Rapids & M. C. R. Co.*, 117–442, 90 N. W. 815.

Statements made by an injured railroad employe to a surgeon in the employ of the company who visits him for the purpose of treating him for his injuries are privileged. *Keist v. Chicago G. W. R. Co.*, 110–32, 81 N. W. 181.

The confidential communications protected under the statute are not restricted to mere verbal statements by the patient to the physician, but include all knowledge or information acquired by the physician through his own observation or examination. *Battis v. Chicago, R. I. & P. R. Co.*, 124–623, 100 N. W. 543.

While the railroad company may send its own physician to examine an employe injured in the course of his employment for the purpose of determining the extent of the injury, yet if the physician thus furnished assumes to advise or administer treatment to the patient with his acquiescence he becomes the physician of the patient and communications made to him and knowledge acquired by him in that relation are privileged. *Ibid.*

Physicians who examine a person without his request, and without any understanding on the part of the person examined that they are making such examination as his physician, are not incompetent. *State v. Height*, 117–650, 91 N. W. 935.

Examinations and communications made in the presence of a physician, but not to him as physician, are not excluded as confidential communications. *Sutcliffe v. Iowa S. T. M. A.*, 119–220, 93 N. W. 90.

The expert testimony of a physician, based on hypothetical questions as to the cause of an injury to his patient, is not incompetent. *Crago v. Cedar Rapids*, 123–48, 98 N. W. 354.

Section applied as to communications between patient and physician. *Herries v. Waterloo*, 114–374, 86 N. W. 306.

Communications to a veterinary surgeon are not privileged. *Hendershot v. Western Union Tel. Co.*, 106–529, 76 N. W. 828.

The patient only can invoke the rule of secrecy regarding a communication to a physician. *State v. Bennett*, 137–427, 110 N. W. 150.

A physician who is in attendance at an operation may testify with reference thereto if not called or employed by the patient, although the patient has given no consent to his presence. *Woods v. Lisbon*, 138–402, 116 N. W. 143.

A physician is only prohibited from testifying in a case in which his patient is a party as to matters of which he has obtained information by reason of his employment by confidential communications intrusted to him in a professional character, and necessary and proper to enable him to discharge his duties. *Blossi v. Chicago & N. W. R. Co.*, 144–697, 123 N. W. 360.

Likewise a minister may testify as to communications with a parishioner relating to a matter in which he is simply acting as a friend and interpreter and having nothing to do with spiritual affairs. *Ibid.*

A physician is a competent witness as to the physical and mental condition of his patient, whether called by an executor of the will or by an heir contesting its validity. *In re Walker's Will, Barry v. Walker*, 152–154, 128 N. W. 386.

This section extends the privilege which at common law was recognized in regard to communications between client and attorney so as to cover communications between patient and physician, and extends to the latter communications the same complete protection, not only as to the physician, but also as to the patient, which at

common law was recognized in regard to communications between attorney and client. Therefore the patient is privileged from disclosing communications made to his physician. *Burgess v. Sims Drug Co.*, 114–275, 86 N. W. 307.

Waiver: While the privilege may be waived, the voluntary disclosure of such communication by the patient in cross-examination will not constitute a waiver such as to authorize the introduction in evidence of the testimony of the physician with reference to such communication. *Ibid.*

Any waiver resulting from voluntary testimony of the patient with reference to the communication must be limited to the action in which such voluntary testimony is given, and will not operate on another trial of the same case. *Ibid.*

Communications from a patient to his physician are not privileged at common law. Although there is no statutory authority for waiving the prohibition, it is settled that it may be waived by the client, and after the death of the client, by his administrator. In a criminal case, involving death of a woman by abortion committed by the defendant, testimony of a physician who attended the woman before her death is admissible. *State v. Grimmell*, 116–596, 88 N. W. 342.

A patient may waive the privilege in case of a communication to his physician and in cases of contests of wills where the parties are claiming rights of the estate through devise, inheritance or in a representative capacity, those representing the estate may also waive the privilege, but in an action on a mutual benefit certificate of life insurance, communications by the deceased to his physician are not competent. *Shuman v. Supreme Lodge K. of H.*, 110–480, 81 N. W. 717.

Where several different physicians had treated a person for an injury received from a defective sidewalk, held that the fact that plaintiff called one of such physicians as a witness did not waive the privilege of objecting to evidence of the other physicians as to communications relating to such injury. *Baxter v. Cedar Rapids*, 103–599, 72 N. W. 790.

The fact that a physician is asked to testify as to the condition in which he found an injured party when called to attend him is not a waiver of privilege as to subsequent communication made to and observations made by such physician. *Nugent v. Cudahy Packing Co.*, 126–517, 102 N. W. 442.

The mere offer of testimony which is competent and material in itself, but is excluded only because of the incompetency of the witness, does not ordinarily afford any ground for an assignment of error. *State v. Booth*, 121–710, 97 N. W. 74.

Where a party testifies only on cross-examination as to the subject matter of the conversation with his attorney, such testimony does not waive the objection to the testimony of the attorney as to such subject matter. *Lauer v. Banning*, 140–319, 118 N. W. 446.

A client who goes upon the stand in an attempt to secure some advantage by reason of transactions between himself and his attorney waives his right to object to the attorney's being called by the other side to give his account of the matter. *Kelly v. Cummens*, 143–148, 121 N. W. 540.

The statute does not absolutely disqualify the physician from testifying. The patient may waive objection by calling the physician to testify as to privileged matters, or by calling other witnesses to testify to the same facts. When the patient voluntarily publishes the occurrences of the sick room, he cannot be permitted to insist that the prohibition and privilege of the statute continues to exist as to the physician. *Woods v. Lisbon*, 150–433, 130 N. W. 372.

The fact that the client as a witness on cross-examination refers to conversations with his physician or attorney does not constitute a waiver of the privilege. *Lauer v. Banning*, 152–99, 131 N. W. 783.

The rule that one who does not produce testimony within his control or prevents the use of such testimony thereby admits that it would be adverse, does not apply to privileged communications. *Ibid.*

Where, in an action for personal injuries, the plaintiff has testified as to complaints made by him with reference to such injuries, the door is opened for the testimony of his physician regarding such complaints. When by his voluntary act he lifts the veil, the professional duty of secrecy ceases and the physician is a competent witness. *Reed v. Rex Fuel Co.*, 141 N. W. 1056.

SEC. 4610. Judge as witness.

While a judge is a competent witness in a case pending in a court before him, his statements as to conversations with a party announced only as furnishing the reason for his decision cannot properly be considered. *Thorn v. Hambleton*, 149–214, 128 N. W. 393.

SEC. 4612. **Criminating questions.** But when the matter sought to be elicited would tend to render him criminally liable, or to expose him to public ignominy, he is not compelled to answer, except as provided in the next section. But in prosecutions against gaming, betting, lotteries,

dealing in options, creating, entering into or becoming a member of, or a party to any pool, trust, agreement, contract, combination, confederation or understanding with any other corporation, partnership, association or individual to regulate or fix the price of any article of merchandise or commodity or to fix or limit the amount or quantity of any article, commodity or merchandise to be manufactured, mined, produced or sold in this state, and keeping gambling houses, or rooms for illegal use or disposal of intoxicating liquors, no witness shall be excused from giving testimony upon the ground that his testimony would tend to render him criminally liable or expose him to public ignominy; but any matter so elicited shall not be used against him, and said witness shall not be prosecuted for any crime connected with or growing out of the act on which the prosecution is based in the cause in which his evidence is used for the state, under the provisions of this section. [35 G. A., ch. 295, § 1.] [C. '73, § 3647; R. § 3989; C. '51, § 2397.]

The objection on the part of a witness to criminating questions is not one which can be urged on behalf of the defendant himself, and an error in ruling on such objection is not one of which the defendant can complain. *State v. Cobley*, 128–114, 103 N. W. 99.

SEC. 4613. Previous conviction.

The record of a conviction for a felony is admissible although an appeal for such conviction is pending. *Hackett v. Freeman*, 103–296, 72 N. W. 528.

Whatever may have been the rule at common law as to proof of previous conviction as affecting the credibility and not the competency of the witness, this section limits such evidence to conviction of a felony. *Palmer v. Cedar Rapids & M. R. Co.*, 113–442, 85 N. W. 756.

It is not proper to ask a witness on cross-examination, for the purpose of affecting his credibility, whether he has not been accused of a crime. *Germinder v. Machinery Mut. Ins. Assn.*, 120–614, 94 N. W. 1108.

Although previous conviction may be shown only by the record for the purposes of impeachment, yet where the question was as to whether the defendant had been absent from the state so as to obviate the bar of the statute of limitations, held that the warden of the penitentiary of another state might testify as to the defendant's being in that state, although it incidentally appeared from his testimony that he was confined in the penitentiary. *State v. Moran*, 131–645, 109 N. W. 187.

It is not improper in questioning the witness as to previous conviction of a felony to direct his attention to the specific felony of which it is claimed he was convicted. *State v. Carter*, 121–135, 96 N. W. 710.

In proving the former conviction of a witness for the purpose of impeaching his credibility, it is immaterial that the record of conviction shows a middle initial which is not a part of the real name of the witness. *State v. Loser*, 132–419, 104 N. W. 337.

Where defendant has testified as a witness, evidence relating to his prior conviction of a felony should not be considered for the purpose of establishing his guilt but only for the purpose of testing his credibility, and the jury should be so instructed. *State v. Johnson*, 152–675, 133 N. W. 115.

SEC. 4614. Moral character.

Inquiry as to the general reputation of the witness for truth and veracity should be restricted to the neighborhood of the present residence of the witness sought to be impeached, and to proof of reputation at a time near that of the trial. When residence has been so recently acquired that the neighbors of the witness are not likely to have ascertained his true character, and in all probability he has not worn off that established in the neighborhood of his former abode, evidence of his reputation at the latter place may be received, as it may also when he has subsequently remained in no place long enough to become well known to his neighbors. *Schoep v. Bankers Alliance Ins. Co.*, 104–354, 73 N. W. 825; *McGuire v. Kenefick*, 111–147, 82 N. W. 485.

It is competent to ask a witness what his occupation is and where he resides, although the answers to such questions may have a tendency to disgrace the witness, affect his credibility or weaken his evidence. *State v. Chingren*, 105–169, 74 N. W. 946.

Before a witness can speak as to the character or reputation of another, his knowledge must appear. The mere individual opinion of the witness is not ad-

missible. No one will be permitted to speak affirmatively to the character or competency of another, as distinguished from general reputation, solely from rumors or reports. *Lacy v. Kossuth County*, 106–16, 75 N. W. 689.

The general moral character of a witness or his general reputation as to morals may be shown, not his character or life as known to the impeaching witness. *State v. Seevers*, 108–738, 78 N. W. 705.

Where the prosecutrix in a prosecution for seduction is a witness, her moral character or reputation may be shown for purposes of impeachment, but in such case the proof should be confined to her general reputation and should not be extended to cover a specific vice. Such testimony should ordinarily be confined to the time of trial. *State v. Haupt*, 126–152, 101 N. W. 739.

Where a witness testifying to the bad character of another witness for purposes of impeachment is cross-examined as to the names of the persons whom he has heard speak ill of such witness and names such persons, the persons named cannot be called to contradict the statements attributed to them by the impeaching witness. To allow such testimony would be to introduce a collateral issue. *Hofacre v. Monticello*, 128–239, 103 N. W. 488.

Testimony as to general moral character of prosecutrix in a trial for rape is admissible as affecting her credibility as a witness. *State v. Blackburn*, 136–743, 114 N. W. 531.

In such a case evidence of illicit relations of prosecutrix with others than defendant is not admissible as the impeachment should be limited to general moral character and not specific acts. *Ibid.*

Moral character as referred to in this section is the equivalent of general reputation. But it is the moral character of the witness, and not his character as to truth and veracity, nor his character as to being peaceful and law abiding, nor some specific vice, which may be shown. *State v. Gregory*, 148–152, 126 N. W. 1109.

The provisions of this section and the preceding do not furnish the only methods of impeachment of a witness. Contradictory statements or contradictory conduct may be shown. *Hunt v. Waterloo, C. F. & N. R. Co.*, 141 N. W. 334.

General bad reputation of a witness for truth and veracity in the community in which he lives or in which he has recently resided is admissible for impeaching purposes. *Ibid.*

SEC. 4615. Whole of a writing or conversation.

The evident design of this provision is that the whole of a conversation on the same subject shall be received in order to determine the consideration and weight to be attached to that portion offered. *Walkley v. Clarke*, 107–451, 78 N. W. 70.

Where a part of a conversation has been introduced in evidence it is competent to prove the other portion as explaining the part introduced. *Hutton v. Doxsee*, 116–13, 89 N. W. 79.

An objection to an entire writing relied on as constituting an admission in a criminal case should not be sustained, although the writing contains some expressions of opinions which would not in themselves be admissible, there being no objection to the specific portion of the writing which is deemed objectionable. *State v. Hasty*, 121–507, 96 N. W. 1115.

A rule that if one party has proven part of a conversation the other is entitled to give the rest of it in evidence, does not warrant the admission of everything which may have been said, but only so much as was said concerning the subject matter of the statements testified to. *State v. Leuhrsman*, 123–476, 99 N. W. 140.

Where a portion of a conversation or correspondence has been given in evidence by one party, the whole relating to the same subject may be inquired into by the other party. *Robertson v. Vasey*, 125–526, 101 N. W. 271.

When one party inquires as to part of a conversation or transaction the other is entitled to the whole thereof bearing upon the same subject. *State v. Rutledge*, 135–581, 113 N. W. 461.

Section applied. *State v. Hudson*, 110–663, 80 N. W. 232.

SEC. 4616. Writing and printing.

In case of inconsistency between the printed and the written portions of a contract, the written portion will prevail. *Sylvester v. Ammons*, 126–140, 101 N. W. 782.

SEC. 4617. Understanding of parties to agreement.

The provision is only applicable to a case where the writing involved is fairly susceptible of different meanings. *Rouss v. Creglow*, 103–60, 72 N. W. 429.

The statutory provision that when the terms of an agreement have been intended in a different sense by the parties thereto that sense is to prevail against either in which he had reason to suppose the other understood it, has no application where as a matter of law the language of the contract is plain and unambiguous. *Inman Mfg. Co. v. American Cereal Co.*, 133–71, 110 N. W. 287.

It is error to submit to the jury the question whether a written contract was understood by one of the parties in a different sense than that indicated by its plain and unequivocal language. *Capital City Carriage Co. v. Moody*, 135–444, 110 N. W. 903.

Where parties do not understand the agreement alike, it is, as against one of them, to be construed in that sense in which the other had reason to believe it was understood. *Ubbinga v. Farmers' Sav. Bank*, 108–221, 78 N. W. 840.

This section applies to verbal contracts as well as those in writing, and it is applicable also to cases of express contract, as well as those implied. *Lull v. Anamosa Nat. Bank*, 110–537, 81 N. W. 784.

Where a contract issued by a building and loan association was ambiguous in its terms, held that it would be construed in the sense in which it was evidently intended to be taken by the person to whom it was issued. *Field v. Eastern B. & L. Assn.*, 117–185, 90 N. W. 717.

It is for the jury to say from the situation of the parties and the surrounding circumstances, such as the occasion of sending a telegram and the apparent object to be served, whether the person to whom such telegram is sent would construe the telegram as a proposition open to acceptance. *Stenger v. Rice*, 149–100, 127 N. W. 1097.

This statutory provision has no application in the construction of plain and unambiguous terms in a contract; but where there is conflicting evidence as to the terms of an oral agreement or as to the language used in a written agreement which has been lost, it is competent to show the situation of the parties, the subject matter of the controversy and the interpretation put on the contract by the parties, for the purpose of determining what the agreement really was. *Cedar Rapids Nat. Bank v. Carlson*, 156–343, 136 N. W. 659.

Section applied. *Wood v. Allen*, 111–97, 82 N. W. 451; *Brown v. Curtis*, 111–542, 82 N. W. 945; *Chamberlain v. Brown*, 141–540, 120 N. W. 334.

SEC. 4618. Historical and scientific works.

While the truths of the exact sciences, the established facts of history, and computations from fixed data may be proven by the works of reputable authorities, yet medicine belongs to the class known as inductive sciences, the data of which are constantly shifting with new discoveries, and as to matters of skill and knowledge in that science, the safer practice is to rely upon the testimony of living witnesses of the medical profession who may bring the learning and research of the books within the comprehension of the jurors. *Bixby v. Omaha & C. B. R. & B. Co.*, 105–293, 75 N. W. 182.

Extracts from medical works, defining and giving the probable cause, progress and symptoms of a disease are not admissible in evidence. *Stewart v. Equitable Mut. L. Assn.*, 110–528, 81 N. W. 782.

Medical books are not admissible in evidence. *State v. Peterson*, 110–647, 82 N. W. 329.

The maps or plats of the government survey in the custody of the proper officer may be certified by him, and as thus certified are admissible in evidence. *Austin v. Whitcher*, 135–733, 110 N. W. 910.

SEC. 4620. Handwriting.

While the standard itself cannot be established by the testimony of persons who have seen the party write, yet the party whose signature the standard is claimed to be may establish it by his own oath. *Renner v. Thornburg*, 111–515, 82 N. W. 950.

Where the question was whether a certain signature, purporting to be that of the wife, was genuine or was in fact the signature of the husband afterwards altered to that of the wife, held that comparison with handwriting of the husband was proper. *Coppock v. Lampkin*, 114–664, 87 N. W. 665.

One who has seen the person write is competent to express an opinion as to whether the writing in question is his handwriting. *Frank v. Berry*, 128–223, 103 N. W. 358.

A signature to a pleading purporting to be that of the party in whose behalf it is filed may be introduced in evidence as the writing of such person in the absence of any showing that the signature was not his. *Ibid.*

Held not error to instruct that expert evidence as to handwriting is of the lowest order of evidence, or evidence of the most unsatisfactory character. *Patton v. Lund*, 114–201, 86 N. W. 296.

The testimony of a nonexpert witness based on comparison is of little or no value and is not admissible. *Murphy v. Murphy*, 146–255, 125 N. W. 191.

[The reference for the case of *Bruner v. Wade*, cited in 2d column of notes on p. 1844 of code should be "84–698" instead of "85–666."]

SEC. **4622. Entries by deceased person.**

Entries by an insurance agent in the books kept by him on behalf of the company are not admissible in an action on an insurance policy issued by him. The business of an insurance agent is not professional in its character. *Cummings v. Pennsylvania F. Ins. Co.*, 153–579, 134 N. W. 79.

SEC. **4623. Books of account—when admissible—photographic copy as part of deposition.** Books of account containing charges by one party against the other, made in the ordinary course of business, are receivable in evidence only under the following circumstances, subject to all just exceptions as to their credibility:

1. They must show a continuous dealing with persons generally, or several items of charge at different times against the other party in the same book or set of books;

2. It must be shown by the party's oath, or otherwise, that they are his books of original entries;

3. It must be shown in like manner that the charges were made at or near the time of the transactions therein entered, unless satisfactory reasons appear for not making such proof;

4. The charges must also be verified by the party or clerk who made the entries, to the effect that they believe them just and true, or a sufficient reason must be given why such verification is not made;

5. In all cases where depositions are taken by either method provided by law, outside of the county in which the case is for trial where books of account are competent evidence in the case, the party desiring to offer the entries of said books as evidence may cause the same to be photographed by or under the direction of the officer taking the deposition and such photographic copy when certified by such officer with his seal attached shall be attached to the deposition, and if the record shows affirmatively the preliminary proof required by subdivisions one, two, three and four of said section forty-six hundred twenty-three, such copy shall be admitted in evidence with the same force and effect as the original. [35 G. A., ch. 296, § 1.] [C. '73, § 3658; R. § 3999; C. '51, § 2406.]

Where books are not shown by the oath of the party who kept them to be books of original entry they are properly excluded. *Frick v. Kabaker*, 116–494, 90 N. W. 498.

Books of account not shown to have been made in the ordinary course of business are not admissible in establishing the items of charge. *Kossuth Co. St. Bank v. Richardson*, 132–370, 106 N. W. 923, 109 N. W. 809.

Even where the showing necessary to entitle a party to introduce books of account in evidence has not been made, they may be admissible as showing entries in the partnership account, charging a partner with knowledge of the understanding with which funds were received. *McDermott v. Hacker*, 109–239, 80 N. W. 338.

Books of account are admissible for the purpose of showing entries against the interest of the person in whose interest such books are kept. *Citizens' Nat. Bank v. Wilson*, 121–156, 96 N. W. 727.

Such evidence may be considered, although it is contradictory to the evidence of the persons authorized to make such entries. *Ibid.*

Books of account held admissible to establish the manner in which the business was carried on as bearing on the question whether a partnership existed. *In re Myers' Estate*, 111–584, 82 N. W. 961.

When books of account are received in evidence they stand in an important sense as the testimony or deposition of a witness. But the entries considered together should identify the items sought to be proven. *Kossuth County State Bank v. Richardson*, 141–738, 118 N. W. 906.

The mere matter of inconvenience will not justify the substitution of copies for the original entries in books of account. *Iowa Bus. Men's B. & L. Assn. v. Fitch*, 142–329, 120 N. W. 694.

Where a party has used a book of account to refresh his recollection, he cannot object to its being permitted to go to the jury. *Graham v. Dillon*, 144–82, 121 N. W. 47.

If a witness can testify that at or about the time a memorandum or entry was made he knew its contents and knew it to be

true, his testimony and the memorandum are both competent evidence, although the witness cannot testify to an independent recollection even after his memory has been refreshed. *Ibid.*

If the payment or loan of money constitutes in any just sense the ordinary business of the person in whose books charges for money paid are found, such books are competent evidence of payments in the ordinary course of business. *Levi v. Levi*, 156–297, 136 N. W. 696.

A ledger may be an original book of entry, although the items entered therein are taken from memorandum slips. *Ricker v. Davis*, 139 N. W. 1110.

Account slips, though not bound into a book, may be admissible as a book of accounts if they are in such form and so preserved as to identity as to carry to the mind the conclusion that the true state of the account between the parties is therein shown from the original entries. *Graham v. Work*, 141 N. W. 428.

SEC. 4625. Statute of frauds—contract in writing.

Effect of statute: The statute of frauds does not prohibit an oral contract nor make such agreement illegal because certain formalities are not complied with. It relates only to the method by which the proof thereof may be made. *Merchant v. O'Rourke*, 111–351, 82 N. W. 759.

The contract is not invalidated by reason of noncompliance with the statute. The provisions of the statute relate only to the proof. *Nebraska Bridge S. & L. Co. v. Conway*, 127–237, 103 N. W. 122.

Where a contract is one which can be evidenced only in writing, the court cannot look beyond the writing to ascertain the terms, conditions or provisions of the contract. *Allan v. Bemis*, 120–172, 94 N. W. 560.

The statute of frauds does not undertake to regulate the manner of executing contracts when made, nor does it have any concern with them after being executed. *Dorr Cattle Co. v. Des Moines Nat. Bank*, 127–153, 98 N. W. 918, 102 N. W. 836.

Where the validity of a contract is only collaterally involved the statute of frauds does not apply. *Schafer v. Whitman*, 146–64, 124 N. W. 763.

The statute does not forbid an oral contract nor render such contract void or voidable. It only forbids oral evidence of a contract which is within its provisions. *Rueber v. Negles*, 147–734, 126 N. W. 966.

An agreement to extend time for a definite period is a sufficient consideration for an agreement to pay, notwithstanding the bar of the statute of limitations, and need not be in writing. *Fitzgerald v. Flanagan*, 155–217, 135 N. W. 738.

Remedy in equity: Notwithstanding the requirement that contracts within the provisions of the statute of frauds can only be proven by written evidence, a court of equity may on parol evidence reform a contract by adding thereto provisions which have been omitted by mutual mistake and then specifically enforce the contract as thus reformed. *Butler v. Threlkeld*, 117–116, 90 N. W. 584.

Notwithstanding the provisions of the statute of frauds, equity may on parol evidence set aside a conveyance for the purpose of preventing the obtaining of an estate by fraud. *Willis v. Robertson*, 121–380, 96 N. W. 900.

A parol contract between the owner of land and another by which the latter agrees to support the former for the balance of his life in consideration that the property shall belong to the latter after the former's death is binding in equity. *Powers v. Crandall*, 136–659, 111 N. W. 1010.

Lost instrument: Parol evidence is admissible to show the terms of a lost instrument which the law requires to be in writing, for instance, a lost antenuptial contract. *In re Devoe's Estate*, 113–4, 84 N. W. 923.

What sufficient memorandum: The memorandum is sufficient if signed by the agent, duly authorized, in his own name. *Nebraska Bridge S. & L. Co. v. Conway*, 127–237, 103 N. W. 122.

A duplicate memorandum of an order by the agent to his principal to ship goods to a buyer, one copy of which is given to the buyer, is sufficient memorandum of the contract to hold the principal. *Ibid.*

It is only necessary that the contract be signed by the party to be charged. In case of a contract giving an option which the other party seeks to enforce, it is not necessary to show that the acceptance and performance of conditions were in writing. *Breen v. Mayne*, 141–399, 118 N. W. 441.

The memorandum in writing need not be delivered to the opposite party nor his agent nor one acting for him; but it is sufficient if it is signed and in any way promulgated so as to become an instrument of evidence. *Doran v. Doran*, 145–122, 123 N. W. 996.

The written memorandum of agreement must be signed by the party to be charged. *Halligan v. Frey*, 141 N. W. 944.

The mere denial of an oral agreement or a refusal to perform will not be sufficient to prove fraud; but where an oral promise to lease is made out and on the strength thereof the tenant has surrendered another lease and made valuable improvements upon the property, and a written lease is presented to him which he signs and under which he pays rents, the landlord will not be allowed to repudiate such written lease

on the ground that it has not been signed by him. *Ibid.*

How objection raised: The objection that the contract is not in writing as required by the statute of frauds must be raised by demurrer or by objection to the introduction of evidence. It is not sufficient, to justify a reversal on appeal, that the objection is raised by answer alone. *Marr v. Burlington, C. R. & N. R. Co.*, 121–117, 96 N. W. 716.

Although the statute of frauds relates to the admissibility of evidence and not to the right of action itself, nevertheless failure of the petition to allege facts taking the case out of the statute of frauds is a ground of demurrer. *Cahill v. Iowa Cent. R. Co.*, 137–577, 115 N. W. 216.

No one but the parties to an action may rely upon the statute of frauds. *Lamb v. Morrow*, 140–89, 117 N. W. 1118.

Objection to testimony of a witness that it is in contravention of the statute of frauds is waived if not made on that ground. *Kerr v. Yager*, 157– —, 138 N. W. 905.

Par. 1. Sale of personalty: Under a general denial in an action for breach of contract of sale, plaintiff must prove his contract by written evidence, or, in lieu thereof, must prove payment or delivery so as to bring the case within the exceptions of the next section. *Thompson v. Frakes*, 112–585, 84 N. W. 703.

The defense available under the statute of frauds as against the enforcement of a parol contract for the sale of personal property, held not to be defeated by evidence with regard to part performance or statements recognizing the validity of the contract. *Johnson v. Holland*, 124–157, 99 N. W. 708.

Par. 2. In consideration of marriage: An oral contract made in consideration of marriage cannot be proven by a written contract entered into between the parties after marriage which does not show that it was executed to give effect to and make of writing the previous parol antenuptial agreement. *Frazer v. Andrews*, 134–621, 112 N. W. 92.

Par. 3. Answering for debt of another: An oral promise to pay for the care of a person who is *non compos mentis* is not a contract within the statute of frauds, even though the person making the promise is not legally liable for the support. *Harlan v. Harlan*, 102–701, 72 N. W. 286.

Where a lessor without waiving his lien permitted the lessee to remove property which was subject to the lien on the oral promise of a third person that the rent should be paid, held that the promise of the third person was within the statute of frauds and that the lessor had not lost his lien. *Griffin v. Hoag*, 105–499, 75 N. W. 372.

A verbal acceptance of an order drawn on a fund is not good unless it be shown that the drawer was the owner of the fund in the hands of the drawee or acceptor at the time the order is accepted, for unless the drawee have such fund his verbal promise to pay the debt of another is within the statute of frauds: *Winburn v. Fidelity L. & B. Assn.*, 110–374, 81 N. W. 682.

The agreement to save a stakeholder harmless from the demands of one of the parties to a wager, if he will pay the amount of the wager to the promisor, is an original promise and not within the statute of frauds. *Himmelman v. Pecaut*, 133–503, 110 N. W. 919.

Where a railroad company contracted with a boarding house keeper to pay for boarding its nonunion employes, held that such contract was not to answer for the debt, default or miscarriage of another and need not be in writing. *Marr v. Burlington, C. R. & N. R. Co.*, 121–117, 96 N. W. 716.

A promise to answer for the debt of another to be within the statute of frauds must be made to the person entitled to enforce the liability assumed by the promisor. A promise to the debtor to pay his debt and thereby relieve him from the payment of it himself is not within the statute. *Merchant v. O'Rourke*, 111–351, 82 N. W. 759.

When the promise, although in form to pay the debt of another, is founded on a new consideration which passes between the parties and gives to the promisor a benefit which he did not enjoy before and would not have possessed but for the promise, it will be regarded as an original undertaking to which the statute of frauds has no application. *Carraher v. Allen*, 112–168, 83 N. W. 902.

A direct promise to pay the debt of another, made to subserve some purpose of the promisor, is not within the statute of frauds. *Williams Shoe Co. v. Gotzian*, 130–710, 107 N. W. 807.

Where the promise to answer for the debt of another is made to subserve promisor's own objects and purposes, and for a consideration to him, it is not within the statute of frauds. *Blake v. Robinson*, 129–196, 105 N. W. 401.

Whenever the main purpose of the person promising is not to answer for the debt of another, but to subserve some object of his own, the promise is not within the statute of frauds, although in form it may have the effect of extinguishing the liability of another. *Pratt v. Fishwild*, 121–642, 96 N. W. 1089.

A promise by which a promisor effects the payment of his own debt or by which he makes an indebtedness his own is not within the statute of frauds. *Senninger v. Rowley*, 138–617, 116 N. W. 695.

Evidence of an oral agreement to answer for the debt, default or miscarriage of another is inadmissible under the statute, regardless of whether acted on or not. *Regan v. Kirk*, 140–302, 118 N. W. 317.

If services are performed on the strength of the promise of a third person and no credit is extended to the person to whom the services are rendered, then the promise is original and not collateral. *Miller v. Adams*, 142–515, 119 N. W. 593.

An agreement to pay for work to be performed and also to make compensation for work already performed by another, is not a contract to pay the debt of such other person, but an original agreement, and not within the statute of frauds. *Jones v. General Construction Co.*, 150–194, 129 N. W. 830.

Where a contractor agrees to complete work on a railroad free from all liens and promises to pay for work already done for a subcontractor by one who is entitled to a lien therefor and the lien is thereupon waived, the promise of the contractor is not merely one to pay the debt of another and is not within the statute of frauds. *McDonald v. General Construction Co.*, 152–273, 132 N. W. 369.

An absolute and independent promise to pay to the promisee the amount due from a third person is not within the statute of frauds, although the original debtor is not released. If the evidence is in conflict as to whether the promise is independent or collateral, the question is for the jury. *Frohardt v. Duff*, 156–144, 135 N. W. 609.

Par. 4. Creating interest in land: A parol sale of growing trees is an executory contract, passing no title to the purchaser. A sale of growing trees, treated as a sale of an interest in realty, would be within the provision of the statute of frauds relating to the sale of an interest in realty. *Garner v. Mahoney*, 115–356, 88 N. W. 828.

An agreement with reference to the interest of joint owners in a mining venture is not within the statute of frauds as to real property. *Doyle v. Burns*, 123–488, 99 N. W. 195.

An agreement to take the assignment of an option and assume the further obligations of the vendee to the vendor is within the statute of frauds. *Esslinger v. Pascoe*, 129–86, 105 N. W. 362.

The right of the owner of a dominant estate to cast surface water upon the servient estate otherwise than in the course of nature constitutes an easement which cannot be proved by parol. *Jones v. Stover*, 131–119, 108 N. W. 112.

An oral agreement that one in possession of property shall surrender it on an adjudication against his claim in another case is within the statute of frauds. *East Omaha Land Co. v. Hansen*, 117–96, 90 N. W. 705.

In such case continuance in possession by the claimant will not take the case out of the statute under the next section. *Ibid.*

Evidence in a particular case held not sufficient to show a contract in writing which could be the subject of an action for specific performance. *Mathes v. Bell*, 121–722, 96 N. W. 1093.

The validity of transfers of real estate is to be determined by the law of the state where the property is situated. This rule is applicable not only to the form and manner of the conveyance or contract, but also to rights of the parties thereto and their capacity to contract. *Meylink v. Rhea*, 123–310, 98 N. W. 779.

Section applied as to a contract creating an interest in real property. *Gregory v. Bowlsby*, 115–327, 88 N. W. 822.

Parol trusts: An oral contract creating a trust in land is not void. If the trustee refuses to perform and the beneficiary is unable to prove the trust by written evidence, he must suffer, but if the contract is fully carried out it does not lie in the mouth of a third person to say that it is void, and therefore confers no rights. *McCormick Har. Mach. Co. v. Griffin*, 116–397, 90 N. W. 84.

Written evidence of a trust is not necessary where the trustee admits the trust or it has been fully carried out and executed. *Johnston v. Jickling*, 141–444, 119 N. W. 746.

After the execution of a trust no one who has not acquired an interest in the property which will be defeated by the execution of the trust can assert its invalidity. *Weis v. Bach*, 146–320, 125 N. W. 211.

It is not competent to show that one who has taken title apparently in his own right holds in trust for another. *Flanders v. Booge*, 146–675, 125 N. W. 661.

Parol proof of an express trust is not admissible. *Burch v. Nicholson*, 157– —, 137 N. W. 1066.

Further as to parol evidence of a trust in land, see notes to code § 2918 in this supplement.

Par. 5. Contract not to be performed within a year: Where the contract is to be performed on one side within a year and is so performed, the other party is not excused from performance, although a longer time is contemplated. *Fernald v. Gilman*, 123 Fed. 797.

The provision as to contracts not to be performed within a year relates to contracts not to be performed on either side. *Sauser v. Kearney*, 147–335, 126 N. W. 322.

Evidence of a parol lease for more than one year is as a rule inadmissible. *Halligan v. Frey*, 141 N. W. 944.

SEC. 4626. Exceptions.

Labor or money to be expended: A contract for the sale of corn to be shelled, that unfit for shelling to be thrown out, is not within the exception of the statute of frauds as to cases where labor, skill or money is necessary to be expended in producing or procuring the property. In such case the work to be done is not of a kind to change either the form or character of the thing sold. *Lewis v. Evans*, 108–296, 79 N. W. 81.

Merely preparing a crop for the market is not labor and expenses in producing or procuring it such as to take an oral contract for the sale thereof out of the statute of fraud. *Mighell v. Dougherty*, 86–480, 53 N. W. 402; *Dierson v. Petersmeyer*, 109–233, 80 N. W. 389.

A parol agreement as to the sale of a crop not yet in existence is valid. *Rueber v. Negles*, 147–734, 126 N. W. 966.

Taking possession: In order that the act of the vendee in taking possession of the property shall be such as to bring the case within the exception of the statute of frauds it must appear that the possession was taken in pursuance of the contract. *Benedict v. Bird*, 103–612, 72 N. W. 768.

The exception of the statute relating to the payment of the purchase price applies only to cases where "the purchase money or any portion thereof has been received by the vendor." *Ibid.*

To constitute such delivery of personal property as to take an oral contract for the sale thereof out of the statute of frauds it is necessary not only that the vendor act with purpose of vesting the right of possession in the vendee, but that the vendee accept with the intention of taking possession as owner. *Dierson v. Petersmeyer*, 109–233, 80 N. W. 389.

Possession taken under a contract for the transfer of an interest in real property takes such contract out of the statute of frauds. *Kitchen v. Chantland*, 130–618, 105 N. W. 367.

If one is already in possession of land under a contract of lease, his continuance in that possession will not be sufficient to support a claim of part performance under a subsequent contract of purchase. The possession, to take the contract out of the statute of frauds, must be exclusively referable to the contract. *Hutton v. Doxsee*, 116–13, 89 N. W. 79.

Taking of possession, to render valid an oral contract to convey, must be with actual or implied consent of the grantor, and by virtue of the contract. *Lowery v. Lowery*, 117–704, 89 N. W. 1118.

If defendant relies on the testimony of plaintiff to establish the taking possession of real property under a contract not in writing, the burden is on him to prove that possession was taken under such contract. *Marks v. McGookin*, 127–716, 104 N. W. 373.

One who has been in possession as tenant cannot claim to have taken possession under a contract of purchase unless he can show that, with the making of the alleged contract, his possession as tenant ceased and that possession thereafter was held as a purchaser under and by virtue of the contract. Nor will it be material as showing possession under the contract of purchase that the tenant made improvements. *Allan v. Bemis*, 120–172, 94 N. W. 560.

Under the evidence in a particular case held that there was not such payment nor taking of possession as to take a parol contract for the sale of land out of the statute of frauds. *Heddleston v. Stoner*, 128–525, 105 N. W. 56.

The statute of frauds does not apply where a vendee has taken and held possession of the property under and by virtue of the contract. *Mohn v. Mohn*, 148–288, 126 N. W. 1127.

Part performance: An oral agreement to transfer real property to another in consideration that the latter will furnish support for a dependent person, is taken out of the statute of frauds by furnishing the support as agreed and can be specifically enforced. *Harlan v. Harlan*, 102–701, 72 N. W. 286.

Part payment, or taking possession under an oral contract, will render the contract binding. *Walkley v. Clarke*, 107–451, 78 N. W. 70.

An oral agreement between husband and wife by which the husband abandons the advantage of the antenuptial contract with reference to the wife's interest in the husband's real property, in consideration of the discontinuance of a meritorious suit for divorce and the resumption of the marriage relations, is valid, notwithstanding the statute of frauds. *Fisher v. Koontz*, 110–498, 80 N. W. 551.

A promise or agreement to make a will for the transfer of an interest in land in another's favor may be taken out of the statute of frauds by the payment of a consideration. *Bird v. Jacobus*, 113–194, 84 N. W. 1062.

An oral contract for a gift of land in consideration of the support of the owner during his natural life, followed by possession and performance on the part of the donee, is not within the statute of frauds. *Soper v. Galloway*, 129–145, 105 N. W. 399.

The fact that performance is in part by the party to the contract and in part by his heir, who after his death claims to inherit, will not defeat the contract where such substituted performance has been accepted by the other party. *Ibid.*

Although performance is commenced under an oral contract to convey, if it is subsequently abandoned before completion, the contract cannot be enforced. *Eastwood v. Crane*, 125–707, 101 N. W. 481.

The surrender of possession by a tenant and abandonment of his lease constitutes a sufficient part performance to take an oral contract to convey the premises out of the statute of frauds. *Yule v. Fell*, 123–662, 99 N. W. 559.

A tender of performance will not bring an oral contract for the conveyance of land within the exception to the statute of frauds. *Ormsby v. Graham*, 123–202, 98 N. W. 724.

Contracts within the statute of frauds are not void, and if performed, or partly performed, they are to the extent of such performance taken out of the statute. *Murphy v. DeHaan*, 116–61, 89 N. W. 100.

Where the contract, although within the statute of frauds, is for labor to be performed and plaintiff has partly or wholly executed the same on his part, the terms of the contract govern as to the rate of compensation. *Ibid.*

At common law payment of the consideration for a conveyance of land was not regarded as part performance of the contract such as to take an oral agreement for the conveyance of land out of the statute of frauds. But under our statute part payment of the purchase money means the receipt of the consideration on which the contract is made, or a part thereof, in whatever form such consideration may exist. *Daily v. Minnick*, 117–563, 91 N. W. 913.

When part payment of the consideration is relied upon alone as taking the case out of the statute of frauds, the identification of the land may also rest in parol, and it is no objection to the enforcement of the contract that there is nothing in the act performed which serves to identify the land. *Ibid.*

Therefore held that parol evidence was admissible to show an agreement with the parents of a child, that in consideration of the child being named after the other party to the agreement, the latter would give the child forty acres of land, and that subsequently a particular tract of land was agreed upon as that to which the previous contract should relate. *Ibid.*

Where a party has incurred expense in preparing to perform a contract, such act constitutes a part performance, taking the case out of the statute of frauds. *De Laval Separator Co. v. Sharpless*, 142–60, 120 N. W. 657.

After performance of a contract on one side, the statute of frauds cannot be interposed as an obstacle to such contract against the other party thereto. *Chantland v. Sherman*, 148–352, 125 N. W. 871.

An oral agreement by which one party is to construct and have the right to use a way over the land of another, which agreement has been acted upon and the way constructed and used for the purpose for which it was intended, is not void because not evidenced in writing. *Arbaugh v. Alexander*, 151–552, 132 N. W. 179.

Under the provisions of the statute of frauds in another state not recognizing part performance as an exception, held that the vendee having paid a part of the consideration under the contract could not sue to recover it back so long as the vendor was ready and able to perform on his part; but if the vendor denied the making of the contract and set up the statute of frauds, the vendee might recover the amount paid in part performance. *Frey v. Stangl*, 148–522, 125 N. W. 888.

The question of whether acts have been done in part performance of a contract, there being no controversy as to the facts, is for the court. *Fallon v. Amond*, 153–504, 133 N. W. 771.

Parol evidence is admissible to prove delivery of property for the purpose of establishing a sale which under the statute of frauds would be rendered valid and effectual by such delivery. *Farmers' Sav. Bank v. Newton*, 154–49, 134 N. W. 436.

A sale of real estate in parol, accompanied with possession, is valid; and so is an oral agreement fixing a division line, where possession is taken under the contract with the knowledge of the other party. *McCoy v. Paxton*, 156–194, 135 N. W. 1091.

The satisfaction and release of a preexisting debt is a sufficient consideration for a conveyance and amounts to such payment as to take the case out of the statute of frauds. *Kerr v. Yager*, 157– —, 138 N. W. 905.

Neither the taking possession of the property by a tenant under a parol lease nor the payment of rent thereunder is such part performance as to take the case out of the statute of frauds. *Halligan v. Frey*, 141 N. W. 944.

Pleading: Where the defendant by pleading raises the objection of the statute of frauds and the plaintiff alleges facts bringing the case within an exception in the statute, the defendant does not waive his defense by failing to object to the evidence of the contract offered, before it appears whether plaintiff can establish the fact of the exception. *Benedict v. Bird*, 103–612, 72 N. W. 768.

SEC. 4627. When contract not denied in the pleadings.

An oral agreement, though within the statute of frauds, may be enforced between the parties as fully as if in writing, unless denied in the pleadings. *Frey v. Stangl*, 148–522, 125 N. W. 868.

SEC. 4628. Party made witness.

Inasmuch as an oral contract, although within the statute of frauds, may be established by the testimony of the party, a recognition by him of the contract is sufficient to make a release from its obligation operative as a consideration for a new agreement. *Merchant v. O'Rourke*, 111–351, 82 N. W. 759.

In an action to recover possession of real estate, in which defendant set up an alleged oral contract of purchase, held that defendant had not established such oral contract as to constitute a defense by the testimony of the plaintiff, where it did not appear from such testimony that the contract referred to entitled defendant to possession of the property. *Marks v. McGookin*, 127–716, 104 N. W. 373.

Where testimony of the adverse party is relied upon to take a contract out of the statute of frauds, it must be sufficient in itself. *Ibid.*

An oral agreement, evidence of which is excluded under the statute of frauds, may nevertheless be established by the testimony of the adverse party. *Frey v. Stangl*, 148–522, 125 N. W. 868.

SEC. 4630. Record or certified copy.

The loss of the original need not be shown in order to justify the reception of certified copies of the record. Proof by the party on oath, or otherwise, that the original is not within his control is sufficient. *Hall v. Cardell*, 111–206, 82 N. W. 503.

The contents of a deed or mortgage may be shown by introducing the record thereof or a certified copy of such record. *State v. Clark*, 141–297, 119 N. W. 719.

SEC. 4633. **Recording United States and state patents.** That section forty-six hundred thirty-three of the code be repealed and the following enacted in lieu thereof:

"United States and state patents for land in the state, and duly certified copies thereof from the general land office of the United States, or the state land office, that have been or may be recorded in the recorder's office of the county in which the land is situated shall be matters of record, and such record, and copies thereof, certified to by the recorder, may be received and read in evidence in all courts, with like effect as the record of other instruments, and other certified copies of original papers recorded in his office; and such patents and certified copies may be recorded without an acknowledgment." [31 G. A., ch. 159, § 1; 16 G. A., ch. 10.]

With reference to the production of an original patent to land, the provisions of this section are not applicable. *Des Moines Sav. Bank v. Kennedy*, 142–272, 120 N. W. 742.

SEC. 4635. Copies of records and entries in public offices.

Certified copies of records in a public office are entitled to the same weight as the originals. *Traer v. St. B. of Medical Examiners*, 106–559, 76 N. W. 833.

The statutory rule that duly certified copies of records belonging to any public office are admissible in evidence in all cases as of equal credibility with the original record is a common law rule generally recognized. *Austin v. Whitcher*, 135–733, 110 N. W. 910.

In a particular case, held that it was sufficiently shown that deeds and plat, the records of which were introduced in evidence, did not belong to the party introducing such records and were not within his control. *Independent School Dist. v. Hewitt*, 105–663, 75 N. W. 497.

A duly certified copy of the field notes of the government survey of land kept in the office of the county auditor, when properly identified by him, is admissible in evidence. *Keller v. Harrison*, 139–383, 116 N. W. 327.

Certified copies of application and affidavit in establishing a homestead on government land held admissible in evidence. *Des Moines Sav. Bank v. Kennedy*, 142–272, 120 N. W. 742.

The town recorder being the official custodian of the town records, his certificate as to the correctness of the records indicated by his attestation is sufficient. *Sawyer v. Lorenzen*, 149–87, 127 N. W. 1091.

SEC. 4638. Officer to give copies of records.

No duty is imposed upon the officer having charge of the records to make a search thereof and give a certificate of the absence of any record of a particular fact or proceeding. *In re Estate of Colton*, 129-542, 105 N. W. 1008; *State v. Kendig*, 133-164, 110 N. W. 463.

SEC. 4644. Judicial record—of this state or federal court.

A judgment may be proved by the record book or a certified transcript thereof. *Baxter v. Pritchard*, 113-422, 85 N. W. 633.

The absence of any record of a divorce proceeding is not to be established by a certificate of the clerk of the court, but by testimony of the officer or other competent person that on examination of the records no such proceeding is shown. *In re Estate of Colton*, 129-542, 105 N. W. 1008; and see *State v. Kendig*, 133-164, 110 N. W. 463.

SEC. 4645. Of another state.

The method provided by the federal statute for proving judgments or records of foreign states is not exclusive and proof complying with the provisions of the state statute on the subject is sufficient. *Tomlin v. Woods*, 125-367, 101 N. W. 135.

The rules of evidence prescribed by the statutes of this state as to proof of a foreign judgment will govern as to the sufficiency of the certification of such judgment. *Morrison Mfg. Co. v. Rimerman*, 127-719, 104 N. W. 279.

The certification by the clerk on a separate sheet of paper attached to the copy of the judgment is sufficient. *Woodworth v. McKee*, 126-714, 102 N. W. 777.

While the state cannot add additional requirements to the federal statute as to the method of proving the judgment of a court in another state, it may provide for the admission of such records and evidence on a showing which would not be sufficient under the federal statute. *Sullivan v. Kenney*, 148-361, 126 N. W. 349.

SEC. 4648. Presumption of regularity.

A situation will not be presumed, in the absence of proof, to defeat the acts of an officer apparently clothed with authority in discharging duties imposed upon him by statute. *Miller Brewing Co. v. Capital Ins. Co.*, 111-590, 82 N. W. 1023.

When an inferior tribunal is authorized to determine a question of fact, its finding is an adjudication which cannot be impeached collaterally. *Oliver v. Monona County*, 117-43, 90 N. W. 510.

A finding necessarily involved in the adjudication of an inferior tribunal will be presumed to exist, although not appearing of record, if there is no requirement that a record thereof be made. *Ibid.*

A presumption of truth attaches to the record of an officer showing the filing of a paper authorized to be filed in his office. *McConkie v. District Court*, 117-334, 90 N. W. 716.

To support a judgment of a justice of the peace rendered in a township adjoining that in which the suit should properly have been commenced, it will be presumed that there was no justice of the peace competent to act in the township in which the suit should have been instituted. (See code § 4482.) *Jonas v. Weires*, 134-47, 111 N. W. 453.

Section applied. *Thompson v. Thompson*, 117-65, 90 N. W. 493.

The jurisdiction of a justice of peace having once been shown, there is a presumption that the subsequent proceedings were regular unless the alleged irregularity appears on the face of the record or there is an omission to make of record that which the law requires to be so entered. *Gilman v. Weiser*, 140-554, 118 N. W. 774.

This section gives the same force and effect to proceedings of tribunals of inferior and limited jurisdiction as applies to courts of general jurisdiction; that is to say, jurisdictional facts need not be shown by the record but will be assumed in support of the findings. *In re Appeal of Head*, 141-651, 118 N. W. 884.

SEC. 4649. Executive acts.

A proclamation by the governor may be proved by the record thereof in the office of the secretary of state. *McPeek v. Western U. Tel. Co.*, 107-356, 78 N. W. 63.

SEC. 4650. Proceedings of legislature.

There may be cases in which statutes of another state when relied upon must be pleaded, but where they are relied upon merely as evidence of ultimate facts it is not necessary that they be pleaded directly, the pleading of the fact being sufficient. *Green v. Equitable Mut. L. & End. Assn.*, 105-628, 75 N. W. 635.

SEC. 4651. Printed copies of the statutes.

A book entitled "The Laws" of a state and bearing a certificate of the secretary of state that the volume was printed under his direction and that the certificate was made in conformity with the laws of the state, is competent evidence of such laws, though having the imprint of a private publisher, as it purports to have been published by state authority. *Summitt v. U. S. Life Ins. Co.*, 123-681, 99 N. W. 563.

A party relying upon the statutes of another state must plead and prove them as any other issuable fact. The courts of this state cannot take judicial notice of them. *Varner v. Interstate Exchange*, 138-201, 115 N. W. 1111.

In the absence of a showing to the contrary, it must be assumed that the statutes and laws of another state on a particular subject are the same as those of this state. *Condit v. Johnson*, 139 N. W. 477.

In the absence of pleading and proof, it must be presumed that the law of another jurisdiction is the same as that of this state. *Lefebure v. American Express Co.*, 139 N. W. 1117.

In the absence of any evidence as to the laws of another state, it will be presumed that they are the same as those of this state. *Smith v. Bloom*, 141 N. W. 32.

SEC. 4652. Written law—unwritten law.

The statute authorizes proof of the unwritten law of foreign countries by parol, but in the absence of such proof it will be presumed to be the same as the law of this state; and held that proof showing the civil law to be in force in Mexico was not sufficient to establish the meaning of the term "adult" in Mexico as different from the meaning under the common law, there being no proof as to the statutory law of Mexico on the subject. *Banco De Sonora v. Bankers' Mut. Cas. Co.*, 124-576, 100 N. W. 532.

The unwritten law and nonstatutory rules and approved methods of practice of another state may be proved as facts by parol evidence, or by reports of cases in the courts of such state. *Varner v. Interstate Exchange*, 138-201, 115 N. W. 1111.

SEC. 4654. Books and papers—how procured.

This section and the following authorize a rule of court for the production of books and papers only when it is made to appear by the petition therefor that the same are material to the just determination of the case in which the application is made. But the court has jurisdiction, upon proper application, to make such rule, and the exercise of its discretion in the matter cannot be reviewed in a certiorari proceeding. *Iowa Loan & Trust Co. v. District Court*, 149-66, 127 N. W. 1114.

The statute makes no distinction between the books and papers belonging to or in the possession of a party to the suit and those belonging to a stranger. *Ibid.*

A party cannot ask or compel the examination of immaterial books and papers, nor such as tend only to disprove his claim. The evident purpose and design of the statute is to furnish a litigant a speedy and summary way by which, under the order of the court, he may obtain written evidence material to his action or defense which is in the possession and control of his adversary. *Grand Lodge v. Webster County Dist. Court*, 150-398, 130 N. W. 117.

SEC. 4655. Petition—rule.

Error of the court in ordering the production of books and papers which are privileged may be reviewed on appeal and furnishes no ground for a proceeding by certiorari to annul a decision punishing the witness for contempt in refusing to comply with such order. *Finn v. Winneshiek Dist. Court*, 145-157, 123 N. W. 1066.

The application should show that the books and papers referred to will constitute material evidence in support of the applicant's action or defense. But it is not necessary to designate with particularity the documents referred to, where exact knowledge of their contents cannot be possessed by the applicant. *Grand Lodge v. Webster County Dist. Court*, 150-398, 130 N. W. 117.

SEC. 4658. Subpoenas for witnesses.

Pendency of some proceeding in a court is necessary to warrant the issue of process for witnesses. *Chambers v. Oehler*, 107-155, 77 N. W. 853.

SEC. 4661. Witness fees.

When a witness is called and sworn and has thus placed himself under and subject to the order and direction of the court, he is entitled to fees for his attendance, but where a witness is present without being subpoenaed, solely at the risk of a party,

and is not sworn, the party who calls him is alone responsible for his fees. Generally speaking, a witness is one who gives evidence in a court. *Fisher v. Burlington, C. R. & N. R. Co.*, 104–588, 73 N. W. 1070.

Witnesses who are not subpoenaed are not entitled to mileage. *Ibid.*

Costs may be taxed, on proper showing, for witnesses who attend without being subpoenaed or used on the trial, but, in the absence of proof as to the distance traveled by them in attending the trial, no mileage can be taxed. *Duree v. Chicago, M. & St. P. R. Co.*, 118–640, 92 N. W. 890.

Where the personal presence of a witness is necessary in a criminal case, the county is liable for his mileage from a point without the state. *Climie v. Appanoose County*, 125–292, 101 N. W. 98.

A witness may have mileage from a point without the state within the discretion of the trial court. *Perry v. Howe Co-op. Creamery Co.*, 125–415, 101 N. W. 150.

The mileage of witnesses whose personal presence at the trial is necessary may be taxed although they have come from other states. *Casley v. Mitchell*, 121–96, 96 N. W. 725.

It is not necessary where prosecutions are dismissed that formal judgments for costs against the county be entered. Such a judgment if entered could not be enforced save by presenting claims for the fees taxed to the board of supervisors of the county for allowance and if allowance should be refused, by suing the county therefor. *McGuire v. Iowa County*, 133–636, 111 N. W. 34.

The taxation of witness fees in the district court in criminal cases where there is no conviction is conclusive as to the liability of the county for such fees. But the same rule does not obtain in the justice's court with reference to fees of justices and constables which are to be audited and paid out of the county treasury. *Ibid.*

Where the prosecution is dismissed owing to the failure of the justice to acquire jurisdiction over the accused, a constable is not entitled to his fees for service of process, nor the justice to his fee for entering judgment. *Ibid.*

A county surveyor, called as an expert witness to state the results of his survey, held to be entitled to compensation as an expert. *Keller v. Harrison*, 151–320, 128 N. W. 851, 131 N. W. 53.

SEC. 4662. Fees in advance.

A witness for defendant in a criminal prosecution is not bound to attend without prepayment of fees, unless the subpoena is issued under the order of the judge as provided in code § 1298. *State v. Keenan*, 111–286, 82 N. W. 792.

SEC. 4665. Proceedings for contempt.

In a proceeding to punish for contempt in disobedience of a subpoena, the court may receive evidence as to the service of the subpoena apart from the formal return provided for by statute; and if it appears that the person against whom the subpoena was directed has waived the reading, he may be punished for contempt as though the formal service had been as prescribed. *Coutts v. District Court*, 149–297, 128 N. W. 362.

SEC. 4667. When party fails to obey subpoena.

The action of the court in ordering a continuance on account of the failure of a witness to appear cannot be reviewed by certiorari. *Coutts v. District Court*, 149–297, 128 N. W. 362.

SEC. 4668. Pleading taken true, or continuance.

In the absence of a showing of want of personal knowledge, a request for judgment on account of failure of the opposite party to produce books and papers as required by statute, by order of the court, should not be granted. *Devier v. Economic L Assn.*, 106–682, 77 N. W. 454.

SEC. 4673. Affidavits—before whom made.

A mere jurat annexed to an official certificate is not an affidavit. *McGuire v. Iowa County*, 133–636, 111 N. W. 34.

The signature of the affidavit is necessary to the validity of the affidavit. *Magney v. Roberts*, 129–218, 105 N. W. 430.

In a proceeding before the board of medical examiners for revocation of a license, affidavits may be received as evidence. *Traer v. St. B. of Medical Examiners*, 106–559, 76 N. W. 833.

Where the affidavit of a juror in support of a motion for new trial is desired, application to an officer competent to take deposition may be made. It is not proper to call the juror as a witness on the motion for a new trial instead of procuring his affidavit. *Harrison v. Ayrshire*, 123–528, 99 N. W. 132.

SEC. 4675. How compelled.

A justice of the peace cannot issue a subpoena for the purpose of requiring the making of an affidavit where no proceeding is pending before him. *Chambers v. Oehler*, 107–155, 77 N. W. 853.

SEC. 4678. Affiant produced.

Affidavits are not receivable to prove a fact in issue in an action. *McCombs v. Travelers' Ins. Co.*, 141 N. W. 327.

SEC. 4680. Publications—how proved.

Section applied. *McConaughy v. Wilsey*, 115–589, 88 N. W. 1101.

SEC. 4681. Proof of serving or posting notices.

The sheriff may testify as to the fact of service which might have been proven by his verified affidavits. *Markley v. Western Union Tel. Co.*, 144–105, 122 N. W. 136.

SEC. 4684. Depositions—when taken and by whom.

Where depositions are taken upon notice, such notice must contain the name of the witness. *Harlan v. Richmond*, 108–161, 78 N. W. 809.

A deposition taken for use in procuring a preliminary injunction under the intoxicating liquor law may be used on the final hearing in such case. *Tinning v. Mumm*, 146–263, 125 N. W. 203.

While a party is entitled in an equity case to insist on the right to take his evidence by depositions so that the case cannot be tried at the appearance term, this consideration has no application to a subsequent term at which the case is set for trial. *Wahlberg v. Buchwald Lumber Co.*, 153–618, 133 N. W. 1055.

Where a court has ordered a case tried on depositions it has inherent power to order witnesses to appear before a commissioner and give any testimony which either party deems material to the issues to be tried. Error in such proceedings in imposing a punishment for contempt for refusal to answer immaterial questions is reviewable on appeal and not by certiorari. *Finn v. Winneshiek Dist. Court*, 145–157, 123 N. W. 1066.

SEC. 4688. Not on election day or holiday, etc.

Legal holidays in code § 3541 relate to appearance in an action and those in code § 3053 relate to presentation and protest of negotiable paper. *Brennan v. Roberts*, 125–615, 101 N. W. 460.

The fact that depositions cannot be taken during the term of the court without express order of court is a sufficient ground for asking a continuance. *Husted v. Williams*, 126–634, 102 N. W. 519.

Where the court fixes a date for the taking of depositions of witnesses whose attendance has been anticipated but who are prevented from being present, no further notice of taking the deposition is required. *State v. Mosher*, 128–82, 103 N. W. 105.

SEC. 4689. On commission—notice—interrogatories.

In a proceeding for the probate of a will, the notice by the proponent as to the taking of depositions may be given to one who has filed objections and who is the chief legatee or devisee under the will. *In re Estate of Jones*, 130–177, 106 N. W. 610.

SEC. 4700. Certificate.

A party to an action may have the right to demand the production of an original instrument which his adversary seeks to prove, notwithstanding the fact that a copy of it is attached to a deposition introduced in evidence. *Ruthven v. Clarke*, 109–25, 79 N. W. 454.

SEC. 4702. Taking in shorthand.

When depositions are taken in shorthand under statutory provisions, the notes may be signed by the witness, after being read over to him, and it is not necessary that the witness sign or swear to the translation of the notes. *Slocum v. Brown*, 105–209, 74 N. W. 936.

SEC. 4705. Transmission.

Failure to file the deposition with the clerk within the time prescribed is not sufficient ground for rejecting it if when offered in evidence it appears that the objecting party has had sufficient notice of the filing so that no prejudice has arisen by the failure to file in time. *Ferguson v. Lederer*, 128–286, 103 N. W. 794.

SEC. 4707. Opened—custody.

Depositions, although not used by the party taking them, are a part of the record, and if removed by him without leave may be required to be returned. *Howe v. Mutual Reserve Fund L. Assn.*, 115–285, 88 N. W. 338.

Where a deposition has been read to the jury without objection, the court may properly disregard an objection urged as ground for withdrawing it after argument to the jury has begun. *McClure v. Great Western Acc. Assn.*, 141–350, 118 N. W. 269.

SEC. 4708. Unimportant deviations.

A failure to file the deposition within the time prescribed by statute is not a reason for rejecting it when offered, if the objecting party has had sufficient notice of its filing to obviate any possible prejudice. *Ferguson v. Lederer*, 128–286, 103 N. W. 794.

Unimportant deviations from the statutory directions as to the method of taking depositions are not sufficient to require their exclusion where no substantial prejudice can result to the opposite party in view of corrections and amendments which might be secured. *Bradley v. Hufferd*, 138–611, 116 N. W. 814.

SEC. 4709. Deposition to show reason for taking.

Answers called for by interrogatories propounded in the pleadings of the opposite party may be introduced in behalf of the party in whose favor the answers are given only as a deposition, and therefore are subject to the objection that the witness is present in court and able to testify, or that the answers are given upon information of others. *Beem v. Farrell*, 135–670, 113 N. W. 509.

A deposition having been taken on proper notice without objection may be used on the trial unless the witness is in court. *Moore v. Fryman*, 154–534, 134 N. W. 534.

SEC. 4711. Notice of filing.

Failure to comply with the provisions of this section is waived by allowing the deposition to be read to the jury without objection. *McClure v. Great Western Acc. Assn.*, 141–350, 118 N. W. 269.

SEC. 4712. Exceptions.

A party cannot be permitted to pick from a deposition taken at his instance those portions favorable to himself and omit the balance. He should either read all of that which is pertinent to the issues, or none. When the deposition is offered by the opposite party, such parts may be received as relate to any distinct transaction, but must include all said on the particular subject. It follows that after the deposition has been introduced by the party taking it he will not be permitted to withdraw a part, such as the cross-examination, without withdrawing the entire deposition, nor will he be allowed to withdraw the whole for the purpose of rereading a part only. *Walkley v. Clarke*, 107–451, 78 N. W. 70.

Where a party offered to read parts of certain depositions, and an objection thereto on the ground that the whole deposition must be introduced was overruled, held that the error, if any, was not ground of reversal, as it appeared that the other portions of the depositions were wholly immaterial and inadmissible, and the objecting party had the opportunity of introducing the other portions of the depositions, had he desired to do so. *Alexander v. Grand Lodge A. O. U. W.*, 119–519, 93 N. W. 508.

Under this section secondary evidence is not to be deemed objectionable as incompetent. *Matthews v. Luers Drug Co.*, 110–231, 81 N. W. 464.

The objection that interrogatories are not proper cross-examination and are incompetent, irrelevant and immaterial, and that the witness had not qualified himself to express the opinions asked for in all the interrogatories, should be overruled when not made before the case is reached for trial. *Cathcart v. Rogers*, 115–30, 87 N. W. 738.

The general objection that no foundation has been laid for the introduction of the deposition does not make it necessary to introduce in evidence the certificate under which it was taken. *Krause v. Redman*, 134–629, 112 N. W. 91.

If depositions are filed in the case during term time, a motion to suppress them is too late if not filed within three days as required by the statute. *Casley v. Mitchell*, 121–96, 96 N. W. 725.

Unless exceptions are taken as required by statute, the objection to a deposition that the notice was insufficient cannot be considered. *Ostenson v. Severson*, 126–197, 101 N. W. 789.

Where the entire deposition is subsequently placed in evidence, any objection to the use of a part of it is obviated. *Farmers & Mer. Bank v. Wood*, 143–635, 118 N. W. 282, 120 N. W. 625.

Where one party has taken the deposition of an opposing party, he may read such portion as contains alleged admissions without being obliged to introduce the entire deposition, leaving it to the other party to introduce the remainder if he sees fit. *Ibid.*

A motion to suppress depositions not made in proper time will not be considered. *Tinning v. Mumm*, 146–263, 125 N. W. 203.

A motion to suppress a deposition must be made within the time provided by statute therefor. *Frey v. Stangl*, 148–522, 125 N. W. 868.

This section recognizes the right to suppress depositions but does not state the grounds therefor, save that it must be for some other cause than incompetency, irrelevancy or immateriality. Failure of a witness to respond to cross-interrogatories is a sufficient ground for the suppression of a deposition. *Carpenter v. Modern Woodmen*, 142 N. W. 411.

PART FOURTH.

CODE OF CRIMINAL PROCEDURE.

TITLE XXIV.

OF CRIMES AND PUNISHMENTS.

CHAPTER 2.

OF OFFENSES AGAINST THE LIVES AND PERSONS OF INDIVIDUALS.

SECTION 4727. Murder.

Indictment: Under an indictment charging murder by drugs or poison in different counts, held that it was not error to receive evidence as to the administration of a particular poison not specifically described in either of the counts without requiring an election at the time as to which count should be relied upon. *State v. Thomas*, 135–717, 109 N. W. 900.

An indictment for killing a person named is not insufficient because it appears on the introduction of the evidence that the person named was in fact an unnamed bastard, the name given it by the grand jury being a combination of the names of the parents. *State v. Cunningham*, 111–233, 82 N. W. 775.

An indictment charging the wrecking of a train for the purpose of robbery and the death of a passenger is not sufficient to charge murder, unless some connection is alleged between the act and the result. *State v. Von Kutzleben*, 136–89, 113 N. W. 484.

In an indictment for murder, it is sufficient to charge the killing as with malice aforethought. The charge that defendant did kill the deceased is an allegation of a fact and not a conclusion. *State v. Rankin*, 150–701, 130 N. W. 732.

Under an indictment charging murder by a blow inflicted with some blunt instrument, there may be a conviction although the jury might fail to find that a blunt instrument was used. *State v. Adams*, 155–660, 136 N. W. 1051.

Intent to kill—express malice: The unlawful administering of poison with bad motive or intent constitutes murder if death ensues, but it is immaterial whether or not there is a specific intent to kill, and an indictment charging death caused in such manner is not defective for failure to allege such specific intent to kill. *State v. Van Tassel*, 103–6, 72 N. W. 497.

The allegation of a specific intent to kill is unnecessary where the crime is charged to have been committed by the administration of poison. *State v. Robinson*, 126–69, 101 N. W. 634; *State v. Thomas*, 135–717, 109 N. W. 900.

An indictment for murder, charging a wilful, deliberate and premeditated assault with a loaded revolver, but leaving it to inference whether or not the assault was made with specific intent to kill, or the revolver was loaded and charged with specific intent to kill, is not sufficient. *State v. Linhoff*, 121–632, 97 N. W. 77.

While the omission to specifically describe malice aforethought in a prosecution for murder may not necessarily be fatal, held that in a particular case a comprehensive definition was not only proper but important to a fair understanding of the nature of the crime on the part of the jury. *State v. Von Kutzleben*, 136–89, 113 N. W. 484.

Express malice may be shown by the language of the defendant and malice may be presumed from the killing. *State v. Klute*, 140 N. W. 864.

Deliberate killing in pursuance of a previously formed design and with a feeling of hostility, revenge and the like, constitutes presumptive evidence of malice. Such facts show express malice. *State v. Wilson*, 141 N. W. 337.

Intent to kill another than the victim: Where a shot is fired at one person with such intent and deliberation and premeditation that death of the assailed caused thereby would be murder in the first degree, the unintended killing of another by such shot is murder in the same degree. *State v. Mathews*, 133–398, 109 N. W. 616.

In a prosecution for murder in the first degree the criminality of defendant's act in shooting another person than the one intended to be injured may be determined with reference to his conduct toward the person whom he intended to injure. *State v. Williams*, 122–115, 97 N. W. 992.

If the purpose of plaintiff is to injure or kill someone, it is immaterial that a mistake was made in the identity of the person actually assaulted. *State v. Dennis*, 119–688, 94 N. W. 235.

Intoxication: Evidence as to the intoxication of defendant should be considered as bearing upon the question as to the degree of the offense. *State v. Williams*, 122–115, 97 N. W. 992.

Evidence of intoxication is admissible as bearing on the question of whether defendant was capable of forming an intent to assist another in an assault resulting in homicide. *State v. Dorland*, 103–168, 72 N. W. 492.

Intoxication may be shown to negative felonious intent, or for the purpose of reducing the degree of homicide, but it is not generally an excuse for an overt act. *State v. Roan*, 122–136, 97 N. W. 997.

Malice inferred: From the mere fact of killing, the inference of malice arises, the burden being on the prosecution to raise it to murder in the first degree, and on the defense to reduce it to manslaughter by evidence tending to show legal excuse, justification or extenuation. *State v. Hayden*, 131–1, 107 N. W. 929.

While a killing in anger may be without malice, yet anger or ill will or both often do inspire and characterize malice which leads to murderous violence and it is not error to instruct that when a wanton, wicked, cruel or revengeful act is shown, the inference or implication may be drawn that the person doing such act was actuated by malice. *State v. Baker*, 157– —, 135 N. W. 1097, 138 N. W. 841.

Cause of death: If the injuries inflicted by the defendant contributed to produce a diseased condition from which death resulted, the defendant is criminally responsible for the resulting death, if the acts were criminal. *State v. Wood*, 112–411, 84 N. W. 520.

It is not competent in a prosecution for murder to go into the question whether some particular form of surgical operation might have saved the life of deceased for whose death, caused by a wound, defendant is on trial, in the absence of evidence tending to indicate any other cause of death than that of the wound inflicted by the defendant. *State v. Seery*, 129–259, 105 N. W. 511.

One who by his criminal conduct aggravates the diseased condition of his victim and causes death sooner than it would otherwise have occurred is responsible for the death thus resulting. *State v. Baldes*, 133–158, 110 N. W. 440.

Where death follows an injury without other independent intervening cause calculated to produce the death of the injured person had he not been injured by the wrongful act of accused, proof of lack of proper treatment which might have saved or prolonged his life cannot be shown. *State v. Pell*, 140–655, 119 N. W. 154.

Evidence is not admissible for the purpose of showing that the wound inflicted was not necessarily fatal. *State v. Brumo*, 153–7, 132 N. W. 817.

Deadly weapon: The question whether the weapon used in inflicting an injury resulting in death is a deadly weapon depends on the testimony, and is a question for the jury. *State v. Seery*, 129–259, 105 N. W. 511.

In the application of the rule as to the presumption arising from the use of a deadly weapon in a deadly manner, an ordinary penknife may be a deadly weapon. *State v. Roan*, 122–136, 97 N. W. 997.

Where an assault with a deadly weapon is made in such a manner that the probable result will be to cause death, the law will presume that such a result was intended. *State v. Dillingham*, 143–282, 121 N. W. 1074.

Aiding and abetting: One may be convicted of the crime of murder in aiding and abetting the person who makes a felonious assault on another, causing death. *State v. Cobley*, 128–114, 103 N. W. 99.

Justification: To constitute justification for the use of force by an officer in effecting an arrest, it is not necessary to show absolute necessity. The law requires

no more than that the officer, in what he does, employs no more force in effecting the arrest than to him, acting as an ordinarily prudent person, seems reasonable and apparently necessary. *State v. Phillips*, 119–652, 94 N. W. 229.

If the officer, using no more force than appears to him to be reasonably necessary, causes the death of the person arrested, and if the arrest is for a misdemeanor and he does not employ a deadly weapon in a deadly manner, but death results without the use of means intended or reasonably calculated to cause death, the death resulting may be excusable as accidental. *Ibid.*

An officer is not justified in killing one who is guilty of a misdemeanor only in order to effectuate his arrest or to prevent his escape after arrest. To this rule there are some exceptions as in case of riot, mob violence, etc. *State v. Smith*, 127–534, 103 N. W. 944.

In arresting or resisting the escape of one who has committed a felony the officer may oppose force to force and if there be no other reasonably apparent method for effecting the arrest or preventing the escape of the felon, the officer may, if he has performed his duties in other respects, take the life of the offender or one who is seeking to rescue him. *Ibid.*

Self-defense: Where one unlawfully attacks another, the person attacked has the right to protect himself against such attack and to save himself from all harm, and is not bound to draw nice calculations from appearances. He may pursue his adversary until he finds himself out of danger. *State v. Linhoff*, 121–632, 97 N. W. 77.

An instruction that if the person attacked continued to shoot under the influence of heat of blood and passion caused by the assault he would only be guilty of manslaughter, held erroneous where it did not appear whether the shot which inflicted the fatal wound was fired before the assailant retreated. *Ibid.*

One person may ask another for assistance in ejecting from his house one who is wrongfully there, and the person thus threatened with ejectment has not the right to resist proper force applied for that purpose. *State v. Roan*, 122–136, 97 N. W. 997.

While a person assaulted may not, under the plea of self-defense, justify the taking of human life, if it reasonably appears that he could have avoided such necessity by retreat, this principle has no application to a case where one is wrongfully assaulted and repels force by the use of like force. The extent to which he may go is to be measured by the character of the assault. *State v. Evenson*, 122–88, 97 N. W. 979.

There is no duty to retreat where one is assaulted with a deadly weapon on his own premises; but he may repel the attack as appears to him reasonably necessary under the circumstances. *State v. Bennett*, 128–713, 105 N. W. 324.

Where parties engage in mutual combat and one of them, without withdrawing, makes use of a deadly weapon in killing the other, the claim that he acted in self-defense in so doing is not available to him. *State v. Whitnah*, 129–211, 105 N. W. 432.

Threats by a third person in the absence of proof of conspiracy between such person and the deceased are not admissible as tending to support the claim of self-defense. *State v. Mitchell*, 130–697, 107 N. W. 804.

Evidence tending to show reasonable apprehension of danger on the part of defendant relying upon self-defense should be received. *State v. Evans*, 122–174, 97 N. W. 1008.

In determining the reasonableness of the act of defendant in killing another in assumed self-defense, the fact that he is naturally a nervous and timid man cannot be taken into consideration. *State v. Usher*, 136–606, 111 N. W. 811.

Intoxication cannot be taken into account in determining whether a person in that condition is likely to believe himself to be in danger for reasons that might not be considered sufficient to create a reasonable apprehension of danger in the mind of a sober man. *State v. Roan*, 122–136, 97 N. W. 997.

Where there is evidence such as to raise a question of self-defense, the defendant is entitled to show the character of the deceased as to quarrelsomeness or violence under exceptional circumstances, similar to those existing at the time of the encounter. *State v. Hunter*, 118–686, 92 N. W. 872.

Where in a prosecution for murder there is evidence raising the question whether defendant acted in self-defense, and it is therefore important to determine which party made the first assault upon the other, the defendant may show not only the reputation for quarrelsomeness of the deceased, although not known to him at the time, but also specific acts of deceased showing his violent, reckless or quarrelsome disposition immediately preceding the encounter, although such acts were not known to defendant at the time of the encounter. *State v. Beird*, 118–474, 92 N. W. 694.

Although in a prosecution for murder committed during an encounter, in which the defendant claims that he was acting in self-defense, the general reputation of deceased for quarrelsomeness may be shown, it is not competent to show particular conduct of deceased with reference to transactions at a remote time and at a different

place. *State v. Sale*, 119–1, 92 N. W. 680, 95 N. W. 193.

Where the killing is admitted, but self-defense is relied on in justification, the previous relations of the parties may be inquired into as bearing upon the question as to who was the aggressor in the affray, and the mental attitude of the defendant when he committed the act. But this rule does not permit an inquiry into the specific details of a previous affray. *State v. Blee*, 133–725, 111 N. W. 19.

Where it is not claimed that the defendant was acting in defense of his possession of property, it is immaterial whether the person killed was a trespasser. *Ibid.*

It is not error to fail to instruct with regard to self-defense, where there is no evidence on which the jury can find that the defendant acted in self-defense. *State v. Seery*, 129–259, 105 N. W. 511.

Under the facts of a particular case, held that defendant had not been so pressed by his assailant as to be justified in using a pocketknife in such a way as to be likely to cause death. *State v. Copeland*, 106–102, 76 N. W. 522.

Where one is assailed on his own premises he is under no obligation to retreat and may be justified in standing his ground against an assailant. *State v. Rutledge*, 135–581, 113 N. W. 461.

Defendant relying on self-defense in a prosecution for murder should be allowed to show that deceased was a dangerous man who would use weapons when angry or engaged in a difficulty, and also to show his own character as of being a quiet and peaceable citizen. *Ibid.*

By admitting the act of killing and relying on self-defense, the defendant cannot render inadmissible the testimony as to the nature and circumstances of the transaction itself. *State v. Lewis*, 139–405, 116 N. W. 606.

Where the jury is in general correctly instructed as to self-defense, the defendant cannot complain that the instructions do not cover every peculiar circumstance relied upon to show such self-defense when no instructions were asked by the defendant calling the court's attention to the peculiar phase of the evidence which the defendant wished to have emphasized. *State v. Baker*, 143–224, 121 N. W. 1028.

The question of defendant's reasonable belief of imminent danger is for the jury. *State v. Clayton*, 145–596, 124 N. W. 605.

The jury should be instructed that it must be satisfied beyond a reasonable doubt that the defendant was not justified in using a deadly weapon in self-defense where the question of justifiable self-defense is raised by the evidence. *State v. Butler*, 146–285, 125 N. W. 196.

The general rule is that the assailed is bound to retreat if it appears to him as a reasonable man that he may do so in safety. The exception in case of the dwelling house, if there is such exception, is not applicable to a house in which the person assailed is a mere boarder. *State v. Dyer*, 147–217, 124 N. W. 629.

One who has armed himself for an anticipated encounter cannot rely on self-defense or provocation. *State v. Watkins*, 147–566, 126 N. W. 691.

In a particular case, held that it was not error to instruct as to self-defense, the jury having been properly directed not to convict unless it should find that the defendant was the person who committed the homicide. *State v. Sloan*, 149–469, 128 N. W. 842.

Instructions as to self-defense in a particular case held not to be erroneous. *State v. Thomas*, 151–572, 132 N. W. 51.

One who is the aggressor in a conflict resulting in the death of the other party to such conflict cannot justify on the ground of self-defense. *State v. Chocklett*, 155–511, 136 N. W. 534.

The right of self-defense includes the right to kill under certain circumstances, and it is not erroneous to so instruct the jury in a case where the defendant relies upon self-defense as a justification for taking the life of his assailant. *State v. Baker*, 157– —, 135 N. W. 1097, 138 N. W. 841.

A person assaulted is not obliged to retire or turn away at the risk of a vicious assault from one who is in fact armed, and instead of retiring from the conflict is simply moving about seeking an opening to rush in and wound or kill the person whom he has assaulted. *Ibid.*

In a particular case held that the evidence was sufficient to sustain a conviction for murder as against the claim that the killing was in self-defense. *Ibid.*

Where it appears that the defendant was throughout the aggressor in the conflict resulting in the death of deceased, held not reversible error to instruct as to defendant's good-faith withdrawal from the affray and notice to the deceased of such withdrawal. *State v. Young*, 157– —, 138 N. W. 871.

Particular conduct of the deceased at a time remote from the killing and not communicated to the defendant is not admissible. The quarrelsome disposition of the deceased, when admissible, must be shown by his general reputation. *State v. Buford*, 139 N. W. 464.

Where there is no evidence to support the contention that the killing was in self-defense, it is not error to refuse to instruct the jury as to the effect of acting in self-defense. *State v. Kilduff*, 141 N. W. 962.

If, after the defendant has retreated, he returns with the intention of provoking or bringing on a quarrel, he cannot claim to have acted in self-defense. *State v. McCaskill*, 142 N. W. 445.

Where there is evidence in a prosecution for murder that the deceased was a quarrelsome man of violent temper and disposition, as bearing upon the question of whether he was the aggressor in the difficulty resulting in his death, it is error to instruct the jury that general reputation as to quarrelsomeness cannot be shown by specific instances of quarrels or that bad reputation for quarrelsomeness cannot be shown by proof of frequent quarrels unless it appears that the deceased was the aggressor in such quarrels. Frequent disagreements may fairly be considered as tending to show a man to be contentious or quarrelsome. *Ibid.*

Burden of proving: Self-defense is not an affirmative matter to be established by defendant, but if there is any evidence tending to show the defendant to have acted in self-defense such evidence relates to the question of whether there was any crime committed, and the burden of proof is therefore upon the prosecution to make out the commission of the crime beyond a reasonable doubt, the evidence tending to show self-defense being taken into consideration. *State v. Sharp*, 127–526, 103 N. W. 770.

An instruction asked on behalf of the defendant to the effect that the burden is on the state to show that the defendant was not acting in self-defense should be given if not covered by the instructions given by the court, provided there is any evidence tending to show self-defense. *State v. Usher*, 126–287, 102 N. W. 101.

The burden is upon the state to show beyond a reasonable doubt that defendant was not acting in self-defense where evidence tending to show self-defense has been introduced. *State v. Williams*, 122–115, 97 N. W. 992.

Further as to burden of proof of self-defense, see notes to code § 5376 in this supplement.

Evidence: Where it appeared that the homicide had been committed by means of a blow with a singletree taken from a wagon, held that it was not improper to show the ownership of the wagon from which the singletree had been taken. *State v. Walker*, 133–489, 110 N. W. 925.

Where the question was as to whether the bullet causing death was fired by defendant or by the deceased with suicidal intent, held that evidence of experiments with regard to powder marks left by the firing of similar weapons at close range was admissible. *State v. Nowells*, 135–53, 109 N. W. 1016.

In a prosecution for murder by poison, held that evidence of the purchase of "Rough on Rats" by defendant was not admissible, in the absence of a showing by analysis or other satisfactory proof that it was a poison. *State v. Blydenburg*, 135–264, 112 N. W. 634.

In a prosecution of a husband for the murder of his wife, evidence of belief on his part that policies of insurance on the life of his wife in his favor were in force was held to be competent as tending to show a motive. *State v. Woodard*, 132–675, 108 N. W. 753.

Testimony as to prior difficulties between the accused and the deceased is admissible to show their relations. *State v. Fielding*, 135–255, 112 N. W. 539.

A defendant accused of murder should be allowed to introduce testimony explaining conduct which tends to incriminate him. *State v. Rutledge*, 135–581, 113 N. W. 461.

Evidence held sufficient to justify a finding by the jury that death was not suicidal but felonious. *State v. Rocker*, 138–653, 116 N. W. 797.

In a prosecution for murder in killing a newly born infant, held that the evidence was sufficient to sustain the conviction. *State v. Rankin*, 150–701, 130 N. W. 732.

In a prosecution for murder committed in an attempt to produce an abortion, held that while the deceased might be found to be a coconspirator with the defendant so as to render her acts and statements admissible against the defendant, the evidence as to such acts and statements must be limited to those done or made pending the conspiracy and in promotion of its object or design. *State v. Gilmore*, 151–618, 132 N. W. 53.

Evidence of threats of the deceased to commit suicide made some time prior to the homicide is admissible as tending to show that the death was suicidal. *State v. Beeson*, 155–355, 136 N. W. 317.

Merely consenting to the commission of a crime will not alone constitute a participation therein; but where it appeared that defendant actually inflicted the injury of which the deceased died, held that there was no error in referring to the conduct of the defendant as being present and consenting to what was done. *State v. Young*, 157– —, 138 N. W. 871.

Under the evidence in a particular case held that the verdict was supported by the evidence as against the contention that the killing was accidental. *State v. Klute*, 140 N. W. 864.

Where there was evidence tending to show larceny of cattle in connection with the killing of the deceased, held that defendant's admissions of the theft of the cattle pointed to him as the perpetrator of the murder. *State v. Krampe*, 140 N. W. 898.

In a particular case held that the evidence was not sufficient to show participation in the crime on the part of one who was present at the time of its commission. *State v. Teale*, 142 N. W. 235.

The intent with which the act was done is a necessary element in establishing the

crime. If there is evidence tending to show that the fatal shot was an accidental or unintentional one, the court should instruct the jury that the burden of proof is on the state to show that it was intentional. *State v. McCaskill*, 142 N. W. 445.

As to whether in a particular case the court properly instructed the jury as to the effect of the exculpatory matter included in a confession of the defendant and tending to show that the offense was manslaughter rather than murder, the judges were divided. *State v. Busse*, 127–318, 100 N. W. 536.

Evidence in particular cases considered. *State v. Wright*, 112–436, 84 N. W. 541; *State v. Hassan*, 149–518, 128 N. W. 960.

Corpus delicti: Evidence in a particular case held sufficient to establish *corpus delicti* in a prosecution for murder. *State v. Novak*, 109–717, 79 N. W. 465.

SEC. 4728. First degree.

Indictment: Where the killing is charged to have been wilful, deliberate and premeditated, it is not essential that the indictment charge the assault to have been wilful. *State v. Dunn*, 116–219, 89 N. W. 984; *State v. Gray*, 116–231, 89 N. W. 987.

There is but one crime designated by the statute as murder. The so-called degrees do not constitute distinct crimes, but gradations of the same crime. When therefore the indictment formally charges the defendant with the crime of murder generally, the requirements of the statute in this respect are met, and the court will look to the facts set forth in the body of the indictment to ascertain the degree of the crime for which the accused may be placed on trial. *State v. Phillips*, 118–660, 92 N. W. 876.

An indictment which charges the inflicting of wounds by defendant upon deceased, with the specific intent to kill, and also death resulting from such wounds, and further charges that the wounds were inflicted deliberately, premeditatedly, with such intent and with malice, sufficiently charges the first degree of the offense. *Ibid.*

It is not improper to charge the assault as having been made with a deadly weapon, the particular description of which is to the grand jury unknown, although the weapon with which it is claimed the crime was committed was before the grand jury and also introduced in evidence on the trial. *State v. Sigler*, 114–408, 87 N. W. 283.

Where defendant is convicted of murder in the second degree, error in the instructions as to the first degree of the crime with which he was charged are immaterial. *State v. Rogers*, 129–229, 105 N. W. 455.

Indictment for murder in the first degree held sufficient. *State v. Wood*, 112–411, 84 N. W. 520.

Although the indictment charges the wrecking of a train for the purpose of robbery and that a passenger on the train is fatally injured, it does not charge murder in the first degree unless some connection is alleged between the wrecking of the train and the death of such passenger. *State v. Von Kutzleben*, 136–89, 113 N. W. 484.

An indictment which charges that the shooting was with the specific intent to kill and also that it was done wrongfully, deliberately, premeditatedly and with the specific intent to kill, is sufficient. *State v. Dyer*, 147–217, 124 N. W. 629.

An indictment charging that defendant committed an assault with a deadly weapon upon the deceased, and with specific intent to kill and murder the deceased, wilfully, feloniously, deliberately, premeditatedly and with malice aforethought did shoot off and discharge, etc., thereby wilfully, etc., inflicting upon the body of the deceased a mortal wound, etc., is sufficient. *State v. McPherson*, 114–492, 87 N. W. 421.

Premeditation: No particular length of time of premeditation or deliberation is required, and an instruction that if "either at some time before or in the moment or instant of time immediately before the fatal shot was fired the defendant had framed in his mind a wilful, deliberate and premeditated design or purpose of his malice aforethought to take the life of the deceased," held not to be erroneous. *Ibid.*

Premeditation and deliberation need not exist for any particular length of time before the killing. It is sufficient if there is such deliberation and premeditation immediately before the fatal injury is inflicted, though it may have existed but for an instant of time. *State v. Fuller*, 125–212, 100 N. W. 1114.

Death resulting from an assault made with a premeditated purpose and with deadly weapons may constitute murder in the first degree. *State v. Dennis*, 119–688, 94 N. W. 235.

Murder may be of the first degree, although the homicide is committed in a sudden encounter, if it appears that the defendant wilfully, deliberately and premeditatedly took advantage of the quarrel for the purpose of killing or inflicting great bodily injury on the deceased, not in self-defense or heat of blood, but with malice aforethought. *State v. Sale*, 119–1, 92 N. W. 680, 95 N. W. 193.

Proof of intentional homicide, without circumstances of mitigation or excuse, affords a presumption of malice, and therefore of murder, but such presumption is of murder in the second degree, and to

sustain a conviction in the first degree there should be evidence of wilfulness, deliberation and premeditation, or some other fact such as to constitute murder in the first degree. *State v. Phillips*, 118–660, 92 N. W. 876.

Premeditation and deliberation need not exist for any particular length of time to warrant a conviction for murder in the first degree. *State v. Baker*, 143–224, 121 N. W. 1028.

It may be proper to submit the question of first degree to the jury although there is no specific proof of deliberation and premeditation apart from the proof of the infliction of a mortal wound. *Ibid.*

The intentional use of a deadly weapon, unless justifiable in self-defense, furnishes sufficient evidence of malice to show deliberation and premeditation. *State v. Dillingham*, 143–282, 121 N. W. 1074.

Poison: A homicide committed by the administration of poison cannot be murder in the second degree or manslaughter, and therefore specific intent to kill is not an essential allegation in the indictment. *State v. Robinson*, 126–69, 101 N. W. 634.

Evidence in particular case held sufficient to support a conviction for murder in the first degree by the administration of poison. *Ibid.*

An indictment for murder by means of felonious administration of poison need not specifically allege malice aforethought or intent to kill. *State v. Thomas*, 135–717, 109 N. W. 900.

All murder perpetrated by means of poison is in the first degree without regard to any specific intent to kill. Therefore, in such a case there is no necessity of an instruction with reference to manslaughter as an included crime. *State v. Burns*, 124–207, 99 N. W. 721.

There can be no state of evidence that will warrant conviction for murder in the second degree where the defendant has committed the crime by means of poison. *State v. Bertoch*, 112–195, 83 N. W. 967.

Lying in wait: Lying in wait means hiding in ambush or concealment. *State v. Tyler*, 122–125, 97 N. W. 983.

It is not error in a prosecution for murder committed by lying in wait or other wilful, deliberate, or premeditated killing, to charge as to included crimes although the evidence shows that the defendant if guilty of any crime is guilty of the crime charged. *State v. Shepherd*, 129–705, 106 N. W. 190.

On plea of guilty: A large discretion is vested in the trial court in fixing the punishment on a plea of guilty of murder in the first degree and the sentence imposed under such circumstances will not be interfered with in the absence of a showing of abuse of discretion. *State v. Smith*, 127–528, 103 N. W. 769.

While it is not provided how the determination by the court as to the punishment for murder in the first degree under a plea of guilty is to be made, it is proper in such cases for the court to take the evidence of witnesses who have knowledge of the occurrence, and until judgment is pronounced the plea of guilty may be withdrawn and a plea of not guilty interposed. *State v. Hortman*, 122–104, 97 N. W. 981.

Question for jury: Everyone is presumed to have intended the natural consequences flowing from his own acts, and the guilt of defendant of any particular degree of murder or of manslaughter is to be determined by the jury, and not by the court, unless some of the essential elements of the act constituting the crime of a particular degree are not proven. *State v. Wood*, 112–411, 84 N. W. 520.

The question as to whether, in view of the defendant's state of mind as shown by the evidence, he was capable of exercising deliberation and premeditation held to be for the jury. *State v. Bennett*, 143–214, 121 N. W. 1021.

The trial court is not required to pass specifically on the sufficiency of the evidence as to wilfulness, deliberation and premeditation. Where the evidence tended to show that the blows which caused the death of the deceased were inflicted with a heavy club which under proper instructions might be found to be a deadly weapon, held not error to submit to the jury the question as to the guilt of defendant in the first degree. *State v. Whitbeck*, 145–29, 123 N. W. 982.

Evidence: The charge of murder in the first degree involves the condition of the defendant's mind at the time of killing, and evidence of intoxication could be considered in determining such condition, but the mere fact that the offender drank liquor shortly before committing the crime will not constitute such evidence of intoxication as to require the question of its effect upon the mental condition to be submitted to the jury. *State v. Busse*, 127–318, 100 N. W. 536.

Evidence that defendant went into an affray by previous agreement with another for the purpose of rendering assistance and stood by while the fatal blow was inflicted, held to tend to show deliberation, premeditation and malice. *State v. Jackson*, 103–702, 73 N. W. 467.

The evidence in a particular case held sufficient to sustain a verdict of murder in the first degree. *State v. Lucas*, 122–141, 97 N. W. 1003.

Where it appeared that the wound was sufficient to have caused death and that it was inflicted by a deadly weapon the presumption is that the killing was murder. But from the killing with a deadly weapon it is not to be inferred that the act was with deliberation and premeditation. *State v. Krampe*, 140 N. W. 898.

SEC. 4729. Second degree.

To constitute murder in the second degree, no premeditation or deliberation is essential, and if, as the result of hatred and ill will, engendered by language of the deceased and his manifestation of hostility, and not as the result of heat of blood, the defendant formed even for a moment before the striking of the fatal blow an intention to kill or inflict great bodily injury, then the offense may constitute that degree of the crime. *State v. Sale*, 119–1, 92 N. W. 680, 95 N. W. 193.

One who is charged with a crime is nevertheless entitled to the protection of the law, and if, as a reasonable man, in view of the display of force against him, which he has reason to believe is made use of with the intention of inflicting personal violence rather than making an arrest, he resists such force and causes death he is not guilty of murder in the first degree. The crime will be murder in the second degree or manslaughter, according as malice may or may not be found to characterize this act. Even a legal arrest, whether with or without warrant, may be attempted in such a violent and menacing manner that, if death result to the officer in the heat of the struggle thus incited, the killing will not be murder in the first degree. *State v. Phillips*, 118–660, 92 N. W. 876.

Where the evidence tends to show that the defendant intentionally struck the deceased with an instrument which as used was a deadly weapon, and caused his death, held that the question of second degree murder was properly submitted to the jury. *State v. Baker*, 143–224, 121 N. W. 1028.

Where the specific intent to kill is not alleged, the indictment is to be considered as charging murder in the second degree. *State v. Rankin*, 150–701, 130 N. W. 732.

Evidence in a particular case held sufficient to sustain a conviction of murder in the second degree. *State v. Teale*, 154–677, 135 N. W. 408.

It is not error in defining the second degree in connection with the first degree of murder, to state the punishment provided for murder in the second degree. As to the first degree, such specification is proper because the degree of punishment is to be determined by the jury. *State v. Wilson*, 141 N. W. 337.

Intent to kill is not essential to constitute murder in the second degree. *State v. Seery*, 129–259, 105 N. W. 511.

Specific intent to kill is not essential at common law to constitute murder, nor is it essential under the statute to constitute murder in the second degree. An unlawful killing with malice, express or implied, is murder in the second degree, even though unaccompanied by a specific intent to kill. *State v. Baldes*, 133–158, 110 N. W. 440.

An indictment for murder, in which it is alleged that defendant with a deadly weapon wilfully, deliberately and feloniously and of his malice aforethought, inflicted upon the deceased a mortal wound of which he then and there died, states all the elements necessary to constitute murder in the second degree. *State v. Whitnah*, 129–211, 105 N. W. 432.

Where, in a prosecution for murder, it clearly appears that death was due to an attempt to procure an abortion, evidence of an unsuccessful attempt on the part of the female to get drugs for the same purpose is not admissible. *State v. Gunn*, 106–120, 76 N. W. 510.

The omission of the specific words "malice aforethought" in a charge of murder in the second degree is immaterial where the act charged is that of causing death by the felonious administration of drugs to a pregnant woman with the intent to produce a miscarriage. *State v. Gibbons*, 142–96, 120 N. W. 474.

Evidence in a particular case held sufficient to sustain a conviction for murder in the second degree. *State v. Brown*, 152–427, 132 N. W. 862.

SEC. 4731. Punishment.

Where the death penalty had been fixed by the jury, held that the evidence was not such as to require the supreme court on appeal to reduce such punishment to life imprisonment. *State v. Junkins*, 147–588, 126 N. W. 689.

SEC. 4746. Proceedings on affirmance.

When a sentence of death imposed in the trial court in a criminal case is affirmed by the supreme court, by an announcement in proper form of an equal division under code § 195, the governor is authorized to issue a warrant of execution if the time fixed by the trial court has expired. *Busse v. Barr*, 132–463, 109 N. W. 920.

SEC. 4750-a. Advise, counsel, encourage, advocate or incite murder. Whoever shall within this state advise, counsel, encourage, advocate or incite the unlawful killing within or without the state of any human being where no such killing takes place shall be punished by imprisonment

in the state penitentiary for not more than twenty years. [29 G. A., ch. 143, § 1.]

SEC. **4750-b. Kidnaping for ransom.** That whoever kidnaps, takes or carries away any person, or decoys or entices such person away from any place in this state for the purpose of or with the intention of receiving or securing from anyone any money, property or thing of value as a ransom, reward or price for the return of the person so kidnaped, taken, carried, decoyed or enticed away, as aforesaid, or whoever shall imprison, detain or hold any person at any place in this state for the purpose or with the intent of receiving or securing from anyone money, property or thing of value as a ransom, reward or price for the return, liberation or surrender of the person so imprisoned, detained or held, shall be deemed to be guilty of the crime of kidnaping for the purpose of ransom, and upon conviction thereof shall be imprisoned in the penitentiary during life, or for any fixed term of years not less than ten years. [29 G. A., ch. 142, § 1.]

One who detains another in order to extort money from him or from another person as the price of liberation, is guilty of the offense of kidnaping, and the subsequent release without the payment of money is immaterial. *State v. Leuth*, 128–189, 103 N. W. 345.

SEC. **4750-c. Other statutes not affected.** This act shall not be held or deemed to repeal or affect in any manner sections forty-seven hundred sixty, forty-seven hundred sixty-one and forty-seven hundred sixty-five of the code. [29 G. A., ch. 142, § 2.]

SEC. **4751. Manslaughter.**

Manslaughter is the killing of another without malice either express or implied, either unlawfully upon a sudden quarrel or unintentionally while the slayer is in the unlawful commission of some act not amounting to a felony. *State v. Walker*, 133–489, 110 N. W. 925.

Neither motive nor intent is necessarily an element of the crime of manslaughter, and where it appeared that defendant had gone into an affray for the purpose of assisting another, held sufficient to show defendant's guilt. *State v. Jackson*, 103–702, 73 N. W. 467.

Homicide includes manslaughter. It means a killing of one man by another, whether lawful or unlawful. *Tomlinson v. Monroe County*, 134–608, 112 N. W. 100.

The mere presence of passion or heat of blood will not in itself reduce a homicide to manslaughter, unless such passion or heat of blood is upon reasonable provocation. *State v. Hunter*, 118–686, 92 N. W. 872.

There may be a conviction for manslaughter in causing the death of another through gross negligence and recklessness under an indictment for murder which does not contain any specific allegations with reference to negligence or recklessness. *State v. Moore*, 129–514, 106 N. W. 16.

Express intent is not a necessary element in the crime of manslaughter. Negligence and reckless indifference to the lives and safety of others will supply the intent. Every sane person is presumed to intend the natural and necessary consequences of his voluntary act. *Ibid.*

Under evidence in a prosecution for murder, tending to show that defendant negligently and recklessly rode down the deceased in the street, an ordinance of the city limiting the speed at which persons might ride or drive upon the streets of the city was held properly admissible in evidence as a fact or circumstances to be considered in determining whether the defendant acted negligently. *Ibid.*

The fact that the defendant was a nervous, timid man does not tend to show that he was not guilty of manslaughter in taking the life of the person killed without reason to believe that there was a necessity for self-defense. *State v. Usher*, 136–606, 111 N. W. 811.

One may be guilty as accessory before the fact of the crime of manslaughter. *State v. Gray*, 116–231, 89 N. W. 987.

A homicide intentionally committed is not reduced from murder to manslaughter on account of provocation or heat of blood if the person committing it has had ample time for deliberation and premeditation. *State v. Smith*, 137–5, 114 N. W. 558.

Where the court in its instructions defines manslaughter and intent, it is doubtful whether an instruction attempting a definition of assault with intent to commit manslaughter is called for. *State v. Dillingham*, 143–282, 121 N. W. 1074.

The provocation required to reduce an intentional killing to manslaughter is such as has a natural tendency to produce a state of mind in an ordinary man of average disposition in which reason is so disturbed or obscured by passion that the person is likely to act rashly, without due deliberation, and from passion rather than judgment; and the fact that the defendant armed himself in anticipation of an encounter tends to negative provocation in the killing resulting in such encounter. *State v. Watkins*, 147–566, 126 N. W. 691.

Where it appeared that the wounds inflicted by the defendant caused death, held that he was necessarily either guilty of manslaughter for which he was convicted, or not guilty of any crime, and that an instruction as to any included offense was not necessary. *State v. Luther*, 150–158, 129 N. W. 801.

Negligence in treating the wound which diminished the chances of the recovery of the deceased is immaterial. *Ibid.*

Manslaughter is a crime distinct from that of murder; and the jury should, under an indictment for murder, convict for manslaughter only where there is reasonable doubt as to which crime the accused is guilty of. Where the killing is by the use of a dangerous weapon calculated to produce death, the presumption, in the absence of any explanation to the contrary, is that such taking of life was with malice aforethought. *State v. Brown*, 152–427, 132 N. W. 862.

Mere words, although abusive and insulting, will not justify an assault or constitute sufficient provocation to reduce to manslaughter an offense which would otherwise be murder. *State v. Brumo*, 153–7, 132 N. W. 817.

Involuntary manslaughter may be committed in many ways, and the law considers as unlawful all acts which are dangerous to a person against whom they are directed and not justified by the occasion, no matter how innocently they may have been performed. A distinction is drawn in this respect between the use of a deadly and dangerous weapon and other careless and negligent acts not necessarily involving life or bodily harm. *State v. Warner*, 157–111, 137 N. W. 466.

It is not necessary for the state to show that defendant was guilty of gross negligence in the use of the deadly weapon. The use of such weapon in a careless and reckless manner is in itself such gross negligence as to make the act criminal if death results. *Ibid.*

Evidence in particular cases held sufficient to support a conviction for manslaughter. *State v. Johns*, 152–383, 132 N. W. 832; *State v. Adams*, 155–660, 136 N. W. 1051.

SEC. 4753. Robbery.

Robbery is larceny committed by violence from the person of one put in fear and the ownership of the property taken must be alleged and proven as in larceny. *State v. Wasson*, 126–320, 101 N. W. 1125.

To warrant a conviction for robbery it should appear that an asasult was committed and that such assault was made with the intent to violently and feloniously and by putting in fear steal from the person of the prosecuting witness. It is not necessary to specifically define what is intended by the word assault. *State v. Atkins*, 122–161, 97 N. W. 996.

An instruction defining this offense as "larceny of property from the person of the owner, accompanied by violence or putting him in fear" is not erroneous. *State v. Osborne*, 116–479, 89 N. W. 1077.

Where there is evidence tending to show an assault with intent to rob, the jury should be instructed in relation to such included crime. *State v. Duffy*, 124–705, 100 N. W. 796.

Larceny and larceny from a person are included offenses in the crime of robbery, and in case of reasonable doubt as to the force, violence or stealth, the jury may convict of one of such included offenses. *State v. Taylor*, 140–470, 118 N. W. 747.

In a prosecution for robbery, the jury may find the defendant guilty of assault only and it is error to fail to submit assault as an included offense. *State v. Becker*, 140 N. W. 201.

A sentence of seventeen years in the penitentiary held not excessive in view of proof of the crime under aggravating circumstances. *State v. Brafford*, 121–115, 96 N. W. 710.

Evidence in particular cases held sufficient to support a conviction for robbery. *State v. Dingman*, 155–332, 135 N. W. 1082; *State v. Becker*, 140 N. W. 201.

SEC. 4754. With aggravation.

The circumstances of aggravation which by statute warrant the imposition of more severe punishment need not be stated in the indictment. *State v. Poe*, 123–118, 98 N. W. 587.

SEC. 4756. Rape.

What constitutes: Under a charge of rape in the usual form, evidence is admissible to show that the prosecutrix was feeble-minded. Such evidence bears upon the question of consent and it is not necessary that the indictment be framed

under the special provisions of code § 4758 with reference to the crime as committed against a person of feeble mind. *State v. McDonough*, 104–6, 73 N. W. 357.

If there is no evidence of penetration the issue as to whether defendant is guilty of rape ought not to be submitted to the jury, but evidence that in case of a girl of tender years the defendant did his utmost to accomplish his purpose, together with evidence concerning injury to the victim, may be sufficient to warrant a submission of the issue to the jury. *State v. Carnagy*, 106–483, 76 N. W. 805.

The statute has eliminated the necessity of proving emission in prosecutions for rape, and it is accordingly held that proof of emission is not essential in a prosecution for sodomy or for incest. *State v. Judd*, 132–296, 109 N. W. 892.

The crime of forcible defilement differs from the crime of rape in that in the former any defilement of the person is sufficient. *State v. Hromadko*, 123–665, 99 N. W. 560.

If the evidence is sufficient to show that sexual intercourse was had entirely against the will of the female and accomplished by force, this is all that is necessary to constitute the crime of rape. *State v. Whimpey*, 140–199, 118 N. W. 281.

The use of the word "violently" in the indictment is equivalent to that of "forcibly" or "by force" and the word "ravish" imports the employment of force sufficient to constitute the crime. *State v. Rohn*, 140–640, 119 N. W. 88.

Age of consent: Proof of consent is immaterial where the unlawful connection is had with a female under the age of consent. *State v. Bailor*, 104–1, 73 N. W. 344.

Inasmuch as connection with a female child under the age of consent is here made to constitute the crime of rape, regardless of any consent on the part of the child, the attempt to have such connection will constitute an assault with intent to commit rape, even though there was no resistance whatever and the defendant expected to accomplish his purpose without opposition. *State v. Carnagy*, 106–483, 76 N. W. 805.

A female under the age of consent as fixed by statute cannot consent to sexual intercourse nor can she assent to an assault for that purpose. *State v. Sherman*, 106–684, 77 N. W. 461.

Carnal knowledge of a female child under the age of fifteen years constitutes rape. *State v. Trusty*, 122–82, 97 N. W. 989.

The indictment may charge in one count carnal knowledge of a female child under the age of consent, and in another count carnal knowledge of the same female as an idiot or imbecile within the provision of code § 4758, without being open to the objection of duplicity, and as the two counts relate to the same transaction the state cannot be required at the beginning of the trial to elect upon which count it will proceed. *Ibid.*

In a prosecution for rape committed by having intercourse with a female under the age of consent, it is not necessary to instruct the jury that defendant cannot be convicted unless the jury is satisfied beyond a reasonable doubt that he intended to have intercourse with the prosecutrix notwithstanding any and all the resistance she might make. *State v. Johnson*, 133–38, 110 N. W. 170.

In a prosecution for rape, committed by having connection with a female under the age of consent, there being no evidence that the act was without the consent of the female, it is not necessary to instruct as to another included crime than that of assault with intent to commit rape. *State v. King*, 117–484, 91 N. W. 768.

In such a prosecution, evidence as to the condition of the hymen of the female six weeks after the alleged offense is not inadmissible, remoteness of time being for the consideration of the jury in determining the value of the testimony. *Ibid.*

In such a prosecution proof of other similar acts committed between the parties is admissible. But the prosecution should be required to elect for which act conviction is sought. *Ibid.*

Under an indictment charging rape on a female under the age of consent "by force and against her will" there cannot be a conviction for assault and battery. *State v. Sheets*, 127–73, 102 N. W. 415.

Nor under such an indictment could there be a conviction for an assault with intent to inflict great bodily injury where there is no evidence of any intent to commit other injury than that involved in rape. *Ibid.*

Under an indictment charging assault "by force and against her will" on a female child under the age of consent there may be conviction without proof that the act was against the consent of the prosecutrix. *Ibid.*

In the absence of evidence of force in the perpetration of the crime of rape on a female under the age of consent, save as incident to the act charged, it is not error to fail to state as to assault and battery. *State v. Stevens*, 133–684, 110 N. W. 1037.

In an indictment for rape committed by having carnal knowledge of a female under the age of consent allegations of force are mere matters of aggravation and are to be treated as surplusage. *State v. Scroggs*, 123–649, 96 N. W. 723.

In a prosecution for rape in having carnal connection with a female under age of consent, the prosecutrix is a competent witness as to her own age. *Ibid.*

Although the indictment charges the act to have been committed with force and arms the defendant may be convicted of

the crime of having connection with a female under the age of consent without resistance. *State v. Anderson*, 125–501, 101 N. W. 201.

Where the charge is carnally knowing a female under the age of consent, evidence tending to show want of resistance or previous intercourse with others is wholly immaterial. *State v. Bricker*, 135–343, 112 N. W. 645.

An indictment charging an assault upon a female under the age of consent and carnal knowledge and abuse of such female does not charge two offenses, although the assault in such a case is not a necessary element of the crime of rape. *State v. Heft*, 148–617, 127 N. W. 830.

One of the material allegations required to be proved under an indictment charging rape on a female child under the age of consent is that she was under fifteen years of age. *State v. Herrington*, 147–636, 126 N. W. 772.

Where the evidence shows without conflict that the female, under fifteen years of age, voluntarily submitted to the intercourse, there is no occasion to instruct as to assault with intent to commit rape or other forms of assault. *Ibid.*

Election: Where the relations of the parties are so intimate and continuous that the crime cannot be fixed upon as happening at any one time, rather than at another during such relationship, the state cannot be required to elect further than is necessary to identify the transaction as distinct from others. But where there are separate and distinct periods during any one of which the crime might have been committed, an election should be required. Each act of connection constitutes an independent and distinct offense. *State v. Norris*, 122–154, 97 N. W. 999.

Included crime: One who is guilty of the crime of rape may be convicted under an indictment for incest if the relationship of the parties brings the case within the statutory provision as to the latter crime. *State v. Rennick*, 127–294, 103 N. W. 159.

Where there is evidence tending to show want of consent on the part of the female, the court should instruct with reference to assault with intent to commit rape, assault and battery and simple assault, these offenses being necessarily included within the charge of rape. *State v. Trusty*, 118–498, 92 N. W. 677.

Under an indictment charging an assault with force and violence upon a female with intent to ravish and carnally know her by force and against her will, it is not proper to instruct with reference to assault and battery as an included crime. *State v. Miller*, 124–429, 100 N. W. 334.

But where the defendant is convicted of assault with intent to commit rape an erroneous instruction as to assault and battery as an included crime will not be considered prejudicial. *Ibid.*

Where the indictment charges the act to have been committed with force and violence such as to constitute a battery, the jury should be instructed as to assault and battery as an included crime. *State v. Egbert*, 125–443, 101 N. W. 191.

In a prosecution for rape under an indictment charging acts which would constitute an assault and battery, it is error to fail to charge with reference to such an included offense, although the jury has been instructed with reference to an assault. *State v. Barkley*, 129–484, 105 N. W. 506.

It is not error to fail to instruct as to assault and battery as an included crime in that of rape where the indictment does not allege more than a mere assault with intent, and the completion of the criminal act. *State v. Johnson*, 133–38, 110 N. W. 170.

In a prosecution for rape the jury should be instructed with regard to an assault with intent to commit rape as an included offense, where the testimony is not inconsistent with guilt of the included crime. *State v. Blackburn*, 136–743, 114 N. W. 531.

In a prosecution for rape in having carnal connection with a female under the age of consent, it is not error to fail to instruct as to assault with intent to commit rape where it clearly appears that there was consent to the act on the part of such female. *State v. Jones*, 145–176, 123 N. W. 960.

An assault with intent to commit great bodily injury is not an included offense under a charge of an assault with intent to commit rape, unless there is evidence of an intent to inflict great bodily injury other than the injury involved in an attempt to rape. *State v. Novak*, 151–536, 132 N. W. 26.

It is not error to instruct the jury as to assault with intent to commit rape, although under the evidence the defendant is guilty of the completed crime of rape, if guilty of any offense. *State v. Haugh*, 156–639, 137 N. W. 917.

Where the indictment for carnal knowledge and abuse of a female under the age of consent does not charge force or violence, it is not necessary to instruct as to assault and battery, as an included crime. *State v. Butler*, 157–163, 138 N. W. 383.

Further as to instructions in regard to included crimes in prosecutions for rape, see notes to code § 5406 in this supplement.

Previous jeopardy: An acquittal under an indictment charging rape is a bar to a subsequent proceeding under an indictment charging incest with the same female in a transaction which might have been proven under the prosecution for rape although the state seeks to prove in the second prosecution a different transaction

from that on which it relied in the first prosecution. *State v. Price*, 127–301, 103 N. W. 195.

Condonation: The crime of rape committed on a female child is condoned by a subsequent marriage between the parties, and after such marriage the wife is incompetent under the provisions of code § 4606 to testify with reference thereto in the criminal prosecution of her husband. *State v. McKay*, 122–658, 98 N. W. 510.

Continuance: Pregnancy of the prosecuting witness is no ground for a continuance. *State v. Carpenter*, 124–5, 98 N. W. 775.

Instructions: It is not necessarily reversible error to refuse an instruction embodying the general statement that an accusation of the crime is easily made, hard to prove and harder to be defended against by the party accused though ever so innocent. *State v. Trusty*, 122–82, 97 N. W. 989.

Evidence: Proof of guilt in a prosecution for rape necessarily includes guilt of the offense of assault with intent to commit rape, and a conviction for the latter will not be reversed on the ground that the evidence showed that if defendant was guilty of any offense he was guilty of the offense charged. Where the conviction depends principally upon the testimony of prosecutrix, the jury may be warranted in discrediting so much thereof as showed the complete commission of the offense, and yet in believing such portion as tended to show the commission of an assault. *State v. Barkley*, 129–484, 105 N. W. 506.

Where it appears by competent evidence that defendant, at the time of the alleged commission of the offense, was afflicted with a venereal disease, and that the prosecutrix was soon after afflicted with the same disease, it is proper to show, in behalf of defendant, that the prosecutrix had, before the time of the commission of the alleged crime, had sexual intercourse with others than the defendant, by whom the disease with which she was found to be inflicted might have been communicated to her. *State v. Height*, 117–650, 91 N. W. 935.

While a charge of rape is easily made by a designing person and difficult to refute, and such a charge should be scanned with great care where the direct evidence of the alleged assault comes from the lips of the prosecutrix alone, yet, on the other hand, where there is evidence corroborating that of the prosecutrix, a conviction will be sustained. *State v. Snider*, 119–15, 91 N. W. 762.

When the issue is as to criminal intimacy between persons of opposite sex, evidence of prior acts of indecent familiarity is competent as showing an antecedent probability. *State v. Trusty*, 122–82, 97 N. W. 989.

Admission of evidence of the relations existing between defendant and prosecutrix extending over several years is not error. *State v. Norris*, 127–683, 104 N. W. 282.

The prosecuting witness may testify as to other and prior assaults upon her by the defendant. *State v. Carpenter*, 124–5, 98 N. W. 775.

The probability of conception following the ravishment is a question for the jury and cannot be conclusively determined by the testimony of experts. *Ibid.*

The evidence in a particular case held sufficient to sustain a conviction. *Ibid.*

Previous conduct of defendant tending to show a lascivious disposition on his part toward the prosecutrix is admissible. *State v. Crouch*, 130–478, 107 N. W. 173.

Proof of other similar acts of defendant with reference to the complainant as tending to show the disposition and intent of the accused in the particular act with which he is charged, is admissible. *State v. Johnson*, 133–38, 110 N. W. 170.

The pregnancy of the prosecutrix being apparent at the time of the trial, defendant should be allowed to show that this condition may have been the result of intercourse with other men than the defendant for the purpose of counteracting any sympathy with the prosecutrix which might otherwise be aroused by reason of her condition. *State v. Bebb*, 125–494, 101 N. W. 189.

Evidence in a particular case in a prosecution for rape held sufficient to show penetration. *State v. Andrews*, 130–609, 105 N. W. 215.

Evidence in a particular case held sufficient to sustain a conviction of rape in having connection with a child eight years of age. *State v. Steffens*, 116–227, 89 N. W. 974.

Testimony for the defendant that by reason of a physical injury he was unable to have sexual intercourse, held not conclusive as to the commission of the offense charged. *Garvik v. Burlington, C. R. & N. R. Co.*, 131–415, 108 N. W. 327.

The rejection of expert evidence as to the possibility of having carnal connection under certain circumstances, held to be error without prejudice where the conviction was only for assault with intent to commit rape. *State v. Taylor*, 103–22, 72 N. W. 417.

It is not competent for medical experts to testify that the crime of rape cannot be committed upon an ordinary mature female. Such evidence is in usurpation of the functions of the jury, and the matter inquired about is not the subject of expert evidence. *State v. Peterson*, 110–647, 82 N. W. 329.

It is for the jury to determine whether in view of the age and mental condition of the prosecutrix she offered that resistance

to the assault which precluded the idea of consent. *Ibid.*

Where the prosecuting witness is reluctant to give testimony, questions leading in character may properly be admitted. *State v. Waters*, 132–481, 109 N. W. 1013; *State v. Dudley*, 147–645, 126 N. W. 812.

Where prosecutrix testifies as a witness, her credibility may be assailed in the same way as that of any other witness. *State v. Blackburn*, 136–743, 114 N. W. 531.

The question as to the period of gestation, under the circumstances, is for the jury under conflicting evidence of physicians as to whether it could have extended for so long a period as contended for by the prosecution. *Ibid.*

The surrounding circumstances of the commission of the alleged crime may be shown although they tend to establish the commission of an independent crime. *State v. Hogan*, 145–352, 124 N. W. 178.

Prior acts of indecent familiarity between the parties may be shown as bearing on the defendant's intent. *State v. Neubauer*, 145–337, 124 N. W. 312.

A physician's testimony as to the condition of the hymen of the prosecutrix two and one-half months after the alleged commission of the rape committed on her, held admissible as bearing on the question whether the condition of the parts was not such as to disprove the charge. *State v. Dudley*, 147–645, 126 N. W. 812.

The possession of an unsigned paper containing a solicitation to sexual intercourse held not sufficient to show want of chastity on the part of the prosecutrix. *Ibid.*

Other assaults of like character by the same defendant upon the prosecutrix may be shown. This is also the rule in civil actions for an assault culminating in rape. *Smith v. Hendrix*, 149–255, 128 N. W. 360.

Proof of prior sexual intercourse between the parties is admissible to give rise to the presumption of consent to the act in question. *State v. Johnson*, 152–675, 133 N. W. 115.

In a prosecution for rape, held there was no such evidence as to alibi as to justify a submission of that defense to the jury and that by its submission the defense was placed in a false light before the jury. *State v. Lindsay*, 152–403, 132 N. W. 857.

Evidence in a particular case held sufficient to identify the defendant as the guilty party. *State v. Hogan*, 144–130, 122 N. W. 818.

Evidence in a particular case held sufficient to sustain a conviction for rape. *State v. McPursley*, 144–414, 121 N. W. 1031, 122 N. W. 930.

Complaint: Complaints made at the time by the prosecutrix relating to her condition and not to the details of the assault may be shown. *State v. Baker*, 106–99, 76 N. W. 509.

The complaint of the injured female is not admissible solely because a part of the *res gestae*, but as a fact tending to corroborate the evidence of the witness. Lapse of time is not, therefore, the sole test in determining the admissibility of proof of such complaint, but the inference arising against the truth of the charge from silence is a matter for the consideration of the jury in determining the weight to be attached to it. *State v. Peterson*, 110–647, 82 N. W. 329.

It is permissible for the state to give in evidence complaints made by the prosecutrix to the effect that defendant assaulted or ravished her, and such testimony is not objectionable as constituting a narrative of facts. The exact particulars stated by her cannot be narrated, but the fact regarding which complaint is made may be stated. *Ibid.*

The education and mental ability of the prosecutrix, whose complaints are proven, may be shown and she may be allowed to testify as to exhibiting the clothing she had on at the time of the ravishment, such clothing being produced at the trial and introduced in evidence. *Ibid.*

The jurors' attention may be directed to the fact that a failure of prosecutrix to make complaint is a circumstance tending to discredit her story. *State v. Wolf*, 112–458, 84 N. W. 536.

Complaint by the prosecutrix may be so long delayed as to rob it of credibility to such an extent that the court will be warranted in disregarding it, but as a rule the inference arising against the truth of a charge of this character from long silence on the part of the female is not a presumption of law, but a matter of fact for the consideration of the jury. *State v. Snider*, 119–15, 91 N. W. 762.

Failure to make complaint does not render the testimony of prosecutrix inadmissible, but is a circumstance for the jury to consider as affecting the credit to be given to it. *State v. Wolf*, 118–564, 92 N. W. 673.

If the injured female does not testify, by reason of death, imbecility or some other cause, the fact of complaint or want of complaint cannot be shown. Such fact does not constitute a defense to the prosecution, nor tend to rebut the hypothesis of guilt. *Ibid.*

While fear of threatened violence and want of suitable opportunity may be shown as excuses to the prosecutrix for failing to make complaint as to the outrage, and should go to the jury as affecting the credibility of the testimony of prosecutrix, yet the courts have uniformly recognized delay without a reasonable excuse as a circumstance to which the jury should give great weight and serious consideration. *Ibid.*

Absence of complaint on the part of the female is not conclusive as against her evidence of the commission of the injury. But the jury may consider that fact with the other facts and circumstances surrounding and connected with the transaction, including the age and general experience of the female complainant. *Garvik v. Burlington, C. R. & N. R. Co.*, 131–415, 108 N. W. 327.

Failure of the prosecutrix to make complaint affects only the credibility of her testimony and circumstances of excuse may be shown to the jury as negativing any inference to be drawn from want of complaint. *State v. Icenbice*, 126–16, 101 N. W. 273.

While a detailing of the occurrence by the prosecutrix is not admissible, her statement as to the fact of intercourse may be shown. *State v. Barkley*, 129–484, 105 N. W. 506.

The fact of complaint may be shown and the prosecutrix may testify as to recognition of the defendant as the person committing the crime, but the unsworn statement of the prosecutrix is not competent evidence. *State v. Hoover*, 134–17, 111 N. W. 323.

It is not proper to show all the details of the complaint of prosecutrix unless constituting a part of the *res gestae;* but it is proper to show that she named the party and enough of her complaint may be detailed to show of what act she complained. Where the prosecutrix is a very young child, the rule excluding details of the evidence is not applied with the same strictness as where she is an adult, or has reached such an age as to have an understanding of the nature of the act. *State v. Andrews*, 130–609, 105 N. W. 215.

The rule admitting complaints of prosecutrix in a prosecution for rape has no application in a bastardy proceeding. *State v. Lowell*, 123–427, 99 N. W. 125.

The declaration of the prosecutrix not made as a part of the *res gestae* with reference to the identity of the defendant when brought before her for identification and not in his presence cannot be shown. The complaints of the prosecutrix may constitute a corroboration of her testimony that the crime has been committed but do not constitute the corroborating evidence required by statute. *State v. Egbert*, 125–443, 101 N. W. 191.

A witness should not be permitted to tell the particulars of complaint by prosecutrix, but enough may be given in evidence to show the nature of the complaint, even though it involves to some extent the particulars thereof. *State v. Symens*, 138–113, 115 N. W. 878.

The length of time elapsing between the offense and the statement of the prosecutrix as to its perpetration held not sufficient to render erroneous the admission of evidence as to such complaint. *State v. Dudley*, 147–645, 126 N. W. 812.

The fact that the complaint is made in answer to questions does not necessarily render it inadmissible. *Ibid.*

Lapse of time before complaint is made is a fact going to the credibility of the testimony of prosecutrix and to its weight rather than to its competency. Where there is a reasonable explanation of long silence, this rule is applied with still more rigor. *Smith v. Hendrix*, 149–255, 128 N. W. 360.

Details of the complaint may be shown where it was so recent and under such circumstances as to constitute a part of the *res gestae*. *State v. Novak*, 151–536, 132 N. W. 26.

Where it appears that the prosecutrix complained of the conduct of the defendant, the defendant should be allowed to show that such complaint was of assault with intent to murder and not of an assault with intent to rape. *State v. Johnson*, 152–675, 133 N. W. 115.

It is proper to receive evidence of the complaint of the prosecutrix that the intercourse was by force. *State v. McGhuey*, 153–308, 133 N. W. 678.

While the complaint must be voluntary, yet where the circumstances indicate an intention to make a complaint, it is immaterial that it is in response to questions. *Ibid.*

Character of prosecutrix: In prosecutions for rape the character of the prosecutrix must be proved by evidence of general reputation; particular acts or specific facts are not admissible. *State v. McDonough*, 104–6, 73 N. W. 357.

Limitation of action: It is necessary that the state show affirmatively that the alleged offense was committed within eighteen months, which is the statutory period for commencing prosecution for this offense. *State v. Kunhi*, 119–461, 93 N. W. 342.

And held that evidence showing that at a certain time the defendant and the complaining witness were both suffering from a venereal disease, there being no evidence as to how long such condition may have existed, was not sufficient to show that the crime was committed within the statutory period prior to the finding of the indictment. *Ibid.*

Punishment: In a particular case held that a sentence of twenty-five years' imprisonment was excessive, and the sentence was reduced to eight years. *State v. Peterson*, 110–647, 82 N. W. 329.

The crime of having criminal connection with a girl under the age of consent committed by a man of mature years is one of peculiar depravity, and a severe sentence will not be interfered with on appeal. *State v. Johnson*, 133–38, 110 N. W. 170.

In a prosecution for rape, committed on a female under the age of consent, held that in view of the evidence tending to show the actual consent of the prosecutrix, who was of about the same age as the defendant, the sentence to fifteen years' imprisonment in the penitentiary was excessive. *State v. Spears*, 130–294, 106 N. W. 746.

A sentence of twenty years at hard labor for rape held not excessive under the evidence. *State v. Ralston*, 139–44, 116 N. W. 1058.

SEC. 4757. Compelling to marry or be defiled.

In forcible defilement there must be the same kind of taking as in abduction and the actual defilement is substituted for the intent to do wrong required in abduction. *State v. Hromadko*, 123–665, 99 N. W. 560.

The indictment must allege the taking of the person of the female to have been unlawful and against her will. *Ibid.*

The offense here described differs from that of rape in that, if a woman is taken against her will, subsequent intercourse with her is a crime although there is not the resistance which is essential in rape. Therefore all the acts of defilement during the duress are a continuance of the one criminal offense and may be proved under one indictment. *State v. Dean*, 148–566, 126 N. W. 692.

Reputation for chastity may be shown as bearing on the question whether in fact prosecutrix was unlawfully taken by force and against her will and unlawfully defiled by means of force, menace or duress. *Ibid.*

As to corroboration, see code § 5488 and notes.

SEC. 4758. Carnal knowledge of imbecile or insensible female.

It is not necessary, where carnal connection with an imbecile or idiot is charged, to allege force and violence, and such an allegation may be treated as surplusage. *State v. Austin*, 109–118, 80 N. W. 303.

An allegation in the indictment that the female was of such imbecility of mind as to prevent actual resistance renders the charge of rape one within the provisions of the section relating to carnal knowledge of a female of imbecile mind, and does not constitute a charge of the crime of having carnal knowledge of a female under the age of consent. *State v. Crouch*, 130–478, 107 N. W. 173.

It is proper in such an indictment to allege an assault, and the implied allegation of force will be treated as surplusage. *Ibid.*

Although imbecility of the prosecutrix is thus alleged, she is not thereby disqualified as a witness; but her qualification is to be tested by the court in the usual manner, and the discretion of the court in receiving her testimony is subject to review only in case of gross abuse. *Ibid.*

Having carnal connection with a female who is an idiot or imbecile constitutes rape, although no resistance is shown. *State v. Trusty*, 122–82, 97 N. W. 989.

In the absence of any evidence of imbecility or weakness on the part of the prosecutrix such as to prevent effectual resistance, held that a conviction under this section could not be sustained. *State v. Nathoo*, 152–665, 133 N. W. 129.

Opportunity alone is not enough to justify a conviction of such offense. *Ibid.*

Alleged resemblance of the baby of prosecutrix to the defendant cannot be considered by the jury; but the appearance and characteristics of the baby as tending to establish the race to which it belongs may be considered in corroboration of defendant's connection with the act, if the alleged sexual intercourse has been otherwise satisfactorily proved and the evidence tends to show racial characteristics of the defendant different from those of the prosecutrix. *Ibid.*

The words "effectual resistance" used in this section are not technical, as distinguished from their ordinary meaning. *State v. McKinnon*, 157– —, 138 N. W. 523.

It is not incumbent upon the prosecution to show that the passions of the prosecutrix were not induced by weak mindedness. It is sufficient to show that her imbecility of mind was such that effectual resistance was impossible. *Ibid.*

In a particular case held that the evidence was sufficient to show imbecility of mind of the prosecutrix. *State v. Johnson*, 136 N. W. 928.

SEC. 4759. Attempt to produce miscarriage.

In a prosecution for murder in causing the death of a female in an attempt to procure an abortion, evidence that the female herself unsuccessfully attempted to procure a drug for that purpose is not admissible. *State v. Gunn*, 106–120, 76 N. W. 510.

It is not necessary in an indictment for administering a drug to a pregnant woman with intent to produce miscarriage to set out the manner of administering the drug, nor the form in which the drug is administered. *State v. Moothart*, 109–130, 80 N. W. 301.

One may be guilty of administering a drug where he causes or procures the pregnant woman herself to take the drug with a wrongful intent. *Ibid.*

Letters of the accused to the woman may be competent as tending to show the relation of the parties as bearing upon the intent with which the defendant acted, and for that purpose letters written after the attempt may be admissible. *Ibid.*

The production of a miscarriage is not essential to the crime, and there may be a conviction on evidence of the administering of the drug with a wrongful intent, although the quantity administered was not such as would produce the intended effect. *Ibid.*

The indictment should negative the statutory exception of cases where a miscarriage is necessary to save the life of the woman. *State v. Aiken*, 109–643, 80 N. W. 1073.

Accordingly, the burden of proving that the case is not within the exception is upon the state, and there should not be a conviction unless the jury are satisfied beyond a reasonable doubt that the miscarriage produced by defendant was not necessary to save the woman's life. *Ibid.*

The woman upon whom the act of abortion is perpetrated is not guilty of the crime, although it is perpetrated by her consent or procurement. But the victim may be a party to the conspiracy with intent to perpetrate the offense, and as a conspirator her declarations may be admissible in evidence against one charged with the crime. *State v. Crofford*, 133–478, 110 N. W. 921.

Where a drug is administered with the intent that it be taken in order to produce miscarriage and it is so taken, it is not essential to the criminality of the act that the drug be one calculated to cause abortion. *State v. Stafford*, 145–285, 123 N. W. 167.

Proof of pregnancy is essential but it is not necessary that the female be quick with child. *Ibid.*

The female is not necessarily an accomplice and corroboration of her testimony is therefore not essential. *Ibid.*

The victim of an abortion may be a conspirator with the perpetrator of the offense in such sense as to make her acts and declarations admissible as against the perpetrator who is prosecuted for murder in causing death in the attempt to produce the abortion; but it must appear that such acts and declarations were done or made pending the conspiracy and in promotion of its object or design. *State v. Gilmore*, 151–618, 132 N. W. 53.

There must be at least prima-facie proof that a miscarriage procured by a physician was attempted without any necessity appearing to him in the exercise of good faith and his best skill for saving the patient's life. *State v. Shoemaker*, 157–176, 138 N. W. 381.

Evidence held sufficient to support a conviction under this section. *State v. Lee*, 113–348, 85 N. W. 619.

SEC. 4761. Enticing away child—repeal.

Section forty-seven hundred sixty-one of the code is hereby repealed. [33 G. A., ch. 14, § 16.]

[See § 254-a46. EDITOR.]

SEC. 4762. Seduction.

What constitutes: Where by reason of former friendship and caresses, flattery and false assurances, the defendant induced the prosecutrix, a girl of seventeen years of age, to submit, held that there were sufficient seductive arts to sustain a conviction. *State v. Hayes*, 105–82, 74 N. W. 757.

To induce intercourse by a promise to marry the prosecutrix if anything goes wrong may constitute seduction. Whether a woman of chaste character would yield her person under such circumstances and whether the act in question was voluntary and to gratify desire rather than because of such conditional promise, may be considered in connection with all the facts and circumstances shown upon the trial, but it cannot be said as a matter of law that an unsophisticated country girl of seventeen years, when addressed by a young man five or six years her senior, would necessarily be of previous unchastity in yielding on the strength of such a promise or that she submitted as the result of passion rather than the false promise of the accused. *State v. Hughes*, 106–125, 76 N. W. 520.

Deception is an essential element of the crime. It consists in inducing, by any kind of deception, an unmarried woman of chaste character to part with her virtue and yield to the embraces of the deceiver. If she submits without being in some way deceived into doing so there is no seduction. Proofs of promise and inducement are competent for the purpose of determining whether there was deception, but if they were not false they could not deceive, and could not constitute seduction. It is therefore error to instruct the jury that if complainant yielded her person by reason of some promise or inducement held out to her by the defendant, or on account of defendant's visits and attentions, the defendant may be convicted. *State v. Hamann*, 109–646, 80 N. W. 1064.

In a particular case held that an instruc-

tion was erroneous in directing the jurors that the kind and character of the arts, promises and deception were of secondary importance, and that the manner in which the ruin of the prosecutrix was accomplished was of no importance. In such case the vital question of defendant's guilt depends upon the circumstances under which the prosecutrix yielded her person to him, and it is of equal importance that the promises relied upon be shown to have been false and therefore deceptive. *State v. Coffman*, 112–8, 83 N. W. 721.

A false promise of marriage constitutes a seductive artifice. *State v. Stolley*, 121–111, 96 N. W. 707.

Promise of marriage constitutes sufficient fraud and artifice to support a conviction for the offense where it appears that the prosecuting witness yielded in reliance thereon. *State v. Mulholland*, 115–170, 88 N. W. 325.

The seductive arts may consist of the exercise of hypnotic influence or flattery. *State v. Donovan*, 128–44, 102 N. W. 791.

The mere fact that the seducer was known to the prosecutrix at the time of the seduction to be a married man will not necessarily negative the crime. *Ibid.*

Indictment for seducing "one Mary Roll, an unmarried person," etc., held sufficiently charged the seduction of an unmarried woman. *State v. Olson*, 108–667, 77 N. W. 332.

In an indictment defining seduction held that the inadvertent use of "artificial" for "artifice" was not such a mistake as to constitute prejudicial error. *State v. Hamann*, 113–367, 85 N. W. 614.

It is error to so instruct the jury as to permit a finding of guilty on proof that the illicit relations were accomplished by means of caresses. *State v. Cotter*, 152–398, 132 N. W. 760.

Prosecution: It is immaterial whether the prosecution for seduction is instituted by the female or by her father, although she may be past majority; and though the prosecution is by the father, it is not prejudicial error to refer in the instructions to the female herself as the prosecuting witness. *State v. Stolley*, 121–111, 96 N. W. 707.

Evidence: It appearing that about the time of the alleged seduction prosecutrix was receiving attention from another man, held that the court properly limited the evidence of the relations of prosecutrix to such other person to the time preceding and contemporaneous with the alleged seduction and excluded evidence of subsequent relations. *State v. Abegglan*, 103–50, 72 N. W. 305.

It is error to permit a witness to state over defendant's objection that the neighbors and others said that they had heard that the prosecutrix was engaged to marry the defendant. *State v. Reilly*, 104–13, 73 N. W. 356.

Prosecutrix may properly testify as to giving birth to a child as the result of the intercourse with the defendant. *State v. Nugent*, 134–237, 111 N. W. 927.

Evidence is admissible of subsequent intercourse between the parties as corroborative of the testimony of the prosecutrix as to the first act. *Ibid.*

As involved in a continuous relationship, there can be but one seduction, no matter how frequently intercourse takes place after the commission of the first act. Therefore, where there is evidence of different acts constituting a continuous relationship, it is not necessary that the state be required to elect on which act it will rely. *Ibid.*

It is not improper to allow the prosecuting witness to testify that at the time of the alleged seduction she entertained an affection for the accused and was willing to become his wife. *State v. Burns*, 119–663, 94 N. W. 238.

Evidence of statements made by the prosecuting witness inconsistent with her testimony as a witness is admissible not merely for impeaching purposes, but as affirmative evidence for the defendant. *State v. Dolan*, 132–196, 109 N. W. 609.

Evidence tending to show that defendant led the prosecutrix to believe that he desired and intended to marry her, and by such methods induced her to yield to his desire, is sufficient to show the seductive arts required. *State v. Drake*, 128–539, 105 N. W. 54.

In a prosecution for seduction, held that a letter of defendant relating to prior illicit relations with the prosecutrix was properly admissible in evidence. *State v. Bennett*, 137–427, 110 N. W. 150.

Prosecutrix may testify that she yielded her person to defendant's embraces because of his promises. *Ibid.*

Prosecutrix may properly be allowed to testify as to her reformation and intention to lead a virtuous life. *Ibid.*

While the mere presence in court of the child begotten of the prosecutrix in the alleged seduction and reference to it as being such child is not objectionable, it will constitute reversible error for the prosecuting attorney to refer in his argument to the alleged resemblance of the child and the defendant. *State v. Hunt*, 144–257, 122 N. W. 902.

The fact that the prosecutrix testifies that the promise of marriage was the sole cause of her yielding to the defendant will not preclude the jury from considering her testimony as a whole, disclosing protestations of love and other acts not inconsistent with a marriage engagement. *State v. Criswell*, 148–254, 127 N. W. 65.

Although the record does not show affirmative evidence that the prosecutrix was

unmarried, that fact may be assumed by inference where it is indicated by the evidence and no question as to whether she was married has been raised. *State v. Moffit*, 155–702, 136 N. W. 908.

All that is essential in the evidence as to the prosecutrix having been a single woman where no controversy as to that point is raised, is that the facts and circumstances disclosed be such as to fairly warrant the inference that prosecutrix was unmarried at the time of the seduction as alleged. *State v. Norman*, 140 N. W. 815.

Even though prosecutrix testifies that a conditional promise of marriage was made by defendant "if anything happened," held that as there was other evidence of seductive arts, a conviction was warranted. *State v. Price*, 157– —, 138 N. W. 520.

It is within the discretion of the court to permit leading questions to be propounded to the prosecuting witness. *State v. Thomas*, 157– —, 138 N. W. 864.

Where the prosecutrix had testified that prior to the alleged seduction the defendant was her suitor, held error to sustain objections to questions on cross-examination as to whether she had, prior to the alleged seduction, been going with other young men whose names were given. *State v. Hector*, 157– —, 138 N. W. 930.

Evidence that defendant told prosecutrix in connection with the intercourse that he would stay by her if anything happened, praised her good looks and the like, held admissible as tending to show seductive arts. *State v. McClure*, 140 N. W. 203.

Although the prosecutrix has not testified that she yielded to the defendant on account of his seductive arts, that fact may be found by the jury by inference from other facts. *Fletcher v. Ketcham*, 141 N. W. 916.

It is not necessary in every case to show by direct evidence that the prosecutrix was induced to surrender her virtue by reason of a promise of marriage or other seductive arts. It is sufficient to constitute seduction that the prosecutrix submitted herself to intercourse on the strength of a promise of marriage. *Ibid.*

Evidence in a particular case held not sufficient to sustain a verdict of guilty of the crime of seduction. *State v. Thomas*, 103–748, 73 N. W. 474.

Evidence in particular cases held sufficient to sustain a conviction for seduction. *State v. Olson*, 108–667, 77 N. W. 332; *State v. Moffit*, 156–702, 136 N. W. 908; *State v. McClure*, 140 N. W. 203.

Evidence in a particular case held sufficient to show that intercourse was secured by a promise of marriage. *State v. Wycoff*, 113–670, 83 N. W. 713.

Character of prosecutrix: If the prosecutrix testifies as a witness, her general moral character at the time of the trial may be shown for the purpose of impeachment, but the proof should not extend to a specific vice. *State v. Haupt*, 126–152, 101 N. W. 739.

Previous chastity: Proof of grossly indecent remarks made in the presence of prosecutrix by other men than defendant held competent, coupled with evidence as to whether such remarks caused indignation on her part, or otherwise, as bearing on the question of her previously chaste character. *State v. Bige*, 112–433, 84 N. W. 518.

Evidence is admissible tending to prove that the prosecutrix had before her alleged seduction knowingly associated with men of bad character. *Ibid.*

A statement by a witness not an expert, and made by way of conclusions from facts stated by her, is not admissible to show that the prosecutrix was already with child at the time of the alleged seduction. *State v. Reinheimer*, 109–624, 80 N. W. 669

Evidence of the general reputation of the prosecutrix as to chastity is not admissible in behalf of the defendant. *Ibid.*

But after defendant has introduced evidence tending to show the unchastity of prosecutrix, the state may sustain her character by proof of her general reputation in the community in which she lived. *Ibid.*

Intimacy of the prosecuting witness with other men than the defendant prior to and at about the time she claims to have been seduced by the defendant is to be considered not only with reference to the paternity of the child which is claimed to have been the result of the connection with defendant, but also as bearing upon the previous chastity of the prosecutrix. *State v. Dolan*, 132–196, 109 N. W. 609.

Unchaste conduct after the time of the alleged seduction cannot be considered. *State v. Wycoff*, 113–670, 83 N. W. 713.

The fact that the woman under promise of marriage has submitted to improper liberties on the part of defendant before the accomplishment of her seduction does not show unchastity such as to defeat the prosecution. *State v. Stolley*, 121–111, 96 N. W. 707.

A question of chastity is one of fact. The fact that prosecuting witness consented to sexual intercourse with the defendant upon his request does not necessarily show want of chastity if there had previously been between them a prospective arrangement for marriage. *State v. Smith*, 124–334, 100 N. W. 40.

The general good reputation of the prosecutrix as being a moral person cannot be shown in rebuttal of evidence tending to show specific acts of unchastity. The reputation for morality which may thus be shown is a reputation for morality in the sexual relations. *State v. Hummer*, 128–505, 104 N. W. 722.

It is error to instruct that no particular amount or degree of lascivious and indecent conduct or conversation can be considered as conclusively showing unchastity. Lascivious conduct is not, like indecency of behavior, a matter of education and refinement. Unchaste character may exist without actual unchastity. It consists of impurity of mind with reference to the sexual relations. *Ibid.*

It is for the jury to pass upon the credibility of witnesses who testify that they had connection with the defendant before the alleged seduction, where they are contradicted by the prosecutrix. *State v. Drake*, 128–539, 105 N. W. 54.

It is within the discretion of the court to determine how far the prosecution may go in asking leading questions of the prosecuting witness. *Ibid.*

Evidence in a particular case held sufficient to support a conviction for seduction, such evidence relating to the previous chastity of the prosecutrix. *State v. Maxwell*, 117–482, 91 N. W. 772.

A resolution to reform after voluntary illicit relations may be shown to have been followed by conduct in harmony with such purpose to reform. *State v. Bennett*, 137–427, 110 N. W. 150.

The question whether prosecutrix has reformed and been restored in virtue, notwithstanding previous illicit relations with the defendant, is for the jury. *Ibid.*

The burden is on the state to prove the reformation of prosecutrix beyond a reasonable doubt. *Ibid.*

The question of chastity of the prosecutrix is for the jury even though there may be direct testimony for the defendant as to her unchastity. *State v. Krumm*, 148–631, 127 N. W. 985.

In a civil action for seduction, evidence of previous relations between the parties, such as to give the defendant an advantage in power over plaintiff which he would not otherwise have had, held an important consideration in determining whether the yielding of the plaintiff was inconsistent with previous chastity of character and purpose. *Fisher v. Bolton*, 148–651, 127 N. W. 979.

It is the previous chaste character of the prosecutrix which is in issue, and her conduct and statements in that respect after the alleged seduction are not admissible. *State v. McClure*, 140 N. W. 203.

The fact that the prosecutrix yielded her virtue to the blandishments of the defendant and the seductive arts resorted to to accomplish his purpose does not show that she was of unchaste character. *State v. Norman*, 140 N. W. 815.

SEC. 4764. Desertion after seduction and marriage.

This section is not unconstitutional because of want of uniformity in its application. *Morris v. Stout*, 110–659, 78 N. W. 843.

In a prosecution of a husband for deserting his wife to whom he has been married for the purpose of escaping a prosecution for seduction, held that evidence relied upon to show adultery of the wife was not sufficient to require the reversal of a conviction for such desertion. *State v. Wagner*, 123–271, 98 N. W. 763.

Although this section refers to the case of the desertion of the wife by the husband where the marriage was entered into in order to escape a prosecution for seduction, the fact that the marriage is so entered into may be shown in a prosecution under code supp. § 4775-a for wife desertion, as bearing on the question of defendant's intent in leaving his wife. *State v. Stout*, 139–557, 117 N. W. 958.

SEC. 4765. Kidnaping.

Where the father and mother are equally entitled to the custody of their child, the crime of kidnaping is not committed by the father who takes the custody of the child from the mother, nor is one who assists the father under such circumstances guilty of the crime. *State v. Dewey*, 155–469, 136 N. W. 533.

SEC. 4766. Exposing child.

One to whom the custody of a child is entrusted by the parent for the purpose of having it abandoned is guilty of the crime of abandonment, although the act was under the direction and with the cooperation of the parent. *State v. Sparegrove*, 134–599, 112 N. W. 83.

SEC. 4767. Malicious threats to extort. If any person, either verbally or by any written or printed communication, maliciously threaten to accuse another of a crime or offense, or to do any injury to the person or property of another, with intent to extort any money or pecuniary advantage whatever, or to compel the person so threatened to do any act against his will, he shall be imprisoned in the penitentiary not more than five years

or be fined not exceeding one thousand dollars, or be imprisoned in the county jail not exceeding one year, or both such fine and imprisonment. [34 G. A., ch. 168, § 1.] [C. '73, § 3871; R. § 4213; C. '51, § 2590.]

This section is not limited to a case where the person accused is innocent of the crime with which he is threatened to be accused. It is the malicious threat to accuse with intent to extort money, etc., which is made criminal and the guilt or innocence of the crime specified in the threat is wholly immaterial. *State v. Debolt*, 104–105, 73 N. W. 499.

Proof of a specific intent in such case is necessary and such intent cannot be presumed from maliciously and feloniously threatening to accuse without just cause or excuse. *Ibid.*

An indictment for malicious threats with intent to extort by charging another with the commission of a crime is sufficient without alleging that the person so threatened was not guilty of the crime threatened to be charged. *Kennedy v. Roberts*, 105–521, 75 N. W. 363.

It is not necessary that the act which defendant sought to compel the prosecuting witness to commit by means of threats be an act which, if consummated, would be a crime. *State v. Todd*, 110–631, 82 N. W. 322.

This section has no application to a United States pension examiner charged with the duty of investigating fraudulent pension claims. *In re Waite*, 81 Fed. 359.

It is not a crime to threaten to accuse one with being a disorderly person for such a threat is not with reference to an accusation of a crime. *State v. Dailey*, 127–652, 103 N. W. 1008.

There is a manifest distinction between bribery, or an offer to take a bribe, and the offense described in this section. If an officer or private person having made an arrest, offers to release the person arrested upon the payment of money or upon the doing of some other thing, this is not the crime of malicious threats to extort. *State v. Browning*, 153–37, 133 N. W. 330.

The statute covers several methods whereby the crime described may be committed, but these acts constitute but one offense although stated disjunctively; and in an indictment the crime may be charged in any or all of the methods specified in the statute. *Ibid.*

Neither officers nor private persons are exempted from the terms of the statute, and one may be guilty of the crime specified, although he had the lawful right to arrest. It is the misuse of power for malicious purposes and with intent to extort money which is aimed at. *Ibid.*

SEC. 4768. **Assault with intent to murder.** If any person assault another with intent to commit murder, he shall be imprisoned in the penitentiary not exceeding thirty years. [30 G. A., ch. 129, § 1; C. '73, § 3872; R. § 4214; C. '51, § 2591.]

To establish an assault with intent to murder, a specific intent to kill with malice aforethought must be shown. But it is enough to warrant a conviction that the evidence sustains a finding that the act done by the defendant was in contemplation of a result which might reasonably be expected to follow from the act done, involving the probable death of the person whom defendant intended to kill; and held that the sending of an infernal machine, addressed to himself at his wife's place of residence, with other circumstances indicating the expectation of defendant that his wife would open the box, with intent that she should thereby be killed, was sufficient, although, as an abstract proposition, the express company transporting the box would have no right to deliver it to the wife and the wife would have no right to open it. *State v. Hoot*, 120–238, 94 N. W. 564.

The crime of assault with intent to commit murder may be charged in general terms. Malice aforethought need not be averred. Nor is it necessary to state the instrument or means used to effectuate the purpose. And held that an indictment charging the assault as made with a revolver by discharging it was sufficient without alleging that the revolver was loaded. *State v. Shunka*, 116–206, 89 N. W. 977.

Previous threat of violence may be shown as bearing on the intent of the defendant in making use of a weapon, but it is not competent to show that another had advised the prosecutor not to allow the defendant to come to his house for fear of violence. *State v. Thompson*, 127–440, 103 N. W. 377.

A specific intent may be proved by circumstantial as well as by direct and positive evidence, and where it is shown that the defendant committed the assault charged which would be unlawful unless justified, a specific intent may be inferred or presumed from the unlawful act. *State v. Bennett*, 128–713, 105 N. W. 324.

But it is always competent to prove facts that tend to show lack of such intent, and intoxication may be shown for that purpose. *Ibid.*

A witness may testify as to how far the accused was affected by intoxication as bearing upon the question of his intent. *State v. Cather*, 121–106, 96 N. W. 722.

The effect of drunkenness as tending to negative criminal intent should be explained to the jury not only with reference to the intent to murder charged in the indictment, but also as to included offenses involving a specific intent. *Ibid.*

Intoxication which has not progressed so far as to rob the assailant of his mental faculties and render him incapable of forming an intent is not a defense in a prosecution for assault with intent to kill. *State v. Yates*, 132–475, 109 N. W. 1005.

The defendant pleading intoxication as a defense in such case has the burden of proof as to the issue. *Ibid.*

Where there is no evidence that the assault was committed in self-defense, the court is not required to instruct on the subject. *Ibid.*

Where there is evidence tending to show that the act of defendant relied upon as constituting an assault was accidental, the burden of proving the assault to have been intentional is on the prosecution and the facts should be established beyond a reasonable doubt. *State v. Matheson*, 142–414, 120 N. W. 1036.

Evidence of previous ill will and threats on the part of the person assailed toward the defendant is competent on the question of which one of the two was the aggressor. *State v. Butler*, 146–285, 125 N. W. 196.

SEC. 4769. With intent to commit rape.

In determining whether an assault was made with intent to commit rape, the controlling question is whether the assailant intended to accomplish carnal intercourse by force notwithstanding any and all resistance the assaulted female might make. *State v. Miller*, 124–429, 100 N. W. 334.

Under a prosecution for assault with intent to commit rape it is not error to fail to instruct as to assault and battery as an included crime where the evidence would not justify a finding that an assault or battery was intended or committed. *State v. Snider*, 119–15, 91 N. W. 762.

To make out the offense of assault with intent to commit rape it must appear that defendant intended to use whatever amount of force was necessary to overcome resistance and accomplish the purpose. But the offense may be complete, even though the resistance is not overcome or the purpose accomplished. *Ibid.*

An assault with intent to have connection with a female child under the age of consent will constitute an assault with intent to commit rape, although no resistance whatever was made and defendant expected to accomplish his purpose without opposition. *State v. Carnagy*, 106–483, 76 N. W. 805.

A female under the age of consent cannot consent to sexual intercourse; and as actual sexual intercourse with such female child constitutes rape, so the attempt to have such intercourse constitutes assault with intent to commit rape, regardless of the consent of the female. *State v. Sherman*, 106–684, 77 N. W. 461.

Where defendant was on trial for an assault with intent to commit rape by having connection with a girl under the age of consent, held that evidence of his conduct in the same transaction towards other girls was admissible against him. *State v. Desmond*, 109–72, 80 N. W. 214.

Unless the indictment charges that the assault was accompanied with force, it is not proper to instruct the jury with reference to assault and battery as an offense included in that of assault with intent to commit rape. *Ibid.*

A written communication by the defendant before the commission of the assault with which he is charged, indicating his intent to have carnal connection with the prosecutrix, is admissible as against him as bearing on his intent. *State v. Sheets*, 127–73, 102 N. W. 415.

Proof of impotency does not constitute a defense to a charge of assault with intent to commit rape. *State v. Bartlett*, 127–689, 104 N. W. 285.

Where the conviction is of assault as an included crime under a charge of assault with intent to commit rape, errors as to the admission of evidence and instructions with regard to the necessary corroboration will be immaterial as no corroboration in regard to the crime of assault is essential. *State v. Hoover*, 134–17, 111 N. W. 323.

It is sufficient to charge that the defendant made an assault with intent, etc., without specifying the manner of such assault. *State v. Johnson*, 114–430, 87 N. W. 279.

An instruction that one who makes an assault upon a female with intent to have sexual intercourse with her is guilty of an assault with intent to commit rape is erroneous in omitting the element of intent to have such intercourse by force and against the will of the person assaulted. *State v. Nathoo*, 152–665, 133 N. W. 129.

Evidence reviewed and held insufficient as to proof of the *corpus delicti*, and as to corroboration of the prosecution, on a charge of assault by a physician on a patient. *State v. Sells*, 145–675, 124 N. W. 776.

Evidence in particular cases held sufficient to sustain a conviction of assault with intent to commit rape. *State v. Fishel*, 140–460, 118 N. W. 763; *State v. McGhuey*, 153–308, 133 N. W. 678.

Where the act of the defendant was under the belief that the person assaulted was an inmate of a house of prostitution, held that a sentence to twenty years' imprisonment was excessive. *State v. Young*, 135–554, 113 N. W. 325.

SEC. 4770. With intent to maim, rob, steal, etc.

In a prosecution for robbery the jury should be instructed as to the included crime of assault with intent to rob if there is evidence tending to show an assault. *State v. Duffy*, 124–705, 100 N. W. 796.

SEC. 4771. With intent to inflict great bodily injury. If any person assault another with intent to inflict a great bodily injury, he shall be imprisoned in the county jail not exceeding one year, or be fined not exceeding five hundred dollars, or by imprisonment in the penitentiary or reformatory not exceeding one year. [33 G. A., ch. 209, § 1.] [C. '73, § 3875; R. § 4217; C. '51, § 2594.]

It is erroneous to charge that whoever assaults another with intent to inflict upon such person some injury of a more grave and serious character than an ordinary battery is guilty of an assault with intent to inflict a great bodily injury, for such charge overlooks a material ingredient of the offense to wit: the unlawfulness of the assault. *State v. Shea*, 104–724, 74 N. W. 687.

A threat accompanied by words declaring an intent to do bodily injury which is not carried out, although there is no obstacle to the execution of the threat, is not conclusive as to the intent, although sufficient to support the finding of such intent. Thus a threat to kill by means of a revolver held in the hand constitutes an assertion that the revolver is loaded sufficient to justify finding to that effect. *Myers v. Clearman*, 125–461, 101 N. W. 193.

Under an indictment charging assault with intent to inflict great bodily injury, a verdict finding the defendant guilty of assault with intent to do great bodily injury or with intent to commit great bodily injury is sufficient. *State v. Leuhrsman*, 123–476, 99 N. W. 140.

An indictment alleging that defendant "did unlawfully, wilfully, maliciously and with specific intent then and there to inflict great bodily injury, make an assault upon one L. C., and did then and there, with specific intent to inflict a great bodily injury, strike, beat, bruise, and otherwise maltreat the said L. C." is sufficient. *State v. Cummings*, 128–522, 105 N. W. 57.

Under an indictment charging rape on a female under the age of consent, committed by force and against her will, in the absence of evidence of any intent to do violence other than to accomplish the rape, the court should not instruct as to assault with intent to do great bodily harm as an included crime. *State v. Sheets*, 127–73, 102 N. W. 415.

The intent to injure another by discharging a loaded gun at him is an intent to inflict great bodily injury. A great bodily injury is not capable of very exact description. *State v. Mitchell*, 139–455, 116 N. W. 808.

An indictment charging assault with a dangerous weapon, to wit, a shotgun which defendant is alleged to have pointed at the person assaulted with the threat to shoot said person with intent to do him great bodily injury, is sufficient without an allegation that the gun was loaded. *Ibid.*

The allegation of an assault and pointing a weapon at another with threat to shoot with intent to do great bodily injury is not open to the objection of duplicity. *Ibid.*

A conditional threat of injury, accompanied by an act calculated to put the person assaulted in fear and with the present ability to inflict the threatened injury if the condition imposed is not complied with, is sufficient to constitute an assault. *Ibid.*

Evidence in a particular case considered with reference to the charge of this offense. *State v. Bysong*, 112–419, 84 N. W. 505.

SEC. 4772. With intent to commit any felony.

The indictment must specify the felony with intent to commit which the assault is made, and the court in its instructions to the jury should require the verdict to specify the specific offense of which the defendant is charged. *State v. Austin*, 109–118, 80 N. W. 303.

Evidence in a particular case held sufficient to sustain a conviction of assault with intent to commit manslaughter. *State v. Schwab*, 112–666, 84 N. W. 944.

SEC. 4774. Assault and battery.

A mere threat does not constitute an assault, although it is coupled with the means, ability and intent to immediately inflict the threatened violence. *State v. Cummings*, 128–522, 105 N. W. 57.

To constitute a criminal assault there

must be some evidence of an attempt or endeavor to do violence to the person. *Haupt v. Swenson*, 125–694, 101 N. W. 520.

Verbal abuse and insult constitute no defense to a charge of assault, but may properly be shown to the court for its consideration in mitigation of punishment. *State v. Leuhrsman*, 123–476, 99 N. W. 140.

To render an assault followed by a blow more than assault and battery, the intent to inflict great bodily injury must be shown. *Myers v. Clearman*, 125–461, 101 N. W. 193.

One who is assaulted is not necessarily bound to retreat even though there be time and opportunity to do so. He may in self-protection repel force with force. The extent to which he may go is to be measured by the character of the assault. *State v. Evenson*, 122–88, 97 N. W. 979.

It is not prejudicial error to submit to the jury assault and battery as an included crime even though there could be no conviction under the indictment for such included crime if the defendant is in fact convicted of the crime charged. *State v. Sheets*, 127–73, 102 N. W. 415.

The only intent required to constitute an assault and battery is the intent to do the wrongful act. *Luttermann v. Romey*, 143–233, 121 N. W. 1040.

It is error to charge that to constitute an assault it is not necessary that an actual injury be inflicted and that it is sufficient to constitute an assault that there be an unlawful attempt or threat to do violence coupled with the present means and intention of carrying the threat into effect or execution. Such instruction would permit the jury to find that an unlawful threat constituted an assault without any attempt to carry it into effect. *State v. Butler*, 155–204, 135 N. W. 628.

Under the evidence in a particular case, held that the jury was justified in finding that corporal punishment inflicted by a teacher upon a scholar was immoderate in degree and that it constituted an assault. *State v. Davis*, 139 N. W. 1073.

SEC. 4775. Carrying concealed weapons.

A confession before a justice of the peace in a prosecution for carrying concealed weapons that defendant had such weapon, accompanied with matter of explanation which would negative the crime, does not constitute a judicial confession on which the defendant may be convicted on appeal without corroborating evidence. *State v. Abrams*, 131–479, 108 N. W. 1041.

SEC. 4775-1a. **Dangerous and concealed weapons—carrying of—age limit.** It shall be unlawful for any person, except as hereinafter provided, to go armed with and have concealed upon his person a dirk, dagger, sword, pistol, revolver, stiletto, metallic knuckles, pocket billy, sandbag, skull cracker, slung shot, or other offensive and dangerous weapons or instruments concealed upon his person; provided that no person under fourteen years of age shall be allowed to carry firearms of any description. [35 G. A., ch. 297, § 1.]

SEC. 4775-2a. **Sale prohibited.** It shall be unlawful to sell, to keep for sale or offer for sale, loan or give away, dirk, dagger, stiletto, metallic knuckles, sandbag or skull cracker. The provisions of this section shall not prevent the selling or keeping for sale of hunting and fishing knives. [35 G. A., ch. 297, § 2.]

SEC. 4775-3a. **Permit to carry.** The chief of police in cities of the first and second class, special charter cities and cities under commission form, or where there is no organized police force, in counties, towns and villages the sheriff or mayor shall issue a permit to carry concealed a revolver, pistol or pocket billy, provided that in the judgment of said officials such permit should be granted. [35 G. A., ch. 297, § 3.]

SEC. 4775-4a. **Peace officers—employes of certain companies—permits.** It shall be the duty of said officials to issue a permit to go armed with a revolver, pistol or pocket billy to all peace officers and such other persons who, in the judgment of said officials, should be permitted to go so armed. Mining companies, banks, trust companies, railroad and express companies may obtain a general permit good for any of their employes, only while on duty, actually engaged in guarding any property or the transportation of moneys or other valuables. Permits issued to peace officers or to employes of railroad or express companies shall permit

such persons to go armed anywhere within the state while in the discharge of their duties. [35 G. A., ch. 297, § 4.]

SEC. **4775-5a. Record of permits to sell.** The chief of police, sheriff or mayor shall have authority to issue permits to sell and shall keep a correct list of all persons to whom permits to sell are issued, together with the number of such permit and the date each is revoked, and furnish the county recorder a copy of all such permits issued and revocations made. [35 G. A., ch. 297, § 5.]

SEC. **4775-6a. Revocation.** Whenever any permit is issued under this act to any person to carry any of the weapons mentioned herein, by virtue of said person being a peace officer, the right of said person to carry any of said weapons shall cease when said person ceases to be such official. Said officials shall have the power to at any time at his [their] discretion, revoke any permit under and by virtue of this act. The county recorder shall keep a complete record, in a book provided for the purpose of all permits issued, and revocations made, and sales of pistols, revolvers and pocket billies. Such record shall not be open to inspection to any, except the sheriff, mayor, or chief of police of the county or municipality. [35 G. A., ch. 297, § 6.]

SEC. **4775-7a. Application.** No permit shall be granted to any person to go armed as heretofore stated, with a revolver, pistol or pocket billy, unless the applicant shall make personal application before the officials heretofore mentioned, and the applicant must state: first, the full name, residence and age of the applicant; second, the place of business, place of employment, or vocation of the applicant; third, the nature of the applicant's business. [35 G. A., ch. 297, § 7.]

SEC. **4775-8a. Production of permit upon request.** It shall be the duty of any person armed with a revolver, pistol or pocket billy concealed upon his person, to produce at all times and upon the request of any peace officer or any other person in authority, the permit provided for in this act. And failure to so produce such permit upon request shall be deemed prima-facie evidence of the violation of the terms of this act. [35 G. A., ch. 297, § 8.]

SEC. **4775-9a. Dealer's permit.** It shall be unlawful for any person, firm, association or corporation to engage in the business of selling, keeping for sale, exchange or [to] give away to any person within the state, any revolver, pistol or pocket billy or other weapons of a like character which can be concealed on the person, without first securing a permit from the proper officials having authority to issue such permit. [35 G. A., ch. 297, § 9.]

SEC. **4775-10a. Report of sale to county recorder—giving of fictitious name.** Every person selling revolvers, pistols, pocket billies and other weapons of a like character which can be concealed on the person, whether such person is a retail dealer, pawnbroker or otherwise, shall report within twenty-four hours to the county recorder, the sale of any revolver, pistol or pocket billy and in such report shall set forth the time of sale, age, occupation, place of employment or business, name and residence of such purchaser of said weapon or weapons, together with the number, make, and other marks of identification of such weapon or weapons. Every person who shall fail to make such report will be guilty of a misdemeanor, and on being convicted of a second offense his permit shall be revoked. Any person purchasing a revolver, pistol or a pocket billy according to the provisions in sections seven and ten, and giving a fictitious name will be guilty of a misdemeanor. [35 G. A., ch. 297, § 10.]

SEC. **4775-11a. Violation—penalty.** Any person who shall violate any of the provisions of section one shall be deemed guilty of a felony and upon conviction thereof shall be punished by a fine of not more than five hundred dollars or by imprisonment in the state prison not more than two years, or by both such fine and imprisonment in the discretion of the court, and in addition thereto may be required to enter into a recognizance with sufficient surety in such sum as the court may order, not exceeding one thousand dollars, to keep the peace and be of good behavior for a period not exceeding one year, provided that in case of the first offense the court may in its discretion reduce the punishment to imprisonment in the county jail of a term not more than three months, or a fine of not more than one hundred dollars. [35 G. A., ch. 297, § 11.]

SEC. **4775-12a. Not applicable to wholesale dealers or jobbers.** This act shall not affect in any respect wholesale dealers or jobbers. [35 G. A., ch. 297, § 12.]

SEC. **4775-13a. Acts in conflict repealed.** All acts and parts of acts, in so far as they are in conflict with this act, are hereby repealed. [35 G. A., ch. 297, § 13.]

SEC. **4775-a. Desertion defined—penalty.** Every person who shall, without good cause, wilfully neglect or refuse to maintain or provide for his wife, she being in a destitute condition, or who shall, without good cause, abandon his or her legitimate or legally adopted child or children under the age of sixteen years, leaving such child or children in a destitute condition, or shall, without good cause, wilfully neglect or refuse to provide for such child or children they being in a destitute condition, shall be deemed guilty of desertion and, upon conviction, shall be punished by imprisonment in the penitentiary for not more than one year, or by imprisonment in the county jail for not more than six months. [32 G. A., ch. 170, § 1.]

[See also § 254-a37. EDITOR.]

While under these statutory provisions the abandonment of a child may consist of one specific act, the neglect or refusal to provide for wife or child is in the nature of a continuing wrong which should properly be charged in that form. But an allegation that on or about a certain date the defendant did unlawfully and without cause wilfully neglect and refuse to maintain and provide for his wife, etc., is sufficient. *State v. Stout*, 139–557, 117 N. W. 958.

As bearing on defendant's intent in leaving his wife, the fact that he was married to her for the purpose of avoiding a prosecution for seduction may be shown. *Ibid.*

The statute describes three different criminal acts: neglect or refusal to maintain or provide for the wife; abandonment of a child under the age of sixteen years; and neglect or refusal to provide for such child. As to the child there may therefore be an abandonment constituting a crime without neglect or refusal to provide. *Ibid.*

There is no cause for desertion which would not authorize a judicial separation. The statute refers to good cause and not to reasonable belief as to the existence of good cause. *Ibid.*

Mere temporary abandonment of the wife not continued so as to constitute neglect and refusal to maintain and provide for her is not in its nature criminal. *Ibid.*

An instruction that it is the duty of a man to care for a wife and minor children and provide them with necessary food, clothing and home suitable to their condition of life is too strong a statement of his duty under this statute, as it does not give sufficient importance to the possible inability of the man to make such provision. *Ibid.*

Any one of the three acts stated disjunctively in this section may subject a person to the penalty specified and such acts may be conjunctively alleged in the indictment. *State v. Dvoracek*, 140–266, 118 N. W. 399.

The fact that the wife or children are unable to support themselves without the aid of the county is enough to establish destitution. *Ibid.*

The venue of the crime charged may properly be laid in the county where the support should have been furnished. *Ibid.*

What would be a good cause for failing to furnish support to the wife must necessarily depend on the proof in a particular

case. It may be such as would justify separation. *Ibid.*

Evidence in a particular case held insufficient to support a conviction for wilfully refusing to provide for the wife. *State v. Fuller*, 142–598, 121 N. W. 3.

Letters written by the defendant to a woman other than his wife containing words of endearment and protestations of love and affection are admissible as bearing on the defendant's intent in leaving his wife. *State v. Morgan*, 146–298, 125 N. W. 166.

The wife is left in a destitute condition under this statutory provision if she is left without money or property upon which she can rely for support. It is not necessary that she be actually without immediate sustenance. *State v. Weyant*, 149–457, 128 N. W. 839.

After the husband has served a sentence for one offense of failure to maintain or provide for his wife, he may, on a continuation of the same criminal conduct, be again indicted for the same crime. *State v. Morgan*, 155–482, 136 N. W. 521.

Where the abandonment of the wife has occurred before the law took effect the wilful refusal to provide for the wife continuing to the time of the trial is punishable under the statute. *Ibid.*

In a prosecution for wife desertion, it is immaterial for defendant to show that prior to the marriage the prosecuting witness was unchaste, unless he can show that such unchastity had resulted in pregnancy existing at the time of the marriage. *State v. Hill*, 142 N. W. 231.

The statute refers to good cause and not to reasonable belief as to existence of good cause. *Ibid.*

But a husband is not liable for the support of a wife who without just cause refuses to live with him, even though her refusal has not been for the time required by statute to constitute desertion. *Ibid.*

While it is proper for the court to instruct as to what will constitute good cause, the failure of the trial court to do so, in the absence of any testimony as to facts showing good cause, is not prejudicial error. *Ibid.*

SEC. **4775-b. Husband or wife may be witness.** In all prosecutions under this act, the husband or wife shall be a competent witness for the state and may testify to any relevant acts or communications between them, anything in previous statutes to the contrary notwithstanding, provided however that no husband or wife shall be called or compelled to testify against the other under this act except upon consent of such witness. [32 G. A., ch. 170, § 2.]

SEC. **4775-c. Bond given conditioned on support.** If after arrest and before trial, or after conviction and before sentence, the party so arrested or convicted shall appear before the court in which the case is pending or the conviction had, and enter into a bond to the state of Iowa in a sum to be fixed by the court, which in no event shall exceed the sum of one thousand dollars, with or without sureties as may be determined by the court, conditioned that such husband will furnish said wife with a necessary and proper home, food, care and clothing, or that such parent will furnish his or her child or children with a necessary and proper home, food, care and clothing, then said court may release the defendant. Said bond shall remain in force so long as the court deems the same necessary; and whenever it shall appear to said court by affidavit or otherwise that such husband or parent is in good faith furnishing his wife, child or children with the necessary and proper home, food, care and clothing, the court may annul the said bond. [32 G. A., ch. 170, § 3.]

The provision as to the acceptance of bond is directory and the matter is left to the sound discretion of the trial court. *State v. Morgan*, 146–298, 125 N. W. 166.

SEC. **4775-d. Failure of undertaking — trial — commitment — release.** Upon failure of said husband or parent to comply with his undertaking he or she may be arrested by the sheriff or other officer upon a warrant issued from the court in which the case is pending or the conviction was had and the court may thereupon order a forfeiture of the undertaking and that the defendant to[1] be tried or committed in execution of the

sentence, or for good cause shown may release the defendant upon a new undertaking. [32 G. A., ch. 170, § 4.]

[1The word "to" is in the session laws but seems to be unnecessary. EDITOR.]

SEC. 4775-e. **Prima-facie evidence of wilful desertion or neglect.** Proof of the desertion of wife, child or children in destitute or necessitous circumstances or of neglect to furnish such wife, child or children necessary and proper food, clothing or shelter, shall be prima-facie evidence that such desertion or neglect was wilful. [32 G. A., ch. 170, § 5.]

SEC. 4775-f. **Acts in conflict repealed.** All acts or parts of acts in conflict herewith are hereby repealed or amended, as the case may be, so as to make this act effective. [32 G. A., ch. 170, § 6.]

CHAPTER 3.

OF OFFENSES AGAINST PROPERTY.

SECTION 4776. Burning inhabited dwelling in nighttime.

Where the burning of a building was established by direct evidence, held that circumstantial evidence was sufficient to prove the *corpus delicti*, that is, that the building was feloniously set on fire. *State v. Millmeier*, 102–692, 72 N. W. 275.

If there is an actual ignition, and the fiber of the wood or other destructible material of the house is charred and thus destroyed, even in a small part, the crime is complete. *State v. Spiegel*, 111–701, 83 N. W. 722.

Malice is an essential element of the crime of arson. *State v. Harvey*, 130–394, 106 N. W. 938.

In a prosecution for arson in the burning of a building belonging to the defendant for the purpose of securing insurance thereon, the value of the building as compared with the amount of the insurance may be shown for the purpose of establishing the motive. *Ibid.*

In general a malicious act involves all that is usually understood by the term wilful, and is further marked by either hatred or ill will toward the party injured, or by such utter recklessness and disregard of the rights of others as indicates a corrupt or malevolent disposition. *State v. Willing*, 129–72, 105 N. W. 355.

It is error to omit to charge that the act must have been committed with malice in order to warrant a conviction. *Ibid.*

SEC. 4780. Burning mills, locks, dams, depots, etc.

Indictment in a particular case held to show a crime under this section and not under the section following. *State v. Spiegel*, 111–701, 83 N. W. 722.

SEC. 4787. Burglary.

What constitutes: The opening of a closed door and entrance therein for the purpose of larceny is burglary. *State v. Brower*, 127–687, 104 N. W. 284.

Under an indictment charging the defendant with breaking and entering a building, proof of breaking and entering the cellar of a building is competent. *Ibid.*

If a door be so nearly closed that entry cannot be effected without pushing the door further open, such act will constitute a breaking. *State v. Sorenson*, 157– —, 138 N. W. 411.

It is error, in defining the crime of breaking and entering in an instruction, to omit reference to the intent to commit a public offense as an essential element of the crime. *State v. Williams*, 120–36, 94 N. W. 255.

The statute makes one guilty of breaking and entering as a crime only where the act is done with intent to commit a public offense. *Ibid.*

The crime of larceny is not included in that of burglary, and an instruction submitting to the jury the question whether defendant charged with burglary was guilty of larceny may properly be refused. *State v. Leonard*, 135–371, 112 N. W. 784.

The defendant indicted for breaking and entering a building with intent to steal having been convicted of that offense on evidence which is not controverted as to the time of its commission, cannot complain that the jury was instructed in regard to breaking and entering in the daytime as an included offense. *State v. Neitzel*, 155–485, 136 N. W. 532.

The crime of burglary may be commit-

ted although the purpose of breaking and entering is not accomplished. *State v. Baker*, 148–149, 126 N. W. 1120.

Presumption: The presumption may be indulged that one who enters a building unbidden during the nighttime does so with the object of stealing, although he escapes without taking anything, and in a particular case held that such presumption was not conclusively rebutted by evidence that while in the building he attempted to take personal liberties with a female sleeping therein. *State v. Worthen*, 111–267, 82 N. W. 910.

Indictment: It is sufficient in an indictment for burglary to allege the breaking and entering "with the intent then and there to commit a public offense, to wit: robbery." It is not necessary to set out in detail the elements of the crime charged to have been intended. *State v. Watson*, 102–651, 72 N. W. 283.

Ownership of property: Proof of occupancy is sufficient to establish an allegation of ownership in a prosecution for burglary. *Ibid.*

It is not essential in an indictment for the offense of breaking and entering that the name of the real owner of the building be stated. It is sufficient to state the name of the person who is in possession. *State v. Williams*, 120–36, 94 N. W. 255.

The purpose of the allegation of ownership in an indictment for burglary is to specify and identify the offense. The ownership may be laid with equal propriety in the owner or the tenant of the premises or in a servant occupying the premises for his master. *State v. Burns*, 155–488, 136 N. W. 520.

Consent: One who knows that the crime of burglary is contemplated against him may remain silent and permit matters to go on for the purpose of apprehending the criminal without being held to have assented to the act. The fact that the agent of the owner has permitted a detective to take a cast of the key to the premises, from which the criminal has been able to manufacture a key with which he enters, will not constitute consent on the part of the owner such as to prevent a conviction of the wrongdoer. *State v. Abley*, 109–61, 80 N. W. 225.

Evidence: Under a charge of breaking and entering buildings with intent to commit larceny, evidence tending to show a conspiracy by the defendant and others to break and enter other buildings for that purpose is admissible. *State v. Donavan*, 125–239, 101 N. W. 122.

The evidence in a particular case held sufficient to show that persons who were arrested together within half an hour after the commission of the crime, having in their possession the tools with which the crime appeared to have been committed, were properly found to be joint conspirators so that the evidence of guilt on the part of one was competent as against another who was on trial. *State v. Leonard*, 135–371, 112 N. W. 784.

Evidence to connect the defendant with a burglary as accomplice to the one who in fact was guilty of the breaking and entering, held sufficient in a particular case. *State v. Arthur*, 135–48, 109 N. W. 1083.

The crime of burglary like any other may be proved by circumstantial evidence. The fact that defendant was wrongfully in the building and that he was there for the purpose of committing larceny and did commit larceny, that all the windows were closed and doors fastened and locked, and that there was no opening left through which he could have entered, held sufficient to warrant the deduction by the jury that the entry must have been effected by a breaking. *State v. Sorenson*, 157– —, 138 N. W. 411.

Evidence in a particular case as to the finding of property in the possession of defendant charged to have been taken in the perpetration of burglary, held not sufficient to sustain a conviction. *State v. Sullivan*, 156–603, 137 N. W. 918.

Evidence in particular cases held sufficient to sustain a conviction. *State v. Ryan*, 113–536, 85 N. W. 812; *State v. Raphael*, 123–452, 99 N. W. 151; *State v. McPherson*, 126–77, 101 N. W. 738; *State v. Platts*, 149–389, 128 N. W. 339; *State v. Skaggs*, 153–381, 133 N. W. 779; *State v. Cristy*, 154–514, 133 N. W. 1074; *State v. Burns*, 139 N. W. 1094.

Under the evidence in particular cases held that the identity of defendant as the person who committed the offense was not sufficiently established. *State v. Snyder*, 137–600, 115 N. W. 225; *State v. Hedgpath*, 142–44, 120 N. W. 468.

Recent possession: Proof of recent possession of goods stolen from a building is not of itself prima-facie evidence of guilt of breaking and entering the building to commit larceny. Such possession is competent evidence from which, in view of all the circumstances, the jury may find or infer guilt, but it does not in itself make a prima-facie case for the state. *State v. Brundige*, 118–92, 91 N. W. 920.

Where there is evidence tending to show possession by defendant soon after the commission of burglary, in which goods are stolen from the building, of the goods thus stolen, it is proper to instruct the jury that the fact of such possession, if unexplained, is sufficient to warrant the conclusion that the person having such possession is the person who broke and entered the building, unless the evidence showing such possession leaves a reasonable doubt whether the defendant may not have come into possession of the goods otherwise than by breaking and entering. *State v. Swift*, 120–8, 94 N. W. 269.

Nor is it necessarily erroneous to charge in that connection that such evidence is sufficient to warrant the conclusion that the person having such possession was the person who broke and entered the building, "unless the evidence showing such possession leaves a reasonable doubt whether such person may not have come honestly into such possession," although it would be better not to use the word "honestly" in such connection, as it might in some cases warrant the jury in disregarding the explanation of the recent possession, if it showed that the goods were dishonestly obtained, although otherwise than in connection with the breaking and entering. *Ibid.*

It is only when the breaking and entering, and the larceny alleged to have been committed in connection therewith, are committed at the same time and by the same person, that is, where the goods were stolen by means of the breaking and entering, that any effect is to be given to the recent possession of goods stolen from a building. *State v. Williams*, 120–36, 94 N. W. 255.

At most, proof of recent possession of goods stolen in connection with breaking and entering gives rise to a mere presumption of guilt, which, in the absence of explanation, will justify the jury in thinking that the one in possession of the property recently stolen by means of breaking and entering broke and entered the building. It is error to instruct in such way as to make the guilt of the defendant in such case depend on his explanation of such possession, and throw upon him the burden of establishing his innocence. *Ibid.*

Where it is shown that the burglary and the stealing of goods soon after found in the possession of defendant were a part of the same transaction, the finding of the goods in defendant's possession constitutes presumptive evidence of guilt of the burglary as well as of the larceny. *State v. Brady*, 121–561, 97 N. W. 62.

But it is error to charge that such circumstance gives rise to a presumption of guilt which must be overcome by the defendant to entitle him to an acquittal. *Ibid.*

It is error to instruct with reference to such presumptive evidence that defendant must show he obtained the goods "honestly and fairly" before he can be relieved from the inference of guilt attaching to such possession. *Ibid.*

Recent possession of stolen goods shown to have been taken in connection with the commission of burglary will support a conviction of the latter crime. The burden of explaining such possession is upon the defendant who was found in possession of the goods. *State v. Raphael*, 123–452, 99 N. W. 151.

Where it appears beyond reasonable doubt that the building in question was broken and entered by someone and that the theft of goods was accomplished at the time by means of breaking and entering, proof of recent possession unexplained is sufficient to warrant a conviction of the defendant of the crime of burglary. *State v. Donavan*, 125–239, 101 N. W. 122.

The recent possession of property procured by larceny from a building is competent evidence of guilt of the burglary. *State v. Brower*, 127–687, 104 N. W. 284.

The finding of property stolen in the commission of a burglary in a room at a hotel which was at the time exclusively in the possession of defendant constitutes presumptive evidence of the commission of the burglary by such defendant. *State v. Hanley*, 133–474, 110 N. W. 914.

Where property stolen in connection with the burglary is found with other property which defendant admits was taken by him from different premises, an instruction as to the effect of recent possession of stolen goods in a prosecution for burglary is proper. *State v. Harris*, 153–592, 133 N. W. 1078.

SEC. 4788. With aggravation.

Evidence that the accused, while in the house, seized a stove poker and threw it at the occupant of the house who was assailed, held proper to go to the jury as tending to show that the defendant armed himself with a dangerous weapon as described in this section. *State v. Davenport*, 149–294, 128 N. W. 351.

SEC. 4790. Possession of burglar's tools. If any person be found having in his possession at any time any burglar's tools or implements, with intent to commit the crime of burglary, he shall be imprisoned in the penitentiary not more than five years, or be fined not exceeding five hundred dollars and imprisoned in the county jail not more than one year. The court before whom such conviction is had shall order the retention by the sheriff of such tools or implements, to be used in evidence in any court in which such person is tried for the offense herein defined, or that of burglary, and the possession of such tools or implements shall be presumptive evidence of his intent to commit burglary. [29 G. A., ch. 144, § 1; 15 G. A., ch. 13.]

The indictment must specifically describe the tools which the defendant is charged with being in possession of with intent to commit burglary. *State v. Erdlen*, 127–620, 103 N. W. 984.

The finding of burglar's tools in a room at a hotel of which the defendant was, for the time being, in exclusive possession, held sufficient to warrant conviction of having possession of such tools. *State v. Hanley*, 133–474, 110 N. W. 914.

SEC. 4791. Other breakings and enterings.

Where an indictment charging the breaking and entering a building in the nighttime alleges the ownership of the building and the larceny of goods found therein, it is sufficient without a more particular allegation that the building was one in which goods, merchandise or other valuable things were kept for use, sale or deposit, as specified by statute. *State v. Burns*, 109–436, 80 N. W. 545.

In such case evidence of actual possession, by the owner of the building, of the property stolen is sufficient proof of ownership. *Ibid.*

It is the building itself, and not any particular room thereof set apart to a special purpose the breaking and entering of which constitutes the crime. *Ibid.*

An indictment charging the breaking and entry of "the certain planing mill of" a person named, situated, etc., is sufficient to charge the breaking and entry of a building. The term "planing mill" without modification or qualification would properly be understood to include a building and machinery therein used in doing the work of planing mills. The fact that the indictment charges that goods, wares and valuable things were kept in such planing mill and that defendant did break and enter the mill, would tend to support this meaning of the term. *State v. Haney*, 110–26, 81 N. W. 151.

Evidence showing that defendant rolled back a closed door to a freight house held sufficient to show a breaking and entry. *State v. Richmond*, 138–494, 116 N. W. 609.

Notwithstanding doubt as to whether the body or box of a freight car resting on timbers on the ground is a railway car within the meaning of this statute, held that as it was practically admitted by defendant that he was guilty of a breaking and entering punishable under this section, the case would not be reversed on account of a misdescription of the structure broken and entered as a railway car. *State v. Anderson*, 154–701, 135 N. W. 405.

The distinction between a felonious breaking and entering in the nighttime and in the daytime has application only where the alleged burglary is of a dwelling house. *State v. Neitzel*, 155–485, 136 N. W. 532.

Where the evidence showed a disappearance of property from a closed buggy shed and the finding of such property subsequently in the possession of the defendant, held that there was sufficient evidence to sustain a verdict of guilty. *State v. Rogers*, 156–570, 137 N. W. 819.

An entry without breaking is made punishable where it is in the nighttime and the building is a dwelling house. In other respects, the definition of burglary is left to judicial decision. *State v. Sorenson*, 157– —, 138 N. W. 411.

Evidence in a particular case, consisting of the testimony of accomplices to some extent corroborated, held sufficient to sustain a conviction for burglary. *State v. O'Callaghan*, 157– —, 138 N. W. 402.

Where defendant was discovered in a building by the night watchman, all openings having been closed prior to his entry, held that the jury might properly be allowed to draw the inference that he entered by breaking. *State v. O'Brien*, 157– —, 138 N. W. 895.

SEC. 4792. Attempting to break and enter.

In a prosecution for burglary in breaking and entering a railroad ticket office, held that it was unnecessary to allege that the railroad company named as the owner of the office was a corporation, nor to state that it was organized under the laws of any state or nation *State v. Ferguson*, 149–476, 128 N. W. 840.

It is sufficient in such an indictment to charge that the building broken into was an office. It need not appear that such office was an independent building as it is burglary for one to break and enter an inner door or window after entering through an open outer door. *Ibid.*

Where it is charged in the indictment that the defendant stole money kept in the building, it is not necessary to allege that the money so stolen was lawful money. *Ibid.*

SEC. 4799-a. **Burglary with explosives.** If any person shall break and enter any building with intent to commit any public offense therein by the use, or with the aid, of nitroglycerin, dynamite, giant powder, gunpowder, or any other explosive material, he shall be imprisoned in the penitentiary not less than fifteen years. [35 G. A., ch. 298, § 1.] [32 G. A., ch. 171, § 1.]

CHAPTER 4.

OF MALICIOUS MISCHIEF AND TRESPASS.

SECTION **4807. To highways, bridges, railways, telegraph lines, water or gas plants, etc.** That section forty-eight hundred and seven of the code, as the same appears in the code and the supplement to the code, [1902] be and the same is hereby repealed and reënacted; and when reënacted, the same shall read as follows:

"If any person maliciously injure, remove or destroy any electric railway or apparatus thereto belonging, or any bridge, rail or plank road; or place, or cause to be placed, any obstruction on any electric railway, or on any such bridge, rail or plank road; or wilfully obstruct or injure any public road or highway; or maliciously cut, burn, or in any way break down, injure or destroy any post or pole used in connection with any system of electric lighting, electric railway or telephone or telegraph system; or break down and destroy or injure and deface any electric light, telegraph or telephone instrument; or in any way cut, break or injure the wires of any apparatus thereto belonging; or shall wilfully tap, cut, injure, break, disconnect, connect, make any connection with or destroy any of the wires, mains, pipes, conduits, meters or other apparatus belonging to, or attached to, the power plant or distributing system of any electric light plant, electric motor, gas plant or water plant; or shall aid or abet any other person in so doing, he shall be imprisoned in the penitentiary not more than five years, or be fined not exceeding five hundred dollars, or imprisoned in the county jail not more than one year, or by both such fine and imprisonment, at the discretion of the court." [30 G. A., ch. 130, § 1; 29 G. A., ch. 145, § 1; 28 G. A., ch. 126, § 1; C. '73, § 3979; R. § 4320; C. '51, § 2680.]

One who has made an excavation in the highway is liable for damage resulting from negligently allowing it to remain so that the highway is in an unsafe condition. *Elzig v. Bales*, 135–208, 112 N. W. 540.

SEC. **4808. Obstructing or defacing roads.** If any person, without authority or permission from the board of trustees, shall in any manner obstruct, deface or injure any public road by breaking up, plowing or digging within the boundary lines thereof, he shall be fined not less than five nor more than twenty-five dollars, or be imprisoned in the county jail not more than thirty days, at the discretion of the court. [29 G. A., ch. 53, § 16; 15 G. A., ch. 17.]

SEC. **4808-a. Placing glass in highways.** It shall be unlawful for any person or persons to place or leave any broken glass, glass bottles, glassware, or glass of any kind in the highways, or in the streets and alleys of any city or town in such a manner as to interfere with safe travel, or in such manner as to injure horses or vehicles while being used or driven on said streets, alleys and highways. [33 G. A., ch. 210, § 1.]

SEC. **4808-b. Violation—penalty.** Any person violating any of the provisions of this act, shall be deemed guilty of a misdemeanor, and shall on conviction thereof, be fined not less than one dollar, nor more than ten dollars for the first offense, and for each offense thereafter, shall be fined a sum of not less than five dollars nor more than twenty dollars. [33 G. A., ch. 210, § 2.]

SEC. 4810. Shooting or throwing at train.

The purpose of the statute is not to provide punishment for an attempt to injure particular persons who may be upon a railroad train or the particular railroad company owning or having possession of the train, but rather for attempting to do an act calculated to imperil the safety of persons on such train, and it is not necessary to name special persons intended to be injured and charge an attempt to do injury to them. *State v. Leasman*, 137–191, 114 N. W. 1032.

SEC. **4810-a. Train robbery.** That if any person shall stop, or attempt to stop any railway passenger train, with intent to rob any person thereon, or to rob any coach attached thereto, or to rob any mail pouch, express safe, or box on such train; or shall wreck or attempt to wreck, derail, or attempt to derail, any such train, by any means whatever, with intent to commit such robbery; or shall obstruct or detain such train, or any locomotive, tender, coach, or car attached thereto, with such intent, or shall place upon any railway track, or under any engine, tender, coach, or car any explosive substance, with intent to obstruct, stop, detain, derail, or wreck such train, for the purpose of committing such robbery, or remove any spike, fishplate, frog, rail, switch, tie, stringer, or appliance used on such railway with intent to obstruct, stop, detain, derail, or wreck such train for the purpose of committing such robbery; or shall enter any locomotive, tender, coach, or car attached to such train, and take or attempt to take possession thereof, for the purpose of committing such robbery; or shall rifle any coach, car, safe, box, or mail pouch on such train; or shall with force and arms take and carry away any valuable thing whatever from such train, or from any person thereon; or shall intimidate, injure, wound, or maim any person thereon, with intent to commit such robbery, he shall, upon conviction thereof, be imprisoned in the penitentiary at hard labor, for life, or for any term not less than ten years. [28 G. A., ch. 127, § 1.]

SEC. 4811. Jumping off cars in motion.

One who is over fourteen years of age is presumed to be capable of caring for his own safety, and to be negligent in jumping off a train while in motion. *Doggett v. Chicago, B. & Q. R. Co.*, 134–690, 112 N. W. 171.

This statutory provision prohibiting persons from getting off the train when in motion applies only to the act of attempting to actually step or pass from the car to the station platform. It is not necessarily contributory negligence for the passenger to go upon the car platform while the train is in motion preparatory to stepping off the car when it shall stop. *Forbes v. Chicago, R. I. & P. R. Co.*, 135–679, 113 N. W. 477.

It was not the purpose of the legislature to limit the offense described in this section to acts which would constitute malicious mischief or trespass with reference to property of railroad companies. *State v. Leasman*, 137–191, 114 N. W. 1032.

While this statute does not cover an attempt to get on or off a moving engine or car, still one who is injured while in the pursuance of such attempt is deprived of a remedy under the provisions of an accident policy excluding liability for accidents incurred while in violation of law. *Flower v. Continental Casualty Co.*, 140–510, 118 N. W. 761.

While it is by statute a crime for anyone not employed on the train or an officer of the law to get on or off of any car of a railroad company while the same is in motion, such act is not conclusive of negligence if done with the consent, approval or assistance of the conductor, brakeman or other person authorized to act for the company with reference to the transportation of passengers. *Gannon v. Chicago, R. I. & P. R. Co.*, 141–37, 117 N. W. 966.

SEC. 4818. Injuries to beasts.

Under this section the act of exposing a poisonous substance with intent that the same be taken by a domestic animal must be charged to have been maliciously done. *State v. Lightfoot*, 107–344, 78 N. W. 41.

SEC. **4821. Hunting upon cultivated or inclosed land.** Any person who shall hunt with dog or gun upon the cultivated or inclosed lands of another without first obtaining permission from the owner or occupant thereof, or his agent, shall for each offense be fined not more than ten dollars and costs of prosecution, and shall stand committed until such fine and costs are paid; but no prosecution shall be commenced under this section except upon the information of the owner or occupant of such cultivated or inclosed lands, or his agent. All islands in navigable streams bordering on the state shall be deemed enclosed lands without fences where the owners or lessees thereof post in plain view notices warning others not to trespass thereon. [31 G. A., ch. 160, § 1; 25 G. A., ch. 64.]

SEC. **4822. Malicious injury to buildings and fixtures.** If any person maliciously injure, deface or destroy any building or fixture attached thereto, or wilfully and maliciously destroy, injure or secrete any goods, chattels or valuable papers of another, he shall be imprisoned in the penitentiary not more than five years, or shall be imprisoned in the county jail not more than one year, or be fined not exceeding five hundred dollars, and be liable to the party injured in a sum equal to three times the value of the property so destroyed or injured. [31 G. A., ch. 161, § 1; C. '73, § 3985; R. § 4326; C. '51, § 2686.]

The act must be shown to be wilful and malicious and the complaining party must appear to have suffered substantial damage. *Freeman v. Strobehn*, 122–157, 97 N. W. 1094.

The malice referred to by the statute must be directed against some person, but it need not be shown that the offender actually knew the owner of the property destroyed. *State v. Leslie*, 138–104, 115 N. W. 897.

Under an indictment for breaking a plate glass window in a building, held not necessary to allege the instrument with which the act was done nor the particular circumstances under which the act was committed. *State v. Smith*, 148–640, 127 N. W. 988.

Proof of the ownership by a corporation of the building injured held sufficient in a particular case. *Ibid.*

One of the essential elements of the crime defined in this section is malice, and evidence is admissible to show the mental condition of the defendant at the time it is charged he did the acts complained of. *State v. Waltz*, 139 N. W. 458.

One who, bent on mischief, wilfully and maliciously destroys the property of another may be prosecuted under this section without regard to whether he knew who the owner was at the time of the commission of the act or not. While malice toward the owner must be established, it is not necessary that the defendant should have known at the time of the doing of the act who the owner was. *Ibid.*

SEC. **4823. To vehicle or harness—operating automobile.** If any person maliciously, wilfully and feloniously cut, break, sever or unfasten any tug, strap, line or other part of any harness attached to any horse or team, or maliciously and feloniously remove, break, unfasten or injure any part of any vehicle, or if any chauffeur or other person shall without the consent of the owner take, or cause to be taken, any automobile or motor vehicle, and operate or drive or cause the same to be operated or driven, he shall be imprisoned in the penitentiary not to exceed one year, or be imprisoned in the county jail not to exceed six months, or be fined not to exceed five hundred dollars. [35 G. A., ch. 299, § 1.] [26 G. A., ch. 87.]

SEC. **4826. To fruit or ornamental trees.**

In a prosecution for malicious mischief in which it was charged that defendant had taken up and carried away fruit trees from the premises of the prosecutor, it was held that the finding of trees planted on defendant's premises by him which had been thus taken from the premises of prosecutor was evidence of the commission of the crime charged, unless the explanation offered on behalf of the defendant created in the minds of the jury a reasonable doubt as to whether such trees had been wrongfully taken from prosecutor's premises; but held that the evidence as

to the identity of the trees was not sufficient to sustain a conviction. *State v. Roscum*, 128–509, 104 N. W. 800.

While there must be proof that the act was maliciously done, it is not necessary to prove that defendant was actuated by specific ill will toward the owner. It is sufficient to prove that defendant intentionally injured or destroyed the property of such owner, without just cause or excuse. *Ibid.*

SEC. **4830-a. To public library books or property.** Any person who shall wilfully, maliciously or wantonly tear, deface, mutilate, injure or destroy in whole or in part, any newspaper, periodical, book, map, pamphlet, chart, picture or other property belonging to any public library or reading room, shall be deemed guilty of a misdemeanor and shall be fined not more than one hundred dollars, or imprisonment not more than thirty days. [30 G. A., ch. 131, § 1.]

SEC. **4830-b. To sidewalks.** Any person guilty of wilfully and unlawfully injuring or destroying any sidewalk made of wood, brick, stone, cement, or any other material, shall be fined not more than one hundred dollars or be imprisoned in the county jail not exceeding thirty days. [31 G. A., ch. 162, § 1.]

SEC. **4830-c. Removal of safeguards or danger signals from highways.** Whoever shall, without the consent of the person in control thereof, wilfully remove, throw down, destroy or carry away from any highway, street, alley, avenue or bridge, any lamp, obstruction, guard or other article or things, or extinguish any lamp or other light, erected or placed thereon for the purpose of guarding or inclosing unsafe or dangerous places in said highway, street, alley, avenue, or bridge, shall be punished by a fine of not more than five hundred dollars, or by imprisonment in the county jail not exceeding one year. [35 G. A., ch. 127, § 1.]

CHAPTER 5.

OF LARCENY AND RECEIVING STOLEN GOODS.

SECTION 4831. Larceny defined.

What constitutes: Larceny as defined by statute is like that of the common law, save in the increased number of articles made the subject of larceny. There is such difference between the crimes of larceny and embezzlement as that they cannot properly be charged in different counts of the same indictment. *State v. Finnigean*, 127–286, 103 N. W. 155.

A definition of the crime in accordance with the statutory terms is sufficient. *State v. Carter*, 144–280, 121 N. W. 694.

Evidence concerning the intoxicated condition of defendant at the time the property was taken is admissible as relating to the specific intent of the defendant. *State v. Haines*, 152–394, 132 N. W. 821.

The taking of two items of personal property at the same time from the same place constitutes but one larceny, although such items of property may belong to different owners. *State v. Sampson*, 157– —, 138 N. W. 473.

A conviction before a justice of the peace of petty larceny in the taking of one of such items of property will bar a subsequent indictment for the taking of the other item of property in the same transaction. *Ibid.*

It may constitute larceny to unlawfully take away liquor from one engaged in illegally selling it. *State v. Sego*, 140 N. W. 802.

In such a case held that the evidence was not such as to justify the court in deciding that the conduct of the defendant was indulged in to the annoyance of the prosecuting witness merely by way of a joke. *Ibid.*

Felonious taking: It is not error necessitating a reversal that the court does not in the instructions defining the offense make use of the word "felonious" as qualifying the intent with which the act is done. All the instructions are to be taken together and if the intent is elsewhere sufficiently described, the defendant cannot complain. *State v. Minor*, 106–642, 77 N. W. 330.

To constitute larceny there must be a trespass in the taking, and if the taking is rightful the crime is not larceny, even though the taker intended to make a wrongful disposition of the money when once in his possession. *State v. Cothern*, 138–236, 115 N. W. 890.

While it is essential to prove a carrying away or asportation, it is not essential to show that the thief has so far succeeded in removing the property that it is completely and permanently lost to the owner. If by trespass he obtains complete control of the goods of another with the felonious intent to deprive the other thereof and carries or moves them in the slightest degree from the place where he finds them so as to have them for a time completely under his physical control, the crime is in this respect complete. *State v. Rozeboom*, 145–620, 124 N. W. 783.

One who, by erasing the address of a package in the possession of a common carrier and substituting another address, causes it to be delivered to a person for whom it was not intended, is guilty of larceny. *Ibid.*

While felonious taking is necessary to constitute larceny, and generally speaking a taking which is accompanied with the consent or acquiescence of the property owner is not felonious, yet where such consent is obtained by fraud or trick with promise to return the property after it has served some temporary use or purpose, but with the secret intention on the part of the receiver to convert it, fraud supplies the place of trespass in the taking and the offense committed is larceny. *State v. Dobbins*, 152–632, 132 N. W. 805.

Ownership: An indictment which alleges ownership of the property in a corporation without alleging the fact of its incorporation will not be fatally defective. *State v. Fogerty*, 105–32, 74 N. W. 754.

The taking at one time of property belonging to different persons severally and not jointly constitutes but one offense of larceny. The fact that the indictment lays the ownership of the property in the owners jointly, instead of severally, will not be fatal. *State v. Congrove*, 109–66, 80 N. W. 227.

An indictment charging the larceny of goods as belonging to a store of a specified name may be supported by proof of ownership in the partnership conducting such store. *State v. Bartlett*, 128–518, 105 N. W. 59.

What property: One who as a trespasser goes upon the land of another and transfers bees from a tree growing thereon to a gum belonging to a third person acquires by his wrongful act no title in the bees, and a person who takes them from the premises on which they have been left by the trespasser is not guilty of larceny of the property of the trespasser. *State v. Repp*, 104–305, 73 N. W. 829.

The term "chattels" as here used to describe the property which is subject of larceny, includes a dog. *Hamby v. Samson*, 105–112, 74 N. W. 918.

Fence wire, attached to posts and forming a fence, is a part of the realty, and the unlawful taking thereof is not larceny. *Murphy v. Olberding*, 107–547, 78 N. W. 205.

Where one of two adjoining landowners took fence wire from posts with which it constituted a division fence and attached it to other posts, where it served the same purpose, held that there was an absence of evidence of intent to convert such as is necessary to constitute larceny. *Ibid.*

A promissory note is a subject of larceny even where it is in the possession of the maker if it has not been marked paid and might have been transferred to a holder in good faith for value. *Davis v. Mohn*, 145–417, 124 N. W. 206.

Indictment: In an indictment for larceny of money, held sufficient to describe the property as "twenty-two dollars and fifty cents in lawful money of the United States of the value of twenty-two dollars and fifty cents." *State v. Fisher*, 106–658, 77 N. W. 456.

It is not necessary to allege the value of certain number of dollars of money which the defendant is charged with embezzling. *State v. Alverson*, 105–152, 74 N. W. 770.

It is proper in an indictment for embezzlement to describe the property converted as "certain money, the same being the lawful money of the United States, in amount and of the value of" the sum specified, and under such an indictment evidence of embezzlement of bank notes is admissible. *State v. Finnegean*, 127–286, 103 N. W. 155.

An allegation as to the trick, artifice and false pretense by which defendant obtained possession of the property does not render the indictment objectionable as charging two offenses. *State v. Dowden*, 137–573, 115 N. W. 211.

An allegation that the accused feloniously took, stole and carried away certain described money, goods and chattels of the property of another is a sufficient description of the offense of larceny. The method and manner of the unlawful taking and carrying away or conversion are matters of evidence merely and need not be pleaded in the indictment. *State v. Dobbins*, 152–632, 132 N. W. 805.

Value: In embezzlement the value of the property must be found by the jury for the purpose of determining the punishment, the same as in larceny. *State v. Carmean*, 126–291, 102 N. W. 97.

An instruction as to reasonable doubt with reference to whether the value of the property exceeds twenty dollars is not nec-

essary where the evidence shows without conflict, and it is practically conceded, that the value of the goods exceeds twenty dollars. *State v. Burton*, 103–28, 72 N. W. 413.

In determining the value of property stolen, the rule of market value does not necessarily apply where the stolen goods have no market value. In such case the original cost may be taken into consideration in determining the value of the goods at the time stolen. *State v. McDermet*, 138–86, 115 N. W. 884; *State v. Lewis*, 144–483, 123 N. W. 168.

Where the evidence as to value of the property stolen shows without conflict that it was in excess of twenty dollars, there is no occasion to instruct that if there is any reasonable doubt as to its value, it must be fixed at not exceeding twenty dollars. *State v. Hayward*, 153–265, 133 N. W. 667.

Evidence in a particular case held sufficient to sustain a conviction for larceny. *State v. Newhouse*, 115–173, 88 N. W. 353; *State v. Carter*, 121–135, 96 N. W. 710.

Evidence in a particular case held sufficient to sustain a conviction of larceny by taking the animals of the prosecutor from his pasture and shipping them to market with other cattle of the defendant. *State v. Greenland*, 125–141, 100 N. W. 341.

Recent possession: The claim of a purchase from strangers is one very commonly made by those found in possession of stolen property and though the evidence is undisputed yet the extreme improbability of such a transaction may be considered by the jury in passing upon the truth of the evidence. *State v. Marshall*, 105–38, 74 N. W. 763.

If the explanation of possession is sufficient to raise a reasonable doubt as to whether the property was honestly obtained, the fact of such possession should not weigh against the defendant. It is error to instruct the jury that defendant's possession will be presumptive evidence of his guilt, unless he explained to the satisfaction of the jury his possession of the property and that he came by it honestly. *State v. Miner*, 107–656, 78 N. W. 679.

One in possession of recently stolen property is not required to make a satisfactory explanation of his possession or to show that he came by the property honestly; but if his excuse or explanation is sufficient to raise a reasonable doubt of his guilt he is entitled to an acquittal. *State v. Bartlett*, 128–518, 105 N. W. 59.

Evidence of recent possession should not be admitted unless it appears that the defendant, and not someone else, was in possession of the goods stolen. *State v. Wackernagel*, 118–12, 91 N. W. 761.

It is error to charge the jury that possession of the stolen goods is prima-facie evidence of the defendant's guilt of the stealing of such goods, and that, if such possession is established they can, upon that fact alone, return a verdict of guilty unless some satisfactory explanation is made. The accused should not be required to satisfactorily explain his possession; the most that can be required of him in such case is that the circumstance be such as to raise a reasonable doubt whether the possession has been acquired otherwise than by the crime charged. If such reasonable doubt has been raised, he will be entitled to an acquittal, even though the explanation of the recent possession is not entirely satisfactory. *State v. Brundige*, 118–92, 91 N. W. 920.

It is error to instruct with reference to recent possession where the evidence does not show such possession on the part of defendant. *State v. Williams*, 120–36, 94 N. W. 255.

The truthfulness of defendant's explanation of his recent possession of the stolen property is for the jury. *State v. King*, 122–1, 96 N. W. 712.

When the charge is of larceny from a building and it appears that the property found in defendant's possession must have been taken from the building if stolen at all, the same inference arises with reference to larceny from the building as to larceny in general. *Ibid.*

It is not error to instruct that if defendant's explanation of his possession of the stolen property after its theft is such as to cause a reasonable doubt as to his guilt he should be given the benefit of such doubt. If the possession of another is interposed between the theft and the defendant, it is a fair and proper circumstance to be considered in his favor as tending to destroy or diminish the unfavorable inference which might otherwise be indulged in. *State v. Carter*, 144–280, 121 N. W. 694.

Although the evidence as to recent possession relates to a time several months subsequent to the commission of the crime, yet if it also appears that such possession commenced soon after the alleged larceny, such evidence may be considered. *State v. Kimes*, 145–346, 124 N. W. 164.

It is error to instruct the jury that if the stolen goods were found in defendant's possession soon after the theft then he is presumptively guilty thereof and may be convicted unless he has satisfied the jury that he came rightfully or honestly into such possession. The unlawful and dishonest character of defendant's possession will not constitute evidence of guilt unless he had guilty connection with the theft for which he is being tried. *Ibid.*

Failure to defend the possession of the property does not tend to show that such possession was the result of the commission of the crime. *Ibid.*

Although it is inaccurate to say that unexplained possession of stolen property raises the presumption of defendant's guilt, yet where the court explained to the jury the correct rule for the application of such evidence, held that there was no reversible error. *State v. Clark*, 145–731, 122 N. W. 957.

Where the evidence relied on for conviction is circumstantial the court should instruct as to the weight of circumstantial evidence. *Ibid.*

Where recent possession is relied upon as evidence of guilt, proof of such recent possession may be established by circumstantial evidence. *Ibid.*

The crime may be established by circumstantial evidence and the fact that evidence of recent possession of the stolen goods is only circumstantial will not require the exclusion of such evidence. *State v. Alley*, 149–196, 128 N. W. 343.

If the facts and circumstances disclosed by the evidence satisfactorily explain defendant's possession of the stolen property or raise a reasonable doubt in the minds of the jurors as to whether he came into the possession thereof otherwise than by stealing, the fact of recent possession is not to be considered in determining the defendant's guilt. *State v. Kimes*, 152–240, 132 N. W. 180.

An instruction is not erroneous which states that where the recent possession of stolen property by defendant is unexplained the presumption arises that defendant is the person who committed the theft, and that, in the absence of any such explanation, the fact of such possession is sufficient to warrant the conviction unless the evidence and circumstances disclosing such possession and the nature of it are such as to leave in the mind a reasonable doubt whether defendant may not have come honestly into the possession of such property. *State v. Hayward*, 153–265, 133 N. W. 667.

The finding of stolen property in a room occupied by defendant and another affords no presumptive evidence of the guilt of the defendant. *State v. Lehlan*, 139 N. W. 475.

Held error to instruct that if defendant had so explained possession of the stolen goods as to raise a reasonable doubt as to whether such goods "were not obtained by him" from the owner, then the fact of such possession would not weigh against the defendant. *State v. Clark*, 140 N. W. 821.

As to recent possession of stolen goods as evidence of guilt of burglary committed in connection with the stealing of such goods, see notes to § 4787.

SEC. 4832. In nighttime in dwelling house, store, boat, etc.

In determining the value of clothing stolen the cost or value when purchased may be taken into consideration. *State v. McDermet*, 138–86, 115 N. W. 884.

The description in this and the following sections of larceny from a building in the daytime and in the nighttime do not define distinct offenses but relate only to the punishment to be imposed for larceny under such aggravating circumstances; and under an indictment for larceny from a building not specifying either daytime or nighttime, the defendant may properly be sentenced on conviction to the maximum punishment provided for larceny. *State v. Carter*, 144–280, 121 N. W. 694.

While the offense of simple larceny is included in the crime of larceny from a dwelling house in the nighttime, it is not necessary to instruct as to such included crime where the evidence shows without question that the defendant is either guilty of the greater crime charged or not guilty of any crime. *State v. Haywood*, 155–466, 136 N. W. 514.

SEC. 4833. Same in daytime.

Breaking and entering is not an ingredient of the offense of larceny in a building and need not be charged in the indictment. *State v. McDermet*, 138–86, 115 N. W. 884.

SEC. 4834. Larceny of logs or lumber.

The ownership of stolen logs must be alleged and proven as alleged. *State v. Loomis*, 129–141, 105 N. W. 397.

SEC. 4836. Possession as evidence.

The provision that in a prosecution for the larceny of logs the finding of the logs in the possession of the defendant shall be presumptive evidence of guilt, does not authorize the presumption that logs found in the possession of one alleged to have stolen them are the property of the person whose mark they bear. The fact of actual ownership must be alleged and proven as in other cases of larceny. *State v. Loomis*, 129–141, 105 N. W. 397.

SEC. 4837. From building on fire or from the person.

Evidence in a particular case held sufficient to sustain a conviction of larceny from the person. *State v. Williams*, 118–494, 92 N. W. 652; *State v. Connor*, 118–490, 92 N. W. 654.

An indictment for such offense, describing the property as "a certain dark-colored pocketbook and its contents, consisting of one hundred and ten dollars in current money of the United States, and of the value of one hundred and ten dollars, a more particular description of which is to this grand jury unknown," held sufficient as to the description of the money. *Ibid.*

SEC. 4840. Embezzlement by public officers.

While the punishment for embezzlement is the same as that of larceny, the two crimes are distinct and cannot be charged in separate counts of the same indictment. *State v. Finnegean*, 127–286, 103 N. W. 155.

An officer not provided for by law is not such "public officer" as may be punished under this section for embezzlement. *State v. Spaulding*, 102–639, 72 N. W. 288.

One who is not a public officer may be guilty as accessory of the crime of embezzlement committed by a public officer. *State v. Rowe*, 104–323, 73 N. W. 833; *In re Rowe*, 77 Fed. 161.

The last sentence of this section, which was added by ch. 67, acts 26 G. A., contemplates the crime as committed by a public officer without any of the specific acts formerly specified as essential to constitute embezzlement, and in a prosecution under such charge it is necessary to allege demand and failure to account. Such demand must be by the person who is entitled to receive the funds demanded. *State v. McKinney*, 130–370, 106 N. W. 931.

Under an indictment charging embezzlement by a public officer, of money or property coming into his hands by virtue of his office, it is not necessary to allege that he has failed to account therefor upon demand. *State v. Hoffman*, 134–587, 112 N. W. 103.

Under such an indictment proof of conversion is sufficient without establishing a specific demand. The particular evidence by which the conversion is to be made out need not be set out in the indictment. *Ibid.*

The deposit by a municipal officer of public funds in a bank is not an embezzlement thereof. *Hunt v. Hopley*, 120–695, 95 N. W. 205.

SEC. 4841. Embezzlement by bailee.

Something more than an ordinary conversion is necessary to be shown in order to establish an embezzlement. *Farmer v. Norton*, 129–88, 105 N. W. 371.

SEC. 4842. Other embezzlement.

The voluntary doing of an act, the unexpected consequence of which even though inevitable, is to deprive another of his property, there being no intention that the act shall have such result, cannot constitute the crime of embezzlement. *State v. Carmean*, 126–291, 102 N. W. 97.

With reference to the crime of embezzlement by an officer or agent of a corporation the plain purpose of the statutory provision is that such officer or agent shall be criminally liable for the fraudulent conversion of the money or property of a corporation just as agents, clerks or servants of a private person are liable for a like fraudulent conversion of the money or property of their employers. And under an indictment charging defendant as an individual with the embezzlement of money of another individual it is not sufficient to prove that defendant was the officer of a corporation and, without fraudulent intent as to the owner of the money, caused him to be deprived thereof by the general course of business of the corporation transacted through an agent of such corporation who alone is guilty of any wrong in misappropriating money. *Ibid.*

In embezzlement the value of the property embezzled must be determined by the jury, as in larceny, for the purpose of determining the punishment for the offense. *Ibid.*

Mere failure of a guardian to account for funds belonging to his ward does not in itself establish the crime of embezzlement. *State v. Disbrow*, 130–19, 106 N. W. 263.

Not every wrongful conversion by a bailee or trustee is an embezzlement. The conversion must be actuated by the fraudulent purpose of depriving the owner of his property, in order to constitute such crime. *Ibid.*

The sale by a guardian without direction of court of a note belonging to the ward's estate does not necessarily constitute embezzlement; but the guardian may be guilty of embezzlement in a subsequent fraudulent misappropriation of the proceeds of such sale. *Ibid.*

By code § 5302 it is sufficient to allege the embezzlement or fraudulent conversion to have been of money generally without designating its particular species, and it is not necessary to specify it as being gold, silver or paper. *State v. Alverson*, 105–152, 74 N. W. 770.

It is sufficient to charge the embezzling of a certain number of dollars named of moneys received by defendant, etc., without other allegation of the value of such money. *Ibid.*

A prosecution for embezzlement by an agent in failing to account for money received under his agency may properly be had in the city where, under his contract, it was his duty to account. His failure or negligence or refusal to account elsewhere would not amount to conversion if, under his contract, he owed no such duty to his employer. *State v. Hengen*, 106–711, 77 N. W. 453.

The jurisdiction of the offense is in the county where the employe is under obligation to account to his employer. *State v. Maxwell*, 113–369, 85 N. W. 613.

Where a purchase of the property of the principal by the agent is ratified by the principal, with knowledge of the facts, the agent is not guilty of embezzlement in subsequently conveying the property as his own and appropriating the proceeds. *State v. Engle*, 111–246, 82 N. W. 763.

An officer of a building and loan association may be convicted of the crime of embezzlement, although he is also guilty of a crime under the provisions of code § 1918, relating to misconduct of officers of such an association. *State v. Ames*, 119–680, 94 N. W. 231.

Fraudulent intent is an essential element of the crime of embezzlement. *Ibid.*

On a prosecution of an agent for the embezzlement of his principal's funds, held that the evidence was sufficient to sustain a conviction. *State v. Pingel*, 128–515, 105 N. W. 58.

One whose money has been embezzled by his agent may take security for the amount due to him without ratifying the embezzlement. *Ibid.*

An essential element of the crime of embezzlement is a fraudulent intent to convert the property of another. *White v. International Textbook Co.*, 144–92, 121 N. W. 1104.

SEC. 4845. Receiving stolen goods.

In a prosecution for receiving or buying stolen property, it is always essential to prove defendant's guilty knowledge of the manner in which the property was obtained, and evidence of other similar transactions is admissible. *State v. Levich*, 128–372, 104 N. W. 334.

The crime of receiving stolen property is distinct from that of stealing the property; and in a prosecution for the former the original thief is not an accomplice whose evidence must be corroborated under the provisions of code § 5489. *State v. Scott*, 136–152, 113 N. W. 758.

In a prosecution for receiving stolen property, other acts of receiving property stolen from the same owner by the same thief and from the same place may be proven to show guilty knowledge and purpose. *Ibid.*

The thief is not an accomplice with the person who receives the stolen property. *State v. Feinberg*, 145–329, 124 N. W. 208.

In determining the value of property for the purpose of fixing the punishment the presumption is that wearing apparel has practically the same value in one locality as in another, and evidence of its value at any place within the jurisdiction of the court, though outside the county, is competent. *Ibid.*

To prove an offense under this section, it is not necessary to show that the stolen property was in the possession of the defendant. It is enough to show that he knew that it was stolen and that, by some means, he aided in concealing it. *State v. Conklin*, 153–216, 133 N. W. 119.

SEC. 4846. Common thief.

Under this section the previous conviction must antedate the aggravated crime, but there is no such limitation under code supp. § 4871-b. *State v. Dale*, 110–215, 81 N. W. 453.

SEC. 4850. **Taking goods from officer.** If any person, knowingly and without authority of law, take, carry away, secrete or destroy any goods or chattels while the same are lawfully in the custody of any sheriff, coroner, marshal, constable, or other officer, and held by such officer by virtue of execution, writ of attachment or other legal process, he shall be guilty of larceny, and, when the value of the property so taken, carried away, secreted or destroyed exceeds the sum of twenty dollars, be imprisoned in the penitentiary not more than one year; and when it does not exceed twenty dollars, be fined not exceeding one hundred dollars, or

imprisoned in the county jail not more than thirty days. [27 G. A., ch. 110, § 1; C. '73, § 3915; R. § 4251.]

SEC. **4852. Selling or concealing mortgaged property.**

Notwithstanding the embodiment in this section of the word "written" in accordance with the provisions of 25 G. A., ch. 50, so as to make it criminal for the mortgagor to wilfully sell or dispose of any portion of the property without the written consent of the holder of the mortgage, it is competent, in a prosecution under the statute, to show that the mortgagor, by the oral direction of the mortgagee, made a sale of the mortgaged property with the good faith, purpose and understanding that the proceeds should be paid over to the mortgagee and credited on the indebtedness. *Kletzing v. Armstrong*, 119–505, 93 N. W. 500.

SEC. **4852-a. Sale of crops with landlord's lien upon.** If any tenant of farm lands shall, with intent to defraud, sell, conceal, or in any manner dispose of any of the grain, or other annual products thereof upon which there is a landlord's lien for unpaid rent, without the written consent of the landlord, he shall be guilty of larceny and punished accordingly. [29 G. A., ch. 146, § 1.]

An indictment charging a tenant of farm lands with having disposed of grain which is subject to the landlord's lien does not charge a continuing offense, and if repeated acts are alleged the indictment is bad for duplicity. *State v. Ashpole*, 127–680, 104 N. W. 281.

Under such statute, the indictment must specifically allege that the tenancy by defendant was of farm lands. *Ibid.*

SEC. **4852-b. Payment of rent.** The payment of the rent for the lands upon which such grain or other annual products were raised at or before the time the same falls due, shall be a bar to any prosecution under section one hereof, and no prosecution shall be commenced until such rent be wholly due. [29 G. A., ch. 146, § 2.]

SEC. **4852-c. Of electric current, water, steam, steam heat or gas.** If any person wilfully and with intent to defraud, in any manner take from the wires, pipes, meters or any other apparatus of any electric motor, electric light, water, steam heating or gas plant or works, any electric current, water, steam, steam heat or gas, he shall be guilty of larceny and shall be punished accordingly. [32 G. A., ch. 172, § 1; 30 G. A., ch. 132, § 1.]

SEC. **4852-d. Of poultry.** Any person guilty of larceny of domestic fowl or poultry from any building, shed, coop or enclosed premises shall, upon conviction thereof, be punished by imprisonment in the penitentiary not exceeding two years, or by imprisonment in the county jail not exceeding one year, or by fine not exceeding five hundred dollars, or by both fine and imprisonment in the county jail, as above provided, at the discretion of the court. [35 G. A., ch. 300, § 1.] [30 G. A., ch. 133, § 1.]

Under a charge of larceny of domestic fowl from inclosed premises, the state must prove that the place from which the property was taken was within the inclosed premises of the person named. *State v. Norman*, 135–483, 113 N. W. 340.

SEC. **4852-e. By executor, administrator or guardian.** If any executor, administrator or guardian embezzles or fraudulently converts to his own use any money or property collected or received by him or coming into his possession or under his control by virtue of his said office he is guilty of larceny and the statute of limitations shall not begin to run as to such offense until the settlement of the estate or the attainment of majority by the ward, as the case may be. [31 G. A., ch. 163, § 1.]

CHAPTER 6.

OF FORGERY AND COUNTERFEITING.

SECTION **4853. Forgery defined.** If any person, with intent to defraud, falsely make, alter, forge or counterfeit any public record; or any process issued or purporting to be issued by any competent court, magistrate or officer; or any pleading or proceeding filed or entered in any court of law or equity; or any attestation or certificate of any public officer, or other person, in relation to any matter wherein such attestation or certificate is required by law, or may be received or be taken as legal proof; or any charter, deed, will, bond, writing obligatory, power of attorney, letter of credit, policy of insurance, bill of lading, bill of exchange, promissory note; or any order, acquittance, discharge, or accountable receipt for money or other valuable thing; or any acceptance of any bill of exchange or order; or any indorsement or assignment of any bill of exchange, promissory note or order, or of any debt or contract; or any instrument in writing, being, or purporting to be, the act of another, by which any pecuniary demand or obligation, or any right or interest in or to any property whatever, is or purports to be created, increased, transferred, conveyed, discharged or diminished, he shall be imprisoned in the penitentiary not more than ten years or imprisoned in the county jail not exceeding one year, or fined not exceeding one thousand dollars. [34 G. A., ch. 169, § 1.] [C. '73, § 3917; R. § 4253; C. '51, § 2626.]

The forged instrument may be written in one county and the forgery actually committed in another county where the instrument is completed. *State v. Spayde*, 110–726, 80 N. W. 1058.

An alteration of a public record with a fraudulent purpose may constitute the offense of forgery. Without such fraudulent purpose, it may constitute the crime defined by code § 4910, of making false entries. *State v. Hanlin*, 134–493, 110 N. W. 162.

It is forgery to falsely make or alter an instrument with intent to defraud, or to utter it as true, knowing it to be forged, although it is not stamped, as required by federal statutes, and therefore the provision of the federal statutes that an unstamped instrument is not admissible in evidence has no application to a prosecution for forgery. *State v. Shields*, 112–27, 83 N. W. 807.

It is unnecessary in charging forgery, unless predicated upon the indorsements, that indorsements on the forged instrument be alleged or proven. But to charge the uttering of a forged instrument, the indictment should allege the indorsements so far as they affect the person to whom the instrument purports to be payable, and the proof in this respect must correspond with the allegations. *State v. Waterbury*, 133–135, 110 N. W. 328.

If the instrument is not on the face of it such an instrument as is the subject of forgery, that fact must be shown by extrinsic allegations and evidence, and it is sufficient to set out the purport of the instrument so as to indicate that it is an instrument in writing purporting to be the act of another by which a pecuniary demand or obligation is, or purports to be, created, etc. *State v. Burling*, 102–681, 72 N. W. 295.

In a prosecution for forgery, other similar forgeries may be shown to prove the intent, but other instruments claimed to have been forged cannot be introduced in evidence for this purpose, unless the fact that they are forgeries is established. *State v. Prins*, 113–72, 84 N. W. 980.

In a prosecution for forgery in altering a check, held that the admission of the defendant that he had added something to the check might be proven as against him. *State v. Spiker*, 131–194, 108 N. W. 233.

Evidence in a particular case held sufficient to sustain a conviction for forgery where the defense was that the defendant had authority to sign his principal's name as agent. *State v. Rivers*, 124–17, 98 N. W. 785.

An instrument purporting to be an order on a school treasurer issued by officers authorized by law to issue such orders is within the language of the statute. It is enough that it is of apparent legal efficacy. *State v. Blodgett*, 143–578, 121 N. W. 685.

The offenses of forgery and of uttering a forged instrument are distinct offenses and an acquittal of the crime of uttering

an instrument is not a bar to a prosecution on the charge of forging it. *Ibid.*

A slight and immaterial variance between the allegations and the proof will be disregarded; but if in material respects the instrument offered in evidence differs from the instrument described in the indictment, the conviction should be set aside. *State v. Carlson*, 145–154, 123 N. W. 765.

In a prosecution for passing a forged check, held that evidence of passing another forged check on a different party was admissible as tending to establish a common conspiracy between defendant and another. *State v. Flood*, 148–146, 127 N. W. 48.

[The reference in 2d column of p. 1923 of code to *Fountain v. Smith*, 70–282, should be to *State v. McMakin*, 70–281.]

SEC. 4854. Uttering forged instrument.

The words "knowingly" or "well-knowing" in the indictment are uniformly held to supply the place of a positive averment that the defendant knew the facts subsequently stated. An intent to defraud may be inferred from knowingly passing an instrument as true which is known to be false. *State v. Waterbury*, 133–135, 110 N. W. 328.

In a prosecution for uttering a forged instrument it is not necessary to allege the false making of the instrument by defendant or a fraudulent purpose in such making, and upon conviction or acquittal of the charge, the question as to whether the instrument in fact was forged remains open. An acquittal of passing a forged instrument is not a bar to a prosecution for forging such instrument. *State v. Blodgett*, 143–578, 121 N. W. 685.

The burden of proof is on the state to prove guilty knowledge and fraudulent intent in a prosecution for uttering a forged instrument. *State v. O'Connell*, 144–559, 123 N. W. 201.

The offense does not necessarily consist in the actual perpetration of a fraud by the passing of a forged instrument, but it is sufficient if it be offered or held out as genuine with the intent to defraud some person or persons. *State v. Weaver*, 149–403, 128 N. W. 559.

CHAPTER 6-A.

OF PUNISHMENT ON CONVICTION THREE OR MORE TIMES OF CERTAIN OFFENSES, AND MAKING CERTAIN EVIDENCE COMPETENT PROOF OF FORMER CONVICTIONS.

SECTION **4871-a. Third conviction of felony.** Whenever any person has been twice convicted of either of the crimes of burglary, robbery, forgery, counterfeiting, larceny where the value of the property stolen exceeded twenty dollars, or of breaking and entering with intent to commit a public offense any dwelling house, office, shop, store, warehouse, railroad car, boat, vessel, or building, in which goods, merchandise, or valuable things, were kept for use, sale or deposit, or has been convicted of two or more of said crimes, and shall thereafter be convicted of any one of such crimes, committed after such conviction, he shall be imprisoned in the penitentiary for any term not less than fifteen years, provided such former judgments shall be referred to in the indictment, stating the court, date and place of rendition. [27 G. A., ch. 109, § 1.]

Under this statute, held that the records of former judgments of conviction of a person of the same name were not sufficient without other evidence tending to identify the defendant on trial as the person against whom such judgments were entered. *State v. Smith*, 129–709, 106 N. W. 187.

The fact of the prior convictions is to be taken as a part of the offense charged, at least to the extent of aggravating it and authorizing an increased punishment. *Ibid.*

The statutory provision (27 G. A., ch. 109) imposing a more severe penalty for larceny where the defendant has been twice previously convicted of the same crime is not unconstitutional although the increased punishment may be imposed on account of convictions prior to the taking effect of the act. *State v. Jones*, 128 Fed. 626.

Also held that it was immaterial that the evidence showed three prior convictions instead of two. *Ibid.*

SEC. **4871-b. Fourth conviction of petty larceny.** Any person over the age of eighteen years who has been three times convicted of larceny where the value of the property stolen did not exceed twenty dollars, upon being convicted the fourth time of said offense shall be imprisoned in the penitentiary not exceeding three years, provided such former judgments shall be referred to in the indictment, stating the court, date and place of rendition. [27 G. A., ch. 109, § 2.]

There is no express requirement that the previous convictions referred to in this section shall antedate the commission of the offense charged. The punishment provided is for the fourth conviction without reference to the order of time of the commission of the acts, except that the previous convictions must precede the finding of the indictment. *State v. Dale*, 110–215, 81 N. W. 453.

The defendant cannot be convicted under this statute on account of a petit larceny committed prior to the time that the statute went into effect, for the statute, which increases the punishment of the crimes described therein, would be *ex post facto* as to the offenses already committed. *Ibid.*

SEC. **4871-c. Evidence admitted.** On the trial of any of said offenses named in this act a duly authenticated copy of the record of the former judgment in any court wherein said conviction was had, for either of said crimes against the party indicted, shall be prima-facie evidence of such former conviction and may be used in evidence against said party. [27 G. A., ch. 109, § 3.]

SEC. **4871-d. Duties of jury and judge.** Upon any trial when the indictment refers to former convictions of the defendant, the jury, if it finds the defendant guilty, and the court, if the defendant is convicted on a plea of guilty, must also find and determine specially whether the defendant had previously been convicted of either of the crimes referred to in the indictment and the number of times so convicted. [27 G. A., ch. 109, § 4.]

CHAPTER 7.

OF OFFENSES AGAINST PUBLIC JUSTICE.

SECTION **4872. Perjury.**

The time of the commission of the offense of perjury need not be specifically stated in the indictment, nor proven as alleged, where the charge is not based on the record or other writing under oath, and the statement asserted to have been false might have been made on either the date alleged or that proven, and would have constituted perjury if made at either time. *State v. Perry*, 117–463, 91 N. W. 765.

In an indictment for perjury it is sufficient to set forth the substance of the controversy or matter in respect to which the offense was committed. (Code § 5296.) *Ibid.*

False swearing in a proceeding on information before a justice of the peace may be punishable as perjury, although the information on which the proceeding is based is not sufficiently specific in charging the crime. Such a proceeding, though voidable, will not be entirely void. *Ibid.*

The corroboration of the evidence of one witness required to establish the falsity of the testimony given may be furnished by facts and circumstances as well as by direct and positive testimony. *State v Clough*, 111–714, 83 N. W. 727.

The fact that the action in which the false testimony is given might be abated on account of the pendency of a former action in another jurisdiction will not defeat the prosecution for perjury. *Ibid.*

A false affidavit for a cost bond may be material so as to constitute perjury. *Ibid.*

The certificate of the clerk to such affidavit, on proof of the handwriting of the signature thereto, is competent and sufficient prima-facie evidence of the jurat and that he performed the duties of clerk. *Ibid.*

The indictment must negative that which is false in the alleged testimony of the defendant, contradicting the matter alleged to have been falsely sworn to in

express and specific terms. *State v. Gallaugher*, 123–378, 98 N. W. 906.

The indictment need not charge the precise date on which the crime was committed. It is sufficient if the time alleged is prior to the finding of the indictment. *State v. John*, 124–230, 100 N. W. 193.

If the court had jurisdiction of the general subject and of the person, and the accused proceeds to a hearing on the information without objection, he is in no position to say that perjury cannot be assigned on false testimony given by him on the hearing, because the allegations of the information were insufficient to constitute a crime. If the defect relates to the allegations in the particular case, the court having jurisdiction of the general class of cases to which the particular one belongs, the defect may be waived, and the proceedings are merely voidable and not void. This is particularly true in those jurisdictions where, as here, an information is amendable. *State v. Brown*, 128–24, 102 N. W. 799.

If the matter sworn to is in any way conducive to the point in issue, or a guide to the court or jury, though it be circumstantial, it is nevertheless perjury. If it be circumstantially material, it is the subject of perjury. *Ibid.*

The materiality of the testimony is a question of law for the court. *Ibid.*

As to sufficiency of indictment (following *State v. Schill*, 27–263), see *State v. Booth*, 121–710, 97 N. W. 74.

Instructions as to the sufficiency of corroborating testimony in support of the charge of perjury held not prejudicially erroneous. *Ibid.*

Where the defendant, charged with an offense triable before a justice of the peace, goes to trial without objection to the form and sufficiency of the information and being sworn as a witness gives false testimony concerning a material matter in controversy, he cannot rely on the defective character of the information to exculpate him from the charge of perjury predicated on the giving of such false testimony. *State v. Roche*, 137–387, 114 N. W. 1034.

Where the indictment fully advises the defendant as to one specification of perjury, he has no ground of complaint if the trial is limited to that specification, although the indictment contains other immaterial specifications. *Ibid.*

As the form of the oath under which a witness is required to testify is not specified by statute, it is not essential to show in a prosecution for perjury that in an administration of such oath the words "so help me God" were used. *State v. Hulsman*, 147–572, 126 N. W. 700.

It is not essential that there be two witnesses to the falsity of the defendant's testimony. It is enough that there be one witness strongly corroborated. *State v. Young*, 153–4, 132 N. W. 813.

SEC. 4873. Subornation.

It is not necessary in an indictment for procuring another to commit perjury to set out the method or means employed. *State v. Porter*, 105–677, 75 N. W. 519.

Under an indictment for perjury, the accused cannot be convicted of subornation of perjury, and proof of subornation of perjury will not constitute a justification for a publication charging perjury. *State v. Lomack*, 130–79, 106 N. W. 386.

SEC. 4882. Attempt to corrupt such persons.

While in an indictment to bribe a juror it must appear that the person charged had knowledge that the person whom he attempted to influence was a juror, yet it is not essential that this fact appear by direct averment. *State v. Dankwardt*, 107–704, 77 N. W. 495.

Where a person uses to a juror such language as "See that the right is done, it will not be to your loss," with intent to improperly influence the juror, such act may be criminal if the words are spoken with the intent to improperly influence the juror. *Ibid.*

SEC. 4889. Compounding felonies involving life imprisonment.

If the inseparable part of the consideration for a contract is the compounding of a felony, the whole contract is void. *Shaulis v. Buxton*, 109–355, 80 N. W. 397.

An agreement or understanding not to prosecute need not be the sole consideration for a contract in composition of a felony in order to render it void. It is sufficient if the contract is made upon an agreement, express or implied, to compound or conceal the offense, or not to prosecute the same. Although the contract may have been based in part upon other valuable considerations, still, if there was such an agreement or understanding as the law forbids, combined and coöperating with that consideration, and operating as a part of the inducement for the making of the contract, then it is void and cannot be enforced. *Rosenbaum v. Levitt*, 109–292, 80 N. W. 393.

It is improper conduct on the part of an attorney to enter into an implied agreement not to prosecute a felonious charge

in the event of a satisfactory settlement of a civil suit. *State v. Johnson*, 149–462, 128 N. W. 837.

This section and the following relate only to the compounding of offenses punishable by imprisonment in the penitentiary. There is no statute authorizing an indictment for compounding a misdemeanor. *State v. Guthrie*, 150–149, 129 N. W. 804.

SEC. 4890. Compounding lesser felonies.

It is a good defense to a promissory note that it was given with the understanding on the part of the maker, warranted by the circumstances, that it was for the purpose of preventing a prosecution for a felony. *Ellyson v. Schooler*, 149–332, 128 N. W. 551.

An offense may be compounded or compromised only as authorized by code § 5622. *White v. International Textbook Co.*, 156–210, 136 N. W. 121.

SEC. 4891. Suffering prisoner to escape.

A sheriff who voluntarily and purposely permits a prisoner, sentenced to confinement in the county jail by a proper federal court, to go and return at pleasure is punishable for contempt. *Ex parte Shores*, (D. C.) 195 Fed. 627.

SEC. 4894. Assisting prisoner to escape from prison.

One who is charged in a preliminary information with a crime amounting to a felony and is held to answer before a grand jury and committed to jail, is detained for a felony within the statutory provision fixing the punishment for the rescue of a prisoner detained in the penitentiary or a jail for a felony. The guilt of the person thus detained is immaterial. *State v. Johnson*, 136–228, 113 N. W 832.

The crime of assisting in the escape of a prisoner provided in this section is entirely separate and distinct from that of breaking jail described in code § 4898. *State v. Duff*, 144–142, 122 N. W. 829.

SEC. 4896. Same from officer.

The crime of rescuing a prisoner is made a felony, and the officer has the right to use a deadly weapon in preventing such rescue if that is the only reasonably apparent method of accomplishing the result. *State v. Smith*, 127–534, 103 N. W. 944.

SEC. 4897. Prison breach—escape—repealed. [29 G. A., ch. 147, § 1.]

[See § 4897-a.]

To constitute a breaking of prison under this section it is necessary that there be some force used, and where it appeared that the prisoner had, while being employed with other prisoners outside of the prison walls, escaped by concealing himself from the guards, held that the crime was not committed. *State v. King*, 114–413, 87 N. W. 282.

SEC. 4897-a. Prison breach—escape—violation of parole. That section forty-eight hundred ninety-seven-a of the supplement to the code, 1907, is hereby repealed and in lieu thereof is enacted the following:

"If any person committed to the penitentiary or reformatory shall break such prison and escape therefrom or shall escape from or leave without due authority any building, camp, farm, garden, city, town, road, street, or any place whatsoever in which he is placed or to which he is directed to go or in which he is allowed to be by the warden or any officer or employe of the prison whether inside or outside of the prison walls, he shall be deemed guilty of an escape from said penitentiary or reformatory and shall be punished by imprisonment in said penitentiary or reformatory for a term not to exceed five years, to commence from and after the expiration of the term of his previous sentence. In order to constitute an escape under the provisions of this act it is not necessary that the prisoner be within any walls or enclosure nor that there shall be any actual breaking nor that he

be in the presence or actual custody of any officer or other person. If any person having been paroled from the state penitentiary or state reformatory as provided by law, shall thereafter depart without the written consent of the board of parole from the territory within which by the terms of said parole he is restricted, or if he shall violate any condition of his parole or any rule or regulation of said board of parole he shall be deemed to have escaped from the custody within the meaning of section one of this act and shall be punished as therein provided." [35 G. A., ch. 301, § 1.] [29 G. A., ch. 147, § 1; R. § 4294.]

SEC. **4897-b. Costs and fees—to be paid from general fund.** That all costs and fees hereafter incurred in prosecutions for violations of section forty-eight hundred ninety-seven of the code, being for breaking and escaping from the penitentiary, shall be paid out of the state treasury from the general fund, in any case where the prosecution fails, or where such fees and costs cannot be made from the person liable to pay the same, the facts being certified by the clerk of the district court and verified by the county attorney of the county. [28 G. A., ch. 128, § 1.]

SEC. **4897-c. Amount certified to auditor of state.** The clerk of the district court, in which the case is prosecuted or tried, shall, under his seal of office, certify to the state auditor a statement of the amount of fees or costs incurred in each case, and such statement shall be approved by the presiding judge in writing appended thereto or endorsed thereon. Should the cause be appealed to the supreme court, the costs there incurred shall be certified to the state auditor by the clerk of that court, but no fees, in such case, for the clerk of either the district or supreme courts shall be included or paid from the state treasury. [28 G. A., ch. 28, § 2.]

SEC. **4897-d. Auditor to issue warrant.** On such certificate being filed in the office of the state auditor the auditor shall issue his warrant on the state treasurer for the amount thereof, payable to the clerk of the district or supreme court, as the case may be, and the clerk shall pay the same to the persons entitled thereto. [28 G. A., ch. 128, § 3.]

SEC. **4898. Breaking jail—escape.** If any person confined in a county jail upon any criminal charge, either before or after conviction for a criminal offense, break jail and escape therefrom, or escape from the custody of the officer charged with his keeping, he shall be imprisoned in such jail not exceeding one year, and fined not exceeding three hundred dollars; but when such jail breaking, or escape from custody, occurs during incarceration after conviction, or before trial for a criminal offense whereof he is afterwards convicted, in either of such cases the sentence to commence from and after the expiration of the sentence upon the original charge. [33 G. A., ch. 211, §§ 1, 2.] [26 G. A., ch. 106; C. '73, § 3959; R. § 4295; C. '51, § 2668.]

SEC. **4899. Resisting execution of process.**

The indictment for resisting an officer in serving process must allege that the defendant "knowingly" did the act complained of. It is not sufficient that the act be charged as unlawfully or wilfully done. *State v. Perry*, 109–353, 80 N. W. 401.

It is sufficient in the indictment to identify the process, the service of which is alleged to have been resisted, and where the process thus described is a search warrant, the affidavit and warrant corresponding with such description are admissible in evidence. *State v. Moore*, 125–749, 101 N. W. 732.

SEC. **4905. Misdemeanors in general.**

Where by the charter of a city acting under special charter it was provided that no member of the city council should vote upon any question in which he was di-

rectly or indirectly interested, held that the action of members of the council in voting to increase their own salary was a misdemeanor under this section. *State v. Shea*, 106–735, 72 N. W. 300.

Where a statute prohibits the doing of an act but provides no special penalty, the doing of such act constitutes in itself a misdemeanor. *State v. York*, 131–635, 109 N. W. 122; *State v. York*, 135–529, 113 N. W. 324.

Where a statute designates conduct as constituting a misdemeanor, such conduct is negligence *per se*. *Woolf v. Nauman Co.*, 128–261, 103 N. W. 785.

SEC. 4906. Punishment.

The violation of the rules adopted by the state board of health being made a misdemeanor by code § 2573, is punishable under the provisions of this section. *Pierce v. Doolittle*, 130–333, 106 N. W. 751.

SEC. 4910. Making false entries in relation to fees.

The offense of making false entries by an officer in relation to his office does not necessarily involve a fraudulent purpose. *State v. Hanlin*, 134–493, 110 N. W. 162.

It is immaterial that the books in which the alterations are made are not books specifically prescribed by the state to be kept by the officer, if they have in fact been kept by him for the purpose of making settlement with reference to his office. *Ibid.*

Such statutory provision is applicable, not only to the clerk of a district court, but to his deputy. *Ibid.*

SEC. 4913-a. Bringing to institutions or inmates drugs, liquors, weapons, explosives or articles aiding escape. That the law as it appears in section forty-nine hundred thirteen-a of the supplement to the code, 1907, is hereby repealed and in lieu thereof is enacted the following:

"That any person not authorized by law, who shall bring or pass or cause to be brought into any penitentiary, reformatory, workhouse, industrial school or hospital of the state, or onto the grounds thereof, or into any enclosure, building, camp, quarry, farm, garden or other place used in connection with any such institution in which prisoners, patients or other inmates are required or permitted to be, any opium, morphine, cocaine or other narcotic, or any intoxicating liquor, or any firearm, weapon or explosive of any kind, or any rope, ladder or other instrument or device for use in making or attempting an escape, or shall in any manner aid in such an escape, shall be punished by imprisonment in the penitentiary or reformatory for a term not exceeding five years. And any person not duly authorized by law who shall place or cause to be placed or aid in placing any of the drugs, liquors, weapons, explosives or other articles hereinbefore enumerated in or near any road, park, path, walk, grove, hedge or field where any prisoner, patient or other inmate of the state institutions specified is or is likely to be with intent that the drug, liquor, weapon, explosive or other article so placed shall be found by or shall pass into the possession of any such prisoner, patient or other inmate, shall be punished by imprisonment in the penitentiary or reformatory for a term not exceeding five years, or by a fine of not more than one thousand dollars nor less than one hundred dollars. The bringing or passing or causing to be brought into any of the places designated in this act of any rope, ladder or other instrument or device adopted for use in making an escape, shall be presumptive evidence that it was so brought or passed for such use, and the leaving of any drug, liquor, weapon, explosive or other article enumerated in this act in or near any of the places specified with knowledge that any prisoner, patient or other inmate is or is likely to be in such place, shall be presumptive evidence that such article was so left to be found by or to pass into the possession of such prisoner, patient or other person in violation of this act. An attempt to do any of the acts prohibited by this act shall be subject to the same punishment as the completed act." [35 G. A., ch. 302, § 1.] [30 G. A., ch. 134, § 1.]

CHAPTER 8.

OF OFFENSES AGAINST THE RIGHTS OF SUFFRAGE.

SECTION **4919-a. Illegal voting.** Whenever any political party shall hold a primary election for the purpose of nominating a candidate for any public office or for the purpose of selecting delegates to any convention of such party, it shall be unlawful for any person not a qualified elector, or any qualified elector not at the time a member in good faith of such political party, to vote at such primary election. Any person violating the provisions of this section, and any person knowingly procuring, aiding or abetting such violation, shall be deemed guilty of a misdemeanor, and upon conviction shall be fined not to exceed one hundred dollars or be imprisoned in the county jail not to exceed thirty days. [27 G. A., ch. 111, § 1.]

SEC. **4919-b. Prima-facie evidence.** It shall be prima-facie evidence of the violation of the preceding section for any person who has participated in any primary election of one political party, to vote at a primary election held by another political party, to select candidates to be voted for at the same election; or to select delegates to any convention of the party holding such primary election. [27 G. A., ch. 111, § 2.]

SEC. **4919-c. Authority to administer oaths.** Any judge of such primary election shall have power to administer oaths to, and to examine under oath, any person offering to vote at such election, touching his qualifications to participate in such primary election, and it shall be the duty of such judge of election to so examine or cause to be examined any person challenged as to his right to vote. Any person testifying falsely as to any material matter, touching his qualifications to participate in such primary election, shall be deemed guilty of perjury and punished accordingly. [27 G. A., ch. 111, § 3.]

SEC. **4919-d. What excepted.** Nothing in this act shall be construed to apply to conventions held under the caucus system. [27 G. A., ch. 111, § 4.]

SEC. **4921. Residence in state.**

To constitute wilfulness in voting where not qualified, there must be something more than the intentional act of voting without legal qualification; and advice of counsel or persons qualified to give advice in such matters may be shown as negativing the wilful intention to illegally vote. But proof of casting a ballot where the elector is as a matter of law not entitled to vote is prima-facie evidence of guilt. *State v. Savre*, 129–122, 105 N. W. 387.

SEC. **4928. Illegally receiving or rejecting votes.**

An election officer will not be criminally liable for refusing to receive the ballot of an elector unless the elector, being qualified by compliance with the law to vote, tenders his ballot within the time within which it is the duty of the election officer to receive ballots. *State v. Clark*, 102–685, 72 N. W. 296.

The refusing of a ballot by the election officer may be wilful if it is purposely and deliberately done, without regard to whether the officer had just grounds for believing the ballot to be lawful. *Ibid.*

CHAPTER 9.

OF OFFENSES AGAINST CHASTITY, MORALITY AND DECENCY.

SECTION 4932. Adultery.

What constitutes—who may prosecute: Under the statutory definition adultery consists in the sexual connection between a man and a woman of whom one is lawfully married to a third person. *State v. Hasty*, 121–507, 906 N. W. 1115.

The crime of adultery is an offense against the innocent spouse of the person guilty of it and against the state, for which a divorce and subsequent marriage of the guilty party do not atone, nor constitute a bar to prosecution. The statute does not necessarily limit the prosecution to cases in which complaint is made by the person who is the husband or wife of the guilty spouse at the time the complaint is made, but the phrase "husband or wife" refers to the relation existing at the time the offense is committed. *State v. Smith*, 108–440, 79 N. W. 115.

The state is not required to confine its evidence to the commission of the crime charged on the dates specified in the indictment, but may show that it was committed at any time within eighteen months preceding the finding of the indictment. If defendant is entitled to have the state elect as to which one of several alleged acts is relied on, he must ask that the state be required to make such election before the case is submitted to the jury. *Ibid.*

Adultery is an offense against the state as well as against the innocent spouse and there may be, therefore, a criminal conspiracy to commit adultery where the combination is not confined to the immediate parties to the intended crime. *State v. Clemenson*, 123–524, 99 N. W. 139.

The requirement that the prosecution must be commenced on the complaint of the husband or wife pertains to the procedure only. Such complaint is not an element of the offense. *Ibid.*

Consent of the female is not essential to constitute the crime of adultery. *Ibid.*

The wife's agency in the prosecution of her husband for adultery need not be shown beyond reasonable doubt. It constitutes no part or element of the offense. *State v. Athey*, 133–382, 108 N. W. 224.

After the prosecution has been properly commenced on the complaint of the wife, she has no power to recall or dismiss the charge so as to defeat the prosecution. *Ibid.*

The fact of prosecution by the wronged spouse need not be proven beyond a reasonable doubt. *State v. Harmann*, 135–167, 112 N. W. 632.

The court is to determine whether such prosecution was instituted by the spouse as required by statute. *Ibid.*

The fact of the prosecution being commenced by the injured spouse need not be alleged in the indictment. *Ibid.*

Where it appeared that the husband appeared before the grand jury and testified with reference to the charge against defendant of adultery with the wife of the informer, such appearance, being in response to a subpoena, does not furnish proof that the prosecution was commenced by the husband. *State v. Loftus*, 128–529, 104 N. W. 906.

A husband who has after the commission of the alleged crime secured a divorce from his wife with whom the adultery is charged to have been committed cannot be the prosecutor. *Ibid.*

A married man can be prosecuted for adultery only at the instance of his wife and not at the instance of the husband of the woman with whom the adultery was committed. *Sloan v. Davis*, 105–97, 74 N. W. 922.

Sexual intercourse between two persons, not husband and wife, either one of them or both being married, constitutes adultery and it is not necessary to charge that the act was done knowingly, wilfully or maliciously. *State v. Anderson*, 140–445, 118 N. W. 772.

Nor is it necessary to allege in the indictment that the prosecution was commenced on the complaint of the husband or wife. *Ibid.*

Where it appeared that the wife went to see the county attorney with reference to the purpose of having the action commenced and voluntarily went before the grand jury for that purpose, held that the record justified the finding that the action was commenced by her, although it did not appear that she was subpoenaed before the grand jury. *State v. Young*, 148–629, 127 N. W. 987.

Where the wife had filed an information before a justice of the peace and, after consultation with the county attorney, had voluntarily appeared before the grand jury and given testimony, held that it sufficiently appeared that the prosecution was commenced by her although she subsequently relented and desired that the defendant should not be convicted. *State v. Leek*, 152–12, 130 N. W. 1062.

It is sufficient that the fact of institution of the suit on the wife's complaint is established by a preponderance of the evidence. *Ibid.*

Evidence: The crime of adultery is not to be inferred from the mutual disposition of the parties to have sexual intercourse when coupled with no other proof save that of the opportunity to indulge therein. While the offense may be established by circumstantial evidence, and the disposition of the parties toward each other and opportunity are important circumstances, yet the circumstances must be such as will lead the guarded discretion of a reasonable man to the conclusion that the offense has been in fact committed. *State v. Thompson*, 133–741, 111 N. W. 319.

While no amount of abuse or misconduct on the part of the wife could serve as a defense or excuse for the crime of adultery on the part of the husband, the fact that the husband has been driven from his home by the violence of his wife's conduct or temper may furnish an explanation of his living apart from her, and therefore may be shown in evidence for that purpose. *State v. Koller*, 129–111, 105 N. W. 391.

Where the wife is an active agent of the prosecution and gives testimony against her husband, proof of an attempt upon her part to deprive him of the attendance of witnesses would have a legitimate bearing upon the weight to be given to her evidence. *Ibid.*

While direct proof of the act of intercourse is not required in a prosecution for adultery, it is necessary that the circumstances shown be inconsistent with innocent conduct. *State v. Chaney*, 110–199, 81 N. W. 454.

For the purpose of showing adulterous disposition subsequent acts of sexual intercourse between parties may be shown. *State v. More*, 115–178, 88 N. W. 322.

The birth of a child, by the woman with whom the adultery is charged to have been committed by defendant, and the admission of paternity of such child by him are admissible where they indicate conception as having taken place about the time of the alleged criminal relation. *State v. Hasty*, 121–507, 96 N. W. 1115.

Evidence in a particular case, including testimony tending to show that the defendant procured a monument to be erected on the grave of the woman with whom he was charged to have committed adultery, designating her as his wife, held sufficient to warrant the conviction. *Ibid.*

It is error to receive in evidence notes addressed to the wife with whom the adultery is alleged to have been committed without anything to connect defendant with the sending of such notes. *State v. Loftus*, 128–529, 104 N. W. 906.

Evidence in a particular case held to sufficiently show the identity of the woman referred to in the evidence and the woman named in the indictment. *State v. Higgins*, 121–19, 95 N. W. 244.

Correspondence between the parties, showing their disposition toward each other, is admissible in a prosecution for adultery. *State v. Butts*, 107–653, 78 N. W. 687.

In a particular case held that the evidence was not sufficient to sustain a conviction for the offense. *State v. Wiltsey*, 103–54, 72 N. W. 415.

Evidence in a particular case held sufficient to sustain a conviction. *State v. Schaedler*, 116–488, 90 N. W. 91.

Where the prosecution relies upon the testimony of the paramour, such testimony should be corroborated. *State v. Brown*, 146–113, 124 N. W. 899.

Proof of recent intimacy between the alleged wrongdoers may furnish corroboration, but such intimacy should be shown by other testimony than that of the paramour. *Ibid.*

Evidence of mere disposition and opportunity is not alone sufficient to sustain a conviction for adultery. While circumstantial evidence may be sufficient, the circumstances must be such as would be inconsistent with any other reasonable hypothesis than that of defendant's guilt. *State v. Trachsel*, 150–135, 129 N. W. 736.

While proof of inclination and opportunity is not sufficient, the commission of the crime may nevertheless be made out by circumstantial evidence. *State v. Leek*, 152–12, 130 N. W. 1062.

Where the evidence shows an adulterous disposition and not only opportunity but proximity, it may be sufficient to sustain a conviction. *State v. Taylor*, 141 N. W. 946.

Election: Where there has been a continuous adulterous relationship, the state should not be required to elect the particular occasion on which the adultery relied on was committed, and confine its evidence to that occasion. *State v. Higgins*, 121–19, 95 N. W. 244.

Adultery is not a continuing offense, and the state should be required to elect on which of two or more transactions relied upon it will ask a conviction. *State v. Loftus*, 128–529, 104 N. W. 906.

Where the particular criminal act for which a conviction alone may be had is sufficiently identified by the evidence, and evidence of other criminal relations between the same parties has been received only for the purpose of corroboration, it is not error to refuse to require the state to make an election. *State v. Hasty*, 121–507, 96 N. W. 1115.

Punishment: Under the indeterminate sentence law (code § 5718-a13) the maximum sentence should be imposed, but error of the court in imposing a less punishment is not ground for reversal. *State v. Perkins*, 143–55, 120 N. W. 62.

SEC. 4933. Bigamy.

It is not necessary to allege in the indictment the cohabitation as continuing. And where the marriage has been contracted in another state, it is not the continuation of the cohabitation within this state which is important, but the fact that in this state cohabitation continues which was commenced in another state under the bigamous marriage. The length of time is immaterial. *State v. Steupper*, 117–591, 91 N. W. 912.

Where the defendant relies upon a prior marriage which had not been dissolved, evidence of a divorce in another county tending to indicate by similarity of names that the prior marriage had thus been terminated, is admissible. *State v. McClelland*, 152–704, 133 N. W. 111.

SEC. 4934. Exceptions.

A subsequent marriage by the faithful spouse after desertion by the other for the statutory period will be presumed to be valid. *State v. Rocker*, 130–239, 106 N. W. 645.

SEC. 4936. Incest. If any man marry his father's sister, mother's sister, father's widow, wife's mother, daughter, wife's daughter, son's widow, sister, son's daughter, daughter's daughter, son's son's widow, daughter's son's widow, brother's daughter or sister's daughter; or if any woman marry her father's brother, mother's brother, mother's husband, husband's father, son, husband's son, daughter's husband, brother, son's son, daughter's son, son's daughter's husband, daughter's daughter's husband, brother's son or sister's son, or if anyone marry his or her first cousin; or if any person, being within the degrees of consanguinity or affinity in which marriages are prohibited by this section, carnally know each other, they shall be guilty of incest, and imprisoned in the penitentiary not exceeding twenty-five years nor less than one year. [33 G. A., ch. 212, § 1.] [31 G. A., ch. 164, § 1; C. '73, § 4030; R. §§ 4367–9.]

A conviction may be had of the crime of incest although the facts show that the act would also constitute rape. *State v. Kouhns*, 103–720, 73 N. W. 353.

The provision (code § 5488) requiring corroboration of the evidence of prosecutrix in a prosecution for rape or seduction does not in terms refer to incest and is not applicable thereto. *Ibid.*

The female is not an accomplice in such sense as that corroboration of her testimony is necessary under code § 5489. *Ibid.*

If the same transaction may constitute either incest or rape, provided the essential features of those crimes are established, an acquittal under an indictment charging rape is a bar to a prosecution for incest committed in a transaction which might have been proven under the indictment for rape although the state seeks in the second prosecution to show a different transaction from that relied upon in the first prosecution. *State v. Price*, 127–301, 103 N. W. 195.

An indictment for incest which charges carnal knowledge on the part of the accused only, is sufficient without also charging such carnal knowledge on the part of the other party to the connection. *State v. Kimble*, 104–19, 73 N. W. 348.

It is sufficient in the indictment to use the language of the statute and it is unnecessary to allege knowledge of the relationship. *State v. Rennick*, 127–294, 103 N. W. 159.

It is not competent to receive evidence tending to show a conspiracy between the prosecutrix and a third person to bring about the criminal relation with which the defendant is charged. *Ibid.*

Though the criminal act is accomplished by force so as to constitute rape, the wrongdoer may nevertheless be convicted of incest if the relationship is shown. *Ibid.*

Knowledge of the relationship is not included in the definition of the crime of incest and need not be alleged in the indictment nor affirmatively proven. *State v. Judd*, 132–296, 109 N. W. 892.

The charge in the indictment that the act was felonious does not render such proof necessary. *Ibid.*

The relationship between the parties may be established by proof of general repute or admissions. *Ibid.*

Proof of penetration is sufficient to constitute carnal knowledge without proof of emission. The fact of penetration may be inferred from circumstances. *Ibid.*

Evidence of undue intimacy or of intercourse prior to the transaction charged as the basis of the prosecution is admissible. *Ibid.*

A female child under fourteen years of age is presumed to be incapable of appreciating the wrong involved in an incestuous

relationship and therefore is not to be regarded as an accomplice in the crime. *State v. Goodsell*, 138–504, 116 N. W. 605.

The word "daughter" is employed in this section as indicating relationship without regard to legitimacy. *Ibid.*

By code § 3182 it is provided that a marriage may be annulled by a proceeding in court if it is between parties whose marriage is prohibited by law, and the only corresponding prohibition is that found in this section. *Back v. Back*, 148–223, 125 N. W. 1009.

Construing this section in a probate proceeding involving the validity of a marriage, held that the marriage between a man and the daughter of his deceased wife by a former marriage, there being no surviving issue of his former marriage, was not invalid. *Ibid.*

The prosecution is not limited to the time of the commission of the offense specified in the indictment. *State v. Heft*, 155–21, 134 N. W. 950.

Evidence of other alleged acts of intercourse is admissible if the jury is properly instructed that such evidence can only be considered as bearing on the disposition and inclination of the defendant, and unless the jury find the defendant guilty of the specific act on which the prosecution elects to rely, he should be acquitted. *Ibid.*

Voluntary submission by the prosecutrix to intercourse with the defendant, held to render her an accomplice whose testimony must be corroborated; but that so long as the condition of minority existed the immaturity of the prosecutrix should be taken into account as throwing some light on the question of voluntary consent. *Ibid.*

The paternity of a child born to the prosecutrix is not a fact necessary to be established in order to convict the defendant. *Ibid.*

In view of the testimony of the prosecutrix that she had had no intercourse with other men than defendant, a doubt as to the paternity of her child might give rise to a doubt as to the general truthfulness of her testimony, but such doubt would not necessarily result in an acquittal, as the jurors might believe that in this one respect the prosecutrix testified falsely, and yet in view of the corroboration as to the transaction complained of may have believed beyond a reasonable doubt that it took place. *Ibid.*

SEC. 4937. Sodomy.

The penalty provided in this section is applicable to the crime as described in code supp. § 4937-a. *State v. Gage*, 139–401, 116 N. W. 596.

SEC. 4937-a. Sodomy defined.

Whoever shall have carnal copulation in any opening of the body except sexual parts, with another human being, or shall have carnal copulation with a beast, shall be deemed guilty of sodomy. [29 G. A., ch. 148, § 1.]

The statutory definition of sodomy is broader than that of the common law. *State v. McGruder*, 125–741, 101 N. W. 646.

It is sufficient in the indictment to allege the offense in the language of the statute. Carnal copulation may be sufficiently shown without proof of the emission of the semen. *Ibid.*

The crime of sodomy as defined in this section may be committed between persons of the same sex. *State v. Gage*, 139–401, 116 N. W. 596.

Actual penetration must be proved, as in rape, but it may be shown by circumstances as well as by direct testimony. *Ibid.*

SEC. 4938. Lewdness—indecent exposure.

It is not necessary that the indictment should name the person to whom the defendant exposed his person. A defendant might properly be convicted of this offense although no person witnessed the indecent act, as for instance where a case might be made out on a confession corroborated by circumstances. *State v. Bauguess*, 106–107, 76 N. W. 508.

The phrase "an indecent exposure of the person" has a well settled and commonly accepted signification, and means the exposure of such parts of the person as modesty or a sense of self-respect requires to be kept usually covered, and it is not necessary in an indictment for the offense to more particularly describe the part of the body exposed. The language of the code not only names but describes the offense and it is sufficient to charge it in the language of the statute. *Ibid.*

It is not necessary to allege in the indictment that the exposure was made in the actual sight of any person. An indictment following the language of the statute is sufficient. *State v. Martin*, 125–715, 101 N. W. 637.

The exposure becomes indecent only when indulged in at a time and place where as a reasonable person one knows or ought to know that his act is open to the observation of others. *Ibid.*

Where the indictment alleges the exposure to have been in the presence of a

female, it is not necessary to allege that it was without the consent of such female. *Ibid.*

Where in a prosecution for lewdness the issue presented by the evidence is only as to the commission of the acts charged, and the question of intent is not involved, it is error to allow evidence of other lewd acts to be introduced. *State v. Vance*, 119–685, 94 N. W. 204.

In a prosecution under this section it is not error to include in an instruction the language of the entire section, although only the fact of indecent exposure is charged in the indictment. *Heath v. Hagan*, 135–495, 113 N. W. 342.

The term "lewd" as used in this section has reference to such open and public indecency as tends to corrupt the public morals and not merely an unlawful indulgence in a single act of incontinence. *State v. Mitchell*, 149–362, 128 N. W. 378.

SEC. **4938-a. Lewd, immoral and lascivious acts with children.** Any person over eighteen years of age who shall wilfully commit any lewd, immoral or lascivious act upon or with the body or any part or member thereof, of a child of the age of thirteen years, or under, with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of such person, or of such child, shall be punished by imprisonment in the penitentiary not more than three years, or by imprisonment in the county jail not more than six months, or by fine not exceeding five hundred dollars. [32 G. A., ch. 173, § 1.]

Other acts of lewdness between the same parties may be shown as tending to establish the lascivious and lewd disposition of defendant. *State v. Neubauer*, 145–337, 124 N. W. 312.

An indictment substantially in the terms of the statute is sufficient. *State v. Kernan*, 154–672, 135 N. W. 362.

SEC. 4939. Keeping house of ill fame.

A covered wagon used for purposes of prostitution which is moved about from place to place is a house of ill fame, within the meaning of this section. (Following *State v. Mullen*, 35–207, holding that a boat on the Mississippi river was a house of ill fame.) *State v. Chauvet*, 111–687, 83 N. W. 717.

Proof of a single act of prostitution in a house is not sufficient to support a conviction for keeping a house of ill fame, but the crime may be established by proof of facts and circumstances from which the inference of guilt is so strong as to exclude reasonable doubt. *State v. Steen*, 125–307, 101 N. W. 96.

Proof of the general reputation for prostitution of women who are kept and harbored in the house is to be considered as tending to show that the keeper of the house had notice of their real character and of the nature of business in which they were engaged. *Ibid.*

To authorize a conviction for keeping a house of ill fame it is not necessary to show that the defendant kept such house for the purpose of gain. *State v. Porter*, 130–690, 107 N. W. 923.

The gist of the offense under this section is the keeping of a place for the purpose of lewdness which, as the term is here applied, means lustfulness or lascivious conduct. *State v. Mitchell*, 149–362, 128 N. W. 378.

SEC. 4941. Leasing house for such purpose.

The leasing of a house with knowledge of lessee's intention to use the same for immoral purposes, and knowingly permitting such use by the lessee after leasing, are separate and distinct offenses and may be alleged conjunctively in one indictment without duplicity. *State v. Des Moines Union R. Co.*, 137–570, 115 N. W. 232.

In an indictment under this section the place referred to need not be particularly described. It is sufficient if it is alleged as located within the county. *Ibid.*

SEC. 4942. Enticing to house of ill fame.

An indictment for abduction under this section is not rendered defective by describing the female abducted as "a virtuous female" instead of as "a female before reputed virtuous" in the language of the statute. If the female is not in fact virtuous her reputation is immaterial. *State v. Dickerhoff*, 127–404, 103 N. W. 350.

An indictment for conspiracy to entice a woman into a life of prostitution and lewdness is sufficient without the allegation of an overt act. *State v. Poder*, 154–686, 135 N. W. 421.

SEC. 4943. Prostitution.

The provisions of this section with reference to resorting to or occupying a house of ill fame for the purpose of prostitution or lewdness were not intended to reach and punish a single act of lewdness committed by a person in his own house. (Explaining *State v. Russell*, 95–406.) *State v. Irvin*, 117–469, 91 N. W. 760.

One may be convicted of being found in a house of ill fame leading a life of prostitution and lewdness without proof of actual sexual intercourse. *State v. Shaw*, 125–422, 101 N. W. 109.

Resorting to a hotel for one night only for the purposes of lewdness does not constitute a crime within the definition of this section. *State v. McDavitt*, 140–342, 118 N. W. 370.

SEC. 4944. Evidence.

This provision is not unconstitutional. *State v. Wilson*, 124–264, 99 N. W. 1060.

It is not erroneous to instruct that a "house resorted to for the purpose of prostitution and lewdness" is a house visited by persons of both sexes for the purpose of having sexual intercourse or some other lewd purpose and that lewdness is unlawful indulgence of the animal desire. *Ibid.*

The weight of authority seems to be that evidence as to reputation for want of chastity of the keeper of a house of ill fame prior to the findings of the indictment is admissible. *State v. Beebe*, 115–128, 88 N. W. 358.

In a prosecution for resorting to, occupying and inhabiting a house of ill fame, testimony as to the general reputation of the house is admissible. *State v. Burns*, 145–588, 124 N. W. 600.

SEC. **4944-a. Houses of lewdness, assignation and prostitution—nuisance.** Whoever shall erect, establish, continue, maintain, use, own or lease any building, erection or place used for the purpose of lewdness, assignation or prostitution is guilty of a nuisance, and the building, erection or place, or the ground itself, in or upon which such lewdness, assignation or prostitution is conducted, permitted or carried on, continued or exists, and the furniture[,] fixtures, musical instruments and contents are also declared a nuisance, and shall be enjoined and abated as hereinafter provided. [33 G. A., ch. 214, § 1.]

SEC. **4944-b. May be enjoined.** Whenever a nuisance is kept, maintained or exists, as defined in this act, the county attorney or any citizen of the county may maintain an action in equity in the name of the state of Iowa upon the relation of such county attorney or citizen, to perpetually enjoin said nuisance, the person or persons conducting or maintaining the same, and the owner or agent of the building or ground upon which said nuisance exists. In such action the court, or a judge in vacation, shall, upon the presentation of a petition therefor alleging that the nuisance complained of exists, allow a temporary writ of injunction without bond, if it shall be made to appear to the satisfaction of the court or judge by evidence in the form of affidavits, depositions, oral testimony or otherwise, as the complainant may elect, unless the court or judge, by previous order, shall have directed the form and manner in which it shall be presented. Three days' notice in writing shall be given the defendant of the hearing of the application, and if then continued at his instance, the writ as prayed shall be granted as a matter of course. When an injunction has been granted, it shall be binding on the defendant throughout the judicial district in which it was issued, and any violation of the provisions of injunction herein provided shall be a contempt as hereinafter provided. [33 G. A., ch. 214, § 2.]

SEC. **4944-c. Proceedings.** The action when brought shall be triable at the first term of court after due and timely service of the notice has been given, and in such action evidence of the general reputation of the place shall be admissible for the purpose of proving the existence of said nuisance. If the complaint is filed by a citizen, it shall not be dismissed

except upon a sworn statement made by the complainant and his attorney setting forth the reasons why the action should be dismissed, and the dismissal approved by the county attorney in writing or in open court. If the court is of the opinion that the action ought not to be dismissed, he may direct the county attorney to prosecute said action to judgment, and if the action is continued more than one term of court, any citizen of the county or the county attorney may be substituted for the complaining party and prosecute said action to judgment. If the action is brought by a citizen and the court finds there was no reasonable ground or cause for said action, the costs may be taxed to such citizen. [33 G. A., ch. 214, § 3.]

SEC. **4944-d. Violation of injunction.** In case of the violation of any injunction granted under the provisions of this act, the court, or in vacation, a judge thereof, may summarily try and punish the offender. The proceedings shall be commenced by filing with the clerk of the court an information under oath, setting out the alleged facts constituting such violation, upon which the court or judge shall cause a warrant to issue, under which the defendant shall be arrested. The trial may be had upon affidavits, or either party may demand the production and oral examination of the witnesses. A party found guilty of contempt under the provisions of this section shall be punished by a fine of not less than two hundred nor more than one thousand dollars, or by imprisonment in the county jail not less than three nor more than six months, or by both fine and imprisonment. [33 G. A., ch. 214, § 4.]

SEC. **4944-e. Order of abatement — sale of property — building closed—contempt.** If the existence of the nuisance be established in an action as provided in this act, an order of abatement shall be entered as a part of the judgment in the case, which order shall direct the removal from the building or place of all fixtures, furniture, musical instruments or movable property used in conducting the nuisance, and shall direct the sale thereof in the manner provided for the sale of chattels under execution, and the effectual closing of the building or place against its use for any purpose, and so keeping it closed for a period of one year, unless sooner released. If any person shall break and enter or use a building, erection or place so directed to be closed, he shall be punished as for contempt as provided in the preceding section. For removing and selling the movable property, the officer shall be entitled to charge and receive the same fees as he would for levying upon and selling like property on execution, and for closing the premises and keeping them closed, a reasonable sum shall be allowed by the court. [33 G. A., ch. 214, § 5.]

SEC. **4944-f. Proceeds of sale—how applied.** The proceeds of the sale of the personal property, as provided in the preceding section, shall be applied in payment of the costs of the action and abatement, and the balance, if any, shall be paid to the defendant. [33 G. A., ch. 214, § 6.]

SEC. **4944-g. Release of property on filing bond.** If the owner appears and pays all costs of the proceeding, and files a bond with sureties to be approved by the clerk in the full value of the property, to be ascertained by the court, or, in vacation, by the clerk, auditor and treasurer of the county, conditioned that he will immediately abate said nuisance and prevent the same from being established or kept therein within a period of one year thereafter, the court, or, in vacation, the judge, may, if satisfied of his good faith, order the premises closed under the order of abatement to be delivered to said owner, and said order of abatement canceled so far as the same may relate to said property; and if the proceeding be

an action in equity, and said bond be given and costs therein paid before judgment and order of abatement, the action shall be thereby abated as to said building only. The release of the property under the provisions of this section shall not release it from any judgment, lien, penalty or liability to which it may be subject by law. [33 G. A., ch. 214, § 7.]

SEC. **4944-h. Assessment of tax.** Whenever a permanent injunction issues against any person for maintaining a nuisance as herein defined, or against any owner or agent of the building kept or used for the purposes prohibited by this act, there shall be assessed against said building and the ground upon which the same is located and against the person or persons maintaining said nuisance, and the owner or agent of said premises, a tax of three hundred dollars. The assessment of said tax shall be made by the assessor of the city, town or township in which the nuisance exists and shall be made within three months from the date of the granting of the permanent injunction. In case the assessor fails or neglects to make said assessment, the same shall be made by the sheriff of the county, and a return of said assessment shall be made to the county treasurer. Said tax shall be a perpetual lien upon all property, both personal and real, used for the purpose of maintaining said nuisance, and the payment of said tax shall not relieve the person or building from any other penalties provided by law. The provisions of the law relating to the collection and distribution of the mulct liquor tax shall govern in the collection and distribution of the tax herein prescribed in so far as the same are applicable, and not in conflict with the provisions of this act.[1] [33 G. A., ch. 214, § 8.]

[1]The enrolled bill, S. F. 37 (ch. 214, 33 G. A.), shown above as §§ 4944-a to 4944-h, inclusive, fails to show the signature of the speaker of the house. EDITOR.]

SEC. **4944-i. Permitting minor females to be inmates.** Whoever, being the keeper of a house of prostitution, or assignation house, building, or premises in this state where prostitution, fornication, or concubinage is allowed, or practiced, shall suffer or permit any unmarried female under the age of eighteen years to live, board, stop or room in such house, building, or premises, shall, on conviction, be imprisoned in the penitentiary not less than one year nor more than five years. [33 G. A., ch. 215, § 1.]

SEC. **4944-j. Detention of females for purposes of prostitution.** Whoever shall unlawfully detain or confine any female, by force, false pretense, or intimidation, in any room, house, building, or premises in this state, against the will of such female, for purposes of prostitution or with intent to cause such female to become a prostitute, and be guilty of fornication or concubinage therein, or shall by force, false pretense, confinement, or intimidation attempt to prevent any female so as aforesaid detained, from leaving such room, house, building, or premises, and whoever aids, assists, or abets by force, false pretense, confinement, or intimidation, in keeping, confining, or unlawfully detaining any female in any room, house, building, or premises in this state, against the will of such female, for the purpose of prostitution, fornication, or concubinage, shall on conviction, be imprisoned in the penitentiary not less than one nor more than ten years. [33 G. A., ch. 216, § 1.]

SEC. **4944-k. Immoral plays, exhibitions and entertainments.** Any person who, as owner, manager, director, or agent, or in any other capacity, prepares, advertises, gives, presents, or participates in any obscene, indecent, immoral, or impure drama, play, exhibition, show, or entertainment, which would tend to the corruption of the morals of youth

or others, and every person aiding or abetting such act and every owner or lessee or manager of any garden, building, room, place, or structure, who leases or lets the same or permits the same to be used for the purposes of any such drama, play, exhibition, show, or entertainment, or who assents to the use of the same for any such purpose, if it be so used, shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine not exceeding one thousand dollars or imprisonment in the county jail not exceeding one year or by both such fine and imprisonment. [33 G. A., ch. 217, § 1.]

SEC. **4946. Bodies for medical purposes—repealed.** [28 G. A., ch. 129, § 1.]

[See § 4946-a.]

SEC. **4946-a. Repeal.** That section forty-nine hundred forty-six of the code be and the same is hereby repealed, and the following enacted as a substitute therefor: [28 G. A., ch. 129, § 1.]

SEC. **4946-b. Bodies for medical purposes—how distributed.** Every coroner, undertaker, superintendent or managing officer of any public asylum, hospital, poorhouse, or penitentiary in this state, shall deliver the bodies of uninterred deceased persons in his charge suitable for scientific purposes with the consent of the friends or relatives, if known, and without such consent if not known, to medical colleges or schools within the state, for the purpose of scientific medical study, unless the deceased person expressed a desire during his last illness that his body should be buried or cremated; such bodies shall be equitably distributed among the medical colleges and schools in the state under such rules and regulations as may be adopted by the state board of health, and the number so distributed shall be in proportion to the number of students matriculated at each medical college or school. The expense of such distribution shall be paid by the medical college or school receiving the bodies. If there shall be more bodies than are required by the medical colleges or schools of the state, the same may be delivered to physicians in the state, under such rules and regulations as may be adopted by the state board of health. [28 G. A., ch. 129, § 2.]

SEC. **4946-c. Duties of various officers.** It shall be the duty of every such coroner, undertaker, superintendent or managing officer of a public asylum, hospital, poorhouse or penitentiary, as soon as any such body shall come into his custody, or as soon as any person shall die, whose body, under the provisions hereof, should be delivered to a medical college or school, to at once notify the secretary of the state board of health by telegram of the fact, and to hold such body unburied for forty-eight hours thereafter, and to deliver the body to such medical college or school as the secretary of the state board of health may direct. If, however, such body is subsequently claimed by any relative or friend, it shall be at once, by the person or persons having the same in charge, or by the medical college or school to which it has been delivered, surrendered to such relative or friend for burial. [28 G. A., ch. 129, § 3.]

SEC. **4946-d. Body held subject to claim.** Every medical college or school, or person receiving the body of any deceased person under the provisions hereof, shall hold the same for the period of sixty days, subject to the claim of relatives or friends. [28 G. A., ch. 129, § 4.]

SEC. **4946-e. Penalties.** Any coroner, undertaker, superintendent or managing officer of any public asylum, hospital, poorhouse or penitentiary within this state into whose hands the body of a deceased person shall

come, which should be delivered to a medical college or school under the provisions hereof, who shall wilfully neglect or refuse to notify the secretary of the state board of health of the existence of such body, or refuse to deliver the same to a medical college or school upon the direction of the secretary of the state board of health, as herein provided, shall be guilty of a misdemeanor, and upon conviction thereof be fined any sum not exceeding fifty dollars; and any person who shall receive or deliver any body or remains knowing that any of the provisions of this act have been violated, shall be imprisoned in the penitentiary not more than two years, or fined not exceeding twenty-five hundred dollars, or both. [28 G. A., ch. 129, § 5.]

SEC. 4952. **Obscene literature—articles of immoral use.** Whoever sells, or offers for sale, or gives away, or has in his possession with intent to sell, loan, or give away any obscene, lewd, indecent, lascivious, or filthy book, pamphlet, paper, drawing, lithograph, engraving, picture, photograph, writing, card, postal card, model, cast, or any instrument or article of indecent or immoral use, or any medicine, article or thing designed or intended for procuring abortion or preventing conception, or advertises[1] the same for sale, or writes or prints any letter, circular, handbill, card, book, pamphlet, advertisement or notice of any kind, giving information, directly or indirectly, when, where, how or by what means any of the articles or things hereinbefore mentioned can be purchased, or otherwise obtained or made, shall be guilty of a misdemeanor and be fined not more than one thousand nor less than fifty dollars, or be imprisoned in the county jail not more than one year, or both. [34 G. A., ch. 170, § 1.] [21 G. A., ch. 177, § 1.]

[1"advertise" in enrolled bill. EDITOR.]

SEC. 4962. Keeping gambling houses.

To a conviction of keeping a gambling house proof of participation in the play is not essential. *State v. White*, 123–425, 98 N. W. 1027.

SEC. 4964. Gaming and betting.

The offense of gambling may be punished under city ordinance not inconsistent with the statutory provisions on the subject. *Blodgett v. McVey*, 131–552, 108 N. W. 239.

To support a conviction for gambling defendant must be shown to have joined in the game or to have participated in the betting or wagering of money or other property of value. *State v. White*, 123–425, 98 N. W. 1027.

SEC. 4965. Gaming contracts void.

Where the question was whether, in purchases of grain made on the board of trade by plaintiff as the agent of defendant, it was intended that no delivery of the grain should be made, held that evidence of the defendant's intention was admissible although such intention would not be controlling. *Counselman v. Reichart*, 103–430, 72 N. W. 490.

In such case, held that in view of the generally known fact that business on the board of trade is conducted on a plan of nondelivery of produce, but as a speculation in margins or differences, the intention of the parties might be determined by evidence outside of the correspondence by telegraph under which the purchases were made. *Ibid.*

A note given in settlement of a balance growing out of dealings in options is void. *People's Sav. Bank v. Gifford*, 108–277, 79 N. W. 63.

The stakeholder is not *in pari delicto* with the parties to the unlawful wager. *Himmelman v. Pecaut*, 133–503, 110 N. W. 919.

After property has been delivered to the successful party in consequence of a bet or wager it is too late for another party to the contract to attempt to impeach the

decision or raise the question of illegality. *Dee v. Sears-Nattinger Auto Co.*, 141–610, 118 N. W. 529.

A negotiable note transferred by indorsement in due course to a holder for value without notice is not vitiated in the hands of such holder by the fact that it was given in a gambling transaction. *Kushner v. Abbott*, 156–598, 137 N. W. 913.

SEC. **4965-a. Possession of gambling devices.** No one shall, in any manner or for any purpose whatever, except under proceeding to destroy the same, have, keep or hold in possession or control any roulette wheel, Klondyke table, poker table, faro or keno layouts. [34 G. A., ch. 179, § 1.]

SEC. **4965-b. Seizure—hearing—destruction.** If any person make oath before a magistrate that he has probable cause to suspect and does suspect, that articles or things mentioned in section one hereof are stored or kept or had in possession at any place within the county in any house, building or other place of any description whatever, describing the house or place as near as may be and naming the occupant thereof, if known, such magistrate shall issue his warrant for the purpose of searching such house or place for and seizing such articles or things. Such warrant may be served at any time of the day or night. The officer may break open any part of [a] building, or anything therein in order to execute the warrant, if after notice of his authority and purpose he is refused admittance. Said articles or things shall be carried before such magistrate to be dealt with as herein provided. The officer shall make return at once after the warrant is served. Within three days after the return is made, notice shall be served upon the party from whose possession said articles or things were taken, if known, and if not known, said notice shall be posted on the premises from which the articles were taken, notifying the possessor of such seizure and that the matter of the destruction of said articles or things will come on for hearing at a certain time and place before the court or magistrate issuing the warrant, or in his absence or inability to serve, before the next nearest and accessible magistrate in the county, which time shall be within ten days after said notice is served or posted. Any person may appear at said hearing and show that the articles or things seized are not of the character specified in section one hereof and if such claim is established, [they] shall be returned to the place from which taken. If the court finds that the articles or things seized are of the character mentioned in section one hereof, it shall enter judgment commanding the immediate destruction of the same. Execution shall issue thereon accordingly. The officer shall forthwith carry out the orders of said execution and make immediate return thereon of his acts, which return shall be entered on the docket of said court. [34 G. A., ch. 179, § 2.]

SEC. **4967. Dealing in options—bucket shops.**

Aside from statutory provisions, an executory contract for the sale of property is void where delivery of the property is neither made nor contemplated, and where settlement is to be made by payment of the difference between the contract price and the market price of the property at the time fixed for settlement. *People's Sav. Bank v. Gifford*, 108–277, 79 N. W. 63

SEC. **4969. Cruelty to animals.** If any person torture, torment, deprive of necessary sustenance, mutilate, overdrive, overload, drive when overloaded, cruelly beat or cruelly kill any animal, or unnecessarily fail to provide the same with proper food, drink, shelter or protection from the weather, or drive or work the same when unfit for labor, or cruelly abandon the same, or carry the same or cause the same to be cruelly carried on any vehicle or otherwise or shall commit any other act or omission by

which unjustifiable pain, distress, suffering or death is caused or permitted to any animal or animals whether the acts or omissions herein contemplated be committed either maliciously, wilfully or negligently and if any person shall knowingly permit such act or omission or shall cause or procure the same to be done he shall be imprisoned in the county jail not exceeding thirty days, or be fined not exceeding one hundred dollars. [32 G. A., ch. 174, § 1; C. '73, § 4031; R. § 4358; C. ' 51, § 2716.]

One who does an act in violation of this section is guilty of a wrong and is liable for injuries resulting to anyone therefrom, so far as such injuries are the natural and proximate consequence of such act, and even though the precise result which followed may not have been anticipated. *Osborne v. Van Dyke*, 113–557, 85 N. W. 784.

SEC. **4975-1a. Exhibition of deformed or abnormal persons.** Any person, firm or corporation who shall exhibit, place on exhibition or cause to be exhibited in any public place in the state, or in any tent, shed, booth, building or in any theatre[,] hall or within any inclosure in the state, any deformed, maimed, idiotic or abnormal person or human monstrosity, and receive any fee or compensation therefor, shall be deemed guilty of a misdemeanor and upon conviction shall pay a fine of not less than ten dollars nor more than one hundred dollars or be imprisoned in the county jail for a term not less than ten days or more than thirty days, or by both such fine and imprisonment. [34 G. A., ch. 178, § 1.]

SEC. **4975-a. Docking horses.** It shall be unlawful for any person or persons to dock the tail of any colt or horse of any age within the state of Iowa, or to procure the same to be done therein. [30 G. A., ch. 135, § 1.]

SEC. **4975-b. Penalty.** Any person or persons violating any of the provisions of this act shall be deemed guilty of a misdemeanor; and upon conviction thereof, shall be punished by a fine not to exceed one hundred dollars, or by imprisonment in the county jail not to exceed thirty days. [30 G. A., ch. 135, § 2.]

SEC. **4975-c. Soliciting for the purpose of prostitution.** That any person who shall ask, request, or solicit another to have carnal knowledge with any male or female for a consideration or otherwise, shall be punished by imprisonment in the penitentiary not exceeding five years, or imprisonment in the county jail not exceeding one year, or by a fine not exceeding one thousand dollars, or both such fine and jail imprisonment. [35 G. A., ch. 304, § 1.] [31 G. A., ch. 165, § 1.]

SEC. **4975-d. Bucket shop and bucket shopping defined.** That section forty-nine hundred seventy-five-d of the supplement to the code, 1907, be and the same is hereby repealed and the following enacted in lieu thereof:

"That a bucket shop, within the meaning of this act, is defined to be an office, store or other place wherein the proprietor or keeper thereof, or other person or agent, either in his or its own behalf, or as the agent or correspondent of any other person, corporation, association or copartnership within or without the state, conducts the business of making, or offering to make, contracts, agreements, trades or transactions respecting the purchase or sale, or purchase and sale, of any stocks, grain, provisions, cotton, or other commodity, or personal property, wherein both parties thereto, or said proprietor or keeper, contemplate or intend that such contracts, agreements, trades or transactions shall be, or may be closed, adjusted or settled according to, or upon the basis of, the public market quotations of prices made on any board of trade or exchange, upon which the commodities or securities referred to in such contracts, agreements,

trades or transactions are dealt in by competitive buying and selling, and without a bona fide transaction on such board of trade or exchange; or wherein both parties, or such keeper or proprietor shall contemplate or intend that such contracts, agreements, trades or transactions shall be, or may be, deemed closed or terminated when the public market quotations of prices made on such board of trade, or exchange, for the articles or securities named in such contracts, agreements, trades or transactions, shall reach a certain figure; and also any office, store or other place where the keeper, person or agent, or proprietor thereof, either in his or its own behalf, or as an agent, as aforesaid, therein makes or offers to make, with others, contracts, trades or transactions for the purchase or sale of any such commodity, wherein the parties thereto do not contemplate or intend the actual or bona fide receipt or delivery of such property, but do contemplate or intend a settlement thereof based upon differences in the price at which said property is, or is claimed to be, bought and sold. The said crime shall be complete against any proprietor, person, agent, or keeper thus offering to make any such contracts, trades or transactions, whether such offer is accepted or not. It is the intention of this act to prevent, punish and prohibit, within this state, the business now engaged in and conducted in places commonly known and designated as 'bucket shops,' and also to include the practice now commonly known as 'bucket shopping' by any person or persons, agent, corporations, associations or copartnerships, who or which ostensibly carry on the business or occupation of commission merchants or brokers in grain, provisions, cotton, coffee, petroleum, stocks, bonds or other commodities whatsoever." [33 G. A., ch. 213, § 1.] [32 G. A., ch. 175, § 1.]

SEC. **4975-e. Keeping or maintaining bucket shop.** It shall be unlawful, and the same is hereby made a felony, for any corporation, association, copartnership, person, or persons, or agent to keep or cause to be kept, within this state, any such bucket shop; and any corporation, person or persons, or agents whether acting individually or as a member, or as an officer, agent or employe of any corporation, association or copartnership, who shall keep, maintain, or assist in the keeping and maintaining of any such bucket shop within this state, shall, upon conviction thereof, be fined in a sum not to exceed one thousand dollars or be imprisoned in the penitentiary not exceeding two years; and any person or persons who shall be guilty of a second offense under this statute, in addition to the penalty above prescribed, may, upon conviction, be both fined and imprisoned in the discretion of the court, and if a corporation, it shall be liable to forfeiture of all its rights and privileges as such; and the continuance of such establishment after the first conviction shall be deemed a second offense. [32 G. A., ch. 175, § 2.]

SEC. **4975-f. Accessory defined.** Any corporation, association, copartnership, person or persons or agents who shall communicate, receive, exhibit, or display in any manner any statements of quotations of the prices of any property mentioned in section one hereof, with a view to any transactions in this act prohibited, shall be deemed an accessory, and upon conviction thereof, shall be fined and punished the same as the principal, and as provided in section two of this act. [32 G. A., ch. 175, § 3.]

SEC. **4975-g. Statement of purchases or sales furnished on demand.** That section forty-nine hundred seventy-five-g of the supplement to the code, 1907, be and the same is hereby repealed and the following enacted in lieu thereof:

"It shall be the duty of every commission merchant, copartnership, association, corporation, person or persons, or agent or broker in this state engaged in the business of buying or selling, or of buying and selling, stocks, bonds, grain, provisions, cotton, or other commodities or personal property for any person, principal, customer or purchaser, to furnish to any customer or principal for whom such commission merchant, broker, copartnership, corporation, association, person or persons, or agent has executed any order for the actual purchase or sale of the commodities hereinbefore mentioned, either for immediate or future delivery, a written statement containing the names of the parties from whom such property was bought, or to whom it shall have been sold, as the case may be, the time when, the place where, and the price at which, the same was either bought or sold; and in case such commission merchant, broker, person or persons, or agent, copartnership, corporation or association shall fail to furnish the said statement, the fact of such failure shall be prima-facie evidence that such property was not sold or bought in a legitimate manner, but was brought in violation hereof." [33 G. A., ch. 213, § 2.] [32 G. A., ch. 175, § 4.]

SEC. **4975-h. Existing statutes not affected—repeal.** That section forty-nine hundred seventy-five-h of the supplement to the code, 1907, be and the same is hereby repealed. [33 G. A., ch. 213, § 3.] [32 G. A., ch. 175, § 5.]

CHAPTER 10.

OF OFFENSES AGAINST PUBLIC HEALTH.

SECTION **4976. Sale of poison without label.**

Violation of the statutory provision as to labeling poisons sold constitutes negligence rendering the vendor liable for damages proximately resulting from such violation. *Burk v. Creamery Pkg. Mfg. Co.*, 126–730, 102 N. W. 793.

SEC. **4979. Throwing dead animals or refuse in stream, spring, etc.** If any person throw, or cause to be thrown, any dead animal, night soil or garbage into any river, well, spring, cistern, reservoir, stream or pond, or in or upon any land adjoining, which is subject to overflow, he shall be imprisoned in the county jail not less than ten nor more than thirty days, or be fined not less than five nor more than one hundred dollars. [33 G. A., ch. 218, § 1.] [C. '73, § 4041.]

SEC. **4982. Adulterating food or liquor—repealed.** [31 G. A., ch. 166, § 17.]

[See § 4999-a30.]

SEC. **4983. Drugs or medicines—repealed.** [32 G. A., ch. 176, § 10.]

[See § 4999-a41.]

SEC. **4984. Other adulteration—repealed.** [31 G. A., ch. 166, § 17.]

[See § 4999-a30.]

SEC. **4984-a. Manufacture—sale—repealed.** [31 G. A., ch. 166, § 17; 27 G. A., ch. 112, § 1.]

[See § 4999-a30.]

SEC. **4984-b. Penalty—repealed.** [31 G. A., ch. 166, § 17; 27 G. A., ch. 112, § 2.]

[See § 4999-a30.]

SEC. **4985. With intent to sell—repealed.** [32 G. A., ch. 176, § 10.]

[See § 4999-a41.]

SEC. **4986. Labeling—repealed.** [32 G. A., ch. 176, § 10; 31 G. A., ch. 166, § 16.]

[See § 4999-a41.]

SEC. **4987. Glucose—skimmed-milk cheese—oleomargarine—repealed.** [31 G. A., ch. 166, § 17.]

[See § 4999-a30.]

SEC. **4988. Penalty—repealed.** [32 G. A., ch. 176, § 10.]

[See § 4999-a41.]

SEC. **4989. Sale of impure or skimmed milk—skimmed-milk cheese—labeling—repealed.** [34 G. A., ch. 113, § 1.] [31 G. A., ch. 167, § 1.]

[See § 2515.]

It is an offense under this section to add water and boracic acid to milk, although without intent to defraud. *State v. Schlenker*, 112–642, 84 N. W. 698.

The provision as to the sale of adulterated or impure milk is inconsistent with the exercise of authority by the city to require that milk dealers procure a license from the city board of health. *Bear v. Cedar Rapids*, 147–341, 126 N. W. 324.

SEC. **4989-a. Skimmed milk to be pasteurized.** That every owner, manager or operator of a creamery shall before delivering to any person any skimmed milk cause the same to be pasteurized at a temperature of at least 185° Fahrenheit. [31 G. A., ch. 168, § 1.]

SEC. **4989-b. Penalty.** Whoever violates the provisions of this act shall, upon conviction, be liable to a fine of not less than twenty-five dollars nor more than one hundred dollars. [31 G. A., ch. 168, § 2.]

SEC. **4990. What deemed adulterated or impure milk—repealed.** [34 G. A., ch. 113, § 1.] [31 G. A., ch. 167, § 2.]

[See § 2515.]

This section is not unconstitutional as applied to the sale of milk adulterated by the addition of water and boracic acid, even though such adulteration is known to the purchaser. *State v. Schlenker*, 112–642, 84 N. W. 698.

SEC. **4993. Compound lard—labeling—repealed.** [31 G. A., ch. 166, § 17.]

[See § 4999-a30.]

SEC. **4994. Canned food—label—repealed.** [31 G. A., ch. 166, § 17.]

[See § 4999-a30.]

SEC. **4995. Soaked goods—repealed.** [31 G. A., ch. 166, § 17.]

[See § 4999-a30.]

SEC. **4996. Penalty—repealed.** [31 G. A., ch. 166, § 17.]

[See § 4999-a30.]

SEC. **4997. Who deemed "packer" or "dealer"—repealed.** [31 G. A., ch. 166, § 17.]

[See § 4999-a30.]

SEC. **4998. Information by board of health—repealed.** [31 G. A., ch. 166, § 17.]

[See § 4999-a30.]

SEC. **4999-a1. Water-closets and facilities for washing.** Every manufacturing establishment, workshop or hotel in which five or more persons are employed, shall be provided with a sufficient number of water-closets, earth closets or privies for the reasonable use of the persons employed therein, which shall be properly screened and ventilated and kept at all times in a clean condition and free from all obscene writing or marking; and such water-closets or privies shall be supplied in the proportion of at least one to every twenty employes; and if women or girls are employed in such establishment, the water-closets, earth closets or privies used by them shall have separate approaches and be separate and apart from those used by the men. In factories, mercantile establishments, mills and workshops, adequate washing facilities shall be provided for all employes; and when the labor performed by the employes is of such a character as to require or make necessary a change of clothing, wholly or in part, by the employes, there shall be provided a dressing room, or rooms, lockers for keeping clothing and suitable washing facilities separate for each sex, and no person or persons shall be allowed to use the facilities assigned to the opposite sex. A sufficient supply of water suitable for drinking purposes shall be provided. [34 G. A., ch. 171, § 1.] [29 G. A., ch. 149, § 1.]

SEC. **4999-a2. Safety appliances — duties of persons in charge — operation of dangerous machinery by minors.** It shall be the duty of the owner, agent, superintendent or other person having charge of any manufacturing or other establishment where machinery is used, to furnish and supply or cause to be furnished and supplied therein, belt shifters or other safe mechanical contrivances for the purpose of throwing belts on and off pulleys, and, wherever possible, machinery therein shall be provided with loose pulleys; all saws, planers, cogs, gearing, belting, shafting, set screws and machinery of every description therein shall be properly guarded. No person under sixteen years of age, and no female under eighteen years of age shall be permitted or directed to clean machinery while in motion. Children under sixteen years of age shall not be permitted to operate or assist in operating dangerous machinery of any kind. [29 G. A., ch. 149, § 2.]

[See also § 2477-a. EDITOR.]

The obligation of the employer to properly guard dangerous machinery is not dependent upon notice by the commissioners of the bureau of labor, and failure to observe the statutory requirements is negligence *per se*. *Woolf v. Nauman Co.*, 128–261, 103 N. W. 785.

The doctrine of assumption of risk is not to be invoked to defeat recovery by employes of immature years for whose protection the statute is specially designed. *Ibid.*

An employer who fails to guard dangerous machinery is liable to an employe for negligence in not providing him a safe place to work. *Calloway v. Agar Packing Co.*, 129–1, 104 N. W. 721.

The statutory provision that the owner or person in charge of a manufacturing or other establishment where machinery is used shall not allow persons under a specified age to assist in cleaning machinery while in motion renders a violation of such provisions negligence *per se*. And a person under the prescribed age is not presumed to have assumed the risk of the incident danger or to have been guilty of contributory negligence in attempting to perform the duty. *Bromberg v. Evans Laundry Co.*, 134–38, 111 N. W. 417.

Negligence of an employer in failing to comply with the requirements of this act does not preclude him from showing assumption of risk or contributory negligence on the part of the employe such as to defeat his recovery. *Sutton v. Des Moines Bakery Co.*, 135–390, 112 N. W. 836.

Failure to provide belt shifters renders the employer liable for injury proximately resulting from such negligence. *Lindquist v. King's Crown Plaster Co.*, 139–107, 117 N. W. 46.

The fact that saws are customarily unguarded in other factories, held not sufficient to show that the failure to guard in a particular case was not a violation of the

statute. *O'Connell v. Smith*, 141–1, 118 N. W. 266.

Failure to comply with the provisions of the statute constitutes negligence. *McCreery v. Union Roofing & Mfg. Co.*, 143–303, 119 N. W. 738.

The requirement is absolute as to belt shifters or other safety devices for the purpose of throwing belts on and off pulleys, irrespective of the practicability of providing loose pulleys. *Ibid.*

If the owner is at fault in not providing proper safety appliances it is immaterial that a coemploye was negligent in the use of the appliances provided. *Ibid.*

Where it appeared that the danger of injury from pieces of wood being thrown toward the operator by a revolving saw might have been avoided by shields or guards and the use of a divider, held that failure to provide such protection was a violation of the statute and therefore negligence *per se*. *Obenchain v. Harris*, 148–86, 126 N. W. 960.

If a machine is not properly guarded the operation of it constitutes negligence and it is not material that similar machines are used in other factories. *Kirchoff v. Hohnsbehn Creamery Supply Co.*, 148–508, 123 N. W. 210.

The manifest meaning of the term "properly guarded" as used is that something shall be put over the machine so that those coming into proximity to or using it may not be injured. *Ibid.*

The kind of guard to be used is not defined, but it must be such as will reasonably accomplish the purpose contemplated. *Stephenson v. Sheffield Brick & Tile Co.*, 151–371, 130 N. W. 586.

If there is evidence that a piece of machinery falling within the statutory description has been operated without any guard, a prima-facie case is made out for plaintiff seeking to recover damages for an injury resulting from such machinery, and it is for the defendant to show that no guard was practicable which would have been reasonably calculated to prevent the injury which occurred. *Kimmerle v. Dubuque Altar Mfg. Co.*, 154–42, 134 N. W. 434.

The failure to provide such guard as is required by statute constitutes negligence. *Verlin v. United States Gypsum Co.*, 154–723, 135 N. W. 402.

The question whether such failure to guard was the proximate cause of plaintiff's injury is for the jury. *Ibid.*

The purpose of the statute is to afford protection to employes exposed to danger from unguarded machinery and to recognize assumption of risk as a defense in such a case would defeat the purpose of the statute. *Ibid.*

Failure to guard machinery does not render the owner liable for injuries to strangers who come upon the premises without right or invitation. *Hart v. Mason City Brick & Tile Co.*, 154–741, 135 N. W. 423.

Where it appears that a practical and efficient guard could have been placed over gearing without in any manner interfering with its operation, the failure to provide such a guard constitutes negligence unless the gearing is so situated that the surrounding parts or attachments supply the needed protection; and the question whether sufficient protection is thereby afforded is a question for the jury. *Lamb v. Wagner Mfg. Co.*, 155–400, 136 N. W. 203.

The design of the exacting that all saws shall be properly guarded is, that something shall be placed near to or over them in such a manner and of such material as to protect the employes coming in proximity therewith or using them from being injured thereby. *Waddell v. Burlington Basket Co.*, 140 N. W. 805.

But where it appeared that it would have been impracticable to provide any shield which would have protected the employe against the danger which resulted in his injury, held that the injury was not the proximate result of an omission to guard the saw. *Ibid.*

The rule of contributory negligence is applicable to cases arising under this act. *Wheeler v. Sioux Paving Brick Co.*, 142 N. W. 400.

Where the owner knew or had reasonable cause to believe that an employe did not consider that he had been placed in full charge of the machinery as foreman, the question of whether such employe was, within the language of the statute, the one having charge of the establishment where the machinery was used so as to defeat his recovery for injuries from unguarded machinery is for the jury. *Ibid.*

SEC. **4999-a3. Assumption of risks.** That section forty-nine hundred ninety-nine-a three, supplement of the code, 1907, be and the same is hereby repealed and the following enacted in lieu thereof:

"That in all cases where the property, works, machinery or appliances of an employer are defective or out of repair, and where it is the duty of the employer from the character of the place, work, machinery or appliances to furnish reasonably safe machinery, appliances or place to work, the employe shall not be deemed to have assumed the risk, by continuing in the prosecution of the work, growing out of any defect as aforesaid, of

which the employe may have had knowledge when the employer had knowledge of such defect, except when in the usual and ordinary course of his employment it is the duty of such employe to make the repairs, or remedy the defects. Nor shall the employe under such conditions be deemed to have waived the negligence, if any, unless the danger be imminent and to such extent that a reasonably prudent person would not have continued in the prosecution of the work; but this statute shall not be construed so as to include such risks as are incident to the employment; and no contract which restricts liability hereunder shall be legal or binding." [33 G. A., ch. 219, § 1.] [32 G. A., ch. 181, § 1.]

The federal employers' liability act relating to interstate commerce is analogous to this section, as amended, in abolishing the rule as to assumption of risk. *Bradbury v. Chicago, R. I. & P. R. Co.*, 149–51, 128 N. W. 1.

Where the negligence charged consists in the violation of a statute enacted for the servant's benefit, the master cannot avail himself of the plea of assumption of risk as against the consequences of his own wrong. *Poli v. Numa Block Coal Co.*, 149–104, 127 N. W. 1105.

An employe does not assume the risk incident to the use of a machine which is not guarded as required by statute although he knows of the unguarded condition and apprehends the dangers incident to the use thereof; but in working about such an unguarded machine, he may be guilty of contributory negligence. *Stephenson v. Sheffield Brick & Tile Co.*, 151–371, 130 N. W. 586.

The defense of assumption of risk is not available to a defendant who has failed to guard machinery as required by statute. *Stodola v. Cedar Rapids & M. C. R. Co.*, 152–37, 131 N. W. 38; *Murray v. Chicago, R. I. & P. R. Co.*, 152–732, 133 N. W. 123; *Verlin v. United States Gypsum Co.*, 154–723, 135 N. W. 402; *Lamb v. Wagner Mfg. Co.*, 155–400, 136 N. W. 203.

Even though the risk of danger resulting in injury to the plaintiff is one incident to his employment, yet if the premises on which he is employed are dangerous by reason of negligence or want of reasonable care in constructing or maintaining such place in which the employes are required to work, then the risk is not assumed. The servant may rightfully assume that the master has done his duty and that he will be exposed to no dangers which are not ordinarily and naturally incident to the work of the nature of that in which he is employed. *Murray v. Swanwood Coal Co.*, 157– —, 138 N. W. 887.

The statute relates to the property, works, machinery or appliances of the employer which are defective or out of repair in cases where it is the duty of the employer to furnish a reasonably safe place to work. The employer's duty is to furnish a safe place to work and then to maintain it in reasonable repair for the protection of the employe. *Ibid.*

This section as amended by 33 G. A., ch. 219, is applicable to railways in the maintenance of their switch yards. *Melody v. Des Moines Union R. Co.*, 141 N. W. 438.

This statutory provision as to assumption of risk does not supersede the common-law rule which makes a complaint of defect, promise of reparation and remaining in employment in reliance on the promise, essential to secure immunity from assumption of the risk. The statute relieves a servant from the risk incident to remaining in the employment of a master, provided only he shall have given notice in writing of a defect which caused his injury. His immunity is not made dependent upon the proof of a promise by the employer to cure the defect or reliance upon that promise. The statute was intended to confer a cumulative or additional right rather than to abridge an existing one. *Barber Asphalt Paving Co. v. Austin*, (C. C. A.) 186 Fed. 443.

Where it is no part of plaintiff's duty to make repairs or remedy defects, he cannot be said to have assumed the risk of failure to do so. *Verlin v. United States Gypsum Co.*, 154–723, 135 N. W. 402.

It was not the intention of the legislature in exempting from the provisions of the statute such risks as are incident to the employment, to thereby leave unchanged the law as it previously existed, nor was it the intention to repeal by implication the provisions of code supp. § 4999-a2. *Wheeler v. Sioux Paving Brick Co.*, 142 N. W. 400.

Where the existence of an unguarded danger has been apparent for so long a time that in the exercise of reasonable care and observation it might have been known by the manager from such facts, knowledge thereof may be presumed. *Ibid.*

SEC. 4999-a4. Blowers and pipes for dust and fumes. All persons, companies or corporations operating any factory or workshop where emery wheels or emery belts of any description, or tumbling barrels used for

rumbling or polishing castings, are used, shall provide the same with blowers and pipes of sufficient capacity, placed in such a manner as to protect the person or persons using same from the particles of dust produced or caused thereby, and to carry away said particles of dust arising from or thrown off such wheels, belts or tumbling barrels while in operation, directly to the outside of the building, or to some receptacle placed[1] so as to receive or confine such particles or dust; provided, however, that grinding machines upon which water is used at the point of grinding contact, and small emery wheels which are used temporarily for tool grinding, are not included within the provisions of this section, and the shops employing not more than one man at such work may, in the discretion of the commissioner of the bureau of labor of the state, be exempt from the provisions hereof. Any factory, workshop, print shop or other place where molten metal or other material which gives off deleterious gases or fumes is kept or used shall be equipped with pipes or flues so arranged as to give easy escape to such gases or fumes into the open air, or provided with other adequate ventilators. [35 G. A., ch. 306, § 1.] [29 G. A., ch. 149, § 3.]

[1"place" in 29 G. A. session laws. EDITOR.]

SEC. **4999-a5. Enforcement—penalty—removal of safety appliances.** It shall be the duty of the commissioner of the bureau of labor of the state, and the mayor and chief of police of every city or town, to enforce the provisions of the foregoing sections. Any person, whether acting for himself or for another or for a copartnership, joint stock company or corporation, having charge or management of any manufacturing establishment, workshop or hotel, who shall fail to comply with the provisions of said sections within thirty days after being notified in writing to do so, by any one of said officers whose duty it may be to enforce the provisions of said sections, shall be punished by a fine not exceeding one hundred dollars or by imprisonment in the county jail not exceeding thirty days.

Whenever any person, in any manufacturing or other establishment wherein machinery is used and wherein or whereon guards or safety appliances have been provided, shall remove such guards or safety appliances from any machine or other equipment or shall so adjust such guards or safety appliances as to destroy their purpose of preventing bodily injuries, excepting whenever it becomes necessary to remove some or all of the guards, including springs or pressure bars that may properly come under this act, to enable the employe operating said machine to perform certain special work that cannot be performed with guard, it shall be the duty of said employe or employer to immediately replace them after said work has been completed. Any person who may neglect or refuse to comply with the provisions of this act shall be punished by a fine of not less than five dollars or more than one hundred dollars, or by imprisonment in the county jail not to exceed thirty days. [34 G. A., ch. 172, § 1.] [29 G. A., ch. 149, § 4.]

SEC. **4999-a6. Protection against fire—means of escape.** The owners, proprietors and lessees of all buildings, structures or enclosures of three or more stories in height, now constructed or hereafter to be erected, shall provide for and equip said buildings and structures with such protection against fire and means of escape from such buildings as shall hereafter be set forth in this bill. [30 G. A., ch. 136, § 1; 29 G. A., ch. 150, § 1.]

SEC. **4999-a7. Buildings and enclosures—how classified.** The buildings, structures and enclosures contemplated in this act shall be classified as follows:

First. Hotels, office buildings or lodging rooms, including boarding houses in which sleeping rooms are kept for rent or hire, of three or more stories in height.

Second. Tenements or boarding houses, of three or more stories in height, occupied by one or more families or aggregating twenty persons or more; provided that a mansard roof or attic, when used for sleeping rooms, shall be counted as one story.

Third. Buildings used as opera houses, theaters or public halls, of a seating capacity exceeding three hundred.

Fourth. Seminaries and colleges, public school buildings, hospitals and asylums, of three or more stories in height.

Fifth. Manufactories, warehouses and buildings of all character of three or more stories in height, not specified in the foregoing sections.

Sixth. Hotels and other buildings which are of strictly fireproof construction. [35 G. A., ch. 305, § 1.] [30 G. A., ch. 136, § 2; 29 G. A., ch. 150, § 2.]

SEC. **4999-a8. Fire escapes and stairways.** Each twenty-five hundred superficial feet of area, or fractional part thereof, covered by buildings or structures specified under classification one, of section two, of this act, shall be provided with one ladder fire escape of steel or wrought-iron construction, attached to the outer wall thereof, and provided with platforms of steel or wrought-iron construction of such size and dimensions and such proximity to one or more windows of each story above the first with all doors leading thereto of half glass locked in such manner as to render access to such ladder from each story easy and safe, and with red lights to designate location of escapes, said ladder to start about five feet from the ground and extend above the roof, or a drop ladder may be hung at the second story in such a manner that it can be easily lowered in case of necessity; provided, however, that where such buildings shall be occupied by more than twenty persons, the said building shall as a substitute for one ladder be provided with one stairway of steel or wrought-iron construction with above described platforms, accessible from each story with a drop or counterbalance stairway from the second story balcony to the ground, or a stationary stairway may be carried down to within five feet from the ground. Buildings under classification two of section two of this act shall be provided for in the same manner as those under the head of classification one. Buildings under classification three, of section two, of this act shall be provided with at least one of the above described outside stairways, or such a number of exits or such a number of above described stairways as may be determined by the chief of fire department, or the mayor of each city or town where no such chief of fire department exists. Each twenty-five hundred superficial feet of area or fractional part thereof covered by buildings, structures or enclosures under classification four of section two of this act, shall be provided for in the same manner as those under the head of classification three. Each twenty-five hundred superficial feet of area or fractional part thereof covered by buildings, structures or enclosures under classification five, section two, of this act shall be provided with at least one above described outside stairway; provided, however, that if there be living or sleeping quarters for more than twenty-five persons in such building, then there shall be at least two of the above

described outside stairways. Each five thousand superficial feet of area, or fractional part thereof covered by buildings under classification six, section two of this act, shall be provided with at least one above described ladder, and platforms at each story, if not more than twenty persons be employed in the same. If more than twenty persons be employed, then there shall be at least two of the above described ladders, and platforms attached, or one such stairway, and platforms of sufficient size at each story, and if more than forty persons be employed in said building, then there shall be at least two, or such number of the above described outside stairways as the chief of fire department, or the mayor of any city or town where no such chief of fire department exists, may from time to time determine. Each six thousand superficial feet of area or fractional part thereof covered by buildings specified in classification sixth[1] of this act, shall be provided with one steel or wrought-iron ladder fire escape with platform constructed, located and attached to such building in the manner herein provided. [30 G. A., ch. 136, § 3; 29 G. A., ch. 150, § 3.]

[1"seventh" in 30 G. A. session laws. EDITOR.]

SEC. **4999-a9. Signs—doors opened outward.** In buildings under all above classifications,[1] signs indicating location of fire escapes shall be posted at all entrances to elevators, stairway landings and in all rooms.

The entrance and exit doors of all hotels, churches, lodge halls, courthouses, assembly halls, theatres, opera houses, colleges and public schoolhouses, and the entrance doors to all class and assembly rooms in all public school buildings, in all cities and incorporated towns, shall open outward. [33 G. A., ch. 220, § 1.] [30 G. A., ch. 136, § 4.]

[1"classification" in 30 G. A. session laws. EDITOR.]

SEC. **4999-a10. Enforcement—penalty.** It is hereby made the duty of commissioner of the bureau of labor statistics, the chief of fire department, or the mayor of each city or town where no such chief of fire department exists, or the chairman of the board of supervisors, in case such building is not within the corporate limits of any city or town, to adopt uniform specifications for fire escapes hereinbefore provided, and keep such specifications on file in their respective offices, and to serve or cause to be served a written notice in behalf of the state of Iowa upon the owner or owners, or their agents or lessees, of buildings within this state not provided with fire escapes in accordance with the provisions of this act, commanding such owner, owners, or agents or either of them, to place or cause to be placed upon said buildings, such fire escape or fire escapes as are provided in this act within sixty days after service of such notice, pursuant to the specifications established. Any such owner, owners' agents, trustees and lessees or either or any of them so served with notice as aforesaid, who shall not within sixty days after the service of said notice upon him or them, place or cause to be placed such fire escape or fire escapes upon such buildings as required by this act and the terms of said notice, shall be subject to a fine not less than fifty dollars, and not more than one hundred dollars, and shall be subject to a further fine of twenty-five dollars for each additional week of neglect to comply with such notice. Any owner, agent, trustee or lessee having charge of any building that is not equipped as provided in section forty-nine hundred ninety-nine-a nine of the supplement to the code, 1907, as amended, who shall refuse or neglect to comply with the provisions of said section, shall be punished by a fine of not less than twenty-five dollars and not to exceed one hundred

dollars. [34 G. A., ch. 173, § 1.] [30 G. A., ch. 136, § 5; 29 G. A., ch. 150, § 4.]

SEC. **4999-a11. Inspection.** All fire escapes erected under the provisions of this act shall be subject to inspection and approval or rejection in writing, by the person named in section four of this act who has caused such written notice to be served. [30 G. A., ch. 136, § 6; 29 G. A., ch. 150, § 5.]

SEC. **4999-a12. Pending litigation—repeal.** Nothing in this act shall in any manner affect pending litigation. That sections forty-nine hundred ninety-nine-e, forty-nine hundred ninety-nine-f, forty-nine hundred ninety-nine-g, forty-nine hundred ninety-nine-h, forty-nine hundred ninety-nine-i, forty-nine hundred ninety-nine-j of the supplement to the code [1902] are hereby repealed. [30 G. A., ch. 136, § 7; 29 G. A., ch. 150, § 6.]

SEC. **4999-a13. Use of dangerous fluids forbidden.** That it shall be unlawful for any person to establish or operate any dye works, pantorium, or cleaning works, in which gasoline, benzine, naphtha, or other explosive or dangerous fluids are used for the purpose of cleaning or renovating wearing apparel or other fabrics, in any building any part of which is used as a residence or lodging house. [28 G. A., ch. 130, § 1.]

SEC. **4999-a14. Penalty.** Any person convicted of violating the provisions of the foregoing section shall be fined in a sum not exceeding fifty nor less than ten dollars. [28 G. A., ch. 130, § 2.]

CHAPTER 10-A.

OF PURE FOODS.

SECTION **4999-a15. State food and dairy commissioner—repealed.** [34 G. A., ch. 174, § 1.] [31 G. A., ch. 166, § 1.]

[See § 4999-a31a. EDITOR.]

SEC. **4999-a16. Duties—seal—assistants—compensation and expenses—repealed.** [34 G. A., ch. 174, § 1.] [31 G. A., ch. 166, § 2.]

[See § 4999-a31a. EDITOR.]

SEC. **4999-a17. Chemist—repealed.** [34 G. A., ch. 113, § 1.] [31 G. A., ch. 166, § 3.]

[See § 2515. EDITOR.]

SEC. **4999-a18. Rules and regulations.** The commissioner shall, with the approval of the executive council, make all necessary rules and regulations for carrying out the provisions of this act, under which the commissioner shall procure from time to time or whenever he has occasion to believe any of its provisions are being violated, or cause to be procured, for examination chemically, microscopically or otherwise, samples of food shipped into this state or offered for sale in this state. The chemist making the examination shall certify the results of his work to the commissioner. [31 G. A., ch. 166, § 4.]

SEC. **4999-a19. County attorney—duties.** If it shall appear from any such examination that any of the provisions of this act have been violated, the commissioner shall at once certify the facts to the proper county attorney, with a copy of the results of the analysis, duly authenti-

cated by the analyst under oath. It shall be the duty of every county attorney to whom the commissioner or his assistants shall report any violation of this act, to cause proceedings to be commenced and prosecuted without delay for the fines and penalties in such case provided. An attorney may be appointed by the governor when he deems advisable to prosecute such cases, but in no case except where the county attorney has first refused to act. [31 G. A., ch. 166, § 5.]

SEC. **4999-a20. Manufacture and sale of adulterated foods prohibited.** No person, firm or corporation, by himself, officer, servant or agent, or as the officer, servant, or agent of any other person, firm or corporation, shall manufacture or introduce into the state, or solicit or take orders for delivery, or sell, exchange, deliver or have in his possession with the intent to sell, exchange or expose or offer for sale or exchange, any article of food which is adulterated or misbranded, within the meaning of this act. Provided that none of the penalties set forth in this act shall be imposed upon any common carrier for introducing into the state, or having in its possession, any adulterated or misbranded articles of food, where the same were received by said carrier for transportation in the ordinary course of its business and without actual knowledge of the adulteration or misbranding thereof. Provided that any manufacturer, wholesaler or jobber may keep goods specifically set apart in his stock for sale in other states, which might otherwise be in violation of the provisions of this act. [31 G. A., ch. 166, § 6.]

It is the package which is put up by the manufacturer or packer for purchasers which must be labeled and a retail dealer selling from such a package is not required to label the portion thus sold. *State v. Neslund*, 141–461, 120 N. W. 107.

SEC. **4999-a21. Terms defined—repealed.** [34 G. A., ch. 174, § 1.] [32 G. A., ch. 177, § 1; 31 G. A., ch. 166, § 7.]

[See § 4999-a31a. EDITOR.]

SEC. **4999-a22. Adulteration defined—repealed.** [34 G. A., ch. 174, § 1.] [32 G. A., ch. 178, § 2; 32 G. A., ch. 177, § 2; 31 G. A., ch. 166, § 8.]

[See § 4999-a31a. EDITOR.]

This section defining adulteration of food implies no authority on the part of a city council to exact a license from city milk dealers. *Bear v. Cedar Rapids*, 147–341, 126 N. W. 324.

SEC. **4999-a23. Labels—repealed.** [34 G. A., ch. 174, § 1.] [32 G. A., ch. 178, § 1.]

[See § 4999-a31a. EDITOR.]

Congress having provided regulations as to the sale of original packages of misbranded articles imported from one state to another, a dealer in this state selling original packages shipped from another state is not subject to the penalty of the law of this state. *State v. Eckenrode*, 148–173, 127 N. W. 56.

SEC. **4999-a24. Samples.** Any person who manufactures or exposes for sale, or delivers to a purchaser any article of food, shall furnish, within business hours, and upon payment or tender of the selling price, a sample of such food to any person duly authorized by the commissioner to receive the same, and who shall apply to such vendor, or person delivering to a purchaser, such article of food for such sample for such use in sufficient quantity for the analysis of any such article or articles in his possession. In the presence of such person and an agent of the commissioner, if so desired by either party, said sample shall be divided into three parts, and

each part shall be sealed with the seal of the commissioner. One part shall be left with the dealer, one delivered to the commissioner, and one deposited with the county attorney for the county in which the sample is taken. The having in possession by any person who manufactures or exposes for sale, any adulterated or misbranded food, within the meaning of this act, shall be prima-facie evidence of having in possession with intent to sell in violation of its provisions. [31 G. A., ch. 166, § 10.]

SEC. **4999-a25. Penalty.** Any person, firm or corporation, or agent thereof, who refuses to comply, on demand, with any of the requirements of this act, or who shall violate any of its provisions, or who shall obstruct or hinder the commissioner, or any of his assistants, in the discharge of any duty imposed by this act, shall be guilty of a misdemeanor, and upon conviction thereof, shall be punished by a fine not exceeding one hundred dollars. [31 G. A., ch. 166, § 11.]

SEC. **4999-a26. Bulletins.** The commissioner shall, from time to time, with the approval of the executive council, issue a printed bulletin, showing the results of inspections, analyses, and prosecutions undertaken under this act, together with such general information as may be deemed suitable. Such bulletins shall be printed in such numbers as may be directed by the executive council, and shall be issued to the newspapers of the state and to all interested persons. [31 G. A., ch. 166, § 12.]

SEC. **4999-a27. Appropriation—repealed.** [34 G. A., ch. 174, § 1.] [32 G. A., ch. 179, § 1; 31 G. A., ch. 166, § 13.]

[See § 4999-a31a. EDITOR.]

SEC. **4999-a28. What exempt—repealed.** [34 G. A., ch. 174, § 1.] [32 G. A., ch. 180, § 1; 31 G. A., ch. 166, § 14.]

[See § 4999-a31a. EDITOR.]

SEC. **4999-a29. Notice—how served on defendant corporation.** Upon the prosecution of a corporation for violations of the provisions of this act, or of section forty-nine hundred eighty-nine of the code, and information filed before a justice of the peace having jurisdiction, the said justice of the peace shall forthwith issue notice to the corporation which shall substantially notify the defendant of the charges contained in the information and that it must forthwith appear and answer the same, which notice may be served by any peace officer in any county of the state on any officer or agent of the defendant corporation by reading the same to him and leaving with him a copy thereof; said notice shall be returned to the justice of the peace without delay with proper return of its service, and from and after two days from the time of making such service the defendant corporation shall be considered to be in court, and all further proceedings shall be the same as against an individual defendant. [31 G. A., ch. 166, § 15.]

SEC. **4999-a30. Repeal.** Sections forty-nine hundred eighty-two, forty-nine hundred eighty-four, forty-nine hundred eighty-seven, forty-nine hundred ninety-three, forty-nine hundred ninety-four, forty-nine hundred ninety-five, forty-nine hundred ninety-six, forty-nine hundred ninety-seven, and forty-nine hundred ninety-eight of the code, and sections forty-nine hundred eighty-four-a and forty-nine hundred eighty-four-b, as they appear in the supplement to the code [1902] are hereby repealed. [31 G. A., ch. 166, § 17.]

SEC. **4999-a31. Food standards.** For the purposes of this act, the following standards are hereby established:

Flavoring Extracts.

1. *Flavoring extract.* A flavoring extract is a solution in ethyl alcohol of proper strength of the sapid and odorous principles derived from an aromatic plant, or parts of the plant, with or without its coloring matter, and conforms in name to the plant used in its preparation.

2. *Almond extract.* Almond extract is the flavoring extract prepared from oil of bitter almonds, free from hyrocyanic acid, and contains not less than one per cent. by volume of oil of bitter almonds.

3. *Anise extract.* Anise extract is the flavoring extract prepared from oil of anise, and contains not less than three per cent. by volume of oil of anise.

4. *Celery seed extract.* Celery seed extract is the flavoring extract prepared from celery seed or the oil of celery seed, or both, and contains not less than three-tenths per cent. by volume of oil of celery seed.

5. *Cassia extract.* Cassia extract is the flavoring extract prepared from oil of cassia and contains not less than two per cent. by volume of oil of cassia.

6. *Cinnamon extract.* Cinnamon extract is the flavoring extract prepared from oil of cinnamon, and contains not less than two per cent. by volume of oil of cinnamon.

7. *Clove extract.* Clove extract is the flavoring extract prepared from oil of cloves, and contains not less than two per cent. by volume of oil of cloves.

8. *Ginger extract.* Ginger extract is the flavoring extract prepared from ginger and contains in each one hundred cubic centimeters, the alcohol-soluble matters from not less than twenty grams of ginger.

9. *Lemon extract.* Lemon extract is the flavoring extract prepared from oil of lemon, or from lemon peel, or both, and contains not less than five per cent. by volume of oil of lemon.

10. *Terpeneless extract of lemon.* Terpeneless extract of lemon is the flavoring extract prepared by shaking oil of lemon with dilute alcohol, or by dissolving terpeneless oil of lemon in dilute alcohol, and contains not less than two-tenths per cent. by weight of citral derived from oil of lemon.

11. *Nutmeg extract.* Nutmeg extract is the flavoring extract prepared from oil of nutmeg, and contains not less than two per cent. by volume of oil of nutmeg.

12. *Orange extract.* Orange extract is the flavoring extract prepared from oil of orange, or from orange peel, or both, and contains not less than five per cent. by volume of oil of orange.

13. *Terpeneless extract of orange.* Terpeneless extract of orange is the flavoring extract prepared by shaking oil of orange with dilute alcohol, or by dissolving terpeneless oil of orange in dilute alcohol, and corresponds in flavoring strength to orange extract.

14. *Peppermint extract.* Peppermint extract is the flavoring extract prepared from oil of peppermint, or from peppermint, or both, and contains not less than three per cent. by volume of oil of peppermint.

15. *Rose extract.* Rose extract is the flavoring extract prepared from attar of roses, with or without red rose petals, and contains not less than four-tenths per cent. by volume of attar of roses.

16. *Savory extract.* Savory extract is the flavoring extract prepared from oil of savory, or from savory, or both, and contains not less than thirty-five hundredths per cent. by volume of oil of savory.

17. *Spearmint extract.* Spearmint extract is the flavoring extract prepared from oil of spearmint, or from spearmint, or both, and contains not less than three per cent. by volume of oil of spearmint.

18. *Star anise extract.* Star anise extract is the flavoring extract prepared from oil of star anise, and contains not less than three per cent. by volume of oil of star anise.

19. *Sweet basil extract.* Sweet basil extract is the flavoring extract prepared from oil of sweet basil, or from sweet basil, or both, and contains not less than one-tenth per cent. by volume of oil of sweet basil.

20. *Sweet marjoram extract.* Sweet marjoram extract, marjoram extract, is the flavoring extract prepared from the oil of marjoram, or from marjoram, or both, and contains not less than one per cent. by volume of oil of marjoram.

21. *Thyme extract.* Thyme extract is the flavoring extract prepared from oil of thyme, or from thyme, or both, and contains not less than two-tenths per cent. by volume of oil of thyme.

22. *Tonka extract.* Tonka extract is the flavoring extract prepared from tonka bean, with or without sugar or glycerin, and contains not less than one-tenth per cent. by weight of courmarin extracted from the tonka bean, together with a corresponding proportion of the other soluble matters thereof.

23. *Vanilla extract.* Vanilla extract is the flavoring extract prepared from vanilla bean, with or without sugar or glycerin, and contains in one hundred cubic centimeters the soluble matters from not less than ten grams of the vanilla bean, and contains not less than thirty per cent. by volume of absolute ethyl alcohol.

24. *Wintergreen extract.* Wintergreen extract is the flavoring extract prepared from oil of wintergreen, and contains not less than three per cent. by volume of oil of wintergreen.

Vinegar.

1. *Cider, apple vinegar.* Vinegar, cider vinegar, apple vinegar, is the product made by the alcoholic and subsequent acetous fermentations of the juice of apples, is laevo-rotatory, and contains not less than four grams of acetic acid, not less than one and six-tenths grams of apple solids, of which not more than fifty per cent. are reducing sugars, and not less than twenty-five hundredths gram of apple ash in one hundred cubic centimeters (20°C.), and the water-soluble ash from one hundred cubic centimeters (20°C.) of the vinegar contains not less than ten milligrams of phosphoric acid (P_2O_5) and requires not less than thirty cubic centimeters of decinormal acid to neutralize its alkalinity.

2. *Wine, grape vinegar.* Wine vinegar, grape vinegar, is the product made by the alcoholic and subsequent acetous fermentations of the juice of grapes and contains, in one hundred cubic centimeters (20°C.), not less than four grams of acetic acid, not less than one gram of grape solids, and not less than thirteen-hundredths gram of grape ash.

3. *Malt vinegar.* Malt vinegar is the product made by the alcoholic and subsequent acetous fermentations, without distillation, of an infusion of barley malt or cereals whose starch has been converted by malt, is dextro-rotatory, and contains, in one hundred cubic centimeters (20°C.), not less than four grams of acetic acid, not less than two grams of solids, and not less than two-tenths gram of ash; and the water-soluble ash from one hundred cubic centimeters (20°C.) of the vinegar contains not less

than nine milligrams of phosphoric acid (P_2O_5), and requires not less than four cubic centimeters of decinormal acid to neutralize its alkalinity.

4. *Sugar vinegar.* Sugar vinegar is the product made by the alcoholic and subsequent acetous fermentations of solutions of sugar, syrup, molasses, or refiners' syrup, and contains, in one hundred cubic centimeters (20°C.), not less than four grams of acetic acid.

5. *Glucose vinegar.* Glucose vinegar is the product made by the alcoholic and subsequent acetous fermentations of solutions of starch sugar or glucose, is dextro-rotatory, and contains, in one hundred cubic centimeters (20°C.), not less than four grams of acetic acid.

6. *Spirit, distilled or grain vinegar.* Spirit vinegar, distilled vinegar, grain vinegar, is the product made by the acetous fermentations of dilute distilled alcohol, and contains, in one hundred cubic centimeters (20°C.), not less than four grams of acetic acid.

Butter.

1. *Butter.* Butter shall contain not less than eighty per cent. by weight of butter fat.

Oysters.

1. *Oysters.* Oysters shall not contain ice, nor more than sixteen and two-thirds per cent. by weight of free liquid.

Ice Cream.

1. *Ice cream.* Ice cream is the frozen product made from pure wholesome sweet cream, and sugar, with or without flavoring, and if desired, the addition of not to exceed one per cent. by weight of a harmless thickener, and contains not less than twelve per cent. by weight of milk fat, and the acidity shall not exceed three tenths of one per cent.

2. *Fruit ice cream.* Fruit ice cream is the frozen product made from pure wholesome sweet cream, sugar, and sound, clean, mature fruits, and, if desired, the addition of not to exceed one per cent. by weight of a harmless thickener, and contains not less than ten per cent. by weight of milk fat.

3. *Nut ice cream.* Nut ice cream is the frozen product made from pure wholesome sweet cream, sugar, and sound, nonrancid nuts, and, if desired, the addition of not to exceed one per cent. by weight of harmless thickener, and contains not less than ten per cent. by weight of milk fat. [34 G. A., ch. 175, § 1; 33 G. A., ch. 221, § 1.] [32 G. A., ch. 178, § 3.]

SEC. **4999-a31a. Repeal.** That sections forty-nine hundred ninety-nine-a fifteen, forty-nine hundred ninety-nine-a sixteen, forty-nine hundred ninety-nine-a twenty-one, forty-nine hundred ninety-nine-a twenty-two, forty-nine hundred ninety-nine-a twenty-three, forty-nine hundred ninety-nine-a twenty-seven, forty-nine hundred ninety-nine-a twenty-eight, supplement to the code, 1907, are hereby repealed and the following enacted in lieu thereof:[1] [34 G. A., ch. 174, § 1.]

[1]The substituted sections are §§ 4999-a31b to 4999-a31g inclusive. EDITOR.]

SEC. **4999-a31b. State food and dairy commissioner — duties — seal—assistants—salary and expenses.** The state food and dairy commissioner shall be charged with the duty of carrying into effect the provisions of this act and shall have an official seal. He may, with the approval of the executive council, appoint such assistants as he may deem

necessary, who may exercise the powers now provided by law in the case of milk inspectors together with those conferred by this act, and they shall perform such duties as may be assigned to them by the state food and dairy commissioner. They shall be paid a salary of not to exceed sixteen hundred dollars per annum, said salary to be paid in the same manner as the salaries of other state officers and they shall be allowed the expenses necessarily incurred by them in the discharge of their duties. Their accounts shall be itemized and sworn to, and when approved by the commissioner and the executive council, shall be paid by warrant of the auditor upon the treasurer out of a sum hereinafter appropriated for carrying out the provisions of this act. [34 G. A., ch. 174, § 2.]

SEC. **4999-a31c. Terms defined—misbranded food.** The word "commissioner," whenever used in this act, shall be taken to mean the state food and dairy commissioner. The word "food," as used herein, shall include all articles used for food, drink, confectionery or condiment, by man or domestic animals, whether simple, blended, mixed or compound. The term "misbranded," as used herein, shall apply to all articles of food, or articles which enter into the composition of food, the package or label of which shall bear any statement, design or device regarding such article, or the ingredients or substances contained therein which shall be false or misleading in any particular, and to any food product which is falsely branded as to the state, territory or country in which it is manufactured or produced.

For the purpose of this act an article of food shall be deemed to be "misbranded":

First. If it be offered for sale under the specific name of another article.

Second. If it be labeled or branded so as to deceive or mislead the purchaser, or purport to be a foreign product when not so.

Third. Baking powders, if each can or package is not plainly labeled so as to show the name of each and every ingredient contained therein.

Fourth. In the case of articles labeled, branded, or tagged so as to plainly indicate that they are mixtures, compounds, combinations, imitations or blends, and the word "mixture," "compound," "combination," "imitation" or "blend," as the case may be, is plainly stated on the package in which it is offered for sale, unless the name of each ingredient shall appear on the main label, in continuous list with no intervening matter of any kind, immediately following the phrase, "mixture of," "compound of," "combination of," "blend of," as the case may be, such names of ingredients to appear in the order in which they are present in quantity in said article of food, beginning with the ingredient present in the greatest[1] proportion. All letters used in naming the ingredients shall be of the same size, style and color as the letters used in the phrase "mixture of," "compound of," "combination of," or "blend of," and shall appear on a background of one color. Labels required by this act shall be distinctly printed in the English language in legible type no smaller than eight-point heavy gothic caps. Such label shall be placed upon the outside of the package and shall contain the name and place of business of the manufacturer, packer or dealer. The term "blend" as used herein shall be construed to mean a mixture of like substances. Provided that nothing in this act shall be construed as requiring or compelling proprietors or manufacturers of proprietary foods which contain no unwholesome added ingredients to disclose their trade formulas, except in so far as the provisions of this act may require to secure freedom from adulteration or misbranding.

Fifth. If any person shall sell, offer or expose for sale any food in package form if the quantity of the contents be not plainly and conspicuously marked on the outside of the package in terms of weight, measure, or numerical count; provided, however, that reasonable variations shall be permitted, and tolerances and also exemptions as to small packages shall be established by rules and regulations made by the state dairy and food commissioner. [35 G. A., ch. 307, §§ 1, 2; 34 G. A., ch. 174, § 3.]

[1"greater" in enrolled bill. EDITOR.]

SEC. **4999-a31d. In effect.** That this act shall take effect from and after its passage; provided, however, that no penalty of fine, imprisonment or confiscation shall be enforced for any violation of its provisions prior to September third, nineteen hundred fourteen. [35 G. A., ch. 307, § 3.]

SEC. **4999-a31e. Adulterated food.** For the purpose of this act, an article of food shall be deemed to be adulterated:

First. If any substance or substances has or have been mixed and packed with it so as to reduce or lower or injuriously affect its quality, strength or purity.

Second. If any substance or substances has or have been substituted wholly or in part for the article.

Third. If any valuable constituent of the article has been wholly or in part abstracted.

Fourth. If it does not conform to the standards established by law.

Fifth. If it be mixed, colored, powdered, coated or stained in a manner whereby damage or inferiority is concealed.

Sixth. If it contains any added poisonous ingredient, or any ingredient which may render such article injurious to health or if it contains saccharine or formaldehyde.

Seventh. If it consists of the whole or any part of a diseased, filthy, decomposed or putrid animal or vegetable substance or any portion of an animal unfit for food, whether manufactured or not, or [if] it is the product of a diseased animal or one that has died otherwise than by slaughter.

Eighth. Candies and chocolates if they contain terra alba, barytes, talc, chrome yellow, or other mineral substances, or poisonous colors or flavors, or other ingredients deleterious or detrimental to health.

Ninth. Vinegar if it contains any added coloring matter. [34 G. A., ch. 174, § 4.]

SEC. **4999-a31f. Appropriation.** For the purpose of enabling the commissioner to enforce the provisions of the various laws, the enforcement of which is vested with the state food and dairy commissioner, for the making of such analysis for other state departments as may be authorized by the executive council, for necessary traveling and miscellaneous expenses of assistants and experts and for all other expenses herein provided, the sum of twenty-one thousand dollars annually, or so much thereof as may be necessary, is hereby appropriated from [any funds in] the treasury not otherwise appropriated. [34 G. A., ch. 174, § 5.]

SEC. **4999-a31g. Acts in conflict repealed.** All acts and parts of acts in conflict herewith are hereby repealed. [34 G. A., ch. 174, § 6.]

CHAPTER 10-B.

OF PURE DRUGS.

SECTION **4999-a32. Manufacture or sale of adulterated drugs prohibited.** No person, firm or corporation, by himself, officer, servant or agent, or as the officer, servant or agent of any other person, firm or corporation, shall manufacture or introduce into the state or solicit orders for delivery, or sell, exchange, deliver, or have in his possession with the intent to sell, exchange or expose, or offer for sale or exchange, any drug which is adulterated or misbranded within the meaning of this act. Provided that none of the penalties set forth in this act shall be imposed upon any common carrier for introducing into the state, or having in its possession, any adulterated or misbranded drugs, where the same were received by said carrier for transportation in the ordinary course of its business and without actual knowledge of the adulteration or misbranding thereof. [32 G. A., ch. 176, § 1.]

SEC. **4999-a33. Drug defined.** The term "drug," as used in this act, shall include all medicines and preparations recognized in the United States Pharmacopœia or National Formulary for internal or external use, and any substance or mixture of substances intended to be used for the cure, mitigation or prevention of disease of either man or other animals, or for the destruction of parasites. [32 G. A., ch. 176, § 2.]

SEC. **4999-a34. Adulteration defined.** For the purposes of this act, a drug shall be deemed to be adulterated:

First. If, when a drug is sold under or by a name recognized in the United States Pharmacopœia or National Formulary, it differs from the standard of strength, quality or purity as determined by the test laid down in the United States Pharmacopœia or National Formulary official at the time of investigation: provided that no drug defined in the United States Pharmacopœia or National Formulary shall be deemed to be adulterated under this provision if the standard of strength, quality or purity be plainly stated upon the bottle, box or other container thereof although the standard may differ from that determined by the test laid down in the United States Pharmacopœia or National Formulary.

Second. If its strength or purity fall below the professed standard or quality under which it is sold. [32 G. A., ch. 176, § 3.]

SEC. **4999-a35. Misbranded defined.** The term "misbranded," as herein used, shall apply to all drugs the package or label of which shall bear any statement, design or device regarding such article or the ingredients or substances contained therein, which shall be false or misleading in any particular and to any drug which is falsely branded as to state, country or territory in which it is manufactured or produced. For the purposes of this act, a drug shall also be deemed to be misbranded:

First. If it be an imitation of or offered for sale under the name of another article.

Second. If the contents of the package as originally put up shall have been removed in whole or in part and other contents shall have been placed in such package, or if the package shall fail to bear a statement on the label showing the name and the exact quantity or proportion of any alcohol, morphine, opium, heroin, chloroform, cannabic indica, chloral hydrate, acetanilide, or any derivative or preparation of any such substances contained therein. The statement herein required shall be plainly printed upon the outside wrapper and also upon a label affixed to the

package in type eight-point caps; provided that in case the size of the package will not permit the use of eight-point caps, the size of the type may be reduced proportionately. There shall be such a contrast between the color of the label and the color of the ink used in printing the label heretofore required, that the printing thereon shall be easily and plainly legible. Provided that nothing in this subdivision contained shall be construed to apply to such drugs and preparations as are specified and recognized by the United States Pharmacopœia and National Formulary, which are in accordance therewith, and which are sold under the name by which they are so recognized, or the filling of prescriptions furnished by practicing physicians, dentists or veterinarians, the originals of which prescriptions are retained and filed by the pharmacist compounding or filling the same; and provided further, that nothing in this subdivision contained shall be construed to apply to such drugs or medicines as are personally dispensed by legally licensed physicians, dentists or veterinarians in the course of their practice as such physicians, dentists or veterinarians. [34 G. A., ch. 176, § 1.] [32 G. A., ch. 176, § 4.]

SEC. **4999-a36. Drugs or preparations containing wood or denatured alcohol—sale prohibited.** No person, firm or corporation shall sell, offer, or expose for sale, or have in his possession, any preparation or product intended for use of man or domestic animals, either for internal or external use, or for cosmetic purposes, or for inhalation, or for perfumes, which contains methyl (wood) alcohol, crude or refined, or denatured alcohol. [32 G. A., ch. 176, § 5.]

SEC. **4999-a37. Bulletins.** The pharmacy commissioners shall, from time to time, with the approval of the executive council, issue a printed bulletin, showing the results of inspections, analyses and prosecutions undertaken under this act, together with such general information as may be deemed suitable. Such bulletins shall be printed in such numbers as may be directed by the executive council, and shall be issued to the newspapers of this state and to all interested persons. [32 G. A., ch. 176, § 6.]

SEC. **4999-a38. Enforcement—appropriation—chemical analysis.** Section forty-nine hundred ninety-nine-a thirty-eight of chapter ten-B of the supplement to the code, 1907, is hereby repealed and the following enacted in lieu thereof:

"It is hereby made the duty of the pharmacy commissioners to enforce the provisions of this act, and for the purpose of enabling them to perform this duty, the sum of two hundred fifty dollars annually for two years, or so much thereof as may be deemed necessary, is hereby appropriated from the funds in the state treasury not otherwise appropriated. To further enable the state board to enforce the provisions of this act, any chemical analysis deemed necessary by them shall, upon request, be performed by the chemist now provided for in section forty-nine hundred ninety-nine-a seventeen of chapter ten-A of the supplement to the code, 1907." [34 G. A., ch. 177, § 1.] [32 G. A., ch. 176, § 7.]

SEC. **4999-a39. Penalty.** Any person, firm or corporation, or agent thereof, who refuses to comply, on demand, with any of the requirements of this act, or who shall violate any of its provisions, or who shall obstruct or hinder the said pharmacy commissioners, in the discharge of any duty imposed by this act, shall be guilty of a misdemeanor, and upon conviction thereof, shall be punished by a fine not exceeding one hundred dollars. [32 G. A., ch. 176, § 8.]

SEC. **4999-a40. Goods exempt—prima-facie evidence.** All goods purchased or received by either wholesale or retail dealers of this state prior to July first, nineteen hundred and seven, shall be exempt from the provisions of this act to April first, nineteen hundred and nine. The having in possession by any person who manufactures or exposes for sale, any adulterated or misbranded drug, within the meaning of this act, shall be prima-facie evidence of having in possession with intent to sell in violation of its provisions: provided that any manufacturer, wholesaler or jobber may keep goods specifically set apart in his stock for sale in other states, which might otherwise be in violation of the provisions of this act. [32 G. A., ch. 176, § 9.]

SEC. **4999-a41. Repeal.** Sections forty-nine hundred eighty-three, forty-nine hundred eighty-five, forty-nine hundred eighty-six and forty-nine hundred eighty-eight of the code are hereby repealed. [32 G. A., ch. 176, § 10.]

SEC. **4999-a42. Depositing samples on porches, lawns, etc., prohibited.** That it shall be unlawful for any person, firm, company or corporation, either in person or by agent, to deposit any sample of any drugs or medicine upon any porch, lawn, in any vehicle or any other place where such drugs or medicine might be picked up by children or other persons. [32 G. A., ch. 182, § 1.]

SEC. **4999-a43. Penalty.** Any person, firm, company, corporation, or agent thereof violating the provisions of this act, shall be guilty of a misdemeanor. [32 G. A., ch. 182, § 2.]

CHAPTER 11.

OF OFFENSES AGAINST PUBLIC POLICY.

SECTION 5000. Lotteries and lottery tickets.

A contract in furtherance of a lottery scheme is invalid. *Chancy Park Land Co. v. Hart*, 104–592, 73 N. W. 1059.

But where the purchasers of lots, buying under a contract by which the lots purchased were to be distributed among them as they might agree, entered into an arrangement by which such lots were distributed by chance, held that the transaction was not a lottery and that the sale was valid. *Ibid.*

SEC. 5002. Allowing minors in billiard rooms, saloons, etc.

It is immaterial whether the minor indulges in any game whatever if he is permitted to enter and remain in the billiard hall. The term "billiard hall" includes a hall in which pool is played. *State v. Johnson*, 108–245, 79 N. W. 62.

SEC. 5006. Sale of cigarettes.

The statute prohibiting the manufacture or sale of cigarettes within the state is void in so far as it applies to the sale of cigarettes imported into the state and sold in the original packages. *McGregor v. Cone*, 104–465, 73 N. W. 1041.

The original package is the bundle put up for transportation or commercial handling, and where such a package was broken open and its contents, consisting of small packages containing ten each, were exposed and sold, held that the seller was punishable. *Ibid.*

The mulct tax on the business of selling cigarettes is levied to meet the burdens imposed upon the general public by what is thought to be the result upon the human race, and particularly upon children of the use of cigarettes. *Hodge v. Muscatine County*, 121–482, 96 N. W. 968.

SEC. 5007. Tax on sale.

By reference in the section providing for a mulct tax on the business of selling cigarettes to the statutory provisions as to a mulct tax on the sale of liquors, provisions of the latter are incorporated into the former section. *Hodge v. Muscatine County*, 121–482, 96 N. W. 968.

This statutory provision is not unconstitutional by reason of the fact that no notice of the assessment and levy of the tax is required to be given to the person engaged in the business or the owner of the property wherein the same is conducted. *Ibid.*

As the property owner may apply to the board of supervisors for remission of the tax, if erroneous, under the provisions of code § 2441 relating to the mulct tax on the sale of intoxicating liquors which is applicable under the section relating to the sale of cigarettes, notice to the property owner of the imposition of the tax which becomes a lien on his property is not essential to its validity. *Hodge v. Muscatine County*, 196 U. S. 276.

This section has no application to sale in original packages of interstate commerce; but small packages, containing ten cigarettes each, transported in bulk to a consignee, though not inclosed in any larger package, do not constitute original packages within the proper meaning of that term. *Cook v. Marshall County*, 119–384, 93 N. W. 372.

This section is not unconstitutional on the ground that, although it relates to some extent to the imposition of a mulct tax, it is included in the criminal code, nor on the ground that it is a statute not of uniform operation. *Ibid.*

This section is not unconstitutional on the ground that it is not germane to and included within the title of that portion of the code relating to the punishment of crime. *Ibid.*

The statutory provision imposing a tax on cigarette dealers is not unconstitutional as denying equal protection of the laws to retail dealers because it does not apply to jobbers and wholesalers doing an interstate business. *Cook v. Marshall County*, 196 U. S. 261; *Hodge v. Muscatine County*, 196 U. S. 276.

The transportation of packages of cigarettes of ten each in bulk does not come within the protection of the rule as to shipment of original packages under interstate commerce. *Ibid.*

This section provides for a tax, constituting a lien, which is valid as against a trustee in bankruptcy. *In re Lange Co.*, (D. C.) 159 Fed. 586.

SEC. **5007-a. Cigarettes and cigarette papers—search warrant—seizure—destruction.** If any reputable citizen of the county make oath before a magistrate, that he has probable cause to suspect, and does suspect, that any house, place or building, naming the house, building or place, as nearly as may be, and the occupant, is unlawfully used as a place in which to receive, keep, store, sell or give away cigarettes, cigarette papers or cigarette wrappers, or any paper made or prepared for the purpose of making cigarettes, or for the purpose of being filled with tobacco for smoking; or that the occupant is in any way concerned, engaged or employed in owning or keeping any such cigarettes or cigarette papers or wrappers, with intent to violate the law, or authorize or permit the same to be done, such magistrate shall issue his warrant particularly describing the place to be searched and the person or persons to be apprehended or things to be seized directed to any peace officer in the county, for the purpose of searching such house, building or place and for the seizure of such cigarettes, cigarette papers or cigarette wrappers, or any paper made for the purpose of making cigarettes, and for the apprehension of the occupant or keeper thereof; and the said cigarettes or cigarette papers and the keeper shall be brought before such magistrate to be dealt with as provided by law. All such cigarettes or cigarette papers, so seized, and unlawfully kept, shall be destroyed and an entry thereof shall be made upon his docket. The discovery of cigarettes or cigarette papers in any public place shall be prima-facie evidence of the keeper's intent to unlawfully sell or give the same as prohibited in section five thousand and six of the code. [33 G. A., ch. 223, § 1.]

SEC. **5007-b. Tax assessed—notice.** The magistrate who shall try said cause and then issue an order condemning and destroying any cigar-

ettes or cigarette papers as provided in the preceding section, shall certify a copy of the record of such proceedings to the treasurer of the county within ten days after the order to destroy such cigarettes or cigarette papers is issued and a tax assessment of three hundred dollars against the property in or upon which the cigarettes or cigarette papers or cigarette wrappers were unlawfully kept or sold, provided for in section five thousand and seven of the code, and collect the same as therein provided. Within thirty days after the receipt of the magistrate's certificate, the county treasurer shall notify the keeper of such house, building or place, and the owner thereof of such assessment. [33 G. A., ch. 223, § 2.]

SEC. **5007-c. Use by minors prohibited.** It shall be unlawful for any person under the age of twenty-one years to smoke or use a cigarette or cigarettes on the premises of another, or on any public road, street, alley or park or other lands used for public purposes or in any public place of business or amusement, except when in company of his parent or guardian. [33 G. A., ch. 224, § 1.]

SEC. **5007-d. Violation—penalty—suspension of sentence.** Any person found guilty of violating the provisions of section one hereof shall be punished by a fine of not to exceed ten dollars, or imprisonment in the county jail not to exceed three days, for each offense; provided, if said minor person shall give information which may lead to the arrest of the person or persons violating any of the provisions of section five thousand and six of the code, and shall give evidence as a witness in the proceedings which may be instituted against said party or parties, the court shall have power to suspend sentence against said minor person. [33 G. A., ch. 224, § 2.]

SEC. **5008. Infringement of civil rights.**

The evil sought to be remedied by the provisions prohibiting the denial of civil rights is unjust or groundless discrimination between individuals where the public generally is invited to be served or entertained. *Humburd v. Crawford*, 128–743, 105 N. W. 330.

Whether a boarding house keeper holds himself out to serve meals to the public generally is not to be determined from advertisements or signs alone, but also from the manner of conducting the business. *Ibid.*

If such person serves meals only in pursuance of previous arrangements, and therefore to particular individuals rather than to anyone who may apply, the civil rights provisions are not applicable to him. *Ibid.*

While as applied to business of a public or quasi public character conducted for the accommodation, refreshment, amusement or instruction of the public, the civil rights statute is valid; nevertheless such statute does not apply to every private business and does not entitle colored persons to the enjoyment of purely gratuitous advertising schemes. *Brown v. Bell Co.*, 146–89, 123 N. W. 231, 124 N. W. 901.

Therefore held that although the plaintiff had paid his admission to a pure food show, he could not recover damages for being refused service by an independent company serving coffee gratuitously as an advertisement at such show. *Ibid.*

SEC. **5016. Not to be sold—repealed.** [27 G. A., ch. 113, § 1.]

[See § 5016-a.]

SEC. **5016-a. Dealing in.** That section five thousand and sixteen of the code is hereby repealed and the following enacted as a substitute therefor:

"No person shall buy, sell, deal in or give away, or offer to buy, sell or deal in any swine that have died of any disease, or that have been killed on account of any disease." [27 G. A., ch. 113, § 1; 26 G. A., ch. 58, § 3.]

SEC. **5024. Canada thistles—repealed.** [33 G. A., ch. 96, § 9.]

[See § 1562.]

SEC. **5028-a. Desecration of flags.** That section five thousand and twenty-eight-a of the supplement to the code, 1907, be and the same is hereby repealed, and the following enacted in lieu thereof:

"Any person who in any manner, for exhibition, or display, shall place or cause to be placed, any word, figure, mark, picture, design, drawing, or any advertisement of any nature, upon any flag, standard, color or ensign of the United States or state flag of this state, or ensign, or shall expose or cause to be exposed to public view any such flag, standard, color or ensign, upon which shall have been printed, painted, or otherwise placed, or to which shall be attached, appended, affixed, or annexed, any word, figure, mark, picture, design, or drawing, or any advertisement of any nature, or who shall expose to public view, manufacture, sell, expose for sale, give away, or have in possession for sale, or to give away, or for use for any purpose, any article, or substance, being an article of merchandise, or a receptacle of merchandise or article or thing for carrying or transporting merchandise, upon which shall have been printed, painted, attached or otherwise placed, a representation of any such flag, standard, color or ensign, to advertise, call attention to, decorate, mark, or distinguish, the article, or substance, on which so placed, or who shall publicly mutilate, deface, defile, or defy, trample upon, or cast contempt, either by words or act, upon any such flag, standard, color or ensign, shall be deemed guilty of a misdemeanor, and shall be punished by a fine not exceeding one hundred dollars or by imprisonment for not more than thirty days; and shall also forfeit a penalty of fifty dollars for each such offense, to be recovered with costs in a civil action, or suit, in any court having jurisdiction, and such action or suit may be brought by and in the name of any citizen of this state, and such penalty when collected, less the reasonable cost and expense of action or suit and recovery, to be certified by the clerk of the district court of the county in which the offense is committed, shall be paid into the county treasury for the benefit of the school fund, and two or more penalties may be sued for and recovered in the same action or suit. The words, 'flag, standard, color or ensign,' as used in this section, shall include any flag, standard, color, ensign, or any picture or representation of either thereof, made of any substance or represented on any substance, and of any size, evidently purporting to be, either of, said flag, standard, color or ensign, of the United States of America, or a picture or a representation, of either thereof, upon which shall be shown the colors, the stars, and the stripes, in any number of either thereof, or by which the person seeing the same, without deliberation may believe the same to represent the flag, colors, standard, or ensign of the United States of America. The possession after this act takes effect, by any person other than a public officer, as such, of any such flag, standard, color or ensign, on which shall be anything made unlawful by this section, or of any article or substance or thing on which shall be anything made unlawful by this section, shall be presumptive evidence that the same is in violation of this section, and was made, done or created after this act takes effect, and that such flag, standard, color, ensign or article, substance, or thing, did not exist when this act takes effect. [35 G. A., ch. 308, § 1.] [28 G. A., ch. 131, § 1.]

SEC. **5028-a1. In effect.** "This act shall be in full force and effect on and after January first, nineteen hundred fourteen." [35 G. A., ch. 308, § 2.]

SEC. **5028-b. Unfair discrimination — in selling — in purchasing.** That section five thousand and twenty-eight-b of the supplement to the code,

1907, and chapter two hundred twenty-two, laws of the thirty-third general assembly amendatory thereof, are hereby repealed and the following enacted in lieu thereof:

Any person, firm, company, association or corporation, foreign or domestic, doing business in the state of Iowa, and engaged in the production, manufacture, sale or distribution of any commodity of commerce, that shall, for the purpose of destroying the business of a competitor in any locality or creating a monopoly, discriminate between different sections, localities, communities, cities or towns of this state, by selling such commodity at a lower price or rate in one section, locality, community, city or town than such commodity is sold for by said person, firm, association, company, or corporation, in another section, locality, community, city or town, after making due allowance for the difference, if any, in the grade or quality, and in the actual cost of transportation from the point of production or purchase, if a raw product, or from the point of manufacture, if a manufactured product, to a place of sale, storage or distribution, shall be deemed guilty of unfair discrimination, which is hereby prohibited and declared to be unlawful; provided, however, that prices made to meet competition in such section, locality, community, city or town shall not be in violation of this act.

Any person, firm, association, company or corporation, foreign or domestic, doing business in the state of Iowa, and engaged in the business of purchasing for manufacture, storage, sale or distribution, any commodity of commerce that shall, for the purpose of destroying the business of a competitor or creating a monopoly, discriminate between different sections, localities, communities, cities or towns, in this state, by purchasing such commodity at a higher rate or price in one section, locality, community, city or town, than is paid for such commodity by such party in another section, locality, community, city or town, after making due allowance for the difference, if any, in the grade or quality, and in the actual cost of transportation from the point of purchase, to the point of manufacture, sale, distribution or storage, shall be deemed guilty of unfair discrimination, which is hereby prohibited and declared to be unlawful; provided, however, that prices made to meet competition in such section, locality, community, city or town shall not be in violation of this act.

Any person, firm, association, company or corporation, or any officer, agent or member of any such firm, company, association or corporation, found guilty of unfair discrimination as herein defined, shall be punished as provided in section five thousand and twenty-eight-c of the supplement to the code, 1907. [35 G. A., ch. 310, §§ 1–4; 33 G. A., ch. 222, § 1.] [31 G. A., ch. 169, § 1.]

It is not essential in an indictment under this statute to state the name of the person injured. The statute is predicated on an injury to the public as distinct from an 'injury to any individual. *State v. Standard Oil Co.*, 150–46, 129 N. W. 336.

The offense described by the statute is committed where an act is done for the purpose of destroying the business of a competitor in that locality and creating a monopoly. It does not consist in a discrimination against the public in the locality where the offense is charged to have been committed by charging a higher rate than is charged in another locality. It is only where the sale is made at a lower rate for the purpose of destroying competition that the offense is committed. *Ibid.*

This section, as amended by 33 G. A., ch. 222, is not unconstitutional as depriving persons or corporations to which it is applicable of their property without due process of law, or as being not uniform in operation. *State v. Fairmont Creamery Co.*, 153–702, 133 N. W. 895.

SEC. **5028-c. Penalty.** Any person, firm, company, association or corporation violating any of the provisions of the preceding section, and any officer, agent or receiver of any firm, company, association or corporation, or any member of the same, or any individual, found guilty of a violation thereof, shall be fined not less than five hundred dollars nor more than five thousand dollars, or be imprisoned in the county jail not to exceed one year, or suffer both penalties. [31 G. A., ch. 169, § 2.]

SEC. **5028-d. Contracts or agreements.** All contracts or agreements made in violation of any of the provisions of the two preceding sections shall be void. [31 G. A., ch. 169, § 3.]

SEC. **5028-e. Enforcement.** It shall be the duty of the county attorneys, in their counties, and the attorney-general, to enforce the provisions of the preceding sections of this act by appropriate actions in courts of competent jurisdiction. [31 G. A., ch. 169, § 4.]

SEC. **5028-f. Complaint—to whom made.** If complaint shall be made to the secretary of state that any corporation authorized to do business in this state is guilty of unfair discrimination, within the terms of this act, it shall be the duty of the secretary of state to refer the matter to the attorney-general who may, if the facts justify it in his judgment, institute proceedings in the courts against such corporation. [31 G. A., ch. 169, § 5.]

SEC. **5028-g. Revocation of permit.** If any corporation, foreign or domestic, authorized to do business in this state, is found guilty of unfair discrimination, within the terms of this act, it shall be the duty of the secretary of state to immediately revoke the permit of such corporation to do business in this state. [31 G. A., ch. 169, § 6.]

SEC. **5028-h. Corporation to be enjoined.** If after revocation of its permit such corporation, or any other corporation not having a permit and found guilty of having violated any of the provisions of this act, shall continue or attempt to do business in this state, it shall be the duty of the attorney-general, by a proper suit in the name of the state of Iowa, to enjoin such corporation from transacting all business of every kind and character in said state of Iowa. [31 G. A., ch. 169, § 7.]

SEC. **5028-i. Cumulative remedies.** Nothing in this act shall be construed as repealing any other act, or part of act, but the remedies herein provided shall be cumulative to all other remedies provided by law. [31 G. A., ch. 169, § 8.]

SEC. **5028-j. Importation of registered cattle without certificate of inspection.** That the importation of registered cattle or cattle eligible to registry for breeding and dairy purposes into this state is hereby prohibited, except when such cattle are accompanied with a certificate from an inspector whose competency and reliability are certified to by the authority charged with the control of domestic animals in the state from whence the cattle came, certifying that said cattle have been examined and subjected to the tuberculin test within sixty days next preceding the date of such importation, and are free from disease. [31 G. A., ch. 170, § 1.]

There is nothing in this section to suggest any authority in the city council to require a license from city milk dealers. *Bear v. Cedar Rapids*, 147–341, 126 N. W. 324.

SEC. **5028-k. Detention and inspection—quarantine.** In lieu of an inspection certificate as required in the preceding section, cattle may be detained at suitable stock yards or other inclosure within this state nearest to the state line, on the railroad or highway over which they were shipped, driven or hauled, and there examined at the expense of the owner, or may

be shipped or driven to their destination under quarantine, there to remain in quarantine until properly examined at the expense of the owner, and released by the state veterinary surgeon. Such expense shall be a lien upon the cattle. [31 G. A., ch. 170, § 2.]

SEC. **5028-l. Penalty.** Any person, firm, company, corporation or agent thereof, violating any of the provisions of this act, shall be guilty of a misdemeanor, and upon conviction thereof shall be fined for each offense not more than one hundred dollars, or be imprisoned in the county jail not more than thirty days, or both fined[1] and imprisoned, at the discretion of the court. Such person, firm, company, corporation or agent shall be liable for the full amount of damages that may result from the violation of this act. Action may be brought in any county in which said cattle are sold, offered for sale or delivered to a purchaser, or in which they may be detained in transit. [31 G. A., ch. 170, § 3.]

[1]"fine" in session laws. EDITOR.]

SEC. **5028-m. Enforcement.** It shall be the duty of the state veterinary surgeon to enforce the provisions of this act. [31 G. A., ch. 170, § 4.]

SEC. **5028-n. Accepting or giving tips or gratuities.** It shall be unlawful for any agent, representative or employe, officer or any agent of a private corporation, or a public officer, acting in behalf of a principal in any business transaction, to receive, for his own use, directly or indirectly, any gift, commission, discount, bonus or gratuity connected with, relating to or growing out of such business transaction; and it shall be likewise unlawful for any person, whether acting in his own behalf or in behalf of any copartnership, association or corporation, to offer, promise or give directly or indirectly any such gift, commission, discount, bonus or gratuity. Any person violating the provisions of this act or any of them shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not less than twenty-five dollars, nor more than five hundred dollars, or by imprisonment in the county jail for not more than one year, or by both such fine and imprisonment. [32 G. A., ch. 183, § 1.]

SEC. **5028-o. Testimony—immunity from prosecution.** No person shall be excused from attending, testifying or producing books, papers, contracts, agreements and documents before any court in obedience to the subpoena of any court having jurisdiction of the misdemeanor on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him, may tend to incriminate him or subject him to a penalty or forfeiture. But no person shall be liable to any criminal prosecution, for or on account of any transaction, matter or thing concerning which he may testify or produce evidence, documentary or otherwise, before said court or in obedience to its subpoena or in any such case or proceeding, provided that no person so testifying or producing any such books, papers, contracts, agreements or documents shall be exempted from prosecution and punishment for perjury committed in so testifying. Provided, this act shall not apply to those cases in which the principals, being the contracting parties, have knowledge of and consent to the payment of a commission to an agent or representative. [32 G. A., ch. 184, § 1; 32 G. A., ch. 183, § 2.]

SEC. **5028-p. Sale of toy pistols and giant firecrackers.** No person shall use, sell, offer for sale or keep for sale within this state any toy pistols, toy revolvers, caps containing dynamite; blank cartridges for toy revolvers or toy pistols, or firecrackers more than five inches in length and more than three fourths of an inch in diameter; provided caps con-

taining dynamite may be used, kept for sale or sold when needed for mining purposes, or for danger signals, or for other necessary uses. [32 G. A., ch. 185, § 1.]

SEC. **5028-q. Penalty.** Any person violating the provisions of this act shall be fined not exceeding one hundred dollars, or be imprisoned in the county jail not exceeding thirty days. [32 G. A., ch. 185, § 2.]

SEC. **5028-r. In effect.** This act shall be in full force and effect from and after January first, nineteen hundred and eight. [32 G. A., ch. 185, § 3.]

SEC. **5028-s. Objectionable advertisements near public schools.** That no bills, posters, or other matter used to advertise the sales of intoxicating liquors or tobacco shall be distributed, posted, painted or maintained within four hundred feet of premises occupied by a public school or used for school purposes; provided, however, that nothing in this act contained shall apply to advertisements in newspapers of regular publication, distributed to subscribers or purchasers thereof. [30 G. A., ch. 137, § 1.]

SEC. **5028-t. Penalty.** Any person violating any of the provisions of this act shall be deemed guilty of a misdemeanor and upon conviction thereof shall be punished by a fine not exceeding one hundred dollars or imprisonment in the county jail not exceeding thirty days. [30 G. A., ch. 137, § 2.]

CHAPTER 12.

OF OFFENSES AGAINST THE PUBLIC PEACE.

SECTION **5033. Exciting disturbance.**

The disturbance of the peace contemplated by the statutory provision as to exciting disturbance in public places relates to a disturbance of the tranquillity enjoyed by citizens of a municipality or community where good order reigns among its members. The enjoyment of such tranquillity is a natural right among all persons in a political society, and any intentional violation of that right is a breach of the peace. *Neola v. Reichart*, 131–492, 109 N. W. 5.

The fact that such breach of the peace is punishable by statute does not prevent its being punished under a city ordinance not inconsistent with the statutory provisions. *Ibid.*

SEC. **5034. Using blasphemous or obscene language.** If any person publicly use blasphemous or obscene language, to the disturbance of the public peace and quiet, he shall be imprisoned in the county jail not exceeding thirty days, or be fined not exceeding one hundred dollars. [28 G. A., ch. 132, § 1.]

A justice of the peace has jurisdiction of the offense described in this section. *Buseman v. Schultz*, 154–493, 132 N. W. 378.

SEC. **5038-a. Boxing contest—sparring exhibition.** Whoever engages in any boxing contest or sparring exhibition with or without gloves for a prize, reward, or anything of value, at which an admission fee is charged or received, either directly or indirectly, and whoever knowingly aids, abets, or assists in any such boxing contest or sparring exhibition, and any owner or lessee of any ground, lot, building, hall, or structure of any kind knowingly permitting the same to be used for such boxing contest or sparring exhibition, shall be fined not exceeding three hundred dollars, or imprisonment in the county jail not exceeding ninety days. [28 G. A., ch. 133, § 1.]

SEC. 5040. Breach of Sabbath.

A subscription for payment of an indebtedness of a church is a matter of charity, and the fact that it is made on Sunday will not constitute a defense. *First M. E. Church v. Donnell*, 110–5, 81 N. W. 171.

The fact that an accident causing injury to a miner occurs in connection with work on Sunday is immaterial as to the right of the miner to recover for negligence of the mine owner. *Taylor v. Star Coal Co.*, 110–40, 81 N. W. 249.

The doing of an act which is a violation of the Sunday law will not constitute a violation of law under the terms of an accident insurance policy where the risk is the same on Sunday as it would have been on a secular day. *Matthes v. Imperial Acc. Assn.*, 110–222, 81 N. W. 484.

A ministerial act done on Sunday, such as giving notice, will not be invalid unless specially prohibited. *State v. Ryan*, 113–536, 85 N. W. 812.

Violation by a pharmacist of the Sunday law in making sales of articles not within the scope of the business of a pharmacist is not such violation of law as to conducting a pharmacy as will disqualify him from being granted a permit to sell intoxicating liquors under the provisions of code § 2387. *In re Application of Maulsby*, 136–66, 113 N. W. 548.

The ground upon which courts refuse to entertain actions on contracts made in contravention of the Sunday statutes is, that one who has participated in a violation of law cannot be permitted to assert in a court of justice any right founded on or growing out of such violation. And although a note may be executed on Sunday, it may still be enforced, unless it be shown that the payee was a party to the illegal execution on that day. *Collins v. Collins*, 139–703, 117 N. W. 1089.

While the transaction of judicial business on Sunday where not clearly authorized is without authority, merely ministerial acts may be performed on that day. *Nixon v. Burlington*, 141–316, 115 N. W. 239.

Subsequent acceptance of a note executed on Sunday is such ratification as to remove any taint of illegality from the transaction. *Orr v. Kenworthy*, 143–6, 121 N. W. 539.

SEC. 5040-a. Ball games and other sports on Decoration Day. That it shall be unlawful to engage in ball games, horse racing, or sports or entertainments that will interfere with the proper observance of the day which is set apart as Decoration Day (May thirtieth), prior to the hour of three o'clock p. m. of said day. Any violation of this act shall be punishable by a fine of not less than five dollars or more than one hundred dollars, or by imprisonment in the county jail not to exceed thirty days in the discretion of the court. [35 G. A., ch. 311, § 1.] [32 G. A., ch. 186, § 1.]

CHAPTER 13.

OF CHEATING BY FALSE PRETENSES, GROSS FRAUDS AND CONSPIRACY.

SECTION 5041. False pretenses.

There is a distinction between larceny and obtaining property by false pretenses; it the false pretenses induce the owner to part with his property, intending to transfer both title and possession, the crime is cheating by false pretenses; but it by fraud, trick or false pretense an owner is induced to part simply with the possession of his property, without intention to pass title, and the party receiving it takes with intent to fraudulently convert to his own use, the crime is larceny. *State v. Loser*, 132–419, 104 N. W. 337.

A pretense such as will furnish a ground for conviction of the crime of cheating by false pretenses must be a representation as to an existing fact or past event, and not a mere promise to do something in the future or representation as to something to take place in the future. But a promise to do something in the future may be so connected with a statement as to an existing fact as that the statement of fact becomes the effective cause of the promise, and in such cases the two may be considered together in determining the character of the pretense. *State v. Hollingsworth*, 132–471, 109 N. W. 1003.

The state need not prove all the representations and statements alleged in the indictment, and the fact that some of them are inconsistent with others is no reason for sustaining a demurrer to the indictment. *Ibid.*

If a soliciting agent for insurance, by intentional false representations as to an

application for insurance claimed to have been secured by him, obtains from the company a portion of the commission to which he would be entitled on procuring such insurance, he may be convicted of obtaining money under false pretenses. *State v. Seligman*, 127–415, 103 N. W. 357.

In a prosecution for such act other similar transactions on the part of the defendant may be shown as bearing upon the question of fraudulent intent. *Ibid.*

The crime of cheating by false pretenses does not apply to real property. *State v. Eno*, 131–619, 109 N. W. 119.

To secure by false pretenses the signature to a deed in which the name of the grantee is left blank may constitute a crime under this section. *State v. Tripp*, 113–698, 84 N. W. 546.

Allegations of an indictment in a particular case held to sufficiently negative the truth of the pretenses alleged and to sufficiently charge that defendant made the representations, knowing them to be false. *Ibid.*

It does not render the indictment insufficient that different and even inconsistent means of perpetrating the fraud are alleged to have been used. A false promise in addition to the false representation may be stated. *Ibid.*

In charging the offense of obtaining a signature to a promissory note by means of false and fraudulent representations, it is not necessary to charge that the representations were made with the specific intent to defraud the person from whom the note was obtained. It is sufficient that the form of the indictment in that respect follows the statute. *State v. Hazen*, 104–16, 73 N. W. 359.

The indictment may allege several false pretenses and proof of one of them is sufficient to warrant conviction. *State v. Chingren*, 105–169, 74 N. W. 946.

An indictment charging that defendant obtained the signature of a person named to a written instrument commonly called a bank check, the false making of which would be punished as forgery, "for the sum of thirty-five dollars," and that the person named did then and there draw and sign said bank check and deliver the same, etc., is sufficient. *State v. Carter*, 112–15, 83 N. W. 715.

The indictment sufficiently charges that the person defrauded relied on the false representations in alleging that he would not have signed the check nor delivered it to the defendant had it not been for the representations so falsely and fraudulently made. *Ibid.*

It is immaterial that some of the statements and representations alleged are in the alternative. *Ibid.*

Evidence of similar pretenses made about the same time and in about the same neighborhood to other persons may be shown, but unless there is evidence that such other pretenses were false the evidence with reference thereto should be stricken out on motion. *Ibid.*

To make out the offense it must be shown that the pretense was of a past event or existing fact, that it was false, calculated to deceive, and was believed and relied on by the party defrauded. But it is not necessary that the false pretenses be the sole inducement to the act procured to be done. *Ibid.*

Obtaining money as a charitable gift by false pretenses is an offense under this section. *Ibid.*

It is not essential that all the false pretenses charged in the indictment be proved in order to warrant a conviction. *State v. Dexter*, 115–678, 87 N. W. 417.

The indictment must allege the ownership of the property obtained by the false pretenses charged. *State v. Jackson*, 128–543, 105 N. W. 51.

The jury must be satisfied beyond a reasonable doubt that the defendant obtained complete control and absolute possession of the property charged to have been obtained by false pretenses within the county in which he is indicted. *Ibid.*

If the prosecutor knew of the falsity of the alleged statements before parting with the possession of his property, no crime is committed. *Ibid.*

It is error to charge that if the false pretenses relied upon are frivolous and not calculated to deceive an ordinarily prudent man under like circumstances, then no crime is committed. *Ibid.*

The amount of money received not being material, a variance between the charge and the proof as to the amount received is not material. *State v. Gibson*, 132–53, 106 N. W. 270.

The venue of the offense of cheating by false pretenses is where the false pretenses are made and acted upon by the person to whom they are made. The fact of mailing a communication containing such false pretenses in another county does not fix the venue of the offense in the county where such communication is mailed. *Ibid.*

Under a charge of receiving money procured by false pretenses, it is sufficient to prove that the defendant received from the person defrauded a check on which he procured money. *Ibid.*

Proof of other false pretenses made about the same time by the defendant to the prosecutor is admissible as bearing upon defendant's evil motive and intent. *Ibid.*

While in a prosecution for obtaining the signature of a person to a written instrument, the false making of which would be punished as forgery, it is necessary to prove the obtaining of the instrument itself by false pretenses, such proof is not

essential in a prosecution for conspiracy in fraudulently combining to obtain such signature. *State v. Soper*, 118–1, 91 N. W. 774.

Where circumstances tending to show the existence of criminal intent in the procuring of money are given to the jury, the accused should be allowed to give his explanation of the transaction and show its innocent character. The false representations relied upon as establishing guilt must appear to have been intentional. *State v. Mason*, 136–554, 114 N. W. 30.

In charging the crime of obtaining money or property by false pretenses it is necessary to state the name of the person whose property rights have been thus trespassed upon. There can be no complete offense except as the property of some other individual has been obtained. *State v. Clark*, 141–297, 119 N. W. 719.

An indictment charging an intent to defraud and sufficiently setting out the false pretenses relied on with such accuracy as to the ownership of the property to be obtained by defendant thereby as to enable him to understand what is intended, is sufficient. *State v. Mullen*, 151–392, 131 N. W. 679.

But in the absence of evidence that defendant made any representations as to the value of the property to which the transaction related or that the other party relied upon such representations, a conviction cannot be sustained. *Ibid.*

SEC. 5044. False weights and measures—repealed. [35 G. A., ch. 266, § 20.]

[See § 3009-t. EDITOR.]

The offense described in this section is not a continuing one. Each act of false weighing is a distinct offense, unless it is but one of a series of acts forming a part of a single transaction. The defendant therefore in a prosecution under this section has the right to require an election on the part of the state where the evidence tends to show different transactions. *State v. Jamison*, 110–337, 81 N. W. 594.

An indictment under this section is not sufficient which charges defendant with unlawfully and fraudulently keeping false weights, and with knowingly buying cattle weighed therewith. The indictment must charge that the defendant used the weights. *Ibid.*

In a prosecution for using false weights, evidence that the defendant's scales were inaccurate at other times than on the occasion referred to in the indictment is admissible as tending somewhat to show guilty knowledge. *Ibid.*

SEC. 5050. Injunction.

Under the provisions of this section, held that a wholesale dealer in cigars could be enjoined from selling boxes of cigars bearing a counterfeit union label, and that good faith in making the sale, as, for instance, where it was made by a clerk in violation of instructions, would constitute no defense. But held that no damages could be recovered in such action by the labor union whose label was counterfeited unless actual damage was shown, and further, that damages by way of penalty could not be allowed in the absence of any evidence as to the amount of such damage. *Beebe v. Tolerton*, 117–593, 91 N. W. 905.

SEC. 5051-a. Fraudulent advertising. Whoever, with intent to sell, or in any wise dispose of merchandise, securities, service, or anything offered by him, directly or indirectly, to the public for sale or distribution, or with intent to increase the consumption thereof, or to induce the public in any manner to enter into any obligation relating thereto, or to acquire title thereto, or an interest therein, causes, with intent to defraud directly or indirectly, to be made, published, disseminated, circulated, or placed before the public, in this state, in a newspaper or other publication, or in the form of a book, notice, handbill, poster, bill, circular, pamphlet or letter, or in any other way, an advertisement of any sort regarding merchandise, securities, service, or anything so offered to the public, which advertisement contains any assertion, representation or statement of fact which is untrue or deceptive, shall be guilty of a misdemeanor. Provided, however, that nothing herein contained shall be construed to place liability hereunder on any owner, publisher, agent or employe of a newspaper or other publication for the publication of such advertisement published in good faith. [35 G. A., ch. 309, § 1.]

SEC. 5052. **Unlawful use or sale of bottles, boxes, etc., of another.** Persons engaged in the manufacture, bottling or selling of soda water, mineral or aerated waters, cider, milk, cream or other lawful beverages in bottles, boxes, casks, kegs or barrels, with their names or other marks of ownership stamped or marked thereon, may file in the office of the recorder of the county in which such articles are manufactured, bottled or sold a description of the name or marks so used by them, and cause notice thereof to be given by three consecutive publications in a weekly newspaper printed in the English language in said county. It shall thereupon be unlawful for any person, without the written consent of the owner, to fill such bottles, boxes, casks, kegs or barrels so marked or stamped, for the purpose of sale, or to sell, dispose of, buy or traffic in or wantonly destroy the same, whether filled or not, and any violation of this section shall be a misdemeanor, and any person convicted thereof shall be fined not exceeding one hundred dollars, or imprisoned in the county jail not exceeding thirty days. The using by any other person than the rightful owner, without written permission, of any such cask, barrel, keg, bottle or box, as prohibited in this section, or the possession thereof by any junk dealer, or dealer in such casks, barrels, kegs, bottles or boxes, the same being marked or stamped and registered as herein required, shall be prima-facie evidence that such use, and the sale or possession, is unlawful, and search warrants may be procured for the discovery and seizure of such bottles, boxes, casks, kegs or barrels, as in other criminal cases. [29 G. A., ch. 151, § 1; 25 G. A., ch. 79.]

SEC. 5058. **Conspiracy to prosecute.**

In a prosecution for conspiracy, held that evidence of acts of coconspirators in the county where the prosecution was had, and also in other counties where it appeared that the same fraudulent scheme was attempted, was admissible. *State v. McIntosh*, 109–209, 80 N. W. 349.

Also held that evidence of declarations by one conspirator, in the presence of the others, though made after the alleged conspiracy was ended, was competent. *Ibid.*

SEC. 5059. **Conspiracy in general.**

Conspiracy is a combination of two or more persons by concerted action to accomplish a criminal or unlawful purpose, or some purpose not in itself criminal, by criminal or unlawful means. The mere knowledge, acquiescence or approval of an act without coöperation or agreement to coöperate is not enough to constitute the crime of conspiracy to do such act. The combination must contemplate the accomplishment of the purpose by the united energy of the persons accused of such conspiracy, or active participation must be shown. *State v. King*, 104–727, 74 N. W. 691.

There may be a conspiracy to commit adultery where the combination is not confined to the parties to the intended crime. *State v. Clemenson*, 123–524, 99 N. W. 139.

The gist of the offense of conspiracy is the wicked and unlawful agreement, and where the agreement is to perpetrate a crime known to the common law or defined by statute in unmistakable terms, all that is necessary is to designate the offense without describing the overt act accomplished in pursuance of the conspiracy. *Ibid.*

Therefore held that in an indictment for conspiracy to commit adultery it was not necessary to allege that the woman with whom carnal connection was to be had by one of the parties to the conspiracy was known to be a married woman. If knowledge of such fact was essential to the criminality of the act it would be implied as necessarily included in the allegation that the combination was to perpetrate that particular crime. But without proof of such knowledge there should not be a conviction. *Ibid.*

Where the act charged as the basis of the conspiracy is not criminal, such as the obtaining of real property by false pretenses, which under statutory provisions relating to such crime does not constitute a criminal offense, there can be no conviction for conspiracy. *State v. Eno*, 131–619, 109 N. W. 119.

While the woman upon whom an abortion is performed is not guilty of the crime, yet if she conspires with others to perform

the act, she is a coconspirator, and her declarations in promotion of the common enterprise are admissible in evidence against another conspirator on trial for the commission of the substantive crime. *State v. Crofford*, 133–478, 110 N. W. 921.

While the acquittal of one of two or more persons charged with the joint commission of a crime of conspiracy may bar the prosecution of others charged with the same conspiracy, it does not follow that an acquittal of one of the persons charged with a substantive crime committed by means of a conspiracy will bar a prosecution of those charged with the same substantive offense. The conspiracy to commit a crime, and the crime itself, are distinct offenses, and the acquittal of one is not a bar to the prosecution of the other. The acts and declarations of one shown to have been engaged in a conspiracy to commit a substantive crime are admissible in evidence on the trial of the other defendant, notwithstanding the person whose declarations are sought to be proven has been previously acquitted. *Ibid.*

In a prosecution for conspiring to commit a felony, the felony being the act of designedly and by false pretenses, and by privy or false tokens, and with intent to defraud, obtaining the signature of any person to a written instrument, the false making of which would be punishable as forgery (code § 5041), it is not necessary to allege that the instrument was actually delivered. It is not necessary in an indictment for conspiracy to commit a crime to describe the crime intended to be committed with the accuracy or detail essential in charging the commission of the crime itself. *State v. Soper*, 118–1, 91 N. W. 774.

Where the conspiracy is charged to have consisted in an agreement to do an act not in itself criminal by illegal means, then the illegal means must be described, but where the offense consists in a conspiracy to commit a crime, the means by which such crime is to be committed need not be alleged. *Ibid.*

The purpose for which evidence is allowed to be introduced of acts by defendant in pursuance of the conspiracy, is to show the existence of the conspiracy itself. Therefore where the conspiracy charged involves false representations, it is competent to prove such representations made to persons not named in the indictment, as tending to show that the representations relied on were intentionally and wilfully made in carrying out the general plan involved in the conspiracy charged. *Ibid.*

For the purpose of thus showing the intent of the conspirators, acts done or representations made outside of the limits of the county in which the crime is charged to have been committed may be shown. *Ibid.*

So long as defendants were acting in pursuance of the unlawful combination, though subsequently to the making of it, and therefore after the completion of the crime of conspiracy, the acts and representations of each may be shown as against the others. *Ibid.*

An indictment for conspiracy is not bad for duplicity in charging that defendants conspired to injure the property of another and also obtain the property by false pretenses. *State v. Loser*, 132–419, 104 N. W. 337.

Where the gist of the crime charged is a conspiracy to commit unlawful acts, the indictment need not allege the overt acts. A conspiracy to injure the property rights of another is punishable in the state where the conspiracy is entered into, although the overt acts in carrying out the conspiracy are committed in another state, where such acts were not in themselves criminal. *Ibid.*

Under an indictment charging a conspiracy to cheat by false pretenses, it is erroneous to instruct that the procuring possession of property by such false pretenses constitutes the crime charged, irrespective of the intent of the owner of the property to pass title thereto. *Ibid.*

Under a charge of conspiracy to cheat by false pretenses, there cannot be a conviction on proof of conspiracy to commit larceny; but the fact that the overt act proven is larceny will not require an acquittal, since the overt act is not the gist of the crime, but is provable only as showing the intent. *Ibid.*

All or any two or more of the acts described by statute as constituting conspiracy may be charged conjunctively in one indictment, and there is no objection to charging one or more of the intents referred to by the statute in one count and others in another, if the same act of conspiracy is referred to in each. Therefore, even though the intent stated in the second count of an indictment is different from that stated in the first, it does not follow that the indictment is bad for duplicity. By particular words, the offense charged in the second count may be so alleged as to constitute a different form only of the same charge of conspiracy contained in the first count. *State v. Caine*, 134–147, 111 N. W. 443.

An actual agreement to enter into a conspiracy need not be proven by direct evidence in order to warrant a conviction. A prima-facie case is made out by proof of the acts and declarations of the defendant himself, and when such prima-facie case is made, evidence of acts and declarations of coconspirators, though not in the presence of each other, if in the carrying out of the common purpose, may be shown. *Ibid.*

While the motives of the purchaser of stock in a corporation cannot be inquired

into in an action to compel the transfer of the stock to him, yet if he is a party to a conspiracy relating to such stock he is not entitled to relief. *Funck v. Farmers' Elevator Co.*, 142–621, 121 N. W. 53.

Although it is not by statute made a crime to take or induce witnesses to go beyond the jurisdiction of the court, yet as such action was a crime at common law, a conspiracy to commit it is criminal. *State v. Hardin*, 144–264, 120 N. W. 470.

While acts, declarations and conduct of an alleged coconspirator are not admissible in evidence until the state has made out a prima-facie case of conspiracy, the matter of requiring prima-facie proof of the conspiracy prior to the admission of such evidence is largely in the discretion of the trial court. *State v. Manning*, 149–205, 128 N. W. 345.

A conspiracy may be established by circumstantial evidence. But in determining whether or not the defendants were guilty of the crime charged, the acts, declarations and conduct of both are admissible in evidence, the proper foundation therefor having been laid. *Ibid.*

Indictment for a statutory conspiracy made substantially in the terms of the statute may be sufficient without the allegation of an overt act. *State v. Poder*, 154–686, 135 N. W. 421.

The crime which is the object of the conspiracy need only be named in general terms without stating the facts constituting it. *Ibid.*

It is not necessary that all or more than one of the conspirators be indicted in order to sustain a conviction against the defendant charged with the crime. *Ibid.*

SEC. 5060. Pools and trusts.

These provisions may render a contract entered into for the purpose of preventing competition or to fix prices, contrary to public policy and void. *Willson v. Morse*, 117–581, 91 N. W. 823.

The publication of a charge that a dealer has entered into a pool to control the prices of a commodity in a particular market is libelous *per se*. *Dorn v. Cooper*, 139–742, 117 N. W. 1, 118 N. W. 35.

This section does not render criminal an agreement among physicians as to a schedule of prices to be charged for professional services. *Rohlf v. Kasemeier*, 140–182, 118 N. W. 276.

The term "commodity" as used in this section does not comprehend personal services, either skilled or unskilled. *Ibid.*

SEC. 5062. **Penalty.** Any corporation, company, firm or association violating any of the provisions of the two preceding sections shall be fined not less than five hundred nor more than five thousand dollars, and any president, manager, director, officer, agent or receiver of any corporation, company, firm or association, or any member of any corporation, company, firm or association, or any individual, found guilty of a violation thereof, shall be fined not less than five hundred nor more than five thousand dollars, or be imprisoned in the county jail not to exceed one year, or both. [32 G. A., ch. 187, § 1; 23 G. A., ch. 28, § 3.]

SEC. 5067-a. **Combinations, pools and trusts—fixing prices.** That it shall be unlawful for any person, company, partnership, association or corporation owning or operating any business of buying, selling, handling, consigning or transporting any commodity or any article of commerce, to enter into any agreement, contract or combination with any other dealer, or dealers, partnership, company, corporation or association of dealers, whether within or without the state, engaged in like business, for the fixing of the price or prices at which any commodity or any article of commerce should be sold by different dealers or sellers; or to divide between said dealers the aggregate or net proceeds of the earnings of such dealers and sellers, or any portion thereof; or to form, enter into, maintain, or contribute money or anything of value to any trust, pool, combination or association of persons of whatsoever character or name, which has for any of its objects the prevention of full and free competition among buyers, sellers, or dealers in any commodity or any article of commerce; or to do or permit to be done by his or their authority any act or thing whereby the free action of competition in the buying or selling of any commodity or any article of commerce is restrained or prevented. [33 G. A., ch. 225, § 1.]

Monopolies have always been odious at common law, and all contracts, arrangements, or agreements in restraint of trade or of free competition have been held void. *Reeves v. Decorah Farmers' Co-op. Society*, 140 N. W. 844.

An agreement among the members of a coöperative association that they will not sell to a competitor engaged in the same business and that they will pay a penalty for the violation of such agreement, is invalid and the competitor may maintain an injunction to restrain the association from carrying out its criminal purpose. *Ibid.*

SEC. **5067-b. Liability.** That in case any person, company, partnership, corporation or association, trust, pool or combination of whatsoever name shall do, cause to be done, or permit to be done, any act, matter or thing in this act prohibited or declared to be unlawful, such person, partnership, company, association, corporation, trust, pool or combination shall be liable to the person, partnership, company, association or corporation injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this act. [33 G. A., ch. 225, § 2.]

SEC. **5067-c. Violation—penalty.** That any person, partnership, company, association or corporation subject to the provisions of this act, or any person, trust, combination, pool or association, or any director, officer, lessee, receiver, trustee, employe, clerk, agent or any person acting for or employed by them, who shall violate any of the provisions of section one of this act, or who shall aid and abet in such violation, shall be deemed guilty of a misdemeanor, and shall upon conviction thereof be fined any sum not less than five hundred dollars and not exceeding two thousand dollars or imprisoned in the county jail for a period not exceeding six months, or both, at the discretion of the court. It shall be the duty of the grand jury to inquire into and ascertain if there exists any pool, trust, combination or violation of any provision in this act, in their respective counties. [33 G. A., ch. 225, § 3.]

SEC. **5067-d. Gift enterprises.** All gift enterprises, as hereinafter defined, and all trade practices carried on in connection therewith are hereby prohibited and declared to be unlawful. [33 G. A., ch. 226, § 1.]

SEC. **5067-e. Defined.** Whenever two or more persons enter into any contract arrangement or scheme, whereby for the purpose of inducing the public to purchase merchandise or other property of one of the parties to said scheme, any other party thereto, for a valuable consideration and as a part of such scheme, advertises and induces or attempts to induce the public to believe that he will give gifts, premiums or prizes to persons purchasing such merchandise or other property of such party to said scheme, and that stamps or tickets will be given by the seller in connection with such sales entitling the purchaser of such property to receive such prizes or gifts from any other party to such scheme, the parties so undertaking and carrying out such scheme shall be deemed to be engaged in a "gift enterprise," unless the articles or things so promised to be given as gifts or premiums with or on account of such purchases, shall be definitely described on such stamp or ticket and the character and value of such promised prize or gift fully made known to the purchaser of such merchandise or other property at the time of the sale thereof, and unless the right of the holder of such stamp or ticket to the gift or premium so promised becomes absolute upon the completion upon the delivery thereof without the holder being required to collect any specified number of other similar stamps or tickets and to present them for redemption together, and the right of the holder of such stamp or ticket to the prize or gift so offered is absolute, and does not depend on any chance, uncertainty or contingency whatever. [33 G. A., ch. 226, § 2.]

SEC. **5067-f. Violation.** Any person who engages in a gift enterprise such as is defined in this act or who advertises the same in any manner or who in furtherance of such scheme, as an inducement to purchasers, issues in connection with the sale of any merchandise or other property any such ticket or stamp purporting to be redeemable in some indefinite article not described thereon, only when presented with a collection of other stamps or tickets of like kind by some other party to such scheme, and which unless presented in the manner aforesaid is not redeemable at all, shall each and all be guilty of a misdemeanor. [33 G. A., ch. 226, § 3.]

SEC. **5067-g. "Person" defined.** The word "person" as used in this act may in proper cases, in order to make the intent and meaning of the law effective, be construed to mean firm or corporation. [33 G. A., ch. 266, § 4.]

SEC. **5070. Weight of flour—repeal.** That section five thousand and seventy of the code of Iowa be and the same is hereby repealed. [34 G. A., ch. 180, § 2.]

SEC. **5070-a. Weight of flour—label.** Every barrel, bag, parcel or package of flour, containing one pound or more, offered or exposed for sale in the state of Iowa, for use within this state, shall have affixed thereto in a conspicuous place on the outside thereof, distinctly printed in the English language, in legible type not smaller than eight-point heavy Gothic capital letters, a statement certifying the number of net pounds contained in the package. Any person who shall sell any package of flour which shall be stamped or labeled with a greater number of pounds net than such package actually contains, or shall sell flour in any manner contrary to the provisions of this section, shall be deemed guilty of a misdemeanor, and upon conviction thereof, shall be fined in a sum of not less than ten dollars nor more than one hundred dollars; provided that in determining the net weight at the time of sale, the reasonable and ordinary shrinkage, if any, may be included. [34 G. A., ch. 180, § 1.]

SEC. **5077-a1. Misreading or manipulation of milk or cream tests—repealed.** [34 G. A., ch. 113, § 1.] [31 G. A., ch. 171, § 1.]

[See § 2515. EDITOR.]

SEC. **5077-a2. Penalty.** Whosoever shall violate any of the provisions of this act shall, upon conviction thereof, be fined not less than twenty-five dollars nor more than one hundred dollars. [31 G. A., ch. 171, § 2.]

SEC. **5077-a3. Grain combinations prohibited.** That it shall be unlawful for any person, company, partnership, association, or corporation owning or operating any grain elevator or engaged in the business of buying, selling, handling, consigning, or transporting grain, to enter into any agreement, contract, or combination with any other grain dealer, or grain dealers, partnership, company, corporation, or association of grain dealers, whether within or without the state, engaged in like business, for the fixing of prices to be paid for grain by different dealers or buyers; or to divide between said dealers the aggregate or net proceeds of the earnings of such dealers and buyers, or any portion thereof; or to form, enter into, maintain, or contribute money or anything of value to any trust, pool, combination, or association of persons of whatsoever character or name, which has for any of its objects the prevention of full and free competition among buyers, sellers, or dealers in grain; or to do or permit to be done by his or their authority any act or thing whereby the free action of competition in the buying or selling of grain is restrained or prevented. [32 G. A., ch. 188, § 1.]

SEC. **5077-a4. Liability for damages.** That in case any person, company, partnership, corporation or association, trust, pool or combination of whatsoever name shall do, cause to be done, or permit to be done, any act, matter or thing in this act prohibited or declared to be unlawful, such person, partnership, company, association, corporation, trust, pool or combination shall be liable to the person, partnership, company, association or corporation injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this act, together with a reasonable attorney's fee to be fixed by the court in every case of recovery and to be taxed as part of the costs in the case, and the property of any person who may be a member of any such trust, pool, combination, corporation or association, violating the provisions of this act, shall be liable for the full amount of such judgment. [32 G. A., ch. 188, § 2.]

SEC. **5077-a5. Duty of grand jury—penalty.** That any person, partnership, company, association or corporation subject to the provisions of this act, or any person, trust, combination, pool or association, or any director, officer, lessee, receiver, trustee, employe, clerk, agent or any person acting for or employed by them or either of them, who shall violate any of the provisions of section one of this act, or who shall aid and abet in such violation, shall be deemed guilty of a misdemeanor, and shall upon conviction thereof be fined any sum not less than five hundred dollars and not exceeding two thousand dollars, or imprisoned in the county jail for a period not exceeding six months, or both, at the discretion of the court. It shall be the duty of the grand jury to inquire into and ascertain if there exists any pool, trust, combination or violation of any provision in this act, in their respective counties. [32 G. A., ch. 188, § 3.]

SEC. **5077-a6. Agricultural seeds — commercial feeding-stuffs — statements required.** Every lot in bulk, barrel, bag, pail, parcel or package of concentrated commercial feeding-stuffs as defined in section three of this act; and every parcel, package or lot of agricultural seeds as defined in section nine of this act, and containing one pound or more, offered or exposed for sale in the state of Iowa for use within this state, shall have affixed thereto, in a conspicuous place on the outside thereof, distinctly printed in the English language in legible type not smaller than eight-point heavy Gothic caps, or plainly written, a statement certifying:

1. In case of concentrated commercial feeding-stuffs:

First. The number of net pounds of feeding-stuffs in the package.

Second. The name, brand or trade-mark under which the article is sold.

Third. The name and address of the manufacturer, importer, dealer or agent.

Fourth. The place of manufacture.

Fifth. Except in the case of condimental stock food; patented, proprietary or trade-marked stock and poultry foods, claimed to possess medicinal or nutritive properties, or both, the chemical analysis of the feeding-stuffs, stating the percentages of crude protein, crude fat, and crude fiber, allowing one per cent. of nitrogen to equal six and twenty-five one-hundredths per cent. of protein, all three constituents to be determined by the latest methods adopted by the Association of Official Agricultural Chemists of the United States.

2. In the case of agricultural seeds:

First. Name of the seed.

Second. Full name and address of the seedsman, importer, dealer or agent.

Third. A statement of the purity of the seed contained, specifying the kind and percentage of the impurities as defined in sections eleven and twelve hereof, provided that said seeds are below the standards fixed in this act.

Fourth. Locality where said seed was grown, when known. [32 G. A., ch. 189, § 1.]

This statute (32 G. A., ch. 189) is a proper exercise of the police power of the state and is not unconstitutional as applied to sales by importers in the original package. Its effect upon interstate commerce is incidental only. *Standard Stock Food Co. v. Wright*, 225 U. S. 540, 32 Sup. Ct. R. 784.

SEC. **5077-a7. Labels.** Every barrel, bag, pail, parcel or package of concentrated commercial feeding-stuffs as defined in section three of this act, and every feed intended for domestic animals that is compounded from two or more substances, in addition to the requirements of section one, shall have affixed thereto, in a conspicuous place on the outside thereof, a statement in the manner and form prescribed in section one, giving the true and correct names of all the ingredients of which it is composed, except condimental stock food, patented, proprietary or[1] trade-marked stock or poultry foods, claimed to possess medicinal or nutritive properties, or both; and these shall be labeled or branded so as not to deceive or mislead the purchaser in any way, and the contents of any such package shall not be substituted in whole or in part for any other contents. Any statement, design or device upon the label or package regarding the substances contained therein, shall be true and correct, and any claim made for the feeding, condimental, tonic or medicinal value, shall not be false or misleading in any particular. The name and percentage of any deleterious or poisonous ingredient or ingredients, shall be plainly stated upon the outside of the package or container. The name and percentage of the dilutent or dilutents, or bases, shall be plainly stated on the outside of the package or container. [32 G. A., ch. 189, § 2.]

[1"of" in session laws. EDITOR.]

SEC. **5077-a8. Concentrated commercial feeding-stuffs defined.** The term concentrated commercial feeding-stuffs, as used in this act, shall include alfalfa meals and feeds; dried beet refuse; ground beef or fish scraps; bean meals; dried blood; brewers' grains, both wet and dry; cerealine feeds; cocoanut meals; corn feeds; corn and oat feeds; corn, oat and barley feeds; compounds under the name of corn and cob meals; corn bran; clover meal; cottonseed meal and feeds; germ feeds; distillers' grains; gluten meals; gluten feeds; hominy feeds; linseed meals; malt refuse; malt sprouts; meat meals; meat and bone meals; mixed feeds of all kinds; oil meals of all kinds; oat feeds; oat bran; oat flour; oat middlings; oat shorts; pea meals; poultry foods; rice bran; rice meal; rice polish; rye bran; rye middlings; rye shorts; starch feeds and starch factory by-products; tankage and packing house by-products; wheat bran; wheat middlings; wheat shorts; and low grade wheat flour; and all materials of similar nature used for domestic animals; also condimental stock foods; patented proprietary or trade-marked stock or poultry feeds claimed to possess medicinal or nutritive properties or both; and all other materials intended for feeding to domestic animals. But it shall not include: hay; straw; whole seeds; unmixed meals made from the entire grains of wheat, rye, barley, oats, Indian corn, buckwheat, and broom corn; nor wheat flours nor other flours fit for human consumption. [32 G. A., ch. 189, § 3.]

SEC. 5077-a9. **Certified copy of statement and samples furnished food and dairy commissioner.** Before any concentrated commercial feeding-stuffs, as defined in section three of this act, is offered or exposed for sale, the importer, manufacturer, person or party who causes it to be sold or offered for sale within the state of Iowa for use within this state, for each and every feeding-stuff bearing a distinguishing name or trade-mark, shall file with the state food and dairy commissioner a certified copy of the statement named in section one of this act, and shall also deposit with the said state food and dairy commissioner a sealed glass jar or bottle containing not less than one pound of the feeding-stuff to be sold or offered for sale, accompanied by an affidavit that it is a fair average sample thereof and corresponds within reasonable limits to the feeding-stuff which it represents. [32 G. A., ch. 189, § 4.]

SEC. 5077-a10. **Inspection fee—license fee—tax tags.** Before any manufacturer, importer, dealer or agent shall offer or expose for sale in this state any of the concentrated commercial feeding-stuffs defined in section three of this act, he shall pay to the state food and dairy commissioner an inspection fee of ten cents per ton for each ton of such concentrated commercial feeding-stuffs sold or offered for sale in the state of Iowa for use within this state; except that every manufacturer, importer, dealer or agent for any condimental, patented, proprietary or trade-marked stock or poultry foods, or both, shall pay to the state food and dairy commissioner, on or before the fifteenth day of July of each year, a license fee of one hundred dollars, in lieu of such inspection fee. Whenever the manufacturer or importer of such foods shall have paid the fee herein required, no other person or agent of such manufacturer or importer shall be required to pay such license fee; and shall affix to each lot shipped in bulk, and to each bag, barrel or package of such concentrated commercial feeding-stuffs, a tag, to be furnished by the said state food and dairy commissioner, stating that all charges specified in this section have been paid; provided that the inspection fee herein required shall not apply to unadulterated wheat, rye and buckwheat bran, nor wheat, rye and buckwheat middlings, nor to wheat, rye and buckwheat shorts manufactured in this state. The said state food and dairy commissioner is hereby empowered to prescribe the form of such tag and adopt such regulations as may be necessary for the enforcement of this act. Tags for use upon concentrated commercial feeding-stuffs shall be issued in denominations suitable for use with twenty-five, fifty and one hundred pounds net, except as hereinafter provided; provided, that any dealer who sells at one time to any other person one ton or more of concentrated commercial feeding-stuffs, shall be held to have complied with the provisions of this section if he delivers to the purchaser the tax tags herein required, even though they may not be attached to the various packages. [32 G. A., ch. 189, § 5.]

This statute must be considered as an inspection law which it is within the power of a state to enact, and its fair import is that the fees exacted by this section are for the purpose of meeting the expenses of inspection. *Standard Stock Food Co. v. Wright*, 225 U. S. 540, 32 Sup. Ct. R. 784.

SEC. 5077-a11. **Samples—analysis.** The state food and dairy commissioner shall cause to be made analyses of all concentrated commercial feeding-stuffs and agricultural seeds sold or offered for sale in this state. Said state food and dairy commissioner is hereby authorized, in person or by deputy, to take for analysis a sample from any lot or package of concentrated commercial feeding-stuffs in this state, not exceeding two pounds

in weight; and in case of agricultural seeds, a sample not exceeding four ounces in weight; but said sample shall be drawn or taken in the presence of the party or parties in interest, or their representative, and shall be taken from a parcel, lot or number of parcels which shall not be less than five per cent. of the whole lot inspected, and shall be thoroughly mixed and divided into two samples and placed in glass or metal vessels carefully sealed and a label placed on each, stating the name or brand of the feeding-stuff, agricultural seeds or material sampled, the name of the party from whose stock the sample is drawn, and the date and place of taking such sample, and said label shall be signed by the said state food and dairy commissioner, or his authorized agent; or said sample may be taken in the presence of two disinterested witnesses. One of said duplicate samples shall be left on the premises of the party whose stock was sampled and the other retained by the state food and dairy commissioner for analysis and comparison with the certified statements required by sections one and four of this act. The result of the analysis of the sample, together with additional information, shall be published from time to time in bulletins issued by the state food and dairy commissioner upon approval of the executive council. [32 G. A., ch. 189, § 6.]

SEC. **5077-a12. Analysis made on request of purchaser—fee.** Any person purchasing any concentrated commercial feeding-stuffs or agricultural seeds in this state for his own use may submit fair samples of said feeding-stuffs or seeds to the state food and dairy commissioner, who, upon receipt of an analysis fee of fifty cents for each sample of agricultural seeds and one dollar for each sample of concentrated commercial feeding-stuff, shall cause an analysis of the same to be made. [32 G. A., ch. 189, § 7.]

SEC. **5077-a13. Wheat or rye screenings.** No person shall sell in ground form wheat or rye screenings containing cockle or other poisonous or deleterious substances. [32 G. A., ch. 189, § 8.]

SEC. **5077-a14. Agricultural seeds defined.** The term agricultural seeds, as used in this act, shall include the seeds of the red clover, white clover, alsike clover, alfalfa, Kentucky blue grass, timothy, brome grass, orchard grass, redtop, meadow fescue, oat grass, rye grass and other grasses and forage plants, flax, rape and cereals. [32 G. A., ch. 189, § 9.]

SEC. **5077-a15. Agricultural seeds to be free from impure seeds.** No person shall sell, offer or expose for sale or distribution in this state for the purpose of seeding, any of the agricultural seeds as defined in section nine of this act, unless the said seeds are free from the seeds of the following weeds: wild mustard or charlock (Brassica sinapistrum), quack grass (Agropyron repens), Canada thistle (Cnicus arvensis), wild oats (Avent fatua), clover and alfalfa dodder (Cuscuta epithymum), field dodder (Cuscuta arvensis), and corn cockle (Lychnis githago). [32 G. A., ch. 189, § 10.]

SEC. **5077-a16. Impurities in agricultural seeds.** The seeds of the following weeds shall be considered as impurities in the agricultural seeds, as defined in section nine of this act, sold, offered or exposed for sale within the state for the purpose of seeding: white cockle (Lychnis vespertina), nightflowering catchfly (Silene noctiflora), curled dock (Rumex crispus), smooth dock (Rumex altissimus), sheep sorrel (Rumex acetosella), yellow trefoil (Medicago lupulina), burr clover (Medicago denticulata), sweet clover (Melilotus alba and officinalis), black mustard (Brassica nigra), plantain, buckhorn (Plantago lanceolata), bracted plantain (Plantago aristata), bindweed (Convolvulus sepium), smooth crab grass (Panicum glabrum), common chickweed (Stellaria media). When such

impurities or any of them are present in quantity exceeding a total of two per cent. of the weight of said agricultural seeds, the approximate percentage of each shall be plainly indicated in statement specified in section one of this act. [32 G. A., ch. 189, § 11.]

SEC. **5077-a17. Other impurities.** Sand, dirt, chaff and foreign substances and seeds other than those specified in sections thirteen and fourteen or broken seed and seed not capable of germinating, shall be considered impurities when present in agricultural seeds sold, offered or exposed for sale in this state for the purpose of seeding, and when such impurities, or any of them, are present in quantity exceeding the standards of purity and viability authorized in section sixteen of this act, the name and approximate percentage of each shall be plainly indicated in the statement specified in section one of this act. [32 G. A., ch. 189, § 12.]

SEC. **5077-a18. Mixed or adulterated seeds.** For the purposes of this act seeds shall be deemed to be mixed or adulterated:

First. When orchard grass (Dactylis glomerata) seed contains ten per cent. or more by weight of meadow fescue (Festuca elatior pratensis) seed, or Italian rye grass (Lolium italicum) seed, or English rye grass (Lolium perenne) seed.

Second. When blue grass or Kentucky blue grass (Poa pratensis) seed contains five per cent. or more by weight of Canadian blue grass (Poa compressa) seed, redtop chaff, redtop (Agrostis alba) seed, or any other seed or foreign substance.

Third. When red clover (Trifolium pratense), mammoth red clover (Trifolium pratense var), or alfalfa (Medicago sativa), contains five per cent. or more by weight of yellow trefoil (Medicago lupulina), or sweet clover (Melilotus alba and M. officinalis) seed or burr clover (Medicago denticulata) seed.

Fourth. When rape (Brassica rapa) contains five per cent. or more of common mustard (Brassica Sinapistrum) or black mustard (B. nigra). [32 G. A., ch. 189, § 13.]

SEC. **5077-a19. Misbranded seed.** For the purpose of this act, seed shall be deemed to be misbranded:

First. When meadow fescue (Festuca elatior pratensis), English rye grass (Lolium perenne) or Italian rye grass (Lolium italicum) is labeled or sold under the name of orchard grass (Dactylis glomerata) seed.

Second. When Canadian blue grass (Poa compressa) seed, redtop (Agrostis alba) seed, or any other seed not blue grass seed, is sold under the name of Kentucky blue grass or blue grass (Poa pratensis) seed.

Third. When yellow trefoil (Medicago lupulina), burr clover (Medicago denticulata), or sweet clover (Melilotus alba) is sold under the name of clover, June clover, red clover (Trifolium pratense), medium red clover, small red clover, mammoth red clover, sapling clover, peavine clover (T. pratense var) or alfalfa (Medicago sativa) seed.

Fourth. When the seeds are not true to the name under which they are sold. [32 G. A., ch. 189, § 14.]

SEC. **5077-a20. Exemptions.** The provisions concerning agricultural seeds contained in this act shall not apply to:

First. Any person or persons growing or selling seeds for food purposes only, or having such seeds in possession for sale for such purposes.

Second. Any person selling seeds direct to merchants, to be cleaned or graded before being offered for sale for the purpose of seeding. This shall not, however, exempt the seller from the restrictions of section ten of this act.

Third. Seed that is held in storage for the purpose of being recleaned, and which has not been offered, exposed or held in possession of or for sale for the purpose of seeding.

Fourth. Seed marked "not absolutely clean," and held or sold for export outside the state only.

Fifth. The sale of seed that is grown, sold and delivered by any farmer on his own premises for seeding by the purchaser himself, unless the purchaser of said seeds obtains from the seller at the time of the sale thereof a certificate that the said seed is supplied to the purchaser subject to the provisions of this act.

Sixth. Mixtures of seeds for lawn or pasture purposes. This shall not, however, exempt the seller of such mixtures of seeds from the restrictions of sections ten and eleven of this act. [32 G. A., ch. 189, § 15.]

SEC. **5077-a21. Standards of purity.** The following standards of purity (meaning freedom from weed seeds or other seeds) and viability are hereby fixed:

STANDARD OF PURITY AND VIABILITY OF AGRICULTURAL SEEDS.

Name of seed.	Per cent. of purity.	Per cent. of germinable seeds.
Alfalfa (medicago sativa)	96	80
Barley	98	90
Blue grass, Canadian (poa compressa)	90	45
Blue grass, Kentucky (poa pratensis)	80	45
Brome, awnless (bromus inermis)	90	75
Clover, alsike (trifolium hybridum)	90	75
Buckwheat	96	90
Clover, crimson (trifolium incarnatum)	98	85
Clover, red (trifolium pratense)	92	80
Clover, white (trifolium repens)	90	75
Corn, field (zea mays)	99	94
Corn, sweet	99	75
Fescue, meadow (fescuta pratensis)	95	85
Flax (linum usitatissimum)	96	89
Millet, pearl (penisetum typhoideum)	99	65
Millet, common (setaria italica)	90	85
Millet, hog (panicum miliaceum)	90	85
Oats (avena sativa)	98	90
Oat grass, tall (arrhena therum avenaceum)	72	70
Orchard grass (dactylis glomerata)	70	70
Rape (brassica rapa)	99	90
Redtop (agrostis alba)	90	70
Rye (secala cereale)	98	90
Rye grass, perennial (lolium perenne)	96	90
Rye grass, Italian (lolium italicum)	95	80
Sorghum (andropogon sorghum)	96	80
Sorghum, for fodder	90	60
Timothy (phleum pratense)	96	85
Wheat (triticum)	98	90

[32 G. A., ch. 189, § 16.]

SEC. **5077-a22. Enforcement.** It is hereby made the duty of the state food and dairy commissioner to enforce the provisions of this act. The inspectors, assistants and chemists appointed by the state food and dairy commissioner shall perform the same duties and have the same authority under this act as are prescribed by chapter one hundred sixty-six, laws of the thirty-first general assembly, and the state food and dairy commissioner may appoint, with the approval of the executive council, such analysts and chemists as may be necessary to carry out the provisions of this act. [32 G. A., ch. 189, § 17.]

SEC. **5077-a23. Penalty.** Whoever sells, offers or exposes for sale any of the seeds specified in sections thirteen and fourteen of this act which are mixed, adulterated or misbranded, or any agricultural seeds which do not comply with sections ten, eleven and twelve of this act, or who shall counterfeit or use a counterfeit of any of the tags prescribed by this act; or who shall prevent or attempt to prevent any inspector in the discharge of his duty from collecting samples; or who shall violate any of the provisions of this act, shall be guilty of a misdemeanor, and upon conviction, shall be fined not more than one hundred dollars and costs of prosecution. Provided that no one shall be convicted for violation of the provisions of section ten of this act if he is able to show that the weed seeds named in section ten are present in quantities not more than one in ten thousand, and that due diligence has been used to find and remove said seeds. [32 G. A., ch. 189, § 18.]

SEC. **5077-a24. Appropriation—fees paid into state treasury.** There is hereby appropriated, for the purpose of enforcing the provisions of this act, a sum not exceeding three thousand dollars annually. Such expense shall be paid by warrant of the state auditor upon bills filed by the state food and dairy commissioner with the executive council and approved by them. All fees collected under the provisions of this act shall be paid into the state treasury. [32 G. A., ch. 189, § 19.]

SEC. **5077-a25. Binder twine—label required.** No binder twine shall be sold, exposed or offered for sale within this state, except the same bears upon each ball a stamp or label truly stating the name of the manufacturer or importer and the number of feet to the pound in such ball; provided that a deficiency not exceeding five per cent. in length stated on the stamp or label shall not be a violation hereof. [32 G. A., ch. 190, § 1.]

SEC. **5077-a26. Penalty.** Any person, firm or corporation who violates the provisions of section one hereof shall be guilty of a misdemeanor and shall be punished by a fine not exceeding one hundred dollars. [32 G. A., ch. 190, § 2.]

SEC. **5077-a27. Exemption—burden of proof.** All binder twine purchased or received by wholesale or retail dealers of this state prior to September first, nineteen hundred and seven, shall be exempt from the provisions of this act until November first, nineteen hundred and eight; but the burden of proof that such twine was so purchased or received shall rest on said dealers. [32 G. A., ch. 190, § 3.]

SEC. **5077-b. Marking articles made of gold or alloy—tests for fineness.** Any person, firm, corporation or association who or which makes for sale, or sells, or offers to sell or dispose of, or has in his, her or its possession with intent to sell or dispose of, any article of merchandise made in whole or in part of gold or any alloy of gold, and having stamped, branded, engraved or imprinted thereon, or upon any tag, card or label attached thereto, or upon any box, package, cover or wrapper in which said article is encased or enclosed, any mark indicating, or designed or intended to indicate, that the gold, or alloy of gold, in such article is of a greater degree of fineness than the actual fineness or quality of such gold or alloy, unless the actual fineness of such gold or alloy, in the case of flatware and watchcases, be not less by more than three one-thousandths parts, and in case of all other articles be not less by more than one-half karat than the fineness indicated by the marks stamped, branded, engraved or imprinted upon any part of such article, or upon any tag, card or label attached thereto, or upon any box, package, cover or wrapper in which such article

is encased or enclosed according to the standards and subject to the qualifications hereinafter set forth, is guilty of a misdemeanor; provided that, in any test for the ascertainment of the fineness of the gold or its alloy in any such article, according to the foregoing standards, the part of the gold or of its alloy taken for the test, analysis or assay shall be such part or portion as does not contain or have attached thereto any solder or alloy of inferior fineness used for brazing or uniting the parts of said article; provided further, and in addition to the foregoing tests and standards, that the actual fineness of the entire quantity of gold and of its alloys contained in any article mentioned in this section (except watchcases and flatware) including all solder or alloy of inferior metal used for brazing or uniting the parts of the article (all such gold, alloys and solder being assayed as one piece) shall not be less than the fineness indicated by the mark stamped, branded, engraved or imprinted upon such article, or upon any tag, card or label attached thereto, or upon any box, package, cover or wrapper in which said article is encased or enclosed. [34 G. A., ch. 181, § 1.]

SEC. **5077-b1. Articles made of silver or alloy.** (a) Any person, firm, corporation or association, who or which makes for sale, or sells or offers to sell or dispose of, or has in his, her or its possession with intent to sell or dispose of, any article of merchandise made in whole or in part of silver or of any alloy of silver and having marked, stamped, branded, engraved or imprinted thereon, or upon any tag, card or label attached thereto or upon any box, package, cover or wrapper in which said article is encased or enclosed, the words "sterling silver" or "sterling" or any colorable imitation thereof, unless nine hundred twenty-five one-thousandths of the component parts of the metal appearing or purporting to be silver, of which such article is manufactured are pure silver, subject to the qualifications hereinafter set forth, is guilty of a misdemeanor, provided that in the case of all such articles there shall be allowed a divergence in fineness of four one-thousandths parts from the foregoing standard.

(b) Any person, firm, corporation or association who or which makes for sale, or sells, or offers to sell or dispose of, or has in his, her or its possession with intent to sell or dispose of, any article of merchandise made in whole or in part of silver or of any alloy of silver and having marked, stamped, branded, engraved or imprinted thereon, or upon any tag, card or label attached thereto, or upon any box, package, cover or wrapper in which such article is encased or enclosed, the words "coin" or "coin silver," or any colorable imitation thereof, unless nine hundred one-thousandths of the component parts of the metal appearing or purporting to be silver, of which such article is manufactured are pure silver, subject to the qualifications hereinafter set forth, is guilty of a misdemeanor; provided that in case of all such articles there shall be allowed a divergence in fineness of four one-thousandths parts from the foregoing standards.

(c) Any person, firm, corporation or association who or which makes for sale, or sells, or offers to sell or dispose of, or has in his, her or its possession with intent to sell or dispose of, any article of merchandise made in whole or in part of silver or of any alloy of silver, and having stamped, branded, engraved or imprinted thereon, or upon any tag, card, or label attached thereto, or upon any box, package, cover or wrapper in which said article is encased or enclosed, any mark or word (other than the word "sterling" or the word "coin") indicating, or designed or in-

tended to indicate, that the silver or alloy of silver in said article is of a greater degree of fineness than the actual fineness or quality of such silver or alloy, unless the actual fineness of the silver or alloy of silver of which said article is composed be not less by more than four one-thousandths parts than the actual fineness indicated by the said mark or word (other than the word "sterling" or "coin") stamped, branded, engraved or imprinted upon any part of said article, or upon any tag, card or label attached thereto, or upon any box, package, cover or wrapper in which said article is encased or enclosed, subject to the qualifications hereinafter set forth, is guilty of a misdemeanor.

(d) Provided that, in any test for the ascertainment of the fineness of any such article mentioned in this section, according to the foregoing standards, the part of the article taken for the test, analysis or assay, shall be such part or portion as does not contain or have attached thereto any solder or alloy of inferior metal used for brazing or uniting the parts of such article, and provided further and in addition to the foregoing test and standards, that the actual fineness of the entire quantity of metal purporting to be silver contained in any article mentioned in this section, including all solder or alloy of inferior fineness used for brazing or uniting the parts of any such article (all such silver, alloy or solder being assayed as one piece) shall not be less by more than ten one-thousandths parts than the fineness indicated according to the foregoing standards, by the mark stamped, branded, engraved or imprinted upon such article, or upon any tag, card or label attached thereto, or upon any box, package, cover or wrapper in which said article is encased or enclosed. [34 G. A., ch. 181, § 2.]

SEC. **5077-b2. Marking of gold plated or gold filled articles.** Any person, firm, corporation or association who or which makes for sale, or sells or offers to sell or dispose of, or has in his, her or its possession with intent to sell or dispose of, any article of merchandise made in whole or in part of inferior metal having deposited or plated thereon or brazed or otherwise affixed thereto a plate, plating, covering or sheet of gold or of any alloy of gold and which article is known in the market as "rolled gold plate," "gold plate," "gold filled" or "gold electroplate," or by any similar designation, and having stamped, branded, engraved or imprinted thereon, or upon any tag, card or label attached thereto, or upon any box, package, cover or wrapper in which said article is encased or enclosed, any word or mark usually employed to indicate the fineness of gold, unless said word be accompanied by other words plainly indicating that such article or some part thereof is made of rolled gold plate, or gold plate, or gold electroplate, or is gold filled, as the case may be, is guilty of a misdemeanor. [34 G. A., ch. 181, § 3.]

SEC. **5077-b3. Marking of silver plated articles.** Any person, firm, corporation or association who or which makes for sale, or sells, or offers to sell or dispose of, or has in his, her or its possession with intent to sell or dispose [of], any article of merchandise made in whole or in part of inferior metal having deposited or plated thereon or brazed or otherwise affixed thereto, a plate, plating, covering or sheet of silver or of any alloy of silver, and which article is known in the market as "silver plate" or "silver electroplate" or by any similar designation, and having stamped, branded, engraved or imprinted thereon, or upon any tag, card, or label attached thereto, or upon any box, package, cover or wrapper in which said article is encased or enclosed, the word "sterling" or the word

"coin" either alone or in conjunction with any other words or marks, is guilty of a misdemeanor. [34 G. A., ch. 181, § 4.]

SEC. **5077-b4. Violation—penalty.** Every person, firm, corporation or association guilty of a violation of any one of the preceding sections of this act, and every officer, manager, director or managing agent of any such person, firm, corporation or association directly participating in such violation or consenting thereto, shall be punished by a fine of not more than five hundred dollars or imprisonment for not more than three months, or both, at the discretion of the court; provided that if the person charged with violation of this act shall prove that the article concerning which the charge is made was manufactured prior to the thirteenth day of June, nineteen hundred and seven, then the charge shall be dismissed. [34 G. A., ch. 181, § 5.]

SEC. **5077-b5. In effect.** This act[1] shall not take effect and be in force until January first, nineteen hundred twelve. [34 G. A., ch. 181, § 6.]

[1"bill" in the enrolled bill. EDITOR.]

SEC. **5077-c. Registration of charitable organizations soliciting public aid—license.** That from and after the passage of this act, all organizations, institutions, or charitable associations which, through agents or representatives, solicit public donations in this state, shall be required to file with the secretary of state a statement setting forth the name and location of such organization, institution or charitable association, the purposes for which such organization, institution or charitable association exists, and the name of its principal officers and soliciting agents. If, in the judgment of the secretary of state, such statement shall be deemed sufficient evidence that the moneys thus collected are to be used in the interest of the purposes represented, the secretary of state shall be authorized to issue to said organization, institution or charitable association, its agents and representatives, a state license, without expense, authorizing said organization, institution or charitable association to solicit public donations in any county, city or township in this state.

Nothing in this act, however, shall be construed to prohibit any person or local organization, church, school or any recognized society or branch of any church or school from publicly soliciting funds or donations within the county or adjoining counties in which such person resides or such church, school, institution, organization or charitable association is located. [35 G. A., ch. 138, § 1.]

SEC. **5077-d. Violation—penalty.** Any person who shall wilfully violate the provisions of this act or who shall solicit funds under any such license and thereafter divert the same to purposes other than that for which they were contributed shall be deemed guilty of a misdemeanor and upon conviction shall be punished by a fine of not more than one hundred dollars or by imprisonment in the county jail not to exceed thirty days. [35 G. A., ch. 138, § 2.]

CHAPTER 14.

OF NUISANCES AND ABATEMENT THEREOF.

SECTION **5078. What deemed nuisances.**

Slaughtering animals and rendering tallow in a meat market located in the heart of a city from which offensive odors are emitted constitutes a nuisance which may

be enjoined in equity. *Rhoades v. Cook*, 122–336, 98 N. W. 122.

Discharging refuse from glucose works into a running stream, so as to pollute and corrupt the water at a point lower down the stream and in another county from that where the glucose works are situated, will constitute a nuisance at the place where the water is thus polluted and corrupted. *State v. Glucose Sugar Refin. Co.*, 117–524, 91 N. W. 794.

The fouling of the waters of a stream constitutes a public offense, and a city thus fouling a running stream with its sewage may be liable for nuisance to an abutting owner injured thereby. *Vogt v. Grinnell*, 133–363, 110 N. W. 603.

The obstruction of a private railway crossing constitutes a nuisance, and a tenant in possession may recover damages for such obstruction. *Morrison v. Chicago & N. W. R. Co.*, 117–587, 91 N. W. 793.

In a civil action held error to tell the jury that any of the matters enumerated in this section, specifying them, would constitute a nuisance, there being no evidence as to the existence of some of the matters so specified. *Hollenbeck v. Marion*, 116–69, 89 N. W. 210.

A fence in the highway is a nuisance and may be removed as such. *Quinn v. Baage*, 138–426, 114 N. W. 205.

Cities are charged with the duty of keeping streets free from nuisances or obstructions. *Lacy v. Oskaloosa*, 143–704, 121 N. W. 542.

To warrant the abatement of a nuisance in the obstruction of a street, the plaintiff must show injury or prejudice to him other or different from that suffered by the citizens in general. *Collins v. Keokuk*, 147–605, 125 N. W. 231.

A property owner suffering peculiar and personal injury from the obstruction of a highway may maintain an action in his own name for the abatement of such obstruction. *Arbaugh v. Alexander*, 151–552, 132 N. W. 179.

Although the obstruction of streets is declared to be a nuisance, yet such obstruction will not be abated at the suit of a private property owner unless it appears that he is injured otherwise than as one of the general public. *Smith v. Jefferson*, 142 N. W. 220.

Further as to nuisances, see notes to code § 4302 in this supplement.

SEC. 5080. Disorderly houses.

The presumption that the acts of a wife are by coercion of the husband for which she is not responsible does not apply to the crime of keeping a house of ill fame. *State v. Gill*, 150–210, 129 N. W. 821.

Ill repute and licentious inclinations of the persons resorting to the house for licentious purposes are immaterial. *Ibid.*

While a single act of illicit intercourse in a place will not alone constitute it a house of ill fame, yet evidence that the place is resorted to for lewdness is sufficient, and acts of incontinence with the wife of the proprietor are sufficient to establish the offense. *Ibid.*

SEC. 5081. Penalty—abatement. Whoever is convicted of erecting, causing or continuing a public or common nuisance as provided in this chapter, or at common law when the same has not been modified or repealed by statute, where no other punishment therefor is specially provided, shall be fined not exceeding one thousand dollars, or be imprisoned in the county jail not exceeding one year, and the court, with or without such fine, may order such nuisance abated, and issue a warrant as hereinafter provided. [34 G. A., ch. 182, § 1.] [C. '73, § 4092; R. § 4412; C. '51, § 2762.]

Where a justice of the peace had authority by statute to impose a penalty for maintaining a dam without a fishway, and in a proceeding to impose such penalty it was decided that there was no obligation to maintain a fishway, and this decision was not appealed from, held that it constituted an adjudication which would bar a subsequent proceeding against the owner to compel the construction of such fishway. *State v. Meek*, 112–338, 84 N. W. 3.

CHAPTER 15.

OF LIBEL.

SECTION 5086. Definition.

The statutory definition of criminal libel is applicable in determining what language is libelous *per se* in a civil action. *Morse v. Times-Republican Printing Co.*, 124–707, 100 N. W. 867.

The publication of any printed false statement with reference to another which has a tendency to degrade or injure him, to render him odious or bring him into public hatred or contempt or ridicule or to injure him in his business or trade or lead to his exclusion from social privileges, is libelous *per se*. *Ibid.*

The statutory definition of criminal libel is applicable in civil actions to recover damages for such libel. *Sheibley v. Ashton*, 130–195, 106 N. W. 618.

A publication of libelous matter by communicating it to the person defamed is sufficient to support a criminal prosecution for libel, but not a civil action for damages. *Yousling v. Dare*, 122–539, 98 N. W. 371.

It is not necessary that the publication charge the commission of a crime. Charges that defendant, who was a county superintendent, violated the rules of common decency in connection with the duties of his office, was irreligious, dishonest and contributed disgraceful matter for publication, held to be libelous. *State v. Keenan*, 111–286, 82 N. W. 792.

Libelous matter published in regard to a candidate for a public office is not privileged unless the publication is for the sole purpose of advising the electors of his character with reference to his qualifications for such office. *Ibid.*

The questions of justification and privilege are for the jury. *Ibid.*

Where the libelous matter charges dishonesty in regard to payment of debts, the prosecuting witness may testify as to his family, means and occupation, as bearing on his ability to pay his debts, and tending to rebut the claim of dishonesty in not doing so. *Ibid.*

Where the libelous matter charges lewdness, held that the prosecuting witness might introduce testimony to show that there was no general talk in the community as to his being a person of lewd character. *Ibid.*

Subsequent publications of a libel are admissible for the purpose of showing motive for the first publication. *State v. Heacock*, 106–191, 76 N. W. 654.

Evidence is not admissible in behalf of defendant in a prosecution for libel to show the reputation of the defendant for truth and veracity. *Ibid.*

This statutory provision as to publication of a libel concerning a deceased person does not make the publisher of a libel concerning an adult deceased civilly liable to the mother of the deceased for shame, humiliation and mental anguish suffered by her on account thereof. *Bradt v. New Nonpareil Co.*, 108–449, 79 N. W. 122.

It is essential that the author or publisher of the libelous article be distinctly designated, and also the party of whom it was written; but it is immaterial whether the expression "of and concerning" be employed if other words of like import are used. *State v. Lomack*, 130–79, 106 N. W. 386.

It is not essential that the falsity of the libelous matter be alleged, and if alleged such allegation will be treated as surplusage. *Ibid.*

Proof of the falsity of the publication is not essential to show malice. This may be inferred from the character of the accusation and the absence of probable or reasonable grounds for making it. *Ibid.*

Publication of a libelous article by the pastor of a church is not privileged because authorized by its official board. *Ibid.*

Unwarranted statements made with reference to the defendant by the person as to whom the libelous publication was made will constitute no justification. *Ibid.*

Language charging a lawyer with such conduct in the practice of his profession as will expose him to contempt and ridicule and deprive him of the benefits of the public confidence is libelous *per se*. *State v. Cooper*, 138–516, 116 N. W. 691.

Where qualified privilege is relied upon for publications in their nature defamatory, but made with reference to a candidate for office or under other circumstances justifying the publication in the discharge of a public duty, the privilege is not broader than the duty, and if such publication is so made as to reach others than those to whom the communication in the discharge of a duty is called for, the privilege is exceeded and does not serve as a defense. *Ibid.*

The publication of a charge that a local dealer has entered into a pool to control the prices of a commodity in a particular market is libelous *per se*. *Dorn v. Cooper*, 139–742, 117 N. W. 1, 118 N. W. 35.

As the question of malice is directly at issue in a libel case, the defendant may testify as to his lack of malice and that his feelings toward the plaintiff were

friendly, both before and after the publication. *Ibid.*

The testimony of defendant as to how he came to make the defamatory publication and his purpose is admissible as tending to support the plea of privilege. *O'Neil v. Adams*, 144–385, 122 N. W. 976.

Libelous matter published in the due course of judicial procedure is absolutely privileged and will not support an action for defamation although made maliciously and with knowledge of its falsity. *Hess v. McKee*, 150–409, 130 N. W. 375.

A newspaper publication of a petition in a divorce proceeding in which the wife charges her husband with being intimate with a woman named, is libelous *per se* as to such woman. *Flues v. New Nonpareil Co.*, 155–290, 135 N. W. 1083.

Such publication will not be privileged as the report of a judicial proceeding unless the action had already been instituted at the time the publication was made. *Ibid.*

The rule of privilege applies to reports of *ex parte* proceedings before a magistrate and applications for criminal information and everything that occurs publicly in open court, provided only that such reports are fair and accurate. *Ibid.*

It is not essential to the privilege that the proceeding be one of which a legal record is required to be kept. *Ibid.*

Malice is not to be inferred from such publication unless it is extravagant, denunciatory or vituperative in character. *Ibid.*

SEC. 5088. Truth given in evidence.

Evidence of good faith is admissible, not as a defense in itself, but only as an element going to make up the defense of qualified privilege, and where a newspaper publisher made libelous statements with reference to a candidate for the office of district judge, and through his newspaper published such statements outside of the judicial district within which the person referred to was a candidate, held that he had exceeded his privilege and that it constituted no defense. *State v. Haskins*, 109–656, 80 N. W. 1063.

Where publication of libelous matter is shielded by no privilege, the defendant cannot exonerate himself by showing a belief on his part in the truth of the charge. *Ibid.*

Where a publication imputing bad character is sought to be justified by proof of the truth of the statement, the character of the plaintiff at places other than the place where the publication is alleged to have been circulated is not admissible. *O'Neil v. Adams*, 144–385, 122 N. W. 976.

SEC. 5091. Jury determine law and fact.

The "direction of the court" referred to in this section is the instruction or charge of the court to the jury. The jury is not required to determine all legal questions which may arise on the trial as to the sufficiency of the indictment, etc., but only such matters as it may consider in deliberating upon a verdict. The jury has not merely the power but also the right to determine the law which should govern the verdict, even though a decision in conflict with the charge of the court may be reached. The opinion of the court must be regarded as advisory and not conclusive as to the duty of the jury. *State v. Heacock*, 106–191, 76 N. W. 654.

It is not error to instruct that if the jury can say on their oaths that they know the law better than the court does they have the right to determine the law as contrary to the instructions of the court. *Ibid.*

Although the jurors are judges of the law in a prosecution for libel, there may be a reversal for errors of law on the part of the court in giving instructions. *State v. Lomack*, 130–79, 106 N. W. 386.

CHAPTER 15-A.

OF HABITUAL CRIMINALS.

SECTION **5091-a. Who deemed—punishment.** Whoever has been twice convicted of crime, sentenced and committed to prison, in this or any other state, or by the United States, or once in this state and once at least in any other state, or by the United States, for terms of not less than three years each shall, upon conviction of a felony committed in this state after the taking effect of this act, be deemed to be an habitual crim-

inal, and shall be punished by imprisonment in the penitentiary for a term of not less than twenty-five years, provided that no greater punishment is otherwise provided by statute, in which case the law creating the greater punishment shall govern; and further provided that, if the person so convicted shall show, to the satisfaction of the court before whom such conviction was had, that he was released from imprisonment, upon either of said sentences, upon a pardon granted for the reason that he was innocent, such conviction and sentence shall not be considered as such under this act. [29 G. A., ch. 152, § 1.]

It is not necessary that the indictment charge where the prison was to which the defendant was committed. *State v. Dowden*, 137–573, 115 N. W. 211.

This statutory provision is not unconstitutional as applied to a former conviction before the act took effect, nor as imposing cruel and unusual punishment. *Ibid.*

SEC. **5091-b. Competent and prima-facie evidence.** On the trial of any cause, under the provisions of this act, a duly authenticated copy of the former judgment and commitment, from any court in which such judgment and commitment was had, for either of the said crimes formerly committed by the party indicted under this act, shall be competent and prima-facie evidence of such former judgment and commitment, and may be used in evidence upon the trial of said cause. [29 G. A., ch. 152, § 2.]

TITLE XXV.

OF CRIMINAL PROCEDURE.

CHAPTER 1.

OF PUBLIC OFFENSES.

SECTION 5092. Divisions of.

To constitute an offense under the statute it is necessary that the act be one which falls within the definition of either a felony or misdemeanor. *State v. Dailey*, 127–652, 103 N. W. 1008.

SEC. 5096. All offenses bailable except. All defendants are bailable both before and after conviction, by sufficient surety, except for offenses punishable with death under the laws of the state when the proof is evident or the presumption great. No defendant convicted of murder in the first degree, or of the crime of treason shall be admitted to bail. [29 G. A., ch. 153, § 1; 17 G. A., ch. 103, § 1; C. '73, §§ 3845, 4107; R. § 4188; C. '51, § 2565.]

[The paragraphs in 2d column of notes to this section in the code under the heading "Knowledge of falsity" belong under code § 5296.]

CHAPTER 2.

OF MAGISTRATES AND PEACE OFFICERS AND THEIR POWERS.

SECTION 5097. Magistrates—duties.

As the statute contemplates that the mayor shall have to some extent concurrent jurisdiction with the two justices of the peace of the township, held that the acceptance by the mayor of a city of the office of justice of the peace in the township in which the city was situated created a vacancy in the office of mayor. *State v. Anderson*, 155–271, 136 N. W. 128.

SEC. 5098. Powers.

A mayor exercising the jurisdiction of a justice of the peace in a criminal case is not civilly liable in imposing a fine or imprisonment on a juvenile offender in violation of the provisions of code supp. § 254-a24, as such unauthorized act is in excess of, but not entirely without, authority. *McGrew v. Holmes*, 145–540, 124 N. W. 195.

The exemption of the mayor or justice of the peace from civil liability in such cases extends to the marshal or constable serving the process for imprisonment. *Ibid.*

SEC. 5099. Peace officers.

A deputy city marshal is not a peace officer. *Twinam v. Lucas County*, 104–231, 73 N. W. 473.

CHAPTER 5.

OF VAGRANTS.

SECTION **5119. Who deemed.** That section fifty-one hundred nineteen of the code be and the same is hereby repealed and the following enacted in lieu thereof:

The following persons are vagrants: all common prostitutes and keepers of bawdy houses or houses for the resort of common prostitutes; all habitual drunkards, gamesters or other disorderly persons; all persons wandering about and lodging in barns, outbuildings, tents, wagons or other vehicles, and having no visible calling or business to maintain themselves; all persons begging in public places, or from house to house, or inducing children or others to do so; all persons representing themselves as collectors of alms for charitable institutions under any false or fraudulent pretenses; all persons playing or betting in any street or public or open place at any game, or pretended game, of chance, or at or with any table or other instrument of gaming; all persons camping on any public highway for the purpose of trading horses. [35 G. A., ch. 312, § 1; 34 G. A., ch. 183, § 1.] [C. '73, § 4130; R. § 4470; C. '51, § 3310.]

While disorderly persons are declared to be vagrants, vagrancy is not made punishable as a crime. And to charge one with being a disorderly person does not charge him with a crime. *State v. Dailey*, 127–652, 103 N. W. 1008.

SEC. 5134. Who deemed tramp.

All vagrants are not tramps, within the definition of code § 5137 with reference to limitation of fees of officers in tramp cases. *Des Moines v. Polk County*, 107–525, 78 N. W. 249.

CHAPTER 7.

OF LOCAL JURISDICTION OF PUBLIC OFFENSES.

SECTION 5154. District court.

In every criminal case jurisdiction must be shown, and where there is a dispute in the evidence as to the venue the jury must determine that dispute, the same as it does any other issue of fact. *State v. Spayde*, 110–726, 80 N. W. 1058.

Where there is no direct instruction as to venue in connection with the commission of the principal crime charged, but full instruction with reference thereto in connection with the charge as to included crimes, held that there was sufficient instruction as to venue in the absence of any request for instructions on the subject. *State v. Icenbice*, 126–16, 101 N. W. 273.

The fact of venue may be established like any other fact, and where the fair inference from the evidence adduced or the circumstances proven is that the transaction in issue occurred in the county, the finding of the jury cannot be disturbed on appeal. *State v. Meyer*, 135–507, 113 N. W. 322.

The prosecution for failure to provide for wife or children may be instituted in the county where the husband fails to furnish such support. *State v. Dvoracek*, 140–266, 118 N. W. 399.

The question of venue is one of fact for the jury, and in a particular case held that there was sufficient evidence of the commission of the criminal act within the county of prosecution to justify the submission of the case to the jury. *State v. Fishel*, 140–460, 118 N. W. 763.

The court will take judicial notice of the geography of the state, but the location of any particular place as being within the county of the prosecution is for the jury under the evidence. The fact that such particular location is testified to by witnesses uncontradicted may render it error without prejudice to fail to specifically submit the question of venue to the jury. *State v. Heft*, 148–617, 127 N. W. 830.

SEC. 5157. Offense partly in county.

In prosecutions for embezzlement, the venue can always be laid in the county where the conversion actually took place. If the charge is against an agent who has failed to account, the prosecution may be in the county where it was his duty to account under his contract. *State v. Hengen*, 106–711, 77 N. W. 453.

In a prosecution for embezzlement the venue is in the county where the employe was under obligation to account to his employer. *State v. Maxwell*, 113–369, 85 N. W. 613.

When a public offense is committed partly in one county and partly in another, the court first taking jurisdiction holds it to the end, and it is erroneous for the first court to dismiss the prosecution and hold the prisoner to await a warrant from the other county. *State v. Spayde*, 110–726, 80 N. W. 1058.

This provision is applicable to the crime of cheating by false pretenses committed by mailing a communication in one county to a person who is in another county and who there receives and acts upon it. *State v. Gibson*, 132–53, 106 N. W. 270.

Where glucose works are maintained in one county, discharging refuse matter into the water of a river so as to render it corrupt and polluted, not only at the place of such discharge, but at a point lower down the river in another county, held that the court of either county had jurisdiction in a prosecution for nuisance. *State v. Glucose Sugar Refin. Co.*, 117–524, 91 N. W. 794.

The fact that the criminality of the consummated act may ultimately depend on the resulting consequences occurring elsewhere does not make the act punishable in the county where the consequence results. *State v. Standard Oil Co.*, 150–46, 129 N. W. 336.

SEC. 5158. Near boundary of two counties.

As to a crime committed in one county but within five hundred yards of the boundary line of an adjoining county, the court which first obtains jurisdiction of the person accused should retain it to the exclusion of the court of the other county. Therefore where a party was arrested upon a warrant issued by a justice of the peace of Iowa county upon the charge of having committed a public offense in Keokuk county but within five hundred yards of the line between such counties, and he was bound over to await the action of the grand jury of Iowa county, held that he could not subsequently be indicted by the grand jury of Keokuk county for the same offense and might by habeas corpus be released from imprisonment under such indictment. *Carter v. Barlow*, 105–78, 74 N. W. 745.

Under an indictment charging an offense to have been committed in the county, evidence is admissible of its commission within five hundred yards of the boundary line in an adjoining county, but an indictment averring the commission of the offense in Iowa county or in Keokuk county, within five hundred yards of the south line of Iowa county, "as nearly as the grand jury know and can state," is fatally defective. *State v. Daily*, 113–362, 85 N. W. 629.

CHAPTER 8.

OF THE TIME OF COMMENCING CRIMINAL ACTIONS.

SECTION 5164. What within eighteen months.

In a prosecution for adultery the state may prove the offense if committed at any time within eighteen months before the finding of the indictment, and is not limited to the time specified in the indictment. *State v. Smith*, 108–440, 79 N. W. 115.

The court should instruct specifically as to the necessity of showing the commission of the offense within the statutory period of limitation prior to the finding of the indictment. *State v. Kunhi*, 119–461, 93 N. W. 342.

The statute of limitations in criminal cases refers to the finding of the indictment and not to the beginning of the prosecution. *State v. Disbrow*, 130–19, 106 N. W. 263.

While it is usually advisable that the statutory limitation of prosecution be stated to the jury, yet if there are some instructions that under the evidence they cannot convict without finding the crime to have been committed within the statutory period of limitation, there is no prejudicial error in not more specifically instructing them as to such statutory period. *State v. McCausland*, 137–354, 113 N. W. 852.

SEC. 5165. Three years.

The defendant cannot complain of the action of the court in limiting the evidence to criminal acts within two years of the finding of the indictment where the statute fixes the period of limitation at three years. *State v. Wilson*, 124–264, 99 N. W. 1060.

SEC. 5167. Defendant out of state.

To bring a case within the provisions of this section it is sufficient to allege in an indictment that during the necessary portion of the time which has expired after the commission of the offense as charged, defendant was a nonresident of the state and living beyond its limits. During such time defendant could not be publicly resident within the state. *State v. Soper*, 118–1, 91 N. W. 774.

CHAPTER 9.

OF FUGITIVES FROM JUSTICE.

SECTION 5171. Sworn evidence—copy of indictment.

In a habeas corpus proceeding to question the validity of extradition, the identity of the prisoner can be inquired into and the venue of the crime charged as within the demanding state; but if the substance of the act charged in the indictment was committed within the demanding state and the indictment on its face fairly charges thereby the violation of the criminal statutes of such state, it is sufficient to sustain the finding of the governor that the defendant was a fugitive from justice. *Harris v. Magee*, 150–144, 129 N. W. 742.

In a particular case held that the sworn statement of a county attorney of the demanding state was sufficient to support the requisition. *Ibid.*

SEC. 5172. Requisition from another state.

One who is charged by preliminary information with a crime which is extraditable under a treaty with a foreign country may properly be brought back for trial under such charge and tried under an indictment which, though in different terms, charges the same offense as that charged in the information. *State v. Rowe*, 104–323, 73 N. W. 833.

CHAPTER 11.

OF ARREST.

SECTION 5194. What constitutes.

As to liability of an officer for causing death in making an arrest, the law exacts no more than that, in what he does, he employs no more force than to him, acting as an ordinarily prudent person, would seem reasonable and apparently necessary under the circumstances for the purpose of effecting the arrest, and if death results, even in making an arrest for a misdemeanor, if he has not employed a deadly weapon in a deadly manner, the result may be excusable as accidental. *State v. Phillips*, 119–652, 94 N. W. 229.

SEC. 5196. Peace officer—with and without warrant.

To justify an arrest without warrant for an offense not committed in the presence of the officer, it must appear that such offense has in fact been committed and that the officer has reasonable ground to believe that the persons arrested have committed it. If no public offense has in fact been committed, the action of the officer in making the arrest is without authority and he is liable for false imprisonment. *Snyder v. Thompson*, 134–725, 112 N. W. 239.

The only power a peace officer has with reference to an arrest which is not possessed by a private person is that the peace officer may arrest where any pub-

lic offense has, in fact, been committed and he has reasonable ground for believing that the person arrested has committed it, while a private person can only arrest in such cases where the offense is a felony. *State v. Browning*, 153–37, 133 N. W. 330.

SEC. 5198. Oral order of magistrate.

An oral direction to make an arrest for an offense not committed in the presence of the magistrate making such order will not protect the officer for an arrest made without warrant, where no crime has in fact been committed. *Snyder v. Thompson*, 134–725, 112 N. W. 239.

SEC. 5199. Manner.

A failure of the officer making the arrest to inform the person to be arrested of the intention to arrest him, of the cause of arrest and of his authority to make it, will render the officer liable for damages suffered by reason of such arrest. *Stewart v. Feeley*, 118–524, 92 N. W. 670.

An officer who makes an arrest without warrant, and does not take the person arrested before a magistrate and make complaint before him, becomes liable for the wrongful arrest. *Ibid.*

No particular form of words is prescribed by the statute for conveying to the person being arrested information as to the intention to arrest him and the offense with which he is charged. But if private persons, acting without a warrant, even though in good faith and with no intention of violating the law, so act as to impress the persons whom they are assaulting with the idea that unlawful violence instead of a lawful arrest is intended, the persons to be arrested will not be presumed to have understood that an arrest was intended. *State v. Phillips*, 118–660, 92 N. W. 876.

If an officer makes an arrest upon insufficient information, he acts at his peril and assumes the risk of being held in damages to an innocent person thus injured. But if a felony has in fact been committed, and the officer arrests without a warrant the party actually guilty thereof, without using undue violence, he commits no wrong. *Ibid.*

SEC. 5200. When resisted.

When a prisoner is under arrest the officer may use reasonable force for the purpose of preventing boisterous and disorderly conduct by him and the disturbance of persons in the vicinity by violent and abusive language. *McNally v. Arnold*, 127–437, 103 N. W. 361.

And see note to § 5194.

CHAPTER 12.

OF PRELIMINARY EXAMINATIONS.

SECTION 5227. Minutes of examination.

The minutes of the evidence of a witness on preliminary examination are not admissible on the trial of the case, either as original evidence or for the purpose of impeaching the testimony of the same witness given on the trial. *State v. Reinheimer*, 109–624, 80 N. W. 669.

As the statute does not require the reading to or signing by the witness of the minutes of his testimony on the preliminary examination, the minutes of such testimony cannot be used on the trial for purposes of impeachment. *State v. Hoffman*, 134–587, 112 N. W. 103.

The testimony of a witness before the magistrate may be shown for the purpose of impeachment, but it is not necessarily substantive proof of the commission of the crime. *State v. Carpenter*, 124–5, 98 N. W. 775.

The examination may be taken and certified by one who is not an official reporter. *State v. Turner*, 114–426, 87 N. W. 287.

SEC. 5228. Certificate.

Although the minutes of the preliminary examination are not certified as provided in this section, if the grand jury acts thereon and returns proper memorandum thereof with the indictment, defendant cannot object to the examination of the witnesses whose testimony is thus returned and whose names are indorsed on the indictment. *State v. Turner*, 114–426, 87 N. W. 287.

SEC. **5230. Commitment.**

The grand jury may return a verdict upon the minutes of the evidence taken before the magistrate without calling or examining the witnesses, and the mere informality of the return of the minutes of the evidence taken by the magistrate will not affect the validity of the indictment nor prevent the calling of the witnesses for the state who are examined before such magistrate. *State v. Johnson*, 133–38, 110 N. W. 170.

SEC. **5237. In case not triable on indictment.**

The provision that on preliminary examination the defendant may be committed for trial before a justice of the peace for an offense not indictable is not applicable to a hearing on habeas corpus in which the person in custody asks to be discharged for an indictable offense. *Myers v Clearman*, 125–461, 101 N. W. 193.

CHAPTER 12-A.

PROSECUTIONS ON INFORMATION FILED BY THE COUNTY ATTORNEY.

SECTION **5239-a. Offenses—jurisdiction.** That from and after the taking effect of this act, criminal offenses in which the punishment exceeds a fine of one hundred dollars or exceeds imprisonment for thirty days may be prosecuted to final judgment, either on indictment, as is now or may be hereafter provided, or on information as herein provided, and the district and supreme court shall possess and exercise the same power and jurisdiction to hear, try and determine prosecutions on information, as herein provided, for all such criminal offenses, to issue writs and process and do all other acts therein, as they possess and may exercise in cases of like prosecutions upon indictment. [34 G. A., ch. 188, § 1.]

SEC. **5239-b. Filing by county attorney.** Whenever an accused shall have had a preliminary examination for a criminal offense, or shall have waived the right to such examination, and in either case been held to the grand jury to answer therefor, the county attorney of the proper county may, prior to the empaneling of the next regular grand jury, file in the district court, either in term time or in vacation, an information under oath, charging said accused with the offense for which he has been held to the grand jury, or for any degree or grade thereof, or for any offense included therein. [34 G. A., ch. 188, § 2.]

SEC. **5239-c. Indorsement.** Such information shall be indorsed, "A True Information," which indorsement shall be signed by the county attorney. [34 G. A., ch. 188, § 3.]

SEC. **5239-d. Names of witnesses — minute of evidence — procedure.** The county attorney shall, at the time of filing such information, indorse or cause to be indorsed thereon the names of the witnesses whose evidence he expects to introduce and use on the trial of the same, and shall also file with such information a minute of the evidence relating to the guilt of the accused of the offense charged of each witness whose name is so indorsed upon the information. Should the county attorney desire to use on the trial witnesses in addition to those whose names are so indorsed, he shall proceed in the same manner as is provided in such cases in trials on indictment. [34 G. A., ch. 188, § 4.]

SEC. **5239-e. Information to be sworn to—approval.** Such information shall be sworn to by the county attorney before some judge of the district court, or before the clerk or deputy clerk of said court. The information, before being filed, shall be presented to some judge of the dis-

trict court of the county having jurisdiction of the offense, which judge shall indorse his approval or disapproval thereon. If the information receive the approval of the judge, the same shall be filed. If not approved, the charge shall be presented to the next grand jury for consideration. At any time after the approval of an information, and prior to the commencement of trial, the court, or any judge thereof, on its own motion may order said information set aside and said cause submitted to the grand jury. [34 G. A., ch. 188, § 5.]

SEC. **5239-f. Copy to accused or attorney.** The clerk of the district court shall cause a copy of the information and minutes of evidence to be delivered to the accused, or to his attorney, at or prior to the time of arraignment. [34 G. A., ch. 188, § 6.]

SEC. **5239-g. Filing by private prosecutor—indorsement by county attorney—costs.** If the information is filed at the instance of a private prosecutor, the county attorney may indorse such fact upon the information and sign such indorsement, and, in such case, the costs may be taxed in the same manner and under the same limitations as in case of indictments. [34 G. A., ch. 188, § 7.]

SEC. **5239-h. Amendments.** An information may be amended as provided for indictments in chapter two hundred twenty-seven,[1] acts of the thirty-third general assembly, and may be filed at any time prior to the commencement of the trial; but, should it appear to the court that the accused should have additional time to prepare for trial on account of amendments, a continuance shall be granted accordingly. Amendments filed during the trial shall be limited to and governed by the provisions for amending indictments during trial. [34 G. A., ch. 188, § 8.]

[1]Subdivisions 7, 8 and 9 of § 5289 herein. EDITOR.]

SEC. **5239-i. How drawn and construed—statutes applicable.** The information shall be drawn and construed, in matter of substance, as indictments are required to be drawn and construed. All provisions of law applying to prosecutions on indictments and relating to the issuance of warrants, the correction of the name of the accused, the issuing of process, the giving of bail, arraignments, pleadings, trials, change of place of trials, return of verdicts, the taking of exceptions, new trials, arrest of judgments, the entering of judgments and the execution thereof, appeals, except as modified or otherwise provided for in this chapter, and all other proceedings in cases of indictments, whether in the court of original or appellate jurisdiction shall in the same manner and to the same extent, as near as may be, apply to information and all prosecutions and proceedings thereon. [34 G. A., ch. 188, § 9.]

SEC. **5239-j. Warrant for arrest—bail.** Upon the filing of such information the clerk shall issue a warrant for the arrest of the accused, and the court or any judge thereof shall fix the bail, if bail is allowable, and in vacation or in the absence of the judge in term time, the clerk of the court shall fix such bail, the action of the clerk being reviewable by the court or judge thereof. [34 G. A., ch. 188, § 10.]

SEC. **5239-k. "County attorney" construed.** Wherever the word county attorney appears in this chapter, the same shall be construed to mean county attorney or the assistant county attorney. [34 G. A., ch. 188, § 11.]

SEC. **5239-l. Time of commencing prosecutions.** The time in which criminal prosecutions may be commenced by information shall be the same as in cases of prosecutions by indictment, which time shall be computed

from the date of the filing of the initial information. [34 G. A., ch. 188, § 12.]

SEC. **5239-m. Motion to set aside—grounds.** A motion to set aside the information may be made on one or more of the following grounds:

1. When it is not indorsed "A True Information", and the indorsement signed by the county attorney.
2. When the minutes of evidence have not been filed with the information.
3. When the names of the witnesses named in such minutes of evidence are not indorsed on the information.
4. When the information has not been verified or filed in the manner herein required.
5. When the accused has not, prior to the filing of the information, been held to the grand jury for the offense charged, or the information has not been approved, as required.

Such motion must be made before a plea is entered by the accused. If not so made, the objection shall be deemed waived. If either of the objections specified in the fifth paragraph above is shown to be true, the court shall sustain said motion. If either of the objections specified in the first four paragraphs above is[1] shown to be true, the court shall sustain said motion, unless the defects are corrected within such time as the court may order. Affidavits and oral and documentary evidence may be received upon the hearing of such motion. [34 G. A., ch. 188, § 13.]

[1"are" in enrolled bill. EDITOR.]

SEC. **5239-n. Arraignments—pleas.** An accused prosecuted on information may, in vacation, be arraigned by any judge of the district court, and, in vacation, be required to plead to the information before any such judge, but arraignments can be made and pleas required, in vacation, only before such judge sitting in chambers at the usual place of holding court in the county in which the information was filed, or to which the cause may be sent on change of venue. The proceedings with reference to arraignments and the taking of pleas, in vacation, shall be signed by the judge and filed with the clerk and entered at length in the records of the court with the same force and effect as if made and entered in term time. [34 G. A., ch. 188, § 14.]

SEC. **5239-o. Judgments on written pleas of guilt.** Judgments may be rendered in vacation on written pleas of guilt of the offense charged, or of any degree or grade thereof, or of any offense included therein, with the same force and effect as though rendered in term time, which written plea of guilt, together with the judge's entry of judgment in reference thereto, shall be forthwith filed with the clerk and entered at length in the records of said court, and, after such entry, be executed as in case of judgments on indictments, but judgments in vacation can only be rendered by a judge of the district court sitting in chambers at the usual place of holding court in the county where the information was filed, or to which the cause has been transferred on change of venue. [34 G. A., ch. 188, § 15.]

SEC. **5239-p. Bail—construction.** Whenever an accused shall be held to answer to the grand jury for an offense and shall give bail, such bail shall be construed as conditioned to answer to any indictment for said offense returned by the grand jury, to which the accused is legally held to answer, and to any information charging said offense filed by the county attorney. [34 G. A., ch. 188, § 16.]

SEC. 5239-q. **Form of information.** Information shall be, substantially, in the following form:

IN THE DISTRICT COURT OF.....COUNTY.

THE STATE OF IOWA, }
vs. } INFORMATION.
A..... B.....}

Comes now ....., as county attorney of ..... county, state of Iowa, and in the name and by the authority of the state of Iowa accuses A..... B..... of the crime of (here insert the name of the offense), committed as follows:

The said A..... B....., on or about the ..... day of ....., A. D. ..... (inserting the year) in the county of ....., and state of Iowa, (here insert the acts or omissions constituting the offense).

.....
County Attorney.

STATE OF IOWA, }
.....COUNTY. } ss.

I, ..., being first duly sworn, do depose and say, that I have made full and careful investigation of the facts upon which the above charge is based, and that the allegations contained in the above and foregoing information are true, as I verily believe.

.....

Subscribed and sworn to by ..... before me, the undersigned, this ..... day of ....., A. D. .....

.....
(Here insert title of official before whom verification is made.)

Upon the information shall be indorsed the following:

(a) A True Information.

.....
County Attorney.

(b) Names of witnesses:
.....
.....
.....
.....

(c) On this ..... day of ....., A. D. ....., being satisfied from the showing made herein that this cause should (or should not, as the case may be) be prosecuted by information, the same is approved (or disapproved and the charge is ordered submitted to the next grand jury, as the case may be).

.....
Judge of the District Court.

(d) This information duly filed in the district court, this.....day of ....., A. D. .....

.....
(Clerk of the District Court of .....County, State of Iowa.)
By.....
Deputy Clerk.

(e) Bail is hereby fixed on the within information in the sum of $.....

.....
(Here insert official title of judge or clerk, as case may be.)

[34 G. A., ch. 188, § 17.]

CHAPTER 13.

OF IMPANELING THE GRAND JURY.

SECTION **5240. Drawing.** At the term of court at which grand jurors are required to appear, the names of the twelve persons constituting the panel of the grand jury shall, on the second day of each term of court, unless otherwise ordered by the court or judge, be placed by the clerk in a box, and after thoroughly mixing the same, he shall draw therefrom seven names, and the persons so drawn shall constitute the grand jury for that term. Should any of the persons so drawn be excused or fail to attend on said second day of the court, the clerk shall draw other names until the seven grand jurors are secured. If, for any reason, the number of grand jurors required is not secured from the twelve persons so constituting such panel, the clerk shall draw from the grand jury list, provided for by section three hundred thirty-eight of the code, such number of names as the court may direct, and from the persons whose names are so drawn the panel of the grand jury for the term shall be filled, and the court shall issue a venire to secure their attendance. [27 G. A., ch. 114, § 1; 21 G. A., ch. 42, § 3; C. '73, §§ 4255–6; R. §§ 4608–9; C. '51, § 2881.]

Failure to fill the panel on an objection to an individual grand juror being sustained, cannot be interposed as a ground for setting aside the indictment. *State v. Wheeler*, 129–100, 105 N. W. 374.

The impaneling of a grand jury is not rendered unlawful by the fact that it takes place in a room in the courthouse other than that usually occupied by the court and to which, for lack of sufficient accommodations, some persons are not able to gain access. *State v. Richards*, 126–497, 102 N. W. 439.

When one grand jury has been regularly and properly discharged and an emergency arises later in the term requiring the services of a grand jury, the court may, instead of recalling the discharged grand jury, call in the entire panel and select a new grand jury. *State v. Disbrow*, 130–19, 106 N. W. 263.

It is no objection to the grand jury as finally organized that the court excused two of the persons examined from duty before seven names had been drawn of persons who should serve as the grand jury. *State v. Johnson*, 136–601, 111 N. W. 827.

The provisions as to manner of drawing the grand jury are applicable to drawing from a special panel. *State v. Von Kutzleben*, 136–89, 113 N. W. 484.

Where the precept under which a grand jury was drawn was set aside and the drawing of a new grand jury was ordered, held that the second grand jury was not subject to challenge on the ground that it had not been selected, drawn and summoned as provided by law. *State v. Pitkin*, 137–22, 114 N. W. 550.

The trial court has power to discharge the grand jury for the term and also during the term to set aside such order and recall the same grand jury or, allowing the order of discharge to stand, recall the grand jury panel and select a new grand jury. A substantial compliance with the statute in the selection of the grand jury is sufficient. *State v. Heft*, 148–617, 127 N. W. 830.

When an indictment has been returned by a properly constituted grand jury, the defendant cannot complain of the discharge of previous grand jurors. *State v. Hassan*, 149–518, 128 N. W. 960.

Technical defects in the selection and summoning of the members of the grand jury will not defeat a conviction under a proper indictment. Substantial compliance with the law is all that is required in such cases. *Ibid.*

SEC. 5241. Challenge to panel—motion.

The objection that two members of the grand jury were residents of the same township will be waived if not urged before pleading to the indictment unless it appears that defendant did not know of the irregularity before pleading. *State v. Kouhns*, 103–720, 73 N. W. 353.

The objection of defendant that his case was resubmitted to a grand jury without giving him an opportunity to challenge the grand jurors is one which cannot be raised by motion in arrest of judgment. It should be taken by plea in abatement, or motion to set aside or quash the indictment. *State v. Brown*, 128–24, 102 N. W. 799.

An objection to the panel which might have been raised by the defendant, bound over to appear, cannot be taken advantage of on motion in arrest of judgment. *State v. McPherson*, 126–77, 101 N. W. 738.

SEC. 5243. Grounds for challenge.

The fact that a grand juror has formed or expressed an unqualified opinion is not recognized as a sufficient ground for setting aside the indictment. *State v. Baughman*, 111–71, 82 N. W. 452.

Where the indictment is set aside and the charge is presented to a second grand jury, the defendant may properly challenge for cause any member of the second grand jury who was a member of and participated in the finding of the indictment by the first grand jury. *State v. Bullard*, 127–168, 102 N. W. 1120.

An opinion as to guilt which will disqualify a trial juror will also disqualify a grand juror. *Ibid.*

Discrepancy between the real name of a juror called and his name as appearing on the jury list, if constituting a ground of challenge, should be ascertained on the preliminary examination and cannot be afterwards made the subject of complaint. *State v. Matheson*, 130–440, 103 N. W. 137.

It is not proper to question a grand juror as to what he would do in the event the county attorney should insist upon an indictment. *State v. Hassan*, 149–518, 128 N. W. 960.

Under the showing in a particular case, held that there was no ground for interfering with the discretion of the trial court in overruling a challenge to a grand juror. *State v. Teale*, 154–677, 135 N. W. 408.

SEC. 5246. To individual juror. If a challenge to an individual grand juror be allowed, he shall not be present at or take any part in the consideration of the charge against the defendant. If a challenge to the panel is allowed, or if by reason of challenges to individual grand jurors being allowed, or if for any cause at any time, the grand jury is reduced to a less number than seven, a new grand jury shall be impaneled to inquire into the charge against the defendant in whose behalf the challenge to the panel has been allowed, or the panel of the jury so reduced below the number required by law shall be filled as the case may be. If a challenge is allowed to the panel the names of jurors required to impanel a new jury shall be drawn from the grand jury list. If such grand jury has been reduced to a less number than seven by reason of challenges to individual jurors being allowed, or from any other cause, the additional jurors required to fill the panel shall be summoned, first, from such of the twelve jurors originally summoned which were not drawn on the grand jury as first impaneled, or excused, and if they are exhausted, the additional number required shall be drawn from the grand jury list and the court shall, when necessary, issue a venire to secure the attendance of such additional jurors. The persons so summoned shall serve only in the case, or cases, in which, by reason of challenges, or other causes, the regular panel is set aside or is insufficient in number to find an indictment. [27 G. A., ch. 114, § 2; C. '73, § 4264; R. § 4617; C. '51, § 2888.]

Where a grand juror has been directed on account of challenge for cause not to take part in considering the case, it will be presumed, in the absence of a showing to the contrary, that he obeyed the direction, although as foreman he has signed the indorsement on the back of the indictment. *State v. Lightfoot*, 107–344, 78 N. W. 41.

Where a challenge to an individual grand juror has been allowed and he does not take part in the finding of the indictment, which is concurred in by a sufficient

number of grand jurors, the objection that the place of the juror challenged has not been filled will not be a ground for setting aside the indictment. *State v. Wheeler*, 129–100, 105 N. W. 374.

Error in failing to fill the place of one of the grand jurors excused on challenge of the defendant is waived by going to trial on the indictment, and cannot afterwards be raised by habeas corpus proceedings for release from the sentence imposed as the result of a trial on such indictment. *Busse v. Barr*, 132–463, 109 N. W. 920.

If in any given case the grand jury has been reduced to a less number than seven by reason of challenges to individual jurors, the clerk in drawing additional jurors is not required to have regard for the provision that no more than one grand juror shall be drawn from any one civil township. *State v. Von Kutzleben*, 136–89, 113 N. W. 484.

SEC. 5248. Foreman appointed.

Where a challenge to the panel of the grand jury is sustained and a new grand jury is impaneled for a particular case, another foreman should be appointed; but the statute as to appointment of foreman is directory only, and when it appears that an indictment is voted and returned by the seven persons constituting the grand jury, the failure to appoint another foreman will not constitute prejudicial error. *State v. Von Kutzleben*, 136–89, 113 N. W. 484.

SEC. 5252. Discharge.

It is not error to reconvene the grand jury after dismissing it for the term on the completion of the business pending. *State v. Phillips*, 119–652, 94 N. W. 229.

CHAPTER 14.

OF THE DUTIES OF THE GRAND JURY.

SECTION 5253. Powers.

Although the grand jury is a constituent part of the court, it is in many respects an independent tribunal exercising judicial functions; and by 33 G. A., ch. 9, the attorney-general is authorized to appear before it whenever in his judgment the interests of the state require him to do so. *Cosson v. Bradshaw*, 141 N. W. 1062.

As to the offenses which a grand jury has power to investigate, it has the same jurisdiction as the court upon which it is in attendance. *Ibid.*

SEC. 5254. Evidence.

Failure of the grand jury to swear a witness who testifies will not authorize the setting aside of the indictment on motion, under code § 5319. *State v. Easton*, 113–516, 85 N. W. 795.

The receiving of incompetent evidence is not a ground for setting aside the indictment when found. *State v. De Groate*, 122–661, 98 N. W. 495.

The fact that a witness testifies before the grand jury does not preclude the state from impeaching the testimony of such witness given on the trial in behalf of the defendant. *State v. Brown*, 128–24, 102 N. W. 799.

It is not necessary that the grand jury make an affirmative showing in the minutes of evidence in connection with the indictment that the witnesses were sworn. *State v. Ottley*, 147–329, 126 N. W. 334.

SEC. 5256. Clerk—oath—compensation. That section fifty-two hundred fifty-six of the supplement to the code, 1907, be repealed and the following enacted in lieu thereof:

"The court may appoint as clerk of the grand jury, a competent person who is not a member thereof. The following oath must be administered to him: 'You solemnly swear that you will faithfully and impartially perform the duties of clerk of the grand jury, that you will not reveal to anyone its proceedings or the testimony given before it and will abstain from expressing any opinion upon any question before it, to or in the presence or hearing of the grand jury or any member thereof.' Such clerk

shall strictly abstain from expressing an opinion upon any question before the body, either to or in the presence or hearing of it or any member thereof, and shall not be present when any vote is being taken upon the finding of an indictment, and shall receive compensation at the rate of two dollars per day for time actually and necessarily employed in the performance of the duties prescribed in this chapter. In all counties having a population of more than fifty thousand inhabitants, the court may, if it deems it necessary, appoint as clerk of the grand jury a competent shorthand reporter and such clerk shall receive such compensation as may be fixed by the court at the time of the appointment, but said compensation, in counties having a population of less than seventy-five thousand inhabitants, shall not exceed four dollars per day for each day actually and necessarily employed in the performance of the duties herein defined. In all counties having a population of more than seventy-five thousand inhabitants, such clerk shall receive as compensation an annual salary of fifteen hundred dollars." [35 G. A., ch. 313, § 1.] [30 G. A., ch. 138, § 1; 25 G. A., ch. 71; 22 G. A., ch. 38; C. '73, § 4275; R. § 4629.]

The clerk may be called as a witness to state what was testified to by a witness before the grand jury with a view of impeaching the evidence of such witness given on the trial. *State v. McPherson*, 114–492, 87 N. W. 421.

A woman may be clerk of the grand jury if regularly appointed. *State v. Pitkin*, 137–22, 114 N. W. 550.

SEC. 5258. Minutes to be kept. The clerk of the grand jury shall take and preserve minutes of the proceedings and of the evidence given before it, except the votes of its individual members on finding an indictment. When the evidence is taken, it shall be read over to and signed by the witness. When an indictment is found, all minutes and exhibits relating thereto shall be returned therewith and filed by the clerk of the court. [28 G. A., ch. 134, § 1; 25 G. A., ch. 71; 22 G. A., ch. 38; C. '73, § 4275; R. § 4629.]

Minutes of the evidence of a witness, signed by him, may be introduced in a civil suit by the opposite party as declarations against interest. *Steele Smith Groc. Co. v. Potthast*, 109–413, 80 N. W. 517.

Where the minutes are attached to the indictment and filed with it, that is sufficient, but they are no part of the indictment, and if not filed with the indictment should be separately filed. Failure, however, to mark the minutes which were duly taken and returned as filed will not warrant the exclusion of the testimony of the witnesses whose testimony is so returned. *State v. Doss*, 110–713, 80 N. W. 1069.

The requirement that exhibits be returned with the indictment and filed with the clerk was evidently intended to cure a defect in the statute theretofore existing. Failure to thus return exhibits is not made a ground for setting aside the indictment. This statutory provision is directory only. *State v. O'Malley*, 132–696, 109 N. W. 491.

The requirement that the minutes be signed by the witnesses respectively is also merely directory. *Ibid.*

The minutes of the testimony of a witness before the grand jury read over to and signed by him may be used on the trial of the case for the purpose of impeaching his testimony. *State v. Hoffman*, 134–587, 112 N. W. 103.

It is not improper for the prosecuting attorney to make use of the minutes of the evidence taken before the grand jury for the purpose of framing questions as a basis for impeachment of a witness. *State v. Woodard*, 132–675, 108 N. W. 753.

The provisions of this section are directory rather than mandatory, and the fact that the minutes of the evidence taken before the grand jury are not signed by the witnesses is not fatal to the indictment. *State v. Ottley*, 147–329, 126 N. W. 334.

The fact that a note introduced in evidence before the grand jury is not filed with the clerk as an exhibit is not a ground for setting aside the indictment. *Ibid.*

SEC. 5260. Member as witness.

The provisions that a grand juror may be a witness under this section precludes the notion of an absolutely impartial trial before the grand jury. *State v. Baughman*, 111–71, 82 N. W. 452.

SEC. 5268. Exception.

Possibly the cases in which the grand jury may be required to disclose testimony given before the grand jury, as authorized by the common law, are limited to the two specified in this section. But as there is no statutory provision with reference to testimony by the clerk appointed under code § 5256, such clerk may testify as to proceedings before the grand jury whenever necessary in the administration of justice, as was the rule at common law. Therefore, held that the clerk might be required to disclose the evidence of a witness before the grand jury for the purpose of impeaching the testimony of such witness on the trial. *State v. McPherson*, 114–492, 87 N. W. 421.

SEC. 5272. Minutes of preliminary examination.

The statute does not require that the substance of the evidence of the witness be preserved, but only that a brief minute thereof be made. *State v. Wrand*, 108–73, 78 N. W. 788.

Defendant cannot object that the transcript of the evidence taken in the preliminary examination, instead of minutes thereof, is returned with the indictment, nor that the minutes of the preliminary examination, acted on by the grand jury, were not certified as required by code § 5228. *State v. Turner*, 114–426, 87 N. W. 287.

Where the grand jury finds an indictment on the evidence taken before the committing magistrate, the informality of the return of such evidence by the magistrate will not vitiate the indictment nor prevent the examination of the witnesses for the state who were examined before such magistrate. *State v. Johnson*, 133–38, 110 N. W. 170.

Where a case is resubmitted to the grand jury there is no final judgment from which the state may appeal. *State v. Evans*, 111–80, 82 N. W. 429.

CHAPTER 15.

OF THE FINDING AND PRESENTATION OF INDICTMENT.

SECTION 5274. How found—indorsement—repealed. [27 G. A., ch. 115, § 1.]

[See § 5274-a.]

The indorsement "a true bill" must be made by the foreman, although he may not have approved the indictment or be qualified to act as grand juror in the case. And it will not be presumed from his indorsement that he disregarded an injunction of the court not to take part in considering the case. *State v. Lightfoot*, 107–344, 78 N. W. 41.

Where five grand jurors have concurred in the finding of the indictment, the fact that a challenge has been sustained as to one member of the panel who has not taken part in the finding of the indictment, but whose place has not been filled, is not ground for setting aside. *State v. Wheeler*, 129–100, 105 N. W. 374.

Although one grand jury fails to act upon a charge submitted to it, the same charge may be taken up by a subsequent grand jury and an indictment found, although no order resubmitting the case to the second grand jury is made. *State v. Brown*, 128–24, 102 N. W. 799.

Whether the copy of the indictment delivered to the defendant is a correct copy is a matter to be determined by the trial court when any question is raised with reference thereto. *State v. Hatlestad*, 132–188, 109 N. W. 613.

Further as to furnishing defendant with a copy of the indictment, see constitution, art. I, § 10, and notes.

Where it appears from the record that the indictment was presented in open court in the presence of the grand jury by their foreman and filed in the presence of the court and of the grand jury, such recital found on the back of the indictment being signed by the clerk of the court, the failure of the foreman to sign an indorsement printed on the back of the indictment that it is a true bill cannot be regarded as an irregularity of such vital nature that it can be successfully raised for the first time in a motion for arrest of judgment or on appeal. *State v. Heft*, 155–21, 134 N. W. 950.

SEC. 5274-a. **How found—indorsement.** That section fifty-two hundred seventy-four of the code be and the same is hereby repealed and the following enacted in lieu thereof:

"An indictment cannot be found without the concurrence of five grand jurors. Every indictment must be indorsed 'A true bill' and the indorsement signed by the foreman of the grand jury." [27 G. A., ch. 115, § 1.]

SEC. 5275. Private prosecutor.

Where an indictment is not indorsed as found at the instance of a private prosecutor, costs cannot be taxed to the person at whose instance the indictment was found. *State v. McAllister*, 107–641, 78 N. W. 672.

The basis of the court's right to tax the costs of a criminal prosecution to an individual as prosecuting witness is the action of the grand jury in returning the fact that an indictment is found at the instance of such person. When the grand jury fails to make a finding and indorsement of that fact, as provided for by statute, the court lacks jurisdiction to tax the costs to a person as prosecutor. *McAllister v. Johnson*, 108–42, 78 N. W. 790.

SEC. 5276. Names of witnesses indorsed.

The evidence of a witness before the grand jury may be proven by persons who heard such evidence, the minutes of the grand jury not being competent evidence as to the fact. *State v. Porter*, 105–677, 75 N. W. 519.

The minutes of the evidence need not be attached to the indictment, but if so attached and filed, that is sufficient. *State v. Doss*, 110–713, 80 N. W. 1069.

Where the minutes of the evidence before the committing magistrate are presented to the grand jury and acted upon by them the names of the witnesses examined before the magistrate and on whose testimony the indictment is found should be indorsed on the back thereof. *State v. Hasty*, 121–507, 96 N. W. 1115.

It is not necessary to return with the indictment documentary evidence which was before the grand jury nor is it required that such evidence be noted on the indictment. *State v. Boomer*, 103–106, 72 N. W. 424.

Documents which are admissible in evidence as against the defendant may be so admitted although not referred to in the minutes of the evidence or returned with the indictment. *State v. Mulhern*, 130–46, 106 N. W. 267.

A document may be introduced in evidence without notice although it has never been before the grand jury. *State v. Harris*, 122–78, 97 N. W. 1093.

Where defendant has been furnished with a copy of the indictment and of the minutes of the evidence, the fact that the prosecuting attorney has been allowed to take the indictment from the files and to keep it in his possession for a time will not constitute reversible error. *State v. McClain*, 130–73, 106 N. W. 376.

Where the minutes of the evidence are attached to the indictment which is marked filed, such filing alone is sufficient. *State v. Ottley*, 147–329, 126 N. W. 334.

A material variance between the name of the witness as indorsed on the back of the indictment and his name as shown by the minutes of his testimony will not be sufficient ground for excluding his testimony on the trial. *State v. O'Brien*, 157– —, 138 N. W. 895.

SEC. 5277. Minutes of evidence.

This section does not preclude the use of the minutes of the evidence before the grand jury for the purpose of establishing the declarations of a witness against his interest. *Steele Smith Groc. Co. v. Potthast*, 109–413, 80 N. W. 517.

Where a copy of the indictment is delivered to an attorney for the defendant, there is sufficient compliance with the constitutional requirement that defendant be furnished with a copy of the indictment against him. *State v. McClain*, 130–73, 106 N. W. 376.

CHAPTER 16.

OF THE INDICTMENT.

SECTION 5279. Defined.

The minutes of evidence are not a part of the indictment, but are to be separately filed. If, however, it appears that such minutes were in fact returned with the indictment and attached to it when filed by the clerk, that is sufficient. *State v. Doss*, 110–713, 80 N. W. 1069.

SEC. 5280. What must contain.

The words employed in charging the crime are not material if the charge is in ordinary and concise language and sufficiently specific. *State v. Lomack*, 130–79, 106 N. W. 386.

Accusations of crime must be so plain, clear and unambiguous that the accused may not be misled to his prejudice concerning the material facts relied upon as constituting such alleged offense. *State v. McKinney*, 130–370, 106 N. W. 931.

The purpose of these statutory provisions as to the sufficiency of indictments is to dispense with those technical rules of the common law which sometimes prevent the disposition of cases upon their merits, wherever the same can be done without prejudice to the rights of the parties. *State v. Fisher*, 106–658, 77 N. W. 456.

Therefore, held that in an indictment for larceny of money, it was sufficient to describe the property as "twenty-two dollars and fifty cents in lawful money of the United States of the value of twenty-two dollars and fifty cents." *Ibid.*

Bank notes are commonly regarded as lawful money. Under an indictment charging embezzlement of certain money, proof of the embezzlement of bank notes of a corresponding amount is admissible. *State v. Finnegean*, 127–286, 103 N. W. 155.

An indictment under the statute defining the offense of procuring an abortion should negative the exception found in the statute of cases where miscarriage is necessary to save the woman's life. *State v. Aiken*, 109–643, 80 N. W. 1073.

If the facts stated do not constitute a crime, the indictment cannot be aided by intendment or its omissions supplied by construction. *State v. Jamison*, 110–337, 81 N. W. 594.

An indictment is sufficient if drawn in such manner as to enable a person of common understanding to know what is meant. *State v. Pinckney*, 111–34, 82 N. W. 450.

In charging assault with intent to commit rape it is not necessary to specify the method or means of the assault. *State v. Johnson*, 114–430, 87 N. W. 279.

Much of what was required in an indictment at common law is dispensed with under our statute. It is now only necessary to set out the offense in ordinary and concise language, and in such manner as to enable a person of common understanding to know what is meant, and, held that in an indictment for assault with intent to commit murder it is not necessary to state the instrument or means used to effectuate the purpose. *State v. Shunka*, 116–206, 89 N. W. 977.

Where the facts alleged as constituting an offense are stated in ordinary language and such as to enable an ordinary person to know what is charged, it is not necessary for the court to enter upon a definition or explanation to the jury as to the meaning of the words used. *State v. Bresee*, 137–673, 114 N. W. 45.

In an indictment for adultery it is not necessary to allege that the woman involved in the charge is a married woman, or that the wrongful act was knowingly, wilfully, maliciously or feloniously committed. *State v. Anderson*, 140–445, 118 N. W. 772.

Where the killing was alleged to have been "in the county aforesaid", held that the venue of the act, as well as of the death, was charged as in that county. *State v. Rankin*, 150–701, 130 N. W. 732.

SEC. 5281. Form.

The statute does not require the signature of the county attorney to an indictment, and the fact that it is signed by an assistant to the county attorney does not render it invalid. *State v. Mathews*, 133–398, 109 N. W. 616.

The language used in the caption of the indictment and even the caption itself may be wholly disregarded without affecting the validity of the indictment when the body of the indictment clearly charges the crime for which the defendant is put on trial. *State v. Smith*, 148–640, 127 N. W. 988.

SEC. 5282. Direct and certain.

The offense must be charged with such certainty and in such manner as to enable a person of common understanding to know what is intended. If the indictment is so broad and general in its terms that the accused may be put upon trial for any one of two or more distinct and independent criminal acts, it is not in compliance with the statute. *State v. McKinney*, 130–370, 106 N. W. 931.

Where the statute makes an act criminal when done maliciously, it is not sufficient to charge that it was done unlawfully and wilfully. *State v. Lightfoot*, 107–344, 78 N. W. 41.

Where the offense involves the element of knowledge, it is not sufficient that the act is charged to have been unlawfully or wilfully done. *State v. Perry*, 109–353, 80 N. W. 401.

Where in two counts the offense of keeping a liquor nuisance was so charged as that there might be a conviction under one count which could not be sustained under

the other, held that the indictment was not sufficiently direct and certain. *State v. Schuler*, 109–111, 80 N. W. 213.

In an indictment for having possession of burglar's tools the defendant should be advised by the averments as to what particular tools he is charged with having in possession. *State v. Erdlen*, 127–620, 103 N. W. 984.

The facts constituting the crime of embezzlement must be so stated as to distinguish it from the crime of larceny. *State v. Finnegean*, 127–286, 103 N. W. 155.

The offense charged is to be determined by the statement of facts appearing in the body of the indictment and the statement of facts thus set forth cannot be aided by intendment, nor can an omission be supplied by construction. *State v. Von Kutzleben*, 136–89, 113 N. W. 484.

There has been no relaxation of the rules requiring a legal accusation of crime to state with clearness and certainty all the facts necessary to constitute a complete offense and to disclose to the defendant the nature of the case which the state proposes to make against him. *State v. Clark*, 141–297, 119 N. W. 719.

In an indictment for obtaining money by false pretenses the name of the person from whom it is claimed that the property or money was obtained must be stated. *Ibid.*

The offense must be charged with such certainty and in such manner as to enable a person of common understanding to know what is intended. *State v. Smith*, 148–640, 127 N. W. 988.

SEC. 5284. Must charge but one offense.

Duplicity: It is an error to allege more than one transaction in an indictment charging an offense which is not a continuing offense. *State v. Ashpole*, 127–680, 104 N. W. 281.

Where several acts are enumerated by the statute disjunctively as constituting an offense, they may be conjunctively alleged without duplicity. *State v. Wick*, 130–31, 106 N. W. 268.

Where in the second count of an indictment for conspiracy it was recited that "the grand jury . . . with no intent or purpose of charging any offense or crime other than the offense and crime charged in count one above, but solely in order to meet the testimony, further alleges" etc., held that this recital sufficiently showed that the second count was simply a different form of charging the same conspiracy charged in the first count. *State v. Caine*, 134–147, 111 N. W. 443.

The offense may be charged in different counts, differing from each other, for the purpose of meeting the evidence in the case. Thus it is not improper to charge in one count rape committed upon a child under the age of consent, and in the second count rape upon the same person, alleged to be naturally imbecile. *State v. Trusty*, 122–82, 97 N. W. 989.

An indictment for rape which also charges an assault as a part of that crime is not objectionable for duplicity. *State v. Peterson*, 110–647, 82 N. W. 329.

It does not constitute duplicity in an indictment to charge the defendant with committing a criminal act, and also with conniving at and encouraging such act. *State v. Easton*, 113–516, 85 N. W. 795.

In an indictment for obtaining a signature by false pretenses, different and even inconsistent means of accomplishing the object may be charged in the indictment without rendering it objectionable on the ground of duplicity. *State v. Tripp*, 113–698, 84 N. W. 546.

Where an indictment for using false weights under code § 5044, which does not describe a continuing offense, alleged the use of such false weights in weighing divers cattle and hogs with intent to defraud divers citizens, held that the indictment was bad for duplicity. *State v. Jameson*, 117–312, 90 N. W. 622.

An indictment charging an assault and the pointing of a gun at another with the intent to do him great bodily injury is not open to the charge of duplicity. *State v. Mitchell*, 139–455, 116 N. W. 808.

The different acts which constitute the offense of practicing medicine without a license may be conjunctively charged without objection on the ground of duplicity. *State v. Corwin*, 151–420, 131 N. W. 659.

An indictment charging a single conspiracy to do a single unlawful act is sufficient, although different acts of defendant in carrying out such conspiracy are alleged. *State v. Poder*, 154–686, 135 N. W. 421.

Different acts enumerated disjunctively in the statute as specifying a particular crime may be conjunctively charged or may be charged in different counts without objection on the ground of duplicity. *State v. Des Moines Union R. Co.*, 137–570, 115 N. W. 232; *State v. Dvoracek*, 140–266, 118 N. W. 399; *State v. Yates*, 145–332, 124 N. W. 174; *State v. Browning*, 153–37, 133 N. W. 330.

Election: Where one offense is charged and the evidence tends to show more than one to have been committed within the statutory period of limitation, the accused has the right to know upon which the prosecution will rely for conviction. *State v. King*, 117–484, 91 N. W. 768.

In a prosecution for adultery where the evidence tends to show continuous adulterous relation, the state should not be re-

quired to select one particular occasion and confine the evidence to that occasion. *State v. Higgins*, 121–19, 95 N. W. 244.

The crimes of embezzlement and larceny are essentially different in character and cannot be charged in separate counts of an indictment. If so charged the state should be required upon motion to elect upon which count it will proceed. *State v. Finnegean*, 127–286, 103 N. W. 155.

Where the offense is not a continuing one and the evidence introduced tends to show distinct transactions, the defendant has the right to require an election on the part of the state as to which transaction is relied upon. *State v. Jamison*, 110–337, 81 N. W. 594.

Where two counts of the indictment are evidently intended to charge but one offense, although the manner of commission is stated in somewhat different language, the prosecution need not be required to elect on which count it will rely. *State v. Von Kutzleben*, 136–89, 113 N. W. 484.

In a proper case for an election the question of duplicity may be raised by motion to require such election to be made. *Ibid.*

SEC. 5285. Time.

The fact that the evidence points to the commission of the crime at a particular date does not render an instruction erroneous which tells the jury that the crime need not be proven to have been committed on the day alleged and that it is sufficient if it is proven to have been committed within the statutory period of limitations. *State v. Hayes*, 105–82, 74 N. W. 757.

If time is necessary to be considered in determining the jurisdiction of the court, it is a material ingredient of the offense, and where the jurisdiction of the court to punish the offense charged is acquired by a statute, the time of the criminal act charged in the indictment must be so alleged as to show that it was committed after the statute took effect. *State v. Dale*, 110–215, 81 N. W. 453.

In a prosecution for adultery the state may prove the act charged as committed at any time within the statutory period of limitation. *State v. Smith*, 108–440, 79 N. W. 115.

In a prosecution for perjury it is not necessary to prove the specific time alleged in the indictment. *State v. John*, 124–230, 100 N. W. 193.

The prosecution is not confined to proof of the crime on the exact date named in the indictment, but may show the commission of the crime on any date within the statutory period of limitation prior to the finding of the indictment. *State v. Heft*, 155–21, 134 N. W. 950.

SEC. 5286. Name of person injured.

An erroneous allegation as to the name of the person injured will not vitiate the indictment. So held where the indictment charged in the indictment must be so ration but did not allege the fact of its incorporation. *State v. Fogerty*, 105–32, 74 N. W. 754.

Erroneously naming the person injured will not be a ground for striking out evidence which relates to the real person intended where the defendant is in no way prejudiced by the variance. *State v. Carnagy*, 106–483, 76 N. W. 805.

If the indictment charges an offense, and, from the facts in evidence, the court is satisfied that defendant was not misled, the giving of an unauthorized name to the person against whom the crime was committed is immaterial, and facts outside the indictment may be considered in determining whether the defendant understood the specific charge intended to be made. So held where in an indictment for murder of an unnamed bastard the grand jury without any authority designated the bastard by a name compounded of the names of its parents. *State v. Cunningham*, 111–233, 82 N. W. 775.

The erroneous statement of the name of the owner of the premises where burglary is committed will not be fatal. *State v. Wrand*, 108–73, 78 N. W. 788.

The fact that an indictment for larceny lays the ownership of the property stolen jointly in the owners thereof, whereas it is owned by them in severalty, will not be a fatal defect. *State v. Congrove*, 109–66, 80 N. W. 227.

In an indictment for the uttering of a forged instrument, it is not necessary to name the person intended to be defrauded. *State v. Weaver*, 149–403, 128 N. W. 559.

Where the offense described is primarily an injury to the public, it is not necessary to name the particular person thereby injured. *State v. Standard Oil Co.*, 150–46, 129 N. W. 336.

And see notes to § 5289.

SEC. 5288. Words of statute.

It is sufficient to follow the language of the statute where the statute so far individuates the offense that the offender has proper notice from the statutory terms of the particular crime charged. *State v. Porter*, 105–677, 75 N. W. 519; *State v. Johnson*, 114–430, 87 N. W. 279; *State v. Kendig*, 133–164, 110 N. W. 463; *State v.*

Cummings, 128–522, 105 N. W. 57; *State v. Henderson*, 135–499, 113 N. W. 328; *State v. Kernan*, 154–672, 135 N. W. 362.

An indictment which charges an offense in the language of the statute is sufficient in all cases where the statutory definition states the material facts constituting the unlawful act. *State v. Martin*, 125–715, 101 N. W. 637.

An indictment is sufficient if it charges the offense in the language of the statute when that shows the material facts which constitute the offense. So held in regard to an indictment charging indecent exposure of the person. *State v. Bauguess*, 106–107, 76 N. W. 508.

An indictment following the statutory language in describing the offense is sufficient where the language used concretely points out with particularity the offense intended to be charged, and no further description is needed to advise the accused of the precise nature and character of the crime for the commission of which he is called to answer. But held that in an indictment for having in possession burglar's tools a particular description of the tools was essential. *State v. Erdlen*, 127–620, 103 N. W. 984.

If an act of a particular description is made criminal nothing further need be alleged in the indictment than the doing of the specific act. Under such circumstances, it is sufficient to follow the language of the statute in describing the act charged. *State v. Hoffman*, 134–587, 112 N. W. 103.

While an indictment following the language of the statute may not be sufficient in some cases for the reason that the statute does not set forth all the elements necessary to constitute the offense, yet, where the acts constituting the offense are stated and every element of the crime appears, the indictment will be sufficient. *State v. Dankwardt*, 107–704, 77 N. W. 495.

In an indictment for incest it is sufficient to use the language of the statute and it is not necessary to allege knowledge of the relationship. *State v. Rennick*, 127–294, 103 N. W. 159.

While it is generally sufficient to charge an offense in the language of the statute this is not the rule when the language does not necessarily charge the offense named. *State v. Wasson*, 126–320, 101 N. W. 1125.

The general rule as to exceptions and provisos is that where the exception or proviso forms a portion of the description of the offense so that the ingredients thereof cannot be accurately and definitely stated if the exception or proviso is omitted, then it is necessary that such exception or proviso be negatived. But where the exception is separable from the description and is not an ingredient thereof, it need not be noticed in the accusation, but is a matter of defense. *State v. Kendig*, 133–164, 110 N. W. 463.

It is enough if the indictment individuates the offense and states the material facts constituting it; and if intent to injure particular persons is not the essence of the offense, the names of the persons intended to be injured need not be stated. *State v. Leasman*, 137–191, 114 N. W. 1032.

It is not necessary in offenses in which the intent constitutes the aggravation material to the punishment prescribed, that the facts be alleged with the same particularity as where the prohibition of the statute is directed against the doing of the act which is made criminal. *State v. Mitchell*, 139–455, 116 N. W. 808.

Where there is a change in phraseology and a word not in the statute is substituted in the indictment for one that is, and the word thus substituted is equivalent to the word used in the statute or is of more extended signification than it, and includes it, the indictment is sufficient. *State v. Rohn*, 140–640, 119 N. W. 88.

An indictment following the language of the statute which so individuates the offense that the offender has proper notice, from the statutory terms, of the particular charge, is sufficient. A specific detailing of the particular things done is not essential. *State v. Corwin*, 151–420, 131 N. W. 659.

An indictment for a statutory conspiracy to commit an act injurious to the public morals is sufficient if in the language of the statute, without charging an overt act. *State v. Poder*, 154–686, 135 N. W. 421.

SEC. 5289. What indictment must show—amendments—objections. The indictment is sufficient if it can be understood therefrom:

1. That it was found by a grand jury of the county impaneled in the court having authority to receive it, though the name of the court is not actually stated;

2. That the defendant is named, or if his true name is unknown to the grand jury, such fact is stated, and that he is described by a fictitious name;

3. That the offense is triable within the jurisdiction of the court;

4. That the offense was committed prior to the time of the finding of the indictment;

5. That the act or omission charged as the offense is stated in ordinary and concise language, with such certainty and in such manner as to enable

a person of common understanding to know what is intended, and the court to pronounce judgment according to law upon a conviction;

6. That, when material, the name of the person injured or attempted to be injured be set forth when known to the grand jury, or, if not known, that it be so stated in the indictment;

7. The county attorney may, at any time before or during the trial of defendant upon indictment, amend the indictment so as to correct errors or omissions therein as to matters of form, or to correct errors in the name of any person or in the description of any person or thing, or in the allegations concerning the ownership of property that may be described in the indictment; but such amendment shall not prejudice the substantial rights of the defendant, or charge him with a different crime or different degree of crime from that charged in the original indictment returned by the grand jury;

8. A notice of the time the state will ask permission to file such amendment, together with a copy of such amendment, shall be served upon the defendant or his attorney and an opportunity be given the defendant to resist the filing of such amendment. No continuance or delay in trial shall be granted because of such amendment, except upon the defendant's application, it appearing to the court that defendant should have additional time to prepare for trial because of the new allegations contained in the indictment;

9. All objections to the indictment relating to matters of substance and form which might be raised by a plea in abatement shall be deemed waived if not raised by the defendant before the jury is sworn on the trial of the case. [33 G. A., ch. 227, § 1.] [C. '73, § 4305; R. § 4659; C. '51, § 2916.]

In general: The general tendency is to disregard objections which go to matters of mere form and not a substantial right. *State v. Martin*, 125–715, 101 N. W. 637.

An indictment is properly to be construed in the sense in which the party framing it must be understood to have used it, if he intended his accusation to be consistent. *State v. Caine*, 134–147, 111 N. W. 443.

It is unnecessary to charge an act as "felonious" if it is made a felony by statute; but the unnecessary use of such word does not affect the sufficiency of the indictment. It is not to be regarded as descriptive of the act in such sense that it must be proved as alleged. *State v. Judd*, 132–296, 109 N. W. 892.

An indictment cannot be aided by intendment. The essential facts must be set out and averred. *State v. Ashpole*, 127–680, 104 N. W. 281.

An indictment under a statute may be sufficient, although it does not follow the exact language of the statute in describing the offense, if the words used are equivalent to those employed in the statute. *State v. Dickerhoff*, 127–404, 103 N. W. 350.

Section applied. *State v. Wood*, 112–411, 84 N. W. 520; *State v. Ryan*, 113–536, 85 N. W. 512.

As to following the language of the statute in charging an offense, see notes to code § 5288 in this supplement.

The provisions of this section and other sections of the code were intended to obviate the technical niceties of the common law through which guilty persons escaped the just penalties of crime, and should be so construed as to effectuate their design, and yet exact such specification of facts as will constitute the offense and so individuate it as will clearly apprise the accused of the particular crime intended. *State v. Rankin*, 150–701, 130 N. W. 732.

Particularity: It is not improper to charge an assault as having been made with a deadly weapon, the particular description of which is to the grand jury unknown, although the weapon with which it is claimed the crime was committed was before the grand jury and also introduced in evidence on the trial. *State v. Sigler*, 114–408, 87 N. W. 283.

A description of money stolen as "one hundred and ten dollars in current money of the United States, and of the value of one hundred and ten dollars, a more particular description of which is to this grand jury unknown", held sufficient. *State v. Williams*, 118–494, 92 N. W. 652; *State v. Connor*, 118–490, 92 N. W. 654.

In charging sodomy it is not necessary to set out the indecent details. *State v. McGruder*, 125–741, 101 N. W. 640.

The use of Roman numerals and Arabic figures and the character "&" for "and" does not affect the validity of the indict-

ment. *State v. McPherson*, 114–492, 87 N. W. 421.

The use in an indictment of the term "planing mill" in charging the offense of breaking and entering a building sufficiently implies that a building was broken and entered. *State v. Haney*, 110–26, 81 N. W. 151.

Where the charge is seduction, the allegation that the person seduced was "an unmarried person" sufficiently charges the seduction of an unmarried woman. *State v. Olson*, 108–667, 77 N. W. 332.

In a particular case held that the allegation of attempt to improperly influence a juror was sufficiently charged without pleading the evidence showing that there was such improper attempt, where the means used was stated. *State v. Dankwardt*, 107–704, 77 N. W. 495.

Venue: Although it is sufficient in an indictment for keeping a liquor nuisance to charge the keeping of such nuisance in the county of the prosecution, yet, if the place is more particularly charged, it must be proven as charged. *State v. Schuler*, 109–111, 80 N. W. 213.

Where the state relies on evidence that the offense was committed within five hundred yards of the boundary line of the county, it may be averred generally that it was committed within the county, but an indictment containing the allegation that the crime was committed in "Iowa county or in Keokuk county, within five hundred yards of the south line of Iowa county, as nearly as the grand jury know and can state," is defective. *State v. Daily*, 113–362, 85 N. W. 629.

Time: The allegation as to time need be no more specific than the proof. An allegation that the act was committed on or about a named date is sufficient. *State v. John*, 124–230, 100 N. W. 193.

Degree of crime: It is not necessary in an indictment for murder to specify the degree. The court will look to the facts charged to determine whether the offense, if committed as charged, was murder in the first or murder in the second degree. *State v. Phillips*, 118–660, 92 N. W. 876.

Name of person injured: Where the charge in an indictment involves injury to the person, an erroneous allegation as to the name of the person is immaterial. Therefore held that in a prosecution for seduction, the naming of the woman seduced as "Nellie ———," whereas the evidence showed her name to be "Mary Ellen ———," was immaterial. *State v. Burns*, 119–663, 94 N. W. 238.

In a prosecution for robbery the ownership of the property taken must be alleged and proven as in cases of larceny. *State v. Wasson*, 126–320, 101 N. W. 1125.

In a prosecution for obtaining property by false pretenses the name of the owner should be alleged. *State v. Jackson*, 128–543, 105 N. W. 51.

Where a business is conducted by a partnership under the name not purporting to be that of the partnership, such as "The Golden Eagle Clothing Store," an indictment for the larceny of goods described as belonging to the store may be supported by proof of ownership in the partnership conducting such store. *State v. Bartlett*, 128–518, 105 N. W. 59.

Where the essence of the crime described is not injury to particular persons it is not necessary to allege the names of persons intended to be injured. *State v. Leasman*, 137–191, 114 N. W. 1032.

It is not essential in an indictment for uttering a forged instrument to name the person to whom it was uttered, published, passed or transferred. *State v. Weaver*, 149–403, 128 N. W. 559.

A mistake as to the name of a third person or as to the ownership of property may be cured by amendment, under 33 G. A., ch. 227, § 7. To this extent, the statute is not unconstitutional. *State v. Mullen*, 151–392, 131 N. W. 679.

And see notes to § 5286.

SEC. 5290. Immaterial matters.

In general: The indictment should not be held insufficient for any defective or imperfect allegation which does not deprive the defendant of a substantial right. *State v. Martin*, 125–715, 101 N. W. 637.

The indictment may contain allegations of different acts as together constituting one offense, without being open to the charge of duplicity. *State v. Wilhite*, 132–226, 109 N. W. 730.

An indictment is not sufficient in which an essential fact is alleged by mere inference or intendment. *State v. Gallaugher*, 123–378, 98 N. W. 906.

Time: While it is not essential that the precise date of the offense be indicated in the indictment, it is essential that the evidence show affirmatively that the crime was committed within the statutory period for commencing prosecutions for the offense. *State v. Kunhi*, 119–461, 93 N. W. 342.

In a prosecution for perjury, where the charge is not based on the record or other writing under oath, and the statements asserted to be false might have been made on either the date alleged or that proven and would constitute perjury if made at either time, variance as to the date between the allegations of the indictment and the evidence is immaterial. *State v. Perry*, 117–463, 91 N. W. 765.

Place: An indictment for maintaining a liquor nuisance "at said building or

place in said county" held sufficiently definite. *State v. Dixon*, 104–741, 74 N. W. 692.

An indictment is not bad for uncertainty which, in charging the maintenance of a nuisance, alleges that defendant unlawfully established, kept, etc., and continued "a certain building or place," etc., for the purpose, etc. Allegation of place is not essential in such an indictment. *Ibid.*

The words "then and there" in an indictment held to refer back to the place where the act was done as charged in the venue, and not to the place named in connection with the description of the property. *State v. Tripp*, 113–698, 84 N. W. 546.

Ownership: An erroneous allegation with reference to ownership is not fatal under statutory provisions if the crime is described in other respects with sufficient certainty. *State v. Watson*, 102–651, 72 N. W. 283.

Variance as to name of the owner of property in a prosecution for burglary will not be fatal. *State v. Wrand*, 108–73, 78 N. W. 788.

One who has the right to use premises and keeps property therein for his own purposes is the owner of the premises within the purview of a statute making it a crime to steal property from the inclosed premises of another. *State v. Norman*, 135–483, 113 N. W. 340.

Where the crime of malicious injury to property is so described that it consists of injury to the public rather than to a particular person, allegation of ownership is unnecessary. *State v. Leasman*, 137–191, 114 N. W. 1032.

Even where ownership is required to be alleged in a criminal case, an allegation of possession is usually sufficient. *Ibid.*

Description: Under an indictment for fraudulent banking charging the defendant with knowingly and unlawfully receiving on deposit the sum of two hundred dollars in lawful money of the United States a particular description of which was to the grand jurors unknown, held that it was unnecessary to prove that the money received was any particular kind of money and that the words "of the United States" might be rejected as surplusage. It might be that if some particular kind of money were specifically described, such as gold coin or treasury notes of a particular denomination, it would be necessary to prove the description as alleged. *State v. Boomer*, 103–106, 72 N. W. 424.

A departure from the language of the statute in describing the offense is immaterial if it does not tend to prejudice the substantial rights of the defendant upon the merits. *State v. Dickerhoff*, 127–404, 103 N. W. 350.

Surplusage: An indictment charging the publication of an alleged libel for the purpose of defaming, etc., a person named "and others", and that such publication tended to provoke the said person named "and others" to wrath, etc., is not objectionable, the words "and others" being surplusage. *State v. Heacock*, 106–191, 76 N. W. 654.

The word "Jr." added to the name of a person as given in the indictment adds nothing thereto, and should be regarded as surplusage. *State v. Dankwardt*, 107–704, 77 N. W. 495.

Words which are not descriptive of the identity of what is legally essential to the charge in the indictment may be rejected as surplusage. *State v. Judd*, 132–296, 109 N. W. 892.

SEC. 5296. Indictment for perjury.

The statutory provision as to what shall be a sufficient indictment for perjury is to be given effect as a remedial statute, relieving the prosecution from undue technical requirements which may have been recognized in the English courts as to the allegations in such prosecutions, and it is unnecessary to specifically set out the authority of the court or persons who administered the oath. The allegation that defendant appeared as a witness on the trial at a criminal prosecution in the district court of Henry county "and was then and there duly sworn before the duly authorized clerk of said court" held sufficient. *State v. Harter*, 131–199, 108 N. W. 232.

The court is presumed to have authority to administer oaths to witnesses, and the act of the clerk in administering such an oath is presumed to have been done under the authority of the court. *Ibid.*

It is unnecessary to allege the name of the particular person who was the clerk of the court at the time the oath was administered. *Ibid.*

The indictment must negative that which is false in the alleged testimony of the defendant, contradicting the matter alleged to have been falsely sworn to in express and specific terms. *State v. Gallaugher*, 123–378, 98 N. W. 906.

The truth of the matter alleged to have been sworn to is sufficiently negatived by the allegation, "Whereas in truth and in fact as defendant well knew, he did not," etc. *State v. Brown*, 128–24, 102 N. W. 799.

An indictment for perjury in a particular case held sufficient as to the allegations of the falsity of defendant's testimony. *State v. Loos*, 145–170, 123 N. W. 962.

The indictment must traverse the truth of the testimony charged to have been falsely given. *State v. Hulsman*, 147–572, 126 N. W. 700.

[The notes in the code to § 5096 under the heading "Knowledge of falsity" belong under this section.]

SEC. 5297. Conspiracy—overt act.

It is not necessary to charge an overt act in an indictment for a statutory conspiracy, the definition of which does not require the commission of such act. *State v. Poder*, 154–686, 135 N. W. 421.

SEC. 5298. Intent to defraud.

This section is applicable to cases of forgery and uttering forged instruments, and in such cases it is not necessary to allege the name of the person intended to be defrauded. *State v. Weaver*, 149–403, 128 N. W. 559.

SEC. 5299. Principal and accessory.

One may be guilty as accessory before the fact of a crime which he is not capable of committing. By aiding and abetting in the commission of a crime he renders himself principal therein under the statutory provisions. So held as to a defendant who, though not a public officer, was guilty of aiding and abetting the crime of embezzlement committed by a public officer. *State v. Rowe*, 104–323, 73 N. W. 833.

All persons concerned in the commission of the offense, including so-called conspirators or confederates, are guilty as principals and may be charged and held as such. A prosecution in which persons aiding and abetting are sought to be held as coconspirators is not a prosecution for conspiracy but for the crime committed. *State v. Smith*, 106–701, 77 N. W. 499.

The words "aid and abet in its commission" as used in this section manifestly have reference to some work or act of encouragement or assistance in the commission of the offense, and not to something done after the crime is committed. An accessory after the fact is not an aider and abettor. *State v. Jones*, 115–113, 88 N. W. 196.

One may be guilty as accessory before the fact to the crime of manslaughter. *State v. Gray*, 116–231, 89 N. W. 987.

The fact of defendant's presence may alone, under some circumstances, show his guilt as aiding and abetting. *State v. Dunn*, 116–219, 89 N. W. 984.

Under the evidence in a particular case, held that defendant was properly convicted of manslaughter, committed by aiding and abetting one who made the deadly assault. *State v. Cobley*, 128–114, 103 N. W. 99.

One who is present assisting or aiding and abetting may be convicted as principal. *State v. Mahoney*, 122–168, 97 N. W. 1089.

Under an indictment charging defendant with having committed the overt criminal act, he may be convicted upon proof that his only connection therewith was that of an aider or abettor. *State v. Berger*, 121–581, 96 N. W. 1094.

One who is present aiding and abetting is more than an accessory before the fact. He is a principal. *Ibid.*

It is not sufficient in charging the commission of a crime by aiding and abetting to allege that the defendant had knowledge of the fact that the crime was in contemplation by the party or parties who actually committed it. Something more than knowledge that the crime is contemplated or mere personal presence at the time and place where the crime is committed must be shown in order to charge one with complicity in the offense. *State v. Bartlett*, 128–518, 105 N. W. 59.

Where one is charged with an offense which is accessorial in its nature it is not necessary to state the method of aiding and abetting, but it is sufficient to charge him as principal by procuring the act to be done. *State v. Porter*, 105–677, 75 N. W. 519.

One who has aided and abetted in the commission of a crime may be charged as principal without specifically referring to the method of his connection with the crime. *State v. Denhardt*, 129–135, 105 N. W. 385.

The guilt of one who aids or abets the commission of a crime must be determined upon the facts which show the part he took in committing it, and does not depend on the guilt of others with whom he coöperated, unless the crime is the result of a conspiracy. *State v. Phillips*, 118–660, 92 N. W. 876.

But where the crime is the result of conspiracy, all who participate in the conspiracy are liable for the act, although not participating in the act itself. *State v. Pasnau*, 118–501, 92 N. W. 682.

Unless a crime is committed in pursuance of a previous conspiracy, the actual participation of the defendant in the wrongful act is the measure of his criminal liability, and evidence of intoxication of the defendant at the time the con-

spiracy is claimed to have been entered into may be shown as tending to exonerate the defendant from liability for a wrongful act in which he did not actually participate. *Ibid.*

In a prosecution for a crime in which it is sought to show that the defendant was guilty as an aider or abettor, or as an accessory before the fact, proof of the actual commission of the crime by another and of his acts and declarations tending to show his guilt is admissible. *State v. Brown*, 130–57, 106 N. W. 379.

It is immaterial whether the defendant in such case is shown to have had actual knowledge of the commission of the crime by such third person, where it appears that the defendant instigated the crime or aided, abetted or assisted in the purpose to commit it, having a knowledge at the time of such purpose. *Ibid.*

The connection of the defendant with the commission of the crime in such a case may be established by circumstantial evidence. *Ibid.*

SEC. 5300. Accessory after the fact.

An accessory after the fact to the commission of a crime, for instance one who has received stolen property from the thief with knowledge of the theft, is not an accomplice under code § 5489 requiring corroboration of the evidence of an accomplice to sustain a conviction. *State v. Jones*, 115–113, 88 N. W. 196.

SEC. 5301. Compounding offense.

This section does not authorize an indictment for the compounding of an offense other than a felony, as provided in code §§ 4889, 4890. *State v. Guthrie*, 150–149, 129 N. W. 804.

When a criminal proceeding has been instituted in good faith it should be prosecuted to the end that the law may be vindicated, and it is a crime to compound an offense. *White v. International Textbook Co.*, 156–210, 136 N. W. 121.

SEC. 5302. Indictment for embezzlement.

Under a charge in an indictment for embezzlement that defendant did receive different amounts of money, said sums amounting to a total of a certain number of dollars named, the particular description of said money being to the grand jury unknown, held that the description as to the money was sufficient without other allegation of its value. *State v. Alverson*, 105–152, 74 N. W. 770.

CHAPTER 17.

OF PROCESS UPON AN INDICTMENT.

SECTION 5309. Process against corporation.

Where defendant was charged as a corporation with the crime of maintaining a nuisance and appeared and pleaded as a corporation, held that the prosecution did not have the burden of proving the fact of legal incorporation of the defendant. *State v. Glucose Sugar Refin. Co.*, 117–524, 91 N. W. 794.

CHAPTER 18.

OF ARRAIGNMENT OF THE DEFENDANT.

SECTION 5310. How soon—waived—corporation.

In the absence of anything appearing of record to indicate that defendant was not arraigned or that arraignment was waived, it should be presumed that there was a proper arraignment or a waiver thereof. *State v. Corwin*, 151–420, 131 N. W. 659.

SEC. 5313. Right to counsel.

The right of defendant to the assistance of counsel is subject to statutory regulation. The power of the court to appoint may be exercised not only when the defendant is arraigned, but at a subsequent stage of the trial. And where only one attorney has been assigned or employed, it may be found essential subsequently to designate another to assist the accused. *Korf v. Jasper County*, 132–682, 108 N. W. 1031.

There is no statutory requirement that counsel for defendant be present in court at the time the verdict is rendered and the jury discharged. *State v. Criswell*, 148–254, 127 N. W. 65.

SEC. 5314. Fee for attorney defending.

The statute does not authorize an order on the treasurer of the county for compensation of defendant's attorney for services rendered on appeal. *State v. Young*, 104–730, 74 N. W. 693.

Where one attorney is appointed to defend two persons, jointly indicted, he is entitled to the statutory fee for the defense of each. *Clark v. Osceola County*, 107–502, 78 N. W. 198.

An attorney selected in the lower court may follow the case to the supreme court, and is entitled to compensation if he has not received, and is not to receive it directly or indirectly from another source. But the claim for services rendered in the supreme court should be presented to the board of supervisors for allowance as other claims against the county. *State v. Behrens*, 109–58, 79 N. W. 387.

The statute fixes the compensation for counsel appointed to represent a defendant, and where the defendant is put on trial for manslaughter, the fee is that provided in case of homicide although the punishment which may be imposed cannot extend to life imprisonment. *Tomlinson v. Monroe County*, 134–608, 112 N. W. 100.

Where the counsel appointed for the defendant follow the case to the supreme court and secure a reversal of the conviction of their client, they may continue to represent him on a second trial without a new appointment and may recover compensation from the county for such services. *Ibid.*

There is no power in the district court to appoint an attorney to prosecute an appeal, but the attorney appointed in the lower court may prosecute an appeal and be allowed compensation therefor. *State v. Cater*, 109–69, 80 N. W. 222.

With reference to compensation to be paid to an attorney appointed to defend a criminal, it is not necessary that the county shall have been a party to the proceeding in which the appointment is made; and no appeal on the part of the county from the action of the court in making such appointment is provided for. *Korf v. Jasper County*, 132–682, 108 N. W. 1031.

SEC. 5315. Arraignment—by whom and how made.

Where defendant was indicted and arraigned as "Charley" Moffit, held that it did not constitute reversible error that the evidence and instructions referred to him as "Charles." *State v. Moffit*, 156–702, 136 N. W. 908.

CHAPTER 19.

OF SETTING ASIDE THE INDICTMENT.

SECTION 5319. Grounds.

The grounds specified on which a motion may be based to set aside an indictment are exclusive of others not named, and therefore the fact that a member of the grand jury finding the indictment had previously formed and expressed an unqualified opinion of defendant's guilt will not require the setting aside of the indictment. *State v. Baughman*, 111–71, 82 N. W. 452.

On a motion to set aside an indictment, the court will not inquire into the sufficiency of the evidence before the grand jury, nor will the indictment be set aside because it may be made to appear that an incompetent witness was called and gave testimony during the course of the investigation. Therefore held that the fact that defendant was called as a witness by the grand jury in the investigation of the charge against him was not a ground for setting aside the indictment. *State v. Shepherd*, 129–705, 106 N. W. 190.

The introduction of incompetent evidence before the grand jury is not a ground for setting aside the indictment. The grounds specified by the statute are exclusive of all others. The court cannot

inquire into the sufficiency of the proof before the grand jury or the mode of examining the witnesses to invalidate the indictment. *State v. De Groate*, 122–661, 98 N. W. 495.

While the law requires grand jurors to be electors of the county, it does not require that a person must have voted or that his name be found upon the poll books, to make him eligible. Therefore a showing that the sheriff was unable to find a person of the name in the ward or city from which he was drawn, or that the county auditor could find no such name on the poll books, does not show that the juror was not properly selected. *State v. Harris*, 122–78, 97 N. W. 1093.

The indictment should be set aside on motion unless the names of the witnesses examined before the committing magistrate, the minutes of whose testimony have been presented to and acted upon by the grand jury, are indorsed on the indictment. *State v. Hasty*, 121–507, 96 N. W. 1115.

But failure to indorse names of witnesses will not be a ground for setting aside, unless it appears that the evidence of the witnesses whose names are not indorsed was material and this fact must be made to affirmatively appear. *Ibid.*

Failure to return exhibits introduced in evidence before the grand jury with the minutes of the evidence as required by code § 5258 is not made a ground of setting aside the indictment. Such provision, as well as that requiring the minutes of the evidence of the witnesses to be signed by them, is directory only. *State v. O'Malley*, 132–696, 109 N. W. 491.

An indictment will not be set aside on motion on the ground that a witness testifying before the grand jury was not sworn. *State v. Easton*, 113–516, 85 N. W. 795.

The fact that the wife testifies before the grand jury with reference to a charge against her husband is not ground for setting aside the indictment. *State v. Brown*, 128–24, 102 N. W. 799.

It is not a statutory ground for setting aside an indictment that the defendant was not given an opportunity to challenge jurors. *State v. Phillips*, 119–652, 94 N. W. 229.

Where father and daughter were both witnesses before a grand jury on the investigation of a public charge, and the father remained with the daughter in the grand jury room while she was being sworn, on account of her nervousness, held that there was not such improper conduct as to require the setting aside of the indictment. *State v. Wood*, 112–484, 84 N. W. 503.

It is not sufficient ground for setting aside an indictment that an assistant to the county attorney appointed by the court has been present with the grand jury during their investigation of the charge. *State v. Tyler*, 122–125, 97 N. W. 983.

A motion to set aside the indictment cannot be entertained after the evidence for the prosecution has been introduced. *Ibid.*

If the county attorney is disqualified from acting in the prosecution, he should not appear before the grand jury. And the fact that he does so is a ground for setting aside the indictment. *State v. Rocker*, 130–239, 106 N. W. 645.

An indictment should not be set aside because names of members of election boards are returned on the jury lists where it appears that their names were placed on the lists without their desire or procurement. *State v. Anderson*, 140–445, 118 N. W. 772.

An irregularity in drawing the grand jury will not invalidate an indictment, unless it appears or may reasonably be inferred from the circumstances that some prejudice has resulted from such irregularity. *State v. Carter*, 144–371, 121 N. W. 801.

Where the objection that the indictment is not indorsed a true bill and the indorsement is not signed by the foreman is not raised until after verdict, it appearing from the record that the indictment was returned by the grand jury and presented in its presence to the court and filed, such objection cannot be first raised in a motion for arrest of judgment or on appeal. *State v. Heft*, 155–21, 134 N. W. 950.

SEC. 5321. Objections to selection of grand jury.

The provision denying to one who has been held to answer before the grand jury the right to have the indictment set aside on the ground that the grand jury was not properly selected is not unconstitutional. Failure to object at the proper time constitutes a waiver of any objection which might have been made. *Busse v. Barr*, 132–463, 109 N. W. 920.

It is intended that as against a defendant held to answer before the finding of the indictment, all matters having relation to the organization of the grand jury should be foreclosed, and the failure of the court to fill the place of an individual juror as to whom a challenge has been sustained, and who does not take part in the proceedings, cannot thus be raised. *State v. Wheeler*, 129–100, 105 N. W. 374.

A defendant who has had opportunity of challenging the panel of the grand jury cannot take advantage of any irregularity which might have been raised by subsequently moving in arrest of judgment. *State v. McPherson*, 126–77, 101 N. W. 738.

The inability of a grand juror to read

and write the English language may be urged by motion to set aside the indictment on behalf of a defendant not held to answer before the finding of the indictment. *State v. Greenland*, 125–141, 100 N. W. 341.

Such objection may be urged in a motion for new trial where the fact does not come to the knowledge of defendant or his counsel prior to the rendition of the verdict. *Ibid.*

The court may in its discretion, after the conclusion of the term at which the indictment was found, refuse to continue the case for the purpose of having the grand juror brought in for examination to determine his ability to read and write. *Ibid.*

The objection that a defendant, whose case was resubmitted to another grand jury than the one to which it was at first submitted, did not have opportunity to challenge the grand jurors who returned the indictment on which he was tried, must be raised by a motion to set aside the indictment or by plea in abatement, and is not available on motion in arrest of judgment. *State v. Brown*, 128–24, 102 N. W. 799.

Objections to an individual grand juror that he had formed or expressed an unqualified opinion is not available by way of motion to set aside the indictment. *State v. Baughman*, 111–71, 82 N. W. 452.

SEC. 5324. If granted.

Where a case is resubmitted to the grand jury there is no final judgment from which the state may appeal. *State v. Evans*, 111–80, 82 N. W. 429.

It is competent for the trial court to order the resubmission of a criminal charge to the grand jury where the indictment is clearly defective. *State v. Hanlin*, 134–493, 110 N. W. 162.

If the accused resists a motion by the prosecuting attorney to set aside the indictment because of its indefiniteness and to resubmit the case to the grand jury for further action, and is sustained by the court in such resistance, he cannot rely on the insufficiency of the indictment raised by such motion as a ground for reversal on appeal. *Ibid.*

SEC. 5325. If resubmitted.

When an indictment is set aside and the case resubmitted to another grand jury, whether by the direction of the court or otherwise, any member of the grand jury who was also a member of the first and participated in the finding of the indictment is subject to challenge for cause. *State v. Bullard*, 127–168, 102 N. W. 1120.

SEC. 5326. Order to set aside, no bar.

This section relates to the setting aside of indictments on motion and not to indictments held to be insufficient on demurrer. *State v. Fields*, 106–406, 76 N. W. 802.

CHAPTER 20.

OF PLEADING BY THE DEFENDANT.

SECTION 5328. Grounds of demurrer.

The objection that the indictment does not charge a crime should be raised by demurrer and not by motion to set aside the indictment. *State v. Kimble*, 104–19, 73 N. W. 348.

The court may on its own motion without a request from either party discharge the jury if it appears that the indictment is so defective that a conviction thereunder could not be sustained and the defendant should thereupon be discharged from custody unless the court believes that a new indictment could be framed on which the defendant could be convicted. *Ibid.*

An objection to an indictment for duplicity cannot be raised for the first time on appeal. *State v. Brown*, 135–40, 109 N. W. 1011.

Where a demurrer had been interposed to the indictment at a term prior to that at which the case was called for trial without being ruled on, and the attention of the court was not directed to that fact until after verdict, held that as the objection raised in the demurrer was without merit no prejudicial error was made to appear. *State v. Heft*, 155–21, 134 N. W. 950.

SEC. 5331. When heard.

When a demurrer to an indictment is sustained on the ground that the indictment contains matter which is a legal defense or a bar to the indictment, the judgment is final; and held that although the order made on the ruling was not in the form of a judgment but in terms discharged the defendant and released his bond, it was in legal effect a final judgment. *State v. Fields*, 106–406, 76 N. W. 802.

Where a demurrer is sustained and the case is resubmitted there is no final judgment from which the state can appeal. *State v. Evans*, 111–80, 82 N. W. 429.

SEC. 5334. Entry—form—guilty.

Where the indictment contains two counts of such character that they cover two distinct offenses, and defendant pleads "guilty of the offense charged," a judgment on such plea is erroneous. *State v. Schuler*, 109–111, 80 N. W. 213.

SEC. 5336. Plea entered by court.

Where defendant is put on trial with ample time to prepare for his defense and is tried as though he had pleaded not guilty, he cannot be presumed to have been prejudiced by the failure to formally enter a plea. *State v. Corwin*, 151–420, 131 N. W. 659.

Where it appears from the record by affirmative recital or necessary implication arising out of the presumption of regularity in the proceedings that the defendant was properly charged by indictment with the crime for which he is put on trial; that he was arraigned on this charge; that being personally present in court and represented by counsel he acquiesced in the trial as on a plea of not guilty, examining jurors as to their qualifications and interposing repeated objections to the evidence offered against him on the ground that it was not admissible; that he introduced evidence to support the defense of the crime charged, testifying himself as a witness; and that not until after the jury returned a verdict against him did he intimate that there was any irregularity or insufficiency in the preliminary steps designated by the statute as proper for the purpose of raising an issue of fact as to his guilt, he cannot complain on appeal that he did not plead not guilty to the charge. *State v. Heft*, 155–21, 134 N. W. 950.

SEC. 5337. Withdrawal of plea of guilty.

The plea of guilty may be withdrawn and a plea of not guilty substituted after the court has proceeded under the plea of guilty to make an inquiry into the facts for the purpose of fixing the punishment and has announced its conclusion but has postponed the pronouncing of judgment to a later day. *State v. Hortman*, 122–104, 97 N. W. 981.

Whether the provision for withdrawing a plea of guilty in a criminal prosecution is applicable in a proceeding to punish for contempt in violating an injunction to abate a liquor nuisance, *quaere;* but in any event such plea cannot be withdrawn after the pronouncement of the judgment by the court although such judgment has not been entered. *Beatty v. Roberts*, 125–619, 101 N. W. 462.

SEC. 5338. Issues—trial—presence of defendant.

The court has no jurisdiction to try an issue of fact in a criminal case without a jury, and no authority is given to the defendant to consent to such a trial. *State v. Rea*, 126–65, 101 N. W. 507.

SEC. 5339. Conviction or acquittal, when a bar.

Where the defendant pleads previous conviction, the state may show that the conviction relied on was void for want of jurisdiction in the court in which the conviction was had. *State v. Jamison*, 104–343, 73 N. W. 831.

No replication to the affirmative plea of previous conviction or acquittal is necessary. *Ibid.*

When the plea of previous conviction is not sustained by the evidence or is not sufficient in law the court may so charge the jury. *Ibid.*

Where, after the defendant was put on trial under an indictment in one county and evidence was introduced, some of it tending to show that a crime had been committed in that county, the court dismissed the prosecution and ordered the defendant to be held for a warrant from another county for the same offense, held that as the question of venue should have

gone to the jury in the first county, the defendant could in the second county plead the proceedings in the first county as a former adjudication. *State v. Spayde*, 110–726, 80 N. W. 1058.

While in general an acquittal in a criminal case is not a bar to a subsequent civil action founded on the same facts, yet, where the civil action is to secure a forfeiture which would have been a part of the penalty to be imposed in the criminal proceeding, and is between the same parties, the previous acquittal is a bar. *State v. Meek*, 112–338, 84 N. W. 3.

As the evidence necessary to convict of the separately described crimes of gambling and keeping a gambling house is not the same, a conviction or acquittal of the one offense does not necessarily bar a prosecution for the other. *State v. White*, 123–425, 98 N. W. 1027.

The fact that evidence of one offense may be introduced in establishing the guilt of the other does not fix the identity of the two under the plea of former conviction or acquittal. *Ibid.*

The test determining whether the accused has been in jeopardy is whether or not, if what is set out in the second indictment had been proved under the first, there could have been a conviction; and it is immaterial that in the second prosecution the state attempts to establish a different transaction than that which was sought to be proven in the first. *State v. Price*, 127–301, 103 N. W. 195.

The acts and declarations of one charged to have committed a substantive offense by conspiracy with others are admissible as against a coconspirator charged with the same substantive offense, although the one whose acts and declarations are thus relied on has been acquitted of a conspiracy to commit the offense. *State v. Crofford*, 133–478, 110 N. W. 921.

The fact that the defendant has previously been acquitted of the crime of stealing property from the premises of A. does not prevent the proof of such stealing as a collateral fact bearing on the guilt of defendant charged with stealing other property from the premises of B. *State v. Norman*, 135–483, 113 N. W. 340.

A conviction under a federal statute of breaking and entering a post office with the intent to commit larceny is not a bar to a state prosecution for burglary under an indictment charging the same breaking and entering. *State v. Moore*, 143–240, 121 N. W. 1052.

Where there is no question as to the identity of the defendant as the person accused in both trials, nor as to the identity of the transactions, the issue as to former jeopardy is a question of law and rightly determined by the court. *State v. Blodgett*, 143–578, 121 N. W. 685.

The test by which to determine whether a former judgment is a bar or not is to inquire whether the same evidence would support both the present and a former prosecution. *Ibid.*

SEC. 5341. Judgment, when a bar.

Under the corresponding section of code of '73 (§ 4366), held that the district court could not order a resubmission of the case to the grand jury when the demurrer to the indictment had been sustained on the ground that the offense charged was within the exclusive jurisdiction of another county, or on the ground that the indictment contained matter which was a legal defense or bar to the indictment. *State v. Fields*, 106–406, 76 N. W. 802.

CHAPTER 21.

OF CHANGE OF PLACE OF TRIAL IN CRIMINAL CASES.

SECTION 5343. What stated.

An application for transfer of a criminal case to another judge of the same district for trial on the ground that the judge to whom the application is addressed is prejudiced against defendant to such an extent that he cannot obtain a fair and impartial trial before him, is to be granted or refused in the exercise of sound discretion. *State v. Heacock*, 106–191, 76 N. W. 654.

Affidavits in a particular case held not to show prejudice or excitement in the county against defendant such as to require a change of venue. *State v. McDonough*, 104–6, 73 N. W. 357.

It is important in the administration of justice that every litigant have a fair trial and that this be made apparent to him from the rulings and procedure of the court. But in a particular case, held that the showing as to prejudice of the judge was not such as to require the reversal of a ruling denying change of venue on that ground. *State v. Blodgett*, 143–578, 121 N. W. 685.

SEC. 5346. Additional testimony.

Affidavits in resistance to the application for change of venue need not show that affiants are not related to the prosecutor. *State v. Icenbice*, 126–16, 101 N. W. 273.

SEC. 5348. Court's discretion.

The supreme court will not on appeal interfere with the discretion vested in the trial court in passing upon an application for a change of venue, unless such discretion appears to have been abused. *State v. Miner*, 107–656, 78 N. W. 679.

A certain discretion is reposed in the trial court in passing upon applications of this kind, and the supreme court does not interfere unless such discretion appears to have been abused. In a particular case, held that the showing was not such as to require reversal of the action of the trial court in refusing a change of venue on account of prejudice of the inhabitants of the county. *State v. Williams*, 115–97, 88 N. W. 194.

The supreme court will not interfere with the conclusion of the trial court in ruling on an application for change of venue except where there is a clear abuse of judicial discretion, and if there is a substantial conflict for determination by the trial court on the showing made, its action will be sustained. *State v. Icenbice*, 126–16, 101 N. W. 273.

Where there is a conflict between the showing made for the defendant and that for the state on an application for change of venue on the ground of hostility and prejudice throughout the county resulting from the widespread circulation of newspaper accounts of the crime, charging the defendant with its commission, the supreme court will not interfere on appeal with the exercise of discretion on the part of the trial court in determining the question. *State v. Brown*, 130–57, 106 N. W. 379.

The granting of a change of venue on the application of the defendant is largely within the discretion of the trial court, and this is peculiarly so where the persons making the affidavits relied upon are personally examined and cross-examined before the court. *State v. Crouch*, 130–478, 107 N. W. 173.

Where the record does not indicate the existence of a feeling against the accused personally, a change of venue on account of a feeling against the crime charged, as such, does not require change of venue. *State v. Rohn*, 140–640, 119 N. W. 88.

The showing in a particular case held not sufficient to require a reversal on account of the refusal to grant a change of venue asked on the ground of local excitement and prejudice. *State v. Dean*, 148–566, 126 N. W. 692.

The exercise of discretion on the part of the trial court in refusing a change of venue on conflicting affidavits will not be reviewed on appeal. *State v. Hassan*, 149–518, 128 N. W. 960.

SEC. 5354. Cost of change.

As the cost of employing an additional attorney to assist in trying a case brought to a county on change of venue falls upon the county from which the change is taken, the board of supervisors of the latter county has authority to employ an additional attorney and may contract with the attorney of that county to render the services. *Bevington v. Woodbury County*, 107–424, 78 N. W. 222.

It is the court of the county in which the case is tried which must allow the costs necessary and consequent upon the trial, and the county to which the change is taken is primarily liable to pay the expense of providing an attorney for defendant, and of furnishing defendant a transcript for the purpose of appeal, when ordered by the trial judge. *State v. Cater*, 109–69, 80 N. W. 222.

CHAPTER 23.

OF CHALLENGING THE JURY.

SECTION 5360. For cause.

Objection stated: A challenge to a juror should distinctly specify the facts constituting the causes thereof. *State v. Young*, 104–730, 74 N. W. 693.

In a particular case, held that the fact that the juror had read newspaper accounts of the crime for which defendant was on trial did not disqualify him. *Ibid.*

Where the challenge of the state is sustained, there being evidently but one ground of objection to the juror, and this being sufficient, the case will not be reversed on the ground that the objection is not sufficiently specific. *State v. Prins*, 113–72, 84 N. W. 980.

A challenge for cause which states no

grounds therefor is insufficient and may be disregarded. *State v. Wilson*, 124–264, 99 N. W. 1060.

When made—examination: If at any time during the trial a ground of objection to a juror comes to the notice or attention of the counsel for the defendant, the objection should be made and opportunity to investigate afforded, and such objection cannot afterwards be urged as a ground for a new trial. *State v. Pray*, 126–249, 99 N. W. 1065.

Inability of a juror to read or write cannot be urged as a ground for new trial where it does not appear that the juror was interrogated as to his qualifications in this respect, although knowledge of his inability was not acquired by the defendant or his counsel prior to the conclusion of the trial. *State v. Greenland*, 125–141, 100 N. W. 341.

Failure to challenge a juror for cause as to his competency and to examine him or other witnesses in support of the challenges is a waiver of the right of challenge although the fact of incompetency is not known to the party until after the trial. *State v. Carpenter*, 124–5, 98 N. W. 775.

If the defendant fails to sustain the objection made after being given opportunity to do so his challenge may be properly overruled. *State v. Pell*, 140–655, 119 N. W. 154.

Discretion of court: The discretion of the trial court in rulings upon challenges for cause will not be interfered with unless a clear case of abuse of discretion is shown. The court may properly take into account the juror's conduct, demeanor and bearing in determining whether, in view of his statements in answer to questions propounded to him, he is qualified to serve. *State v. Brown*, 130–57, 106 N. W. 379.

The discretion of the trial court in overruling a challenge for cause will not be a ground for reversal where it appears from the answers of the juror that he can try the case upon the evidence alone and reach a fair and impartial decision regardless of any opinion he may have previously formed. *State v. Hassan*, 149–518, 128 N. W. 960.

The trial court must exercise a discretion in determining the sufficiency of the showing in support of a challenge and its action will not be interfered with unless an abuse of discretion is shown. *State v. Teale*, 154–677, 135 N. W. 408.

The exercise of discretion on the part of the trial judge in overruling challenges for cause will not be interfered with on appeal where after cross-examination of the jurors challenged it appears that they were wholly disinterested and willing to accept and abide by the instructions as to the law which the court might give them. *State v. Heft*, 155–21, 134 N. W. 950.

It would require a strong showing to justify the sustaining of a challenge for cause on a mere preconceived error of the juror as to the effect to be given to evidence which may be introduced. *Ibid.*

After the juror has been examined and cross-examined as to his qualifications, it is not error to refuse permission to counsel for defendant to further examine the juror, it not appearing that counsel desire to question him on any new subject. *Ibid.*

Where it does not appear that the juror had ever formed or expressed an unqualified opinion as to the guilt or innocence of the accused, the action of the trial court in overruling the challenge will not be ground for reversal. *State v. Lindsay*, 140 N. W. 903.

Error without prejudice: Prejudice is not to be presumed to the defendant from a ruling of the court excusing a juror on challenge for cause by the state nor is such prejudice to be presumed where a juror unsuccessfully challenged for cause by the defendant might have been subsequently excluded on peremptory challenge. *State v. Pray*, 126–249, 99 N. W. 1065.

The defendant is not prejudiced in having one excluded from the jury who is of even doubtful qualifications. *State v. Crouch*, 130–478, 107 N. W. 173.

Any possible error in excusing a juror at his own request is removed if the defendant is given the opportunity to exercise an additional peremptory challenge, especially where it does not appear that he exhausted his peremptory challenges. *State v. Fielding*, 135–255, 112 N. W. 539.

It is not error of which defendant can complain that the court excuses a juror at his own request. *Ibid.*

Where, after the overruling of a challenge to one of the trial jurors, the defendant waives a peremptory challenge, he cannot afterwards complain of the overruling of his challenge for cause. *State v. Mathews*, 133–398, 109 N. W. 616.

As to new trial on account of disqualification of juror, see notes to code § 5424 in this supplement.

Where it does not appear that the juror as to whom a challenge has been offered formed part of the panel trying the case, the action of the court in overruling such challenge cannot be reviewed. *State v. Foster*, 136–527, 114 N. W. 36.

Where no objection is made to any juror selected, and no peremptory challenges are interposed, the fact that the examination of some of the jurors tended to show a previous opinion will not be ground for reversal on appeal. *State v. Hogan*, 145–352, 124 N. W. 178.

Bias of a juror cannot be made the ground for a motion for a new trial unless it is shown that defendant and his counsel did not know of such bias before the

juror was sworn. *State v. Buford*, 139 N. W. 464.

Having formed or expressed an opinion: Everyone who says he has formed an opinion from what he has heard and read is not necessarily disqualified. The appearance and intelligence, or want of intelligence, of the juror as he appears before the court may be taken into account. It is the duty of the court, not of the juror, to determine whether his opinion disqualifies him. *State v. Hudson*, 110–663, 80 N. W. 232.

The fact that a juror has heard statements in regard to the crime, without expressing any opinion, does not necessarily render him incompetent. *State v. Geier*, 111–706, 83 N. W. 718.

Although the juror admits having formed an opinion, yet if, upon the whole examination, it appears that such opinion is qualified and the juror expresses himself as able to render a just and fair verdict on the evidence, guided by the instructions of the court, he is qualified. *State v. Williams*, 115–97, 88 N. W. 194.

As the juror's conduct, demeanor and bearing in court may properly be accorded material weight in considering the facts as to his competency disclosed by his answers, the supreme court will be reluctant to interfere with the exercise of discretion in this respect on the part of the lower court. But where the juror discloses that he has become convinced of the truth of evidence tending to show defendant's guilt, a challenge should be sustained although he shows by his answers an honest and sincere intention to determine defendant's guilt only on the evidence introduced. *State v. Crofford*, 121–395, 96 N. W. 889.

The mere admission of a juror on being interrogated by the court that he can decide the case fairly should not be allowed to overcome his repeated statements that he entertains a fixed opinion as to a fact essential in determining the guilt of the defendant. *State v. John*, 124–230, 100 N. W. 193.

The discretion of the trial court must govern very largely in the matter of selection of a jury. The supreme court will not interfere on an appeal unless there is made to appear the positive violation of law or a clear abuse of discretion. It is for the court to determine whether the examination of a proposed juror discloses his fitness and it may reject a juror if in its judgment unfitness is thus disclosed, although he in terms declares that he is free from prejudice or fixed opinion. *State v. Smith*, 124–334, 100 N. W. 40.

Where the juror on examination by the court unqualifiedly affirms his ability to discard any belief with reference to defendant's guilt, based on conversations with others, the action of the court in overruling the challenge will not be interfered with on appeal. *State v. Fielding*, 135–255, 112 N. W. 539.

A qualified opinion which the juror can lay aside and disregard and render a verdict on the evidence alone is not a sufficient ground for challenge. *State v. Ralston*, 139–44, 116 N. W. 1058.

A person is qualified for a juror if notwithstanding any impressions he may have received he appears to be fair minded and able and willing to render a fair and impartial verdict. *State v. Rohn*, 140–640, 119 N. W. 88; *State v. Krampe*, 140 N. W. 898.

A person is qualified to act as a juror when it is apparent from his entire examination that, notwithstanding his personal knowledge of the facts or an opinion which he may have formed therefrom, he can try the case fairly and impartially on the evidence alone. *State v. Teale*, 154–677, 135 N. W. 408.

Although the showing in support of the challenge is technically insufficient, yet if there is a fair question as to the competency of the juror, the trial court may well sustain the challenge. *Ibid.*

Under affidavits on motion for a new trial on the ground of bias of a juror, held that no such bias was shown as to justify an interference with the verdict. *State v. Buford*, 139 N. W. 464.

Having heard evidence on former trial: The fact that a juror heard part of the evidence in the case on a former trial will not necessarily disqualify him from serving. *State v. Prins*, 117–505, 91 N. W. 758.

Relation to counsel: The relation of attorney and client between a juryman and one assisting in a criminal prosecution is not made a ground for challenge. *State v. Carter*, 121–135, 96 N. W. 710.

SEC. 5361. Juror examined.

The fact that a juror is not sworn on his *voir dire* will not deprive the defendant of the right to have a new trial on showing that the juror was prejudiced against him and made false answers as to having formed or expressed an opinion. *State v. Wright*, 112–436, 84 N. W. 541.

SEC. 5364. Peremptory challenges.

If the defendant makes no objection to the swearing of the jury after waiver of peremptory challenges on behalf of the defendant and the state, he cannot afterwards complain that all of his peremptory challenges had not been exhausted. *State v. Icenbice*, 126–16, 101 N. W. 273.

Where the defendant in a criminal case,

being entitled to ten peremptory challenges, when called upon to exercise his eighth challenge, stated by counsel that one peremptory challenge was waived, and the prosecution thereupon waived a peremptory challenge, held that the defendant was still entitled to exercise the right of two further peremptory challenges, and that it was error to refuse to allow him to do so. A waiver of one peremptory challenge is not a waiver of all further right of peremptory challenge as to persons already called as jurors. *State v. Hunter*, 118–686, 92 N. W. 872.

The statute gives the right of peremptory challenge absolutely, and if the right is denied, prejudice therefrom is conclusively presumed. The right to interpose peremptory challenges is not lost until the jury is sworn. *Ibid.*

SEC. 5365. Number.

Where two or more defendants are tried jointly, the number of peremptory challenges is limited to the number which a single defendant might exercise. *State v. Wolf*, 112–458, 84 N. W. 536.

The right of peremptory challenge is not a constitutional right; it exists only by virtue of statute. And where a defendant indicted for murder in the first degree is convicted only of manslaughter, and on the reversal of such conviction is again put on trial for the offense of manslaughter, he is entitled only to the number of peremptory challenges allowed in the case of an original prosecution for such offense. *State v. Smith*, 132–645, 109 N. W. 115.

CHAPTER 24.

OF THE TRIAL TO A JURY.

SECTION 5370. Continuances.

The provision that a continuance on the ground of the absence of a witness shall not be granted if the opposite party will admit that the witness if present would testify as stated in the affidavit for continuance, is not unconstitutional as applied to a continuance asked by the defendant, even though by the admission of the state defendant is thereby deprived of the presence of the witness whose expected testimony is set out in the affidavit. *State v. Wiltsey*, 103–54, 72 N. W. 415.

The admission that the absent witness would testify as alleged in the affidavit for continuance does not waive objection to the incompetency of such testimony. *State v. Leuhrsman*, 123–476, 99 N. W. 140.

It is not error to refuse a continuance asked for the purpose of procuring evidence which would be available only by way of impeachment of anticipated evidence for the other party. *State v. Athey*, 133–382, 108 N. W. 224.

The fact that the evidence of witnesses because of whose absence continuance is asked would be merely cumulative is not necessarily a ground for refusing a continuance. It may happen that the interests of justice will be promoted by a postponement in order to enable the defendant to secure all the witnesses who can testify in his favor as to a given fact. *State v. Hasty*, 121–507, 96 N. W. 1115.

But in general a continuance need not be granted for the purpose of enabling the defendant to secure witnesses whose testimony will be valuable to him only by way of impeachment. Such testimony does not bear upon an issue in the case. The ruling on an application for continuance to enable a party to procure impeaching evidence is generally regarded as purely discretionary and will not be interfered with on appeal. *Ibid.*

On a showing as to inability to procure testimony from a foreign country bearing on the mental capacity of defendant, held that a continuance should have been granted although a previous continuance on a similar ground had already been given. *State v. Von Kutzleben*, 136–89, 113 N. W. 484.

Feeling prevalent in the community as to the crime on account of its nature and circumstances, but not directed against the accused personally so as to prevent a fair and impartial determination with respect to his individual guilt or innocence, is not sufficient ground for a continuance. *State v. Rohn*, 140–640, 119 N. W. 88.

The matter of granting a continuance under a showing of fact made rests largely within the discretion of the trial court and a conviction will not be set aside on account of the refusal of a continuance where it does not appear that there was a clear case of abuse of discretion. *State v. Baker*, 146–612, 125 N. W. 659.

The showing as to inability to prepare for trial until the succeeding term after

arraignment held not sufficient to require a continuance. *State v. Dudley*, 147–645, 126 N. W. 812.

A motion for a continuance on account of absence of witnesses may properly be overruled where no showing is made of reasonable diligence to procure the testimony of such witnesses. *State v. Hayward*, 153–265, 133 N. W. 667.

SEC. 5371. Provisions in civil cases.

The provisions of code § 3709 as to taking exceptions to instructions are applicable to criminal cases. *State v. Williams*, 115–97, 88 N. W. 194.

The provisions as to preservation of the evidence by shorthand report and translation thereof are applicable in criminal cases. *State v. Perkins*, 143–55, 120 N. W. 62.

SEC. 5372. Order of trial.

Where defendant, having been put on trial under an indictment charging murder, is convicted of manslaughter and such conviction is subsequently reversed and he is again put on trial for manslaughter, it is not error to read to the jury the original indictment in which the crime of murder is charged. *State v. Walker*, 133–489, 110 N. W. 925.

Some latitude is to be given counsel in the opening statement, and so long as they act in good faith, believing that the facts which are proposed to be proved are admissible in evidence, the supreme court will not interfere on appeal. *State v. Trusty*, 122–82, 97 N. W. 989.

In the opening statement the county attorney should not anticipate possible attempts of the defense to avoid liability. The statements should be confined to the evidence which the prosecution expects to introduce to sustain the indictment. *State v. Ryan*, 113–536, 85 N. W. 812.

Although defendant relies on insanity as a defense, the state still has the burden of proof as to the commission of the crime, and the defendant does not have the right to open and close. *State v. Robbins*, 109–650, 80 N. W. 1061.

The provision that when the evidence is concluded the county attorney must commence and conclude the argument does not exclude the making of the opening and the concluding arguments by an attorney employed by private parties to assist the county attorney. *State v. Novak*, 109–717, 79 N. W. 465.

The judge should not during the argument of the case be beyond the hearing of the proceedings. There can be no court without a judge and his presence as the presiding genius of the trial is as essential at one time as another. *State v. Carnagy*, 106–483, 76 N. W. 805.

The presumption is that the indictment has been read to the jury and the plea of defendant stated, although this has not been done by the county attorney in his opening statement. *State v. Ralston*, 139–44, 116 N. W. 1058.

The right of defendant's counsel to reply to arguments of the county attorney in his closing argument is only to be determined by the trial judge in the exercise of a reasonable discretion. *State v. Leek*, 152–12, 130 N. W. 1062.

It is not error for one who is assisting the county attorney to read the indictment to the jury. *State v. Chocklett*, 155–511, 136 N. W. 534.

Where during the closing argument a controversy arose as to the testimony of a witness and the court allowed such witness to be recalled to explain the testimony already given, with opportunity to the other party to further argue the case, held that there was no such abuse of discretion as to require the granting of a new trial. *State v. Thomas*, 157– —, 138 N. W. 864.

Further as to absence of judge from court room during argument as ground for new trial, see notes to code § 5424 in this supplement.

SEC. 5373. Evidence for state—notice. The county attorney, in offering the evidence in support of the indictment in the order prescribed in the last section, shall not be permitted to introduce any witness who was not examined before a committing magistrate or the grand jury, and the minutes of whose testimony were not presented with the indictment to the court, unless he shall have given to the defendant or his attorney of record if the defendant be not found within the county a notice in writing, stating the name, place of residence and occupation of such witness, and the substance of what he expects to prove by him on the trial, at least four days before the commencement of such trial. Whenever the county attorney desires to introduce evidence to support the indictment, of which he shall not have given said four days' notice because of insufficient time therefor

since he learned said evidence could be obtained, he may move the court for leave to introduce such evidence, giving the same particulars as in the former case, and showing diligence such as is required in a motion for a continuance, supported by affidavit, whereupon, if the court sustains said motion, the defendant shall elect whether said cause shall be continued on his motion, or the witness shall then testify; and if said defendant shall not elect to have said cause continued, the county attorney may examine said witness in the same manner and with the same effect as though four days' notice had been given defendant or his attorney as hereinbefore provided, except the county attorney, in the examination of witnesses, shall be strictly confined to the matters set out in his motion. [28 G. A., ch. 135, §§ 1, 2; 17 G. A., ch. 168, § 3; C. '73, § 4421; R. § 4786.]

Duty to call witnesses: The state is not bound to call as witnesses all the persons examined before the grand jury, even though it appears that they were witnesses to the criminal act. *State v. Hudson*, 110–663, 80 N. W. 232.

Documentary or real evidence: It is not necessary to give notice of what is expected to be proved by documentary evidence. Such evidence is not required to be indorsed on the indictment or returned as part of the minutes. *State v. Boomer*, 103–106, 72 N. W. 424.

The statutory provision refers to persons and not things and the accused need not be advised before their offer that papers or documents will be used by the state. *State v. Bennett*, 137–427, 110 N. W. 150.

Witnesses not examined: The statutory provision as to returning minutes of evidence with the indictment does not preclude the use of evidence other than the minutes in order to determine whether the witness was in fact examined before the grand jury or committing magistrate. *State v. Marshall*, 105–38, 74 N. W. 763.

Where the names of witnesses are indorsed on the indictment and minutes of their evidence returned therewith it is presumed their evidence was properly before the grand jury, and to overcome such presumption it must be made to affirmatively appear not only that they did not testify before the grand jury, but also that they either did not give evidence before the committing magistrate or else that the minutes thereof made by him were not used by the grand jury. *Ibid.*

A witness may be examined as to any and all matters within his knowledge material to the case, although some particular fact as to which he testifies is not referred to in the minutes of his testimony. *State v. Seery*, 129–259, 105 N. W. 511.

Minutes of evidence: While the minutes of the evidence are not a part of the indictment and should be separately filed, yet, if attached to the indictment and filed with it, this is sufficient. *State v. Doss*, 110–713, 80 N. W. 1069.

When a witness has testified before the grand jury and the minutes of his testimony are properly presented and filed, he may on the trial be examined as to any and all matters within his knowledge bearing on the defendant's innocence or guilt. *State v. Perkins*, 143–55, 120 N. W. 62.

Indorsement of names: Witnesses whose names are not indorsed on the indictment may be called to give evidence in rebuttal. *State v. Whitnah*, 129–211, 105 N. W. 432.

The county attorney cannot call as witnesses those who gave testimony before the committing magistrate, minutes of which were presented to the grand jury and acted upon by them, unless the names of such witnesses are indorsed on the indictment. *State v. Hasty*, 121–507, 96 N. W. 1115.

A variance between the name of the witness as indorsed on the indictment and his true name is not a valid objection to an examination of the witness, unless defendant has been misled or prejudiced by the variation. *State v. Dale*, 109–97, 80 N. W. 208.

Notice: The fact that a witness states his occupation to be different from that named in the notice is not conclusive that the notice is not sufficient. *Ibid.*

Whether the state is entitled to examine the witness under the notice is a question for the court. *Ibid.*

A notice is sufficient which advises the defendant with reasonable certainty as to the person who is to be called as a witness against him. *State v. Mathews*, 133–398, 109 N. W. 616.

The notice in a particular case held not defective in failing to accurately describe the occupation of the witness named. *State v. McPherson*, 114–492, 87 N. W. 421.

Where the notice gave the name of the witness as "Lee Wood" and his occupation as that of a laborer, held that it was sufficient where it appeared that he commonly went by that name, although his real name was Ernest Lee Wood, and he was at the time confined in the county jail. *State v. Dunn*, 116–219, 89 N. W. 984.

Mistake in the notice as to the name or residence of the witness will not justify a reversal unless defendant has been prejudiced thereby. *State v. Harmann*, 135–167, 112 N. W. 632.

Where it affirmatively appears that the defendant has not been misled to his prejudice by an inaccuracy in the notice with reference to the name, place of residence or occupation of the witness, he is not entitled to a reversal because of defect in the notice. *State v. Anderson*, 125–501, 101 N. W. 201.

The fact that the matters of which the defendant was given notice appear to have occurred at another time and place from that stated in the notice is not a valid objection to the evidence. *State v. Trusty*, 122–82, 97 N. W. 989.

The court may allow witnesses to testify when notice that they will be introduced has been given a sufficient length of time before the commencement of the trial, even though in the meantime the prosecution may have moved for leave to introduce the evidence without such notice, and the defendant may have requested a continuance on that ground which has been refused. *State v. Snider*, 119–15, 91 N. W. 762.

The violation by the county attorney of an agreement not to use any testimony save that of which defendant was given notice may constitute a ground for continuing or postponing the case if other evidence is offered, even though such as might properly be received under statutory provisions. But on failure to ask such continuance or postponement, the defendant cannot on appeal complain of the admission of such evidence. *State v. McClain*, 130–73, 106 N. W. 376.

If on the case being called for trial the county attorney applies for postponement in order that he may give the necessary notice of the calling of witnesses whose names are not indorsed on the indictment, and the defendant then consents to the use of the witnesses without the giving of such notice, he cannot afterwards complain that the names of the witnesses were not indorsed. *State v. Arthur*, 135–48, 109 N. W. 1083.

The notice here contemplated may be given on Sunday. *State v. Ryan*, 113–536, 85 N. W. 812.

The examination need not be limited to the matters stated in the notice. It is sufficient if it directs the defendant's attention to such matters and enables him to produce such other witnesses as he may desire with reference to the same subject. *State v. Boomer*, 103–106, 72 N. W. 424.

To authorize service on the attorney of notice of the intention to call witnesses whose names are not indorsed on the indictment, it is not essential that the accused should have gone beyond the boundaries of the county. It is sufficient that the officer, after diligent search, has failed to find him. *State v. Hasty*, 121–507, 96 N. W. 1115.

It is not in itself misconduct for the prosecuting attorney to call a witness whose name is not indorsed on the indictment and as to whom no notice such as required by statute has been served, but he should not, after a ruling that the witness cannot be examined, continue to ask questions of the witness for the purpose of disclosing to the jury what he desires to prove by the testimony of such witness. *State v. Krug*, 136–231, 113 N. W. 822.

Sunday is not to be excluded in determining whether four days' notice has been given. *State v. Clark*, 145–731, 122 N. W. 957.

Where it is made to appear, on objection that the minutes of the testimony of a witness called for the prosecution are not returned with the indictment, that such witness did not testify before the grand jury in the finding of the indictment on which the defendant is being tried, notice properly given that the witness will be called is sufficient. *State v. Heft*, 155–21, 134 N. W. 950.

Where the notice is sufficient to enable the defendant to ascertain the identical person whom the state proposes to call as a witness and of the substance of the testimony of such witness, the defendant cannot complain of defects in such notice. *State v. Butler*, 157–163, 138 N. W. 383.

Where the return of service of the notice recited that it was served upon two defendants named by reading such notice to each of said defendants and delivering to them a true copy thereof, held that it sufficiently appeared that a copy was delivered to each. *State v. O'Brien*, 157– —, 138 N. W. 895.

Where the attention of the trial court is not called to a defect in the return of service of such notice, such defect cannot be urged as a ground for reversal on appeal. *Ibid.*

A material variation between the name of a witness as appearing by the minutes of his testimony before the grand jury and his name as indorsed on the back of the indictment will not be a ground for excluding his testimony. *Ibid.*

SEC. 5375. Separate trials.

Where the offense charged in an indictment is a misdemeanor, the matter of granting separate trials is within the discretion of the court. *State v. Jamison*, 110–337, 81 N. W. 594.

Where a felony is charged, each one of

joint defendants is entitled to a separate trial as an absolute right, and by exercising this right he can avail himself of the full number of peremptory challenges provided by law, but if a separate trial is not asked, the number of peremptory challenges is limited to the number allowed where only one defendant is on trial. *State v. Wolf*, 112–458, 84 N. W. 536.

SEC. 5376. Reasonable doubt.

Definition: Absolute certainty is not required and is rarely if ever possible in any case; but to justify a conviction, the evidence, when taken as a whole and fairly considered, must so satisfy the judgments and consciences of the jurors as to exclude every other reasonable conclusion. Certainty is seldom possible and never required, but the conclusion must be so certain as to exclude any other reasonable hypothesis. *State v. Marshall*, 105–38, 74 N. W. 763.

Not all the facts involved in the case, but only those essential to conviction, must be established beyond a reasonable doubt and be incompatible with any reasonable hypothesis of innocence. *State v. House*, 108–68, 78 N. W. 859.

It is not necessary that each essential fact in the chain of circumstances solely relied on to connect the accused with the commission of the offense, when separately considered, be found beyond reasonable doubt. Such a fact, though having little to sustain it when standing alone, may derive such support from others immediately connected therewith as to exclude all doubt of its existence. Nevertheless, if conviction depends entirely on different circumstances, arranged linkwise, connecting the defendant with the crime charged, then each and every one of these must be established beyond a reasonable doubt, for no chain can be stronger than its weakest link. *State v. Cohen*, 108–208, 78 N. W. 857.

It is not necessary that each of the essential facts in the case, standing isolated and alone, be proven beyond a reasonable doubt, nor that it be established by independent evidence. The material circumstances, when given their respective places in the sequence of events, may strengthen and support each other to such an extent that on a consideration of the whole case the jury may be convinced beyond a reasonable doubt of defendant's guilt. *State v. Hossack*, 116–194, 89 N. W. 1077.

The definition of reasonable doubt given in *State v. Ostrander*, 18–435, has been too often followed to be now disregarded. *State v. Willing*, 129–72, 105 N. W. 355.

It is not necessary that every circumstance shown in evidence by the state shall be proved beyond a reasonable doubt, but it is necessary that every fact which is essential to the conviction of the defendant must be so proved. *State v. Ottley*, 147–329, 126 N. W. 334.

Where the state relies on circumstantial evidence alone to secure conviction, it is the rule that every essential or material fact constituting the offense must be proven beyond a reasonable doubt. *State v. Harris*, 153–592, 133 N. W. 1078.

It is error to instruct that it is not necessary to find every essential fact of a crime charged to be proven beyond a reasonable doubt. *Ibid.*

Presumptions: The presumption of innocence is not to be treated as affirmative evidence in behalf of the defendant. *State v. Linhoff*, 121–632, 97 N. W. 77.

Questions of fact only: The statutory provisions relating to reasonable doubt are applicable only to the jury trying questions of fact. They have no relation to the decision of questions of law by the court. *Busse v. Barr*, 132–463, 109 N. W. 920.

Not applicable on appeal: The rule as to reasonable doubt is not applicable upon review by the supreme court of the sufficiency of the evidence to support a verdict. *State v. Pray*, 126–249, 99 N. W. 1065.

Instructions: The charge is to be taken as an entirety and it is not always necessary to explain the bearing of the doctrine of reasonable doubt in connection with each instruction. *State v. Heacock*, 106–191, 76 N. W. 654.

It is error to instruct the jury that a reasonable doubt is such a doubt as the jury are able to give a reason for. Such an instruction casts the burden of furnishing reasons for not finding guilt established upon the defendant, whereas it is upon the state to make out a case excluding all reasonable doubt. Besides, jurors are not bound to give reasons to others for the conclusion reached. *State v. Cohen*, 108–208, 78 N. W. 857.

It is not proper to instruct the jury that "a doubt, to justify an acquittal, must be reasonable" etc., as such an instruction is open to the interpretation that the jury starts out with the primary obligation to convict the accused unless some reasonable doubt arises to justify a verdict of not guilty. *State v. Phillips*, 118–660, 92 N. W. 876.

It is error to instruct that "a reasonable doubt does not mean a doubt from mere caprice or groundless conjecture, but it means a reasonable doubt, such as the jury are able to give a reason for." *State v. Lee*, 113–348, 85 N. W. 619.

It is not error in an instruction with reference to reasonable doubt to use such

expressions as "it must be shown beyond a reasonable doubt" or "it must appear beyond reasonable doubt" as the substitute for "it must be proven beyond a reasonable doubt." *State v. Crofford*, 133–478, 110 N. W. 921.

An instruction that "if, after a careful comparison of the evidence and a full consideration of the whole case, your minds are brought to an abiding conviction beyond a reasonable doubt," etc., is sufficient without making use of the words "to a moral certainty." *State v. Van Tassel*, 103–6, 72 N. W. 497.

It is not necessary to instruct the jury to the effect that so long as any one juror has a reasonable doubt of guilt there can be no conviction. *State v. Penney*, 113–691, 84 N. W. 509.

It is unnecessary to give an elaborate explanation of the meaning of the term "reasonable doubt." *State v. Mahoney*, 122–168, 97 N. W. 1089.

An instruction in which preponderance of evidence was referred to, held not prejudicially erroneous in view of specific instruction as to the necessity of finding the evidence sufficient beyond reasonable doubt. *State v. Rivers*, 124–17, 98 N. W. 785.

Where the jury is instructed as to quantum of evidence necessary to a conviction it is not essential that the words "beyond a reasonable doubt" be used in every instruction given with reference to a sufficiency of the evidence to sustain a conviction. *State v. Carpenter*, 124–5, 98 N. W. 775.

The court is not required to say in each instruction given as to the particular elements of the crime or facts tending to establish it, that they should be established beyond a reasonable doubt. The usual general instruction upon that subject is sufficient. *State v. Crouch*, 130–478, 107 N. W. 173.

While it is improper to refer to reasonable doubt as a doubt which will justify acquittal, because it throws the burden of proof in some sense upon the defendant, yet where the charge as a whole is so framed as to protect the accused in his legal rights, such an instruction will not necessitate a reversal. *State v. McCausland*, 137–354, 113 N. W. 852.

It is not error in an instruction as to reasonable doubt to fail to define "burden of proof" and "preponderance of evidence." *State v. Richardson*, 137–591, 115 N. W. 220.

It is error to instruct the jury that reasonable doubt as to one or more of the material allegations of the indictment being established will not require acquittal, if after full and fair consideration of the entire case the jury has no reasonable doubt as to defendant's guilt. *State v. Kimes*, 145–346, 124 N. W. 164.

An instruction that the state is not required to prove the defendant's guilt beyond all doubt,—that is, that absolute certainty is not required, moral certainty being all that the law demands, "such certainty as you would act upon in the graver and more important affairs of life," held not a ground for reversal. *State v. Krampe*, 140 N. W. 898; *State v. Lindsay*, 140 N. W. 903.

Instructions in particular cases as to reasonable doubt held not erroneous. *State v. Novak*, 109–717, 79 N. W. 465; *State v. Ryan*, 113–536, 85 N. W. 812.

Instructions in a particular case as to a reasonable doubt held sufficient. *State v. Hetland*, 141–524, 119 N. W. 961.

Burden of proof: As a general rule, when an offense is grounded on a negative, or when that negative is an essential element of the crime, the burden is on the state to prove it. Therefore, held that in a prosecution for the statutory offense of procuring an abortion the state should satisfy the jury beyond a reasonable doubt that the miscarriage was not necessary to save the life of the woman, the statutory description of the crime containing that exception. *State v. Aiken*, 109–643, 80 N. W. 1073.

Where there is evidence tending to show that the injury inflicted, charged as constituting a crime, was accidental, the jury should be instructed to take such evidence into account in determining whether a crime is established beyond a reasonable doubt. The burden of proving the accidental nature of the injury is not upon the defendant. *State v. Matheson*, 130–440, 103 N. W. 137.

Where there is evidence tending to show that the fatal shot was accidental, the jury should be instructed not to convict if on the whole case there is a reasonable doubt as to whether the shot was intentional. *State v. McCaskill*, 142 N. W. 445.

Burden of proof as to insanity: The fact that defendant relies on insanity as a defense does not relieve the state of the burden of proving the commission of the crime beyond a reasonable doubt. *State v. Robbins*, 109–650, 80 N. W. 1061.

Where the defendant, in a prosecution for murder, introduced evidence tending to show that he was rendered unconscious by the assault of the deceased and before fully recovering his consciousness inflicted the injury on the deceased resulting in his death, held that it was error to instruct that the evidence as to unconsciousness must be conclusive. *State v. Brandenberger*, 151–197, 130 N. W. 1065.

The defense of insanity must be proved by the defendant by a preponderance of the evidence; unless it be established by such preponderance it is not sufficient to raise a reasonable doubt. *Ibid.*

As to alibi: While, as a distinct issue, an alibi must be established by a preponderance of the evidence, yet if the evidence offered to show it falls short of this in weight, nevertheless such evidence is for the consideration of the jury, and if upon the whole case, including that part pertaining to the alibi, the jurors have a reasonable doubt of defendant's guilt, he should be acquitted. *State v. McGarry*, 111–709, 83 N. W. 718.

Even though the evidence as to alibi is not sufficient to establish that defense by a preponderance of the evidence, nevertheless the jury should be instructed to take such evidence into account in determining whether the guilt of the defendant is established beyond a reasonable doubt. *State v. Hogan*, 115–455, 88 N. W. 1074.

A specific instruction as to reasonable doubt which may be raised by testimony tending to show an alibi does not constitute error as tending to mislead the jury into a belief that only the reasonable doubt thus raised can be considered in determining whether defendant should be acquitted, there being proper instructions as to reasonable doubt in general. *State v. Pray*, 126–249, 99 N. W. 1065.

The court may advise the jury to scan with care and attention the evidence tending to establish an alibi. *State v. Worthen*, 124–408, 100 N. W. 330.

It is proper to instruct the jury to acquit if the evidence as to alibi raises a reasonable doubt of defendant's presence at the time and place of the commission of the crime charged. *State v. Thomas*, 135–717, 109 N. W. 900.

It is not error to charge the jury that the defense of alibi is not made out unless established by a preponderance of evidence, if they are also instructed that such evidence must be considered with other evidence in determining whether the defendant is guilty beyond a reasonable doubt. *State v. Whitbeck*, 145–29, 123 N. W. 982.

As to self-defense: The burden is on the state to show that defendant was not acting in self-defense, and this it must do by evidence sufficiently strong to remove reasonable doubt. *State v. Shea*, 104–724, 74 N. W. 687.

Self-defense is not an affirmative matter to be established by the defendant by a preponderance of the evidence, but it goes to the question of guilt and the evidence tending to show self-defense should be taken into consideration in determining whether there is reasonable doubt of the guilt of the defendant. *State v. Sharp*, 127–526, 103 N. W. 770.

In the instructions in a case where there is evidence tending to show self-defense, the court should not limit the jury to the consideration of such evidence as establishing the specific defense relied upon, but they should be so instructed as that they may take into account the evidence tending to show self-defense with all the other evidence in the case in determining whether there is reasonable doubt of defendant's guilt. *State v. Morris*, 128–717, 105 N. W. 213.

It is error to instruct the jury in such method as to justify the implication that the defendant has the burden of showing self-defense. *State v. Partipilo*, 139–474, 116 N. W. 1049.

Defendant's good character: It is always permissible for the defendant in a criminal action to show his general good character or reputation as to the trait involved in the charge against him. *State v. Heacock*, 106–191, 76 N. W. 654.

Proof of good character is admissible, not as showing a defense, but on the ground that one of such character and repute would not be likely to commit the offense charged. *State v. House*, 108–68, 78 N. W. 859.

The weight to be attached to proof of good character is for the jury. *Ibid.*

Evidence of good character should be considered together with the other evidence in the case, and it is error to limit the jury with respect to such evidence to determining whether or not the defendant was of good moral character and to direct that a finding of good character may be considered with reference to whether the witnesses who testified to facts tending to criminate defendant were mistaken or testified falsely. *State v. Wolf*, 112–458, 84 N. W. 536.

One accused of a criminal offense is permitted to prove his character and general reputation in the community of his residence with respect to the trait involved, but this rule does not permit him to go into details. *State v. Dexter*, 115–678, 87 N. W. 417.

An instruction as to the effect of impeaching evidence and limiting the effect of proof of general moral character to the credibility of the witness is not erroneous in failing to fully explain the effect of proof of good moral character with reference to defendant who is also a witness. *State v. Olds*, 106–110, 76 N. W. 644.

The state is not permitted to assail the general character of the defendant until it has been placed in issue and even then not by proof of particular instances of misconduct but only by evidence of the general reputation or actual character with respect to the trait involved. *State v. Thompson*, 127–440, 103 N. W. 377.

Where the defendant's character and reputation are put in issue, a witness's testimony to the effect that he knew what people said of defendant's general reputation for truth, honesty and morality in the neighborhood in which he lived, prior

to the commission of the crime, is admissible. *State v. Prins*, 117–505, 91 N. W. 758.

Proof of occasional visits to saloons or occasional drinking is not necessarily an impeachment of good moral character. *State v. Richards*, 126–497, 102 N. W. 439.

The real character of the defendant when his character has been put in issue may be shown as distinct from his reputation. *Ibid.*

Instruction as to evidence of good character in a particular case held correct. *State v. Cunningham*, 111–233, 82 N. W. 775.

While it is error to instruct that if defendant is found guilty good character furnishes no excuse, yet where the evidence of defendant's guilt is direct and he relies on self-defense, an instruction that good character should be considered in determining the question whether the witnesses for the prosecution might have been mistaken in their testimony was held not prejudicially erroneous. *State v. Krug*, 136–231, 113 N. W. 822.

While the good character of defendant may be shown, it is not competent to attempt to offset his confession of guilt by proof of good conduct in specific respects. *State v. Foster*, 136–527, 114 N. W. 36.

Good character does not constitute a defense. Evidence thereof is received in an ordinary case only as tending to give rise to a reasonable doubt in the minds of the jury as to defendant's guilt. *State v. Jones*, 145–176, 123 N. W. 960.

The defendant has the right to rely on the presumption of good character which always obtains in the absence of evidence to the contrary, and the jury has no right to take into consideration his omission to call witnesses to establish such character. An argument to the jury predicated on the failure to establish such good character is such misconduct as to warrant the granting of a new trial. *State v. Dudley*, 147–645, 126 N. W. 812.

In the absence of request for instructions in regard to the effect to be given evidence as to good character, failure to instruct on that subject will not constitute reversible error. *State v. Brandenberger*, 151–197, 130 N. W. 1065.

In rebutting evidence of good moral character offered by defendant, the state cannot introduce evidence as to particular transactions; but it is competent on cross-examination of a witness, who has testified as to the defendant's good moral character, to ask whether there have not been rumors or reports in the community as to his bad character with reference to particular transactions. *State v. Kimes*, 152–240, 132 N. W. 180.

It is not error to fail to instruct the jury as to the effect of evidence of the defendant's good character when no such instruction is asked. *State v. Poder*, 154–686, 135 N. W. 421.

It is not error to charge that evidence of the good character of the defendant may be considered for the purpose of rebutting the presumption of guilt arising from circumstantial evidence, provided it is also stated that such proof of good character may be considered in its bearing upon the whole case, notwithstanding the conclusive or inconclusive character of the testimony, and may be given such weight as the jury thinks it entitled to. *State v. O'Callaghan*, 157– —, 138 N. W. 402.

SEC. 5377. Reasonable doubt as to degree.

It is better in ordinary cases for the court to instruct the jury in the simple language of the statute that, where there is reasonable doubt of the degree of the offense, the defendant should be convicted only of the lower degree; but it is not necessarily erroneous to instruct that the jury must consider first the principal charge and if a verdict of guilty thereon be not found must proceed to the minor included offenses in the order of their gradation. *State v. Leuhrsman*, 123–476, 99 N. W. 140.

It is not error to instruct the jury that if they fail to find defendant guilty of the offense charged they shall then proceed to consider the question of his guilt of an included offense. *State v. McCausland*, 137–354, 113 N. W. 852.

There is no legal presumption of guilt at any stage of a criminal prosecution and the burden of proof remains with the state to the end. *State v. Heft*, 148–617, 127 N. W. 830.

The provisions of the statute as to finding the defendant guilty only of an included offense established beyond reasonable doubt if there is reasonable doubt as to the higher offense charged in the indictment, is not fully met by instructing as to each of such offenses that the defendant cannot be convicted unless guilt is established beyond a reasonable doubt. *Ibid.*

Instructions as to included offenses held not objectionable as not sufficiently indicating to the jury that there should be no conviction thereof in the absence of proof beyond a reasonable doubt. *State v Butler*, 157–163, 138 N. W. 383.

Under an indictment charging carnal knowledge and abuse of a female child under the age of consent, not alleging the use of force and violence in the perpetration of the offense, it is not necessary to instruct as to assault and battery. *Ibid.*

See also notes to code § 5406 in this supplement.

SEC. 5382. Separation of jury—before final submission.

It is error to allow the jury to separate during the trial where defendant asks in accordance with statutory provisions that the jury shall be kept together. *State v. Smith*, 102–656, 72 N. W. 279.

The authority to permit the jury to separate is granted to the court and not to the judge. *State v. Smith*, 107–480, 78 N. W. 224.

SEC. 5383. Admonition.

Although the jury is to be directed not to form or express an opinion until the case is finally submitted, nevertheless an inadvertent act of a juror, pending the trial, in telling a person not interested in the case what his conclusion is or will be does not necessarily require a setting aside of the verdict. *State v. Baughman*, 111–71, 82 N. W. 452.

The reading by jurors during the progress of the trial of newspapers containing reports of the trial and comments on the evidence is improper, even though the newspaper accounts are not in themselves unfair. *State v. Caine*, 134–147, 111 N. W. 443.

SEC. 5385. Law and fact.

The court has no power to instruct that an essential fact has been established, although all the evidence tends to prove such fact. *State v. Lightfoot*, 107–344, 78 N. W. 41. See also notes to next section.

SEC. 5386. Instructions.

Duty to instruct in general: It is error to present to the jury the facts as claimed by the state and also those testified to by the defendant, with the direction that the jury is to carefully consider these different claims and acquit if on the whole case they entertain a reasonable doubt of defendant's guilt. The objection is that the jury might be led to think that the primary issue is as to the matter of defense presented by the defendant. *State v. Vance*, 119–685, 94 N. W. 204.

It is error to call the attention of the jury to the fact that if the defendant is acquitted, the crime charged as against him, if committed, will go unpunished for the reason that the defendant cannot twice be put in jeopardy under the law. *State v. Hunter*, 118–686, 92 N. W. 872; *State v. Crofford*, 121–395, 96 N. W. 889.

It is not error to call the attention of the jury to its duty to the state and to the defendant. *State v. Wilson*, 124–264, 99 N. W. 1060.

It is not error to advise the jurors that the gravity or magnitude of the punishment prescribed by law for the offense charged should not be allowed to affect their judgment or determine their verdict. *State v. Baldes*, 133–158, 110 N. W. 440.

It is not necessarily error warranting a reversal in a prosecution for rape to fail to charge on request that the accusation is easily made, hard to prove, and harder to be defended against by the party accused, though ever so innocent. *State v. Trusty*, 122–82, 97 N. W. 989.

It is not necessary in the instructions to define words in common use, such as the word "felonious." *State v. Penney*, 113–691, 84 N. W. 509.

A conviction is not to be reversed because some expressions are found in the instructions which on critical examination are thought to be inaccurate, if no fundamentally prejudicial error is involved. *State v. McCausland*, 137–354, 113 N. W. 852.

After the jury has been in deliberation for a long time without agreement, the court may properly instruct as to the desirability of reaching an agreement and the proper method of consideration of the case for the purpose of doing so. *State v. Richardson*, 137–591, 115 N. W. 220.

It is not necessary for the court to enter upon a definition or explanation to the jury which is made up of men who are supposed to be of ordinary intelligence and understanding as to the meaning of the words used in charging an offense unless they have some special legal meaning. It is provided by statute (code § 5280) that the charge in the indictment shall be stated in ordinary language and in such manner as to enable a person of ordinary understanding to know what is meant. *State v. Bresee*, 137–673, 114 N. W. 45.

It is not error for the court to urge the jury to agree upon a verdict if it can be done. *State v. McGhuey*, 153–308, 133 N. W. 678.

In an instruction as to assault as an included crime, it is not necessary, at least in the absence of any request, to give a technical definition of assault. *State v. Baker*, 157– —, 135 N. W. 1097, 138 N. W. 841.

When the offense is statutory, the definition of the crime may be given in the exact words of the statute and it is not error to read to the jury the statute which

fixes the punishment. *State v. Wilson*, 141 N. W. 337.

Although the jurors have the power to acquit without regard to the instructions of the court, it is not erroneous to instruct them that they are not at liberty to convict or acquit at pleasure. *Ibid.*

Instructions not asked: An instruction need not be given on each specific phase of the case, unless requested. *State v. House*, 108–68, 78 N. W. 859.

It is not error to fail to call attention to a question arising on the evidence where no such instruction is asked. *State v. Seevers*, 108–738, 78 N. W. 705.

It is the right of a defendant charged with the commission of a crime to have the jury properly instructed, and that every essential part of the case should be covered by the instructions given. But if the instructions as given are correct, the defendant cannot complain if the jury is not specifically instructed as to a question arising under the evidence, where no instruction is asked. *State v. Hoot*, 120–238, 94 N. W. 564.

While it is the duty of the court in a criminal case to instruct as to the theory of the defense and as to material questions of law involved relating to such defense, although no instructions are asked for the defendant, it is not the duty of the court in the absence of instructions asked to refer to the effect of particular items of evidence introduced for the defendant. *State v. Jones*, 145–176, 123 N. W. 960.

It is the duty of the trial court, in a criminal case, to so instruct the jury as to fairly present the case in such a manner as that the jury may not be misled or fail to understand the real issues for its determination. But ordinarily it is the duty of defendant's counsel, even in a criminal case, to ask such instructions as he thinks should be given to cover the case as presented by the testimony. *State v. Manning*, 149–205, 128 N. W. 345.

While mere failure to instruct may constitute reversible error if it should be apparent that this failure resulted in depriving defendant of a fair trial, yet where the instructions given are correct as far as they go, the defendant should, if he desires further instructions, ask for them or he will not be heard to complain. *State v. Brandenberger*, 151–197, 130 N. W. 1065.

In the absence of request, failure to instruct as to evidence of good character does not constitute reversible error. *Ibid.*

In the absence of a specific request, it is not error to fail to instruct that the law presumes every man innocent until he is proven guilty, if the jury has been instructed that every material element of the crime charged must be proven beyond a reasonable doubt. *State v. Hayward*, 153–265, 133 N. W. 667.

On issue not presented: The jury should not be permitted to convict on an issue of fact not involved in the indictment and an instruction warranting such conviction is erroneous. *State v. Nine*, 105–131, 74 N. W. 945.

Not based on evidence: Where the evidence for the defendant in a prosecution for assault with intent to murder does not suggest that the assault was committed in self-defense, it is not necessary for the court to instruct the jury with reference to that subject. *State v. Yates*, 132–475, 109 N. W. 1005.

Limitation of action: It is error for the court to omit to instruct as to the necessity of showing the commission of the crime within the statutory period of limitation. *State v. Kunhi*, 119–461, 93 N. W. 342.

As to alibi: Evidence tending to show an alibi supports the plea of not guilty, and no specific instruction on the subject is necessary where none is asked. *State v. Judd*, 132–296, 109 N. W. 892.

It is not error to fail to instruct as to alibi where no such instruction is asked. *State v. Lightfoot*, 107–344, 78 N. W. 41.

Further as to alibi, see notes to code § 5376 in this supplement.

Instructions as to facts: It is error for the court to say that the evidence shows without contradiction that the crime charged has been committed, confining the jury to the determination of the question whether the crime charged was committed by defendant. *State v. Lightfoot*, 107–344, 78 N. W. 41.

The fact that witnesses testified to material matters and that there is no direct denial of such facts by other witnesses, does not justify the court in instructing that such matters are not in dispute. *State v. Austin*, 109–118, 80 N. W. 303.

It is error for the court to instruct that a certain fact which the evidence tends to show, if true, would be a strong circumstance indicating the guilt of the defendant. *State v. Kehr*, 133–35, 110 N. W. 149.

It is error to instruct the jury that from any particular state of facts a presumption of guilt arises. The question of guilt is to be determined by the jury on all facts. *State v. Poe*, 123–118, 98 N. W. 587.

It is not proper to charge that circumstances tending to show the guilt of defendant gave rise to a presumption of guilt which must be overcome by the defendant in order to entitle him to an acquittal. *State v. Brady*, 121–561, 97 N. W. 62.

It is error to tell the jury with reference to a material fact that the proof shows the fact beyond all controversy. The question as to whether a material fact is established by the evidence must be left to the jury, even though there is no conflict in the evidence as to such fact. *State v. Carter*, 112–15, 83 N. W. 715.

It is error to instruct the jury that as to essential elements of the crime there is no conflict in the evidence and leave the jury to find the defendant guilty without passing on such elements. *State v. Bige*, 112–433, 84 N. W. 518.

A court may in an instruction assume as true a particular evidential fact which is expressly admitted or is assumed or is treated as true by both parties, although such fact weighs against the defendant. *State v. McKnight*, 119–79, 93 N. W. 63.

It is not error to assume in the instructions the existence of a fact testified to by the defendant himself. *State v. Mitchell*, 130–697, 107 N. W. 804.

Where the question was whether defendant was intoxicated at the time of committing the act charged, held that an instruction to the jury that "there is some evidence tending to show that the defendant was to some extent under the influence of intoxicating liquor" was erroneous in that it tended to indicate to the jury the court's view as to the weight of such evidence. *State v. Dorland*, 103–168, 72 N. W. 492.

It is of the highest importance that the court should refrain from invasion of the province of the jury and avoid all expression of personal opinion concerning the truth of evidence offered on either side. *State v. Dobbins*, 152–632, 132 N. W. 805.

The trial court should refrain from an argumentative instruction as to evidence. *State v. Skaggs*, 153–381, 133 N. W. 779.

It is not error to assume and treat a particular evidential fact as true which the defendant admits to be true and as to which there is no controversy whatever. But the court cannot assume a fact as established simply because there is no evidence for the defendant to controvert the evidence relied upon by the prosecution to establish such fact. *State v. Anderson*, 154–701, 135 N. W. 405.

Motive of prosecution: It is error to instruct as to defendant's guilt with reference to the motives of the prosecution. *State v. Jackson*, 128–543, 105 N. W. 51.

Circumstantial evidence: In submitting a case depending entirely upon circumstantial evidence, the jury should have careful direction as to the quantum of proof necessary to justify a conviction. *State v. Brady*, 121–561, 97 N. W. 62.

Where the prosecution does not depend on proof of a chain of circumstances to establish defendant's guilt, it is not error to fail to charge that the jury should be satisfied beyond a reasonable doubt of each link in the chain of circumstances relied upon to establish defendant's guilt. *State v. Lucas*, 122–141, 97 N. W. 1003.

Confession: The court in instructing the jury with reference to a confession should explain the effect of the portion of the confession tending to exculpate the defendant as well as of that portion tending to incriminate him. *State v. Busse*, 127–318, 100 N. W. 536.

Presumption in favor of instructions: It is presumed in favor of the instructions that there was some occasion for giving them unless the contrary appears from the record. *State v. Leuhrsman*, 123–476, 99 N. W. 140.

In general as to instructions, see notes to code § 3705 in this supplement.

As to additional instructions after the jury has retired for deliberation, see notes to code § 5398 in this supplement.

As to instructions with reference to a lower degree or included offenses, see notes to code § 5406 in this supplement.

SEC. 5387. Deliberation of jury in charge of officer.

While the requirement that the officer placed in charge of the jury must be sworn is mandatory, yet the failure to administer an oath to him is not made a ground for new trial and does not in itself constitute such prejudicial error as to require the granting of a new trial. *State v. Foster*, 136–527, 114 N. W. 36.

SEC. 5389. Want of jurisdiction—no offense charged.

If evidence is introduced in behalf of the state and is in dispute, and there is some evidence tending to show venue in the county in which the indictment was found, it is not proper to discharge the jury and order the prisoner committed to await a warrant from another county, and if defendant is thereafter put on trial in such other county he may plead the dismissal of the prosecution in the first county as a former adjudication. *State v. Spayde*, 110–726, 80 N. W. 1058.

SEC. 5396. Defendant committed during trial.

It is discretionary with the court to order that a defendant who has been released on bail prior to the trial shall be committed to the custody of the sheriff to abide the judgment or further order of the court; and as there is no requirement that any record be made of the causes or reasons for such recommitment it must be assumed on appeal that there is proper ground therefor. The fact of recommitment pending trial cannot be made a ground for reversal of the conviction. *State v. Baker*, 146–612, 125 N. W. 659.

CHAPTER 25.

OF THE JURY AFTER SUBMISSION.

SECTION 5398. Additional instructions.

After the jury has been deliberating for some time without arriving at a verdict the court may properly call them in and instruct with reference to the desirability of a verdict and the necessity of abjuring pride of opinion, and of the proper manner of procedure in arriving at a verdict when a difference of opinion exists as to the facts. *State v. Tripp*, 113–698, 84 N. W. 546.

It is proper to allow the testimony of a witness to be read to the jury in open court at the request of the jurors. *State v. Hunt*, 112–509, 84 N. W. 525.

An additional instruction given to the jury pursuant to its request after retiring for deliberation, held proper. *Ibid.*

CHAPTER 26.

OF THE VERDICT.

SECTION 5403. Presence of defendant.

No legal right of the defendant is invaded by receiving the verdict and discharging the jury in the absence of defendant's counsel, if the defendant is present and no request is made for the presence of counsel. *State v. Criswell*, 148–254, 127 N. W. 65; *State v. McGhuey*, 153–308, 133 N. W. 678.

SEC. 5404. Verdict rendered.

A verdict for assault with intent to do great bodily injury is sufficient under an indictment charging assault with intent to inflict great bodily injury. *State v. Leuhrsman*, 123–476, 99 N. W. 140.

An error in the middle initial of the foreman signing the verdict is immaterial where it appears that the verdict was received by the court and there is nothing in the record to overcome the presumption of regularity. *State v. Moffit*, 155–702, 136 N. W. 908.

The insertion of a middle initial in the name of the foreman as signed to the verdict which is not found in his name as it appears in the jury list is immaterial, there being no question as to the real identity of the juror. *State v. Rogers*, 156–570, 137 N. W. 819.

SEC. 5405. General and special.

A verdict of guilty as charged is sufficient to sustain a sentence for the offense charged in the indictment, although it is of such character that the defendant might have been convicted of a lower degree or of an included crime as to which the jury has been fully instructed. *State v. Yates*, 132–475, 109 N. W. 1005.

A verdict of not guilty imports an acquittal on every material allegation in the indictment and is a bar to a subsequent prosecution for any act which might have been proved under the indictment on which the acquittal was secured. *State v. Price*, 127–301, 103 N. W. 195.

In a prosecution for uttering a forged instrument the responsibility of the accused for the falsity of the instrument is not involved and a verdict of not guilty will not prevent his subsequent prosecution for the forgery. *State v. Blodgett*, 143–578, 121 N. W. 685.

SEC. 5406. Finding an offense of different degree.

Instructions as to lower degrees and included offenses: It is not error to instruct the jury as to the crime charged of which under the evidence the defendant might be convicted, although in fact he is convicted of a lower degree of the crime. *State v. Jackson*, 103–702, 73 N. W. 467.

It is proper for the court to instruct the jury that in a case of reasonable doubt as to the defendant's guilt of the offense charged, he may be convicted of a lower degree of the offense or of any included crime. *State v. Leuhrsman*, 123–476, 99 N. W. 140.

Where under the evidence defendant is clearly guilty of the offense charged, or not guilty of any offense, it is not error to fail to give instructions with reference to in-

cluded offenses. *State v. Murphy*, 109–116, 80 N. W. 305; *State v. Stanley*, 109–142, 80 N. W. 228; *State v. Hoot*, 120–238, 94 N. W. 564; *State v. Atkins*, 122–161, 97 N. W. 996; *State v. Ralston*, 139–44, 116 N. W. 1058; *State v. Dean*, 148–566, 126 N. W. 692; *State v. Haywood*, 155–466, 136 N. W. 514.

To require an instruction as to an included offense there must be some evidence which would support a conviction for such offense. *State v. Penney*, 113–691, 84 N. W. 509; *State v. Bone*, 114–537, 87 N. W. 507.

Where one offense is necessarily included in that with which the defendant is charged, a conviction for the included offense will not be set aside on the ground that under the evidence the defendant must have been guilty of the offense charged if guilty in any degree. *State v. Barkley*, 129–484, 105 N. W. 506.

Error in an instruction as to the crime charged will not necessitate reversal if the defendant is convicted of an included crime, as to which there is no error. *State v. Morris*, 128–717, 105 N. W. 213.

It is not necessary to instruct as to an included crime for which there could not have been a conviction under the evidence. *State v. Beabout*, 100–155, 69 N. W. 429; *State v. Van Tassel*, 103–6, 72 N. W. 497.

It is not prejudicial error to submit to the jury an included offense of which the defendant could not be convicted under the indictment where the defendant is in fact convicted of the offense charged. *State v. Sheets*, 127–73, 102 N. W. 415.

Where the jury is instructed as to included offenses such offenses should be defined in the instructions. *State v. Thompson*, 127–440, 103 N. W. 377.

A defendant convicted of the offense charged under an indictment for breaking and entering a building in the nighttime with intent to commit larceny cannot complain that the court erroneously instructed as to breaking and entering in the daytime as an included offense. *State v. Neitzel*, 155–485, 136 N. W. 532.

In homicide cases: In a prosecution for murder, where it is a matter of inference only whether the homicide was premeditated and deliberate, or done in a moment of desperation or passion, it is proper to instruct as to murder in the second degree. *State v. Cunningham*, 111–233, 82 N. W. 775.

The provision requiring the jury to find as to the degree does not require that in a prosecution for murder in the first degree an instruction be given as to the second degree where the facts show that defendant is either guilty of the crime charged or is innocent of any offense. So held where the charge was of murder committed by poison. *State v. Smith*, 102–656, 72 N. W. 279; *State v. Bertoch*, 112–195, 83 N. W. 967.

It is not error in a prosecution for homicide to omit instructions as to assault with intent to inflict great bodily injury and assault and battery, where the record clearly shows that if defendant was guilty of any crime he was guilty at least of the crime of manslaughter. *State v. Walker*, 133–489, 110 N. W. 925.

While it is true that a defendant who has been tried on an indictment charging murder in the first degree and convicted of manslaughter only cannot be again tried for the offense of murder, it is not error when the defendant is put on trial a second time for manslaughter to read to the jury the original indictment charging murder. *Ibid.*

It is not error in a prosecution for murder committed by lying in wait or other wilful, deliberate or premeditated killing, to charge as to included crimes although the evidence shows that the defendant if guilty of any crime is guilty of the crime charged. *State v. Shepherd*, 129–705, 106 N. W. 190.

There may be a conviction of manslaughter on evidence of gross negligence and recklessness of the defendant causing the death of the deceased, under an indictment charging him with murder in which there is no specific allegation as to negligence or recklessness. *State v. Moore*, 129–514, 106 N. W. 16.

Where the defendant is convicted of manslaughter he cannot complain as to failure to instruct as to the included offense of assault, where it appears that if he was guilty of any crime he was guilty of the crime of which he was convicted. *State v. Dyer*, 147–217, 124 N. W. 629.

Where defendant was convicted of manslaughter for inflicting a wound resulting in death, held that there was no error in failing to instruct as to included offenses. *State v. Luther*, 150–158, 129 N. W. 801.

Under the facts of a particular case, held that the court properly instructed as to various forms of assault as constituting included offenses. *State v. Rankin*, 150–701, 130 N. W. 732.

It is not error to omit an instruction as to manslaughter in a prosecution for murder when there is no testimony tending to reduce the offense, if any, below the grade of murder. *State v. Brown*, 152–427, 132 N. W. 862.

In a prosecution for murder where the evidence showed without conflict that the blow inflicted by the defendant caused death, held that it was not error to refuse to instruct as to included assaults. *State v. Adams*, 155–660, 136 N. W. 1051.

In a prosecution for murder there is no occasion to instruct as to included assaults where the only question is as to whether the killing was accidental or intentional. *State v. Klute*, 140 N. W. 864.

In rape cases: Where defendant was charged with rape in having intercourse with a female under the age of consent, held that it was not necessary to instruct with reference to a simple assault in view of the fact that if there was any assault it was at least an assault with intent to commit rape. *State v. Sherman*, 106–684, 77 N. W. 461.

The crime of assault with intent to inflict great bodily injury is not necessarily included in that of rape. *State v. McDonough*, 104–6, 73 N. W. 357.

While an assault is necessarily included in rape, yet if it appears from the evidence without question that if there was an assault there was also an assault and battery it will not be error to fail to instruct with reference to assault when a proper instruction as to assault and battery is given. *Ibid.*

There may be assault with intent to commit rape without an assault and battery. If the indictment does not charge the assault as accompanied with force it is error to instruct with reference to assault and battery as an included offense. *State v. Desmond*, 109–72, 80 N. W. 214.

Where an indictment for rape charges that defendant wilfully and feloniously assaulted the prosecutrix, and did wilfully and feloniously ravish and carnally know her, it is error to fail to charge the jury with reference to assault and battery and simple battery. *State v. Wolf*, 112–458, 84 N. W. 536.

In a prosecution for rape where there is evidence tending to show want of consent, the court should instruct as to assault with intent to commit rape, assault and battery and simple assault. *State v. Trusty*, 118–498, 92 N. W. 677.

Under a prosecution for assault with intent to commit rape it is not error to fail to instruct as to assault and battery as an included crime where the evidence would not justify a finding that an assault or battery was intended or committed. *State v. Snider*, 119–15, 91 N. W. 762.

In the prosecution for assault with intent to commit rape in which no battery is charged, an erroneous instruction as to assault and battery as an included crime will be error without prejudice if the defendant is convicted of the crime charged. *State v. Miller*, 124–429, 100 N. W. 334.

In a prosecution for rape alleged to have been committed with force and violence, if the evidence tends to show violence, the jury should be instructed with reference to assault and battery as an included crime. *State v. Egbert*, 125–443, 101 N. W. 191.

In a prosecution for rape under an indictment charging acts which would constitute an assault and battery, it is error to fail to charge with reference to such an included offense, although the jury has been instructed with reference to an assault. *State v. Barkley*, 129–484, 105 N. W. 506.

In a prosecution for rape it is not necessary to instruct with reference to assault and battery as an included crime where the allegations of the indictment charge nothing more than assault with intent and the commission of the offense. *State v. Johnson*, 133–38, 110 N. W. 170.

In a prosecution for rape, committed by having connection with a female under the age of consent, the court may properly omit any reference to any other included crime than that of assault with intent to commit rape, there being no evidence that the connection was without the consent of the female. *State v. King*, 117–484, 91 N. W. 768.

In a prosecution for rape in having connection with a female under the age of consent, the evidence showing no other force than that involved in the perpetration of the act, held that it was not error to fail to instruct as to assault or assault and battery. *State v. Stevens*, 133–684, 110 N. W. 1037.

In a prosecution for rape on a female under the age of consent, it appearing without conflict in the evidence that the act was voluntarily submitted to on her part, there is no occasion to instruct as to assault with intent to commit rape or other forms of assault. *State v. Herrington*, 147–636, 126 N. W. 772.

The defendant cannot complain on conviction of assault with intent to commit rape, that the court has instructed as to such included crime in a prosecution for the completed crime, although under the evidence the defendant is guilty of the completed crime if guilty of any offense. *State v. Haugh*, 156–639, 137 N. W. 917.

Further as to included crimes in prosecutions for rape, see notes to code § 4756 in this supplement.

In robbery cases: In a prosecution for robbery the court should instruct as to assault with intent to rob if there is any evidence of an assault. *State v. Duffy*, 124–705, 100 N. W. 796.

SEC. 5407. Included offenses.

Where the included offenses are not degrees of the crime charged, but are distinct, failure to give instructions as to included crimes is not necessarily prejudicial error in the absence of a request for such instructions from defendant. *State v. Murphy*, 109–116, 80 N. W. 305.

On reversal of a conviction for manslaughter under an indictment charging murder in the first degree, the defendant can only again be put on trial for the offense of which he was convicted, and he is only entitled to the number of peremptory challenges allowed in case of a prose-

cution for such offense. *State v. Smith*, 132–645, 109 N. W. 115.

Under charge of the commission of a crime, there may be a conviction of an attempt. *State v. Mahoney*, 122–168, 97 N. W. 1089.

Ordinarily, an assault with intent to commit great bodily injury is not included in a charge of an assault with intent to commit rape. *State v. Novak*, 151–536, 132 N. W. 26.

As to instructions with reference to included offenses, see notes to preceding section.

CHAPTER 27.

OF EXCEPTIONS.

SECTION 5415. As to what.

An exception is authorized in a criminal case as to any action or decision of the court which affects a material or substantial right of the party, whether such action or decision was made before or after the trial. Therefore, held that a statement of the court in its decision overruling a motion for a new trial was properly embodied in the bill of exceptions. *State v. Taylor*, 103–22, 72 N. W. 417.

Error in an instruction which has been called to the court's attention by motion for a new trial may be reviewed on appeal, although the instruction was not excepted to. *State v. Hamann*, 109–646, 80 N. W. 1064.

SEC. 5418. Taking exceptions.

There is no provision for a judge to change a bill of exceptions as offered for his signature to conform to his view of the facts; nor can he, by addenda to the bill of exceptions, incorporate other matter into the record. *State v. Smith*, 107–480, 78 N. W. 224.

A bill of exceptions signed by bystanders may be filed within the time allowed by statute or by order of court for filing bill of exceptions. *State v. Taylor*, 103–22, 72 N. W. 417.

It is not competent to contradict by a bill of exceptions signed by bystanders the recital of the bill of exceptions as to the same matter signed by the judge. *State v. Tripp*, 113–698, 84 N. W. 546.

Misconduct of attorney as a ground for reversal on appeal cannot be shown by affidavits, even though they are embodied in the bill of exceptions, but must be made to appear by recital of the bill of exceptions itself. Although such affidavits may be made part of the record, they do not become competent evidence to prove the fact. *State v. Burton*, 103–28, 72 N. W. 413.

Misconduct of counsel in addressing the jury must be shown by bill of exceptions. *State v. Kilduff*, 141 N. W. 962.

Rulings of the court as to the admission of evidence not excepted to by the defendant will not be considered on appeal. *State v. Finley*, 147–563, 126 N. W. 699.

CHAPTER 28.

OF NEW TRIAL.

SECTION 5424. Causes for.

As in civil cases: The rules recognized as to new trials in civil cases are applicable in criminal cases, although on some grounds the courts will set aside verdicts more readily in criminal than in civil cases. *State v. Olds*, 106–110, 76 N. W. 644.

No such procedure as an application by petition for a new trial after judgment is recognized in criminal cases. *State v. Hayden*, 131–1, 107 N. W. 929.

Error or misconduct of judge: Under the facts of a particular case, held that it was not such misconduct as to require a new trial that the judge, in addressing the prosecuting witness, spoke to her as "my girl," such form of address not necessarily indicating any sympathy with or immaturity on the part of the prosecuting witness. *State v. Burns*, 119–663, 94 N. W. 238.

It is error such as to necessitate a new trial for the court to refer to the effect of an acquittal as preventing another trial and allowing the defendant, if guilty, to

escape punishment. *State v. Hunter*, 118–686, 92 N. W. 872.

Absence of the judge from the court room held not to be ground for new trial where it appeared that the absence was during the argument of defendant's counsel and that the judge was not out of hearing of counsel at the time and heard all that was said. *State v. Porter*, 105–677, 75 N. W. 519.

The fact that the judge is during the argument out of hearing and is not presiding over the proceedings will be a ground for reversal. *State v. Carnagy*, 106–483, 76 N. W. 805.

While the absence of the judge from the court room during the trial may be ground of reversal, yet, where the defendant has consented thereto, he cannot afterwards complain if he might have secured the presence of the judge at any time, and shows no prejudice resulting to him from his absence. *State v. Hammer*, 116–284, 89 N. W. 1083.

It is not sufficient as a ground for new trial that the judge was in an adjoining room dictating instructions during the argument to the jury, if he was in such position as to hear the argument and see what took place in the court room. *State v. Burns*, 119–663, 94 N. W. 238.

It is not improper for the court to remind a witness that he is under oath and must tell the truth and the whole truth, providing it appears to the court that the witness is reluctant to do so and is attempting to evade answers to proper questions. *State v. Poder*, 154–686, 135 N. W. 421.

It is improper for the court in response to an inquiry of the jury to give assurance that a recommendation of clemency will be considered. *State v. Kernan*, 154–672, 135 N. W. 362.

It is not error for the court in response to an argument by defendant's attorney that, on conviction, the court will sentence the defendant to the extreme limit of the punishment provided for, to say to the jury that such matter should not be considered. *State v. McGhuey*, 153–308, 133 N. W. 678.

Misconduct of jurors: Where the juror makes false answers as to having previously formed or expressed an opinion, and is shown to have been prejudiced against the defendant, a new trial may properly be granted. *State v. Wright*, 112–436, 84 N. W. 541.

The action of the members of the jury during the progress of the trial in reading newspaper accounts of the evidence with comments thereon, is sufficient to authorize the granting of a new trial, although the newspaper accounts are not unfair to the defendant. *State v. Caine*, 134–147, 111 N. W. 443.

The consideration by the jury during their deliberations of the fact that defendant, if convicted, might have an appeal, does not constitute such misconduct as to require a reversal. *State v. Lucas*, 122–141, 97 N. W. 1003.

Misconduct of the jury cannot be established by affidavits of attorneys based entirely upon alleged statements of jurors. *State v. Tyler*, 122–125, 97 N. W. 983.

An affidavit for new trial on account of misconduct of a juror is not sufficient where it does not disclose the name of the juror or give any reason for not doing so in order that the prosecution may be able to controvert the showing. *State v. Foster*, 136–527, 114 N. W. 36.

To throw upon the state the burden of an explanation of alleged misconduct, the showing must be such as to indicate prejudice to the party complaining. *Ibid.*

An improper statement made by one juror to another after the verdict has been agreed upon but before its final rendition does not require the granting of a new trial. *State v. Baker*, 157– —, 135 N. W. 1097, 138 N. W. 841.

The action of the bailiff in improperly communicating with jurors in violation of his oath will not be ground for new trial where it appears that the communication did not relate to the merits of the case and was not prejudicial. *State v. Lindsay*, 140 N. W. 903.

Disqualification of juror: The objection that one of the jurors could not read or write the English language and that such fact was not known to the party complaining until after the trial will not be a ground for new trial where it appears that the complaining party, having been given the right to challenge, failed to claim such right as to such juror and made no examination of the juror as to his competency. In such case the objection will be deemed to have been waived. (Overruling *State v. Groome*, 10–308.) *State v. Pickett*, 103–714, 73 N. W. 346.

Where no examination of a juror is made before he is accepted, and it does not appear that his disqualification was not known to the defendant at that time, the right to object to the juror as disqualified is waived. *State v. Burke*, 107–659, 78 N. W. 677.

To take advantage of the disqualification of a juror after verdict, it is incumbent on the party complaining to show affirmatively that neither he nor his counsel had knowledge thereof before the juror was sworn. *State v. Bussamus*, 108–11, 78 N. W. 700; *State v. Moats*, 108–13, 78 N. W. 701.

Where the juror gives false answers as to his having formed or expressed an opinion and is shown to have been prejudiced, the defendant is entitled to a new trial. *State v. Wright*, 112–436, 84 N. W. 541.

A showing that one of the jurors who has testified that he had not heard of the case

nor formed or expressed an opinion with reference thereto, had in fact been present when the statements were made as to the commission of the crime, held not sufficient to entitle the defendant to a new trial. *State v. Geier*, 111–706, 83 N. W. 718.

Where the fact as to supposed prejudice of a juror, not discovered before the impaneling of the jury, comes to the knowledge of the defendant during the progress of the trial, objection on that ground should then be taken. The defendant cannot speculate upon the result of the trial and if unsuccessful raise the objection first in a motion for a new trial or on appeal. *State v. Baker*, 157– —, 135 N. W. 1097, 138 N. W. 841.

Misconduct of counsel: Where defendant makes no complaint at the time as to improper remarks of counsel, and asks no direction to the jury for the purpose of removing prejudice arising therefrom, he cannot afterward complain. *State v. Hogan*, 115–455, 88 N. W. 1074.

It is error in closing the case for the prosecution to state facts derogatory to the defendant which do not appear in evidence. *State v. Williams*, 122–115, 97 N. W. 992.

The mere statement of deductions from the evidence and conclusions as to what the conduct of a party might properly be in the future do not constitute such misconduct as to require a new trial. *State v. Hasty*, 121–507, 96 N. W. 1115.

It does not constitute misconduct on the part of the prosecuting attorney in opening the case to the jury, where the defendant whose conviction for murder has been reversed on appeal is put on trial for manslaughter, to state to the jury that in his opinion the evidence would sustain a conviction of the higher offense. *State v. Walker*, 133–489, 110 N. W. 925.

The assertions of counsel as to a fact will not constitute misconduct if counsel does not purport to speak from other knowledge than that afforded by the evidence. *State v. Bricker*, 135–343, 112 N. W. 645.

While the prosecuting attorney has no right to misrepresent or misstate the facts, he is not required to forego all the embellishments of oratory or leave uncultivated the fertile field of fancy. *State v. Burns*, 119–663, 94 N. W. 238.

It is not every indulgence in lurid argument on the part of counsel which will afford ground for granting a new trial. Beyond insisting that counsel must keep fairly within the record and abstain from inflammatory appeals to passion and prejudice, the court will not attempt to control the manner and method of argument to the jury. *State v. Drake*, 128–539, 105 N. W. 54.

Misconduct of the county attorney in argument to a jury alleged as consisting of the exhibition before the jury of a revolver by way of illustration, held not sufficient to require a new trial, although the revolver was not introduced in evidence as the one found in possession of defendant when arrested. *State v. Brafford*, 121–115, 96 N. W. 710.

It is improper for counsel for the prosecution to give countenance to violence or to inflame the passions of the jury. *State v. Harmann*, 135–167, 112 N. W. 632.

It is improper for the prosecuting attorney to suggest to the jury the possibility of a lynching in case they should acquit. *State v. Busse*, 127–318, 100 N. W. 536.

Severe criticism by the prosecuting attorney of witnesses for the defense will not be a ground for new trial where it appears that as a whole the trial has been fair and impartial. *State v. Nowells*, 135–53, 109 N. W. 1016.

Repeated attempts to get before the minds of the jury a fact which cannot properly be introduced in evidence, the purpose being to prejudice the minds of the jury against the defendant, may be sufficient misconduct on the part of the prosecuting attorney to require the granting of a new trial in case of conviction. *State v. Roscum*, 119–330, 93 N. W. 295.

It may constitute misconduct to ask improper questions on examination of a witness, although objections to the questions are sustained; but whether such misconduct works prejudice to the defendant is a matter peculiarly within the knowledge of the trial court, and its refusal to grant a new trial on that ground will not generally be interfered with. *State v. Waterbury*, 133–135, 110 N. W. 328.

Where the identity of the defendant as the person charged with the crime is in controversy, it is not improper for the prosecuting attorney to refer to the characteristics of the defendant's countenance. *Ibid.*

It is such misconduct as may require a new trial that the prosecution after adverse rulings of the court on the question insists on asking a witness as to a fact which is wholly inadmissible with the evident purpose of bringing that fact to the attention of the jury. *State v. Blydenburg*, 135–264, 112 N. W. 634.

Publication in newspapers during the course of the trial of documents secured from the prosecuting attorney, held not to necessitate a new trial, there being no indication of bad faith on the part of the prosecuting attorney and no showing that the publication was in any way brought to the attention of the jury. *State v. Walker*, 133–489, 110 N. W. 925.

Where an improper statement of counsel is at once withdrawn and the jury directed to give it no consideration, the action of a trial court in overruling a motion for a new trial on account of such improper statement will not in general be reversed

on appeal. *State v. Mathews*, 133–398, 109 N. W. 616.

Improper argument made use of by the prosecuting attorney cannot first be made the ground of objection on motion for new trial, but should be called to the attention of the court at the time, when the court might have restrained the continuance of the improper argument and prevented the prejudice which is claimed to have resulted therefrom. *State v. Sale*, 119–1, 92 N. W. 680, 95 N. W. 193.

In the absence of bad faith or a showing of prejudice, the action of the trial court in overruling a motion for new trial on account of misconduct of the prosecuting attorney in asking improper questions will not be reversed on appeal where it appears that the trial judge ruled promptly and correctly when objections were made and at the request of the defendant instructed the prosecuting attorney to abandon objectionable lines of examination, which instructions of the court were obeyed by the attorney. *State v. Greenland*, 125–141, 100 N. W. 341.

An assertion by the prosecuting attorney that the defendant is guilty of the crime charged does not constitute misconduct requiring new trial, where it does not appear that the attorney pretended to speak of his own knowledge or otherwise than as the result of his belief based upon the evidence. *State v. Norman*, 135–483, 113 N. W. 340.

In a particular case held that the argument of the prosecuting attorney to the jury, although it appeared to have been to some extent improper, was not such as to require the supreme court on appeal to reverse the conviction. *State v. Junkins*, 147–588, 126 N. W. 689.

It is only when misconduct of the county attorney in argument is such as to indicate, under the record, improper considerations being presented to the jury which, in view of the record, were likely to influence their action that a new trial on the ground of such misconduct will be granted. *State v. Leek*, 152–12, 130 N. W. 1062.

The matter of granting a new trial on account of improper argument of counsel is largely within the discretion of the trial court. *State v. Johns*, 152–383, 132 N. W. 832.

Under a general allegation of "illegal conduct and statements by the county attorney in his closing argument" as ground for a new trial, held that the objection of improper reference by the county attorney to the failure of the defendant to testify was not sufficiently raised. *State v. Kimes*, 152–240, 132 N. W. 180.

An attorney ought not to be permitted to get a matter before the jury in an opening statement which he must know he will not be allowed to prove. Nor ought an attorney in his closing argument to be permitted to assert a matter of importance without any foundation whatever in the evidence. *State v. Nathoo*, 152–665, 133 N. W. 129.

A misstatement of the record by the county attorney will not necessarily be ground for new trial where the evidence is not complicated and it must be apparent to the jury whether or not the record has been properly stated. *State v. Hayward*, 153–265, 133 N. W. 667.

Where no objection appears to have been interposed to argument of counsel for the state during the trial, such objection cannot be made on appeal. *State v. Chocklett*, 155–511, 136 N. W. 534.

Although the county attorney has no occasion to inform the jury as to his own conclusions with reference to the guilt of the defendant, it does not constitute a ground for a new trial if he does so, nor if he urges the jury to prevent the commission of similar offenses by the defendant or others by finding the defendant guilty. *State v. Haugh*, 156–639, 137 N. W. 917.

As the examination of witnesses and conduct of the trial is largely for the trial court to determine, its conclusion that the defendant has not been prejudiced by the misconduct of the county attorney of which complaint is made on appeal will not be interfered with unless the court's discretion has been abused. *State v. McClure*, 140 N. W. 203.

It is to be presumed that the jury has obeyed the direction of the court to disregard improper statements of the county attorney. *Ibid.*

Any prejudice that might have resulted from improper argument of counsel, held in a particular case to have been obviated by the admonition of the court not to consider such statements. *State v. Norman*, 140 N. W. 815.

Counsel are not held to the utmost strictness in their opening statements to the jury, but good faith is required. *State v. Clark*, 140 N. W. 821.

Some latitude must be given to counsel in the opening statement and if want of good faith does not appear, the court will not set aside the verdict on that ground. *State v. Klute*, 140 N. W. 864.

It is too late to except to arguments of counsel in a motion for new trial. *State v. Wilson*, 141 N. W. 337.

While counsel should confine their arguments to the record, inferences of fact from facts and circumstances actually shown are permissible and unless such right is abused or it is shown that the prosecuting attorney has acted in bad faith or has intentionally violated the rules applicable to argument to the prejudice of the defendant, the supreme court will not interfere on appeal. *Ibid.*

Mere misconduct of counsel is not enough to require the granting of a new trial unless it appears to have been so prejudicial as to deprive the complaining party of a

fair hearing; and the reasonable discretion of the trial judge who saw and heard all that took place at the trial in refusing a new trial will not be interfered with on appeal. *Ibid.*

Error in admission of evidence: In general, error in the admission of improper evidence may be cured by its withdrawal from the jury and by proper instructions in relation thereto. *State v. Booth*, 121–710, 97 N. W. 74.

Where incompetent evidence has been received, its subsequent withdrawal or exclusion by the court will ordinarily cure the error. But held that error in admitting evidence tending to show defendant guilty of other criminal acts, having no connection with the crime charged, was such error as could not be cured by withdrawing it from the consideration of the jury. *State v. Brundige*, 118–92, 91 N. W. 920.

Verdict against evidence: The rule with reference to granting new trials for want of evidence in criminal cases is different from that applied in civil. The supreme court, though proceeding carefully and cautiously, will not support a verdict if it be against the clear weight of the evidence. *State v. Reinheimer*, 109–624, 80 N. W. 669.

Insufficiency of the evidence is a ground for a new trial, but it cannot be relied on as a ground for motion in arrest of judgment unless preserved by a bill of exceptions. *State v. Young*, 153–4, 132 N. W. 813.

Witness not sworn: Where one of the material witnesses for the prosecution was not sworn and the fact was not discovered until after the verdict, held that the defendant was entitled to a new trial. *State v. Lugar*, 115–268, 88 N. W. 333.

Fair trial: Where on an application for a new trial there was a showing of excitement and manifestation of prejudice on the part of those present in the court room, but it did not appear that there was any failure of the trial judge to discharge his full duty under the circumstances, held that it was not error to refuse to grant a new trial on that ground. *State v. Thomas*, 135–717, 109 N. W. 900.

The fact that a third person asks a juror pending the trial whether he knows that he is related to the defendant, and then advises him of such relationship, does not constitute a ground for a new trial. *State v. Hasty*, 121–507, 96 N. W. 1115.

Newly discovered evidence is not a statutory ground for a new trial in a criminal case. *State v. Watson*, 102–651, 72 N. W. 283.

Newly discovered evidence is not in itself sufficient to warrant a new trial. *State v. Reinheimer*, 109–624, 80 N. W. 669.

Affidavits of newly discovered evidence do not necessarily entitle the defendant to a new trial. *State v. Baughman*, 111–71, 82 N. W. 452.

In a particular case, held that the court did not abuse its discretion in refusing to grant a new trial on the ground of newly discovered evidence. *State v. Seevers*, 108–738, 78 N. W. 705.

Newly discovered evidence impeaching in character and on a collateral matter will not be ground for granting a new trial, especially where it is not such as to indicate that a different result might be anticipated on another trial. *State v. Leuth*, 128–189, 103 N. W. 345.

In a criminal case newly discovered evidence is not a ground for new trial although a new trial may be granted on that ground in a proper case in the exercise of the court's discretion in the interest of justice. *State v. Pell*, 140–655, 119 N. W. 154.

In general as to grounds for new trial in both civil and criminal cases, see notes to code § 3755 in this supplement.

SEC. 5425. Application—when made.

After the entry of judgment and the taking of an appeal an amendment to the motion for new trial is too late and should be overruled. *State v. Dudley*, 147–645, 126 N. W. 812.

CHAPTER 29.

OF ARREST OF JUDGMENT.

SECTION 5426. Grounds of.

The objection that a defendant, whose case was resubmitted to another grand jury than the one to which it was first submitted, did not have opportunity to challenge the grand jurors who returned the indictment on which he was tried must be raised by a motion to set aside the indictment or by plea in abatement, and is not available on motion in arrest of judgment. *State v. Brown*, 128–24, 102 N. W. 799.

Insufficiency of the evidence is not a ground for demurrer, nor can it be relied

on in a motion in arrest of judgment unless preserved by a bill of exceptions for the purposes of appeal. *State v. Young*, 153–4, 132 N. W. 813.

A motion in arrest of judgment not stating any sufficient ground of demurrer, held to be properly overruled so far as it raised the objection that defendant's demurrer to the indictment had not been ruled on prior to the trial and verdict. *State v. Heft*, 155–21, 134 N. W. 950.

CHAPTER 30.

OF JUDGMENT.

SECTION 5431. Of conviction—time for.

As applied to a criminal case, a judgment is the formal and final pronouncement of the court by which the prosecution is brought to an end, leaving nothing to be done except to carry such judgment into execution in case there has been a conviction. *State v. Hortman*, 122–104, 97 N. W. 981.

Where it does not appear that the court continued in session for three days after the return of the verdict, there cannot be a reversal of a sentence because three days were not allowed to elapse. *State v. Roan*, 122–136, 97 N. W. 997.

The fact that sentence is imposed without previously fixing a time therefor does not constitute error such as to require a reversal where it appears that the defendant has taken every step which would have been open to him had the time been fixed. *State v. Usher*, 136–606, 111 N. W. 811.

The sentence of the court is evidenced only by the record, and after the sentence as imposed has been fully satisfied, it cannot be corrected by *nunc pro tunc* order so as to show the imposition of a fine in addition to the imprisonment to which the defendant was sentenced. *Smith v. District Court*, 132–603, 109 N. W. 1085.

After the pronouncement of judgment by the court it is too late to withdraw a plea of guilty under the provision of code § 5337, although the judgment has not yet been entered of record. *Beatty v. Roberts*, 125–619, 101 N. W. 462.

SEC. **5442-a. Commitment of females to certain institutions.** In all cases in which any court, for the violation of any law, ordinance or police regulation, has power to commit the accused to a county, city or town jail, such court, in lieu of ordering the accused committed to such jail, shall have power to order the accused, if a female, committed to any institution as herein provided, which is situated within the judicial district, within any part of which such court has jurisdiction, provided such institution is willing to receive the accused under such commitment without expense to the state. No female shall be so committed for a time longer than would be legal if committed to a jail. If the court has already committed such female to a jail and thereafter it appears that any such institution is willing to receive such female under a commitment, and under the conditions herein imposed, then, in such case, the court shall have power to make an additional order, releasing such female from such jail and ordering her committed to such institution for the unexpired time of the original commitment. Any such female may be surrendered at any time to the court, judge or presiding magistrate making the original order, which court, judge or magistrate may make a further order committing the accused to a proper jail for the unexpired term of the original commitment. [34 G. A., ch. 187, § 1.]

SEC. **5442-b. Release on bond.** If, after any female is so committed to such institution, a bond is given under which such female is entitled to a release from such commitment, then such female shall be released by an order issued by the officer approving said bond. [34 G. A., ch. 187, § 2.]

SEC. **5442-c. Custody and control—labor—"institution" defined.** Any female committed to an institution as herein provided shall be in the legal custody and control of the person residing therein, and who is the immediate managing head of said institution, and such female, whether the commitment so provides or not, shall, while being held under such commitment, do and perform such reasonable, fit and proper labor as such managing head may direct, which labor shall be the sole compensation to such institution for the keep of such female. The term "institution" as herein used shall embrace any institution, society, association, corporation or organization having for its objects, in whole or in part, the furnishing of relief, care and assistance to the poor, dissolute, needy or unfortunate, or any other charitable or benevolent object. [34 G. A., ch. 187, § 3.]

SEC. **5442-d. Visitation by board of control.** Any institution having any such female in its custody shall be subject to visitation by the board of control, its members or agents, which may require such information from such institution as the said board shall deem necessary, in order to enable it to exercise proper supervision. Should the said board at any time deem any such institution unfit to have the custody of any such female, it shall notify such institution through said managing head, whereupon all such females then in custody of such institution shall be at once surrendered to the court, judge or presiding magistrate, making the original commitment. [34 G. A., ch. 187, § 4.]

CHAPTER 31.

OF EXECUTION.

SECTION **5443. Copy of judgment.**

The court has no power to suspend sentence after it is pronounced. *Miller v. Evans*, 115–101, 88 N. W. 198.

Therefore, a defendant who, after sentence of imprisonment, has been allowed by the officer to remain at large until the expiration of the term of imprisonment fixed by the sentence can still be committed to serve out the term. The time at which the sentence is to be carried out is ordinarily directory only, and forms no part of the judgment of the court. *Ibid.*

SEC. **5447-a. Suspension of execution of sentence—guardianship—reports—pardon.** That whenever any person over the age of sixteen years, and under the age of twenty-five years, shall be convicted of any crime against the laws of this state, excepting treason, murder, rape, robbery and arson, if such conviction shall be the first conviction of the defendant for a felony, the trial judge before whom such conviction is had, and by whom the judgment of the court is pronounced, shall have the power to suspend the execution of the sentence of such person so convicted and place such person in custody and under the care and guardianship of any suitable person a resident and citizen of the state of Iowa, during good behavior of such person so convicted, and the judge so exercising this power of suspension of the execution of sentence shall enter same upon the calendar and cause the same to be journalized and made of record in the court in which such conviction is had, and the person having such custody, care and guardianship of the person, the execution of whose sentence has been suspended, shall make a full and complete report every thirty days, in writing, to the district court wherein such conviction was

had, showing the whereabouts and conduct of the person thus placed in his care, custody and guardianship. Such person, however, may be pardoned by the governor at any time after the suspension of execution of the sentence pronounced against him upon such conditions and with such restrictions and limitations as he may think proper. [35 G. A., ch. 314, § 1; 34 G. A., ch. 184, § 1.]

SEC. **5447-b. Revocation.** That after any such suspension of the execution of sentence shall have been granted the same may be revoked by the district court wherein such conviction was had or any judge thereof without notice, and the defendant committed in obedience to such judgment. [34 G. A., ch. 184, § 2.]

CHAPTER 32.

OF APPEALS.

SECTION **5448. When allowed.** The mode of reviewing in the supreme court any judgment, action or decision of the district court in a criminal case is by appeal. An appeal can only be taken from the final judgment, and within six months thereafter. Either the defendant or state may appeal. [33 G. A., ch. 228, § 1.] [C. '73, §§ 4520–2; R. §§ 4904–6.]

From final judgment: Where the record showed that the court sustained a motion in arrest of judgment and ordered defendant to appear before the next grand jury, held that such ruling was a final judgment from which an appeal might be taken by the prosecution. *State v. Alverson*, 105–152, 74 N. W. 770.

There cannot be an appeal in a criminal case from an order overruling a demurrer. *State v. Doty*, 109–453, 80 N. W. 505.

This section provides only for appeals in criminal cases from the final judgment, and not from an intermediate order. *State v. Wright*, 111–621, 82 N. W. 1013.

No appeal in a criminal case from an intermediate order or ruling is authorized even though such order or ruling would have finally disposed of the case. *State v. Sloan*, 131–676, 109 N. W. 190.

The action of the trial court in sustaining a demurrer to the indictment and resubmitting the case to the grand jury does not constitute a final judgment from which the state may appeal. *State v. Evans*, 111–80, 82 N. W. 429.

Effect of appeal: Until the judgment of the lower court is modified or reversed it continues in force notwithstanding an appeal, although the right to execute it may be suspended; therefore the record of conviction for a felony may be introduced to impeach the credibility of a witness although an appeal from the judgment in such case is pending. *Hackett v. Freeman*, 103–296, 72 N. W. 528.

Appeal by state: It is not contemplated that on an appeal by the state the supreme court shall deal with imaginary questions. *State v. Gunn*, 106–120, 76 N. W. 510.

The fact that on an appeal by the state the court finds the ruling of the district court on a demurrer and its judgment thereon to be erroneous will not affect the right of defendant to insist that as to him the judgment was final. *State v. Fields*, 106–406, 76 N. W. 802.

On affirmance of a conviction in the supreme court on appeal, even though by an equally divided court as provided in code § 195, the judgment of the trial court is to be carried into execution. No other judgment than the announcement by written opinion filed of the affirmance by operation of law is required. *Busse v. Barr*, 132–463, 109 N. W. 920.

In criminal cases there can be no appeal except from the final judgment. *State v. Young*, 148–629, 127 N. W. 987.

SEC. **5448-a. Not retroactive.** The provisions of this act shall not affect any case in which judgment has been entered in the district court prior to the taking effect of this act. [33 G. A., ch. 228, § 2.]

SEC. **5450. Transcript—duty of clerk.**

While a judge may have some discretion under code § 254 as to ordering a transcript at the expense of the county when defendant is unable to pay for it, yet, if he

finds that fact, he should not refuse to order the transcript merely because in his judgment the defendant has had a fair trial. *State v. Robbins*, 106–688, 77 N. W. 463.

Under the provisions of code § 254 that a transcript of the evidence may be ordered at the expense of the county where it is shown by the defendant that he is unable to pay for such transcript, for the purpose of appeal, the application for such transcript should be made to the trial judge. *State v. Cater*, 109–69, 80 N. W. 222.

The ruling of the judge as to granting a transcript at the expense of the county is subject to review. *State v. Wright*, 111–621, 82 N. W. 1013.

The supreme court has no occasion to examine the transcript for the purpose of determining whether error has been committed where the case is submitted on printed abstracts and arguments. *State v. Blodgett*, 143–578, 121 N. W. 685.

SEC. 5461. Provisions as to civil cases applicable.

When a criminal case is presented on printed abstract and arguments the same rules prevail as in civil cases with reference to the presumption that the abstract contains all the record necessary in the determination of the appeal. *State v. Blodgett*, 143–578, 121 N. W. 685.

SEC. 5462. Decision—costs on reversal.

Arguments: Although no arguments are filed on either side, the supreme court will not dismiss the appeal but will inspect the record and ascertain whether it shows any manifest error in the proceedings. *State v. Rea*, 126–65, 101 N. W. 507.

Reversal—on what grounds: The erroneous admission of material evidence which must in the nature of the case have been prejudicial will be ground for reversal. *State v. Walker*, 124–414, 100 N. W. 354.

The full duty of the supreme court on appeal in a criminal case is discharged when the judgment of conviction is affirmed after a finding that the defendant has had a fair trial to an impartial jury, that the verdict is supported by the evidence and that no prejudicial error of law has been committed. *State v. Thomas*, 135–717, 109 N. W. 900.

While the court is required to examine the record, this does not involve an examination of the transcript of the evidence where the case is submitted on printed abstract. In such case the abstract constitutes the record and it is presumed to contain everything essential to the determination of the points raised. Questions not raised in the printed argument are deemed to have been waived. *State v. Blodgett*, 143–578, 121 N. W. 685.

The erroneous discharge of a grand jury panel is not a ground for reversing a conviction under an indictment found by a grand jury selected from a panel duly authorized. *State v. Carter*, 144–371, 121 N. W. 801.

Where it appears that a crime has been committed as described in a statutory definition, the case will not be reversed on account of an error in the particular description of the crime within the definition of the statute. *State v. Anderson*, 154–701, 135 N. W. 405.

Fair trial: A criminal case may be reversed on the ground that the defendant has not had a fair trial, although no specific rulings have been properly objected to. *State v. Barr*, 123–139, 98 N. W. 595.

Speedy trial: On an appeal in a criminal case it is not competent for the court to determine that the prosecution should have been dismissed because the defendant had not been given a speedy trial. *State v. Sloan*, 131–676, 109 N. W. 190.

Objections not made below: The rule which obtains in civil cases that an objection not made in the court below cannot be considered in the supreme court on appeal does not apply in criminal cases where the statute requires that the supreme court shall examine the record and without regard to technical errors or defects which do not affect the substantial rights of the parties render such judgment on the record as the law demands. *State v. Nine*, 105–131, 79 N. W. 945.

Objections waived: The defendant may waive objections to incompetent testimony and when he does so by silence or otherwise his conviction will not be reversed on account of the introduction of such evidence. *State v. Conroy*, 126–472, 102 N. W. 417.

Verdict against evidence: The supreme court, though proceeding carefully and cautiously, will interfere in criminal cases more readily than in civil on the ground that a verdict is without support in the evidence. *State v. Bertoch*, 112–195, 83 N. W. 967.

In a particular case, held that there was not sufficient evidence to warrant a conviction for murder by the administration of poison. *Ibid.*

A verdict of conviction in a criminal case will not be sustained by the supreme court where it appears to be clearly against the weight of the evidence. *State v. Sullivan*, 156–603, 137 N. W. 918.

Misconduct of counsel: The supreme court on appeal may grant a new trial where it appears that defendant has been

prejudiced by the act of the prosecuting attorney in making repeated offers to prove facts which should not be considered by the jury as bearing upon defendant's guilt. *State v. Roscum*, 119–330, 93 N. W. 295.

Error cured: Error in admitting evidence of a confession may usually be obviated by directing the jury not to consider it, after it has become apparent that the admission was improper. *State v. Moran*, 131–645, 109 N. W. 187.

Error without prejudice: Action of the court which is absolutely harmless and without prejudice will not be a ground of reversal, whether erroneous or not. *State v. Novak*, 109–717, 79 N. W. 465.

In criminal cases only technical errors which do not affect the substantial rights of the defendant are to be disregarded as without prejudice. If the error involves a material point in the case, prejudice must be presumed unless on survey of the whole record the contrary affirmatively appears. *State v. Nugent*, 134–237, 111 N. W. 927.

In appeals in criminal cases the supreme court considers the case without regard to technical errors or defects which do not affect substantial rights of parties. *State v. Robbins*, 106–688, 77 N. W. 463.

A conviction will not be reversed for a refusal to allow a witness to answer a question asked where it appears that the response to the question desired would have been favorable to the party objecting. *State v. Kuhn*, 117–216, 90 N. W. 733.

If from the entire record it clearly appears that an error committed by the trial court was harmless, it will not necessitate a reversal. *State v. Miller*, 124–429, 100 N. W. 334.

Error in an instruction as to the crime charged will not necessitate reversal if the defendant is convicted of an included crime, as to which there is no error. *State v. Morris*, 128–717, 105 N. W. 213.

Although the venue of a crime should be specifically submitted to the jury as a question of fact, yet where the evidence as to venue is uncontradicted it may constitute error without prejudice to fail to so do. *State v. Heft*, 148–617, 127 N. W. 830.

The supreme court has uniformly refused to grant a reversal for technical errors which it is manifest from the record could not have prejudicially affected the defendant. If an error or irregularity which the defendant might have taken advantage of by calling the court's attention thereto before verdict is not thus brought to the court's attention and is not of such character as to require the granting of a new trial or the sustaining of a motion in arrest of judgment, it will not be considered on appeal unless it is of such character as to have affected the merits of the case to defendant's prejudice. *State v. Heft*, 155–21, 134 N. W. 950.

Exceptions necessary: Defendant in a criminal case may waive error on appeal, and he does so by not taking exception in the lower court to the ruling of which he subsequently complains. And if the defendant files an argument on appeal the court will consider only the errors urged in such argument. *State v. Schwab*, 112–666, 84 N. W. 944.

Where proper exceptions are not taken, rulings on questions of law raised during the trial will not be considered on appeal. *State v. Williams*, 115–97, 88 N. W. 194.

Where no exception has been taken as to rulings in the lower court they cannot be considered on appeal. *State v. Finley*, 147–563, 126 N. W. 699.

Waiver of right to appeal: An appeal in a criminal case is to be heard and decided upon its merits. There is no provision for dismissing such appeal on the ground that defendant has by statement in the lower court with a view of securing a mitigated sentence waived such right. But the right to have any particular questions reviewed may be waived by the withdrawal in the lower court of objections to rulings afterwards complained of. *State v. Conroy*, 133–195, 110 N. W. 437.

Costs: The provision that in case of reversal or modification in defendant's favor of a judgment on appeal he shall be entitled to recover the costs of printing abstracts and briefs, to be paid by the county from which the appeal is taken, applies to suits pending at its passage. *State v. Dorland*, 106–40, 75 N. W. 654.

The recovery against the county in such case is to be by way of taxation of costs. If the costs thus taxed are not paid by the county they may undoubtedly be recovered by suit against it. *Ibid.*

Rehearing: While in civil cases the supreme court will not grant a rehearing on account of matters not urged in the original presentation of the case, this rule does not apply in criminal cases, and a reversal may be ordered on grounds presented for the first time on rehearing. *State v. Phillips*, 119–652, 94 N. W. 229.

SEC. 5463. In appeals by state.

Even though it appears that the verdict in favor of defendant is wrong, the supreme court has no authority on appeal by the state to reverse the case. *State v. Cooper*, 138–516, 116 N. W. 691.

On an appeal by the state the court

will only discuss and dispose of those questions which are proper to be determined as a precedent in other cases. *State v. Gilbert*, 138–335, 116 N. W. 142.

In a case criminal or quasi criminal in character the supreme court can, on appeal by the state, do no more than announce proper rules of law for other cases, the acquittal of the defendant being final. *Town of Scranton v. Hensen*, 151–221, 130 N. W. 1079.

Error of the lower court in directing a verdict for the defendant is not a ground for reversal on appeal by the state. The supreme court on such appeal has only authority to point out the error committed by the lower court. *State v. Johnson*, 157– —, 138 N. W. 458.

SEC. 5468. Time of imprisonment deducted.

The deduction of the time of imprisonment which defendant has served under a sentence which has subsequently been reversed is to be fixed by the court, and the period of imprisonment specified in the second judgment is to be what remains after deduction is made from that which the court finds to be the proper term of imprisonment on the second conviction. It will be presumed, therefore, that the term fixed by the court on the second conviction has been determined in view of the amount of deduction to which the prisoner is entitled. *Travis v. Hunter*, 109–602, 80 N. W. 680.

In giving credit for a term of imprisonment already served, under sentence which has been set aside on appeal, the good time which the defendant has earned in serving such former sentence is to be taken into account. *State v. Barr*, 133–132, 110 N. W. 280.

If in imposing the second sentence in such a case the court exceeds the limitation thus fixed, the excess of the second sentence is void and the prisoner is entitled to discharge after serving so much of the term of imprisonment fixed in the second sentence as might properly have been imposed. *Ibid.*

It is error to impose a sentence for the maximum term of imprisonment authorized by the statute without deducting the time during which the defendant has already been imprisoned on a prior sentence which has been set aside on appeal. *State v. Butler*, 155–204, 135 N. W. 628.

CHAPTER 34.

OF EVIDENCE AND WITNESSES.

SECTION 5483. As in civil cases.

Declarations or admissions of defendant: Acts, conduct, threats, declarations and statements of a person accused of crime, occurring before such crime was committed, are admissible to show a motive or intent and may be established not only by direct but also by circumstantial evidence. *State v. Smith*, 102–656, 72 N. W. 279.

Threats made by the accused against the person or property of the injured party may be shown to prove the existence of malice and to connect the accused with the commission of the crime. *State v. Millmeier*, 102–692, 72 N. W. 275.

Statements by defendant made after the crime in question was committed held not to be shown to have relation to the crime and therefore to have been erroneously admitted. *Ibid.*

As a general rule, verbal admissions of a party should be received with great caution as that kind of evidence is subject to imperfections and mistake, but held that it was not necessary to instruct the jury to this effect where the admission relied on appeared to have been made deliberately and understandingly in a conversation in which his purpose was to state the particular facts of his connection with the crime. *State v. Jackson*, 103–702, 73 N. W. 467.

In a prosecution for the larceny of property shown to have been taken by the defendant in the nighttime, held competent to prove that the road traveled by him from the place of the taking to his house was an unusual, unfrequented road and a different one from that which he would naturally have taken under ordinary circumstances. *State v. Norman*, 135–483, 113 N. W. 340.

While admissions in the form of a compromise are not competent in a law action, this rule does not apply to a criminal case. *Town of Scranton v. Hensen*, 151–221, 130 N. W. 1079.

The conduct of a suspected party charged with crime may be shown to be such as an innocent person would not be likely to resort to. Such a fact is not conclusive of guilt but it may strengthen the inference of guilt arising from other facts. *State v. Kimes*, 152–240, 132 N. W. 180.

Therefore held that the testimony of a witness on a former trial called for de-

fendant might be shown on a subsequent trial to have been false to defendant's knowledge and by his procurement. *Ibid.*

The voluntary act of one accused of burglary in taking the arresting officer to his room and delivering up a weapon, held admissible in connection with the evidence that the weapon was one stolen at the time of the burglary, as tending to show defendant's guilt of that crime. *State v. Skaggs*, 153–381, 133 N. W. 779.

As to confessions, see notes to code § 5491 in this supplement.

Involuntary confessions: Inculpating facts, discovered by means of involuntary confessions, are not excluded. *State v. Height*, 117–650, 91 N. W. 935.

Acts and declarations of coconspirators: To justify the admission of acts and declarations of a coconspirator as against the defendant, the alleged conspiracy must be shown by testimony outside of such acts and declarations. The rule allowing the statements of one coconspirator to be given in evidence against another is a marked exception to the general rule excluding hearsay testimony and applies only when those statements are made pending the conspiracy and in furtherance of its unlawful purposes. *State v. Crofford*, 121–395, 96 N. W. 889.

Statements by a coconspirator made before the formation of the conspiracy or after its accomplishment are not admissible except as against the person making them. *Ibid.*

The prima-facie showing of the fact of conspiracy is first addressed to the court alone simply as governing its action in the admission of evidence. But when a prima-facie case is thus made, the final determination whether such conspiracy did or did not exist should be left to the jury, and the finding by the jury of the fact of conspiracy is the necessary preliminary to the consideration by them of acts and declarations of the coconspirator. An instruction to this effect should be given. *Ibid.*

While it is within the discretion of the trial court to admit proof of acts and declarations of joint conspirators even before a prima-facie case of conspiracy has been made, yet if subsequently the evidence does not tend to show that the person making the declarations was a coconspirator with the defendant in the commission of the crime charged and made the declarations in carrying out the conspiracy, the declarations should be withdrawn from the jury. *State v. Walker*, 124–414, 100 N. W. 354.

Circumstantial evidence may be sufficient to show that the person making the declarations and the defendant were coconspirators for the commission of the crime, but it is not enough to justify the consideration of the declarations against the defendant that the evidence introduced tends to raise a suspicion of a conspiracy. *Ibid.*

The sufficiency of the proof of the conspiracy to justify introduction of declarations of one conspirator against another in the first instance, should be determined by the trial judge and only when a prima-facie case is made out should the question of conspiracy be left to the jury. *Ibid.*

The declarations of a coconspirator, to be admissible, should be shown to have been made pending the conspiracy and in furtherance of its unlawful purpose. *Ibid.*

Acts and declarations of coconspirators in carrying out the common enterprise may be shown as against one of them, although not done or made in the presence of the defendant. *State v. Dickerhoff*, 127–404, 103 N. W. 350.

Acts and declarations of a woman upon whom the crime of abortion is alleged to have been committed are admissible as against one charged with the commission of the offense upon proof that the crime was committed in pursuance of a previous conspiracy to which the woman was a party. *State v. Crofford*, 133–478, 110 N. W. 921.

Those who join in a conspiracy to commit a crime subsequent to its inception adopt the prior acts of their associates in such sense that the prior acts and declarations of such associates are admissible as against them. *Ibid.*

Evidence of acts done in furtherance of a common unlawful purpose is relevant as against one engaged in carrying out such purpose. *State v. Donavan*, 125–239, 101 N. W. 122.

Where the intent is material, other acts of the same character tending to show a common purpose and design to defraud may be proven although such acts were committed by a coconspirator. *State v. Flood*, 148–146, 127 N. W. 48.

Statements and acts of a coconspirator before the conspiracy was performed or after its termination, or not in promotion thereof, though provable as admissions against such person making or doing them, are not admissible against the coconspirator. *State v. Gilmore*, 151–618, 132 N. W. 53.

The alleged conspiracy, to sustain the admission of acts or declarations of one coconspirator against another, cannot be shown by declarations of the one alone. *Ibid.*

While a coconspirator may not be held criminally liable for offenses committed by other conspirators prior to his participation in the transaction, he will be presumed to have known the character and purpose of the unlawful combination which may be shown by acts and conduct prior as well as subsequent to the date of his

joinder therein. *State v. Dobbins*, 152–632, 132 N. W. 805.

Declarations of a coconspirator having nothing to do with the promotion of the common enterprise are not admissible. *State v. Poder*, 154–686, 135 N. W. 421.

Before the declarations of one alleged confederate are admissible against another, it must appear that a confederation existed at the time of their utterance. *State v. Anderson*, 154–701, 135 N. W. 405.

Against one of joint defendants: Where two or more defendants are joined together, evidence admissible against one of them may be introduced although it is inadmissible against the others, the jury being directed to consider such evidence only as against the defendant as to whom it is admissible. *State v. Wolf*, 112–458, 84 N. W. 536.

Testimony of one jointly accused: One of two persons separately charged with the commission of a crime identical as to each, may be called as a witness upon the trial of the other. *State v. Cobley*, 128–114, 103 N. W. 99.

Statements in hearing of defendant: Declarations of one who has been recently poisoned made *in extremis* in the presence of one whom he charges with the administration of the poison, held to be admissible as against the person so charged. *State v. Kuhn*, 117–216, 90 N. W. 733.

It is competent to prove declarations made against the defendant in his presence. *State v. Worthen*, 124–408, 100 N. W. 330.

Statements made by a third person in the presence of the defendant with reference to the facts and circumstances of the crime may be proven as tending to implicate him. *State v. Burns*, 124–207, 99 N. W. 721.

Declarations of third persons: Declarations of third persons with reference to defendant's guilt are not admissible as independent evidence unless as a part of the *res gestae*, or unless by independent evidence they are shown to have been made by a coconspirator. *State v. Walker*, 124–414, 100 N. W. 354.

In a criminal prosecution, books of account, not kept by the defendant, and the entries in which are not made by his direction, are not admissible against him. *State v. Ames*, 119–680, 94 N. W. 231.

Dying declarations: Declarations made under a solemn sense of approaching death are only competent as to facts which the witness might testify to if living. Therefore, expressions of opinion on the part of deceased are not admissible as dying declarations. *State v. Wright*, 112–436, 84 N. W. 541.

Dying declarations must be shown to have been made under a sense of impending death, but this apprehension of certain dissolution may be inferred from the conduct, condition or statements of the declarant. The question as to whether such statements are admissible as dying declarations is for the court. *State v. Kuhn*, 117–216, 90 N. W. 733.

The statement in such a declaration with reference to the defendant that "she poisoned me" is not inadmissible on the ground that it states a conclusion. *Ibid.*

Statements by way of dying declarations are admissible which contain no more than assertions of fact as to who fired the fatal shot, and as to the manner and attending circumstances of the shot, that it was intentional and not accidental. *State v. Fielding*, 135–255, 112 N. W. 539.

While dying declarations of deceased are admissible for as well as against a defendant charged with criminal homicide, yet they are not admissible in either case if they state merely a conclusion or opinion. Nor are statements in a dying declaration which are in the nature of conclusions admissible in favor of the defendant as admissions against interest, the legal controversy being not between the deceased and defendant, but between the state and the defendant. *State v. Sale*, 119–1, 92 N. W. 680, 95 N. W. 193.

To be admissible as a dying declaration, the declaration of deceased must appear to have been made at a time when he was in fact *in extremis* and under the belief of impending dissolution. *State v. Dennis*, 119–688, 94 N. W. 235.

The question of the admissibility of the statement as a dying declaration is for the court and should be determined from all the facts and circumstances appearing in the case. The court is not limited in its inquiry to what was said by the declarant upon the subject, but the fact may be proved like any other fact in the case. *Ibid.*

To render dying declarations admissible it must appear that the person making them was actually dying, or was suffering from mortal injury, and that he was fully conscious of such fact, and that the words were spoken under solemn conviction of impending dissolution. *State v. Phillips*, 118–660, 92 N. W. 876.

Where the wife of deceased testified with reference to dying declarations, that the deceased declared, "I cannot stand it if this pain does not leave me soon," held that her evidence did not sufficiently show that the declarations were made under a sense of impending death. Such declarations should be admitted only where the preliminary showing that deceased was in fact *in extremis*, and had himself given up all hope of recovery, is clear and unequivocal. The fact that the declarant realized that he was in danger of death, and believed that he must die if relief were not soon administered, is not enough. *Ibid.*

While it is for the court to pass upon the admissibility of the declarations in evidence, the jury should be required to take into consideration all the testimony bearing upon the character of the alleged dying declaration and the circumstances under which it was made, for the purpose of determining whether it was made under such circumstances as to entitle it to be considered, and the jury should be explicitly instructed as to such matter. *Ibid.*

Statements of the deceased in a particular case held sufficient to show consciousness of impending dissolution, such as to make his declarations admissible as dying declarations. *State v. McKnight*, 119–79, 93 N. W. 63.

Dying declarations are to be strictly limited to the facts and circumstances attending the immediate injury from which the declarant is about to die, and statements as to prior occurrences are inadmissible. *Ibid.*

Where dying declarations are reduced to writing and signed by the deceased, parol testimony as to the declarations should be excluded as not being the best evidence. *State v. Busse*, 127–318, 100 N. W. 536.

Under the evidence in a particular case, held that knowledge of impending death was sufficiently shown to justify the admission in evidence of dying declarations. *State v. Nowells*, 135–53, 109 N. W. 1016.

In a prosecution of a husband for the murder of his wife, held that evidence was incompetent as to statements made by the deceased wife some time prior to the homicide with reference to her husband's conduct toward her. *State v. Beeson*, 155–355, 136 N. W. 317.

When it appears that the declaration was made *in articulo mortis* and with the belief that death was impending it is admissible. *State v. Dyer*, 147–217, 124 N. W. 629.

In a particular case held that the statement of the deceased was admissible as a dying declaration. *State v. Luther*, 150–158, 129 N. W. 801.

Where dying declarations have been introduced in evidence, the jury may consider evidence offered to impeach the credibility of the person making such declarations. *State v. Johns*, 152–383, 132 N. W. 832.

Where deceased had received a mortal wound and seemed to realize his condition and was conscious that death could not long be delayed when he made his declaration, held that such declaration was admissible. *State v. Brumo*, 153–7, 132 N. W. 817.

It is competent to show that the attention of the deceased was called to the fatal character of his wound before the dying declaration was made. *State v. Klute*, 140 N. W. 864.

While dying declarations are only admissible as to the facts which point to the cause of death and the circumstances producing and attending it, nevertheless statements relating to the act or transaction of the killing, even in general terms, are admissible and although a portion of the declaration is in itself objectionable, yet if it is so intimately interwoven with the thread of the narrative as not to be separated without destroying the sense of the whole, the declaration is not to be rejected on that ground. *Ibid.*

Motive: The existence or nonexistence of motive is immaterial where the guilt of the accused is established beyond a reasonable doubt. *State v. Klute*, 140 N. W. 864.

Attempt to escape: Evidence of attempted escape is admissible as tending to show guilt. In response the defendant may show, if he can, that the attempt to escape was because of fear of mob violence. *State v. Desmond*, 109–72, 80 N. W. 214.

Flight: The fact of flight is a circumstance *prima facie* indicative of guilt. *State v. Matheson*, 130–440, 103 N. W. 137.

Where the person accused of a crime has left the state soon after the commission of the alleged offense and has not returned until arrested and brought back, the fact may be proven as indicative of guilt, the question whether such departure has any connection with the criminal charge being for the jury. *State v. Alley*, 149–196, 128 N. W. 343.

It is not error to instruct the jury that proof of flight is *prima facie* indicative of guilt. *State v. O'Callaghan*, 157– —, 138 N. W. 402.

Actual knowledge on the part of the defendant of the suspicion and accusation against him, as distinguished from mere constructive knowledge, is necessary to make the flight of the defendant indicative of guilt. *State v. Sorenson*, 157– —, 138 N. W. 411.

Evidence is admissible to show that the defendant went to another part of the state within a short time after the commission of the act complained of. The question as to whether he left through fear of prosecution or for other cause is a question for the jury. *State v. Waltz*, 139 N. W. 458.

Evidence of other crimes and similar acts: In a prosecution for maliciously exposing a poisonous substance with intent that it be taken by a domestic animal, evidence of such acts with reference to other animals is admissible to show intent. *State v. Lightfoot*, 107–344, 78 N. W. 41.

The state cannot prove against a defendant any crime not alleged in the indictment, either as a foundation for separate punishment or as aiding the proofs that he is guilty of the crime charged. The exceptions to the rule may be classified as follows: Evidence as to other offenses is competent to establish

(1) motive, (2) intent, (3) absence of mistake or accident, (4) a common scheme embracing the commission of two or more crimes so related to each other that proof of one tends to prove the others, and (5) the identity of the person charged with the commission of the crime under investigation. *State v. Vance*, 119–685, 94 N. W. 204.

An allegation of crime cannot be established by proof of independent criminal acts or of defendant's general disreputable character. *State v. Berger*, 121–581, 96 N. W. 1094.

An accused person is not to be proved guilty of one crime by proving that he has committed another. In a few exceptional cases the commission of other criminal acts may be shown for the purpose of establishing the intent, but generally speaking, this exception applies only to cases in which the criminal character of the act depends upon the specific intent with which it is committed. *State v. Roscum*, 119–330, 93 N. W. 295.

Subject to certain well-defined exceptions, evidence of a crime committed by the defendant other than that with which he is charged should be excluded. *State v. Crofford*, 121–395, 96 N. W. 889.

Evidence of particular crimes, committed at the same time and place by the same person, is sometimes admissible, but where offered to show defendant's connection with the main offense, it should sufficiently appear that the defendant was connected with the crime with which he is charged. *State v. Wackernagel*, 118–12, 91 N. W. 761.

Evidence of the commission by the defendant of other criminal acts which have no connection with the crime charged may constitute such error as cannot be cured by subsequently directing the jury not to give consideration to such evidence. *State v. Brundige*, 118–92, 91 N. W. 920.

Evidence of a distinct crime from that with which the defendant is charged cannot be shown unless it tends to establish a criminal intent with reference to the act with which the defendant is charged. *State v. Carmean*, 126–291, 102 N. W. 97.

If evidence is material and relevant to the issue, the mere fact that it tends to establish guilt of a crime other than the one alleged furnishes no ground for its rejection. *State v. Wrand*, 108–73, 78 N. W. 788.

Any evidence directly tending to prove the crime charged is admissible although it may also tend to prove the commission by defendant of some other crime. *State v. Donavan*, 125–239, 101 N. W. 122.

Evidence which tends to show guilty knowledge, intent, purpose or design, is competent though it may also tend to prove that the defendant has committed some other crime. *State v. Levich*, 128–372, 104 N. W. 334.

In a prosecution for adultery, distinct adulterous acts, committed between the same parties, may be proven in explanation of or as characterizing the acts and conduct of the parties complained of as constituting the particular offense charged. *State v. Higgins*, 121–19, 95 N. W. 244.

When the issue is as to criminal intimacy between persons of opposite sex, evidence of prior acts of indecent familiarity is competent as showing an antecedent probability. *State v. Trusty*, 122–82, 97 N. W. 989.

Ordinarily evidence of another offense other than that alleged may not be received, but to this rule there are well established exceptions, one of these being in case of rape committed by having carnal connection with a female under the age of consent. In a prosecution for such crime, evidence of other acts of the same character between the parties may be proven. *State v. King*, 117–484, 91 N. W. 768.

In a prosecution for assault with intent to commit rape by having connection with a girl under the age of consent, held that improper conduct of defendant with other girls in the same transaction might be proved. *State v. Desmond*, 109–72, 80 N. W. 214.

In a prosecution for rape, evidence of other similar acts of the defendant with reference to the complainant as tending to show the disposition and intent of the accused in the particular act with which he is charged is admissible. *State v. Johnson*, 133–38, 110 N. W. 170.

In a prosecution for rape the prosecuting witness may testify as to other and prior assaults made upon her by the defendant. *State v. Carpenter*, 124–5, 98 N. W. 775.

In a prosecution for cheating by false pretenses, proof of other false pretenses of like kind made by the defendant to the prosecutor at about the time the offense charged was committed is admissible as bearing upon defendant's evil motive and intent. *State v. Gibson*, 132–53, 106 N. W. 270.

In a prosecution for obtaining money by false pretenses, other similar fraudulent transactions by the defendant may be shown as bearing upon the question of intent. *State v. Seligman*, 127–415, 103 N. W. 357.

In a prosecution for obtaining property by false pretenses, evidence of similar pretenses made about the same time and in the same neighborhood to other persons may be shown, if accompanied with evidence that such pretenses were false. *State v. Carter*, 112–15, 83 N. W. 715.

In a prosecution for forgery, evidence of other similar forgeries may be introduced

to show the intent. *State v. Prins*, 113–72, 84 N. W. 980.

In a prosecution for receiving stolen property several acts of the same character following each other in close connection, all the thefts being by the same persons from the same place and the property being in each case delivered to the defendant, have a legitimate tendency to show a course of conduct indicating guilty knowledge and guilty purpose and such evidence is admissible although some of the transactions are subsequent to the act specifically charged in the indictment. *State v. Scott*, 136–152, 113 N. W. 758.

If a circumstance is so related to or connected with the alleged crime under investigation as to be otherwise admissible, it is not rendered inadmissible because it tends to prove another crime. *State v. O'Connell*, 144–559, 123 N. W. 201.

One of the exceptions to the rule that evidence is not admissible to show the commission by defendant of another wholly independent crime is, that evidence which tends to identify the defendant as the person who committed the crime with which he is charged is competent, although it may incidentally tend to prove that he has committed another independent crime. *State v. Harris*, 153–592, 133 N. W. 1078.

As a rule evidence of other crimes committed by defendant is not admissible. But there are exceptions to this rule. *State v. Clark*, 140 N. W. 821.

Alibi: While the defense of alibi must be made out by a preponderance of the evidence relating thereto, nevertheless the defendant is entitled to acquittal if all the evidence, including that relating to alibi, leaves in the minds of the jury a reasonable doubt as to defendant's guilt of the crime charged. *State v. Thomas*, 135–717, 109 N. W. 900.

Circumstantial evidence: Where the conviction of a crime is sought on circumstantial evidence, each circumstance necessary to reach a conclusion of guilt must be fully and fairly proven, and if in considering any such necessary circumstance the jury have a reasonable doubt as to the sufficiency of the evidence, such doubt should be resolved in favor of the defendant, and the jury should be so instructed. *State v. Harmann*, 135–167, 112 N. W. 632.

Where it is sought to establish a crime by circumstantial evidence, the jury should be distinctly informed as to the established and approved rules governing the proof of crime by that form of evidence. *State v. Blydenburg*, 135–264, 112 N. W. 634.

It is not error to instruct the jury that a criminal charge may be established by circumstantial evidence as well as by direct and positive proof. *State v. Walker*, 133–489, 110 N. W. 925.

Self-crimination: Although there is no statutory or constitutional provision against requiring defendant in a criminal case to give self-criminating evidence, held that the general guaranty of due process of law was sufficient to render incompetent as against the defendant evidence of the result of a compulsory examination of his person. *State v. Height*, 117–650, 91 N. W. 935.

The rule against self-criminating evidence does not make it unlawful to require the defendant in a criminal case to uncover his face or hands, or otherwise exhibit those portions of his person which are usually subject to personal inspection for the purpose of identification. But he cannot be compelled to exhibit those portions of his body which are usually covered. *Ibid.*

SEC. 5484. Who competent—defendant as witness.

Defendant as witness before indictment: It will not be ground for setting aside the indictment that the person against whom a charge is being investigated on which the indictment is subsequently found is called and examined as a witness. *State v. Shepherd*, 129–705, 106 N. W. 190.

Codefendants: Where one of two defendants is separately tried the provisions of this section are not applicable as to failure to testify on the part of defendant not on trial. *State v. Hogan*, 115–455, 88 N W. 1074.

Criminating evidence: The statutory provision that defendant cannot be called as a witness by the state in a criminal prosecution is not in its terms broad enough to cover the constitutional guaranty found in some states against criminating evidence. But the common-law rule against requiring a witness to give self-criminating evidence in any judicial proceeding is covered by the general constitutional provision as to due process of law, and evidence of facts discovered by the compulsory examination of the person of the accused is not admissible. *State v. Height*, 117–650, 91 N. W. 935.

Impeachment: Defendant testifying as a witness cannot complain of impeachment by proof of bad reputation up to the time of the commission of the crime, any effect on his reputation of reports with reference to such crime being thus excluded. *State v. Hayden*, 131–1, 107 N. W. 929.

Where the defendant is a witness in his own behalf he may be asked on cross-examination as to his residence and occupation, although answers to such questions may tend to disgrace and discredit him. *State v. Wasson*, 126–320, 101 N. W. 1125.

Testimony on former trial: The fact that defendant elects not to be a witness

does not deprive the state of the right to prove as against him statements made in his testimony when a witness on a former trial. *State v. Kimes*, 152–240, 132 N. W. 180.

Instructions: It is error to instruct the jury with reference to the testimony of defendant in such way as to authorize them to treat the defendant as a witness already impeached and lead them to think that he should be corroborated in order to be believed. *State v. Hunter*, 118–686, 92 N. W. 872.

It is not error to tell the jury that in considering defendant's testimony they should take into consideration the circumstances under which it was given, his interest in the event of the suit, and all other circumstances, and that they are not required to receive blindly the testimony of the accused person as true, but may consider whether it is true as made in good faith or only for the purpose of avoiding conviction. *State v. Walker*, 133–489, 110 N. W. 925.

Where defendant testified as a witness in his own behalf and was the only witness interested in the result of the case who did testify, held that it was not error to call the attention of the jury to the fact that the defendant was so interested and that such interest might be taken into account in weighing his testimony. *State v. Young*, 104–730, 74 N. W. 693.

It is not error for the court to direct the attention of the jury to the fact that the defendant, who has testified, is an interested party as bearing on the weight to be given to his testimony. *State v. Ryan*, 113–536, 85 N. W. 812.

The fact that defendant was the wife of deceased does not change the rule that the credibility of her testimony is for the jury, and it is proper to instruct the jury that they may consider her interest, even though the existence of the marital relation might be regarded as strengthening the presumption of innocence. *State v. Hossack*, 116–194, 89 N. W. 1077.

The court should, on the request of defendant, give an instruction in accordance with the provisions of this section, even though no reference has been made to the failure of defendant to be a witness. *State v. Carnagy*, 106–483, 76 N. W. 805.

The court may properly instruct the jury as to the matters to be considered in determining what weight to give to the testimony of defendant as a witness. *State v. Steidley*, 135–512, 113 N. W. 333.

Comment by prosecuting attorney: The provision of this section that when defendant does not become a witness his failure to do so shall not be referred to does not render it improper for the prosecuting attorney to refer to the fact that in certain respects the evidence of one who testifies is not contradicted, even though it appears that as to the matter thus testified to the defendant was the only person who could have taken the stand and testified in denial. *State v. Snider*, 119–15, 91 N. W. 762.

It does not constitute an improper reference to the failure of defendant to testify as a witness that the attorney for the state calls attention to the evidence of a witness as being uncontradicted, although the only witness who could have controverted the truth of such testimony is the defendant himself. *State v. Hasty*, 121–507, 96 N. W. 1115.

Remarks of counsel in a particular case held not objectionable as referring to failure of defendant to testify. *State v. Davis*, 110–746, 82 N. W. 328.

The reference to the failure of the defendant to testify which is prohibited is any reference which may come to the notice of the jury. The prohibition does not extend to a reference to that matter in argument to the court not in the presence of the jury. *State v. Seery*, 129–259, 105 N. W. 511.

If, notwithstanding an improper reference by the prosecuting attorney to the fact that defendant had been convicted on a former trial, the counsel for defendant expressly waive the error and elect to proceed with the trial of the case, such improper statement cannot afterwards be made the ground for a new trial. *State v. Smith*, 132–645, 109 N. W. 115.

A conviction will not be reversed on account of the possibility of a remote inference on the part of the jury that the argument of the prosecuting attorney had reference to the failure of the defendant to testify as a witness. *State v. Baker*, 143–224, 121 N. W. 1028.

The county attorney may, without violation of the statutory provision, call attention to the fact that certain evidence against defendant is not controverted, although the natural and obvious method of controverting such testimony would be for the defendant, as a witness, to deny its truth. *State v. Kimes*, 152–240, 132 N. W. 180.

If a new trial is not asked in the lower court on the ground of reference by the county attorney to the failure of defendant to testify, then such reference is not a ground for reversal on appeal. *Ibid.*

Complaint on account of reference by the county attorney to the failure of the defendant to testify must be made ground for asking a new trial and is waived by failing to do so. *State v. McKinnon*, 157– —, 138 N. W. 523.

Counsel for the prosecution should not either directly or indirectly make reference to defendant's failure to take the witness stand. *State v. Hector*, 157– —, 138 N. W. 930.

The attorneys for the state may, without violation of the provisions of this section,

call the jurors' attention to the fact that certain evidence is uncontradicted though it may appear from the evidence that the accused was the only person who might have contradicted it. *State v. Krampe*, 140 N. W. 898.

Comment by jurors: Reference by jurors in their consultation to the fact that defendant was not a witness is not made by statute a ground for a new trial, and does not make a new trial necessary where it appears that the fact was not taken into account by the jurors in reaching their verdict. *State v. Thomas*, 135–717, 109 N. W. 900.

SEC. 5485. Cross-examination of defendant.

The defendant who has testified as a witness may be cross-examined with reference to his various places of residence, his going under assumed names and his whereabouts at particular times. *State v. Watson*, 102–651, 72 N. W. 283.

Where defendant in a criminal case is a witness he may be cross-examined as to his different occupations and places of residence. *State v. Chingren*, 105–169, 74 N. W. 946.

A defendant who becomes a witness may be cross-examined with reference to his memory, history, motives or matters affecting his credibility. *State v. Kuhn*, 117–216, 90 N. W. 733.

Where the defendant testifies as a witness, counsel for the state should be limited to cross-examination. *State v. Fuller*, 142–598, 121 N. W. 3.

In a prosecution for rape, held proper to ask the defendant as a witness on cross-examination if he had not admitted the crime. *State v. McPursley*, 144–414, 121 N. W. 1031, 122 N. W. 930.

The defendant as a witness stands upon the same footing as any other with reference to cross-examination as to his memory, history and motives or as to other matters affecting his credibility. The extent to which such cross-examination may be carried must necessarily rest in the sound discretion of the trial court. *State v. Brandenberger*, 151–197, 130 N. W. 1065.

SEC. 5488. Corroboration in rape, seduction, etc.

Question is for jury: Whether there is any corroborating evidence is a question for the court, but its weight and sufficiency is solely for the jury. *State v. Bricker*, 135–343, 112 N. W. 645.

The requirement of corroboration is met if there is some independent evidence tending to corroborate the prosecutrix in connecting the defendant with the commission of the crime, and the sufficiency of such evidence is for the jury. *State v. Norris*, 127–683, 104 N. W. 282.

The quantum of corroborative proof is not fixed by the law. If there is some proof by way of corroboration it is sufficient to sustain a verdict. *State v. Norris*, 122–154, 97 N. W. 999.

The statute does not fix the amount or kind of evidence required in corroboration, nor is its sufficiency to be determined by excluding the evidence of the injured party. If considered in connection therewith the other evidence tends to identify and single out the accused as the perpetrator of the crime, it is of that character contemplated by the statute and its sufficiency is to be passed upon by the jury. *State v. Baker*, 106–99, 76 N. W. 509.

Where there was evidence of circumstances tending to identify and point out the defendant as the perpetrator of the crime, held, that it constituted sufficient corroboration to go to the jury. *Ibid.*

Evidence in a prosecution for rape that the prosecuting witness, in making complaint soon after the offense, named the defendant as the guilty party does not constitute such corroboration of her own testimony charging him with the crime as is required under this section. Evidence of complaint made by the prosecuting witness soon after the commission of the offense is corroborative only of her evidence that the crime was committed. *State v. Wheeler*, 116–212, 89 N. W. 978.

The confession of the defendant may supply the necessary corroboration of the testimony of the prosecutrix necessary to connect him with the commission of the crime. *State v. Icenbice*, 126–16, 101 N. W. 273.

The facts and circumstances surrounding the case, as established by the evidence, at the time of the commission of the offense, and all the circumstances as shown by the evidence, are to be considered by the jury in order to determine whether or not there is other evidence than the testimony of the prosecutrix tending to connect the defendant with the commission of the offense. *State v. Carpenter*, 124–5, 98 N. W. 775.

The fact that the parties kept company and acted as lovers usually do, and other like circumstances, are sufficient to constitute the corroborating evidence necessary to connect the defendant with the offense. *State v. Reinheimer*, 109–624, 80 N. W. 669.

Proof that defendant visited prosecutrix as a suitor is not sufficient, as a matter of law, to constitute the required corroboration. *State v. Bess*, 109–675, 81 N. W. 152.

Evidence of conduct of defendant towards prosecutrix as a lover prior to and

about the time of the alleged seduction, held sufficient corroborative evidence. *State v. Mulholland*, 115–170, 88 N. W. 325.

While acquaintance and opportunity will not suffice of themselves to constitute corroborative evidence, yet if it appears that in addition thereto visits were made, company was kept and acts and conduct were indulged in such as usually characterize lovers, the jury in considering such evidence in connection with all the other evidence in the case may be warranted in finding therefrom sufficient corroboration. *State v. Smith*, 124–334, 100 N. W. 40.

Mere proof of acquaintance and opportunity does not constitute the corroboration required in cases of seduction. *State v. Kissock*, 111–690, 83 N. W. 724.

In prosecutions for seduction proof of acquaintance and of opportunity is not alone sufficient corroboration of the prosecuting witness, but the fact that accused was waiting on prosecutrix as a suitor, shown by his being with her attending church or entertainments, taking long drives, etc., may be sufficient. Proof of admissions on the part of accused that he was waiting on prosecutrix only ostensibly as a suitor may furnish the necessary corroboration. *State v. Hughes*, 106–125, 76 N. W. 520.

Proof of a statement by defendant made within a week after the alleged seduction that he was going to the house of prosecutrix for sexual intercourse, held properly admissible as tending to show that such relation had existed between them. *Ibid.*

While mere opportunity does not of itself amount to corroboration, yet if this opportunity is shown to have been of the defendant's creation and made with apparent deliberation, it may with other evidence be sufficient to constitute the corroboration required. *State v. Crouch*, 130–478, 107 N. W. 173.

The testimony of the prosecutrix alone is not sufficient to connect the defendant with the crime. Opportunity alone is not of itself under some circumstances such corroborating evidence tending to connect defendant with the crime of assault to commit rape as is required by the statute. *State v. Egbert*, 125–443, 101 N. W. 191.

In the absence of any corroborating evidence such as is required by the statute, the court should on defendant's motion direct a verdict in his favor. *Ibid.*

Corroboration may be found, not alone in any one particular fact, but in the relation of the parties and the attending circumstances. *State v. Hayes*, 105–82, 74 N. W. 757.

The crime being established, evidence of intimacy and actual cohabitation is sufficient as connecting defendant with the crime. *State v. Wycoff*, 113–670, 83 N. W. 713.

Proof of other similar acts of the defendant with reference to the prosecuting witness tending to show the disposition and intent of the accused in the particular act with which he is charged may furnish the necessary corroboration. *State v. Johnson*, 133–38, 110 N. W. 170.

Any evidence tending to identify and single out the defendant as the perpetrator of the crime which is proven by the testimony of the prosecuting witness is sufficient to afford the corroboration required by the statute. *State v. Waters*, 132–481, 109 N. W. 1013.

Where the evidence tends to exclude the possibility of anyone other than the defendant having committed the offense and confirms the testimony of the prosecutrix that it was committed by the defendant, it furnishes sufficient corroboration. *State v. Stevens*, 133–684, 110 N. W. 1037.

A writing by defendant tending to connect him with sexual intercourse had with the prosecuting witness on one date, held not to be a corroboration of the evidence of prosecutrix with reference to a connection had at previous date. *State v. Burns*, 110–745, 82 N. W. 325.

The corroboration must be by evidence other than that of the prosecutrix and must tend to connect the defendant with the crime. Proof that prosecutrix gave birth to an illegitimate child is, therefore, not a corroborative circumstance. *State v. McGinn*, 109–641, 80 N. W. 1068; *State v. Coffman*, 112–8, 83 N. W. 721; *State v. Kissock*, 111–690, 83 N. W. 724.

The fact of the birth of a child is not to be taken into consideration as furnishing the necessary corroborative evidence. *State v. Dolan*, 132–196, 109 N. W. 609.

Corroboration of the testimony of prosecutrix held sufficient in particular cases. *State v. Burns*, 119–663, 94 N. W. 238; *State v. Bartlett*, 127–689, 104 N. W. 285.

Where it appears that a child was born to prosecutrix after the alleged rape, the jury should be instructed that the fact of the birth of such child is not corroborative of her testimony. *State v. Blackburn*, 136–743, 114 N. W. 531.

The corroboration required by the statute may be furnished by facts and circumstances as well as by direct testimony. *State v. Ralston*, 139–44, 116 N. W. 1058.

The rule requiring corroborating evidence in a prosecution for seduction has no application in a civil action for damages for seduction. *Olson v. Rice*, 140–630, 119 N. W. 84; *Beans v. Denny*, 141–52, 117 N. W. 1091.

The corroboration contemplated by the statute is that which tends to single out and identify the defendant as the perpetrator of the crime. *State v. Whimpey*, 140–199, 118 N. W. 281.

If there is any evidence tending to strengthen or corroborate the testimony of

prosecutrix as to the commission of the crime and thereby to single out the defendant as the perpetrator, its sufficiency is for the jury. It is not necessary that the corroboration be as to the use of force; it is sufficient if it relates to the sexual act which the prosecutrix refers to as constituting rape. *State v. Hetland*, 141–524, 119 N. W. 961.

Admission of sexual intercourse as testified to by the prosecutrix furnishes a sufficient corroboration of the testimony of prosecutrix that such intercourse involved such use of force as to amount to rape. *State v. McPursley*, 144–414, 121 N. W. 1031, 122 N. W. 930.

Admissions of the defendant of any facts tending to connect him with the commission of the offense are sufficient to go to the jury on the question of corroboration. *State v. Sells*, 145–675, 124 N. W. 776.

Opportunity alone is not sufficient as corroboration; and presence of the defendant at the place where the crime is charged to have been committed will not be sufficient if it is wholly consistent with innocence as where it is at a place in which the defendant would usually and properly be. *Ibid.*

The presence in the same room with prosecutrix of the defendant under conditions indicating familiarity, held sufficient as tending to connect the defendant with the crime testified by the prosecutrix to have been committed just before the defendant was thus found. *State v. Dudley*, 147–645, 126 N. W. 812.

It is error to so instruct the jury in a prosecution for seduction as to authorize them to consider the birth of a child to the prosecutrix as a corroborative circumstance tending to connect the defendant with the offense. *State v. Cotter*, 152–398, 132 N. W. 760.

It is also error to instruct in such way as to permit the jury to find that corroboration of the testimony of prosecutrix in any particular is sufficient under this section. *Ibid.*

Evidence tending to show opportunity brought about by the defendant and with apparent deliberation on his part may be considered by the jury as tending to connect the defendant with the commission of the offense. *State v. McGhuey*, 153–308, 133 N. W. 678.

In nearly all seduction cases the corroboration is of necessity circumstantial. *State v. Thomas*, 157– —, 138 N. W. 864.

The flight of the defendant after the commission of the crime and for the purpose of avoiding prosecution is a circumstance corroborating his connection with the offense. *State v. McClure*, 140 N. W. 203.

The corroboration in particular cases held to be sufficient. *State v. McCausland*, 137–354, 113 N. W. 852; *State v. Hogan*, 145–352, 124 N. W. 178; *State v. Herrington*, 147–636, 126 N. W. 772; *State v. Haugh*, 156–639, 137 N. W. 917; *State v. Lindsay*, 140 N. W. 903.

Incest: Corroboration is not required in a prosecution for incest. *State v. Kouhns*, 103–720, 73 N. W. 353.

Instructions: Corroboration is one of the essentials of conviction without which the accused is entitled to an acquittal and it is the duty of the court to so instruct the jury although no such instruction is asked. *State v. Carnagy*, 106–483, 76 N. W. 805.

An instruction that there must be evidence corroborating the testimony of the prosecuting witness, without specifically stating that the corroboration must tend to connect the defendant with the commission of the offense, is erroneous. *State v. Fountain*, 110–15, 81 N. W. 162.

Error cured: Errors in admission of evidence and instructions as to corroboration on a charge of assault with intent to commit rape become immaterial if the conviction is for simple assault. *State v. Hoover*, 134–17, 111 N. W. 323.

[As to corroboration in prosecution for compelling to marry or be defiled, see code § 4757.]

SEC. 5489. Corroboration of accomplice.

The woman with whom the unlawful act in seduction or incest is committed is not an accomplice in such sense as to require corroboration. *State v. Kouhns*, 103–720, 73 N. W. 353.

To make corroboration of the evidence of an accomplice necessary as provided by statute it is only required that it appear by a preponderance of the evidence that the witness was an accomplice. *State v. Smith*, 102–656, 72 N. W. 279.

The corroboration is not sufficient in such a case if it merely shows the commission of the offense or the circumstances thereof. *Ibid.*

Instructions in a particular case as to corroboration required to support the testimony of an accomplice, held correct. *State v. Smith*, 106–701, 77 N. W. 499.

Where defendant introduces a witness who testifies to being an accomplice with another in the commission of the crime charged, defendant cannot complain that instructions were not given as to the necessity of corroboration. *Ibid.*

Section applied in a prosecution for keeping a house of ill fame with reference to the evidence of an inmate. Whether in such cases such a witness is to be deemed an accomplice within the meaning of the statute, *quaere*. *State v. Chauvet*, 111–687, 83 N. W. 717.

An accessory after the fact, as, for instance, a receiver of stolen goods, is not an

accomplice under the provisions of this section. *State v. Jones*, 115–113, 88 N. W. 196.

The person who steals property and the one who afterwards receives it from him knowing it to be stolen are guilty of separate and distinct offenses, and in the prosecution of the latter for unlawfully receiving, the former is not an accomplice in such sense that his evidence must be corroborated. *State v. Scott*, 136–152, 113 N. W. 758.

In the case of charge of incest with a daughter under fourteen years of age the presumption is that she was incapable of appreciating the wrong and was not therefore an accomplice requiring corroboration. *State v. Goodsell*, 138–504, 116 N. W. 605.

It seems that voluntary submission by the prosecutrix to intercourse as charged in a prosecution for incest would render her an accomplice whose testimony must be corroborated. *State v. Heft*, 155–21, 134 N. W. 950.

A general rule for determining whether a witness is an accomplice or not is to determine whether he could have been indicted and convicted of the same crime. *State v. Duff*, 144–142, 122 N. W. 829.

In a prosecution for adultery committed with the wife of the prosecuting witness, such wife is an accomplice and her testimony should be corroborated. *State v. Brown*, 146–113, 124 N. W. 899.

It is not necessary that the accomplice be corroborated in his testimony in every material particular. But the corroboration must be of some material part of his evidence tending to connect the defendant with the commission of the offense. *State v. Cowell*, 149–460, 128 N. W. 836.

It is not necessary that the corroboration of an accomplice be of every material fact. If the corroboration satisfies the jury that the witness speaks the truth in some material part of his testimony, this is sufficient also as to other matters for which there is no corroboration. *State v. Dorsey*, 154–298, 134 N. W. 946.

As a rule, if there be any corroborating testimony, the sufficiency thereof is for the jury. *Ibid.*

The corroboration of testimony need not be direct but may be circumstantial. *Ibid.*

If the evidence other than that of the accomplice merely shows the commission of the offense or the circumstances thereof, it is not sufficient. But it is not necessary that the accomplice be corroborated upon every material fact to which he testifies. It is enough if he be so corroborated on some of the material facts as to satisfy the jury that he spoke the truth with reference thereto and thus induce them to believe that his entire testimony is true although not otherwise corroborated. *State v. O'Callaghan*, 157– —, 138 N. W. 402.

The corroborating evidence must be other than that which is furnished by the accomplice and must tend to connect the accused with the commission of the offense. *State v. Duncan*, 157– —, 138 N. W. 913.

SEC. 5490. Conspiracy—overt act.

No evidence of an overt act is essential in a prosecution for a statutory conspiracy so described as not to require the commission of an overt act. *State v. Poder*, 154–686, 135 N. W. 421.

SEC. 5491. Confession of defendant.

Judicial confessions are those made in conformity to law before a committing magistrate, or in court in the course of legal proceedings. Extrajudicial confessions are those which are made by a party elsewhere than before a magistrate or in court. The latter must be corroborated by proof of the *corpus delicti*. *State v. Abrams*, 131–479, 108 N. W. 1041.

To constitute a confession, the admission or declaration must amount to an acknowledgment of guilt of the offense charged, or participation therein, and an admission of the act charged as constituting a crime but accompanied with an explanation which negatives the criminality is not a judicial confession. *Ibid.*

A plea of guilty which is subsequently withdrawn is not a judicial confession. *Ibid.*

A conviction cannot be had upon an extrajudicial confession unless it be accompanied with other evidence that a crime has in fact been committed by some one. *State v. Westcott*, 130–1, 104 N. W. 341.

This corroborating testimony need not of itself and independent of the confession be such as to prove the commission of a crime beyond a reasonable doubt. It is sufficient if when considered with the confession it establishes beyond all reasonable doubt that a crime was in fact committed. *Ibid.*

A statement of fact which in itself negatives a criminal intent does not constitute a confession with reference to which an instruction as to the necessity of corroboration need be given. *State v. Thomas*, 135–717, 109 N. W. 900.

Corroboration of a confession is not necessary where there is other evidence of the commission of the crime and the only purpose of the confession is to connect the defendant with it. *State v. Icenbice*, 126–16, 101 N. W. 273.

A mere admission or declaration of a defendant against his interest is not neces-

sarily a confession, even though the admission is criminating. To make an admission or declaration a confession it must in some way be an acknowledgment of guilt, and be so intended. *State v. Novak*, 109–717, 79 N. W. 465.

The violation by a detective to whom admissions are made of an agreement not to reveal such admissions will not render the admissions incompetent if they were voluntary when made. *Ibid.*

Evidence in a particular case held not to show any such promises, threats or duress as to render admissions incompetent. *Ibid.*

The prosecution, in putting in evidence statements of the defendant as constituting admissions, does not bind itself to accept as true all that may be contained in the statements shown. *Ibid.*

Where the person having custody of the defendant assures him that it will go easier with him if he tells the facts tending to show him guilty of the offense, a statement of the defendant made in response to such suggestion is not voluntary and should not be received. *State v. Jay*, 116–264, 89 N. W. 1070.

The fact that after defendant was placed under arrest the officer in charge questioned him, and that in response to such questions he made a confession, is not sufficient to render such confession invalid. *State v. Penney*, 113–691, 84 N. W. 509.

The fact that defendant at the time of making the confession was in the custody of one of the parties does not in itself show the statements to have been involuntary. *State v. Peterson*, 110–647, 82 N. W. 329.

Where a confession is proven by the evidence of a detective it is proper to show to the jury what arts were used by the detective to secure such confession and all the circumstances under which the confession was made. *State v. Van Tassel*, 103–6, 72 N. W. 497.

Where the confession appears on its face to be free and voluntary, the burden is on defendant to rebut that presumption. *State v. Storms*, 113–385, 85 N. W. 610.

It is for the court to determine whether the confession was voluntary. But if there is a conflict in the evidence on that question and the court is in doubt, the question should be left to the jury. *Ibid.*

Evidence in a particular case held not sufficient to show that the confession was not voluntary. *Ibid.*

Under conflict in evidence as to whether a confession was freely and voluntarily made, the question of its admissibility should be left to the jury. *State v. Foster*, 136–527, 114 N. W. 36.

The fact that one statement in the nature of a confession is made under inducements does not render subsequent statements made after such inducements are withdrawn involuntary. *Ibid.*

A written confession made by the accused to the county attorney reciting that it is freely and voluntarily made without threats being used or promises being given and shown by other evidence to have been thus made, is admissible. *State v. Kilduff*, 141 N. W. 962.

Further as to confessions, see notes to code § 5483 in this supplement.

SEC. 5492. Witnesses for defendant.

Where the court allows the subpoena of a witness for the defendant who is in another state, the county is liable for his mileage outside of as well as within the state. *Climie v. Appanoose County*, 125–292, 101 N. W. 98.

The board of supervisors has no discretion as to the allowance of witness fees which have been taxed against the county by the court in a criminal prosecution. *Ibid.*

The application for the summoning of witnesses for the defense is wholly *ex parte* and no notice is required. It is left for the court or judge to consider the showing made, written or oral, and grant the order if satisfied; otherwise to refuse it. *State v. Gilbert*, 138–335, 116 N. W. 142.

SEC. 5493. Service.

In a prosecution for conspiracy in taking or inducing a witness to go beyond the jurisdiction of the court, it is not necessary to show that a subpoena has been legally served on such witness if it appears that defendants were fully advised that his attendance at court would be legally required. *State v. Hardin*, 144–264, 120 N. W. 470.

SEC. **5499-a. Photograph—measurements.** It shall be lawful for the sheriff of any county or the chief of police in any city in this state, to take or procure the taking of the photograph of any person held to answer on a charge of any felony, such person being in the custody of such officer, or to make and record any measurements of such prisoner, by the Bertillon

or other system, and to exchange such photographs, or measurements, or copies of the same, with other sheriffs and police officers, or to distribute the same by mail for the purpose of securing evidence for the identification of such person held to answer, if the identity and past record of the said person are unknown to him, and the cost of such photographs, and measurements, and of distributing the same, may be allowed by the court as a part of the costs in the case. [29 G. A., ch. 154, § 1.]

SEC. **5499-b. Requiring attendance of witnesses at criminal actions in another state.** When a petition is filed in the office of a clerk of the district court upon the relation and oath of a prosecuting attorney in another state, which, by its laws, has heretofore or may hereafter make provision for commanding persons within its borders to attend and testify in a criminal action in this state, setting forth that there is a criminal action pending in the courts of such state wherein a person residing or being within the county wherein said court is held is a material witness for the state in such action, to which there is attached a certified copy of the indictment therein, a judge of said court shall issue an order fixing a time and place for a hearing on said petition, which may be during a session of court or in vacation, and thereupon the clerk shall prepare a notice requiring the said witness to appear before the said judge at the time and place specified in said order to make defense thereto and shall deliver the same to the sheriff of said county for service upon said person. [35 G. A., ch. 315, § 1.]

SEC. **5499-c. Costs.** All costs of said proceeding, which shall be estimated by the clerk, shall be paid to the clerk at the time said petition is filed. [35 G. A., ch. 315, § 2.]

SEC. **5499-d. Order.** If it shall be shown upon said hearing that the said person is a material and necessary witness for the prosecution in said case, the court shall enter an order commanding said person to appear and testify in said cause in the court in which such criminal action is pending at a certain named time and place, of which order the said person shall take notice. [35 G. A., ch. 315, § 3.]

SEC. **5499-e. Fees in advance—protection from service of papers and arrest.** If any person on whom such order has been made, having been tendered by the party asking for the order ten cents for each mile traveled to and from such court, and the sum of five dollars for each day that his attendance is required, including the time going to and returning from the place of trial, the number of days to be specified in such order, shall unreasonably neglect to attend and testify in such court, he shall be punished in the manner provided for the punishment of disobedience of any order issued from the office of the clerk of the district court; provided, however, that the laws of the state in which the trial is to be held give to persons coming into the state, under such order, protection from the service of papers and arrest. [35 G. A., ch. 315, § 4.]

SEC. **5499-f. Certified copy sent to other states.** Upon the taking effect of this act it shall be the duty of the secretary of state to certify a copy of this law to the executive department of each of the states of the United States. [35 G. A., ch. 315, § 5.]

CHAPTER 35.

OF BAIL.

SECTION 5505. Form of bond.

The surety does not become bound to pay the fine imposed upon the principal. He is simply a jailer for the principal, charged with the duty of producing him when his personal presence is required, or of surrendering him in execution of judgment. When once that duty is performed the liability of surety is extinguished, and whenever the court orders the defendant out on bail into the custody of the sheriff, in execution of the judgment pronounced against him, and the sheriff in pursuance of that order takes possession of the prisoner, the liability of the surety ceases. *State v. Zimmerman*, 112–5, 83 N. W. 720.

SEC. 5506. Upon appeal.

Where an appeal is from the assessment of a fine, the bond given on appeal must secure its payment in case of an affirmance. *Muscatine County v. Oliver*, 139 N. W. 1105.

CHAPTER 37.

OF FORFEITURE OF BAIL.

SECTION 5518. In what court. The action on the undertaking must be in the court in which the defendant was or would have been required to appear by the undertaking, and if suit is brought, any recovery thereon shall be paid to the county in which the defendant was indicted, less the costs of suit; save, when it requires the appearance of the defendant before a justice of the peace or a court of limited jurisdiction, or before an examining magistrate, such court or officer, upon the forfeiture of the undertaking, shall within thirty days file the same, together with a copy of all his official entries in relation thereto, in the office of the clerk of the district court of the county; and thereupon it shall be the duty of the county attorney to proceed to collect the same by a civil action in the district court of said county, or any other court of said county having jurisdiction. [34 G. A., ch. 185, § 1.] [C. '73, § 4599; R. § 4993.]

SEC. 5519. Surrender before judgment.

Mere forgetfulness on the part of the defendant as to the time of his required appearance or his inability to be present on account of lack of means to pay transportation to the place where appearance is required will not exonerate his sureties. *State v. Sandy*, 138–580, 116 N. W. 599.

CHAPTER 39.

OF DEPOSIT OF MONEY INSTEAD OF BAIL.

SECTION 5524. With whom and effect.

There is no provision for the deposit of money by any person other than the defendant himself, and when a deposit of money is made there is no right to have it returned except to the defendant. One who furnishes money to be used instead of bail to secure the release of a defendant must be presumed to have loaned it to the defendant, and he is not entitled to have it returned to him individually. Such money may, therefore, be applied to the payment of the fine imposed on the defendant. *State v. Owens*, 112–403, 84 N. W. 529.

After deposit of money in lieu of bail, the clerk should accept a bail bond, if offered, and release the money deposit, notwithstanding the provision of code § 5527 that money deposited by the defend-

ant shall be applied to the satisfaction of the judgment. *State v. Anderson*, 119–711, 94 N. W. 208.

The execution of a bail bond on appeal has the effect of releasing the money deposited in lieu of bail, and the court cannot require as a condition that a portion of the money as deposited be applied to the payment of the judgment or costs. *Ibid.*

The undertaking of a surety upon an appeal does not include payment of the costs of prosecution of the case in either court. *Ibid.*

This provision as to deposit of money in lieu of bail does not contemplate the deposit of money by third persons. *Ibid.*

While money deposited as bail by a third person to secure the release of a defendant may be resorted to in satisfaction of fine and costs assessed in the proceeding, it does not constitute a loan to the defendant and is not subject to garnishment at the suit of his creditors. *Wright v. Dougherty*, 138–195, 115 N. W. 908.

Where a third person deposits money as bail for defendant, the money so deposited is not subject to assignment by the defendant. *Doty v. Braska*, 138–396, 116 N. W. 141.

CHAPTER 40.

OF SURRENDER OF THE DEFENDANT.

SECTION 5528. Method.

Where a defendant who was on bail placed himself under the control of the sheriff after conviction, and was subsequently allowed, by an order of the court, to depart for temporary purposes, held that his surety was thereby released. *State v. Zimmerman*, 112–5, 83 N. W. 720.

The sureties on the bail bond become the custodians of the person of their principal and may at any time before the entry of forfeiture be exonerated by his surrender. But the failure or inability of the defendant to appear will not in itself excuse a forfeiture. *State v. Sandy*, 138–580, 116 N. W. 599.

SEC. 5530. Return of money deposited.

As a third person is not authorized to deposit money in lieu of bail to secure the release of defendant, one who has thus furnished money to secure defendant's release is not entitled to have it returned to him on surrender of defendant. *State v. Owens*, 112–403, 84 N. W. 529.

CHAPTER 43.

OF THE DISMISSAL OF CRIMINAL ACTIONS.

SECTION 5536. If not tried at second term.

This section relating to the dismissal of a prosecution where defendant is not brought to trial at the fixed regular term of the court in which the indictment is triable was evidently designed to enforce the constitutional provision giving the defendant in a criminal prosecution the right of a speedy trial. If postponement of the trial is due to any request or conduct on the part of the defendant or his counsel, or if the case is continued without objection on defendant's part and without demand for a trial, he is not entitled to a dismissal because the case was not brought to trial at the second term. *State v. Smith*, 106–701, 77 N. W. 499.

On an appeal in a criminal case, the court has no jurisdiction to determine whether the prosecution should have been dismissed because the defendant had not been given a speedy trial. *State v. Sloan*, 131–676, 109 N. W. 190.

Where good cause for continuance is shown, the defendant is not entitled to dismissal on the ground that he has not had the speedy trial provided for by statute. *State v. Johnson*, 136–601, 111 N. W. 827.

Where the delay in the trial is due to the rulings and motions for continuance, the defendant is not entitled to dismissal on the ground that the case is not tried within the time specified by statute. *State v. Nugent*, 134–237, 111 N. W. 927.

CHAPTER 44.

OF THE INSANITY OF A DEFENDANT.

SECTION 5540. Proceedings suspended.

After a defendant has been arrested on a warrant issued on an indictment the district court has exclusive jurisdiction to determine the question of his sanity and his custody in case of insanity, and the commissioners of insanity cannot be given authority to investigate such question. The provisions of code § 2279, so far as they purport to give such authority to the commissioners, are invalid. The court should proceed in such case under this section. *Stone v. Conrad*, 105–21, 74 N. W. 910.

The finding in a collateral investigation as to the defendant's sanity during the trial is admissible on the issue as to insanity at the time of the commission of the crime but not conclusive as it relates to a subsequent date. *State v. Grendahl*, 131–602, 109 N. W. 121.

Such a finding under which the defendant is sent to an insane hospital does not preclude testimony of the physician of such hospital after the defendant was received and treated there, as to his mental condition. *Ibid.*

Where evidence is offered tending to show that the defendant is not of sound mind when put on trial the court may have that question investigated. *State v. Neubauer*, 145–337, 124 N. W. 312.

CHAPTER 45.

OF SEARCH WARRANTS AND PROCEEDINGS THEREON.

SECTION 5545. Definition.

Ordinarily a finding in a search warrant proceeding is not conclusive as to the ownership of the property; but where rival claimants appear, employ counsel and submit the issue of ownership upon testimony adduced, the finding is conclusive although strictly speaking they are not parties to the action. *Montgomery v. Alden*, 133–675, 108 N. W. 234.

SEC. 5550. Warrant.

A description which points out or identifies the place to be searched with such reasonable identity as will obviate any mistake in locating it is all that is required. *State v. Moore*, 125–749, 101 N. W. 732.

SEC. 5563. Return to owner.

While adverse claimants of the property are not strictly parties to a search warrant proceeding, yet if they raise the issue as to ownership the finding on such issue is conclusive. *Montgomery v. Alden*, 133–675, 108 N. W. 234.

CHAPTER 47.

OF PROCEEDINGS AND TRIALS BEFORE JUSTICES OF THE PEACE.

SECTION 5576. Information.

An information sworn to and left with the magistrate which is acted upon by him, is presumed to have been filed and to have been sworn to before him acting within his jurisdiction. *Lovilia v. Cobb*, 126–557, 102 N. W. 496.

SEC. 5577. Must contain.

Proceedings under an information which charges an offense, but is not specific enough in stating the details thereof, will not be void, but only voidable, and there-

fore false testimony given in such proceeding may constitute perjury. *State v. Perry*, 117–463, 91 N. W. 765.

An information may be amended after appeal to the district court. *Lovilia v. Cobb*, 126–557, 102 N. W. 496.

An amendment to an information in a prosecution before a justice of the peace may be made in the district court on appeal. *State v. Reilly*, 108–735, 78 N. W. 680.

Where there is no doubt as to the nature of the offense charged, the information may be so amended as to charge its commission anywhere within the jurisdiction of the court, instead of in a particular subdivision of the territory over which the court has jurisdiction. Such an amendment may require a postponement of the trial, and for this reason is largely discretionary. *State v. Abrams*, 131–479, 108 N. W. 1041.

SEC. 5617. Trial on appeal.

On an appeal from a conviction before a justice of the peace or mayor of a city the information may be amended. *Lovilia v Cobb*, 126–557, 102 N. W. 496.

On such appeal jury trial may be waived. *Ibid.*

On an appeal from a conviction before a justice of the peace, the accused may withdraw his plea of guilty on which the conviction was entered, and is then entitled to a trial. *State v. Abrams*, 131–479, 108 N. W. 1041.

The trial of an appeal in a criminal case from conviction by a justice of the peace may be by the court without a jury unless a jury is demanded by the defendant. *State v. Ozias*, 136–175, 113 N. W. 761.

CHAPTER 48.

OF COMPROMISING CERTAIN OFFENSES BY LEAVE OF THE COURT.

SECTION 5622. When allowed.

No public offense can be compounded, nor proceedings therein stayed, except as provided in these sections. *White v. International Textbook Co.*, 156–210, 136 N. W. 121.

Further as to compounding crimes, see notes to code §§ 4889, 4890 and 5301 in this supplement.

CHAPTER 49.

OF PARDONS AND THE REMISSION OF FINES AND FORFEITURES.

SECTION 5626. **By governor.** The governor shall have power to remit fines and forfeitures upon such conditions and with such restrictions and limitations as he may think proper. After conviction of murder in the first degree, no pardon shall be granted by the governor until he shall have presented the matter to and obtained the advice of the board of parole thereon, but he may commute a death sentence to imprisonment in the penitentiary for life. Before presenting the matter to the board of parole for its action, he shall cause a notice containing the reasons assigned for granting the pardon to be published in two newspapers of general circulation, one of which shall be published at the capital and the other in the county where the conviction was had, once each week, for four successive weeks, the last publication to be at least twenty days prior to the session of the board of parole to which the matter shall be presented. [34 G. A., ch. 186, § 1.] [31 G. A., ch. 9, § 27; C. '73, § 4712; R. § 5116; C. '51, § 3278.]

The governor has the power to remit a fine imposed in a criminal prosecution for maintaining a liquor nuisance but cannot remit the costs nor prevent their being a

lien upon the property against which they are adjudged. *State v. Mateer*, 105–66, 74 N. W. 912.

The governor may grant a conditional suspension of judgment in a criminal case. *Ibid.*

CHAPTER 50.

OF ILLEGITIMATE CHILDREN.

SECTION 5629. Complaint.

Evidence of improper relations between the prosecutrix and a man not the defendant is immaterial, unless it be shown that such relations might have existed at the time the child in dispute was conceived. *State v. Seevers*, 108–738, 78 N. W. 705.

If the defendant is the father of the child, he is liable in this proceeding, even though the mother was the lawful wife of another at the time the child was conceived, and knew the fact. *Ibid.*

It is not proper to permit prosecutrix to testify that she is without money or other property with which to support the child. *Ibid.*

In a bastardy proceeding it is error to allow an infant nine months of age, claimed to be the result of intercourse between defendant and the complaining witness, to be introduced in evidence to the jury. *State v. Harvey*, 112–416, 84 N. W. 535.

Under complaint filed before the child is born proof of the subsequent birth of the child is competent evidence. It is not required in such case that after the birth of the child the complaint be amended by alleging that fact. *State v. Harris*, 112–589, 84 N. W. 681.

The procedure under a complaint of bastardy is that which obtains in ordinary civil actions, and the rules of evidence are the same. Therefore, declarations of the prosecutrix as to the act of sexual intercourse or her failure to make complaint cannot be shown. *State v. Lowell*, 123–427, 99 N. W. 125.

In a bastardy proceeding the state should not be permitted to show the extent of property owned by defendant's father. *State v. Meier*, 140–540, 118 N. W. 792.

The defendant may show intercourse of plaintiff with others at or about the time of conception. *Ibid.*

Resemblance of the child to defendant is not a proper subject of comment in argument to the jury where there is no evidence in the record relating thereto. *Ibid.*

By a fair settlement with the putative father, the mother may preclude both herself and the county from maintaining the proceeding. *Ibid.*

The relations of the complainant to other men than the defendant are immaterial unless they tend to show that some other than the defendant was the father of the child. *State v. Engstrom*, 145–205, 123 N. W. 948.

It is error to so instruct the jury as that they may be allowed to reach a verdict in pursuance of sentiment rather than in accordance with the rules of law laid down by the court. *Ibid.*

The fact that the prosecutrix, while testifying, had on her lap the child which she testifies is the offspring of the illicit relation, held no ground for objection on appeal, the court having cautioned the jury against considering or discussing any supposed or fancied resemblance or nonresemblance between the child and the defendant. *State v. Stark*, 149–749, 129 N. W. 331.

The prosecution may be maintained in the county of the residence of the prosecutrix although she was temporarily absent from such county when the child was born. *Ibid.*

The condition and experience in life of the complainant is a matter which the jury may properly consider as bearing upon the question whether, in fact, complainant permitted the defendant to have intercourse with her. *State v. Wangler*, 151–555, 132 N. W. 22.

Complainant's testimony that no other man than defendant aside from her father and brothers had ever kissed or hugged her, held competent as negativing improper relations with other men who might have been the father of the child. *Ibid.*

The jury should return a verdict of not guilty on finding that the preponderance of evidence is not in favor of the plaintiff. *Ibid.*

TITLE XXVI.

OF THE DISCIPLINE AND GOVERNMENT OF JAILS AND PENITENTIARIES.

CHAPTER 1.

OF THE JAILS.

SECTION 5637. How used.

A sheriff is punishable for contempt in allowing a prisoner, sentenced to confinement in the county jail by a proper federal court, to go from and return to such jail at his pleasure. *Ex parte Shores*, (D. C.) 195 Fed. 627.

SEC. 5641. Sheriff's duty. [35 G. A., ch. 33, § 1; 33 G. A., ch. 3, § 4.]

[The above section was amended by 33 G. A., and the amendment repealed by 35 G. A., leaving the section as it now appears in the code. EDITOR.]

SEC. 5652. Hard labor may be required. Able-bodied male persons over the age of sixteen, confined in any jail under the judgment of any tribunal authorized to imprison for the violation of any law, ordinance, by-law or police regulation, may be required to labor during the whole or part of the time of his sentence, as hereinafter provided, and such tribunal, when passing final judgment of imprisonment, whether for non-payment of fine or otherwise, shall have the power to and shall determine whether such imprisonment shall be at hard labor or not. [33 G. A., ch. 229, § 1.] [C. '73, § 4736; R. § 5126; C. '51, § 3107.]

The length of time that prisoners shall be required to labor depends upon the character of the work, the season of the year, their strength and condition of health, whether accustomed to labor, and must necessarily be left largely to the discretion of the officer in charge of the prisoners. *State v. Welsh*, 109–19, 79 N. W. 369.

CHAPTER 2.

OF PENITENTIARIES.

[The penitentiaries are now under the management and control of the board of control. See § 2727-a8. EDITOR.]

SECTION 5662. Bond—oath. Each shall, before entering upon the discharge of his duty, execute a bond payable to the state in the penal sum of twenty-five thousand dollars, with not less than five freehold sureties, to be approved by the governor, conditioned that he will faithfully discharge all his duties as general superintendent and financial agent of the state for said institution; that he will faithfully apply any and all moneys

that may come into his hands by virtue of his office to the purposes for which they are appropriated, and none other; that he will cause to be kept a full and intelligible record of all the transactions of a monetary character connected with the institution; that he will impartially, and to the best of his ability, administer the disciplinary regulations of the institution so as to contribute to the health, safe-keeping and profitable employment of the convicts; that he will appoint no one to the office of clerk, deputy warden or guard through favoritism or other personal consideration, and no one without due and proper regard to his qualifications for said stations; that he will render a faithful account of all the transactions of the institution to the governor, or his lawfully authorized agent, every thirty days, and oftener as he may be required; that he will not become directly or indirectly interested in any contract for supplying materials, labor, provisions, clothing or any other thing for the use of said penitentiary, and that, at the expiration of his official term, he will surrender all books, papers, records, moneys or other property or securities belonging to said institution to his successor in office. Each shall also take and subscribe an oath or affirmation, which shall be endorsed on the back of said bond, that he will support the constitution of the United States and that of the state of Iowa, and that he will scrupulously observe all the stipulations and conditions of said bond, and faithfully discharge all his duties agreeably to law according to the best of his ability, which bond shall be filed with the secretary of state. [28 G. A., ch. 136, § 1; C. '73, § 4747; R. § 5175.]

SEC. **5663. Restrictions — clerk — guards — assignment of duties.** The warden must not carry on nor be concerned in the business of trade or commerce during his continuance in office; he must reside constantly within the precincts of the prison, and shall take charge of the penitentiary and of all the interests of the state connected therewith, and shall appoint some suitable person as clerk, who shall also act as commissary under the direction of the warden, one deputy, one assistant deputy, and as many guards as may be necessary to the safe-keeping and government of the convicts, not exceeding one for every ten convicts under his charge at Fort Madison, and one for every eight at Anamosa, and the warden under the direction of the board of control shall assign said guards to any duty that may be necessary to properly conduct the business of said penitentiaries. At no time shall there be less than forty-five guards at Fort Madison and forty-two guards at Anamosa. [32 G. A., ch. 191, § 1; 30 G. A., ch. 139, § 1; 27 G. A., ch. 117, § 1; 17 G. A., ch. 149; C. '73, § 4748; R. § 5142; C. '51, § 3128.]

[The amendment by 30 G. A., ch. 139, § 1, ignored the code supplement of 1902 where the section appeared. The change has been made to the section as it appeared in the said code supplement.]

SEC. **5667. Clerk—bond—oath.** Each clerk of the penitentiary shall receive his appointment from and hold his office during the pleasure of the warden, and be in all things responsible to him. Before entering upon the discharge of his duties, he shall give bond to the state in the penal sum of twenty thousand dollars, with two or more freehold sureties, to be approved by the governor, conditioned that he will keep a fair, honest, impartial and faithful record of the affairs of the penitentiary, written in a legible hand, with proper indices, upon a system of bookkeeping which shall enable him at all times to present in a plain and intelligible manner the financial condition of the institution; that he will discharge all his duties as clerk and commissary faithfully; and that he will not become

interested, directly or indirectly, in any contract for furnishing supplies for the use of said institution; and that he will yield strict and implicit obedience to the laws, rules and regulations of the institution, and to all the legal orders of the warden. He shall also take and subscribe an oath, which shall be endorsed on the bond, that he will support the constitution of the United States and that of this state, and that he will scrupulously observe all the conditions, stipulations and requirements thereof, and will faithfully discharge his duty as clerk and commissary during his continuance in office, according to the best of his judgment and ability; which bond shall be filed in the office of the secretary of state, and action thereon may be brought for the violation of any of its conditions, in the name of the state, for the use of the warden or any other person injured by such violation. [28 G. A., ch. 136, § 2; 26 G. A., ch. 79, § 1; C. '73, § 4752; R. § 5180.]

SEC. **5669. Deputy warden.** Each deputy warden and assistant deputy shall receive his appointment from the warden, and shall hold his office during his pleasure; he shall give bond with sureties and in the same manner, take a like oath, and be in all respects subject to like responsibilities, as the clerk, so far as the same are applicable; but the amount of the bond shall be five thousand dollars. The deputy warden shall keep a regular time-table of the convict labor, and record the same in a book to be kept for that purpose, and shall keep a record of all the business under his control, and return an account thereof, together with an account of the convict labor, to the clerk at the close of each day. The assistant deputy warden shall perform the duties of deputy warden in his absence or inability to act, and such other duties as shall be prescribed by the warden with the approval of the board of control of state institutions. [30 G. A., ch. 139, § 2; 18 G. A., ch. 154, § 3; C. '73, § 4754; R. §§ 5169, 5182.]

SEC. **5669-a. Residence for deputy—house rent—repealed.** [35 G. A., ch. 316, § 2.] [27 G. A., ch. 116, § 1.]

[See § 5717. EDITOR.]

SEC. **5683. Property of convict.**

Under authority to receive and care for any property the convict may have on his person on entering, the warden may take possession of a certificate of deposit, but has no right to receive payment of the amount called for, and if he does so the convict may afterwards recover against the bank the amount of the certificate. *Thompson v. Niles*, 115–67, 87 N. W. 732.

SEC. **5685. Visitors—repealed.** [30 G. A., ch. 140, § 1; 28 G. A., ch. 137, §§ 1, 2.]

[See § 5685-a.]

SEC. **5685-a. Visitors—fees—how used.** That the law as it appears in section fifty-six hundred eighty-five-a of the supplement to the code, 1907, is hereby repealed and in lieu thereof is hereby enacted the following:

"Each of the wardens of the penitentiary and the reformatory shall demand and receive of each person, except state officers and others exempt by law and relatives of a prisoner confined therein, who visits the prison for the purpose of viewing the interior or precincts, the sum of twenty-five cents, of which the warden shall render an[1] account each month to the board of control of state institutions. The money so collected shall be applied in the discretion of said board in the purchase of books, periodicals, newspapers, and furniture and furnishings for library and reading rooms, and for lectures, concerts and other entertainments and musical instruments and musical supplies for the institution for which it was collected.

If at any time in the opinion of said board there be money in the fund so created not needed for the uses specified it may be transferred on the order of said board to the support fund of the institution." [35 G. A., ch. 317, § 1.] [30 G. A., ch. 140, § 1.]

[1"and" in enrolled bill. EDITOR.]

SEC. 5702-a. **Manufacture prohibited.** It shall not be lawful except to complete existing contracts made by board of control to manufacture for sale any pearl buttons or butter tubs in the penitentiaries of the state, and it shall be the duty of the board of control and wardens of said penitentiaries to enforce the provisions of this act, and to prohibit the manufacture of pearl buttons or butter tubs, in whole or in part, by the inmates confined in said penitentiaries. [28 G. A., ch. 138, § 1.]

[See § 2727-a74a for later provisions respecting manufacture of butter tubs at the reformatory. EDITOR.]

SEC. 5702-b. **Existing contracts.** This act shall not alter or impair the conditions of any contract actually made and entered into by and between any contractor and the board of control, which shall have been made prior to the passage of this act. [28 G. A., ch. 138, § 2.]

SEC. 5703. **Good conduct—diminution of sentence.**

The diminution of time from a sentence which is granted by the statute on account of good conduct should be credited to the prisoner on a second sentence imposed on a new trial, after the first sentence has been set aside. *State v. Barr*, 133–132, 110 N. W. 280.

SEC. 5704. **Forfeiture.**

Although the right to diminution of sentence for good conduct is not a vested right, yet a prisoner is not bound by the acceptance of a conditional pardon providing for a forfeiture of the credit already accrued to a forfeiture of such credit for breach of the conditions. After the condition is broken he can only be remanded, for the balance of the term, to the remainder of the imprisonment which he would have been required to serve had he not accepted the conditional pardon. *State v. Hunter*, 124–569, 100 N. W. 510.

SEC. 5707. **Work in stone quarries.** Able-bodied male persons sentenced to imprisonment in the penitentiary may be taken to that at Anamosa, or to that at Fort Madison, there confined and worked in places and buildings owned or leased by the state outside of the penitentiary inclosures; but the labor of such convicts shall not be leased, and the warden shall keep a regular time-table of the convict labor and record thereof in a book provided for that purpose, and shall also keep a record of all the business under his control, returning to the clerk at the close of each day an account thereof, together with that of convict labor. He shall also have all stone which is not used for building purposes by the state, together with all refuse stone at the quarries, broken to be used for the improvement and macadamizing of streets and highways, this work to be done by convict labor when not otherwise employed, but the warden may in his discretion make such disposition of any surplus refuse stone at the quarries as may be for the best interest of the state. [35 G. A., ch. 318, § 1.] [29 G. A., ch. 155, § 1; 25 G. A., ch. 20, § 1; 18 G. A., ch. 154, § 3; 17 G. A., ch. 187; 16 G. A., ch. 40, §§ 7, 8; 14 G. A., ch. 43, § 14.]

SEC. 5711. **Assistant deputy warden—repeal.** Section fifty-seven hundred eleven of the code is hereby repealed. [30 G. A., ch. 139, § 4.]

SEC. 5716. **Compensation of officers and employes.** That the law as it appears in section fifty-seven hundred sixteen, of the supplement to

the code, 1907, is hereby repealed, and in lieu thereof is enacted the following:

"The officers and employes of the reformatory at Anamosa and the penitentiary at Fort Madison, hereinafter specified, shall be paid for their services each month, sums to be fixed by the board of control of state institutions, not exceeding, however, the sums specified as follows: The warden, two hundred ten dollars; the deputy warden, one hundred twenty-five dollars; the assistant deputy warden, one hundred dollars; the clerk, one hundred dollars; the chaplain, one hundred dollars, and an additional chaplain, twenty dollars; matron of the women's department, seventy-five dollars; the physician and surgeon of the reformatory at Anamosa, one hundred dollars; the physician and surgeon of the penitentiary at Fort Madison, one hundred dollars; the kitchen stewards, receiving and disbursing officers, record clerks, and captains of night guards, each eighty dollars; but turnkeys, and guards of the first class shall be paid eighty dollars; turnkeys and guards of the second class, seventy-five dollars; turnkeys and guards of the third class, sixty-five dollars. Other officers and employes in the opinion of the board of control of state institutions needed to carry on the various departments of the prisons, properly and efficiently, may be authorized, and their salaries fixed by said board, subject to the approval of the governor, as provided by the law as found in section twenty-seven hundred twenty-seven-a thirty-eight of the supplement to the code, 1907. The salaries and wages herein authorized shall be paid by the state treasurer from any money in the state treasury not otherwise appropriated, upon certified abstracts as provided by the law, as it appears in section twenty-seven hundred twenty-seven-a forty-three of the supplement to the code, 1907." [35 G. A., ch. 316, § 1.] [31 G. A., ch. 172, § 1; 30 G. A., ch. 141, §§ 1, 2; 30 G. A., ch. 139, § 3; 29 G. A., ch. 156, § 1; 26 G. A., ch. 79, § 2; 22 G. A., ch. 69, §§ 7, 10; 20 G. A., ch. 187, § 2; 18 G. A., ch. 200; 17 G. A., ch. 167; 16 G. A., ch. 156; C. '73, §§ 4783–4; R. § 5192.]

SEC. **5717. House rent of warden.** The law as it appears in section fifty-seven hundred seventeen of the code, and in section fifty-six hundred sixty-nine-a and section fifty-seven hundred eighteen-a twenty-eight of the supplement to the code, 1907, is hereby repealed, and in lieu thereof, is enacted the following:

"In addition to his salary, each warden shall be provided with a furnished house to be designated by the board of control, or house rent and water, heat, ice, and lights, and the labor of prisoners, not exceeding three at one time for household and domestic service. Each deputy warden shall be furnished with a house to be designated by the board of control, or house rent and water, heat, ice, and lights, and domestic service by not more than one prisoner at one time. The matron of the female department shall be allowed, in addition to her salary, a furnished apartment, heat, light, and domestic service within the building occupied by the women's department. The prison labor authorized by this section shall not be used except on the premises and for the benefit of the person authorized to use it, and for his family. Provided, however, that no labor of prisoners shall be used in a manner to prejudice prison discipline." [35 G. A., ch. 316, § 2.] [18 G. A., ch. 200; 17 G. A., ch. 167; 16 G. A., ch. 156; C. '73, § 4783; R. § 5168.]

SEC. **5718. Support of prisoners.** Section fifty-seven hundred eighteen of the code is hereby repealed, and in lieu thereof is enacted the following:

"For the general support of the prisoners confined in the reformatory at Anamosa and the penitentiary at Fort Madison there shall be paid from any money in the state treasury not otherwise appropriated the sum of eleven dollars and fifty cents monthly for each prisoner in the reformatory and eleven dollars monthly for each prisoner in the penitentiary, to be estimated by the average number present during the preceding month. Said sums shall be drawn from the state treasury as provided by the law as it appears in section twenty-seven hundred twenty-seven-a forty-three of the supplement to the code, 1907." [35 G. A., ch. 316, § 3.] [19 G. A., ch. 91; 17 G. A., ch. 83; C. '73, §§ 4785–7.]

SEC. **5718-a1. Religious worship.** That it shall be the duty of [the] board of control, superintendents, warden, and other officers having the management of any penal, correctional, charitable or educational institution, or other place of confinement now existing or hereafter established and supported by public funds, to permit all persons committed to, confined or detained in, or otherwise held in such institutions, or other place of confinement, spiritual advice, instruction, and ministration from any recognized clergyman of the church or denomination which such person so committed, confined, detained or received may profess to adhere to or prefer; which said profession or choice shall be by such person communicated to the warden, superintendent or other officer in charge of such institution. It shall be the duty of the warden, superintendent or other officer receiving such person so committed, to inquire of such committed person as to his religious preference and enter the same in the book kept for the purpose, and cause the person making such choice or preference to sign the same. And during the time of detention such person so committed, confined or detained shall be allowed at suitable and reasonable times to receive the visits of clergymen belonging to the denomination or church so preferred at the time of commitment, or chosen at any later period. [31 G. A., ch. 35, § 1.]

SEC. **5718-a2. What permitted.** It shall be the duty of the superintendent, warden or other officer having the control and management of such institution to allow the person so committed or detained the privilege of communicating with any clergyman of good standing of the church or denomination so preferred for at least an hour on the first day of the week in each week; and all facilities consistent with discipline and the proper care of such person so detained or confined shall be allowed to the clergyman so ministering or teaching; and all opportunity for engaging in religious services according to the rites of such church and denomination shall be freely allowed in so far as the same are consistent with discipline and good order. In case of severe sickness of anyone so committed, confined or detained, opportunity shall be given him for spiritual ministration according to laws, ritual, rites, and customs of such denomination, so far as the same may be done without interference with the efficient management and control of such institution. That minister or ministers attending persons as provided by this act shall be entitled to no compensation for so doing. [31 G. A., ch. 35, § 2.]

SEC. **5718-a3. Minors—rules and regulations.** In case any person so committed, detained or restrained is a minor and has formed no choice, his preference may, at any time, be expressed by himself with the approval of parents or guardian, if he has any such. It shall be the duty of the officers or governing authorities of any such institution to provide such rules and regulations as may be necessary to carry into effect the provisions of this act. [31 G. A., ch. 35, § 3.]

SEC. **5718-a4. "The reformatory."** Hereafter the penitentiary at Anamosa shall be officially known and designated as "the reformatory," and shall be the reformatory department of the state penitentiary of Iowa. [32 G. A., ch. 192, § 1.]

SEC. **5718-a5. Commitments.** Any male person who shall be committed to the penitentiary after the fourth day of July, nineteen hundred and seven, (except those convicted of murder, treason, sodomy or incest) and who at the time of commitment is between the ages of sixteen and thirty years, and who has never before been convicted of a felony, shall be confined in the reformatory; provided, however, that persons between the ages of sixteen and thirty years convicted of rape, robbery, or of breaking and entering a dwelling house in the nighttime with intent to commit a public offense therein, may, as the particular circumstances may warrant, in the discretion of the court, be committed to either the reformatory at Anamosa, or the penitentiary at Fort Madison. [32 G. A., ch. 192, § 2.]

SEC. **5718-a6. Insane department.** The criminal insane shall continue to be confined in the insane department at Anamosa, as provided in section fifty-seven hundred and nine of the code. [32 G. A., ch. 192, § 3.]

SEC. **5718-a7. Transfer of prisoners for violation of rules or insubordination.** Any male prisoner confined in the reformatory may be transferred to the penitentiary at Fort Madison, upon order of the board of control, for violation of the rules of the reformatory or for insubordination and a like transfer may be ordered by said board whenever it shall be of the opinion that a prisoner is not a hopeful subject for reformatory treatment. [32 G. A., ch. 192, § 4.]

SEC. **5718-a8. Transfer of prisoners over age limit—former convictions.** If it shall appear at any time after conviction and incarceration in the reformatory that a prisoner was over thirty years of age at the time of commitment, he shall be at once transferred to the prison at Fort Madison, and he shall likewise be transferred if it shall appear that he had, prior to the last conviction, been convicted of a felony in Iowa or elsewhere. [32 G. A., ch. 192, § 4½.]

SEC. **5718-a9. What prisoners retained in reformatory—transfer of life prisoners.** The board of control may retain in the reformatory such persons as have been or are committed to the penitentiary at Anamosa for crimes committed on or prior to July fourth, nineteen hundred and seven, except that all persons convicted of murder in the first degree and all persons sentenced to life imprisonment shall be kept and confined in the prison at Fort Madison and a transfer shall be made as soon as reasonably convenient after July fourth, nineteen hundred and seven, from the reformatory to the prison at Fort Madison of the persons named in this exception, provided that prisoners committed for life who are now beyond fifty-five years of age shall not be removed. [32 G. A., ch. 192, § 5.]

SEC. **5718-a10. Transfer when Fort Madison penitentiary is overcrowded.** Whenever there is unoccupied room in the reformatory and the prison at Fort Madison is overcrowded, the board of control may, in its discretion, transfer from the prison at Fort Madison well-behaved and most promising convicts, who are confined for their first offense. The prison at Fort Madison shall be deemed to be overcrowded when the number of inmates exceeds the number of cells. [32 G. A., ch. 192, § 6.]

SEC. **5718-a11. Employment of inmates.** The inmates of the reformatory shall be employed only on state account, which employment shall be conducive to the teaching of useful trades and callings so far as prac-

ticable, and the intellectual and moral development of the inmates; provided, however, that the inmates of the reformatory may be employed to complete any contracts for prison labor to be performed in the penitentiary at Anamosa. [32 G. A., ch. 192, § 7.]

[See § 2727-a74a for later provisions respecting manufacture of butter tubs at the reformatory. EDITOR.]

SEC. **5718-a12. Registers and records.** The board of control shall cause to be kept at the reformatory and penitentiary such registers and records of prisoners for the use of the board of parole as may be approved by the executive council. [32 G. A., ch. 192, § 8.]

SEC. **5718-a13. Indeterminate sentences.** After July fourth, nineteen hundred and seven, whenever any person over sixteen years of age is convicted of a felony, committed subsequent to July fourth, nineteen hundred and seven, except treason or murder, the court imposing a sentence of confinement in the penitentiary shall not fix the limit or duration of the same, but the term of such imprisonment shall not exceed the maximum term provided by law for the crime of which the prisoner was convicted; provided that if a person be sentenced for two or more separate offenses and the second or further term is ordered to begin at the expiration of the first and such succeeding term of sentence is specified in the order of commitment, the several terms shall for the purpose of this act be construed as one continuous term of imprisonment; and provided that where one is convicted of a felony that is punishable by imprisonment in the penitentiary, or by fine, or by imprisonment in the county jail, or both, the court may impose the lighter sentence if it shall so elect. [32 G. A., ch. 192, § 9.]

While the court is required on conviction to impose the maximum sentence, the imposition of less than the maximum on conviction will not constitute error entitling the defendant to have the sentence reversed. *State v. Perkins*, 143–55, 120 N. W. 62.

The court may properly impose the maximum term of sentence authorized by the statute and the propriety of such sentence cannot be inquired into on appeal. *State v. Dillingham*, 143–282, 121 N. W. 1074.

The court has no power under these provisions to fix the term of imprisonment at less than the maximum term specified by statute. The defendant has therefore no ground of complaint against a sentence for the maximum term. *State v. Duff*, 144–142, 122 N. W. 829; *State v. Loos*, 145–170, 123 N. W. 962.

Under the indeterminate sentence law it cannot be objected on appeal that the sentence imposed in a criminal case is excessive. *State v. Rozeboom*, 145–620, 124 N. W. 783.

While the sentence should not be for a definite period, the fact that it is for the maximum period of punishment prescribed by statute, will not interfere with the adjustment of the punishment in accordance with the provisions of this statute. *State v. Davenport*, 149–294, 128 N. W. 351.

The statutory provisions as to indeterminate sentence are not unconstitutional. *State v. Ferguson*, 149–476, 128 N. W. 840.

Where the punishment provided by statute is imprisonment in the penitentiary not exceeding a specified period, the trial court has no discretion to impose a sentence for a shorter period of imprisonment. *State v. Haines*, 152–394, 132 N. W. 821.

Notwithstanding the fixing of the sentence at a shorter term than the maximum term fixed by statute, it is the duty of the warden to keep the prisoner in restraint for such maximum period less good time earned, should he not be sooner paroled or pardoned as provided by law. *Adams v. Barr*, 154–83, 134 N. W. 564.

On conviction, a judgment or sentence that defendant be imprisoned in the penitentiary according to law is all that is required and whatever is added thereto is unauthorized and may be ignored as void or mere surplusage. No reference whatever need be or should be made to a maximum or minimum period. *Ibid.*

Where it does not appear that the offense was one committed since the enactment of the indeterminate sentence law and the sentence is for a fixed term, it is to be presumed in support of the sentence that the crime was one committed before the law took effect. *Ibid.*

The chief merit of the indeterminate sentence is that the punishment is made to fit the offender rather than the crime, and all circumstances in mitigation or excuse may be considered and the sentence so regulated as to meet the ends for which punishment is inflicted. The fact that the circumstances of the crime indicate that it is minor in character is not a ground for complaint that the sentence for the maximum punishment provided by statute is unwarranted. *State v. Sego*, 140 N. W. 802.

SEC. **5718-a14. Board of parole—terms—office—supplies—compensation—secretary—salary—duties—employes.** Prior to the adjournment of the thirty-second general assembly, the governor, with the advice and consent of the senate, shall appoint three electors of the state, not more than two of whom shall belong to the same political party, and one member of whom shall be a duly licensed attorney at law, as members of a board to be known as a board of parole. Said members shall hold office, as designated by the governor, for two, four and six years, respectively; subsequent appointments shall be made as provided above, and shall be for a term of six years, except appointments to fill vacancies, which shall be for the unexpired term. The terms of the members first appointed shall commence July first, nineteen hundred and seven, and the chairman of the board shall be the member whose term first expires. Appointments made when the general assembly is not in session shall be subject to the approval of the senate when next in session. A suitable office at the capitol shall be provided for the use of the board, with such furniture and office supplies as shall be reasonably necessary for the use of the same, and such board shall hold at least four sessions each calendar year. They shall receive as compensation ten dollars per day for the time actually spent in discharge of the duties of this office, and all necessary expenses while on official business. The board of parole shall employ a competent secretary who shall receive a salary not to exceed two thousand dollars per year and necessary traveling expenses when on official business required and designated by the board. He shall keep records and perform such duties as state agent or otherwise, as shall be prescribed by the board. They may employ such other employes as the executive council may authorize by written resolution. [35 G. A., ch. 33, § 1; 34 G. A., ch. 189, § 1; 33 G. A., ch. 3, § 1.] [32 G. A., ch. 192, § 10.]

SEC. **5718-a15. Appropriation.** There is hereby appropriated from any funds in the state treasury not otherwise appropriated sufficient thereof to pay the salaries and expenditures herein authorized. [32 G. A., ch. 192, § 11.]

SEC. **5718-a16. Traveling expenses—emergency trips.** The secretary and other employes shall be entitled to their necessary traveling expenses by the nearest traveled and practicable routes incurred in going from Des Moines to the penitentiaries or other places in the state when on official business. No expenditure for traveling expenses to other states shall be made by the board or any officer or agent thereof unless the authority to make such trip is granted at a meeting of the board upon a written resolution adopted by the board, which shall state the purpose of such trip and the reason the same is deemed necessary. Emergency trips may be made upon written order of the chairman, which shall be reported to the board at its next meeting. [32 G. A., ch. 192, § 12.]

SEC. **5718-a17. Itemized statement of expenditures—how approved and paid.** Before any expenses or per diem of the members of the board or any officer or agent thereof, or any expense incurred by others under the direction of the board, shall be paid, a minutely itemized statement of such expenditures shall be presented to the proper authorities, duly veri-

fied, which certification shall aver that the expense bill is just, accurate and true, and is claimed for cash expenditures or cash disbursements truly and actually paid and made to the parties named as shown by said statement herein. Unless the said statement is so verified and duly audited, payment thereof shall not be made. The expense bills of the members of the board, the secretary and its other employes, when so verified, shall be presented to the executive council for their written audit before payment is made. The salaries and actual expenses of the board, the secretary and other employes shall be paid monthly by the treasurer of the state upon the warrant of the auditor of state. [32 G. A., ch. 192, § 13.]

SEC. **5718-a18. Rules and regulations governing paroles—parole before commitment.** The board of parole shall have power to establish rules and regulations under which it may allow prisoners within the penitentiaries other than prisoners serving life terms to go upon parole outside of the penitentiary buildings, enclosures and appurtenances, but to remain while on parole in the legal custody of the wardens of the penitentiaries and under the control of the said board of parole and subject, at any time, to be taken back and confined within the penitentiary; it may, on the recommendation of the trial judge and county attorney, and when it shall appear that the good of society will not suffer thereby, parole, after conviction and before commitment, persons not previously convicted of a felony; and the board shall have full power to enforce such rules and regulations and to retake and reimprison any such paroled convict. The order of said board certified by its secretary shall be a sufficient warrant for any peace officer to arrest and take into actual custody or to return to the penitentiary specified in the order any prisoner conditionally released or paroled by said board; and it is hereby made the duty of all peace officers to execute such order the same as any other criminal process and they shall receive the same fees as sheriffs for like services, the same to be paid out of the appropriation made herein, but no person shall be released on parole before the expiration of the maximum term provided by law for the punishment of the crime of which he was convicted until the board of parole shall have satisfactory evidence that arrangements have been made for his employment or maintenance for at least six months. The time when a prisoner is upon parole or absent from the penitentiary shall not be held to apply upon his sentence if he shall violate the terms of his parole. [33 G. A., ch. 231, § 1.] [32 G. A., ch. 192, § 14.]

The indeterminate sentence statute is not unconstitutional as delegating the power to grant reprieves and pardons. *State v. Duff*, 144–142, 122 N. W. 829.

The provisions as to the powers of the board of parole do not conflict with the constitutional authority conferred upon the governor to grant reprieves and pardons. *Ware v. Sanders*, 146–233, 124 N. W. 1081.

The board has authority to extend paroles without regard to the date of the offense for which the conviction was had. *Ibid.*

SEC. **5718-a19. Inquiry relative to pardon or parole.** The board of parole may institute any inquiry it may deem expedient in regard to any prisoner or application for pardon, final discharge or parole; but said board shall not receive, unsolicited by them, any petition or communication or argument in regard to said application, unless provided for in their adopted rules. [32 G. A., ch. 192, § 14½.]

SEC. **5718-a20. Board of parole to recommend pardon.** It shall be the duty of the board of parole to keep in communication, so far as possible, with all persons who are on parole and when, in their opinion, any prisoner who has served not less than twelve months of his parole ac-

ceptably, has given such evidence as is deemed reliable and trustworthy that he is and will continue to be a law-abiding citizen and that his final release is not incompatible with the welfare of society; and when the said board of parole shall have procured, as far as possible, all facts relating to the history of such paroled prisoner, both before and after his confinement and parole, and his record while detained, the board of parole shall recommend to the governor the discharge of such prisoner from further liability under his sentence. Said recommendation shall be entered on a proper record, kept by said board for that purpose, and a certified copy of the order of discharge, when made, by the governor, shall be filed with the clerk of the court in which said prisoner was sentenced to the penitentiary. All papers and documents relating to the pardon of any person shall, upon the granting of such pardon, become a part of the files of the governor's office. [32 G. A., ch. 192, § 15.]

SEC. **5718-a21. Power of governor to grant reprieves, pardons or commutations not impaired.** Nothing in this act contained shall be construed as impairing the power of the governor under the constitution, to grant a reprieve, pardons or commutations of sentence in any case. [32 G. A., ch. 192, § 16.]

SEC. **5718-a22. Clothing, money and transportation furnished paroled prisoners.** Upon the release of any prisoner upon parole, he shall be furnished with clothing and money as provided in section fifty-six hundred eighty-four of the code, and transportation to his place of employment, provided that no further allowance shall be made if final discharge is granted while on parole. [32 G. A., ch. 192, § 17.]

SEC. **5718-a23. Investigation of applications for pardon.** It shall be the duty of the board of parole, under the direction of the governor, to take charge of all correspondence in reference to the pardon of persons convicted of crimes and to carefully investigate each application, and to file its recommendation with the governor with its reasons for the same. [32 G. A., ch. 192, § 18.]

SEC. **5718-a24. Repeal.** All acts and parts of acts which are in conflict with this act are hereby repealed in so far as they shall apply to persons convicted of crime committed after the fourth day of July, nineteen hundred and seven. This act shall not operate, however, to repeal any of the laws now in force, in so far as they may relate to persons that have heretofore been convicted of a crime under the laws of the state of Iowa, or to any persons that shall hereafter be convicted of a crime committed on or before the fourth day of July, nineteen hundred and seven, and the rights under the law of all prisoners that are now or hereafter may be committed to the penitentiary for crimes committed on or prior to the fourth day of July, nineteen hundred and seven, are expressly preserved to them. This act shall not operate in any way to repeal any laws that refer to the sentence of persons hereafter convicted of murder in the first or second degree, or treason. [32 G. A., ch. 192, § 19.]

So far as these statutory provisions involve mitigation of severity of punishment or provide for parole, they are not open to the objection that they are *ex post facto* as to persons convicted before the statute took effect. *Ware v. Sanders*, 146–233, 124 N. W. 1081.

SEC. **5718-a25. Duty of clerk of district court and county attorney.** It shall be the duty of the clerk of any court in which a prisoner shall be sentenced to the penitentiary, to furnish the board of parole a record containing a copy of the indictment with the minutes of testimony attached

thereto; and the name and residence of the judge presiding at the trial and of the county attorney who prosecuted the prisoner; also the jurors and the witnesses sworn at the trial. The county attorney who prosecuted said prisoner and the presiding judge, shall, when requested by the board of parole, furnish to it a full statement of all the facts and circumstances connected with the commission of the crime of which the prisoner is convicted, so far as known or believed by them. [32 G. A., ch. 192, § 20.]

SEC. **5718-a26. Employment for paroled prisoners—duty of public officers.** The board of parole may render such assistance as may be deemed necessary to the success of parole system, in the procuring of employment with trustworthy employers for prisoners about to be paroled; and necessary expenses incident thereto, not already provided for, shall be paid as other expenses of the board. It is hereby made the duty of every public officer to whom inquiry may be addressed by the board of parole concerning any prisoner to give said board all information possessed or accessible to him which may throw light upon the question of the fitness of said prisoner to receive the benefits of parole. [32 G. A., ch. 192, § 21.]

SEC. **5718-a27. Female convicts to be confined in reformatory.** Any female heretofore or hereafter convicted of a felony and sentenced to confinement in the penitentiary shall be kept in the reformatory at Anamosa. [32 G. A., ch. 193, § 1.]

SEC. **5718-a28. Convict labor—how employed—repealed.** [35 G. A., ch. 316, § 2.] [32 G. A., ch. 194, § 1.]

[See § 5717. EDITOR.]

SEC. **5718-a28a. Employment of prisoners on highways or public works.** The board of control of state institutions with the advice of the warden of any penal institution of this state, is hereby authorized to permit any able-bodied male prisoners to work upon the highways of this state or upon any public works, but such labor shall not be leased to contractors and no prisoner[1] shall be designated or permitted to work upon the highways or any public works whose character and disposition makes it probable that he would attempt to escape, or that he would likely be an unruly or ungovernable prisoner or violate any of the laws of the state while engaged in such work, or whose health would be impaired by such labor; and no prisoner who is opposed to working upon the highways of this state or upon any public works shall be required to perform such labor. [35 G. A., ch. 134, § 1.]

[1"prisoners" in enrolled bill. EDITOR.]

SEC. **5718-a28b. Jurisdiction of warden.** Prisoners employed upon the highways of this state or upon any public works, under the provisions of this act, shall at all times be under the charge and jurisdiction of the warden of the institution to which the prisoner was sentenced; said warden shall designate such guards, officers or agents to direct and supervise such prisoners as he shall deem necessary; said prisoners shall be considered under the custody of the warden at all times even when they are performing services under the honor system and without any guard or officer in their immediate presence. [35 G. A., ch. 134, § 2.]

SEC. **5718-a28c. Supervision state highway commission.** The state highway commission shall supervise the work performed under the provisions of this act upon the highways of the state but may coöperate with the board of supervisors and local officials in the performance of said work. [35 G. A., ch. 134, § 3.]

SEC. **5718-a28d. Care while absent from institution.** It shall be the duty of the board of control and the warden to prescribe the conditions and manner of keeping and caring for said prisoners while away from any of the penal institutions. [35 G. A., ch. 134, § 4.]

SEC. **5718-a28e. Application by board of supervisors or other officials.** Whenever a county board of supervisors or other local officials shall desire to use prisoners upon the highways within their respective jurisdictions, they may apply therefor to the state highway commission specifying the number of men desired, the character of work and the amount which they are willing to pay for said labor. If said highway commission can supervise the work and believe said prisoners can be safely and advantageously employed at said place, they shall submit the matter to said board of control and the board of control and warden shall arrange with such board of supervisors or local officials the terms and details of the contract including the compensation to be paid the state for the use of such prisoners. [35 G. A., ch. 134, § 5.]

SEC. **5718-a28f. Payment for labor.** Boards of supervisors, or other local officials authorized to make road improvements, are hereby permitted to employ prisoners to work upon the highways and pay for such services from any funds available for road or bridge work whenever in their judgment such prisoners may be employed advantageously. [35 G. A., ch. 134, § 6.]

SEC. **5718-a28g. Allowances to prisoners or dependents.** The board of control is hereby authorized to allow prisoners who work upon the highways of the state such part of the earnings received by the prisoners as the board shall deem just and equitable over and above the cost of maintenance of such prisoners, and may deduct a part of such earnings and forward direct to the family or person dependent upon such prisoner for support; and said board of control and warden may also provide for the deposit of the earnings of such prisoners in a bank or banks, to be given said prisoners upon their release, except such part as may be allowed for current expenses. [35 G. A., ch. 134, § 7.]

SEC. **5718-a28h. Clothing.** Prisoners who work upon the highways of the state shall not be required or permitted to work in clothing which will make them look ridiculous or unduly conspicuous. [35 G. A., ch. 134, § 8.]

SEC. **5718-a28i. Violation of rules.** Any prisoner working upon the highway of the state may at any time be returned to the prison for a violation of any of the rules prescribed by the warden or board of control, or for a lack of industry, acts of immorality, or if in the opinion of such warden or guard such prisoners are likely to attempt to escape, or for any other reason or cause making it necessary or advisable to return said prisoners to the penitentiary. [35 G. A., ch. 134, § 9.]

SEC. **5718-a29. Wardens authorized to grant vacations with pay—repeal.** The law as it appears in sections fifty-seven hundred eighteen-a twenty-nine and fifty-seven hundred eighteen-a thirty of the supplement to the code, 1907, is hereby repealed. [33 G. A., ch. 232, § 4.] [32 G. A., ch. 195, § 1.]

SEC. **5718-a30. Vacations granted upon application—when—repealed.** [33 G. A., ch. 232, § 4.] [32 G. A., ch. 195, § 2.]

[See § 5718-a29. EDITOR.]

SEC. **5718-b. Removal of prisoner for trial for murder.** Any person, now, or hereafter, confined in any prison or reformatory of this state,

who is now, or shall hereafter be indicted charged with the crime of murder, may be removed from such prison or reformatory for trial on such indictment. [33 G. A., ch. 230, § 1.]

SEC. **5718-c. Order.** After an indictment is returned against any person confined in such prison or reformatory charging the defendant with the crime of murder, the judge of the district court of the county in which such indictment is had, may enter an order under the seal of said court, directing that such person shall be produced for trial thereon; one copy of said order shall be delivered to the sheriff of said county and one copy thereof furnished to the warden, jailer or superintendent having the custody of such person, which shall be his authority for the delivery of such prisoner to the sheriff. [33 G. A., ch. 230, § 2.]

SEC. **5718-d. Defendant returned—how punished.** On the trial of any person as provided herein, if the defendant be found not guilty, he shall be returned to the prison or reformatory from which he was taken, but if convicted under said indictment he shall be punished as provided by law. [33 G. A., ch. 230, § 3.]

STATUTES AND RULES

REGULATING PRACTICE IN THE

SUPREME COURT OF IOWA

REVISED AND ADOPTED AT THE SEPTEMBER TERM, 1910, TAKING EFFECT JANUARY 1, 1911,

TOGETHER WITH SUPPLEMENTAL RULES GOVERNING THE ORGANIZATION OF THE SUPREME COURT, TAKING EFFECT SEPTEMBER 1, 1913, ADOPTED IN PURSUANCE OF SECTION THREE, CHAPTER TWENTY-TWO, THIRTY-FIFTH GENERAL ASSEMRLY.

[The excerpts from statutes appearing herein are from the amended statutes in force at the date of this supplement. Notes of decisions referring to the subject matter of the rule will be found under the corresponding section of the code or this supplement. Even where the rule is not directly based on any code or supplement section, the cases bearing on the rule are incorporated into notes to sections of the code or supplement and references to such sections are given.

Citations of corresponding sections of prior rules have been added to the various sections of these rules, and a table tracing sections of former rules through subsequent rules to the rules now in force has been compiled and appended. EDITOR.]

I. ORGANIZATION.

SECTION 1. The supreme court of Iowa shall consist of seven judges, four of whom shall constitute a quorum to hold court, but one alone thereof may adjourn from day to day or to a certain day or until the next term. [Supp. § 193.] [Oct. '03, § 1; May '97, § 1; June '86, §§ 1, 2.]

SEC. 2. Of the judges whose terms of office first expire, the senior in time of service shall be chief justice for one year, and, if there be but two of them, the junior for one year, and so on in rotation. If two or more are equal in time of service, then the right to the position and the order in which they serve shall be determined by seniority in age. And at the last term in each year, the supreme court shall determine and enter of record, who, under these rules, shall be chief justice for the year next ensuing. [Const., art. V, § 3; Supp. § 1066.] [Oct. '03, § 2; May '97, § 2; June '86, § 1.]

II. JURISDICTION.

SEC. 3. The supreme court shall have appellate jurisdiction only in cases in chancery and shall constitute a court for the correction of errors at law. [Const., art. V, § 4.] [Oct. '03, § 3.]

SEC. 4. It has appellate jurisdiction over all judgments and decisions of all courts of record, except as otherwise provided by law. [Code § 4100.] [Oct. '03, § 4; May '97, § 3; June '86, § 4.]

SEC. 5. An appeal may also be taken to the supreme court from:

1. An order made affecting a substantial right in an action, when such order, in effect, determines the action and prevents a judgment from which an appeal might be taken;

2. A final order made in special actions affecting a substantial right therein, or made on a summary application in an action after judgment;
3. An order which grants or refuses, continues or modifies a provisional remedy; grants or refuses, dissolves, or refuses to dissolve an injunction or attachment; or grants or refuses a new trial; or sustains or overrules a demurrer;
4. An intermediate order involving the merits or materially affecting the final decision;
5. An order or judgment on habeas corpus. [Code § 4101.] [Oct. '03, § 5; May '97, § 4; June '86, § 5.]

SEC. 6. If any of the above orders or judgments are made or rendered by a judge, the same are reviewable, the same as if made by a court. [Code § 4102.] [Oct. '03, § 6; May '97, § 5; June '86, § 5.]

SEC. 7. The supreme court has power to issue all writs and processes necessary to secure justice to parties, and to enforce its appellate jurisdiction; and it may exercise supervisory control over all inferior judicial tribunals. [Const., art. V, § 4; Code § 4109.] [Oct. '03, § 7; May '97, § 6; June '86, §§ 7, 9.]

SEC. 8. It may enforce its mandates upon inferior courts and officers by fine and imprisonment, which imprisonment may continue until its mandates are obeyed. [Code § 4147.] [Oct. '03, § 8; May '97, § 7; June '86, § 8.]

III. TERMS.

SEC. 9. There shall be three regular terms in each year, to be held as follows, to wit: The first term beginning with the second Tuesday in January and ending with the first Monday of May; the second beginning with the first Tuesday after the first Monday of May and ending with the third Monday of September; and the third beginning with the first Tuesday after the third Monday of September and ending with the third Saturday of December. [Supp. § 192-a.] [Oct. '03, § 9; May '97, § 8; June '86, § 10.]

SEC. 10. The time allotted to each term shall be divided as nearly as practicable into periods of four weeks each, the first part of each period to be devoted to the argument and submission of cases, and the second to consultation and the preparation of opinions. Cases assigned for each period shall be called in their order as shown on the term docket, but no more submissions shall be taken for any one period than in the judgment of the court can be properly considered and determined before the next succeeding session. All causes on the docket shall be heard at each term unless continued or otherwise disposed of by order of court. [Code § 192; Supp. §§ 192-b, 193-a, 193-b.] [Oct. '03, § 10; May '97, § 8; June '86, § 10.]

[See also supplemental rule 113. EDITOR.]

SEC. 11. The regular public sessions of the court will be held in the supreme court room at the capitol, commencing at nine o'clock a. m., standard time. On Tuesday and Friday of the first week of each four weeks' period submission of motions will be taken before calling the calendar. Motions noticed for a day when the court is not sitting will be taken on the next motion day on which the court sits. [Supp. §§ 192-b, 193-a, 193-b.] [Oct. '03, § 11; May '97, § 8.]

SEC. 12. Judgments of affirmance, rulings and orders, in causes submitted and orders authorized by law, may be made and entered by the court at any time regardless of the terms of court. [Code § 192.] [Oct. '03, § 12; May '97, § 8; June '86, § 10.]

IV. APPEALS.

SEC. 13. Appeals from the superior and district courts may be taken to the supreme court at any time within six months from the rendition of the judgment or order appealed from, and not afterward. No appeal shall be taken in any cause in which the amount in controversy between the parties, as shown by the pleadings, does not exceed one hundred dollars, unless the trial judge shall, during the term in which judgment is entered, certify that the cause is one in which the appeal should be allowed, and, upon such certificate being filed, the same shall be appealable regardless of the amount in controversy; but this limitation shall not affect the right of appeal in any action in which an interest in real estate is involved, nor shall the right of appeal be affected by the remission of any part of the verdict or judgment returned or rendered. [Code § 4110.] [Oct. '03, § 13; May '97, § 9; June '86, § 11.]

SEC. 14. A part of several coparties may appeal; but in such case they must serve notice of the appeal upon those not joining therein, and file proof thereof with the clerk of the supreme court. [Code § 4111.] [Oct. '03, § 14; May '97, § 10; June '86, § 22.]

SEC. 15. Coparties refusing to join in an appeal cannot afterwards appeal, or derive any benefit therefrom, unless from the necessity of the case, but they shall be held to have joined, and be liable for their proportion of the costs, unless they appear and object thereto. [Code, § 4112.] [Oct. '03, § 15; May '97, § 11; June '86, §§ 23, 24.]

SEC. 16. The death of one or all of the parties shall not cause the proceedings to abate, but the names of the proper persons shall be substituted, as is provided in such cases in the district court. The court may also, in such case, grant a continuance when such a course will be calculated to promote the ends of justice. [Code § 4150.] [Oct. '03, § 16; May '97, § 12; June '86, § 25.]

SEC. 17. An appeal is taken and perfected by the service of a notice in writing on the adverse party, his agent, or any attorney who appeared for him in the court below, and also upon the clerk of the court wherein the proceedings were had, stating the appeal from the same, or from some specific part thereof, defining such part. When such service cannot be made the trial court or judge on application shall direct what notice shall be sufficient. [Supp. § 4114.] [Oct. '03, § 17; May '97, § 13; June '86, §§ 12, 13.]

SEC. 18. A notice of appeal shall be served and return made thereon in the same manner as an original notice in a civil action, and filed in the office of the clerk of the court in which the judgment or order appealed from was rendered or made. All other notices connected with or growing out of the appeal shall be served and the return made in like manner, and filed in the office of the clerk of the supreme court, and all notices provided for in this section become a part of the record in the case on being filed. [Code § 4115.] [Oct. '03, § 18; May '97, § 14; June '86, § 28.]

SEC. 19. Notice of appeal shall not be held insufficient because served before the clerk of the trial court has spread the judgment entry upon the court record if it shall appear that such entry has been made in proper form before appellant's abstract was filed in the office of the clerk of the supreme court. [Supp. § 4114.]

SEC. 20. The attorneys and guardians *ad litem* of the respective parties in the court below shall be deemed the attorneys and guardians of the same parties respectively in this court, until others are retained or appointed, and notice thereof served on the adverse party. [Oct. '03, § 19.]

V. SUPERSEDEAS BONDS.

SEC. 21. No proceedings under a judgment or order, nor any part thereof, shall be stayed by an appeal, unless the appellant executes a bond with one or more sureties to be filed with and approved by the clerk of the court in which the judgment or order was rendered or made, to the effect that he will pay to the appellee all costs and damages that shall be adjudged against him on the appeal; and will satisfy and perform the judgment or order appealed from, in case it shall be affirmed, and any judgment or order which the supreme court may render or order to be rendered by the inferior court, not exceeding in amount or value the original judgment or order, and all rents of or damages to property during the pendency of the appeal out of the possession of which the appellee is kept by reason of the appeal. If the bond is intended to stay proceedings on only a part of the judgment or order, it shall be varied so as to secure the part stayed alone. When thus filed and approved, the clerk shall issue a written order requiring the appellee and all others to stay all proceedings under such judgment or order, or so much thereof as is superseded thereby, but no appeal or stay shall vacate or affect such judgment or order. [Code § 4128.] [Oct. '03, § 20; May '97, § 32; June '86, §§ 31, 32.]

SEC. 22. If a party has perfected his appeal, and the clerk of the lower court refuses for any reason to approve the bond or requires an excessive penalty or unjust or improper conditions, he may apply to the district court or judge thereof, who shall fix the amount and conditions of the bond and approve the same. Pending the application, the judge may, by a written order, recall and stay all proceedings under the order or judgment appealed from, until the decision of the application. The bond thus approved shall be filed with the clerk, who shall issue a written order to stay proceedings. [Code § 4132.] [Oct. '03, § 21; May '97, § 33.]

SEC. 23. The appellee may move the court rendering the judgment or making the order appealed from, or the supreme court or a judge of either court, if in vacation, upon ten days' notice in writing to appellant, to discharge the bond on account of defect in substance or insufficiency in security, which motion, if well taken, shall be sustained, unless appellant shall, within a day to be fixed in the order made and filed therein, give a new and sufficient bond as required by said order. If the new bond is not given, proceedings shall be had in the lower court as though no bond had been given, but a new and sufficient bond may be given at any time with like effect and results as though given in the first instance. [Code § 4133.] [Oct. '03, § 22; May '97, § 34; June '86, §§ 33, 34.]

SEC. 24. If the judgment or order is for the payment of money, the penalty shall be in at least twice the amount of the judgment and costs. If not for the payment of money, the penalty shall be sufficient to save the appellee harmless from the consequences of taking the appeal, but in no case shall the penalty be less than one hundred dollars. [Supp. § 4134.] [Oct. '03, § 23; May '97, § 35; June '86, § 35.]

VI. DOCKETING OF CAUSES.

SEC. 25. A notice of appeal must be served thirty, and the cause filed and docketed fifteen days before the first day of the next term of the supreme court, or the same shall not be submitted at that term, unless the parties consent thereto. If the appeal is taken less than thirty days before the term, it must be so filed and docketed for the next succeeding term. [Code § 4116.] [Oct. '03, § 24; May '97, § 15; June '86, § 15.]

SEC. 26. The cause on appeal shall be docketed as it was in the court below, and the party taking the appeal shall be called appellant, and the other party appellee. No case shall be docketed until the fees provided by law therefor have been paid. [Code §§ 4108, 4121.] [Oct. '03, § 25; May '97, § 16; June '86, § 17.]

SEC. 27. The clerk shall docket the causes as they are filed in his office, and shall arrange and set a proper number for trial for each period of the term, placing together those from the same judicial district. No cause shall be docketed unless the abstract is filed fifteen days before the first day of the term at which the cause is set down for trial unless otherwise ordered by the court. If the abstract is not so filed the case shall be docketed for the next succeeding term. [Code §§ 4117, 4119.] [Oct. '03, § 26; May '97, § 17; June '86, § 114.]

SEC. 28. Immediately after the time expires during which causes may be docketed for trial at a term of court, the clerk shall make and cause to be printed, without delay, the docket for the term, which shall give all causes, whether continuances or appearances, for trial at such term, which shall designate the number, the party appealing, the court and county from which the appeal is brought, the counsel of the parties, the period for which each cause is assigned for trial, whether noticed for oral argument and such other matter for the information of the court and attorneys as may be conveniently given. He shall forward to each judge of the court, to each attorney having causes at the term, and to the clerk of the district and superior courts of each county, a copy of said docket. [Oct. '03, § 27; May '97, § 18; June '86, § 115.]

VII. ADVANCING CAUSES.

SEC. 29. If a cause involves the decision of a question of public importance, or rights which are likely to be lost or greatly impaired by delay, the court will, in its discretion, upon motion supported by affidavit, order the submission of the cause at a term in advance of that at which it would otherwise be submitted. [Oct. '03, § 28; May '97, § 19.]

VIII. ABSTRACTS, TRANSCRIPTS AND RECORDS.

SEC. 30. At least forty days before the day assigned for the hearing of a cause, appellant shall serve upon each appellee, or his attorney, a printed abstract of so much of the record as may be necessary to a full understanding of the questions presented for decision, which abstract shall be prepared as required by §§ 50, 51 and 52 of these rules. Appellant shall also, thirty days before the first day of the term for which the cause is to be docketed for trial, file with the clerk twelve copies of said abstract. No cause shall be heard until forty days after such service and thirty days after such filing with the clerk, unless advanced by order of the court. In case of cross-appeals the party first giving notice of appeal shall, under this rule, be considered the appellant. [Oct. '03, § 29; May '97, § 20; June '86, § 18.]

SEC. 31. If it appear from an inspection of the abstract that the appellant has negligently or intentionally failed to comply with the rule requiring only so much of the record as may be necessary to a full understanding of the question presented for decision to be included therein, the court may, in its discretion, order a new abstract prepared in conformity with such rule or affirm the judgment of the lower court without considering the appeal. [Oct. '03, § 30; May '97, § 21.]

SEC. 32. The abstract so filed will be presumed to contain the record unless denied or corrected by a subsequent abstract. Every denial shall

point out as specifically as the case will permit the defects alleged to exist in the abstract. A denial by appellee shall be taken as true unless the appellant sustains his abstract by a certification of the record. Should the appellee deem the appellant's abstract incorrect or unfair he may prepare such additional abstract as he shall deem necessary to a full understanding of the questions presented to the court for decision. A denial by the appellant of such additional abstract, if not confessed, will be disregarded unless sustained by a certification of the record. The appellee shall serve one printed copy of his additional abstract or denial on each appellant or his attorney and deliver twelve printed copies thereof to the clerk within fifteen days after receiving appellant's abstract, and a denial by the appellant shall be served on the appellee and twelve printed copies thereof delivered to the clerk within five days after service of the additional abstract. [Code §§ 4118, 4120.] [Oct. '03, § 31; May '97, § 22; June '86, § 19.]

SEC. 33. All objections to the jurisdiction of the court to entertain an appeal must be made in printed form stating specifically the ground thereof and served upon the appellant or his attorney of record not less than ten days before the date assigned for the submission of the cause. [Supp. § 4139.]

SEC. 34. No certification of the record shall be required unless ordered by the supreme court, or a judge thereof, which order must be made upon an application in writing or by motion, designating the matters and things of record desired to be included therein, and showing the necessity therefor. The order, if granted, shall contain similar designations and show the parts to be given by an abstract of the original record and the portions to be by transcript, and may require any or all the matters to be presented by an amended abstract. The application and the order made shall be filed in the office of the clerk of the supreme court, who shall transmit the order to the clerk of the lower court, and send a notice or copy thereof to the appellant, or his attorney. The order shall be attached to and returned with the record certified, and be submitted with the papers in the case. The appellant, upon notice or copy of the order being received by him or his attorney, shall, within five days, unless otherwise ordered, pay or secure to the satisfaction of the clerk of the lower court his fees and expenses for preparing and forwarding the record ordered. [Code § 4122.] [Oct. '03, § 32; May '97, § 23; June '86, § 12.]

SEC. 35. When certification of the record is required, the designated papers, notices, depositions, exhibits identified as evidence, notices of appeal with return or acceptance of service thereon, and any other papers filed in the case, or any part thereof, may be transmitted to the supreme court in the original form or by a transcript of the same, excepting that the shorthand reporter's translation of his report shall be transmitted in its original form, but all entries of record must be certified by transcript. The clerk of the trial court shall verify his return, whether it be of the record or transcription thereof, by his certificate, under seal, distinguishing between originals and transcripts, and such certification so made shall constitute a part of the record in the supreme court. [Code § 4123.] [Oct. '03, § 33; May '97, §.24; June '86, § 20.]

SEC. 36. Where a view of an original paper or exhibit in the action may be important to a correct decision of the appeal, the court may order the clerk of the court below to transmit the same, which he shall do in the manner provided for the transmission of certifications of the record. [Code § 4124.] [Oct. '03, § 34; May '97, § 25; June '86, § 30.]

SEC. 37. A transcript may be denied; and when such denial is made it shall be as specific as the case will permit. The trial court, the supreme court, or judge of either court may make any orders necessary to secure a perfect record or transcript thereof, upon a showing by affidavit or otherwise, and upon such notice as the court or judge may prescribe. [Code §§ 4120, 4127.] [Oct. '03, § 35; May '97, § 26; June '86, § 29.]

SEC. 38. The transcript of any paper or exhibit required for use in the supreme court may be transmitted thereto by the clerk of the trial court, by express or other safe and speedy method, but not by a party or any attorney of a party. [Code § 4125.] [Oct. '03, § 36; May '97, § 27; June '86, § 12.]

SEC. 39. If an abstract of the record is not filed by appellant thirty days before the second term after the appeal was taken, unless further time is given by the court, or a judge thereof, for cause shown, the appellee may file an abstract of such matters of record as are necessary, or may file a copy of the final judgment or order appealed from, notice of appeal and return of service thereof certified by the clerk of the trial court; and cause the case to be docketed, and the appeal upon motion shall be dismissed, or the judgment or order affirmed. [Code § 4120.] [Oct. '03, § 37; May '97, § 28; June '86, § 21.]

SEC. 40. If the appellant fails to promptly pay or secure to the satisfaction of the clerk of the trial court, his fees and expenses for preparing and forwarding to the clerk of the supreme court any record ordered to be certified by the supreme court, or a judge thereof, upon receiving notice thereof, or copy of the order therefor, the appeal, upon motion supported by proofs of the facts, may be dismissed or the judgment affirmed as appellee may elect. [Code § 4122.] [Oct. '03, § 38; May '97, § 29.]

SEC. 41. Where appellant has no right, or no further right, to prosecute the appeal, the appellee may move to dismiss it, and if the grounds of the motion do not appear in the record, or by a writing purporting to have been signed by the appellant and filed, they must be verified by affidavit. [Code § 4151.] [Oct. '03, § 39; May '97, § 30; June '86, § 26.]

SEC. 42. The appellee may, by answer or abstract filed and verified by himself, agent or attorney, plead any facts which render the taking of the appeal improper, or destroy the appellant's right of further prosecuting the same, to which the appellant may file a reply or abstract likewise verified by himself, his agent or attorney, and the questions of law or fact therein shall be determined by the court, upon evidence in the form of affidavits unless otherwise ordered. [Code § 4152.] [Oct. '03, § 40; May '97, § 31; June '86, § 27.]

IX. MOTIONS.

SEC. 43. (1) All motions must be in writing, filed with the clerk and entered upon the motion book. No motion shall be submitted without being publicly called by the court, unless the parties otherwise agree.

(2) Motions must be served by copy of the same and of all affidavits or documents upon which they are based, upon the opposite party or attorney, ten days before the morning on which the causes for the district are set for hearing. Such opposite party shall then have five days to file papers in resistance to the same, copies of which must be served upon the other party or attorney, and no papers will be regarded which do not appear to have been so served. This rule shall not apply to motions the causes whereof arise after the filing of the abstract, but in such cases timely notice of such motions shall be given to the opposite attorneys. Nor

shall this rule apply, as to time of service, to motions for continuance, or to advance.

(3) Motions made in a cause after judgment rendered by the supreme court, or after the time assigned for the hearing of causes from the district from which it was appealed, will be heard only upon proof of service of reasonable notice of such motion upon the adverse party or his attorney.

(4) Arguments in support of motions, if any, must be in writing or print, and shall be filed before the morning of the day set for the hearing of the cause, and served by copy upon the opposite party or attorney when the motion is served; and arguments in resistance, if any, must be in writing or print and filed before the morning of the day set for the hearing of the cause, and served by copy on the opposite party or attorney when the papers in resistance are served. [Code § 4138.] [Oct. '03, § 43; May '97, § 38; June '86, § 52.]

X. BRIEFS AND ARGUMENTS.

SEC. 44. When the appeal presents only questions of law upon rulings of the court below, appellant shall open and close the argument, and must, at least forty days before the day assigned for the hearing of the case, serve upon an attorney for each appellee copies of his brief of points, authorities and argument. If appellee desires to be heard, he shall, at least fifteen days prior to the time set for hearing, serve upon an attorney for each appellant copies of his brief or argument; and the printed reply, if any, shall be served at least three days before the case is to be finally submitted. If the trial in the supreme court is *de novo*, and appellant has the burden, he shall observe the foregoing rules. If appellee has the burden, he may waive his right to open the argument; and if he fails to serve and file his brief within the time hereinbefore provided, he shall be held to have waived the right. Appellant will then be entitled to open the argument, and must serve copies of his brief upon an attorney for each appellee fifteen days before the hearing. Appellee may then, and at least three days before the submission, serve upon an attorney for each appellant copies of his argument, which must be strictly confined to matters in reply to appellant's argument. A failure to comply with the above requirements will entitle the party not in default, unless the court shall, for sufficient cause, otherwise order, to a continuance or to have the case submitted at his option upon the briefs and arguments on file when the default occurred. [Supp. § 4139.] [Oct. '03, § 44; May '97, § 39; June '86, §§ 53, 57.]

SEC. 45. All printed briefs and arguments, except upon motions shall be prepared as required by sections 53, 54 and 55 hereof, and each party shall file with the clerk twelve printed copies of each brief or argument, together with proper evidence of service of the same upon opposing attorneys. The clerk shall note upon his docket the date of the service and filing of all abstracts and arguments, and no brief or argument not served or filed within the time prescribed by these rules will be transmitted to the judges or considered by them in disposing of the case. No cause will be entered as submitted until the arguments are finally and actually concluded. [Oct. '03, § 45; May '97, § 40; June '86, §§ 53, 54.]

SEC. 46. Notice in writing, or in print, of intention to argue a case orally, shall be served upon an attorney for the adverse party and filed with the clerk of this court twenty days before the first day of the term, and the party who fails to serve and file such notice shall not be entitled to argue orally, except in reply to an oral argument for the adverse party. [Oct. '03, § 46; May '97, § 41; June '86, § 55.]

SEC. 47. If the case is triable upon errors assigned and not *de novo* and appellant has given notice of oral argument, he will be entitled to open and close. If appellee alone gave the notice he will be entitled to open the argument and appellant must confine his remarks strictly to a reply. If the cause is triable *de novo* the party upon whom rests the burden of the proof may, if he has given the requisite notice, open and close the argument. If he has not given notice he will be confined strictly to an answer to the argument for the other side. No oral argument shall exceed one-half hour in length, unless an extension of time be granted before the argument is commenced or it becomes apparent during the course of the argument that more time is necessary, whereupon the court may grant additional time. On original submission two attorneys may be heard on each side; but in the event counsel opening the argument is not entitled to reply, but one attorney shall be heard for either party. Reply arguments shall be limited to fifteen minutes. On petitions for rehearing only one attorney shall be heard for either party; the petitioner to have not exceeding twenty and the respondent not more than fifteen minutes; unless extensions be granted by the court. [Oct. '03, §§ 47, 48; May '97, §§ 42, 43; June '86, §§ 56, 57.]

SEC. 48. Oral argument shall be confined to a discussion of the proposition and authorities contained in the briefs. Failure to discuss in oral argument points properly made in the briefs shall not be deemed a waiver of such points, but they will be fully considered in determining the cause. [Oct. '03, § 49.]

SEC. 49. Before taking up the assignment for the several periods a preliminary call of all causes included in that assignment will be made; but the submission of a cause shall not be taken on this call if any party thereto objects. The court will hear all causes included in the assignment and take the submission thereof in the order in which they are assigned, excepting those which have been continued or otherwise disposed of. [Supp. § 4139.] [Oct. '03, § 50; May '97, § 44; June '86, §§ 58, 68.]

XI. PREPARING AND PRINTING ABSTRACTS, TRANSCRIPTS, BRIEFS, ARGUMENTS, AND PETITIONS FOR REHEARING.

SEC. 50. All abstracts, denials of abstracts, briefs, arguments and petitions for rehearing shall be printed upon unruled writing paper, with type commonly known as small pica, leaded lines, the printed page to be four inches wide by seven inches long, with a margin of two inches; but the type in which extracts are printed may be small pica solid or brevier with leaded lines. The lines of abstracts must be numbered consecutively on each page. The first page of the abstract, denial, brief or argument, shall show the title of the cause, designating the appellant and the appellee, the term of the supreme court to which the appeal is brought, the court from which the appeal is taken, the name of the judge who presided at the trial, and the names of the attorneys for both appellant and appellee; also the name of the paper filed, the party by whom filed and one copy shall show the time and manner of service. [Oct. '03, § 51; May '97, § 66; June '86, §§ 96, 117.]

SEC. 51. Abstracts and all amendments thereto must be accompanied by a complete index of their contents. [Oct. '03, § 52; May '97, § 67; June '86, § 97.]

SEC. 52. Abstracts of record shall be made in substantially the following form:

IN THE SUPREME COURT OF IOWA.

JANUARY TERM, 19....

JOHN DOE, *Appellant*,
vs.
RICHARD ROE, *Appellee.*
} "In Equity" or "At Law."

Appeal from Van Buren District Court.

JOHN SMITH, Judge.

J. C. K., *for the Appellant.*
H. H. S., *for the Appellee.*

APPELLANT'S ABSTRACT OF RECORD.

Due, timely and legal service of the within.....is hereby acknowledged this.....day of.....19....

.....
Attorneys for .....

On the.....day of....., 19...., the plaintiff filed in the Van Buren district court a

PETITION

stating his cause of action as follows:

[Set out all of petition necessary to an understanding of the questions to be presented to this court, and no more. In setting out exhibits, omit all merely formal irrelevant parts, as, for example, if the exhibit be a deed or mortgage and no question is raised as to the acknowledgment, omit the acknowledgment. When the defendant has appeared it is useless to encumber the record with the original notice, or the return of the officer.]

On the.....day of....., A. D. 19...., the defendant filed a

DEMURRER

to said petition setting up the following grounds:

[State only the grounds of demurrer omitting the formal parts. If the pleading was a motion, and the ruling thereon is one of the questions to be considered, set it out in the same way, and continue.]

And on the.....day of....., 19...., the same was submitted to the court, and the court made the following ruling thereon:

[Here set out the ruling. In every instance let the abstract be made in the chronological order of the events in the case; let each ruling appear in the proper connection. If the defendant pleaded over, and thereby waived his right to appeal from these rulings, no mention of them should be made in the abstract but it should continue.]

And on the.....day of....., 19...., the defendant filed his

ANSWER

to the petition, setting up the following defenses:

[Here set out the defenses, omitting all formal parts. If motions or demurrers were interposed to this pleading, proceed as directed with reference to the petition. Frame the record so that it will properly present all questions to be reviewed and raised before issue is joined. When the abstract shows issue joined, proceed.]

BILL OF EXCEPTIONS.

On the.....day of....., 19...., said cause was tried to a jury (or the court, as the case may be) and on the trial the following proceedings were had:

[Here set out so much of the evidence and proceedings as is necessary to show the rulings of the court to which exceptions were taken during the progress of the trial.]

INSTRUCTIONS.

After the evidence and the arguments of counsel were concluded the plaintiff (or defendant, as the case may be) asked the court to give each of the following instructions to the jury:

[Set out instructions referred to, and continue.]

Which the court refused as to each instruction, to which several rulings the plaintiff (or defendant) excepted at the time. And thereupon the court gave the following instructions to the jury:

[Set out the instructions.]

To the giving of those numbered (give the numbers) and to the giving of each thereof the plaintiff (or defendant) at the time excepted.

VERDICT.

On the.....day of....., 19..., the jury returned into court with the following verdict:

[Set out the verdict.]

MOTION FOR NEW TRIAL.

On the.....day of....., 19..., the plaintiff (or defendant) filed a motion praying the court to set aside the verdict and grant a new trial upon the following grounds:

[Set out the grounds aforesaid for the new trial.]

On the.....day of....., 19..., the court made the following ruling upon said motion:

[Set out the record of the ruling.]

To which the plaintiff (or defendant) at the time excepted.

JUDGMENT.

On the.....day of....., 19..., the following judgment was rendered and entered of record:

[Set out the judgment entry appealed from.]

On the.....day of....., 19..., the plaintiff perfected an appeal to the supreme court of the state of Iowa, by serving upon the defendant and the clerk of the district court of Van Buren county a notice of appeal.

[If supersedeas bond was filed, state the fact.]

INDEX.

[This outline is presented for the purpose of indicating the character of the abstract contemplated by the rule, which, like all the rules, is to be substantially complied with. Of course, no formula can be laid down applicable to all cases. The rule to be observed in abstracting a case is: Preserve everything material to the questions to be decided and omit everything else.]

[Code §§ 3675, 3749.] [Oct. '03, § 53; May '97, § 68; June '86, § 98.]

SEC. 53. The brief of appellant shall contain a short and clear statement disclosing:

First. The nature of the action.

Second. What the issues were.

Third. How the issues were decided, and what the judgment or decree was.

Fourth. A brief and concise statement of so much of the facts as fully presents the errors and exceptions relied upon, referring to the pages and lines of the abstract.

Fifth. The errors relied upon for a reversal.

Following this the brief shall contain, under a separate heading of each error relied on, separately numbered propositions or points, stated concisely, and without argument or elaboration, together with the authorities relied on in support of them; and in citing cases, the names of parties must be given, with the book and page where reported. When textbooks are cited the number or date of the edition must be stated, with the number of the volume and the page or section. No alleged error or point, not contained in this statement of points, shall be raised afterwards, either by reply brief, or in oral or printed argument, or on petition for rehearing. [Oct. '03, § 54; May '97, § 69; June '86, § 99.]

SEC. 54. The brief of appellee shall point out any omissions or inaccuracies in appellant's statement of the record, and shall contain a short and clear statement of the propositions by which counsel seek to meet the alleged errors and sustain the judgment or decree, or by which such errors are obviated. Following this statement, the brief shall contain the points and authorities relied on in like manner as required in appellant's brief.

The brief of appellee on cross-errors shall be prepared in the manner required of an appellant's brief. The brief of appellant, in answer to the cross-assignment of errors, shall be prepared in the manner required of appellee's answer to appellant's assignments of error. Reply briefs shall be prepared in manner like to answer briefs. [Oct. '03, § 55.]

SEC. 55. The brief of any party may be followed by an argument in support of such brief, which shall be distinct therefrom, but shall be bound with the same. The argument shall be confined to a discussion and elaboration of the points contained in the briefs in the order stated. The names of counsel shall be affixed to all briefs filed by them. [Oct. '03, § 56.]

SEC. 56. Transcripts of the record, when required by the supreme court, or a judge thereof, may be made substantially in the manner following, viz:

STATE OF IOWA,
County of .....

In the district (or superior) court of Iowa, at a term begun and holden in the county of....., on the.....day of....., A. D. 19..., before J. H. G., judge of the.....judicial district (or judge of the.....superior court) of the state of Iowa.

N. P.
v.
C. D.

Be it remembered that heretofore, to wit, on the.....day of....., A. D. 19..., a petition was filed in the office of the clerk of the district (or superior) court, in and for the county (or city) of..... in words and figures following, to wit:

[Here insert the petition in full.]

[Proceed in the same manner in relation to whatever paper is filed; such as the original notice, or a petition for attachment, etc. If the cause has come from another county by a change of venue, begin as above, "Be it remembered," and state in like manner all that was done in the county from which the venue was changed.]

And afterward there was filed in the office of the said clerk a notice, in the words and figures following, to wit:

[Here insert the notice in full.]

[Copy all indorsements on the face of the transcript, or copy of record, and not upon the back of the leaf.]

Upon which (or attached to which) was a return as follows:

[Copy the officer's return, with all indorsements in full; if the suit be by attachment, copy the petition or affidavit, writ or attachment, bond, notice, return, etc.]

And afterwards, to wit: on the.....day of....., A. D. 19...., there was filed in the office of the said clerk, an answer in words and figures following, to wit:

[Here insert answer in full.]

[Should the clerk doubt what the paper is, let him call it a "paper in the words and figures following," etc. Where a paper is filed in term time, add the day of the term to the day of the month, as in the next form.]

A. B.
v.
C. D.

And afterward, to wit: on the.....day of....., A. D. 19...., it being the.....day of the.....term of said court, the said A. B. (or plaintiff) filed the following demurrer to the answer of the said C. D. (or the said defendant). to wit:

[Here insert demurrer in full.]

[If a party files more than one pleading at the same time, they should be numbered in their regular order, as for instance a demurrer and answer, and the transcript may say (stating the date) the said C. D. (or defendant) filed his demurrer and answer, which are filed subject to the rule.]

A. B. }
v. }
C. D. }

And now, on the.....day of....., A. D. 19...., it being the..... day of the said term thereof, this cause coming on for hearing on the plaintiff's demurrer to the defendant's answer (copy the entry of the proceedings of the court, sustaining or overruling the demurrer.)

And afterward, on the.....day of the said....., it being the..... day of the said term, the said plaintiff filed his reply in the words and figures following, to wit:

[Here set out reply in full.]

And afterward, on the.....day of....., A. D. 19...., the said defendant filed motion and affidavit for a continuance, as follows, to wit:

[Here set out copy of motion and affidavit.]

And the same being now heard and considered by the court, the said motion is sustained, and it is ordered that this cause be continued until the next term of the court (at the cost of the defendant).

In the district (or superior) court, ...county (or.....city).

A. B. }
v. }
C. D. }

.....term, A. D. 19....

And now on this.....day of....., it being the.....day of said term, this cause coming on for trial, came to a jury, to wit:.....
.....
.....twelve good and lawful men, who were sworn well and truly to try the issues between the said parties, and a true verdict render, according to the law and evidence given them in court. The jury retired to consider on their verdict, and afterward, on the same day, the jury returned into court and rendered its verdict, as follows:

[Here insert in full the verdict as rendered.]

[Or, if the jury does not return until the next day, let the record recite the fact.]

A. B. }
v. }
C. D. }

And afterward, on the.....day of....., A. D. 19...., being the..... day of said term, the shorthand reporter filed his report in writing or in shorthand (as the case may be) certified as required by law, the translation of which, duly certified, was filed on the.....day of....., A. D. 19...., and is as follows: [Here attach the original translation unless otherwise directed by order of the supreme court, or a judge thereof.]

A. B. }
v. }
C. D. }

Now, on this.....day of....., A. D. 19..., the plaintiff filed his motion for a new trial, to wit:

[Here insert in full the motion for a new trial.]

A. B. }
v. }
C. D. }

And now, on this.....day of....., A. D. 19..., this cause coming up for a hearing on the motion of the plaintiff for a new trial, it is considered by the court, that the same be overruled (or as the case may be).

[Then add the final entries of record, comprising final judgment, etc., and certificate of clerk.]

The foregoing form is an example only, and is to be varied according to the circumstances. The actual facts of the case will dictate what is to be done, but in all cases

it is to be done substantially in like manner with the above, giving the proper order and date of the filing of papers and incorporating them at the proper date into the proceedings of the court. When the order made by this court or a judge thereof, pursuant to rules 32, 34, 35 and 36, requires but a part of the record be transcribed, the foregoing form should be so modified as that it will include only those matters directed to be certified. All other, except the mere formal parts, must be omitted.

[Code §§ 3675, 3749, 4122, 4123.] [Oct. '03, § 57; May '97, § 70; June '86, § 100.]

XII. DECISIONS AND OPINIONS.

SEC. 57. The court may reverse, modify or affirm the judgment, decree or order appealed from, or render such as the inferior court should have done. [Supp. § 4139.] [Oct. '03, § 58; May '97, § 45; June '86, § 61.]

SEC. 58. No cause will be considered as decided until a written decision is filed with the clerk. The decision of the court on all questions passed upon by it, including motions and points of practice, shall be specifically stated, and shall be accompanied by an opinion upon all such matters as are deemed of sufficient importance, together with any dissent therefrom, which dissent may be stated with or without an opinion; and all decisions and opinions, including dissents, shall be in writing and be filed with the clerk, except rulings on motions which may be entered upon the announcement book. If the decision is not accompanied with an opinion, it shall briefly state the title of the case, the county from which the case was appealed, the name of the presiding judge, the nature of the action, the names of counsel appearing on either side, and the conclusions reached. [Code § 198; Supp. § 4139.] [Oct. '03, § 59; May '97, § 46; June '86, §§ 59, 69.]

SEC. 59. When the court is equally divided in opinion the judgment of the court below shall stand affirmed but the decision is of no further force or authority. In case of such division, opinions may be filed at the option of the court. If no opinion is filed a written announcement shall be made of the division of the court upon the questions presented, and that the judgment is affirmed by operation of law. [Code §§ 195, 198.] [Oct. '03, § 60; May '97, § 47.]

XIII. JUDGMENTS AND DECREES.

SEC. 60. The supreme court, if it affirms the judgment, shall also, if the appellee asks or moves therefor, render judgment against the appellant and his sureties on the appeal bond for the amount of the judgment, damages and costs referred to therein, in case such damages can be accurately known to the court without an issue and trial. [Code § 4140.] [Oct. '03, § 61; May '97, § 50; June '86, § 62.]

SEC. 61. Upon the affirmance of any judgment or order for the payment of money, the collection of which in whole or in part has been stayed by an appeal bond, the court may award to the appellee damages upon the amount so stayed; and, if satisfied by the record that the appeal was taken for delay only, may award as damages a sum not exceeding fifteen per cent. thereof. [Code § 4141.] [Oct. '03, § 62; May '97, § 51; June '86, § 63.]

SEC. 62. Decrees to be entered in this court shall be prepared by the attorney of the parties in whose favor they are rendered. Copies shall be served on the opposite attorney and filed with the clerk within twenty days after the attorney preparing them shall have received notice of the decision in the cause in which it is to be entered. [Oct. '03, § 63; May '97, § 52; June '86, § 71.]

SEC. 63. When, by the decision, a decree is to be entered in this court at the option of either party, such option shall be declared and a decree furnished under the above rule within twenty days from the date at which the attorney required to prepare the decree received notice of the decision. [Oct. '03, § 64; May '97, § 53; June '86, § 72.]

SEC. 64. No procedendo, except in criminal cases and in cases where petitions for rehearing have been overruled, shall issue in any case until the expiration of thirty days from the filing of the opinion, except upon an order of one of the judges of the court, upon cause shown. [Oct. '03, § 65; May '97, § 54; June '86, § 70.]

XIV. REHEARINGS.

SEC. 65. No petition for rehearing shall be filed after sixty days from the filing of the opinion or decision of the supreme court. [Code § 4149.] [Oct. '03, § 66; May '97, § 60; June '86, § 88.]

SEC. 66. Written notice of intention to petition for a rehearing shall be served on the opposite party or his attorney, and the clerk of this court, and filed with the clerk, within thirty days after filing of the opinion or decision, and if no such notice is served, the petition for rehearing shall not be filed after the expiration of such thirty days. [Code § 4149.] [Oct. '03, § 67; May '97, § 61; June '86, § 89.]

SEC. 67. The petition for rehearing shall be printed, and, with proof of service thereof on the opposite party or his attorney, be filed with the clerk of this court within sixty days after the opinion is filed, and may be made the argument or brief of authorities relied upon for a rehearing. It shall include a copy of the opinion or decision of the court to which objection is made, or a reference to the volume and page of the Northwestern Reporter in which it has been printed. The adverse party may file an argument in response. [Code § 4149.] [Oct. '03, § 68; May '97, § 62; June '86, §§ 90, 91, 92.]

SEC. 68. A copy of the petition shall be served upon the attorney of the adverse party, and if there be more than one, upon the attorney of each of them, within sixty days after the opinion or decision is filed; and twelve copies shall be delivered to the clerk of the court. If there be a printed argument in resistance of the petition, a copy thereof shall be served upon the attorney for the petitioner ten days before the day fixed for the hearing of the cause, and twelve copies shall be delivered to the clerk of this court. [Code § 4149.] [Oct. '03, § 69; May '97, § 63; June '86, §§ 90, 91.]

SEC. 69. The cause shall be placed on the docket for hearing on the first day of the next period commencing not less than twenty days after the filing of the petition and service thereof. If the party applying for a rehearing shall give notice of oral argument in his petition, both parties shall be entitled to be heard orally unless the petitioner waive oral argument. [Code § 4149.] [Oct. '03, § 70; May '97, § 64; June '86, § 90.]

SEC. 70. If a petition for rehearing is filed, it shall suspend the decision, if the court or one of the judges, upon its presentation, so order, until after the final decision on the rehearing. [Code § 4148.] [Oct. '03, § 71; May '97, § 65; June '86, § 93.]

XV. RECORDS AND REPORTS.

SEC. 71. The records and reports must in all cases show whether a decision was made by the full bench, and whether either, and if so, which of

the judges dissented from the decision. [Code § 199.] [Oct. '03, § 72; May '97, § 48; June '86, § 59.]

SEC. 72. All decisions and opinions of the court shall be published in the official reports, except such as the court may think unimportant. Decisions and opinions which are not to be included will be marked, "Not to be officially reported," and when so marked they will not be included in the reports. [Code § 200.] [Oct. '03, § 73; May '97, § 49; June '86, § 60.]

XVI. EXECUTIONS.

SEC. 73. If the supreme court affirms the judgment or order it may send the cause to the court below to have the same carried into effect, or may issue the necessary process for this purpose, directed to the sheriff of the proper county, as the party may require. [Code § 4143.] [Oct. '03, § 74; May '97, § 55; June '86, § 64.]

SEC. 74. If remanded to the inferior court to be carried into effect, such decision and the order of the court thereon, being certified thereto and entered on the records thereof, shall have the same force and effect as if made and entered during the session of that court. [Code § 4144.] [Oct. '03, § 75; May '97, § 56; June '86, § 73.]

SEC. 75. If by the decision of the supreme court, the appellant becomes entitled to a restoration of any part of the money or property that was taken from him by means of such judgment or order, either the supreme court or the court below may direct execution or writ of restitution to issue for the purpose of restoring to him such property or its value. [Code § 4145.] [Oct. '03, § 76; May '97, § 57; June '86, § 65.]

SEC. 76. Executions issued from the supreme court shall be like those from the district court, attended with the same consequences, and returnable in the same time. [Code § 4153.] [Oct. '03, § 77; May '97, § 58; June '86, § 66.]

SEC. 77. In cases in which the judgment below is affirmed in this court, the parties in whose favor the judgment is affirmed may have execution either from this court or the court below. In case of an execution from this court, if a process of garnishment is served upon the execution defendant, either principal or surety, the sheriff, in addition to his return, shall return a copy of the execution and his returns to the district or superior court from which the cause was appealed, and all issues of fact which may arise in said garnishment process shall be tried by that court. [Oct. '03, § 78; May '97, § 59; June '86, § 67.]

XVII. APPEALS IN CRIMINAL ACTIONS.

SEC. 78. The mode of reviewing in the supreme court any judgment, action or decision of the district court in a criminal case, is by appeal. An appeal can only be taken from the final judgment and within six months thereafter. Either the defendant or state may appeal. [Supp. § 5448.] [Oct. '03, § 79; May '97, § 71; June '86, §§ 39, 40, 41.]

SEC. 79. An appeal is taken and perfected by the party or his attorney serving on the adverse party or his attorney of record in the district court at the time of the rendition of the judgment, and on the clerk of such court, a notice in writing of the taking of the appeal, and filing the same with such clerk, with evidence of service thereof indorsed thereon or annexed thereto. [Code § 5449.] [Oct. '03, § 80; May '97; § 72; June '86, §§ 42, 43.]

SEC. 80. When several defendants are indicted and tried jointly, any one or more of them may join in taking the appeal, but those of their co-defendants who do not join shall take no benefit therefrom, yet they may appeal afterwards. [Code § 5451.] [Oct. '03, § 81; May '97, § 73; June '86, § 49.]

SEC. 81. When an appeal is taken, it is the duty of the clerk of the court in which the judgment was rendered to forthwith prepare and transmit to the attorney-general a certified copy of the notice of appeal in the case, with the date of service thereof, and, without unnecessary delay, to make out a full and perfect transcript of all papers in the case on file in his office, except the papers returned by the examining magistrate on the preliminary examination, where there has been one, and of all entries made in the record book, certify the same under seal of the court, and transmit the same to the clerk of the supreme court. [Code § 5450.] [Oct. '03, § 82; May '97, § 74; June '86, § 44.]

SEC. 82. An appeal taken by the state in no case stays the operation of a judgment in favor of the defendant. [Code § 5452.] [Oct. '03, § 83; May '97, § 75; June '86, § 45.]

SEC. 83. An appeal taken by the defendant does not stay the execution of the judgment, unless bail is put in; but where the judgment is imprisonment in the penitentiary, and an appeal is taken within ninety days after judgment is rendered, and the defendant is unable to give bail, and that fact is satisfactorily shown to the court, or judge thereof, it may, in its discretion, order the sheriff or officer having the defendant in custody to detain him in custody, without taking him to the penitentiary, to abide the judgment on the appeal, if the defendant desires it. [Code § 5453.] [Oct. '03, § 84; May '97, § 76; June '86, §§ 46, 47.]

SEC. 84. When an appeal is taken by the defendant, and bail is given, the clerk must give to the defendant, or his attorney, a certificate under the seal of the court that an appeal has been taken and bail given, and the sheriff or other officer having the defendant in custody must, upon receiving it, discharge the defendant from custody and cease all further proceedings in execution thereof, and forthwith return to the clerk of the court who issued it the execution under which he acted, with his return thereon, and if it has not been issued, it shall not be until after final judgment on the appeal. [Code § 5454.] [Oct. '03, § 85; May '97, § 77; June '86, § 48.]

SEC. 85. The party appealing is the appellant, the adverse party is the appellee, but the title of the action shall not be changed on the appeal, and the cause shall be so docketed at the commencement of the period assigned for trying causes from the judicial district from which the appeal comes, which causes shall take precedence of all other business, be tried at the term at which the transcript is filed, unless continued for cause or by consent of the parties, and be decided, if practicable, at the same term. [Code § 5455.] [Oct. '03, § 86; May '97, § 78; June '86, §§ 50, 74.]

SEC. 86. The personal appearance of the defendant in the supreme court on the trial of an appeal is in no case necessary. [Code § 5456.] [Oct. '03, § 87; May '97, § 79; June '86, § 75.]

SEC. 87. An appeal shall not be dismissed for any informality or defect in taking it, if corrected in a reasonable time, and the supreme court must direct how it shall be corrected. [Code § 5457.] [Oct. '03, § 88; May '97, § 80; June '86, § 76.]

SEC. 88. No assignment of error is necessary. [Code § 5458.] [Oct. '03, § 89; May '97, § 81; June '86, § 77.]

SEC. 89. Criminal actions shall be presented in the supreme court, by printed abstracts, denials, arguments and petitions for rehearing, as required by the rules applicable to civil actions, provided that the defendant shall be entitled to close the argument. The provisions of the code and rules of this court in civil procedure relating to the printing, serving and filing of abstracts, denials, arguments, petitions for rehearing, notice thereof and of oral arguments, motions and resistances thereto, the certification of the record and the filing of decisions and opinions, shall apply in criminal cases, save that appellant need not serve his abstract, brief and argument more than thirty days before the day assigned for the hearing of the cause. [Code §§ 5459, 5461.] [Oct. '03, § 90; May '97, § 82; June '86, § 78.]

SEC. 90. If the appeal is taken by the defendant the supreme court must examine the record, without regard to technical errors or defects which do not affect the substantial rights of the parties, and render such judgment on the record as the law demands. It may affirm, reverse, or modify the judgment, or render such judgment as the district court should have done, or order a new trial, or reduce the punishment, but cannot increase it. And in case the judgment of the trial court is reversed or modified in favor of the defendant on the appeal of the defendant, he shall be entitled to recover the cost of printing abstracts and briefs not exceeding one dollar for each page thereof, to be paid by the county from which the appeal was taken. [Code § 5462.] [Oct. '03, § 91; May '97, § 83; June '86, § 80.]

SEC. 91. If the state appeals the supreme court cannot reverse or modify the judgment so as to increase the punishment, but may affirm it, and shall point out any error in the proceedings, or in the measure of punishment, and its decision shall be obligatory as law. [Code § 5463.] [Oct. '03, § 92; May '97, § 84; June '86, § 81.]

SEC. 92. If a judgment against the defendant is reversed without ordering a new trial, the supreme court must direct that the defendant be discharged and his bail exonerated, or if money be deposited instead, that it be refunded to him. [Code § 5464.] [Oct. '03, § 93; May '97, § 85; June '86, § 82.]

SEC. 93. On a judgment of affirmance against the defendant, the original judgment shall be carried into execution as the supreme court shall direct, except as otherwise provided. [Code § 5465.] [Oct. '03, § 94; May '97, § 86; June '86, § 83.]

SEC. 94. The decision of the supreme court, with any opinion filed, or judgment rendered, must be recorded by its clerk and after the expiration of the period allowed for a rehearing or as ordered by the court, or provided by its rules, a certified copy of the decision and opinion shall be transmitted to the clerk of the trial court, filed and entered of record by him, and thereafter the jurisdiction of the supreme court shall cease and all proceedings necessary for executing the judgment shall be had in the trial court, or by its clerk. [Code § 5466.] [Oct. '03, § 95; May '97, § 87; June '86, §§ 79, 84, 85.]

SEC. 95. Unless some proceeding in the district court is directed, a copy of the judgment of the trial court and decision on appeal, or of the judgment and decision on appeal, certified by the clerk of the trial court, shall be delivered to the sheriff, or other proper officer, as an execution, and shall authorize him to execute the judgment of the court, or take any steps required to bring the action to a conclusion. [Code § 5467.] [Oct. '03, § 96; May '97, § 88; June '86, § 86.]

SEC. 96. If a defendant, imprisoned during the pendency of an appeal, upon a new trial ordered by the supreme court, is again convicted, the

period of his former imprisonment shall be deducted from the period of imprisonment to be fixed on the last verdict of conviction. [Code § 5468.] [Oct. '03, § 97; May '97, § 89; June '86, § 87.]

XVIII. CONSTRUCTION AND MODIFICATION OF RULES.

SEC. 97. When, by reason of peculiar circumstances, the foregoing rules relating to the abstract, preparation and argument of causes, ought to be waived or modified in any case, the party desiring such waiver or modification may, upon reasonable notice to the adverse party, apply to any judge of this court in vacation, or to the court in term time, for an order directing the waiver or modification desired. The application shall be in writing, shall set out the peculiar facts relied upon by the applicant, and shall be verified by the party, or a person having knowledge of the facts, and certified by counsel as being true and made in good faith. The order upon such application shall be in writing, and shall be filed with the clerk of this court. In no case will these rules be waived or modified upon agreement of counsel alone. [Oct. '03, § 98; May '97, § 90; June '86, § 101.]

XIX. DISTRIBUTION OF PRINTED MATTER.

SEC. 98. The clerk shall make the following distribution of all printed abstracts, denials of abstracts, briefs and arguments received under the foregoing rules: One copy to each judge of the court, one copy to the state library, two copies to the law department of the state university, and the remainder shall be placed in his office, one copy of which shall remain permanently among the files. [Oct. '03, § 99; May '97, § 91; June '86, §§ 102, 116.]

XX. RETURN OF PAPERS AND EXHIBITS.

SEC. 99. In all cases save where a decree is to be rendered in this court, the clerk, as soon as the cause is at an end here, shall transmit to the clerk of the court below all original papers, exhibits and transcripts certified up from said court. If decree is entered in this court either party desiring to withdraw any of the said files may, by motion, showing proper grounds therefor, and upon five days' notice to the other party or his attorney, secure an order from the court or a judge thereof, allowing him to do so upon filing a receipt for the same with the clerk of this court. [Code § 4126.] [Oct. '03, § 100; May '97, § 92; June 86, § 113.]

XXI. COSTS.

SEC. 100. The appellant may be required to give security for costs, under the same circumstances and upon the same showing as plaintiffs in civil actions in inferior courts may be. [Code § 4135.] [Oct. '03, § 101; May '97, § 93; June '86, § 94.]

SEC. 101. When the parties or their attorneys shall furnish printed abstracts, denials of abstracts, amendments, briefs, arguments, or petitions for rehearing in conformity to section 50 of these rules, the clerk will tax the actual cost of printing the same which shall not exceed one dollar for each page, embraced in a single copy thereof, and when not so prepared and printed shall not exceed the sum of one dollar for every three hundred seventy-five words, which in no event shall exceed one dollar per page, against the unsuccessful party not furnishing the document, to be col-

lected and paid to the successful party as other costs. It is made the duty of every party who files any printed matter for which costs of printing are claimed, to state at the end of the document in writing or in print and have certified by his attorney as being correct, the true and actual cost of the printing of the same and no costs will be taxed for such printing unless this statement and certificate be made. [Supp. § 4142.] [Oct. '03, § 102; May '97, § 94; June '86, § 95.]

SEC. 102. If any denial of the abstracts, transcripts or records is made, or if any additional abstract is filed, without good or sufficient cause, the costs of the same, or any unnecessary part thereof, and of any transcript thereby made necessary, shall be taxed to the party causing the same; and when any unnecessary costs have been made by either party the court will, upon application, tax the same to the party making them without reference to the disposition of the case. [Code §§ 4118, 4120.] [Oct. '03, § 103; May '97, § 95; June '86, § 95.]

SEC. 103. Whenever the translation of the shorthand notes is required to be filed in this court, the clerk shall tax as part of the costs in the case, the expense of procuring the same, which shall not exceed the rate of five cents per hundred words. If the amount paid or agreed to be paid is not stated in the translation so filed the clerk shall tax at the statutory rate. [Supp. § 4142.] [Oct. '03, § 104; May '97, § 96.]

SEC. 104. All other taxable fees and costs shall abide the result of the appeal and be taxed to the unsuccessful party, unless otherwise ordered. [Supp. §§ 3853, 4142.] [Oct. '03, § 105; May '97, § 97.]

XXII. ADMISSION OF ATTORNEYS.

[For statutory regulations as to admissions to the bar see Title III, Chapter 10 of the code, and § 310, et seq., supplement. EDITOR.]

SEC. 105. The board of law examiners shall consist of five members, in addition to the attorney-general; and no examination for admission shall be conducted by less than three members of the board. [Oct. '03, § 106; May '97, § 102; June '86, § 105.]

SEC. 106. Examinations shall be held at the capitol at Des Moines, commencing on the first Tuesday in October, and on the first Tuesday in June; and at the university in Iowa City commencing on Tuesday of the week following the week of the annual commencement of the state university, and each examination shall continue not less than three days. Such examinations shall be both written and oral. At least fifty written questions to be prepared by such board on subjects of the law shall be propounded to each candidate, to be answered in writing, and the members of the board shall conduct such oral examinations as they deem necessary and proper. The board shall estimate each candidate's examination in percentage on the basis of one hundred per cent. for the entire examination, and no one shall be recommended by the board for admission who does not, on this basis, receive a marking of at least seventy-five per cent. [Sept. '10, § 107; Oct. '03, § 107; May '97, §§ 98, 103, 104, 105, 106; June '86, §§ 103, 106, 107, 110.]

[The above section appears as amended by the court on April 11, 1914. EDITOR.]

SEC. 107. The board shall determine the general educational qualifications of the applicants for examination before allowing them to enter upon the examination as to their legal attainments, and for that purpose may require such of them as do not otherwise show their qualifications,

as provided by this rule, to submit to written tests as to their knowledge of the subjects of orthography, reading, writing, arithmetic, geography, English grammar, United States and English history, elementary algebra, elementary physics, elementary economics and civil government, and such other subjects as the board may deem necessary. But in lieu of such written tests the board shall accept as sufficient evidence of the educational qualifications required by statute, proof of graduation from the regular collegiate or liberal arts course in any university or college of good standing in the United States, or from any high school of this state having a course of study which prepares for admission to the state university, or from any normal school or academy prescribing a course of study at least equivalent to such high school course. The board shall also accept as sufficient proof of educational qualifications the certificate of the president or principal of any such university, college, high school, normal school or academy in this state that the applicant has regularly and in good faith pursued and successfully completed four years of the regular course of such school as above described; also certificates or diplomas of the state board of educational examiners; also the certificate of the president of the state university or any college in this state having an equivalent collegiate or liberal arts course of study, that the applicant has been found by examination or on proper certification to be entitled to admission without conditions as a student in such course or in any other course of study in such institution for which the same qualifications for admission are required, or for which it is required that the applicant shall have actually and in good faith acquired a general education substantially equivalent to that involved in the completion of a high school course of study of at least four years in extent. The board may adopt such reasonable regulations as shall be deemed wise with regard to acceptance of other proofs of educational qualifications as a substitute for written tests by the board. The board may before recommending the admission of an applicant, subject him to a special examination as to general educational qualifications if his written or oral examination on legal subjects renders it doubtful whether his educational qualifications are such as required by statute. [Oct. '03, § 108.]

SEC. 108. No candidate who has failed to pass any examination given by the board shall be received as an applicant for examination within three months after such failure. [Oct. '03, § 109.]

SEC. 109. The board of law examiners shall prepare such forms as may be necessary for application for examination, and make such rules, not inconsistent with the rules of this court, with reference to the method of conducting the examinations herein provided for, as they may deem expedient. [Oct. '03, § 110.]

SEC. 110. The members of the board of law examiners shall be paid fifteen dollars each for each day spent in conducting examinations as authorized by these rules, upon the certificate of the attorney-general as to the time thus occupied; such compensation to be paid by the clerk of this court out of funds in his hands derived from fees of candidates for examination. [Oct. '03, § 111.]

[For rules adopted by the board of law examiners for the examination of candidates for admission to the bar see page 1960 hereof.]

SUPPLEMENTAL RULES GOVERNING THE ORGANIZATION OF THE SUPREME COURT.

[TAKING EFFECT SEPTEMBER FIRST, 1913.]

In pursuance of section 3 of chapter 22 of the acts of the thirty-fifth general assembly, the supreme court have adopted the following additional rules:

SEC. 111. (1) From and after the beginning of the September term, A. D. 1913, the supreme court shall be divided into two divisions, to be known as the first and the second.

(2) Each division shall consist of three judges and the chief justice, who shall sit with each division in the consideration of all matters coming before either division.

(3) The personnel of the divisions shall not be permanent, but may be changed from time to time, by the chief justice, as exigencies may arise, or, by affirmative vote of a majority of the judges. The personnel of the divisions shall be changed at least once a year.

SEC. 112. Each division shall, except as hereinafter provided, hear and determine all motions and cases submitted to it, and all petitions for rehearing in cases decided by it, including motions for decrees to retax costs and all other interlocutory matters.

SEC. 113. (1) Each term shall be so divided into periods as that the last shall be for the consideration, by the full bench, of all motions, cases on original submission, petitions for rehearings, and other matters properly referable thereto; and all other periods shall be so divided that one division shall sit on the first Tuesday of the period for the submission of such motions, cases, and petitions for rehearing and other matters as may be assigned to it, and the other shall sit for the hearing of matters assigned to it, on the second Tuesday of each period. And, to equalize the work, cases assigned for each period shall be divided, as nearly as practicable, into two equal parts, save that all cases and other matters for consideration by the entire bench, shall be assigned for the last period of the term.

(2) Upon call of the docket for any period or any division thereof, or at any time prior thereto, when it becomes apparent that any matter is for hearing by the full bench, any cause or any motion or other matter may be assigned for the last period of each term.

(3) All cases or other matters passed to another period shall go to and be heard by the division to which the cause was originally assigned; and causes or other matters "passed to last period" shall also be heard by the division to which the case was originally assigned, save where the matter is for the full bench, when it shall be passed to the last period and be heard at that time.

(4) Tuesday and Friday of each period or subdivision thereof shall be "motion days" for the submission of motions to the proper division of the court, or to the full bench.

SEC. 114. (1) All cases involving constitutional questions shall be heard by the full bench; and the chief justice may order any case to be so submitted.

(2) Should there be a difference of opinion among the members of either division as to how a case should be decided, or as to the facts or

the rules of law applicable thereto, any member of that division, or the chief justice, on his own motion, may call in the other division, and the division thus called in shall consider the case and take part in the decision.

(3) And, if a difference of opinion should arise upon the disposition of a motion, the chief justice shall call in the other division, which shall take part in the determination thereof.

(4) Any member may note his dissent from, or special concurrence in any opinion filed by either division, or by the full bench.

SEC. 115. Should a member of a division get behind with his work for any reason, or be disqualified from sitting in any cause, the chief justice may call in a judge from another division who is up with his work, to sit in place of the one who is behind, or disqualified, and may also, in the event an entire division gets behind, make such a division of the cases for any period as will equalize matters between the two divisions.

SEC. 116. Where a chief justice retires and is reëlected, he shall take his place with the division from which his successor comes, and, if a new man takes his place, he too shall be assigned to the division from which the then chief justice is taken.

SEC. 117. As the chief justice is to preside over each division, allowance shall be made therefor in the assignment of cases for opinions, and such credit given as will equalize the work as nearly as possible.

SEC. 118. (1) The clerk, in making up the term dockets and the assignments for the several periods, shall make the same in accord with these rules and so assign motions and petitions for rehearing as that the same will be submitted to and reach the proper divisions.

(2) Assignment shall also be made of all motions, cases for original submission, and petitions for rehearing which are to go to the full bench, all under the orders and directions of the chief justice.

SEC. 119. Each and every opinion filed shall show, on its face, what judges participated therein.

SEC. 120. Consultation may be had between the divisions at any time upon cases pending on motion, for original submission, or upon petitions for rehearing, upon request of any member of the court.

SEC. 121. Cases submitted prior to the September, 1913, term, shall be decided by the full bench and petitions for rehearing in cases heretofore or hereafter decided by the full bench, shall be submitted to the full bench.

SEC. 122. These rules shall be regarded as supplemental to those now in force and be treated as amendatory thereto; and no prior rule or decision applicable thereto shall be regarded as repealed, save it be inconsistent herewith and then only to the extent of such inconsistency.

SEC. 123. These rules shall go into effect on September first, 1913, and may be changed at any time upon majority vote of the entire membership of the bench.

RULES ADOPTED BY THE BOARD OF LAW EXAMINERS OF IOWA FOR THE EXAMINATION OF CANDIDATES FOR ADMISSION TO THE BAR.

At a meeting of the board of law examiners, held at the capitol on the twenty-eighth day of August, 1901, the following rules for the examination of applicants for admission to practice as attorneys and counselors in the courts of this state, under chapter ten of title three of the code, as amended by chapter eleven of the acts of the twenty-eighth general assembly, were duly adopted, and shall be in force and effect from and after this date:

RULE 1. Every applicant for admission to the bar shall make application, under oath, and upon the form prescribed by the board of law examiners, which will be furnished by the clerk of the supreme court, upon request, and shall file his application with the clerk of the supreme court at least ten days before the first day of the term at which he asks to be examined.

RULE 2. Each applicant shall attach to his application, as proof of his good moral character, a certificate of a judge of the district court of the district, or a clerk of the district court of the county, in which the applicant resides, to the effect that he has knowledge of the moral character of the applicant, and that the same is good.

RULE 3. Every applicant who is a graduate of a collegiate, classical, philosophical, scientific or engineering course in any university or college of good standing in the United States or a graduate of a four years' course in any high school which prepares for admission to the state university, or of a course of study in any normal school or academy equivalent to such high school course, or holds a certificate or diploma from the state board of educational examiners, shall attach to his application the diploma or certificate issued to him by such high school, college, normal school, academy or state board of educational examiners, and the same shall be accepted as proof of the general educational qualification of the applicant. Every applicant not holding such diploma or certificate, before being permitted to take the law examination, must pass a satisfactory written examination before the board of law examiners in orthography, reading, writing, arithmetic, geography, English grammar, United States and English history, elementary algebra, elementary physics, elementary economics, civil government, and the elementary principles of the government land surveys.

RULE 4. No applicant whose preliminary examination shall not average at least seventy-five per cent. on a basis of one hundred per cent. will be permitted by the board to take the law examination.

RULE 5. Proof of qualification as to age, place of residence, time and place of study, shall be by affidavit made before some officer authorized to administer oaths and having a seal. Proof of residence and age shall be by affidavits of at least two witnesses, and the applicant shall also make affidavit as to his age and place of residence. Proof of his term of study shall be by affidavit of the member of the bar or judge with whom he pursued his studies; and when he has studied at a law school, such fact, and his term of study, shall be shown by the affidavit of one or more of the professors or instructors of such school; such affidavits must show that the applicant has actually, and in good faith, pursued the study of law in the manner, and for the time prescribed by statute; and must also

show that the affiant is a practicing lawyer or judge of a court of record, or professor or instructor at a law school at which the applicant studied.

RULE 6. In estimating the time of study, a school year of thirty-six weeks spent at a reputable law school in the United States shall be equivalent to a full year spent in an office, and a fraction of a school year spent in such law school shall be considered the equivalent of the same fraction of a year spent in the office of an attorney or judge.

RULE 7. The examination shall be upon printed and oral questions submitted to each applicant, and during such examination he shall not have access to books or papers, nor shall he communicate with anyone upon the subject thereof.

RULE 8. Each applicant permitted to take the law examination at the capitol at Des Moines shall register with the clerk of the supreme court, and shall draw a number by which number the applicant shall be known throughout such examination.

Said clerk shall prepare a list of the applicants so registering showing the number drawn by each applicant, and shall deliver such list to the attorney-general duly sealed in an envelope and identified by the signature of such clerk, immediately after the beginning of such examination. Each applicant shall write his number at the head of his paper, but shall not write thereon either his name or his address.

After the marking of the papers submitted in such examination and at the conclusion thereof, the said envelope shall be opened in the presence of said clerk and the board, and said board shall cause to be written the final average attained by each member upon the list taken from such envelope opposite the name of the applicant bearing such number.

RULE 9. At each law examination held at the state university, the method of designating the applicants outlined in rule 8 shall be followed with the exception that the dean of the college of law shall perform the duties required to be performed in rule 8 by the clerk of the supreme court.

(For tables of statutes and rules of the supreme court see pages 1962 to 1964, inclusive. Editor)

TABLE OF STATUTES AND RULES OF THE SUPREME COURT ADOPTED JUNE 22, 1886,

TAKING EFFECT AT THE OCTOBER TERM, 1886,

SHOWING SECTIONS OF ALL LATER STATUTES AND RULES CORRESPONDING THERETO.

The Statutes and Rules of 1886 can be found in the preface to McClain's Code of 1888.

June '86	May '97	Oct. '03	Sept. '10 Sept. '13	June '86	May '97	Oct. '03	Sept. '10 Sept. '13
1	1, 2	1, 2	1, 2	46	76	84	83
2	1	1	1	47	76	84	85
3	Omitted	Omitted	Omitted	48	77	85	84
4	3	4	4	49	73	81	80
5	4, 5	5, 6	5, 6	50	78	86	85
6	Omitted	Omitted	Omitted	51	36, 37	Omitted	Omitted
7	6	7	7	52	38	43	43
8	7	8	8	53	39, 40	44, 45	44, 45
9	6	7	7	54	40	45	45
10	8	9–12	9–12	55	41	46	46
11	9	13	13	56	43	48	47
12	13, 23, 27	17, 32, 36	17, 34, 38	57	39	44	44
13	13	17	17	58	44	50	49
14	Omitted	Omitted	Omitted	59	46, 48	59, 72	58, 71
15	15	24	25	60	49	73	72
16	Omitted	Omitted	Omitted	61	45	58	57
17	16	25	26	62	50	61	60
18	20	29	30	63	51	62	61
19	22	31	32	64	55	74	73
20	24	33	35	65	57	76	75
21	28	37	39	66	58	77	76
22	10	14	14	67	59	78	77
23	11	15	15	68	44	50	49
24	11	15	15	69	46	59	58
25	12	16	16	70	54	65	64
26	30	39	41	71	52	63	62
27	31	40	42	72	53	64	63
28	14	18	18	73	56	75	74
29	26	35	37	74	78	86	85
30	25	34	36	75	79	87	86
31	32	20	21	76	80	88	87
32	32	20	21	77	81	89	88
33	34	22	23	78	82	90	89
34	34	22	23	79	87	95	94
35	35	23	24	80	83	91	90
36	Omitted	Omitted	Omitted	81	84	92	91
37	Omitted	Omitted	Omitted	82	85	93	92
38	Omitted	Omitted	Omitted	83	86	94	93
39	71	79	78	84	87	95	94
40	71	79	78	85	87	95	94
41	71	79	78	86	88	96	95
42	72	80	79	87	89	97	96
43	72	80	79	88	60	66	65
44	74	82	81	89	61	67	66
45	75	83	82	90	62, 64	68, 70	67, 69

TABLE OF SUPREME COURT STATUTES AND RULES—CONTINUED

June '86	May '97	Oct. '03	Sept. '10 Sept. '13	June '86	May '97	Oct. '03	Sept. '10 Sept. '13
91	62, 63	68, 69	67, 68	105	102	106	105
92	62	68	67	106	103	107	106
93	65	71	70	107	104	107	106
94	93	101	100	108	100	See Board Rules	
95	94, 95	102, 103	101, 102	109	107	Omitted	Omitted
96	66	51	50	110	106	107	106
97	67	52	51	111	99	See Board Rules	
98	68	53	52	112	101	See Board Rules	
99	69	54	53	113	92	100	99
100	70	57	56	114	17	26	27
101	90	98	97	115	18	27	28
102	91	99	98	116	91	99	98
103	98	107	106	117	66	51	50
104	99	See Board Rules					

TABLE OF STATUTES AND RULES OF THE SUPREME COURT ADOPTED AT THE MAY TERM, 1897,

TAKING EFFECT OCTOBER 1, 1897,

SHOWING SECTIONS OF ALL LATER STATUTES AND RULES CORRESPONDING THERETO.

The Statutes and Rules of 1897 may be found in the Code, page 2151.

May '97	Oct. '03	Sept '10 Sept. '13	May '97	Oct '03	Sept '10 Sept. '13	May '97	Oct. '03	Sept. '10 Sept. '13
1	1	1	27	36	38	53	64	63
2	2	2	28	37	39	54	65	64
3	4	4	29	38	40	55	74	73
4	5	5	30	39	41	56	75	74
5	6	6	31	40	42	57	76	75
6	7	7	32	20	21	58	77	76
7	8	8	33	21	22	59	78	77
8	9–12	9–12	34	22	23	60	66	65
9	13	13	35	23	24	61	67	66
10	14	14	36	Rep	Rep.	62	68	67
11	15	15	37	Rep.	Rep	63	69	68
12	16	16	38	43	43	64	70	69
13	17	17	39	44	44	65	71	70
14	18	18	40	45	45	66	51	50
15	24	25	41	46	46	67	52	51
16	25	26	42	47	47	68	53	52
17	26	27	43	48	47	69	54	53
18	27	28	44	50	49	70	57	56
19	28	29	45	58	57	71	79	78
20	29	30	46	59	58	72	80	79
21	30	31	47	60	59	73	81	80
22	31	32	48	72	71	74	82	81
23	32	34	49	73	72	75	83	82
24	33	35	50	61	60	76	84	83
25	34	36	51	62	61	77	85	84
26	35	37	52	63	62	78	86	85

TABLE OF SUPREME COURT STATUTES AND RULES—CONTINUED.

May '97	Oct. '03	Sept. '10 Sept. '13	May '97	Oct. '03	Sept. '10 Sept. '13	May '97	Oct. '03	Sept. '10 Sept. '13
79	87	86	89	97	96	99	See Boa	rd Rules
80	88	87	90	98	97	100	See Boa	rd Rules
81	89	88	91	99	98	101	See Boa	rd Rules
82	90	89	92	100	99	102	106	105
83	91	90	93	101	100	103	107	106
84	92	91	94	102	101	104	107	106
85	93	92	95	103	102	105	107	106
86	94	93	96	104	103	106	107	106
87	95	94	97	105	104	107	Omitted	Omitted
88	96	95	98	107	106	108	Omitted	Omitted

TABLE OF STATUTES AND RULES OF THE SUPREME COURT ADOPTED AT THE OCTOBER TERM, 1903,

TAKING EFFECT JANUARY 1, 1904,

SHOWING SECTIONS OF THE LATER STATUTES AND RULES CORRESPONDING THERETO.

The Statutes and Rules of 1903 may be found in the Supplement to the Code, 1907, page 1173.

Oct. '03	Sept. '10 Sept. '13	Oct. '03	Sept. '10 Sept. '13	Oct. '03	Sept. '10 Sept. '13	Oct. '03	Sept. '10 Sept. '13
1	1	29	30	57	56	85	84
2	2	30	31	58	57	86	85
3	3	31	32	59	58	87	86
4	4	32	34	60	59	88	87
5	5	33	35	61	60	89	88
6	6	34	36	62	61	90	89
7	7	35	37	63	62	91	90
8	8	36	38	64	63	92	91
9	9	37	39	65	64	93	92
10	10	38	40	66	65	94	93
11	11	39	41	67	66	95	94
12	12	40	42	68	67	96	95
13	13	41	Omitted	69	68	97	96
14	14	42	Omitted	70	69	98	97
15	15	43	43	71	70	99	98
16	16	44	44	72	71	100	99
17	17	45	45	73	72	101	100
18	18	46	46	74	73	102	101
19	20	47	47	75	74	103	102
20	21	48	47	76	75	104	103
21	22	49	48	77	76	105	104
22	23	50	49	78	77	106	105
23	24	51	50	79	78	107	106
24	25	52	51	80	79	108	107
25	26	53	52	81	80	109	108
26	27	54	53	82	81	110	109
27	28	55	54	83	82	111	110
28	29	56	55	84	83		

TABLES OF SESSIONS AND LAWS

OF THE

GENERAL ASSEMBLY

TABLE SHOWING DATES OF CONVENING AND ADJOURNING OF THE VARIOUS SESSIONS OF THE GENERAL ASSEMBLY.

Session	Convened	Adjourned	Session	Convened	Adjourned
1	Nov. 30, 1846	Feb. 25, 1847	18	Jan. 12, 1880	Mar. 27, 1880
1 Extra	Jan. 3, 1848	Jan. 25, 1848	19	Jan. 9, 1882	Mar. 17, 1882
2	Dec. 4, 1848	Jan. 15, 1849	20	Jan. 14, 1884	April 2, 1884
3	Dec. 2, 1850	Feb. 5, 1851	21	Jan. 11, 1886	April 13, 1886
4	Dec. 6, 1852	Jan. 24, 1853	22	Jan. 9, 1888	April 10, 1888
5	Dec. 4, 1854	Jan. 26, 1855	23	Jan. 13, 1890	April 15, 1890
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8	Jan. 9, 1860	April 3, 1860	26 Extra	Jan. 19, 1897	May 11, 1897†
8 Extra	May 15, 1861	May 29, 1861	27	Jan. 10, 1898	April 1, 1898
9	Jan. 13, 1862	April 8, 1862	28	Jan. 8, 1900	April 6, 1900
9 Extra	Sept. 3, 1862	Sept. 11, 1862	29	Jan. 13, 1902	April 11, 1902
10	Jan. 11, 1864	Mar. 29, 1864	30	Jan. 11, 1904	April 12, 1904
11	Jan. 8, 1866	April 3, 1866	31	Jan. 8, 1906	April 6, 1906
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13	Jan. 10, 1870	April 13, 1870	32 Extra	Aug. 31, 1908	Nov. 24, 1908‡
14	Jan. 8, 1872	April 23, 1872*	33	Jan. 11, 1909	April 9, 1909
15	Jan. 12, 1874	Mar. 19, 1874	34	Jan. 9, 1911	April 12, 1911
16	Jan. 10, 1876	Mar. 16, 1876	35	Jan. 13, 1913	April 19, 1913
17	Jan. 14, 1878	Mar. 26, 1878			

*The 14th G. A. held an adjourned session Jan. 15, 1873, to Feb. 20, 1873.

†The extra session of the 26th G. A. held an adjourned session July 1, 1897, to July 2, 1897.

‡The extra session of the 32d G. A. took a recess from Sept. 10, 1908, to Nov. 24, 1908.

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CORRESPONDING SECTIONS OF
IOWA CODES

CODE OF 1851

This table is intended to be used in tracing the development of sections of the Code of 1851 only. The sections of that code are in numerical order and to the right of each is found the corresponding section or sections of later codes.

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8	5	9	9	9
9	6	11	11	11
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20	23	32	36	35
21	24	33	37	36
22	25	34	38	37
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25	28	Omitted		
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30	33	49	53	50
31	34	50	54	51
32	35	51	55	52
33	36	52	56	53
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35	38	53	57	54
36	39	54	58	Omitted
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92	220	Omitted		
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94	222	Omitted		
95	223	280	367	395
96	224	589	1034	1072
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99	227	Omitted		
100	228	Omitted		
101	229	Omitted		
102	230	Omitted		
103	See 473	Omitted		
104	240	Omitted		
105	241	Omitted		
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107	See 243, 318	308	429	442
108	244	See 303	402	422
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110	246	Omitted		
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113	249	Temporary		
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115	251	310	431	446
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118	254	313	434	449
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126	262	Omitted		
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128	264	Omitted		
129	265	See 303	402	422
130	266	Omitted		
131	267	Omitted		
132	268	Omitted		
133	269	Omitted		
134	270	Omitted		
135	271	Omitted		
136	272	Omitted		
137	273	Omitted		
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155	363	330	464	486
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193	403	359	494	521
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197	407	363	498	525
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208	418	375	510	539
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229	451	398	539, 540	579
230	452	399	539, 540	579
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235	457	388	525	Omitted
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242	Omitted			
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246	481	606	1067	1093
247	482	607	1068	1093
248	483	608	1069	1093
249	484	609	1070	1094
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251	486	611	1072	1096
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255	490	615	1076	1132
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282	516	644	1107	1169
283	517	645	1108	1157
284	518	645	1108	1157
285	519	649	1112	1158
286	520	650	1113	1159
287	521	651	1114	1160
288	522	652	1115	1161
289	523	653	1116	1163
290	524	654	1117	1164
291	525	655	1118	1165
292	526	656	1119	1167
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307	541	664	1129	1169, 1170
308	542	665	1130	1168, 1174
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311	545	668	1133	1175
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327	557	678	1143	1184, 1185
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329	559	679	1144	1187
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346	576	698	1164	1204
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348	578	700	1166	1206
349	579	699	1165	1205
350	580	699	1165	1205
351	581	703	1169	1209
352	582	704	1170	1210
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354	584	702	1168	1208
355	585	705	1171	1211
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359	589	708	1174	1214
360	590	709	1175	1215
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370	600	720	1186	1225
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372	601	722	1188	1227
373	603	723	1189	1228
374	604	724	1190	1212
375	605	725	1191	1229
376	606	726	1192	1230
377	607	727	1193	1231
378	608	728	1194	1232
379	609	729	1195	1250
380	610	730	1196	1198
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382	612	732	1198	1234
383	613	733	1199	1235
384	614	734	1200	1236
385	615	735	1201	1237
386	616	736	1202	1238
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422	653	776	1248	1284
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424	655	777	1249	1285
425	656	778	1250	1286
426	657	779	1251	1287
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549	854	Omitted		
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741	1229	Omitted		
742	1230	Omitted		
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1696	2790	2555	3760	3470
1697	2792	2556	3761	3471
1698	2794	2561	3766	3476
1699	4111	2527	3732	3445
1700	Omitted			
1701	2800	2586	3791	3501
1702	2802	2589	3794	3504
1703	2797, 2795, 3553	2580, 2576, 3225	3785, 3781, 4455	3495, 3491, 4163

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1705	2801, 2827	2585, 2613	3790, 3818	3500, 3532
1706	2803	2590	3795	3505
1707	2805	2592	3797	3507
1708	2804	2591	3796	3506
1709	2806	2593	3798	3508
1710	2807, 2810	2594	3799	3509
1711	2808	2595	3800	3510
1712	2809	2596	3801	3511
1713	2810	Omitted		
1714	2811	2599	3804	3514
1715	2812	2599	3804	3514
1716	2813	2600	3805	3515
1717	2819	2605	3810	3520
1718	2814	2601	3806	3516
1719	2818	Omitted		
1720	2815	2602	3807	3517
1721	2816	2603	3808	3518
1722	Omitted			
1723	2817	2604	3809	3519
1724	2822	2608	3813	3523
1725	2831, 2832	2618	3823	3534
1726	2824	2610, 2612	3815, 3817	3528, 3531
1727	2825	2611	3816	3529
1728	2826	2612	3817	3531
1729	2828, 2829	2614, 2615	3819, 3820	3533, 3526
1730	Omitted			
1731	2841	2627	3833	3542
1732	2816, 2823, 2834	2603, 2609, 2620	3808, 3814, 3825	3518, 3524, 3536
1733	2872	2644	3850	3557
1734	Omitted			
1735	2948	2720	3927	3630
1736	2875	2646	3852	3559
1737	2849	2635	3841	3550
1738	2879	2651	3857	3564
1739	Omitted			
1740	2884, 2886, 2889, 2891	2659	3865	3570
1741	2895	2665	3871	3576
1742	2917	2712	3918	3622
1743	See 2880	2655	3861	3566
1744	2904	2669	3875	3580
1745-7	Omitted			
1748	2905, 2906, 2907, 2908, 2909	2670, 2671, 2672, 2673	3876, 3877, 3878, 3879	3581, 3582, 3583, 3584
1749	2968	2731	3938	3641
1750	2918	2648	3854	3561
1751	2844	2630	3836	3545
1752	Omitted			
1753	2946	2719	3926	3618
1754	2877	2649	3855	3562
1755	2976	2653	3859	3565
1756	2979	2691	3897	3602
1757	2973	2687	3893	3598
1758	2972	2686	3892	3597
1759	2977	2689	3895	3600
1760	2982	2735	3942	3645
1761-2	3005	2747	3954	3661
1763	3007	2744	3951	3655
1764	3008	2748	3955	3662
1765	3009	2749	3956	3663
1766	3010, 3011	2750	3957	3664

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1768	3024, 3025	2746	3953	3657
1769	3021	Omitted		
1770	2996, 2997	2739	3946	3649
1771	3086	2654	3860	3565
1772	2998	2740	3947	3650
1773	3026	2761	3968	3676
1774	3036	2771	3978	3686
1775	3037	2772	3979	3687
1776	3045	2778	3985	3699
1777	3044	2775	3982	Superseded See 3698
1778	3070	2799	4006	3719
1779	3061	2790	3997	3710
1780	3063	2792	3999	3712
1781	3062	2791	3998	3711
1782	3064	2793	4000	3713
1783	3068	2797	4004	3717
1784	3069	2798	4005	3718
1785	3075	2805	4012	3724
1786–7	3079	2808	4015	3727
1788	3081	2810	4017	3729
1789	3073, 3085	2803, 2813	4010, 4020	3722, 3732
1790	3084	2812	4019	3731
1791–2	3051	2784	3991	3705
1793	3088	2743	3950	3654
1794	3089	2815	4022	3734
1795	3098	2824	4031	3743
1796	3093	2819	4026	3738
1797	Omitted			
1798	3139	2860	4067	3780
1799–1800	Omitted			
1801	3129	2846	4053	3766
1802	3130	2847	4054	3767
1803–4	3127	2844	4051	3764
1805	3106	2831	4038	3749
1806–7	3110	2835	4042	3753
1808	3114	2838	4045	3756
1809–10	3115	2838	4045	3756
1811	3449	2933	4143	3853
1812	Omitted			
1813	3461	2944	4154	3864
1814–15	3121	2849	4056	3769
1816	3123, 3126	2853	4060	3773
1817	3142	2866	4073	3785
1818	2960	2728	3935	3638
1819	3141	2865	4072	3785
1820	3133	2855	4062	3775
1821	3143	2861	4068	3781
1822	3131, 3143	2848, 2861	4055, 4068	3768, 3781
1823	3145	2863	4070	3783
1824	3148	2869	4076	3788
1825	Omitted			
1826	3149	2870	4077	3789
1827	3150	2871	4078	3790
1828–30	3151	2872	4079	3791
1831	3152	2873	4080	3792
1832	3151	2872	4079	3791
1833	3153	2874	4081	3793
1834	3156–3159	2876	4083	3795
1835	3160	2877	4084	3796
1836	3163	2878	4085	3797

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1839	3399	2896	4106	3815
1840	3400	2897	4107	3816
1841	3401	2897, 3566	4107, 4815	3816, 4356
1842	3402	Omitted		
1843	3408	3408	4644	4377
1844	3409	3409	4645	4378
1845	3410	3410	4646	4379
1846	3172	2949	4163	3876
1847	3173	2950	4164	3877
1848	3174	2951	4165	3878
1849	3175	2953	4167	3880
1850	3176	2954	4168	3881
1851	3177	2955	4169	3882
1852	3178	2956	4170	3883
1853	3181	2959	4173	3885
1854	3183	2961	4175	3887
1855	3184	2963	4177	3890
1856	3185	2962	4176	3889
1857	3186	2964	4178	3891
1858	3184	2963	4177	3890
1859–60	3194	2967	4181	3894–3898, 3900
1861	3195	2975	4200	3935, 3947
1862	3196	2976	4201	3936
1863	3199	2979	4204	3935
1864	3200	2980	4205	3939
1865	3201	2980	4205	3939
1866	3202	2981	4206	3935, 3940
1867	3203	2982	4207	3941
1868	3204	2983	4208	3942
1869	3205	2984	4209	3943
1870	3206	2985	4210	3943
1871	3207	2986	4211	3944, 3946
1872	3208	2987	4212	3945
1873	3209	2988	4213	3946
1874	3215	2969	4183	3898
1875	3217	2971	4185	3902
1876	3219	2996	4221	3909
1877–8	3220	2997	4222	3910
1879	3221	2998	4223	3911
1880	3224	3010	4235	3923
1881	3222	2999	4224	3912
1882	3217	2971	4185	3902
1883	3244	3023	4248	3934
1884	3245	3024	4249	4579
1885	3247	3026	4251	3954
1886	3246	3025	4250	3955
1887	Omitted			
1888	3248	3027	4252	3955
1889	3250	3032	4257	3959
1890	3251	3033	4258	3960
1891	3256	Omitted		
1892	3269	3050	4275	3974
1893	3272	3046	4271	3971
1894	3273	3047	4272	3972
1895	3274	3048	4273	4007
1896	3275	3049	4274	3973
1897	3276	Omitted		
1898	3304	3072	4297	4008, 4017
1899	3305	3072	4297	4008, 4017
1900	3306	3073	4298	4012

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1902	3308	3075	4300	4013, 4014
1903	3268	3045	4270	3970
1904	3267	3044	4269	3969
1905	3310	3079	4308	4023
1906	3311	3080	4309	4024, 4026
1907	3312	3081	4310	4027
1908	3313	3082	4311	4028
1909	3314	3083	4312	4029
1910	3315	3084	4313	4030
1911	3316	3085	4314	4031
1912	3317	3086	4315	4042
1913	3320	3089	4318	4033
1914	3322	3091	4320	4035
1915	3258	3039	4264	3966
1916	3277	3055	4280	3991
1917	3287	3053	4278	3977
1918	3323	3092	4321	4036
1919	3324	3093	4322	4037
1920	3325	3094	4323	4038
1921	3326	3095	4324	4039
1922	3327	3096	4325	4039
1923	3328	3097	4326	4040
1924	3329, 3330	3098, 3099	4327, 4328	4043
1925	3331	3101	4330	4044
1926	3332	3102	4331	4045
1927	3333	3103	4332	4045, 4046
1928	3334	3104	4333	4046
1929	3335	3105	4334	4047
1930	3336	3106	4335	4050, 4051
1931	3337	3107	4336	4048
1932	3338	3108	4337	4049
1933	3341	3111	4340	4052
1934	3342	3112	4341	4053
1935	3343	3113	4342	4054
1936	3344	3114	4343	4055
1937	3345	3115	4344	4056
1938	3346	3116	4345	4056
1939	3347	3117	4346	4056
1940	3348	3118	4347	4056
1941	3349	3119	4348	4056
1942	3350	3120	4349	4058
1943	3351	3121	4350	4059
1944	3352	3122	4351	4060
1945	3353	3123	4352	4061
1946	3354	3124	4353	4062
1947	3355	3125	4354	4063
1948	3356	3126	4355	4064
1949	3357	3127	4356	4065
1950	Omitted			
1951	3358	3128	4357	Omitted
1952	3359	3129	4358	4066
1953	3375	3135	4364	4072
1954	3376	3136	4365	4073
1955	3377, 3385	3137	4366	4074
1956	3378	3138	4367	4075
1957	3380	3140	4369	4077
1958	3386	3145	4374	4082
1959	3389	3148	4377	4085
1960	See 3499	3154	4383	4091
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1966	3488	3217	4447	4155
1967	3489	3218	4448	4156
1968	3490	3219	4449	4157
1969	3491	3220	4450	4158
1970	3492	3221	4451	4159
1971	3493	3222	4452	4160
1972	3494	3223	4453	4161
1973	3507	3173	4402	4110
1974	3509	3178	4407	4114
1975–6	3511	3179	4408	4122, 4125
1977	3512	3184	4414	4123
1978	3513	3180	4409	4116
1979	3517	3174	4403	4111
1980	3518	3175	4404	4112
1981	3519	3176	4405	4112
1982	3520	3211	4441	4150
1983	3527, 3528	3186	4416	4128
1984	3531	3190	4420	4134
1985	3532	3191	4421	4129
1986	3537	3195	4425	4140
1987	3533	3192	4422	4130
1988	3534	3193	4423	4131
1989	3536	3194	4424	4139
1990	3538	3196	4426	4141
1991	3539	3197	4427	4143
1992	3540	3198	4428	4145
1993	3541	3199	4429	4146
1994–5	3553	3225	4455	4163
1996	3554	3229	4459	4167
1997	3555	3230	4460	4168
1998	3557	3232	4462	4170
1999	3561	3228	4458	4166
2000–1	3562, 3567	3239	4469	4176
2002	3569	3246	4476	4183
2003	3571, 3589	3253	4483	4190
2004	3572	3249	4479	4186
2005	3573	3252	4482	4189
2006	3574	Omitted		
2007	3575	3254	4484	4191
2008	3576	3261	4491	4198
2009	3577	3266	4496	4203
2010	3579	3260	4490	4197
2011	3580	Omitted		
2012	3582	Omitted		
2013	3583	Omitted		
2014	3584	3268	4498	4205
2015	3586	3270	4500	4207
2016	3587	3271	4501	4207
2017	3588	3272	4502	4207
2018	3589	3253	4483	4190
2019	3590	Omitted		
2020	3591	3247	4477	4184
2021	3592	3256	4486	4193
2022	3593	3257	4487	4194
2023	3596	3262	4492	4199
2024	3597	3263	4493	4200
2025	3601	3273	4503	4223
2026	3604	3276	4506	4227
2027	3605	3248	4478	4185
2028	3606	3278	4512	4241
2029	3607	3278	4512	4241
2030	3608	3281	4515	4244

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2032	3610	3282	4516	4245
2033	3611	Omitted		
2034	3612	3283	4517	4246
2035	3613	3279	4513	4242
2036	3614	Omitted		
2037	3615	3289	4523	4252
2038	3616	3290	4524	4253
2039	3617	3293	4527	4256
2040	3618	3290	4524	4253
2041	3619	3290	4524	4253
2042	3620	3298	4534	4262
2043	3621	3299	4535	4263, 4264
2044	3622	3300	4536	4265
2045	3623	3284	4518	4247
2046	3624	3284	4518	4247
2047	3625	3285	4519	4248
2048	3626	Omitted		
2049	3627	Omitted		
2050	3628	3286	4520	4249
2051	3629	3286	4520	4249
2052	3630	3306	4542	4271
2053	3631	3288	4522	4251
2054	3632	3305	4541	4270
2055	3633	3301	4537	4266
2056	3634	3302	4538	4267
2057	3635	3303	4539	4268
2058	3636	3304	4540	4269
2059	3637	3291	4525	4254
2060	3638	3292	4526	4255
2061	3639	3292	4526	4255
2062	3640	3294	4528	4257
2063	3641	3295	4529	4258
2064	3642	3296	4530	4259
2065	3643	Omitted		
2066	3644	See 3302	4538	4267
2067	3645	3297	4531	4260
2068	3646	Omitted		
2069	3647	3280	4514	4243
2070	3648	3280	4514	4243
2071	3649	3307	4543	4273
2072	3650	3308	4544	4274
2073	3651	3309	4545	4275
2074	3652	3310	4546	4276
2075	3653	3311	4547	4277
2076	3654	3312	4548	4278
2077	3655	3313	4549	4280
2078	Omitted			
2079	3656	3314	4550	4281
2080	3657	3315	4551	4281
2081	3658	3316	4552	4282
2082	3659	3317	4553	4283
2083	3660	3319	4555	4287
2084	3661	3321	4557	4289
2085	3662	3322	4558	4290
2086	3663	3320	4556	4288
2087	3664	Omitted		
2088	3665	3323	4559	4292
2089	3666	3324	4560	4291
2090	3667	3325	4561	4293
2091	3668	3326	4562	4294
2092	3669	Omitted		

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2094	3671	3329	4565	4297
2095	3672	3330	4566	4298
2096	3673, 3660, 4179	3318, 3319	4554, 4555	4284, 4287
2097	3674	Omitted		
2098	3675	3416	4652	4385
2099	3676	3417	4653	4386
2100	3677	3417	4653	4386
2101	3678	3418	4654	4387
2102	3679	3419	4655	4388
2103	3680	3420	4656	4389
2104	3681	3421	4657	4390
2105	3682	3422	4658	4391
2106	3683	3423	4659	4392
2107	3684	3424	4660	4393
2108	3685	3425	4661	4394
2109	3686	3426	4662	4396
2110	3687	3427	4663	4397
2111	3688	3428	4664	4398
2112	3689	3429	4665	4399
2113	3690	3430	4666	4400
2114	3691	3834	5114	3873, 3874
2115	3692	3431	4667	4401
2116	3693	3432	4681	4402
2117	3694	3446	4695	4415
2118	3695	Omitted		
2119	3696	Omitted		
2120	3697	Omitted		
2121	3701	3433	4682	4403
2122	3703	3435	4684	4405
2123	3705	3437	4686	4407
2124	3706	3438	4687	4408
2125	3707	3439	4688	4409
2126	3708	3440	4689	4410
2127	3709	3441	4690	4411
2128	3710	3442	4691	4412
2129	3711	3443	4692	4413
2130	3712	3444	4693	4414
2131	3713	3331	4567	4302
2132	3714	3331	4567	4302
2133	3715	3331	4567	4302
2134	3716	3332	4568	4303
2135	3717	3333	4569	4304
2136	3718	3334	4570	4305
2137	3719	3335	4571	4306
2138	3720	3336	4572	Omitted
2139	3721	3337	4573	4307
2140	3722	3338	4574	4308
2141	3723	3339	4575	4309
2142	3724	3340	4576	4309
2143	3725	3341	4577	4309
2144	3726	3342	4578	4310
2145	3727	3368	4604	4336
2146	See 2787	2552	3757	3467
2147	3728	3369	4605	4337
2148	3729	3370	4606	4338
2149	3730	3371	4607	4339
2150	3731	3372	4608	4340
2151	3732	3345	4581	4313
2152	3733	3347	4583	4315
2153	3734	3347	4583	4315
2154	3736	3349	4585	4317
2155	3737	3349	4585	4317

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2157	3739	3351	4587	4319
2158	3740	3353	4589	4321
2159	3741	3354	4590	4322
2160	3742	3355	4591	4323
2161	3743	3352	4588	4320
2162	3744	3356	4592	4324
2163	3745	3357	4593	4325
2164	3746	3350	4586	4318
2165	3747	3358	4594	4326
2166	3748	3360	4596	4328
2167	3749	3361	4597	4329
2168	3750	3362	4598	4330
2169	3751	3363	4599	4331
2170	3752	3364	4600	4332
2171	3753	3365	4601	4333
2172	3754	3366	4602	4334
2173	3755	3359	4595	4327
2174	3756	3367	4603	4335
2175	3757	3345	4581	4313
2176	3758	Omitted		
2177	3759	Omitted		
2178	3760	Omitted		
2179	3761	3374	4610	4342
2180	3761, 3763	3373	4609	4341
2181	3764	3374	4610	4342
2182	3765	3376	4612	4344
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2189	3773, 3778	3386	4622	4354
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2191	3775	3388, 3389	4624, 4625	4356, 4357
2192	3776	3394	4630	4362
2193	3777	3395	4631	4363
2194	3778	3396	4632	4364, 4365
2195	3779	3397	4633	4366
2196	3780	See 3395	4631	4363
2197	3781	3398	4634	4367
2198	3782	3399	4635	4368
2199	3783	3400	4636	4369
2200	3784	3401	4637	4370
2201	3785	3403	4639	4372
2202	3786	3404	4640	4373
2203	3787	3405	4641	4374
2204	3788	3406	4642	4375
2205	3789	3407	4643	4376
2206	3790	3393	4629	4361
2207	3791	Omitted		
2208	3792	Omitted		
2209	3794	Omitted		
2210	3795	2923	4133	3843
2211	3796	2924	4134	3844
2212	3797	2925	4135	3845
2213	3801	3449	4698	4417, 4418
2214	3802	3450	4699	4418, 4419
2215	3803	3451	4700	4419
2216	3804	Omitted		
2217	3805	3452	4701	4420
2218	3806	3453	4702	4421
2219	3807	3455	4704	4423
2220	3808	3456	4705	4424
2221	3809	3454	4703	4422
2222	3810	3457	4706	4425
2223	3811	3458	4707	4426

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2225	3813	3461	4710	4429
2226	3814	3462	4711	4430
2227	3815	3463	4712	4431
2228	3816	3464	4713	4432
2229	3817	3465	4714	4433
2230	3818	3469	4718	4437
2231	3819	3470	4719	4438
2232	3820	3471	4720	4439
2233	3821	3472	4721	4440
2234	3822	3466	4715	4434
2235	3823	3473	4722	4441
2236	3824, 4182	3474	4723	4442
2237	3825	3475	4724	4443
2238	3826	3476	4725	4444
2239	3827	3477	4726	4445
2240	3828	3459	4708	4427
2241	3829	3478	4727	4446
2242	3830	3479	4728	4447
2243	3831	3480	4729	4448
2244	3832	3481	4730	4449
2245	3833	3482	4731	4450
2246	3834	3483	4732	4451
2247	3835	3484	4733	4452
2248	3836	3485	4734	4453
2249	3837	3486	4735	4454
2250	3838	3487	4736	4455
2251	3839	3488	4737	4456
2252	3840	3489	4738	4457
2253	3841	3467	4716	4435
2254	3842	3468	4717	4436
2255	3843	3490	4739	4458
2256	3844	3502	4751	4471
2257	3845	3503	4752	4472
2258	3846	3504	4753	4473
2259	3847	3505	4754	4474
2260	3848	3506	4755	4475
2261	3849	3507	4756	4476
2262	3850	3508	4757	4477
2263	3851	3509	4758	4478
2264	3852	3510	4759	4479
2265	3853	3511	4760	4480
2266	3854	3512	4761	4480
2267	3855	3513	4762	4481
2268	3856	3514	4763	4482
2269	3857	3515	4764	4484
2270	3858	3516	4765	4485
2271	3859	3517	4766	4486
2272	3860	3518	4767	4487
2273	3861	3519	4768	4488
2274	3862	3520	4769	4489
2275	3863	3521	4770	4490
2276	3864	3522	4771	4491
2277	3865	3523	4772	4492
2278	3866	3524	4773	4493
2279	3867	3525	4774	4494
2280	3868	3526	4775	4495
2281	3869	3527	4776	4496
2282	3870	3528	4777	4497
2283	3871	3529	4778	4498
2284	3872	3530	4779	4499
2285	3873	3531	4780	4500
2286	3874	3532	4781	4501

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2287	3877	3535	4784	4505
2288	3878	3535	4784	4505
2289	3879	3536	4785	4506
2290	3880	3537	4786	4507
2291	3881	3538	4787	4508
2292	3882	3539	4788	4509
2293	3883	3540	4789	4510
2294	3884	3541	4790	4511
2295	3885	3542	4791	4512
2296	3886	3543	4792	4513
2297	3887	3544	4793	4514
2298	3888	3545	4794	4515
2299	3889	3546	4795	4516
2300	Omitted			
2301	3890	3547	4796	4517
2302	3891	3548	4797	4518
2303	3892	3549	4798	4519
2304	3893	3550	4799	4520
2305	3894	3551	4800	4521
2306	3895	3552	4801	4522
2307	3896	3553	4802	4523
2308	3897	3554	4803	4524
2309	3898	3555	4804	4525
2310	3899	3556	4805	4526
2311	3900	3557	4806	4527
2312	3901	3558	4807	4528
2313	3902	3559	4808	4529
2314	3903	3560	4809	4530
2315	3904	3561	4810	4531
2316	3905	3562	4811	4532
2317	3906	3563	4812	4533
2318	3907	3564	4813	4534
2319	3908	3565	4814	4535
2320	3909	3567	4816	4537
2321	3910	3568	4817	4538
2322	3911	3569	4818	4539
2323	3912	3570	4819	4540
2324	3913	3571	4820	4541
2325	3914	3572	4821	4542
2326	3915	3573	4822	4543
2327	3916	3574	4823	4545
2328	3917	3575	4824	4546, 4547
2329	3918	3576	4825	4548
2330	3919	3577	4826	4549
2331	3920	3578	4827	4550
2332	3921	3579	4828	4551
2333	3922	3580	4829	4552
2334	3923	3581	4830	4553
2335	3924	3582	4831	4554
2336	3925	3583	4832	4555
2337	3926	3584	4833	4553
2338	3927	3585	4834	4556
2339	3928	3586	4835	4557
2340	3929	3587	4836	4558
2341	3930	3588	4837	4560
2342	3931	3589	4838	4561
2343	3932	3590	4839	4562
2344	3933	3591	4840	4563
2345	3934	3592	4841	4564
2346	3935	3593	4842	4565
2347	3936	3594	4843	4566
2348	3937	3595	4844	4567
2349	3938	3597	4846	4569

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2350	3939	3598	4847	4570
2351	3940	3599	4848	4571
2352	3941	3600	4849	4572
2353	3942	3601	4850	4573
2354	3943	3602	4851	4574
2355	3944	3603	4852	4576
2356	3945	3604	4853	4577
2357	3946	3605	4854	4578
2358	3947	3606	4855	4579
2359	Omitted			
2360	3948	3607	4856	4580
2361	3949	3608	4857	4581
2362	3952	3611	4860	4208
2363	3953	3612	4861	4208
2364	3954	3613	4862	4209
2365	3955	3614	4863	4210
2366	3956	3615	4864	4212
2367	3957	3616	4865	4211, 4212
2368	3958	3617	4866	4214
2369	3959	3618	4867	4215
2370	3960	3619	4868	4221
2371	3961	3620	4869	4216
2372	3962	3621	4870	4217
2373	3963	3622	4871	4218
2374	3964	3623	4872	4219
2375	3965	Omitted	4873	4220
2376	3966	3624	4874	4222
2377	3967	3625	4875	4584
2378	3968	3626	4876	4585
2379	3969	3627	4877	4586
2380	3970	3628	4878	4587
2381	3971	3628	4878	4587
2382	3972	3629	4879	4588
2383	3973	3630	4880	4589
2384	3974	3631	4881	4590
2385	3975	3632	4882	4591
2386	3976	3633	4883	4592
2387	3977	3634	4884	4594
2388	3978	3636	4886	4601, 5484
2389	3979	3637	4887	4602
2390	Omitted			
2391	3983	3641	4891	4606
2392	3984	3642	4892	4607
2393	3985	3643	4893	4608
2394	3986	3643	4893	4608
2395	3987	3644	4894	4609
2396	3988	3646	4896	4611
2397	3989	3647	4897	4612
2398	3990	3648	4898	4613
2399	3992	3650	4900	4615
2400	3993	3651	4901	4616
2401	3994	3652	4902	4617
2402	3995	3653	4903	4618
2403	3996	3654	4904	4619
2404	3997	3655	4905	4620
2405	3998	3657	4907	4622
2406	3999	3658	4908	4623
2407	4000	3656	4906	4621
2408	4005	3645	4895	4610
2409	4006	3663	4914	4625
2410	4007	3664	4915	4625
2411	4008	3665	4916	4626
2412	4009	3666	4917	4627

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2414	199, 4011	3668	4919	4624
2415	4013	3672	4923	4659
2416	4014	3673	4924	4660
2417	4015	3674	4925	4662
2418	4016	3675	4926	4664
2419	4017	3676	4927	4665
2420	4018	3677	4928	4666
2421	4024	3683	4934	4667
2422	4025	3684	4935	4668
2423	4026	3685	4936	4654
2424	4027	3686	4937	4655
2425	4028	3687	4938	4656
2426	4029	3688	4939	4657
2427	4042	3697	4948	4680
2428	4043	3698	4949	4681
2429	4044	3699	4950	4682
2430	4045	3700	4951	4683
2431	4046	3701	4952	4634
2432	4047	3702	4953	4635
2433	4051	3706	4957	4638
2434	4053	3708	4959	4640
2435	4054	3709	4960	4641
2436	4056	3711	4962	4643
2437	4057	3712	4963	4644
2438	4058	3713	4964	4645
2439	4059	3714	4965	4646
2440	4060	3715	4966	4647
2441	4061	3716	4967	4649
2442	4062	3717	4968	4650
2443	4063	3718	4969	4651
2444	4064	3719	4970	4652
2445	4065	3721	4972	4684, 4687
2446	4066	3722	4973	4685, 4688
2447	4067	3723	4974	4685
2448	4068	3724	4975	4686
2449	4069	3725	4976	4690
2450	4070	3726	4977	4691
2451	4071	3727	4978	4689
2452	4072	3728	4979	4692
2453	4073	3730	4981	4688, 4698
2454	4077	3729	4980	Omitted
2455	4078	3734	4985	4694
2456	4079	3735	4986	4699
2457	4080	3736	4987	4700
2458	4081	3737	4988	4700, 4705
2459	4083	3739	4990	4707
2460	4084	3740	4991	4706
2461	4085	3741	4992	4708
2462	4086	3742	4993	4703
2463	4087	3743	4994	4709
2464	4088, 4089	3751	5002	4712
2465	4092	3727	4978	4689
2466	4093	3744	4995	4710
2467	See 4094	3745	4996	4718
2468	See 4098	3749	5000	4721
2469	See 4096	3747	3747	4719
2470	Omitted			
2471	Omitted			
2472	Omitted			
2473	See 4098, 4099	3749, 3750	5000, 5001	4721, 4723
2474	4100	3754	5005	4717
2475	4036	3691	4942	4674

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2477	4021	3680	4931	4672
2478	4022	3681	4932	4672
2479	4023	3682	4933	4672
2480	4038	3692	4943	4675
2481	4039	3693	4944	4676
2482	4040	3694	4945	4677
2483	4041	3695	4946	4678
2484	4104	Omitted		
2485	4105	2882	4089	3801
2486	4106	2883	4090	3802
2487	4107	2884	4091	3802
2488	4108	2885	4092	3803
2489	4109	2882	4089	3801
2490	3416	255	339	368
2491	3417	256	340	369
2492	3418	257	341	369
2493–4	See 3431, 3432	2916, 2917	4126, 4127	3836, 3837
2495	See 3432	2917	4127	3837
2496	3433	2918	4128	3838
2497–8	Omitted			
2499	3436	2920	4130	3840
2500–1	4111	2526	3731	3313, 3444
2502	4110	2525	3730	3443
2503	2622	2528	3733	3446
2504	4112	2776	3983	3691
2505	4113	246	324	355
2506	4114	247	325	356
2507	4115	251	335	364
2508	4116	252	336	365
2509	4117	253	337	366
2510	4118	254	338	367
2511	4119	248	326	357
2512	4120	3669	4920	4648
2513	4121	45 P. 23	49 P. 23	49 P. 23
2514	See 34	See 50	See 54	See 51
2515	Omitted			
2516	2620, 4173	2520	3725	3438
2517–21	Omitted			
2522	4131	Omitted		
2523	4132	3819	5096	1291
2524	4133	3756	5007	87
2525	2949	3771	5026	205
2526	4135	3772	Repealed	
2527	430, 1852, 4136, 4140, 4141	3781	5033	296
2528	4137	Omitted		
2529	4138	Omitted		
2530	4139	Omitted		
2531	4140	3781	5033	296
2532	4141	3781	5033	296
2533	4142	Omitted		
2534	4143	3792	5066	498
2535	4144	Omitted		
2536	4145	3788, 3789	5040–5062	511
2537	4146	3790	5064	512
2538	4147	3789	5062	511
2539	4148	3799	5075	531
2540	4149	3805	5081	4598
2541	4150	3806	5082	4599
2542	4151	3801	5077	382
2543	4152	3804	5080	4597
2544	4153	3814	5090	4661

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2545	4154	3811	5087	354, 4593
2546	4155	3800	5076	543
2547	888	986	1500	1553
2548	4156	3808	5084	590
2549	4157	3836	5116	1294
2550	4158	3813	5089	1290
2551	4159	3828	5108	3152
2552	4160	3835	5115	4715
2553	4161	3843	5123	1300
2554	4162	Omitted		
2555	4163	Omitted		
2556	See 3449	2933	4143	3853
2557	4164	3837	5117	1295
2558	4165	3838	5118	1296
2559	4166	3839	5119	Omitted
2560	4167	3840	5120	1297
2561	4168	3829	5109	2428, 5314
2562	4169	3830	5110	5314
2563	4170	3831	5111	5314
2564	Omitted			
2565	4188	3845	5125	4724, 5096
2566	4189	3846	5126	4725
2567	4190	3847	5127	4726
2568	4191	3848	5128	4727
2569	4192	3849	5129	4728
2570	4193	3850	5130	4729
2571	4194	3851	5131	4730
2572	4195	3852	5151	4747
2573	4196	3853	5152	4748
2574	4197	3854	5153	4749
2575	4198	3855	5154	4750
2576	4199	3856	5155	4751
2577	4200	3857	5156	4752
2578	4201	3858	5157	4753
2579	4202	3859	5158	4754
2580	4203	3860	5159	4755
2581	4204	3861	5160	4756
2582	4205	3862	5161	4757
2583	4206	3863	5162	4758
2584	4207	3865	5164	4760
2585	4208	3866	5165	4761
2586	4209	3867	5166	4762
2587	4210	3868	5167	4763
2588	4211	3869	5168	4765
2589	4212	3870	5169	4766
2590	4213	3871	5170	4767
2591	4214	3872	5171	4768
2592	4215	3873	5172	4769
2593	4216	3874	5173	4770
2594	4217	3875	5174	4771
2595	4218	3876	5175	4772
2596	4219	3877	5176	4773
2597	4220	3878	5177	4774
2598	4222	3880	5179	4776
2599	4223	3881	5180	4777
2600	4224	3882	5181	4778
2601	4225	3883	5182	4779
2602	4226	3884	5183	4780
2603	4227	3885	5184	4781
2604	4228	3886	5185	4782
2605	4229	3887	5186	4783
2606	4230	3888	5187	4784
2607	4231	3889	5188	4785

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2609	4233	3892	5191	4788
2610	4234	3893	5192	4789
2611	4235	3894	5194	4791
2612	4237	3902	5208	4831
2613	4238	3903	5209	4832
2614	4239	3904	5210	4833
2615	4240	3905	5211	4837
2616	4241	3906	5212	4838
2617	4242	3907	5213	4839
2618	4243	3908	5214	4840
2619	4244	3909	5215	4842, 4843
2620	4245	3910	5216	4844
2621	4246	3911	5217	4845
2622	4247	Omitted	Omitted	4846
2623	4248	3912	5218	4847
2624	4249	3913	5219	4848
2625	4250	3914	5220	4849
2626	4253	3917	5223	4853
2627	4254	3918	5224	4854
2628	4255	3919	5225	4855
2629	4256	3920	5226	4856
2630	4257	3921	5227	4857
2631	4258	3922	5228	4858
2632	4259	3923	5229	4859
2633	4260	3924	5230	4860
2634	4261	3925	5231	4861
2635	4262	3926	5232	4862
2636	4263	3927	5233	4863
2637	4264	3928	5234	4864
2638	4265	3929	5235	4865
2639	4266	3930	5236	4866
2640	4267	3931	5237	4867
2641	4268	3932	5238	4868
2642	4269	3933	5239	4869
2643	4270	3934	5240	4870
2644	4271	3936	5242	4872
2645	4272	3937	5243	4873
2646	4273	3938	5244	4874
2647	4274	3939	5245	4875
2648	4275	3940	5246	4876
2649	4276	3941	5247	4877
2650	4277	3942	5248	4878
2651	4278	3943	5249	4879
2652	4279	3944	5250	4880
2653	4280	3945	5251	4881
2654	4281	3946	5252	4882
2655	4282	3947	5253	4883
2656	4283	3948	5254	4884
2657	4284	3949	5257	4887
2658	4285	3950	5258	4888
2659	4286	3951	5259	4889
2660	4287	3952	5260	4890
2661	4288	3953	5261	4891
2662	4289	3954	5262	4892
2663	4290	3955	5263	4893
2664	4291	3956	5264	4894
2665	4292	3957	5265	4895
2666	4293	3958	5266	4896
2667	4294	Omitted	Omitted	4897
2668	4295	3959	5267	4898
2669	4296	3960	5268	4899
2670	4297	3961	5269	4900

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2671	4298	3962	5270	4901
2672	4299	3963	5271	4902
2673	4300	3964	5272	4903
2674	4301	3965	5273	4904
2675	4302	3966	5274	4905
2676	4303	3967	5275	4906
2677	4304	3968	5276	4907
2678	4318	3977	5285	4818
2679	4319	3978	5286	4806
2680	4320	3979	5287	4807
2681	4321	3980	5288	4824
2682	4322	3981	5289	4826
2683	4323	3982	5290	4801
2684	4324	3983	5291	4829
2685	4325	3984	5292	4825, 4826
2686	4326	3985	5293	4822
2687	4327	3986	5294	4802
2688	4328	3987	5295	4803
2689	4329	3988	5296	4830
2690	4330	3989	5297	4800
2691	4333	3993	5302	4914
2692	4334	3994	5303	4918
2693	4335	3995	5304	4919
2694	4336	3996	5305	4920
2695	4337	3997	5306	4921
2696	4338	3998	5307	4922
2697	4339	3999	5308	4923
2698	4340	4000	5309	4924
2699	4341	4001	5310	4925
2700	4342	4002	5311	4926
2701	4343	4003	5312	4927
2702	4344	4004	5313	4928
2703	4345	4005	5314	4929
2704	4346	4006	5315	4930
2705	4347	4008	5317	4932
2706	4348	4009	5318	4933
2707	4349	4010	5319	4934
2708	4350	4011	5320	4935
2709	4351	4012	5321	4938
2710	4352	4013	5322	4939
2711	4353	4014	5323	4940
2712	4354	4015	5324	4941
2713	4355	4016	5325	4942
2714	4356	4017	5328	4945
2715	4357	4021	5333	588
2716	4358	4031	5352	4969
2717	4359	4022	5334	4951
2718	4360	4023	5342	4959
2719	4361	4024	5343	4960
2720	4362	4025	5344	4961
2721	4363	4026	5345	4962
2722	4364	4027	5346	4963
2723	4365	4028	5347	4964
2724	4366	4029	5348	4965
2725	4371	4035	5356	4981
2726	4372	4036	5357	4982
2727	4373	4037	5358	4983
2728	4374	4038	5359	2593, 4976
2729	4375	4039	5360	4977, 4978
2730	4377	4043	5380	5000
2731–2734	Repealed			
2735	4378	4044	5381	5001
2736	4379	4045	5388	5009

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2737	4380	4046	5389	5010
2738	4386	4065	5431	5029
2739	4387	4066	5432	5030
2740	4388	4067	5433	5031
2741	4389	4068	5434	5032
2742	4390	4069	5435	5033
2743	4391	4070	5436	5035
2744	4394	4073	5439	5041
2745	4395	4074	5440	5042
2746	4396	4075	5441	5043
2747	4397	4076	5442	5044
2748	4398	4077	5443	5045
2749	4399	4078	5444	5046
2750	4400	4079	5445	5047
2751	4401	4080	5446	5048
2752	4402	4081	5447	5053
2753	4403	4082	5448	5054
2754	4404	4083	5449	5055
2755	4405	4084	5450	5056
2756	4406	4085	5451	5057
2757	4407	4086	5452	5058
2758	4408	4087	5453	5059
2759	4409	4089	5470	5078
2760	4410	4090	5471	5079
2761	4411	4091	5472	5080
2762	4412	4092	5473	5081
2763	4413	4093	5474	5082
2764	4414	4094	5475	5083
2765	4415	4095	5476	5084
2766	4416	4096	5477	5085
2767	4417	4097	5478	5086
2768	4418	4098	5479	5087
2769	4419	4099	5480	5088
2770	4420	4100	5481	5089
2771	4421	4101	5482	5090
2772	4422	4102	5483	5091
2773	4442	4112	5494	5102
2774	4443	4113	5495	5103
2775	4444	4114	5496	5104
2776	4445	4115	5497	5105
2777	4446	Omitted		
2778	4447	4108	5490	5097, 5098
2779–80	4447–54	4115	5497	5105
2781	4456	4117	5499	5107
2782	4457	4118	5500	5108
2783	4458	4119	5501	5109
2784	4459	4120	5502	5110
2785	4460, 4464	4121	5503	5110
2786	4461	4122	5504	5111
2787	4462	4123	5505	5112
2788	4465	4125	5507	5114
2789	4466	4126	5508	5115
2790	4486	Omitted		
2791	4487	See 506	692	658
2792	4488	See 506	692	658
2793	4489	4145	5529	5143
2794	4490	4146	5530	5144
2795	4491	4147	5531	5145
2796	4492	4148	5532	5146
2797	4493	4149	5533	5147
2798	4494	4150	5534	5148
2799	4495	4151	5535	5149
2800	4496	4152	5536	5150

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2801	4497	4153	5537	5151
2802	4498	4154	5538	5152
2803	4500	4155	5539	5153
2804	4505	4157	5541	5155
2805	4506	4158	5542	5156
2806	4507	4159	5543	5157
2807	4508	4160	5544	5158
2808	4509	4161	5545	5159
2809	4510	4162	5546	5160
2810	4511	4163	5547	5161
2811	4513	4165	5549	5163
2812	4514	4166	5550	5164
2813	4515	4167	5551	5165
2814	4516	4169	5553	5167
2815	4517	4170	5554	5168
2816	4428	4103	5484	5092
2817	4429	4104	5485	5093
2818	4430	4105	5486	5094
2819	4431	4106	5487	5095
2820	4435	Const. Art. 5, § 8	Const. Art. 5, § 8	Const. Art. 5, § 8
2821	4438	4364	5749	5339 See Const. Art. 1, § 12
2822	4530	4111	5493	5101
2823	4439	4108	5490	5097, 5098
2824	4531	4185	5569	5182
2825	4532	Omitted		
2826	4533	Omitted		
2827	4534	4186	5570	5183
2828	4535	4187	5571	5184
2829	4536	4188	5572	5184
2830	4440	4109	5491	5099
2831	4539	4191	5575	5187
2832	4540	4192	5576	5188
2833	4541	4193	5577	5189
2834	4542	4194	5578	5190
2835	4543	4195	5579	5191
2836	4544	4196	5580	5192
2837	4545	4197	5581	5193
2838	4557	4209	5593	5194
2839	4552	4204	5588	5199
2840	4548	4200	5584	5196
2841	4552	4204	5588	5199
2842	4562	4214	5598	5206
2843	4554	4206	5590	5201
2844	4553	4205	5589	5200
2845	4550	4202	5586	5198
2846	4549	4201	5585	5197
2847	4552	4204	5588	5199
2848	4554	4206	5590	5201
2849	4563	4215	5599	5206
2850	4551	4203	5587	5193
2851	4561	4213	5597	5205
2852	4575	4226	5610	5216
2853	4576	4227	5611	5216
2854	4577	4228	5612	5216, 5217
2855	4578	4229	5613	5218
2856	4579	4230	5614	5218
2857	4580	4231	5615	5219
2858	4581	See Const. Art. 1, § 12	See Const. Art. 1, § 12	See Const. Art. 1, § 12
2859	4582	4232	5616	5220
2860	4583	4233	5617	5221
2861	4585	Omitted		

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2864	4588	Omitted		
2865	4589	Omitted		
2866	4590	Omitted		
2867	4591	4239	5622	5225
2868	4593	4241	5624	5227
2869–70	4594	4242	5625	5228
2871	4595	4243	5626	5229
2872	4596	4244	5627	5230
2873	4597	Omitted	Omitted	5230
2874	4598, 4599	4245, 4246	5628, 5629	5230
2875	4600	4247	5630	5231
2876	4601	4248	5631	5232
2877	4602	4249	5632	5233
2878	4603	4250	5633	5234
2879	4604	4251	5634	5235
2880	4605	4252	5635	5236
2881	4608, 4609, 4610	4255, 4256, 4257	5638, 5639, 5640	5240
2882	4611	4258	5641	5241, 5243
2883	4612	4260	5643	5241
2884	4613	4261	5644	5243
2885	4614	Omitted		
2886	4615	4262	5645	5244
2887	4616	4263	5646	5245
2888	4617	4264	5647	5246
2889	4618	4265	5648	5247
2890	4619	4266	5649	5241, 5242, 5243
2891	4620	4267	5650	5248
2892	4621	4268	5651	5249
2893	4622	4269	5652	5250
2894	4623	4270	5653	5251
2895	4624, 4629	4275	5658	5256, 5257, 5258
2896	4625	4271	5654	5252
2897	4626	4272	5655	5253
2898–9	4627	4273	5656	5254
2900	4630	4276	5659	5259
2901	4631	4277	5660	5260
2902	4632	4278	5661	5261
2903	4633	4279	5662	5262
2904	4634	4280	5663	5263
2905	4635	4281	5664	5264
2906	4636	4282	5665	5265
2907	4638	4284	5667	5267
2908	4639	4285	5668	5268
2909	4640	4286	5669	5269
2910	4645	4291	5674	5274
2911	4643	4289	5672	5272
2912	4644	4290	5673	5273
2913	4647	4293	5676	5276, 5277
2914	4648	4294	5679	5276
2915	4649	4295	5680	5279
2916	4659	4305	5690	5289
2917	4654	4300	5685	5284
2918	4835	4465	5850	5406
2919	4658	4304	5689	5288
2920	4660	4306	5691	5290
2921	4661	4307	5692	5291
2922	4662	4308	5693	5292
2923	4663	4309	5694	5293
2924	4664	4310	5695	5294
2925	4665	4311	5696	5295
2926	4666	4312	5697	5296

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2927	4667	4313	5698	5298
2928	4668	4314	5699	5299
2929	4669	4315	5700	5300
2930	4670	4316	5701	5301
2931	4680	4327	5712	5310
2932	4681	4328	5713	5311
2933	4683	4330	5715	5312
2934	4684	4331	5716	5312
2935	4678	4324	5709	5307
2936	4685	4332	5717	5313
2937–8	4686	4333	5718	5315
2939	4687	4334	5719	5316
2940	4688	4335	5720	5317
2941	4689	4336	5721	5318
2942	4690	4336	5721	5318
2943	4691	4337	5722	5319
2944	4694	Omitted		
2945	4695	4340	5725	5322
2946	4696	4341	5726	5323
2947	4697	4342	5727	5324
2948	4698	4343	5728	5325
2949	4699	4344	5729	5326
2950	4700	4345	5730	5327
2951	4701	4346	5731	5330
2952	4707	4352	5737	5328
2953	Omitted			
2954	4709	4354	5739	5331
2955	4713	4358	5743	5332
2956	Omitted			
2957	4714	4359	5744	5333, 5335
2958	Omitted			
2959	4704	4349	5734	5338
2960	4718	4363	5748	5338
2961	4717	4362	5747	5337
2962	4720	4365	5750	5340
2963	4722	4367	5752	5336
2964	4752	4390	5775	3694
2965	4753	4391	5776	3693
2966	4754	4392	5777	3695
2967	4755	4393	5778	3697
2968	4756	4394	5779	3697
2969	4757	4395	5780	3696
2970	4758	4396	5781	3698, 5357
2971	4759	4397	5782	Const. Art. 1, § 9
2972	3027, 4760	2762, 4398	3969, 5783	3677, 5358
2973	3028, 4761	2763, 4399	3970, 5784	3678, 5358
2974	3029, 4762	2764, 4400	3971, 5785	3679, 5358
2975	3030, 4763	2765, 4401	3972, 5786	3680, 5358
2976	3031, 4764	2766, 4402	3973, 5787	3681, 5358
2977	3032, 4765	2767, 4403	3974, 5788	3682, 5358
2978	3033, 4766	2768, 4404	3975, 5789	3683, 5359
2979	3034	2769	3976	3684
2980	4778	4412	5797	3685
2981	4779	4413	5798	5365
2982	4767	4405	5790	5360
2983	4768	4405	5790	5360
2984	4769	4405	5790	5360
2985	4770	4405	5790	5360
2986	4771	4405	5790	**5360**
2987	4772	4406	5791	3692
2988	3042, 4773	2773, 4407	3980, 5792	3689, 5361
2989	3043, 4774	2774, 4408	3981, 5793	3690, 5362
2990	4775	4409	5794	5362

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2992	4789	4424	5809	5375
2993–5	Omitted			
2996	4790	4425	5810	5297, 5490
2997	4101	4558	5956	5487
2998	4102	4559	5957	5489
2999	4103	4560	5958	5488
3000	4791	4430	5815	5378
3001	4792	4431	5816	5379
3002	4793	4444	5829	5389
3003	4794	4445	5830	5390
3004	4795	4446	5831	5391
3005	4796	4447	5832	5392
3006	4797	4448	5833	5393
3007	4798	4449	5834	5394
3008	4799	4450	5835	5395
3009	4800	4432	5817	5380
3010	4801	4433	5818	5381
3011	4802	4434	5819	5382
3012	4803	4435	5820	5383
3013	4804	4443	5828	5388
3014	4810	4437	5822	5384
3015	4811	4438	5823	5091
3016	4812	4439	5824	5385
3017	4813	4440	5825	5386
3018	4814	4441	5826	5386
3019	4815	4442	5827	5387
3020	4816	4451	5836	5396
3021	4817	4452	5837	5397
3022	4818	4433	5838	5397
3023	4819	4454	5839	5398
3024	4820	4455	5840	5399
3025	4821	4456	5841	5399
3026	4822	4457	5842	5400
3027	4823	4458	5843	5401
3028	4824	4459	5844	5401
3029	4825	4460	5845	5402
3030	4826	4461	5846	5403
3031	4827	4462	5847	5404
3032	4828	4463	5848	5405
3033	4829	4464	5849	5405
3034	4830	4474	5859	5405
3035	4831	4475	5860	5405
3036	4832	4476	5861	5405
3037	4833	4477	5862	5405
3038	4834	4478	5863	5409
3039	4836	4466	5851	5407
3040	4837	4467	5852	5408
3041	4838	4468	5853	5409
3042	4839	4469	5854	5410
3043	4840	4470	5855	5411
3044	4842	4472	5857	5414
3045	4843	4473	5858	5413
3046	4844	4479	5864	5415
3047	4848	4483	5868	5418
3048	4851	4486	5871	5421
3049	Omitted			
3050	4852	4487	5872	5422
3051	4853	4488	5873	5423
3052	4854	4489	5874	5424
3053	4855	4490	5875	5425
3054	4856	4491	5876	5426
3055	4857	4492	5877	5427
3056	Omitted			

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3057	4858	4493	5878	5428
3058	4861, 4862	4496	5881	5431
3059	4863	4497	5882	5432
3060	4864	Omitted		
3061	4865	4498	5883	5433
3062	4866	4499	5884	5433
3063	4868	4501	5886	5433
3064	4869	4502	5887	5434
3065	4870	4503	5888	5435
3066	4874	4507	5892	5438
3067	4875	Omitted		
3068	4876	Omitted		
3069	4877	Omitted		
3070	4880	4508	5893	5439
3071	4881	4509	5894	5440
3072	See 4902	4518	5903	5446
3073	4884	4510	5895	5441
3074	4886	4512	5897	5443
3075	4897	4513	5898	5444
3076	4898	4514	5899	5444
3077	4899	4515	5900	5444
3078	4900	4516	5901	5445
3079	4882	Omitted	5133	4732
3080–1	Omitted			
3082	4890	Omitted	5139	4740
3083	Omitted			
3084	4894	Omitted		
3085	Omitted			4740
3086	4895	Omitted		4742
3087	4902	4518	5903	5446
3088	4904	4520	5905	5448
3089	4905, 4906	4521, 4522	5906, 5907	5448
3090	4906	4522	5907	5448
3091–2	Omitted			
3093	4917	4526	5911	5451
3094	4914, 4915	4528, 4529	5913, 5914	5453
3095	4915	4529	5914	5453
3096	4909	4525	5910	5450
3097–8	4925	4538	5923	5462
3099	4927	4540	5925	5464
3100	4928	4541	5926	5465
3101	4929	4542	5927	5466
3102	4930	4543	5928	5466
3103	5122	4723	6121	5637
3104	5123	4724	6122	5640
3105	5124	4725	6123	5641
3106	5125	4726	6124	5642
3107	5126	4736	6136	5652
3108	5127	4727	6125	5643
3109	5128	4728	6128	5644
3110	5129	4729	6129	5645
3111	5130	4730	6130	5646
3112	5131	4731	6131	5647
3113	5132	4732	6132	5648
3114	5133	4733	6133	5649
3115	5134	4734	6134	5650
3116	5135	4735	6135	5651
3117	5136	4744	6144	Omitted
3118	5137	4770	6170	5675
3119	5138	4771	6171	5676
3120	5173	4745	6145	5661
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3124	5178	4750	6150	5665
3125	5139	Omitted		
3126	5140	Omitted		
3127	5141	Omitted		
3128	5142	4748	6148	5663
3129	5143, 5179	4751	6151	5666
3130	5144	4772	6172	5677
3131	5145	4773	6173	5678
3132	5146	Omitted		
3133	5147	Omitted		
3134	5148	4774	6174	5679
3135	5149	4775	6175	5680
3136	5150	4791	6191	5689
3137	5151	4792	6192	5690
3138	See 5188			
3139	5152	Omitted		
3140	5153	4793	6193	5691
3141	5154	4794	6194	5692
3142	5155	4758	6158	5672
3143	5156	4795	6195	5693
3144	5157	4796	6196	5694
3145	5158	4797	6197	5695
3146	5159	4798	6198	5696
3147	5160	4776	6176	5681
3148	5161	4777	6177	5682
3149	5162	4778	6178	5683
3150	5163	4779	6179	5684
3151	5164	4780	6180	5685
3152	5165	4781	6181	5686
3153	5166	4782	6182	5687
3154	5190-92	4783	6183	5716
3155	5168	4767	6167	5717
3156	4934 See Const. Art. 3, § 20	See Const. Art. 3, § 20	See Const. Art. 3, § 20	See Const. Art. 3, § 20
3157	4938	4547	5932	5470
3158	4939	4548	5933	5470
3159	4941	4550	5935	5475
3160	4942	4551	5936	5475
3161	4943	4552	5937	5476
3162	4944	4553	5938	5477
3163	4945	See Const. Art. 3, § 19	See Const. Art. 3, § 19	See Const. Art. 3, § 19
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3167	4949	4555	5940	5474
3168	4950	4561	5959	5492
3169	See 4633	See 4279	See 5662	See 5262
3170	4951	4562	5960	5492
3171	4952	4563	5961	5493
3172	4953	4564	5962	5493
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3174	4955	4566	5964	5495
3175	4956	4567	5965	5496
3176	4954	4565	5963	5494
3177	4960	4571	5969	5498
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3209	4963	Omitted		
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3215	4966	4587	5985	5506
3216-18	4967	4573	5971	5500
3219	4968	4574	5972	5501
3220	4969	4575	5973	5507
3221	4970	4576	5974	5508
3222	4971	4577	5975	5509
3223	4972	4578	5976	5509
3224	4973	4579	5977	5510
3225	4974	4580	5978	5511
3226	4975	4581	5979	5512
3227	4976	4582	5980	5502
3228	4977	4583	5981	5503
3229	4978	4584	5982	5504
3230	4981	4587	5985	5506
3231	Omitted			
3232	4983	4589	5987	5524
3233	4984	4590	5988	5525
3234	4985	4591	5989	5526
3235	4986	4592	5990	5527
3236	4987	4593	5991	5528
3237	4988	4594	5992	5529
3238	4989	4595	5993	5530
3239	4990	4596	5994	5515
3240	4992	4598	5996	5517
3241	4991	4597	5995	5516
3242	4992	4598	5996	5517
3243	4995	4601	5999	5520
3244	4996	4602	6000	5521
3245	4997	4603	6001	5522
3246	4998	4604	6002	5523
3247	4999	4605	6003	5523
3248	5007	4613	6011	5535
3249	5008	4614	6012	5536
3250	5009	4615	6013	5537
3251	5011	4617	6015	5539
3252	5012	4618	6016	5539
3253	5049	4654	6052	5569
3254	5050	4655	6053	5570
3255	5051	4656	6054	5571
3256	5052	4657	6055	5572
3257	5053	4658	6056	5573
3258	5054	4659	6057	5574
3259	5014	Omitted		
3260	5015	4620	6018	5540
3261	5016	4621	6019	5540
3262	5018	4623	6021	5542
3263	5019	4624	6022	5542
3264	5020	4625	6023	5543
3265	5021	4626	6024	5543
3266	Omitted			
3267	5022	4627	6025	5543
3268	5005	4611	6009	5533
3269	5006	4612	6010	5534
3270	4727	4368	5753	5342
3271	4728	4369	5754	5343
3272	4733, 4734	4374, 4375	5759, 5760	5348, 5349
3273	4736	4377	5762	5350
3274	4738	4379	5764	5352
3275	4739	4380	5765	5353
3276	4740	4381	5766	5354
3277	4741	4382	5767	5355

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Code of 1851	Revision of 1860	Code of 1873	McClain's Code of 1888	Code of 1897
3278	5116	4712	6110	5626
3279	5121	4714	6112	5628
3280–1	5116	4712	6110	5626
3282	4518	4171	5555	5169
3283	4522	4175	5559	5172
3284	4523	4176	5560	5173
3285	4524	4177	5561	5174
3286	4525	4178	5562	5175
3287	4526	4179	5563	5176
3288	4527	4180	5564	5177
3289	4528	4181	5565	5178
3290	4529	4182	5566	5179
3291	5024	4629	6027	5545
3292	5025	4630	6028	5546
3293	5026	4631	6029	5547
3294	5027	4632	6030	5548
3295	5028	4633	6031	5549
3296	5029	4634	6032	5550
3297	5032	4637	6035	5552
3298	5033	4638	6036	5553
3299	5036	4641	6039	5556
3300	5037	4642	6040	5557
3301	5038	4643	6041	5558
3302	5039	4644	6042	5559
3303	5040	4645	6043	5560
3304	5041	4646	6044	5561
3305	5042	4647	6045	5562
3306	5043	4648	6046	5563
3307	5044	4649	6047	5564
3308	5045	4650	6048	5565
3309	5047	4652	6050	5567
3310	4470	4130	5512	5119
3311	4471	4131	5513	5120
3312	4475	4135	5517	5124
3313	4476	4136	5518	5125
3314	4477	4137	5519	5126
3315	4478	4138	5520	5127
3316	4479	4139	5521	5128
3317	4480	4140	5522	5129
3318	4481	4141	5523	5130
3319	4482	4142	5524	5131
3320	4483	4143	5525	5132
3321	4484	4144	5526	5133
3322	5055	4660	6058	5575
3323	5056	4661	6059	5576
3324	5057	4662	6060	5577
3325	5058	4663	6061	5578
3326	5059	4664	6062	5579
3327	5060	4665	6063	5580
3328	5061	4666	6064	5581
3329	5062	4667	6065	5582
3330	5063	4668	6066	5583
3331	5064	4669	6067	5584
3332	5067	4672	6070	5587
3333	5068	4673	6071	5588
3334	5069	4674	6072	5589
3335	5070	4675	6073	5590
3336	5071	4676	6074	5592
3337	5072	4677	6075	5593
3338	5073	4678	6076	5594
3339	5074	4679	6077	5595
3340	5075	4680	6078	5591
3341	5076	4681	6079	5596

Code of 1851	Revision of 1860	Code of 1873	McClain's Code of 1888	Code of 1897
3342	5077	4682	6080	5597
3343	5078	4683	6081	5598
3344	5079	4684	6082	5599
3345	5080	4685	6083	5600
3346	5081	4686	6084	5601
3347	5082	4687	6085	5602
3348	5083	4688	6086	5603
3349	5084	4689	6087	5604
3350	5085	4690	6088	5605
3351	5087	4692	6090	5607
3352	5088	Omitted		
3353	5089	Omitted		
3354	5090	4693	6091	5608
3355	5091	4694	6092	5609
3356	5092	4695	6093	5610
3357	5093	4696	6094	5611
3358	5095	4697	6095	5612
3359	5096	4698	6096	5613
3360	5099	4701	6099	5616
3361-4	5100	4702	6100	5617
3365	5102	4704	6102	5619
3366	5103	4705	6103	5620
3367	5104	4706	6104	5621

REVISION OF 1860

This table is intended to be used in tracing the development of sections of the Revision of 1860 only. The sections of that revision are in numerical order, and to the right of each is found the corresponding section or sections of later codes.

Revision of 1860	Code of 1873	McClain's Code, 1888	Code of 1897	Revision of 1860	Code of 1873	McClain's Code, 1888	Code of 1897
1	1	1	1	19	28	32	32
2	2	2	2	20	29	33	32
3	3	3	3	21	30	34	33
4	8	8	8	22	31	35	34
5	9	9	9	23	32	36	35
6	11	11	11	24	33	37	36
7	10	10	10	25	34	38	37
8	14	18	18	26-28	Omitted		
9	16	20	20	29	45	49	48
10	15	19	19	30	46	50	49
11	16	20	20	31	47	51	49
12	Omitted			32	48	52	49
13	5	5	5	33	49	53	50
14	6	6	6	34	50	54	51
15	7	7	7	35	51	55	52
16	13	17	17	36	52	56	53
17	Omitted			37	Omitted		
18	12	12	12, 13	38	53	57	54

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Revision of 1860	Code of 1873	McClain's Code, 1888	Code of 1897
39	54	58	Omitted
40	Omitted		
41	3755	5006	65
42–43	See Const. Art. 4, § 15	See Const. Art. 4, § 15	See Const. Art. 4, § 15
44	59	68	63
45	60	69	64
46–47	759	1231	1259
48	760	1232	1261
49	761	1233	1261
50	Omitted		
51	762	1234	1262
52	763	1235	1263
53	764	1236	1264
54	765	1237	1260
55–56	759	1231	1259
57	58	67	62
58	3756	5007	85, 86
59	61	70	66
60	62	71	68
61	121	157	165
62–63	35	39	38
64	63	72	69
65–69	Omitted		
70	3757	5008	98, 100
71	66	75	89
72	67	76	90
73	68	77	91
74	69	78	92
75	70	79	93
76	71	80	94
77	72	81	95
78	73	82	96
79	74	83	97
80	132	167	184
81	121	157	165
82	3758	5009	115
83	75	84	101
84	76	85	102
85	77	86	103
86	78	87	104
87	79	88	105
88	80	89	106
89	81	90	107
90	132	167	184
91	Omitted		
92	83	97	72
93	85	99	74
94	84	98	73
95	83	97	72
96	Omitted		
97	87	101	76
98–99	88	102	77
100	3759	5010	See 88
101	86	100	75
102–108	Omitted		
109	583	1031	1067
110	678	1143	1184, 1177
111	143	182	198
112	154	193	213
113	155	196	216
114	Omitted		
115	156	196	216
116	160	198	218
117–18	157	Omitted	
119	159	195	215
120	158	194	214
121–122	Omitted		
123	581	1028	1065
124	150	189	208
125	151	190	209
126	152	191	210
127	153	192	210
128	678	1143	1184, 1185
129	3770	5025	211
130–131	153	192	210
132	Omitted		
133	94	115	117
134	95	115	117
135	678	1143	1184, 1185
136	94, 95	115	117
137	783	1255	1272
138	97	116	117
139	102	135	134
140	97	117	Omitted
141	98	120	120
142	99	121	121
143	100	119	119
144	101	134	133
145	Omitted		
146	3766	5022	143
147	96	116	117
148–153	3764	5019	138
154–155	3765	5020	139
156	102	135	134
157	103	136	135
158	104	Omitted	
159–160	Omitted		
161	See 44	See 48	See 47
162	Omitted		
163	106	115	117
164	107	115	117
165	678	1143	1184, 1185
166	106, 107	115	117
167	783	1255	1272
168	108	116	117
169	108	117	Omitted
170	3767	5021	141
171	109	120	120
172	110	121	121
173	105	118	118
174	Omitted		
175	3768	5022	143
176	Omitted		
177–178	3767	5021	141
179	Omitted		
180	Omitted	Omitted	See 2498
181	Omitted	Omitted	See 2498
182	Omitted	Omitted	See 2499
183	Omitted		
184	Omitted	Omitted	See 2500
185	Omitted	Omitted	See 2499
186	Omitted	Omitted	
187	See 1598	See 2620	See 2639
188	267	354	383
189	271	358	387

Revision of 1860	Code of 1873	McClain's Code, 1888	Code of 1897
190	272	359	388
191	269	356	385
192	270	357	386
193	Omitted		
194	275	362	391
195	258	345	373
196	262	349	377
197	259	346	374
198	263	350	378
199	3668	4919	4624
200	259	346	374
201	277	364	393
202	264	351	379
203	265	352	380
204	266	353	381
205–206	Omitted		
207–209	259	346	374
210	3975	5283	4912
211–212	Omitted		
213	2095	3272	3054
214–215	125	Repealed	
216	3976	5284	4913
217–220	Omitted		
221	279	366	394
222	Omitted		
223	280	367	395
224	589	1034	1072
225	See 3368	4604	4336
226–230	Omitted		
231	281	368	396
232–233	282	369	397
234	285	372	400
235	284	371	399
236–237	286	373	401
238	287	374	402
239	283	370	398
240–242	Omitted		
243	308	429	442
244	See 303	402	422
245–247	Omitted		
248–249	Tem'rary		
250	309	430	443, 444
251	310	431	446
252	311	432	447
253	312	433	448
254	313	434	449
255	314	435	450
256	315	436	451
257	316	437	452
258	317	438	453
259	318	439	454, 897, 1006
260	319	440	455, 897, 1006
261–264	Omitted		
265	See 303	402	422
266–273	Omitted		
274	See 2312	3509	225
275	See 2490	3695	3411
276–287	Omitted		
288	1446	2249	2314
289	1447	2250	2312
290	See 3805	5081	4598
291–292	324	454	474
293–298	Omitted		
299	Omitted	1394	1349
300–301	Omitted	1395	1349
302	279	366	394
303	294	389	410
304–306	299	394	410
307	296	391	412
308	297	392	413, 415
309	301	400	420
310	676	1141	1180
311	302	401	421
312	303	402	422, 423, 424
313	304, 305	426	440
314	306, 307	427, 428	549, 441
315	832	1313	1375
316	See 3811	5087	354
317	3791	5065	469
318	308	429	442
319–320	320	450	470
321	321	451	471
322	322	452	472
323–331	Omitted		
332	See 295	390	411
333	629	1092	1145
334	Omitted		
335	635	1098	1149
336	646	1109	1153
337–341	Omitted		
342	193	Repealed	
343	194	256	287
344	Omitted		
345	196	257	288
346	197	258	288
347–348	Omitted		
349	203	264	293
350	Omitted		
351	3815	5091	4595
352	3816	5093	4596
353–356	3786	5038	300
357	Omitted		
358	335	469	494
359	Omitted		
360	327	458	482
361	328	459	483, 484
362	329	463	485
363	330	464	486
364	331	465	487
365	332	466	488
366	333	467	488
367	334	468	489
368–371	Omitted		
372	584	Omitted	
373	Omitted		
374	205	Omitted	
375	206	Omitted	
376	207	Omitted	
377	678	Omitted	
378	Omitted		
379	783	Omitted	
380–381	3775	Repealed	
382	3775	Repealed	

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Revision of 1860	Code of 1873	McClain's Code, 1888	Code of 1897
383	337	472	499
384	338	473	500
385	339	474	501
386	340	475	502
387	341	476	503
388	342	477	546
389	343	478	547
390	344	479	504
391	345	480	505
392	347	482	507
393	349	484	513
394	350	485	513
395	351	486	514
396	352	487	515
397	353	488	517
398	354	489	518
399	355	490	519
400	356	491	520, 530
401	357	492	520
402	358	493	520
403	359	494	521
404	360	495	522
405	361	496	523
406	362	497	524
407	363	498	525
408	364	499	526
409	365	500	520
410	366	501	527
411	367	502	528
412	368	503	529
413	369	504	534
414	370	505	534
415	371	506	535
416	372	507	536
417	374	509	538
418	375	510	539
419	376	511	540
420	377	512	541
421	766	1238	Omitted
422	3784, 3792	5036, 5066	297, 498
423	3785, 3796	5037, 5070	299, 495
424	3784, 3796	5036, 5070	299, 495
425–427	Omitted		
428	See 3784, 3792	5036, 5066	297, 498
429	Omitted		
430	3781	5033	296
431	3785	5037	299
432	3784	5036	297
433	766	1238	298
434–435	Omitted		
436	3781–2, 3787	5033–4, 5039	296
437–440	Omitted		
441	379	516	551
442	381	518	553
443	389	526	1073
444	391	530	566
445	392	531	576
446	393	532	574
447	394	533	575
448	395	534	576
449	396	535	393, 576
450	397	537	577
451	398	539	579
452	399	540	579
453	385	522	557
454	386	523	558
455	387	524	559
456	Omitted		
457	388	525	Omitted
458	Omitted		
459	573	1020	1057
460	574	1021	1058
461	575	1022	1059
462	576, 577	1023, 1024	1060, 1061
463	578	1025	1062
464	579	1026	1063
465	580	1027	1064
466	581	1028	1065
467	582	1029	1066
468	584	236	1069
469	Omitted		
470	587	1032	1070
471	588	1033	1071
472–473	589	1034	1072
474	590	1035	1073
475	591, 590	1038, 1039, 1041	1073, 1074, 1075
476	Omitted		
477	592	1036	Omitted
478	593	1037	1073
479	Omitted		
480	603	1064	1090
481	606	1067	1093
482	607	1068	1093
483	608	1069	1093
484	609	1070	1094
485	610	1071	1095
486	611	1072	1096
487	612	1073	1126, 1127
488	613	1074	1128
489	614	1075	1130
490	615	1076	1132
491	616	1077	Sup'rs'd'd 1106
492	617	1078	1117
493	619	1079	1115
494	620	1080	1115
495	621	1081	1116
496	622	1085	1138
497	623	1086	1138, 1139, 1170
498	627	1090	1140
499	624	1087	Sup'rs'd'd
500	625	1088	See 1120
501	626	1089	1138
502	628	1091	1144
503	629	1092	1145
504	630	1093	1142
505	634	1097	1148
506	635	1098	1149
507	636, 637	1099, 1100	1150, 1151
508	638	1101	1170
509	639	1102	1152
510	640	1103	1154

Revision of 1860	Code of 1873	McClain's Code, 1888	Code of 1897
511	641	1104	1155
512	642	1105	1156
513	Omitted		
514	641	1104	1155
515	643	1106	1169
516	644	1107	1169
517-518	645	1108	1157
519	649	1112	1158
520	650	1113	1159
521	651	1114	1160
522	652	1115	1161
523	653	1116	1163
524	654	1117	1164
525	655	1118	1165
526	656	1119	1167
527	657	1120	1165
528	658	1121	1166, 1167
529	3827	5107	1172
530	646	1109	1153
531-533	Omitted		
534	648	1111	1167
535	659	1124	1173
536	660	1125	1173
537	661	1126	1144
538-539	662	1127	1149, 1150, 1151, 1157
540	663	1128	1161, 1163
541	664	1129	1169, 1170
542	665	1130	1168, 1174
543	666	1131	1174
544	667	1132	1174
545	668	1133	1175
546	669	1134	1176
547	632	1095	1169
548	633	1096	1147
549	670	1135	1177
550	671	1136	1178
551	672	1137	See const. art. 3, § 32
552	673	1138	1179
553	674	1139	1182
554	674	1139	1183
555	677	1142	1188
556-557	678	1143	1184, 1185
558-559	679	1144	1187
560	680	1145	1188, 1189
561	675	1140	1180, 1181
562	676	1141	1180
563	682	1147	1191
564	685, 686	1150, 1152	1177, 1178, 1179, 1266
565	687	1153	1177
566	688	1154	Omitted
567	689	1155	1192
568	690	1156	1193, 1195
569	692	1158	1198
570	693	1159	1199
571	692	1158	1198
572	694	1160	1200
573	695	1161	1201
574	696	1162	1202
575	697	1163	1203
576	698	1164	1204
577	699, 700	1165, 1166	1205, 1206
578	700	1166	1206
579-580	699	1165	1205
581	703	1169	1209
582	704	1170	1210
583	701	1167	1207
584	702	1168	1208
585	705	1171	1211
586	704, 706	1170, 1172	1210, 1212
587	707	1173	1213
588	702	1168	1208
589	708	1174	1214
590	709	1175	1215
591	702, 705	1168, 1171	1208, 1211
592	714	1180	1220
593	710	1176	1216
594	711	1177	1217
595	712	1178	1218
596	Omitted		
597	713	1179	1219
598	718	1184	1198
599	719	1185	1224
600	720	1186	1225
601	721	1187	1226
602	722	1188	1227
603	723	1189	1228
604	724	1190	1212
605	725	1191	1229
606	726	1192	1230
607	727	1193	1231
608	728	1194	1232
609	729	1195	1250
610	730	1196	1198
611	731	1197	1233
612	732	1198	1234
613	733	1199	1235
614	734	1200	1236
615	735	1201	1237
616	736	1202	1238
617	737	1203	1198
618	738	1204	1239
619	739	1205	1240
620	740	1206	1241
621	741	1207	1242
622	742	1208	1243
623	743	1209	1244
624	744	1210	1245
625	Omitted		
626	745	1211	1250
627	Omitted		
628	746	1218	1251
629	747	1219	1252
630	748	1220	1254
631	749	1221	1252
632	750	1222	1253
633	Omitted		
634	751	1223	1255
635	752	1224	1256, 1257
636	754	1226	1254
637	755	1227	1254
638	753	1225	1257
639	756	1228	1256
640	757	1229	1252

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Revision of 1860	Code of 1873	McClain's Code, 1888	Code of 1897
641	758	1230	1257
642	766	1238	87, 99, 116, 298, 481, 491, 496, 510, 1186
643	767	1239	87, 99, 116, 207, 298, 481, 491, 496, 510, 2621
644	768	1240	87, 99, 116, 298, 481, 491, 496, 510
645	766	1238	298
646	769	1241	510
647	770	1242	87, 99, 116, 207, 298, 481, 491, 496, 510, 2621
648	771	1243	491, 496, 510
649–650	773	1245	1281
651	774	1246	1282
652	775	1247	1283
653	776	1248	1284
654	Omitted		
655	777	1249	1285
656	778	1250	1286
657	779	1251	1287
658	780	1252	1288
659	Omitted		
660	772	1244	1280
661	774	1246	1282
662	781	1253	1266, 1276
663	782	1254	1268
664	783	1255	1272
665	783	1255	1265
666	Omitted		
667	785	1257	1274, 1276
668	786	1258	1275
669	787	1259	1273
670	783	1255	1272
671	788	1260	1267
672	789	1261	1278, 1279
673	791	1265	1171
674–675	19	23	23
676	20	24	24
677	21	25	25
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1519	1522	2358	2381
1520	3822–3	5099	2325, 2349
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1522	1447	2250	2312
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1527	1490	2323	2356
1528	1491	2324	2358
1529	1492	2325	2356
1530	1493	2326	2358
1531	1494	2327	2355
1532	1495	2328	2355, 2357
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1538	1501	2334	2364
1539	1502	2335	2364
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1556	1480	2277	2335
1557	1481	2278	2336
1558	3809	5085	2335
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1563	1542	2383	2382, 2383, 2427, 2430
1564	1543	2384	2405, 2408, 2430
1565	1544	2401	2413
1566	1546	2403	2415
1567	1547	2404	2416
1568	1548	2405	2402
1569	1549	2406	2424
1570	3807	5083	511
1571	1550	2407	2423
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1579	1552	2409	2422
1580	1553	2410	2419
1581	1554	2415	2382, 2431
1582	Omitted		
1583	1555	2416	2382
1584–1585	Omitted		
1586	1548	2405	2402
1587	1541	2382	2382
1588–1635	Omitted		
1636	1570	2583	1872
1637	1571	2584	1873
1638	1573	2586	Omitted
1639	1574	2587	Omitted
1640–1696	Omitted		
1697	1109	1670	1658
1698	1110	1671	1659
1699	Omitted		
1700	1104	1666	1654
1701	1103	1665	1653
1702	1106	1667	1655
1703	1107	1668	1656
1704	1112	1673	1661
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1715	1604	2630	2646
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1719	1608	2634	2617
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1741	1107	1668	1656
1742	1108	1669	1657
1743	Omitted		
1744	Omitted	2643	2656
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1764	1561	2433	2463
1765	1563	2435	2465
1766	1564	2436	2466
1767	1565	2437	2467
1768	1566	2438	2468
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1775	2037	3212	3009
1776	2043	3218	3012
1777	2050	3226	3017
1778	2049	3225	3016
1779	2053, 2057	3229, 3233	3020, 3022
1780	2060	3236	3023
1781–1784	2049	3225	3016
1785	2075	3251	3037
1786	2076	3252	3037
1787	2077	3253	3038
1788	2077	3253	3038
1789	2078	3254	3039
1790	2079	3255	3040
1791	2080	3256	3041
1792	2081	3257	3042
1793	Omitted		
1794	2082	3258	3043
1795	2083	3259	3043
1796	2084	3260	3044
1797	2085	3261	3045
1798	2086	3262	3046
1799	2087	3263	3047
1800	2089	3265	3049
1801	2090	3266	3049
1802	2091	3267	3049
1803	2088	3264	3048
1804	2093	3270	3052
1805	2103	3280	3060

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1808	2099	3276	3057
1809	2100	3277	3058
1810	2101	3278	3059
1811	2102	3279	3059
1812	2096	3273	3055
1813	2092	3268	3050
1814	2094	3271	3053
1815	2104	3281	3062
1816	2105	3282	3061
1817	2106	3283	3063
1818	2107	3284	3063
1819	2108	3285	3064
1820	2109	3286	3065
1821	2110	3287	3066
1822	2111	3288	3067
1823	2112	3289	3068
1824	2113	3290	3069
1825	2114	3291	3070
1826	2115	3292	3071
1827	2116	3293	3071
1828	2117	3294	3072
1829	2119	3296	3074
1830	2118	3295	3073, 3085
1831	2120	3297	3076
1832	2121	3298	3077
1833	2122	3299	3079
1834	2123	3302	3080
1835	2124	3303	3081
1836	2125	3304	3082
1837	2126	3305	3083
1838	2127	3306	3084
1839	2128	3307	3086
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1842	2123	3302	3080
1843	277	364	393
1844	278	365	393
1845	2129	3310	3088
1846	2130	3311	3089
1847	2131	3311, 3315	3089, 3093
1848	2134	3314	3092
1849	2135	Omitted	
1850	2136	Omitted	
1851	2137	3314	3092
1852	2138	3322	3100
1853	2139	3317	3095
1854	2140	3312	3090
1855	2141	3317	3095
1856	2142	3320	3098
1857	Omitted		
1858–1864	2510	3715	3429
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1866	2144	3318	3096
1867	2145	3323	3101
1868–1869	2145	3323	3101
1870	2133	3316	3094
1871	2146	3319	3097
1872	Omitted	3321	3099
1873	Omitted		
1874	2147	3330	3106
1875	2148	3331	3106
1876	2149	3332	3106
1877	2150	3333	3107
1878	2151	3334	3108
1879	2152	3335	3108
1880	2153	3336	3108
1881	2154	3337	3108
1882	2155	3338	3109
1883	2156	3339	3109
1884	2157	3340	3110
1885	2158	3341	3111
1886	2159	3342	3112
1887	2160	3343	3113
1888	2161	3344	3114
1889	2162	3345	3114
1890	2163	3346	3115
1891	2164	3347	3116
1892	2165	3348	3116
1893	2166	3349	3117
1894	2167	3350	3118
1895	2168	3351	3119
1896	2169	3352	3120
1897	2170	3353	3121
1898	2177	3364	3130
1899	2178	3365	3130
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1903	2180	3367	3132
1904	2181	3368	3133
1905	2182	3369	3134
1906	2069	3245	3030
1907	2070	3246	3031
1908	2071	3247	3031
1909	2072	3248	3032
1910	Omitted		
1911	2073	3249	3032
1912	2074	3250	3033
1913	3803	5079	3036
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1915	2020	3195	2995
1916	2021	3196	2996
1917	2022	3197	2997
1918	2023	3198	2998
1919	2024	3199	2999
1920	2025	3200	2999
1921	2026	3201	2999
1922	2027	3202	3000
1923	2028	3203	3001
1924	2029	3204	3002
1925	2030	3205	3003
1926	1585	2607	2640
1927	1589	2611	2640
1928	1587	2609	2609, 2635
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1933	1589	2611	2640
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1961	1907	3072	2888
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1963	1838	2994	2839
1964	1839	2995	2838
1965	1840	2996	2838
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1967	66	75	89
1968	1783, 1884	2902, 3045	2809, 2855
1969	1844	3000	2847
1970	1845	3001	2840
1971	1846	3002	2841
1972	1851	3007	2843
1973	1852	3008	2843
1974	1853	3009	2845
1975	1854	3010	2846
1976	1856	3012	2843
1977	1857	3013	2843
1978	1858	3014	2843
1979	1855	3011	2846
1980	1859	3015	2848
1981	1861	3017	2849
1982	1862	3018	2849
1983	1863	3019	2849
1984	1864	3026	2850
1985	1866	3027	2851
1986	1867	3028	2853
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1991	1877	3038	2853
1992	1878	3039	2857
1993	1879	3040	2852
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2023	1727	2842	2773
2024	1793	2912	2803
2025	Omitted		
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2027	1717	2823	2746
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2030	1718	2825	2751
2031	1719	2826	2751
2032	1752	2867	2758
2033	1778	2896	2753
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2038	1738	2853	2771, 2780, 2801, 2806
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2040	1740	2855	2759
2041	1741	2856	2761
2042	1743	2858	2761
2043	1742	2857	2763
2044	1777	2895	2767, 2806
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2046	1745	2860	2765
2047	1746	2861	2822
2048	1747	2862	2768
2049	1748	2863	2768
2050	1749	2864	2768
2051	1751	2866	2769
2052	1754	2869	2785
2053	1753	2868	2785
2054	1756	2871	2781, 2782
2055	1757	2872	2778
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2057	1779	2897	1401, 2807
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2059	1779	2897	1401, 2807
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2065	675	1140	1180
2066	1766	2881	2735, 2736
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2070	1771	2889	2737
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2072	1773	2891	2741
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2077	1761	2876	2773
2078	784	1256	1265
2079	1752	2867	2758
2080	1791	2910	2770
2081	1786	2905	2822
2082–2084	Omitted		
2085	1792	2911	Omitted
2086–2088	See 1778	2896	2753, 2806
2089	1778	2896	2753, 2808
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2093	1721	2830	2757
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2095	1787	2906	2811
2096	1788	2907	See 2813
2097	1800	2919	2794
2098	1801	2922	2794
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2104	1809	2943	Omitted
2105	1800, 1805	2919, 2926	2794
2106	1802	2923	2795
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2119	1764	2879	2805
2120	1841	2997	2839
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2135	1831	2987	2818
2136	1832	2988	2819
2137	1833	2989	2819
2138	1834	2990	2819
2139	1835	2991	2820
2140	1836	2992	2820
2141	1664	2751	2714
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2145	1666	2753	2714
2146	1667	2754	2615
2147	1680	2767	2715
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2158	1689	2773	2723
2159	1687	2771	2615, 2723
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2188	558	993	598
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2194	1488	2287	2348
2195	1487	2286	2348
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2199	1920	3091	2901
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2201	1923	3094	2906
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2211	1932	3103	2916
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2230	1960	3133	2950
2231	1961	3134	2951
2232	1964	3137	2955
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2235	3659	4909	4629
2236	3660	4910	4630
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2259	1972	3147	2961
2260	1973	3148	2962
2261	1974	3149	2963
2262	1975	3150	2963
2263	Omitted		
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2265	1977	3152	2965
2266	1978	3153	2965
2267	1979	3154	2966
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2285	1997	3172	2978
2286	1998	3173	2979, 2980
2287	1999	3174	2979
2288	2000	3175	2981
2289	2001	3176	2981
2290	2002	3177	2982
2291	2003	3178	2982
2292	2004	3179	2983
2293	2005	3180	2983
2294	2006	3181	2984
2295	2007	3182	2985
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2297	2009	3184	2986
2298	2010	3185	2987
2299	2011	3186	2988
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2307	2320	3520	3266
2308	2321	3521	3267
2309	2322	3522	3270
2310	2323	3523	3271
2311	2324	3524	3272
2312	2325	3525	3273
2313	2326	3526	3274
2314	2327	3527	3275
2315	2328	3528	3275
2316	2334	3534	3279
2317	2335	3535	3279
2318	2336	3536	3280
2319	2337	3537	3281
2320	2329	3529	3276
2321	2330	3530	3276
2322	2331	3531	3277
2323	2338	3538	3282
2324	2339	3539	3282
2325	2340	3540	3283
2326	2341	3541	3284
2327	2343	3543	3287
2328	2351	3551	3294
2329	2353	3554	3296
2330	2344	3544	3287
2331	2333	3533	3278
2332	2342	3542	3286
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2335	2347	3547	3290
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2339	2348	3548	3291
2340	2349	3549	3292
2341	2368	3569	3306
2342	2369	3570	3306
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2349	2363	3564	3301
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2369	2383	3587	3319
2370	2375	3579	3314
2371	2384	3588	3320
2372	2385	3589	3321
2373	2386	3590	3322
2374	2387	3591	3323
2375	2388	3592	3323
2376	2389	3593	3324
2377	2390	3594	3325
2378	2391	3595	3325
2379	2392	3596	3326
2380	2393	3597	3326
2381	2394	3598	3326
2382	2395	3599	3326
2383	2396	3600	3328
2384	2397	3601	3328
2385	2398	3602	3329
2386	2399	3603	3330
2387	2400	3604	3330
2388	2401	3605	3332
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2391	2408	3612	3338
2392	2411	3615	3341
2393	2408	3612	3338
2394	2411	3615	3341
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2396	2413	3617	3342
2397	2414	3618	3343
2398	2415	3619	3344
2399	Omitted		
2400	2416	3620	3345
2401	2417	3621	3346
2402	2418	3622	3347
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2404	2420	3624	3348
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2409	2425	3629	3352
2410	2426	3630	3353
2411	2427	3631	3353
2412	2428	3632	3354
2413	2429	3633	3355
2414	2430	3634	3356
2415	2431	3635	3357
2416	2432	3636	3358
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2418	2434	3638	3360
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2423	2437	3641	3363
2424	2438	3642	3364
2425	2439	3643	3365
2426	2441	3645	3367
2427	2443	3647	3369
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2430	2446	3650	3371
2431	2447	3651	3372
2432	2448	3652	3373
2433	2449	3653	3373
2434	2450	3654	3374
2435	2452	3656	3376
2436	2453	3657	3378
2437	2454	3658	3378
2438	Omitted		
2439	2458	3662	3382
2440	2460	3665	3387
2441	2465	3670	3384
2442	2466	3671	3385
2443	2467	3672	3385
2444	2468	3673	Omitted
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2447–2448	2469	3674	3394
2449	2470	3675	3395
2450	2471	3676	3395
2451	2472	3677	3396
2452	2473	3678	3397
2453	2482	3687	3405
2454	2494	3699	3415
2455	2495	3700	3415
2456	2475	3680	3399
2457	2474	3679	3398
2458	2477	3682	3401
2459	2476	3681	3400
2460	2487	3692	3409
2461	2488	3693	3409
2462	2489	3694	3410
2463	2483	3688	3406
2464	2484	3689	3407
2465	2485	3690	3408
2466	2486	3691	3408
2467	2478	3683	3402
2468	2461	3666	3388
2469	2462	3667	3389
2470	2463	3668	3390
2471	2464	3669	3391
2472	2319	3519	3265
2473	Omitted	Omitted	3265
2474	2479	3684	3403
2475	2480	3685	3403
2476	2481	3686	3404
2477	2440	3644	3366
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2495	2455	3659	3379
2496	2456	3660	3380
2497	2457	3661	3381
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2508–2511	2207	3398	3158
2512	2209	3400	3160
2513	2207	3398	3158
2514	2215	3406	3166
2515	2185	3376	3139
2516	2186	3377	3140
2517	2187	3378	3141
2518	2188	3379	3141
2519	2189	3380	3142
2520	2190	3381	3142
2521	2191	3382	3143
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2525	2194	3385	3146
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2547	2244	3435	3195
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2558	2263	3454	3211
2559	2264	3455	3212
2560	2265	3456	3212
2561	2251	3442	3201
2562	2247	3438	3198
2563	2252	3443	3201
2564	2266	3457	3213
2565	2267	3458	3214
2566	2268	3459	3215
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2574	2281	3472	3229
2575	2282	3473	3230
2576	2283	3474	3231
2577	2284	3475	3231
2578	2285	3476	3232
2579	2286	3477	3233
2580	2287	3478	3235
2581	2288	3479	3236
2582	2289	3480	3236
2583	2290	3481	3237
2584	2291	3482	3238
2585	2292	3483	3239
2586	2293	3484	3240
2587	2294	3485	3241
2588	2295	3486	3241
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2597	2304	3495	3249
2598	2305	3496	3248
2599	2306	3497	3244
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2602	2309	3500	3252
2603	2310	3501	3253
2604	2311	3502	3254
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2606	2505	3710	3425
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2632	3164	4393	4101
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2665	177	223	242
2666	178	224	243
2667	179	225	244
2668	167	212	234
2669	168	213	234
2670	169	214	235
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2672	171	216	237
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2691	3494	4743	4463
2692	3495	4744	4464
2693	3496	4745	4465
2694	3497	4746	4466*
2695	3498	4747	4467
2696	3499	4748	4468
2697	3500	4749	4469
2698	3501	4750	4470
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2704	211	289	317
2705	212	290	318
2706	213	291	319
2707	214	292	320
2708	215	293	321
2709	216	294	322
2710	217	295	323
2711	218	296	324
2712	219	297	325
2713	220	298	326
2714	221	299	327
2715	222	300	328
2716	223	301	329
2717	224	302	330
2718	225	303	331
2719	226	304	331
2720	227	305	332
2721	228	306	333
2722	229	307	334
2723	234	312	335
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2735	230	308	345
2736	243	321	344
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2739	245	323	353
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2741	2530	3735	3448
2742	Omitted		
2743	2531	3736	3449
2744	2532	3737	3450
2745	2533	3738	3451
2746	2534	3739	3452
2747	2535	3740	3453
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2749	2537	3742	3455
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2751	2539	3744	3456
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2757	2543	3748	3459
2758	2544	3749	3459
2759	2545	3750	3460
2760	2546	3751	3461
2761	2547	3752	3462
2762	2548	3753	3463
2763	2549	3754	3464
2764	2550	3755	3465
2765	2551	3756	3466
2766	2683	3889	3594
2767	2572	3777	3487
2768	2573	3778	3488
2769	2574	3779	3489
2770	2575	3780	3490
2771–2772	2562	3767	3477
2773	Omitted		
2774	2563	3768	3478
2775	Repealed		
2776	2564	3769	3479
2777	2565	3770	3480
2778	2566	3771	3482
2779	2567	3772	3483
2780	2568	3773	3484
2781	2569	3774	3481
2782	2570	3775	3485
2783	2571	3776	3486
2784	2559	3764	3474
2785	2553	3758	3468
2786	2558	3763	3473
2787	2552	3757	3467
2788	2557	3762	3472
2789	2554	3759	3469
2790	2555	3760	3470
2791	Omitted		
2792	2556	3761	3471
2793	2560	3765	3475
2794	2561	3766	3476
2795	2576	3781	3491
2796	2579	3784	3494
2797	2580	3785	3495
2798	2581	3786	3496
2799	2582	3787	3497
2800	2586	3791	3501
2801	2585	3790	3500
2802	2589	3794	3504
2803	2590	3795	3505
2804	2591	3796	3506
2805	2592	3797	3507
2806	2593	3798	3508
2807	2594	3799	3509
2808	2595	3800	3510
2809	2596	3801	3511
2810	2594	3799	3509
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2814	2601	3806	3516
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2827	2613	3818	3532
2828	2614	3819	3533
2829	2615	3820	3526
2830	2617	3822	3527
2831-2832	2618	3823	3534
2833	2619	3824	3535
2834	2620	3825	3536
2835	2621	3827	3537
2836	2622	3828	3538
2837	2623	3829	3538
2838	2624	3830	3539
2839	2625	3831	3540
2840	2626	3832	3541
2841	2627	3833	3542
2842	2628	3834	3543
2843	2629	3835	3544
2844	2630	3836	3545
2845	2631	3837	3546
2846	2632	3838	3547
2847	2633	3839	3548
2848	2634	3840	3549
2849	2635	3841	3550
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2857	2637	3843	3553
2858	2636	3842	3552
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2867	2640	3846	3555
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2869	2641	3847	3555
2870	2642	3848	3556
2871	2643	3849	3557
2872	2644	3850	3557
2873-2874	2645	3851	3557
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2877	2649	3855	3562
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2880	2655	3861	3566
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2882	2657	3863	3568
2883	2658	3864	3569
2884	2659	3865	3570
2885	2660	3866	3571
2886	2659	3865	3570
2887	2661	3867	3572
2888	2662	3868	3573
2889	2659	3865	3570
2890	2662	3868	3573
2891	2659	3865	3570
2892	2663	3869	3574
2893	2656	3862	3567
2894	2664	3870	3575
2895	2665	3871	3576
2896	2666	3872	3577
2897-2898	2667	3873	3578
2899	2668	3874	3579
2900	2652	3858	3565
2901	2701	3907	3612
2902	2705	3911	3616
2903	2706	3912	3617
2904	2669	3875	3580
2905	2670	3876	3581
2906	2671	3877	3582
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2908-2909	2673	3879	3584
2910	2675	3881	3586
2911	2676	3882	3587
2912	2675	3881	3586
2913	Omitted		
2914	2678	3884	3589
2915	2679	3885	3590
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2938	Omitted		
2939	Omitted		
2940	2711	3917	3621
2941	Omitted		
2942	2718	3925	3629
2943	Omitted		
2944	2704	3910	3615
2945	Omitted		
2946	2719	3926	3618
2947	Omitted		
2948	2720	3927	3630
2949	2721	3928	3631
2950	2722	3929	3632
2951	Omitted		
2952	2723	3930	3633
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2962	Omitted		
2963–2964	2648	3854	3561
2965	Omitted		
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2967	2730	3937	3640
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2970	2733	3940	3643
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2972	2686	3892	3597
2973	2687	3893	3598
2974	2688	3894	3599
2975	2647	3853	3560
2976	2653	3859	3565
2977	2689	3895	3600
2978	2690	3896	3601
2979	2691	3897	3602
2980	2734	3941	3644
2981	2680	3886	3591
2982	2735	3942	3645
2983	2692	3898	3603
2984	2736	3943	3646
2985	2693	3899	3604
2986	2694	3900	3605
2987	2695	3901	3606
2988	2696	3902	3607
2989	2697	3903	3608
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3014	2752	3959	3666
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3017	2755	3962	3669
3018	2756	3963	3670
3019	2757	3964	3671
3020	2758	3965	3672
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3022	2759	3966	3673
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3028	2763	3970	3678
3029	2764	3971	3679
3030	2765	3972	3680
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3032	2767	3974	3682
3033	2768	3975	3683
3034	2769	3976	3684
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3126	2853	4060	3773
3127	2844	4051	3764
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3129	2846	4053	3766
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3131	2848	4055	3768
3132	2854	4061	3774
3133	2855	4062	3775
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3137	2858	4065	3778
3138	2859	4066	3757
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3141	2865	4072	3785
3142	2866	4073	3785
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3344	3114	4343	4055
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3347	3117	4346	4056
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3351	3121	4350	4059
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3353	3123	4352	4061
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3382	3142	4371	4079
3383	3143	4372	4080
3384	3144	4373	4081
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3407	2902	4112	3821
3408	3408	4644	4377
3409	3409	4645	4378
3410	3410	4646	4379
3411	3411	4647	4380
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3464	2947	4157	3867
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3482	3130	4359	4067
3483	3131	4360	4068
3484	3132	4361	4069
3485	3133	4362	4071
3486	3134	4363	4070
3487	3216	4446	4154
3488	3217	4447	4155
3489	3218	4448	4156
3490	3219	4449	4157
3491	3220	4450	4158
3492	3221	4451	4159
3493	3222	4452	4160
3494	3223	4453	4161
3495	3154	4383	4091
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3499	3154	4383	4091
3500	3156	4385	4093
3501	3157	4386	4094
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3503	3159	4388	4096
3504	3160	4389	4097
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3515	3182	4411	4120
3516	3183	4413	4137
3517	3174	4403	4111
3518	3175	4404	4112
3519	3176	4405	4112
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3521	3212	4442	4151
3522	3213	4443	4152
3523	3214	4444	4115
3524	3185	4415	4127
3525	3209	4439	4124
3526	3210	4440	4135
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3530	3189	4419	4133
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3533	3192	4422	4130
3534	3193	4423	4131
3535	3203	4433	4117
3536	3194	4424	4139
3537	3195	4425	4140
3538	3196	4426	4141
3539	3197	4427	4143
3540	3198	4428	4145
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3543	3201	4431	4148
3544	3202	4432	4149
3545	3168	4397	4105
3546	3207	4437	4136
3547	3208	4438	4138
3548	3204	4434	4139
3549	Omitted		
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3551	3206	4436	4144
3552	3215	4445	4153
3553	3225	4455	4163
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3556	3231	4461	4169
3557	3232	4462	4170
3558	3233	4463	4171
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3561	3228	4458	4166
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3563	3241	4471	4178
3564	3243	4473	4180
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3568	3241	4471	4178
3569	3246	4476	4183
3570	3250	4480	4187
3571	3253	4483	4190
3572	3249	4479	4186
3573	3252	4482	4189
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3576	3261	4491	4198
3577	3266	4496	4203
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3579	3260	4490	4197
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3585	3269	4499	4206
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3587	3271	4501	4207
3588	3272	4502	4207
3589	3253	4483	4190
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3593	3257	4487	4194
3594	3258	4488	4195
3595	3259	4489	4196
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3597	3263	4493	4200
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3608	3281	4515	4244
3609	3287	4521	4250
3610	3282	4516	4245
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3651	3309	4545	4275
3652	3310	4546	4276
3653	3311	4547	4277
3654	3312	4548	4278
3655	3313	4549	4280
3656	3314	4550	4281
3657	3315	4551	4281
3658	3316	4552	4282
3659	3317	4553	4283
3660	3319	4555	4287
3661	3321	4557	4289
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3663	3320	4556	4288
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3666	3324	4560	4291
3667	3325	4561	4293
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3671	3329	4565	4297
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3678	3418	4654	4387
3679	3419	4655	4388
3680	3420	4656	4389
3681	3421	4657	4390
3682	3422	4658	4391
3683	3423	4659	4392
3684	3424	4660	4393
3685	3425	4661	4394
3686	3426	4662	4396
3687	3427	4663	4397
3688	3428	4664	4398
3689	3429	4665	4399
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3724	3340	4576	4309
3725	3341	4577	4309
3726	3342	4578	4310
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3740	3353	4589	4321
3741	3354	4590	4322
3742	3355	4591	4323
3743	3352	4588	4320
3744	3356	4592	4324
3745	3357	4593	4325
3746	3350	4586	4318
3747	3358	4594	4326
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3762	3378	4614	4346
3763	3373	4609	4341
3764	3374	4610	4342
3765	3376	4612	4344
3766	3379	4615	4347
3767	3375	4611	4343
3768	3381	4617	4349
3769	3382	4618	4350
3770	3383	4619	4351
3771	3384	4620	4352
3772	3385	4621	4353
3773	3386	4622	4354
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3775	3387	4623	4355
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3779	3397	4633	4366
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3782	3399	4635	4368
3783	3400	4636	4369
3784	3401	4637	4370
3785	3403	4639	4372
3786	3404	4640	4373
3787	3405	4641	4374
3788	3406	4642	4375
3789	3407	4643	4376
3790	3393	4629	4361
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3793	3402	4638	4371
3794	Omitted		
3795	2923	4133	3843
3796	2924	4134	3844
3797	2925	4135	3845
3798	3386	4622	4354
3799	Omitted		
3800	3388	4624	4356
3801	3449	4698	4417, 4418
3802	3450	4699	4418
3803	3451	4700	4419
3804	Omitted		
3805	3452	4701	4420
3806	3453	4702	4421
3807	3455	4704	4423
3808	3456	4705	4424
3809	3454	4703	4422
3810	3457	4706	4425
3811	3458	4707	4426
3812	3460	4709	4428
3813	3461	4710	4429
3814	3462	4711	4430
3815	3463	4712	4431
3816	3464	4713	4432
3817	3465	4714	4433
3818	3469	4718	4437
3819	3470	4719	4438
3820	3471	4720	4439
3821	3472	4721	4440
3822	3466	4715	4434
3823	3473	4722	4441
3824	3474	4723	4442
3825	3475	4724	4443
3826	3476	4725	4444
3827	3477	4726	4445
3828	3459	4708	4427
3829	3478	4727	4446
3830	3479	4728	4447
3831	3480	4729	4448
3832	3481	4730	4449
3833	3482	4731	4450
3834	3483	4732	4451
3835	3484	4733	4452
3836	3485	4734	4453
3837	3486	4735	4454
3838	3487	4736	4455
3839	3488	4737	4456
3840	3489	4738	4457
3841	3467	4716	4435
3842	3468	4717	4436
3843	3490	4739	4458
3844	3502	4751	4471
3845	3503	4752	4472
3846	3504	4753	4473
3847	3505	4754	4474
3848	3506	4755	4475
3849	3507	4756	4476
3850	3508	4757	4477
3851	3509	4758	4478
3852	3510	4759	4479
3853	3511	4760	4480
3854	3512	4761	4480
3855	3513	4762	4481
3856	3514	4763	4482
3857	3515	4764	4484
3858	3516	4765	4485
3859	3517	4766	4486
3860	3518	4767	4487
3861	3519	4768	4488
3862	3520	4769	4489
3863	3521	4770	4490
3864	3522	4771	4491
3865	3523	4772	4492
3866	3524	4773	4493
3867	3525	4774	4494
3868	3526	4775	4495
3869	3527	4776	4496
3870	3528	4777	4497
3871	3529	4778	4498
3872	3530	4779	4499
3873	3531	4780	4500
3874	3532	4781	4501
3875	3533	4782	4502
3876	3534	4783	4503
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3879	3536	4785	4506
3880	3537	4786	4507
3881	3538	4787	4508
3882	3539	4788	4509
3883	3540	4789	4510
3884	3541	4790	4511
3885	3542	4791	4512
3886	3543	4792	4513
3887	3544	4793	4514
3888	3545	4794	4515
3889	3546	4795	4516
3890	3547	4796	4517
3891	3548	4797	4518
3892	3549	4798	4519
3893	3550	4799	4520
3894	3551	4800	4521
3895	3552	4801	4522
3896	3553	4802	4523
3897	3554	4803	4524
3898	3555	4804	4525
3899	3556	4805	4526
3900	3557	4806	4527
3901	3558	4807	4528
3902	3559	4808	4529
3903	3560	4809	4530
3904	3561	4810	4531
3905	3562	4811	4532
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3913	3571	4820	4541
3914	3572	4821	4542
3915	3573	4822	4543
3916	3574	4823	4545
3917	3575	4824	4546, 4547
3918	3576	4825	4548
3919	3577	4826	4549
3920	3578	4827	4550
3921	3579	4828	4551
3922	3580	4829	4552
3923	3581	4830	4553
3924	3582	4831	4554
3925	3583	4832	4555
3926	3584	4833	4553
3927	3585	4834	4556
3928	3586	4835	4557
3929	3587	4836	4558
3930	3588	4837	4560
3931	3589	4838	4561
3932	3590	4839	4562
3933	3591	4840	4563
3934	3592	4841	4564
3935	3593	4842	4565
3936	3594	4843	4566
3937	3595	4844	4567
3938	3597	4846	4569
3939	3598	4847	4570
3940	3599	4848	4571
3941	3600	4849	4572
3942	3601	4850	4573
3943	3602	4851	4574
3944	3603	4852	4576
3945	3604	4853	4577
3946	3605	4854	4578
3947	3606	4855	4579
3948	3607	4856	4580
3949	3608	4857	4581
3950	3609	4858	4582
3951	3610	4859	4583
3952	3611	4860	4208
3953	3612	4861	4208
3954	3613	4862	4209
3955	3614	4863	4210
3956	3615	4864	4212
3957	3616	4865	4212
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3959	3618	4867	4215
3960	3619	4868	4221
3961	3620	4869	4216
3962	3621	4870	4217
3963	3622	4871	4218
3964	3623	4872	4219
3965	Omitted	4873	4220
3966	3624	4874	4222
3967	3625	4875	4584
3968	3626	4876	4585
3969	3627	4877	4586
3970-3971	3628	4878	4587
3972	3629	4879	4588
3973	3630	4880	4589
3974	3631	4881	4590
3975	3632	4882	4591
3976	3633	4883	4592
3977	3634	4884	4594
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3979	3637	4887	4602
3980	3638	4888	4603
3981	4556	5954	5483
3982	3639	4889	4604
3983	3641	4891	4606
3984	3642	4892	4607
3985-3986	3643	4893	4608
3987	3644	4894	4609
3988	3646	4896	4611
3989	3647	4897	4612
3990	3648	4898	4613
3991	3649	4899	4614
3992	3650	4900	4615
3993	3651	4901	4616
3994	3652	4902	4617
3995	3653	4903	4618
3996	3654	4904	4619
3997	3655	4905	4620
3998	3657	4907	4622
3999	3658	4908	4623
4000	3656	4906	4621
4001	3659	4909	4629
4002	3660	4910	4630
4003	3661	4911	4631
4004	3662	4912	4632
4005	3645	4895	4610
4006	3663	4914	4625
4007	3664	4915	4625
4008	3665	4916	4626
4009	3666	4917	4627
4010	3667	4918	4628
4011	3668	4919	4624
4012	3671	4922	4658
4013	3672	4923	4659
4014	3673	4924	4660
4015	3674	4925	4662
4016	3675	4926	4664
4017	3676	4927	4665
4018	3677	4928	4666
4019	3678	4929	4670
4020	3679	4930	4671
4021	3680	4931	4672
4022	3681	4932	4672
4023	3682	4933	4672
4024	3683	4934	4667
4025	3684	4935	4668
4026	3685	4936	4654
4027	3686	4937	4655
4028	3687	4938	4656
4029	3688	4939	4657
4030	3689	4940	4673
4031-4034	Omitted		
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4036	3691	4942	4674
4037	3696	4947	4679
4038	3692	4943	4675
4039	3693	4944	4676

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4043	3698	4949	4681
4044	3699	4950	4682
4045	3700	4951	4683
4046	3701	4952	4634
4047	3702	4953	4635
4048	3703	4954	Obsolete
4049	3704	4955	4636
4050	3705	4956	4637
4051	3706	4957	4638
4052	3707	4958	4639
4053	3708	4959	4640
4054	3709	4960	4641
4055	3710	4961	4642
4056	3711	4962	4643
4057	3712	4963	4644
4058	3713	4964	4645
4059	3714	4965	4646
4060	3715	4966	4647
4061	3716	4967	4649
4062	3717	4968	4650
4063	3718	4969	4651
4064	3719	4970	4652
4065	3721	4972	4684, 4687
4066	3722	4973	4685, 4688
4067	3723	4974	4685
4068	3724	4975	4686
4069	3725	4976	4690
4070	3726	4977	4691
4071	3727	4978	4689
4072	3728	4979	4692
4073	3730	4981	4688, 4698
4074	3731	4982	4696
4075	3732	4983	4696
4076	3733	4984	4697
4077	3729	4980	Omitted
4078	3734	4985	4694
4079	3735	4986	4699
4080	3736	4987	4700
4081	3737	4988	4700, 4705
4082	3738	4989	4704
4083	3739	4990	4707
4084	3740	4991	4706
4085	3741	4992	4708
4086	3742	4993	4703
4087	3743	4994	4709
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4090	3752	5003	4713
4091	3753	5004	4714
4092	3727	4978	4689
4093	3744	4995	4710
4094	3745	4996	4718
4095	3746	4997	4718
4096	3747	4998	4719
4097	3748	4999	4720
4098	3749	5000	4721
4099	3750	5001	4723
4100	3754	5005	4717
4101	4558	5956	5487
4102	4559	5957	5489
4103	4560	5958	5488
4104	Omitted		
4105	2882	4089	3801
4106	2883	4090	3802
4107	2884	4091	3802
4108	2885	4092	3803
4109	2882	4089	3801
4110	2525	3730	3443
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4114	247	325	356
4115	251	335	364
4116	252	336	365
4117	253	337	366
4118	254	338	367
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4126	249	327	358
4127	2523	3728	3441
4128	2524	3729	3442
4129	2994	4219	3907
4130	3448	4697	4416
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4132	3819	5096	1291
4133	3756	5007	85
4134	3771	5026	205
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4136	3781	5033	296
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4143	3792	5066	498
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4146	3790	5064	512
4147	3789	5062	511
4148	3799	5075	531
4149	3805	5081	4598
4150	3806	5082	4599
4151	3801	5077	382
4152	3804	5080	4597
4153	3814	5090	4661
4154	3811, 3812	5087, 5088	354
4155	3800	5076	543
4156	3808	5084	590
4157	3836	5116	1294
4158	3813	5089	1290
4159	3828	5108	3152
4160	3835	5115	4715
4161	3843	5123	1300
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4165	3838	5118	1296
4166	3839	5119	Omitted
4167	3840	5120	1297

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4176	3244	4474	4181
4177	3245	4475	4182
4178	3277	4511	4240
4179	3319	4555	4287
4180	3346	4582	4314
4181	3380	4616	4348
4182	3474	4723	4442
4183	2510	3715	3429
4184	2511	3716	3430
4185	2512	3717	Omitted
4186–4187	Omitted		
4188	3845	5125	4724, 5096
4189	3846	5126	4725
4190	3847	5127	4726
4191	3848	5128	4727
4192	3849	5129	4728
4193	3850	5130	4729
4194	3851	5131	4730
4195	3852	5151	4747
4196	3853	5152	4748
4197	3854	5153	4749
4198	3855	5154	4750
4199	3856	5155	4751
4200	3857	5156	4752
4201	3858	5157	4753
4202	3859	5158	4754
4203	3860	5159	4755
4204	3861	5160	4756
4205	3862	5161	4757
4206	3863	5162	4758
4207	3865	5164	4760
4208	3866	5165	4761
4209	3867	5166	4762
4210	3868	5167	4763
4211	3869	5168	4765
4212	3870	5169	4766
4213	3871	5170	4767
4214	3872	5171	4768
4215	3873	5172	4769
4216	3874	5173	4770
4217	3875	5174	4771
4218	3876	5175	4772
4219	3877	5176	4773
4220	3878	5177	4774
4221	3864	5163	4759
4222	3880	5179	4776
4223	3881	5180	4777
4224	3882	5181	4778
4225	3883	5182	4779
4226	3884	5183	4780
4227	3885	5184	4781
4228	3886	5185	4782
4229	3887	5186	4783
4230	3888	5187	4784
4231	3889	5188	4785
4232	3891	5190	4787
4233	3892	5191	4788
4234	3893	5192	4789
4235	3894	5194	4791
4236	3895	5196	4852
4237	3902	5208	4831
4238	3903	5209	4832
4239	3904	5210	4833
4240	3905	5211	4837
4241	3906	5212	4838
4242	3907	5213	4839
4243	3908	5214	4840
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4245	3910	5216	4844
4246	3911	5217	4845
4247	Omitted	Omitted	4846
4248	3912	5218	4847
4249	3913	5219	4848
4250	3914	5220	4849
4251	3915	5221	4850
4252	3916	5222	4851
4253	3917	5223	4853
4254	3918	5224	4854
4255	3919	5225	4855
4256	3920	5226	4856
4257	3921	5227	4857
4258	3922	5228	4858
4259	3923	5229	4859
4260	3924	5230	4860
4261	3925	5231	4861
4262	3926	5232	4862
4263	3927	5233	4863
4264	3928	5234	4864
4265	3929	5235	4865
4266	3930	5236	4866
4267	3931	5237	4867
4268	3932	5238	4868
4269	3933	5239	4869
4270	3934	5240	4870
4271	3936	5242	4872
4272	3937	5243	4873
4273	3938	5244	4874
4274	3939	5245	4875
4275	3940	5246	4876
4276	3941	5247	4877
4277	3942	5248	4878
4278	3943	5249	4879
4279	3944	5250	4880
4280	3945	5251	4881
4281	3946	5252	4882
4282	3947	5253	4883
4283	3948	5254	4884
4284	3949	5257	4887
4285	3950	5258	4888
4286	3951	5259	4889
4287	3952	5260	4890
4288	3953	5261	4891
4289	3954	5262	4892
4290	3955	5263	4893
4291	3956	5264	4894
4292	3957	5265	4895
4293	3958	5266	4896
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4298	3962	5270	4901
4299	3963	5271	4902
4300	3964	5272	4903
4301	3965	5273	4904
4302	3966	5274	4905
4303	3967	5275	4906
4304	3968	5276	4907
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4309	3971	5279	4910
4310	3972	5280	4911
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4320	3979	5287	4807
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4322	3981	5289	4825, 4826
4323	3982	5290	4801
4324	3983	5291	4829
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4326	3985	5293	4822
4327	3986	5294	4802
4328	3987	5295	4803
4329	3988	5296	4830
4330	3989	5297	4800
4331	3990	5298	4809
4332	3991	5299	4804
4333	3993	5302	4914
4334	3994	5303	4918
4335	3995	5304	4919
4336	3996	5305	4920
4337	3997	5306	4921
4338	3998	5307	4922
4339	3999	5308	4923
4340	4000	5309	4924
4341	4001	5310	4925
4342	4002	5311	4926
4343	4003	5312	4927
4344	4004	5313	4928
4345	4005	5314	4929
4346	4006	5315	4930
4347	4008	5317	4932
4348	4009	5318	4933
4349	4010	5319	4934
4350	4011	5320	4935
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4352	4013	5322	4939
4353	4014	5323	4940
4354	4015	5324	4941
4355	4016	5325	4942
4356	4017	5328	4945
4357	4021	5333	588
4358	4031	5352	4969
4359	4022	5334	4951
4360	4023	5342	4959
4361	4024	5343	4960
4362	4025	5344	4961
4363	4026	5345	4962
4364	4027	5346	4963
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4386	4065	5431	5029
4387	4066	5432	5030
4388	4067	5433	5031
4389	4068	5434	5032
4390	4069	5435	5033
4391	4070	5436	5035
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4394	4073	5439	5041
4395	4074	5440	5042
4396	4075	5441	5043
4397	4076	5442	5044
4398	4077	5443	5045
4399	4078	5444	5046
4400	4079	5445	5047
4401	4080	5446	5048
4402	4081	5447	5053
4403	4082	5448	5054
4404	4083	5449	5055
4405	4084	5450	5056
4406	4085	5451	5057
4407	4086	5452	5058
4408	4087	5453	5059
4409	4089	5470	5078
4410	4090	5471	5079
4411	4091	5472	5080
4412	4092	5473	5081
4413	4093	5474	5082
4414	4094	5475	5083
4415	4095	5476	5084
4416	4096	5477	5085
4417	4097	5478	5086
4418	4098	5479	5087
4419	4099	5480	5088
4420	4100	5481	5089
4421	4101	5482	5090
4422	4102	5483	5091
4423–4427	Omitted		
4428	4103	5484	5092
4429	4104	5485	5093
4430	4105	5486	5094
4431	4106	5487	5095

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4433–4434	Omitted		
4435	Const. Art. 5, § 8	Const. Art. 5, § 8	Const. Art. 5, § 8
4436	Omitted		
4437	Const. Art. 1, § 10	Const. Art. 1, § 10	Const. Art. 1, § 10
4438	4364	5749	5339
			See Const. Art. 1, § 12
4439	4108	5490	5097, 5098
4440	4109	5491	5099
4441	4110	5492	5100
4442	4112	5494	5102
4443	4113	5495	5103
4444	4114	5496	5104
4445	4115	5497	5105
4446	Omitted		
4447	4108, 4115	5490, 5497	5097, 5098, 5105
4448–4454	4115	5497	5105
4455	4116	5498	5106
4456	4117	5499	5107
4457	4118	5500	5108
4458	4119	5501	5109
4459	4120	5502	5110
4460	4121	5503	5110
4461	4122	5504	5111
4462	4123	5505	5112
4463	4124	5506	5113
4464	4121	5503	5110
4465	4125	5507	5114
4466	4126	5508	5115
4467	4127	5509	5116
4468	4128	5510	5117
4469	4129	5511	5118
4470	4130	5512	5119
4471	4131	5513	5120
4472	4132	5514	5121
4473	4133	5515	5122
4474	4134	5516	5123
4475	4135	5517	5124
4476	4136	5518	5125
4477	4137	5519	5126
4478	4138	5520	5127
4479	4139	5521	5128
4480	4140	5522	5129
4481	4141	5523	5130
4482	4142	5524	5131
4483	4143	5525	5132
4484	4144	5526	5133
4485–4486	Omitted		
4487–4488	506	692	658
4489	4145	5529	5143
4490	4146	5530	5144
4491	4147	5531	5145
4492	4148	5532	5146
4493	4149	5533	5147
4494	4150	5534	5148
4495	4151	5535	5149
4496	4152	5536	5150
4497	4153	5537	5151
4498	4154	5538	5152
4499	Omitted		
4500	4155	5539	5153
4501	Omitted		
4502	4156	5540	5154
4503	See 3507	4756	4476
4504	Omitted		
4505	4157	5541	5155
4506	4158	5542	5156
4507	4159	5543	5157
4508	4160	5544	5158
4509	4161	5545	5159
4510	4162	5546	5160
4511	4163	5547	5161
4512	4164	5548	5162
4513	4165	5549	5163
4514	4166	5550	5164
4515	4167	5551	5165
4516	4169	5553	5167
4517	4170	5554	5168
4518	4171	5555	5169
4519	4172	5556	5170
4520	4173	5557	5170
4521	4174	5558	5171
4522	4175	5559	5172
4523	4176	5560	5173
4524	4177	5561	5174
4525	4178	5562	5175
4526	4179	5563	5176
4527	4180	5564	5177
4528	4181	5565	5178
4529	4182	5566	5179
4530	4111	5493	5101
4531	4185	5569	5182
4532–4533	Omitted		
4534	4186	5570	5183
4535	4187	5571	5184
4536	4188	5572	5184
4537	4189	5573	5185
4538	4190	5574	5186
4539	4191	5575	5187
4540	4192	5576	5188
4541	4193	5577	5189
4542	4194	5578	5190
4543	4195	5579	5191
4544	4196	5580	5192
4545	4197	5581	5193
4546	4198	5582	5195
4547	4199	5583	5196
4548	4200	5584	5196
4549	4201	5585	5197
4550	4202	5586	5198
4551	4203	5587	5193
4552	4204	5588	5199
4553	4205	5589	5200
4554	4206	5590	5201
4555	4207	5591	5202
4556	4208	5592	5203
4557	4209	5593	5194
4558	4210	5594	5194
4559	4211	5595	5194
4560	4212	5596	5204
4561	4213	5597	5205

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4562	4214	5598	5206
4563	4215	5599	5206
4564	4216	5600	5206
4565	4217	5601	5207
4566	4218	5602	5208
4567	4219	5603	5209
4568	4220	5604	5209, 5210
4569	4221	5605	5211
4570	4222	5606	5212
4571	4223	5607	5213
4572	4224	5608	5214
4573	4225	5609	5215
4574	4185, 4108	5569, 5490	5182, 5098
4575	4226	5610	5216
4576	4227	5611	5216
4577	4228	5612	5216, 5217
4578	4229	5613	5218
4579	4230	5614	5218
4580	4231	5615	5219
4581	See Const. Art. 1, § 12	See Const. Art. 1, § 12	See Const. Art. 1, § 12
4582	4232	5616	5220
4583-4584	4233	5617	5221
4585-4590	Omitted		
4591	4239	5622	5225
4592	4240	5623	5226
4593	4241	5624	5227
4594	4242	5625	5228
4595	4243	5626	5229
4596	4244	5627	5230
4597	Omitted	Omitted	5230
4598	4245	5628	5230
4599	4246	5629	5230
4600	4247	5630	5231
4601	4248	5631	5232
4602	4249	5632	5233
4603	4250	5633	5234
4604	4251	5634	5235
4605	4252	5635	5236
4606	Omitted		
4607	4253	5636	5237
4608	4255	5638	5240
4609	4256	5639	5240
4610	4257	5640	Sup'rs'd'd
4611	4258	5641	5241, 5243
4612	4260	5643	5241
4613	4261	5644	5243
4614	Omitted		
4615	4262	5645	5244
4616	4263	5646	5245
4617	4264	5647	5246
4618	4265	5648	5247
4619	4266	5649	5241, 5242, 5243
4620	4267	5650	5248
4621	4268	5651	5249
4622	4269	5652	5250
4623	4270	5653	5251
4624	4275	5658	5256, 5257, 5258
4625	4271	5654	5252
4626	4272	5655	5253
4627	4273	5656	5254
4628	4274	5657	5255
4629	4275	5658	5256, 5257 5258
4630	4276	5659	5259
4631	4277	5660	5260
4632	4278	5661	5261
4633	4279	5662	5262
4634	4280	5663	5263
4635	4281	5664	5264
4636	4282	5665	5265
4637	4283	5666	5266
4638	4284	5667	5267
4639	4285	5668	5268
4640	4286	5669	5269
4641	4287	5670	5270
4642	4288	5671	5271
4643	4289	5672	5272
4644	4290	5673	5273
4645	4291	5674	5274
4646	4292	5675	5275
4647	4293	5676	5276, 5277
4648	4294	5679	5276
4649	4295	5680	5279
4650	4296	5681	5280
4651	4297	5682	5281
4652	4298	5683	5282
4653	4299	5684	5283
4654	4300	5685	5284
4655	4301	5686	5285
4656	4302	5687	5286
4657	4303	5688	5287
4658	4304	5689	5288
4659	4305	5690	5289
4660	4306	5691	5290
4661	4307	5692	5291
4662	4308	5693	5292
4663	4309	5694	5293
4664	4310	5695	5294
4665	4311	5696	5295
4666	4312	5697	5296
4667	4313	5698	5298
4668	4314	5699	5299
4669	4315	5700	5300
4670	4316	5701	5301
4671	4317	5702	5302
4672	4318	5703	5303
4673	4319	5704	5304
4674	4320	5705	5305
4675	4321	5706	5306
4676	4322	5707	5307
4677	4323	5708	5307
4678	4324	5709	5307
4679	4325	5710	5308
4680	4327	5712	5310
4681	4328	5713	5311
4682	4329	5714	5311
4683	4330	5715	5312
4684	4331	5716	5312
4685	4332	5717	5313
4686	4333	5718	5315
4687	4334	5719	5316
4688	4335	5720	5317
4689-4690	4336	5721	5318

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4692	4338	5723	5320
4693	4339	5724	5321
4694	Omitted		
4695	4340	5725	5322
4696	4341	5726	5323
4697	4342	5727	5324
4698	4343	5728	5325
4699	4344	5729	5326
4700	4345	5730	5327
4701	4346	5731	5330
4702	4347	5732	5329, 5338
4703	4348	5733	5329
4704	4349	5734	5338
4705	4350	5735	5338
4706	4351	5736	5338
4707	4352	5737	5328
4708	4353	5738	5330
4709	4354	5739	5331
4710	4355	5740	5331
4711	4356	5741	5331
4712	4357	5742	5331
4713	4358	5743	5332
4714	4359	5744	5333, 5335
4715	4360	5745	5334, 5335
4716	4361	5746	5334
4717	4362	5747	5337
4718	4363	5748	5338
4719	4364	5749	5339
4720	4365	5750	5340
4721	4366	5751	5341
4722	4367	5752	5336
4723–4724	Omitted		
4725–4726	Omitted		
4727	4368	5753	5342
4728	4369	5754	5343
4729	4370	5755	5344
4730	4371	5756	5345
4731	4372	5757	5346
4732	4373	5758	5347
4733	4374	5759	5348
4734	4375	5760	5349
4735	4376	5761	5349
4736	4377	5762	5350
4737	4378	5763	5351
4738	4379	5764	5352
4739	4380	5765	5353
4740	4381	5766	5354
4741	4382	5767	5355
4742	4383	5768	Obsolete
4743	4384	5769	Obsolete
4744	4385	5770	Obsolete
4745	4386	5771	5354
4746	4387	5772	Obsolete
4747	4388	5773	Obsolete
4748	Omitted		
4749–4750	4419	5804	5370
4751	4389	5774	5356
4752	4390	5775	3694
4753	4391	5776	3693
4754	4392	5777	3695
4755	4393	5778	3697
4756	4394	5779	3697
4757	4395	5780	3696
4758	4396	5781	3698, 5357
4759	4397	5782	Const. Art. 1, § 9
4760	4398	5783	5358
4761	4399	5784	5358
4762	4400	5785	5358
4763	4401	5786	5358
4764	4402	5787	5358
4765	4403	5788	5358
4766	4404	5789	5359
4767	4405	5790	5360
4768–4771	4405	5790	5360
4772	4406	5791	3692
4773	4407	5792	5361
4774	4408	5793	5362
4775	4409	5794	5362
4776	4410	5795	5363
4777	4411	5796	5363
4778	4412	5797	3685
4779	4413	5798	5365
4780	4414	5799	5364
4781	4415	5800	5367
4782	4416	5801	5366
4783	4417	5802	5369
4784	4418	5803	5368
4785	4420	5805	5372
4786	4421	5806	5373
4787	4422	5807	5374
4788	4423	5808	5372
4789	4424	5809	5375
4790	4425	5810	5297, 5490
4791	4430	5815	5378
4792	4431	5816	5379
4793	4444	5829	5389
4794	4445	5830	5390
4795	4446	5831	5391
4796	4447	5832	5392
4797	4448	5833	5393
4798	4449	5834	5394
4799	4450	5835	5395
4800	4432	5817	5380
4801	4433	5818	5381
4802	4434	5819	5382
4803	4435	5820	5383
4804	4443	5828	5388
4805	4426, 4556	5811, 5954	5483
4806	4427	5812	5491
4807	4428	5813	5376
4808	4429	5814	5377
4809	4436	5821	5371
4810	4437	5822	5384
4811	4438	5823	5091
4812	4439	5824	5385
4813	4440	5825	5386
4814	4441	5826	5386
4815	4442	5827	5387
4816	4451	5836	5396
4817	4452	5837	5397
4818	4453	5838	5397
4819	4454	5839	5398
4820	4455	5840	5399
4821	4456	5841	5399

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4823	4458	5843	5401
4824	4459	5844	5401
4825	4460	5845	5402
4826	4461	5846	5403
4827	4462	5847	5404
4828	4463	5848	5405
4829	4464	5849	5405
4830	4474	5859	5405
4831	4475	5860	5405
4832	4476	5861	5405
4833	4477	5862	5405
4834	4478	5863	5409
4835	4465	5850	5406
4836	4466	5851	5407
4837	4467	5852	5408
4838	4468	5853	5409
4839	4469	5854	5410
4840	4470	5855	5411
4841	4471	5856	5412
4842	4472	5857	5414
4843	4473	5858	5413
4844	4479	5864	5415
4845	4480	5865	5415
4846	4481	5866	5416
4847	4482	5867	5417
4848	4483	5868	5418
4849	4484	5869	5419
4850	4485	5870	5420
4851	4486	5871	5421
4852	4487	5872	5422
4853	4488	5873	5423
4854	4489	5874	5424
4855	4490	5875	5425
4856	4491	5876	5426
4857	4492	5877	5427
4858	4493	5878	5428
4859	4494	5879	5429
4860	4495	5880	5430
4861-4862	4496	5881	5431
4863	4497	5882	5432
4864	Omitted		
4865	4498	5883	5433
4866	4499	5884	5433
4867	4500	5885	5433
4868	4501	5886	5433
4869	4502	5887	5434
4870	4503	5888	5435
4871	4504	5889	5436
4872	4505	5890	5437
4873	4506	5891	5438
4874	4507	5892	5438
4875-4879	Omitted		
4880	4508	5893	5439
4881	4509	5894	5440
4882	Omitted	5133	4732
4883	Omitted	5134	4733
4884	4510	5895	5441
4885	4511	5896	5442
4886	4512	5897	5443
4887	Omitted	5136	4735
4888	Omitted	5137	4736
4889	Omitted	5148	4746
4890	Omitted	5139	4740
4891	Omitted	5140	4740
4892	Omitted	5141	Sup'rs'd'd 4740
4893	Omitted	5142	Omitted
4894	Omitted	5143	4741
4895	Omitted	5144	4742
4896	Omitted	5145	4743
4897	4513	5898	5444
4898	4514	5899	5444
4899	4515	5900	5444
4900	4516	5901	5445
4901	4517	5902	5444
4902	4518	5903	5446
4903	4519	5904	5447
4904	4520	5905	5448
4905	4521	5906	5448
4906	4522	5907	5448
4907	4523	5908	5449
4908	4524	5909	5449
4909	4525	5910	5450
4910	Omitted		
4911	4527	5912	5452
4912	Omitted	5146	4744
4913	Omitted	5147	4745
4914	4528	5913	5453
4915	4529	5914	5453
4916	4530	5915	5454
4917	4526	5911	5451
4918	4531	5916	5455
4919	4532	5917	5455
4920	4533	5918	5456
4921	4534	5919	5457
4922	4535	5920	5458
4923	4536	5921	5459
4924	4537	5922	5460
4925	4538	5923	5462
4926	4539	5924	5463
4927	4540	5925	5464
4928	4541	5926	5465
4929	4542	5927	5466
4930	4543	5928	5466
4931	4544	5929	5467
4932	Omitted	5148	4746
4933	4545	5930	5468
4934	See Const. Art. 3, § 20	See Const. Art. 3, § 20	See Const Art. 3, § 20
4935-4936	See Const. Art. 3, § 19	See Const. Art. 3, § 19	See Const. Art. 3, § 19
4937	4546	5931	5469
4938	4547	5932	5470
4939	4548	5933	5470
4940	4549	5934	5470
4941	4550	5935	5475
4942	4551	5936	5475
4943	4552	5937	5476
4944	4553	5938	5477
4945	See Const. Art. 3, § 19	See Const Art. 3, § 19	See Const. Art. 3, § 19
4946	See Const. Art. 3, § 20	5950	5481
4947	See Const. Art. 3, § 20	See Const. Art. 3, § 20	See Const. Art. 3, § 20

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4949	4555	5940	5474
4950	4561	5959	5492
4951	4562	5960	5492
4952	4563	5961	5493
4953	4564	5962	5493
4954	4565	5963	5494
4955	4566	5964	5495
4956	4567	5965	5496
4957	4568	5966	5497
4958	4569	5967	5492
4959	4570	5968	5479
4960	4571	5969	5498
4961	4572	5970	5499
4962	Const. Art. 1, § 12	Const. Art. 1, § 12	Const. Art. 1, § 12
4963–4964	Omitted		
4965	Omitted		
4966	4587	5985	5506
4967	4573	5971	5500
4968	4574	5972	5501
4969	4575	5973	5507
4970	4576	5974	5508
4971	4577	5975	5509
4972	4578	5976	5509
4973	4579	5977	5510
4974	4580	5978	5511
4975	4581	5979	5512
4976	4582	5980	5502
4977	4583	5981	5503
4978	4584	5982	5504
4979	4585	5983	5505
4980	4586	5984	Omitted
4981	4587	5985	5506
4982	4588	5986	Omitted
4983	4589	5987	5524
4984	4590	5988	5525
4985	4591	5989	5526
4986	4592	5990	5527
4987	4593	5991	5528
4988	4594	5992	5529
4989	4595	5993	5530
4990	4596	5994	5515
4991	4597	5995	5516
4992	4598	5996	5517
4993	4599	5997	5518
4994	4600	5998	5519
4995	4601	5999	5520
4996	4602	6000	5521
4997	4603	6001	5522
4998	4604	6002	5523
4999	4605	6003	5523
5000	4606	6004	5513
5001	4607	6005	5513
5002	4608	6006	5514
5003	4609	6007	5531
5004	4610	6008	5532
5005	4611	6009	5533
5006	4612	6010	5534
5007	4613	6011	5535
5008	4614	6012	5536
5009	4615	6013	5537
5010	4616	6014	5538
5011	4617	6015	5539
5012	4618	6016	5539
5013	4619	6017	5539
5014	Omitted		
5015	4620	6018	5540
5016	4621	6019	5540
5017	4622	6020	5541
5018	4623	6021	5542
5019	4624	6022	5542
5020	4625	6023	5543
5021	4626	6024	5543
5022	4627	6025	5543
5023	4628	6026	5543
5024	4629	6027	5545
5025	4630	6028	5546
5026	4631	6029	5547
5027	4632	6030	5548
5028	4633	6031	5549
5029	4634	6032	5550
5030	4635	6033	Omitted
5031	4636	6034	5551
5032	4637	6035	5552
5033	4638	6036	5553
5034	4639	6037	5554
5035	4640	6038	5555
5036	4641	6039	5556
5037	4642	6040	5557
5038	4643	6041	5558
5039	4644	6042	5559
5040	4645	6043	5560
5041	4646	6044	5561
5042	4647	6045	5562
5043	4648	6046	5563
5044	4649	6047	5564
5045	4650	6048	5565
5046	4651	6049	5566
5047	4652	6050	5567
5048	4653	6051	5568
5049	4654	6052	5569
5050	4655	6053	5570
5051	4656	6054	5571
5052	4657	6055	5572
5053	4658	6056	5573
5054	4659	6057	5574
5055	4660	6058	5575
5056	4661	6059	5576
5057	4662	6060	5577
5058	4663	6061	5578
5059	4664	6062	5579
5060	4665	6063	5580
5061	4666	6064	5581
5062	4667	6065	5582
5063	4668	6066	5583
5064	4669	6067	5584
5065	4670	6068	5585
5066	4671	6069	5586
5067	4672	6070	5587
5068	4673	6071	5588
5069	4674	6072	5589
5070	4675	6073	5590
5071	4676	6074	5592
5072	4677	6075	5593
5073	4678	6076	5594

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5074	4679	6077	5595
5075	4680	6078	5591
5076	4681	6079	5596
5077	4682	6080	5597
5078	4683	6081	5598
5079	4684	6082	5599
5080	4685	6083	5600
5081	4686	6084	5601
5082	4687	6085	5602
5083	4688	6086	5603
5084	4689	6087	5604
5085	4690	6088	5605
5086	4691	6089	5606
5087	4692	6090	5607
5088–5089	Omitted		
5090	4693	6091	5608
5091	4694	6092	5609
5092	4695	6093	5610
5093	4696	6094	5611
5094	Omitted		
5095	4697	6095	5612
5096	4698	6096	5613
5097	4699	6097	5614
5098	4700	6098	5615
5099	4701	6099	5616
5100	4702	6100	5617
5101	4703	6101	5618
5102	4704	6102	5619
5103	4705	6103	5620
5104	4706	6104	5621
5105	4707	6105	692
5106	4708	6106	5622
5107	4709	6107	5623
5108	4710	6108	5624
5109	4711	6109	5625
5110–5115	Omitted		
5116	4712	6110	5626
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5120	4713	6111	5627
5121	4714	6112	5628
5122	4723	6121	5637
5123	4724	6122	5640
5124	4725	6123	5641
5125	4726	6124	5642
5126	4737, 4738	6137, 6138	5653, 5654
5127	4727	6125	5643
5128	4728	6128	5644
5129	4729	6129	5645
5130	4730	6130	5646
5131	4731	6131	5647
5132	4732	6132	5648
5133	4733	6133	5649
5134	4734	6134	5650
5135	4735	6135	5651
5136	4744	6144	Omitted
5137	4770	6170	5675
5138	4771	6171	5676
5139–5141	Omitted		
5142	4748	6148	5663
5143	4751	6151	5666
5144	4772	6172	5677
5145	4773	6173	5678
5146–5147	Omitted		
5148	4774	6174	5679
5149	4775	6175	5680
5150	4791	6191	5689
5151	4792	6192	5690
5152	Omitted		
5153	4793	6193	5691
5154	4794	6194	5692
5155	4758	6158	5672
5156	4795	6195	5693
5157	4796	6196	5694
5158	4797	6197	5695
5159	4798	6198	5696
5160	4776	6176	5681
5161	4777	6177	5682
5162	4778	6178	5683
5163	4779	6179	5684
5164	4780	6180	5685
5165	4781	6181	5686
5166	4782	6182	5687
5167	Omitted	6207, 6208	5702
5168	4767	6167	5717
5169	4754	6154	5669
5170	4768	6168	5662, 5667
5171	4769	6169	5713
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5173	4745	6145	5661
5174	4746	6146	5661
5175	4747	6147	5662
5176	4746	6146	5661
5177	4749	6149	5664
5178	4750	6150	5665
5179	4751	6151	5666
5180	4752	6152	5667
5181	4753	6153	5668
5182	4754	6154	5669
5183	4755	6155	5670
5184	4756	6156	5670
5185	4757	6156	5671
5186	4799	6199	5697
5187	4800	6200	5698
5188	4801	6201	5699
5189	4802	6202	5700
5190–5193	4783	6183	5716
5194	4803	6203	5714
5195	4804	6204	5715
5196	4805	6205	5701
5197–5198	Omitted		

CODE OF 1873

This table is intended to be used in tracing the development of sections of the Code of 1873 only. The sections of that code are in numerical order and to the right of each is found the corresponding section or sections of later codes.

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2	2	2	52	56	53
3	3	3	53	57	54
4	4	4	54	58	Omitted
5	5	5	55	64	60
6	6	6	56	65	61
7	7	7	57	66	61
8	8	8	58	67	62
9	9	9	59	68	63
10	10	10	60	69	64
11	11	11	61	70	66
12	12	12, 13	62	71	68
13	17	17	63	72	69
14	18	18	64	73	126
15	19	19	65	74	67
16	20	20	66	75	89
17	21	21	67	76	90
18	22	22	68	77	91
19	23	23	69	78	92
20	24	24	70	79	93
21	25	25	71	80	94
22	26	26	72	81	95
23	27	27	73	82	96
24	28	28	74	83	97
25	29	29	75	84	101
26	30	30	76	85	102
27	31	31	77	86	103
28	32	32	78	87	104
29	33	32	79	88	105
30	34	33	80	89	106
31	35	34	81	90	107
32	36	35	82	91	108
33	37	36	83	97	72
34	38	37	84	98	73
35	39	38	85	99	74
36	40	39	86	100	75
37	41	40	87	101	76
38	42	41	88	102	77
39	43	42	89	103	78
40	44	43	90	104	79
41	45	44	91	105	80
42	46	45	92	106	81
43	47	46	93	107	82
44	48	47	94–95	115	117
45	49	48	96	116	117
46	50	49	97	117	Omitted
47	51	49	98	120	120
48	52	49	99	121	121
49	53	50	100	119	119
50	54	51	101	134	133

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103	136	135
104	Omitted	
105	122	122
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108	116	117
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110	121	121
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117	153	173
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122	158	168
123	161	178
124	162	178
125	Repealed	
126	163	179
127	164	185
128	165	180
129	123	123
130	125	125
131	166	Temporary
132	167	184
133–134	173	192
135	Omitted	
136	173	192
137	174	201
138	176	202
139	178	193
140	179	195
141	180	196
142	181	197
143	182	198
144	183	199
145	184	200
146	185	204
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148	187	204
149	188	204
150	189	208
151	190	209
152	191	210
153	192	210
154	193	213
155–156	196	216
157	Omitted	
158	194	214
159	195	215
160	198	218
161	206	225
162	207	225
163	208	226
164	209	228
165	210	232
166	211	233
167	212	234
168	213	234
169	214	235
170	215	236
171	216	237
172	217	238
173	218	239
174	219	239
175	220	240
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177	223	242
178	224	243
179	225	244
180	226, 243	See "Rules of Practice"
181	227	245
182	228	246
183	229	247
184	230	Superseded
185	231	248
186	232	248
187	250	281
188	251	282
189	252	283
190	253	284
191	254	285
192	255	286
193	Repealed	
194	256	287
195	Omitted	
196	257	288
197	258	288
198	259	289
199	260	290
200	261	291
201	262	292
202	263	Obsolete
203	264	293
204	266	294
205–207	Repealed	
208	281	310
209	283	312
210	287	316
211	289	317
212	290	318
213	291	319
214	292	320
215	293	321
216	294	322
217	295	323
218	296	324
219	297	325
220	298	326
221	299	327
222	300	328
223	301	329
224	302	330
225	303	331
226	304	331
227	305	332
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230	308	345
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244	322	Omitted
245	323	353
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248	326	357
249	327	358
250	328	359
251	335	364
252	336	365
253	337	366
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256	340	369
257	341	369
258	345	373
259	346	374
260	347	375
261	348	376
262	349	377
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265	352	380
266	353	381
267	354	383
268	355	384
269	356	385
270	357	386
271	358	387
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273	360	389
274	361	390
275	362	391
276	363	392
277	364	393
278	365	393
279	366	394
280	367	395
281	368	396
282	369	397
283	370	398
284	371	399
285	372	400
286	373	401
287	374	402
288	375	396
289	376	403
290	377	404
291	379	406
292	381	407
293	382	408
294	389	410
295	390	411
296	391	412
297	392	413
298	393	414
299	394	410
300	399	415
301	400	420
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303	402	422, 423, 424
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305	426	440
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314	435	450
315	436	451
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320	450	470
321	451	471
322	452	472
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324	454	474
325	456	476
326	457	477, 545
327	458	482
328	459	483, 484
329	463	485
330	464	486
331	465	487
332	466	488
333	467	488
334	468	489
335	469	494
336	470	493
337	472	499
338	473	500
339	474	501
340	475	502
341	476	503
342	477	546
343	478	547
344	479	504
345	480	505
346	481	506
347	482	507
348	483	4062
349	484	513
350	485	512
351	486	511
352	487	515
353	488	517
354	489	518
355	490	519
356	491	520, 530
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359	494	521
360	495	522
361	496	523
362	497	524
363	498	525
364	499	526
365	500	520
366	501	527
367	502	528
368	503	529
369	504	534
370	505	534
371	506	535
372	507	536
373	508	537
374	509	538
375	510	539
376	511	540
377	512	541
378	513	542
379	516	551
380	517	Omitted
381	518	553
382	519	554
383	520	555
384	521	556
385	522	557
386	523	558
387	524	559
388	525	Omitted
389	526	1073, 1074, 1075
390	528	565, 647-650, 1185
391	530	566
392	531	576
393	532	574
394	533	575
395	534	576
396	535	393, 576
397	537	577
398	539	579
399	540	579
400	541	Obsolete
401	542	Obsolete
402	543	Obsolete
403	544	Obsolete
404	545	Obsolete
405	546	Obsolete
406	547	Obsolete
407	548	Obsolete
408	549	Obsolete
409	550	Obsolete
410	551	Obsolete
411	552	Obsolete
412	553	580
413	554	581
414	555	582
415	556	2568
416	557	2571
417	558	2568
418	559	2568
419	560	2573
420	561	2571
421	569	599
422	570	600, 601
423	571	602
424	572	603
425	573	602
426	574	617
427	575	618
428	576	619
429	577	620
430	579	610
431	580	611
432	581	612
433	582	613
434	587	631
435	588	632
436	589	633
437	590	634
438	591	635
439	592	637
440	593	622
441	594	623
442	595	624
443	596	625
444	597	626
445	598	627
446	599	627
447	600	604
448	601	604
449	602	605, 606
450	603	605, 609
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453	606	606
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461	620	727, 894, 953, 1005
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465	624	751, 782, 791, 794, 969
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468	632	777
469	635	785-790, 884, 1002
470	636	880, 999, 1001
471	639	720, 955
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477	648	884, 1002
478	649	840, 975, 982, 984
479	650	986
480	651	698
481	652	975, 982
482	660	680, 947
483	662	693
484	663	694
485	664	735
486	665	950, 3447, 5166
487	667	891, 892, 893
488	668	899
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490	670	668, 943
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493	673	668, 683
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495	675	636, 887, 902, 1014
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503	689	1145, 1146
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507	694	638
508	695	638
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510	697	640
511	698	643, 645, 646, 649, 668
512	699	658, 659
513	700	1277
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515	702	651, 652, 662, 673, 946
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517	708	648, 695
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520	715	641
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524	722	655, 668, 676, 695
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533	791	662, 673, 946
534	794	651, 652, 658
535	798	647, 652, 660, 666
536	801	662, 673, 946
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539	804	734, 3234
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556	991	596
557	992	597
558	993	598
559	994	914
560	995	915, 917
561	996	917
562	997	Omitted
563	998	918
564	999	919
565	1000	919
566	1001	919
567	1002	921
568	1005	922
569	1006	923
570	1007	924
571	1008	929
572	1009	930
573	1020	1057
574	1021	1058
575	1022	1059
576	1023	1060
577	1024	1061
578	1025	1062
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580	1027	1064
581	1028	1065
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604	1065	1092
605	1066	1090
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707	1173	1213
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721	1187	1226
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723	1189	1228
724	1190	1212
725	1191	1229
726	1192	1230
727	1193	1231
728	1194	1232
729	1195	1250
730	1196	1198
731	1197	1233
732	1198	1234
733	1199	1235
734	1200	1236
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736	1202	1238
737	1203	1198
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739	1205	1240
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This table is intended to be used in tracing the development of sections of McClain's Code of 1888 only. The sections of that code are in numerical order and to the right of each is found the corresponding section or sections of the later code.

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		1770–1	1792	1835	1929	1906	1997
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1713	1732	1776	1795	1840	1934	1911	2002
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1715	1735	1778	1796	1842	1936	1913	2004
1716	1752	1779	1816	1843	1937	1914	2005
1717	1736	1780	1797	1844	1938	1915	2006
1718	1737	1781	1798	1845	1939	1916	2007
1719	1753	1782–3	Omitted	1846	1940	1917	2008
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1721	1720	1785–6	1898	1848	1942	1919–20	2010
1722	1690	1787	1902	1849	1943	1921	2011
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1741	1773	1804	1869	1876	See 1960	1944	Omitted
1742	1799	1805	1870	1877	1961	1945	2024
1743	1774	1806	1868	1878	1955	1946	2025
1744	1775	1807–8	1859	1879–80	1956	1947	2026
1745	1776	1809	1872	1881	1962	1948	2027
1746	1777	1810	1873	1882	1963	1949	2028
1747	1778	1811	1881	1883	1955	1950	2029
1748	1779	1812	1877	1884	1957	1951	2030
1749	1780	1813	1887	1885	1958	1952	2031
1750	1781	1814	1888	1886	1959	1953	2032
1751	1801	1815	1322	1887	1960	1954	2033
1752	1802	1816	1856	1888	1964	1955	2034
1753	1806	1817	1857	1889	1965	1956	2035
1754	1803	1818	1858	1890	1966	1957	2036
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1759	1812	1823	1862	1895	1971	1962–4	2143
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1971	2054	2049	2122	2112–13	1331	2195	2266
1972	2055, 2056	2050	2123	2114	1332	2196	2270
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1979	2092	2056	2129	2120	2218	2203	2272
1980	2093	2057	2130	2121–29	2219	2204	2273
1981	2094	2058	2131	2130–35	2220	2205	2274
1982	2095	2059	2132	2136	2221	2206	2275
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2259	2318	2333	2363	2395	2408	2465	2489
2260	2321	2334-5	2364	2396	2412	2466	2491
2261	2321	2336	2356	2397-8	2405	2467	Repeal'ng
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2264	Omitted	2339	Omitted	2401	2413	2470-71	2481
2265	2324	2340	2367	2402	2414	2472-74	2490
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2271	2327	2345	2371	2406	2424	2479-80	2490
2272	2328	2346	2374	2407	2423	2481	2491
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2274	2331	2348	2371	2409	2422	2483	2503, 2505,
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2325	2356	2387	2407	2454	2482	2534	2588
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4565	4297	4629	4361	4703	4422	4765	4485
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5222	4851
5223	4853
5224	4854
5225	4855
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5227	4857
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5255	4885
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5271	4902
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5403	See 2540–41, 2547–48
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5405	See 2545
5406	See 2540, 2541
5407	See 2543
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5425	Omitted
5426	5025
5427–8	5026
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5456	Omitted
5457	Repeal'ng
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5463	5159
5464	5073
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5528	Omitted
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5555	5169	5626	5229	5691	5290	5762	5350
5556–7	5170	5627–9	5230	5692	5291	5763	5351
5558	5171	5630	5231	5693	5292	5764	5352
5559	5172	5631	5232	5694	5293	5765	5353
5560	5173	5632	5233	5695	5294	5766	5354
5561	5174	5633	5234	5696	5295	5767	5355
5562	5175	5634	5235	5697	5296	5768–70	Obsolete
5563	5176	5635	5236	5698	5298	5771	5354
5564	5177	5636	5237	5699	5299	5772–3	Obsolete
5565	5178	5637	5238	5700	5300	5774	5356
5566	5179	5638–9	5240	5701	5301	5775	3694
5567	5180	5640	Sup'rs'd'd	5702	5302	5776	3693
5568	5181	5641	5241, 5243	5703	5303	5777	3695
5569	5182	5642	5243	5704	5304	5778–9	3697
5570	5183	5643	5241	5705	5305	5780	3696
5571–2	5184	5644	5243	5706	5306	5781	3698, 5357
5573	5185	5645	5244	5707–9	5307	5782	Const.
5574	5186	5646	5245	5710	5308		Art. 1, § 9
5575	5187	5647	5246	5711	5309	5783–8	5358
5576	5188	5648	5247	5712	5310	5789	5359
5577	5189	5649	5241–43	5713–14	5311	5790	5360
5578	5190	5650	5248	5715–16	5312	5791	3692
5579	5191	5651	5249	5717	5313	5792	5361
5580	5192	5652	5250	5718	5315	5793–4	5362
5581	5193	5653	5251	5719	5316	5795–6	5363
5582	5195	5654	5252	5720	5317	5797	3685
5583–4	5196	5655	5253	5721	5318	5798	5365
5585	5197	5656	5254	5722	5319	5799	5364
5586	5198	5657	5255	5723	5320	5800	5367
5587	5193	5658	5256–58	5724	5321	5801	5366
5588	5199	5659	5259	5725	5322	5802	5369
5589	5200	5660	5260	5726	5223	5803	5368
5590	5201	5661	5261	5727	5324	5804	5370
5591	5202	5662	5262	5728	5325	5805	5372
5592	5203	5663	5263	5729	5326	5806	5373
5593–5	5194	5664	5264	5730	5327	5807	5374
5596	5204	5665	5265	5731	5330	5808	5372
5597	5205	5666	5266	5732	5329, 5338	5809	5375
5598–5600	5206	5667	5267	5733	5329	5810	5297, 5490
5601	5207	5668	5268	5734–6	5338	5811	5483
5602	5208	5669	5269	5737	5328	5812	5491
5603	5209	5670	5270	5738	5330	5813	5376
5604	5209, 5210	5671	5271	5739–42	5331	5814	5377
5605	5211	5672	5272	5743	5332	5815	5378
5606	5212	5673	5273	5744	5333, 5335	5816	5379
5607	5213	5674	5274	5745	5334, 5335	5817	5380
5608	5214	5675	5275	5746	5334	5818	5381
5609	5215	5676	5276, 5277	5747	5337	5819	5382
5610–11	5216	5677	5278	5748	5338	5820	5383
5612	5216, 5217	5678	Repeal'ng	5749	5339	5821	5371
5613–14	5218	5679	5276	5750	5340	5822	5384
5615	5219	5680	5279	5751	5341	5823	5091
5616	5220	5681	5280	5752	5336	5824	5385
5617	5221	5682	5281	5753	5342	5825–6	5386
5618	5222	5683	5282	5754	5343	5827	5387
5619	5223	5684	5283	5755	5344	5828	5388
5620	5224	5685	5284	5756	5345	5829	5389
5621	5485	5686	5285	5757	5346	5830	5390
5622	5225	5687	5286	5758	5347	5831	5391
5623	5226	5688	5287	5759	5348	5832	5392
5624	5227	5689	5288	5760	5349	5833	5393
5625	5228	5690	5289	5761	5349	5834	5394

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5835	5395	5912	5452	5984	Omitted	6055	5572
5836	5396	5913-14	5453	5985	5506	6056	5573
5837-8	5397	5915	5454	5986	Omitted	6057	5574
5839	5398	5916-17	5455	5987	5524	6058	5575
5840	5399	5918	5456	5988	5525	6059	5576
5841	5399	5919	5457	5989	5526	6060	5577
5842	5400	5920	5458	5990	5527	6061	5578
5843-4	5401	5921	5459	5991	5528	6062	5579
5845	5402	5922	5460	5992	5529	6063	5580
5846	5403	5923	5462	5993	5530	6064	5581
5847	5404	5924	5463	5994	5515	6065	5582
5848-9	5405	5925	5464	5995	5516	6066	5583
5850	5406	5926	5465	5996	5517	6067	5584
5851	5407	5927-8	5466	5997	5518	6068	5585
5852	5408	5929	5467	5998	5519	6069	5586
5853	5409	5930	5468	5999	5520	6070	5587
5854	5410	5931	5469	6000	5521	6071	5588
5855	5411	5932-4	5470	6001	5522	6072	5589
5856	5412	5935-6	5475	6002-3	5523	6073	5590
5857	5414	5937	5476	6004-5	5513	6074	5592
5858	5413	5938	5477	6006	5514	6075	5593
5859-60	5405	5939	5473	6007	5531	6076	5594
5861-2	5405	5940	5474	6008	5532	6077	5595
5863	5409	5941	5471	6009	5533	6078	5591
5864-5	5415	5942	5477, 5478	6010	5534	6079	5596
5866	5416	5943	5479	6011	5535	6080	5597
5867	5417	5944	5478	6012	5536	6081	5598
5868	5418	5945	5480	6013	5537	6082	5599
5869	5419	5946	5478	6014	5538	6083	5600
5870	5420	5947	5482	6015-17	5539	6084	5601
5871	5421	5948	Temp'r'ry	6018-19	5540	6085	5602
5872	5422	5949	5473	6020	5541	6086	5603
5873	5423	5950	5481	6021-2	5542	6087	5604
5874	5424	5951-2	5478	6023-26	5543	6088	5605
5875	5425	5953	5482	6027	5545	6089	5606
5876	5426	5954	5483	6028	5546	6090	5607
5877	5427	5955	5486	6029	5547	6091	5608
5878	5428	5956	5487	6030	5548	6092	5609
5879	5429	5957	5489	6031	5549	6093	5610
5880	5430	5958	5488	6032	5550	6094	5611
5881	5431	5959-60	5492	6033	Omitted	6095	5612
5882	5432	5961-2	5493	6034	5551	6096	5613
5883-6	5433	5963	5494	6035	5552	6097	5614
5887	5434	5964	5495	6036	5553	6098	5615
5888	5435	5965	5496	6037	5554	6099	5616
5889	5436	5966	5497	6038	5555	6100	5617
5890	5437	5967	5492	6039	5556	6101	5618
5891-2	5438	5968	5479	6040	5557	6102	5619
5893	5439	5969	5498	6041	5558	6103	5620
5894	5440	5970	5499	6042	5559	6104	5621
5895	5441	5971	5500	6043	5560	6105	692
5896	5442	5972	5501	6044	5561	6106	5622
5897	5443	5973	5507	6045	5562	6107	5623
5898-5900	5444	5974	5508	6046	5563	6108	5624
5901	5445	5975-6	5509	6047	5564	6109	5625
5902	5444	5977	5510	6048	5565	6110	5626
5903	5446	5978	5511	6049	5566	6111	5627
5904	5447	5979	5512	6050	5567	6112	5628
5905-7	5448	5980	5502	6051	5568	6113	5629
5908-9	5449	5981	5503	6052	5569	6114	5630
5910	5450	5982	5504	6053	5570	6115	5631
5911	5451	5983	5505	6054	5571	6116	5632

TABLE OF CORRESPONDING SECTIONS

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6117	5633	6142	5658	6175	5680	6204	5715
6118	5634	6143	5659	6176	5681	6205	5701
6119	5635	6144	Omitted	6177	5682	6206	Saving
6120	5636	6145–6	5661	6178	5683	6207–8	5702
6121	5637	6147	5662	6179	5684	6209	5703
6122	5640	6148	5663	6180	5685	6210–11	Temp'r'ry
6123	5641	6149	5664	6181	5686	6212	5707
6124	5642	6150	5665	6182	5687	6213	Temp'r'ry
6125	5643	6151	5666	6183–4	5716	6214	5674
6126–7	5639	6152	5667	6185–7	5718	6215	5718
6128	5644	6153	5668	6188–90	5688	6216	5716
6129	5645	6154	5669	6191	5689	6217	5661
6130	5646	6155–6	5670	6192	5690	6218	5707
6131	5647	6157	5671	6193	5691	6219	5676, 5707
6132	5648	6158–65	5672	6194	5692	6220	Repeal'ng
6133	5649	6166	5673	6195	5693	6221	Omitted
6134	5650	6167	5717	6196	5694	6222	5663
6135	5651	6168	5662, 5667	6197	5695	6223	Repeal'ng
6136	5652	6169	5713	6198	5696	6224	Omitted
6137	5653	6170	5675	6199	5697	6225–9	5709
6138	5654	6171	5676	6200	5698	6230	5710
6139	5655	6172	5677	6201	5699	6231	5672
6140	5656	6173	5678	6202	5700	6232–3	Temp'r'ry
6141	5657	6174	5679	6203	5714	6234	5711, 5716

*MORTALITY TABLES.

TABLES FOR DETERMINING THE VALUATION OR PRESENT WORTH OF LIFE AND TERM ESTATES OR ANNUITIES AND REMAINDERS OR REVERSIONARY INTERESTS COMPUTED AT FOUR PER CENT PER ANNUM FOR THE USE OF THE COURTS OF IOWA IN THE ASSESSMENT OF COLLATERAL INHERITANCE TAX.

See Section 1481-a16, Supplement to the Code, 1913.

STATE OF IOWA,
Treasury Department,
Des Moines, July 15, 1900.

Section seven (7) of chapter fifty-one (51) of the acts of the twenty-eighth (28) general assembly provides:

"The treasurer of state is directed to obtain and publish for the use of the courts and appraisers throughout the state tables showing the average expectancy of life and the value of annuities or life and term estates, and the present worth or value of remainders and reversions. The taxable value of life or term, deferred or future estates shall be computed at the rate of 4 per cent interest."

Pursuant to the foregoing provisions, the following tables for determining the taxable value,—namely, the present worth, of life estates or annuities and remainders or reversionary interests are hereby published and promulgated for the use of the courts and appraisers of the state.

Table No. 1 gives the basis for valuing "life estates" or annuities, the proceeds of which the beneficiary enjoys during his or her life.

Table No. 2 relates to "term estates" or annuities terminable at a certain period, definitely stated in the provisions of the instrument creating the estate.

The tables printed herein are those used by the United States government in the assessment of the inheritance tax under the war revenue act of June 13, 1898, prepared for the internal revenue service under the direction of the government actuary, Mr. J. S. McCoy. They are based upon the "Actuaries' or Combined Experience Tables," money being considered worth four (4) per cent per annum. Both the tables and notes are reproduced from circulars No. 527, March, 1899, and No. 21,231, December, 1899, issued by the Commissioner of Internal Revenue.

JOHN HERRIOTT,
Treasurer of State of Iowa.

*For the convenience of the bench and bar these tables are inserted at this point. [U. G. WHITNEY, Editor pro tem.]

TABLE NO. 1.

Single-life, 4 per cent, showing the present worth of an annuity, or life interest, and of a reversionary interest.

Age.	Mean redemption period.	Annuity or present value of one dollar due at the end of each year during the life of a person of specified age.	Reversion, or present value of one dollar due at the end of the year of death of a person of specified age.	Age.	Mean redemption period.	Annuity or present value of one dollar due at the end of each year during the life of a person of specified age.	Reversion, or present value of one dollar due at the end of the year of death of a person of specified age.
0	23.179	$14.72829	$0.39507	50	18.113	$12.47032	$0.48191
1	30.552	17.30771	0.29586	51	17.527	12.17919	0.49311
2	35.626	18.69578	0.24247	52	16.947	11.88408	0.50446
3	37.572	19.15901	0.22465	53	16.372	11.58531	0.51595
4	38.702	19.41226	0.21491	54	15.804	11.28325	0.52757
5	39 352	19.55301	0.20950	55	15.243	10.99789	0.53931
6	39.654	19.61731	0.20703	56	14.689	10.66982	0.55116
7	39.691	19.62502	0.20673	57	14.143	10.35931	0.56310
8	39.625	19.61097	0.20727	58	13.603	10.04630	0.57514
9	39.264	19.53413	0.21022	59	13.072	9.73131	0.58726
10	38.891	19.45359	0.21332	60	12.549	9.41474	0.59943
11	38.507	19.36943	0.21656	61	12.029	9.09765	0.61163
12	38.113	19.28184	0.21993	62	11.532	8.78052	0.62382
13	37.710	19.19065	0.22344	63	11.039	8.46412	0.63600
14	37.298	19.09590	0.22708	64	10.557	8.14888	0.64812
15	36.877	18 99764	0.23086	65	10.088	7.83552	0.66017
16	36.447	18.89569	0.23478	66	9.630	7.52476	0.67212
17	36 010	18.79010	0.23884	67	9.185	7.21699	0.68396
18	35 565	18.68070	0.24305	68	8.753	6.91298	0.69565
19	35.113	18.56751	0.24740	69	8.333	6.61301	0.70719
20	34.652	18.45038	0.25191	70	7.926	6.31716	0.71857
21	34.186	18.32932	0.25656	71	7.532	6.02612	0.72976
22	33.711	18.20416	0.26138	72	7.151	5.74003	0.74077
23	33.230	18.07471	0.26636	73	6.782	5.45928	0.75157
24	32.742	17.94097	0.27150	74	6.425	5.18402	0.76215
25	32.248	17.80274	0.27682	75	6.081	4.91463	0.77251
26	31.747	17.65984	0 28231	76	5.749	4.65125	0.78264
27	31.239	17.51224	0 28799	77	5.428	4.39383	0.79254
28	30.725	17.35968	0.29386	78	5.119	4.14286	0.80220
29	30 205	17 20225	0.29991	79	4.823	3.89858	0.81159
30	29.678	17.03961	0.30617	80	4.537	3.66071	0.82074
31	29,147	16.87176	0 31262	81	4.262	3.42900	0.82965
32	28.608	16.69846	0.31929	82	3.995	3.20258	0.83836
33	28.067	16.51964	0.32617	83	3.737	2.98024	0.84691
34	27 516	16 33503	0.33327	84	3.484	2.76106	0.85534
35	26.961	16 14437	0 34060	85	3.236	2.54366	0.86371
36	26 401	15.94755	0.34817	86	2.992	2.32795	0.87200
37	25.834	15.74427	0.35599	87	2.752	2.11384	0.88024
38	25.263	15.53421	0.36407	88	2.517	1.90115	0.88842
39	24.685	15.31722	0.37241	89	2.286	1.69107	0.89650
40	24.101	15.09295	0.38104	90	2.062	1.48540	0.90441
41	23.511	14.86102	0.38996	91	1.845	1.28432	0.91214
42	22.915	14.62122	0.39918	92	1.637	1.09024	0.91961
43	22 313	14.37356	0.40871	93	1.442	0.90647	0.92667
44	21.708	14.11860	0.41852	94	1.263	0.73687	0.93320
45	21.103	13.85713	0.42857	95	1.103	0.58435	0.93906
46	20 499	13.58958	0.43886	96	0.975	0.46182	0.94378
47	19.896	13 31698	0.44935	97	0.877	0.36698	0.94742
48	19.298	13.03942	0.46002	98	0.746	0 24038	0.95229
49	18.703	12.75716	0.47088	99	0.500	0.00000	0.96154

EXPLANATORY NOTES AND EXAMPLES.

The first column shows the age of the person under consideration.

The second column shows the corresponding "mean redemption period" and represents the time in years in which the present values of annuities and reversions certain will become equal, respectively, to the present value of annuities and reversions contingent on the duration of life. The "mean redemption period" is a mean between the last payment of the annuity and the payment of the reversion, averaging six months later than the former payment and six months earlier than the latter payment. (This period is ordinarily designated the expectancy of life during which a beneficiary will enjoy the life estate.)

The third column shows the present value of an annuity for life of one dollar per annum, the last payment being made at the end of the year prior to the one in which death occurs.

The fourth column shows the present worth of one dollar payable at the end of the year in which death occurs.

EXAMPLE 1.

A person dying bequeaths to his nephew, aged forty years, an annuity of one thousand dollars during life. What is the present value of the annuity?

Reference to the foregoing table shows that the present value of one dollar a year, payable at the end of each year during the life of a person aged forty years, is fifteen dollars nine cents two mills and ninety-five one-hundredths of a mill ($15.09295) ; therefore, the present value of one thousand dollars is one thousand times as much, or fifteen thousand and ninety-two dollars and ninety-five cents, the amount upon which tax accrues.

EXAMPLE 2.

A person dying bequeaths to his sister, aged thirty-five years, a life interest in personal property amounting to fifty thousand dollars ($50,000), the estate to revert absolutely at her death to other collateral parties. Required the present value, at the date of death of the testator, of the life interest of the sister in the estate; also, required at the same date, the present value of the reversionary interest of said other parties in the estate.

At a net interest of four per cent per annum, the assumed rate, the estate of $50,000 will realize an income or annuity of $2,000 per annum. The present value of the sum of $1.00, payable at the end of each year during the life of a person aged thirty-five years, is found by the table to be $16.14437, and the present value of an annuity of $2,000 for the same time would be two thousand times as much, or $32,288.74, the amount upon which tax accrues.

The reversion or present value of $1.00, due at the end of the year of death of a person aged thirty-five years, is found by the table to be $0.34060, and such value of $50,000 would be fifty thousand times as much, or $17,030, the amount upon which tax accrues.

TABLE NO. 2.

Present value of annuities and reversions certain upon a 4 per cent basis.

Number of years.	Present worth of an annuity of one dollar, payable at the end of each year, for a certain number of years.	Present worth of one dollar, payable at the end of a certain number of years.	Number of years.	Present worth of an annuity of one dollar, payable at the end of each year, for a certain number of years.	Present worth of one dollar, payable at the end of a certain number of years.
	Annuity	*Reversion*		*Annuity*	*Reversion*
1	$ 0.96154	$ 0.961538	16	11.65229	0.533908
2	1.88609	0.924556	17	12.16567	0.513373
3	2.77509	0.888996	18	12.65929	0.493628
4	3.62989	0.854804	19	13.13394	0.474642
5	4.45182	0.821927	20	13.59032	0.456387
6	5.24214	0.790314	21	14.02916	0.438834
7	6.00205	0.759918	22	14.45111	0.421955
8	6.73274	0.730690	23	14.85684	0.405726
9	7.43533	0.702587	24	15 24696	0 390121
10	8.11089	0.675564	25	15.62208	0.375117
11	8.76047	0.649581	26	15.98277	0.360689
12	9.38507	0.624597	27	16.32958	0.346816
13	9.98565	0.600574	28	16.66306	0.333477
14	10.56312	0.577475	29	16.98371	0.320651
15	11.11839	0.555265	30	17.29203	0.308319

EXAMPLE.

A man dies leaving personal property to the amount of $50,000, his niece to have the income from it for 20 years, it then to revert to his youngest brother. What is the present worth of these legacies?

The income from $50,000 would be $2,000 per annum, assuming money at 4 per cent.

The present worth of an annuity of $2,000 for 20 years will be 2,000 times an annuity of $1.00. In the table opposite 20 we find the value of an annuity of $1.00 to be $13.59032. Therefore the present worth of an annuity of $2,000 will be $27,180.64.

A reversion of $1.00 at the end of 20 years is shown by the table to be $0.456387, and a reversion of $50,000 will be 50,000 times as much, or $22,819.35.