LAWS OF IOWA RELATING TO RAILWAYS, EXPRESS COMPANIES, ETC.

APPENDIX TO REPORT OF RAILROAD COMMISSIONERS FOR 1899.

PUBLISHED BY PERMISSION OF THE EXECUTIVE COUNCIL, FROM THE CODE OF 1897.

TITLE V, CHAPTER 6.

STREETS AND PUBLIC GROUNDS.

SEC. 767. **Railway tracks—street railways.** Cities and towns shall have the power to authorize or forbid the construction of street railways within their limits and may define the motive power by which the cars thereon shall be propelled; and to authorize or forbid the location and laying down of tracks for railways and street railways on all streets, alleys and public places; but no railway track can thus be located and laid down until after the injury to property abutting upon the street, alley or public place upon which such railway track is proposed to be located and laid down has been ascertained and compensated for in the manner provided with reference to taking private property for works of internal improvement. [23 G. A., ch. 11, § 1; 18 G. A., ch. 96, § 1; 15 G. A., ch. 6; C. '73, §464; R., § 1064.]

Right to locate railways upon streets: Since the change made in § 1262 of code of '73, by 15 G. A., ch. 47 (see § 2017), the power to authorize the laying down of tracks for street and other railways, and the use of steam motors thereon, does not exist except as here given, the earlier case of *Milburn v. Cedar Rapids*, 12-246, and many cases following it, being no longer applicable: *Stanley v. Davenport*, 54-463; *Stange v. Hill & West Dubuque St. R. Co.*, 54-669.

The provisions of this section were not originally applicable to cities acting under special charter: *Ibid; Simplot v. Chicago, M. & St. P. R. Co.*, 5 McCrary, 158.

An ordinance authorizing the construction of railway tracks upon city streets, without making the right to occupy such streets conditional upon payment of damages as required by statute, does not confer any rights upon the railway company: *Stange v. Dubuque*, 62-303.

Where the fee of the street is in the city for the use and benefit of the public, the general assembly has the control thereof, and may prescribe the terms and

conditions under which the public may use such streets: *Sears v. Marshalltown St. R. Co*, 65-742.

Consent by city council: The statute does not prescribe the manner by which authority may be granted to a railroad company to construct its track upon the streets of the city, and such authority may be given by resolution duly passed, or by vote duly taken, appearing in the proper records of the city: *Merchants' Union Barb Wire Co. v. Chicago, R. I. & P. R. Co.*, 70-105.

The city council may authorize the laying of a railway track over an alley, although the effect may be to prevent the use of the alley for other purposes. Whether the same rule would apply in case of a street, *quœre: Heath v. Des Moines & St. L. R. Co.*, 61-11.

But the city council is not authorized to devote an alley to a railway track for the private benefit of some individual; and the fact that leave has been granted to lay the track over an alley for purely private benefit will not prevent a subsequent grant of a right to a railway company to lay a track through such alley for public use: *Ibid.*

The city having been given by this section the power to grant the right to lay down a railway track over its streets, all else in connection therewith is a matter of detail and within the discretion of the city, subject only to equitable control and proper police regulations: *O'Neil v. Lamb*, 53-725.

Compensation to property owners: A railway which has been located over the streets of a city, at a time when compensation to adjacent property owners for such use of the street was not required, cannot lay new switches and side tracks in connection with such railway, without making compensation: *Drady v. Des Moines & Ft. D. R. Co.*, 57-393; *Merchants' Union Barb Wire Co. v. Chicago, R. I. & P. R. Co.*, 70-105.

The statutory provisions requiring compensation apply to a railroad authorized by ordinance and partly constructed prior to the time that the change in the statute went into effect: *Mulholland v. Des Moines, A. & W. R. Co.*, 60-740; *Hanson v. Chicago, M. & St. P. R. Co.*, 61-588.

Where a railway company had commenced the use of its track constructed under permission granted by the city council before the statutory change requiring compensation *held*, that it could not afterward be made liable for damages to abutting lot owners: *Merchants' Union Barb Wire Co. v. Chicago, R. I. & P. R. Co.*, 70-105.

When the road is located upon private property and not upon a street an abutting owner cannot recover damages resulting from the ordinary operation of the road: *Rinard v. Burlington & N. R. Co.*, 66-440. Nor can damages be recovered from the city in such a case from injuries from an embankment: *Callahan v. Des Moines*, 63-765.

The provisions as to making compensation for injury to property abutting on a street upon which a railway track is proposed to be located are only applicable to property owners whose property abuts upon the portion of the street occupied by the track, and not to owners of property abutting upon a street which is merely crossed by the track: *Morgan v. Des Moines & St. L. R. Co.*, 64-589.

Under the provisions of § 2017 a railway company has the right to cross a street with its track without paying damages to abutting property owners, where it does not occupy the street in front of abutting property. But if it crosses the street at an angle, so that a portion of the track is in front of abutting property, the provisions of this sections as to consent of council and as to damages apply: *Enos v. Chicago, St. P. & K. C. R. Co.*, 78-28; *Gates v. Chicago, St. P. & K. C. R. Co*, 82-5 8.

The damages to be allowed to an abutting property owner by reason of the construction of a track over a street are not limited to damages arising from a change of grade, but extend to all legitimate damages which are contemplated in other provisions for condemning right of way: *Drady v. Des Moines & Ft. D. R. Co.*, 57-393.

In estimating the damages caused by the operation of a steam railway along a street where damages to property owner have not been previously assessed and paid, the fact that such operation has diverted travel from the street may be shown in evidence as showing the manner in which the rental value of the property has been diminished, and for the purpose of ascertaining the measure of damage: *Stange v. Dubuque*, 62-303.

In an action for such damages all the facts attending the use and operation of the railroad may properly be given in evidence as bearing upon the effect of the operation of the road on the rental value of the property; such, for instance, as annoyance to the occupants of the property by noise, escape of fire from engines, etc.: *Wilson v. Des Moines, O. & S. R. Co.*, 67-509.

In a proceeding to assess damages to abutting property by reason of the location and operation of a railroad upon a street, the property owner is entitled to be compensated for injuries which he will sustain on account both of the laying down of the track in the street on which his property abuts, and of the appropriation of his land, if any, which is taken for right of way purposes: *McClean v. Chicago, I. & D. R. Co.*, 67-568.

The provisions of this section as to the manner of assessment of damages resulting from the location of a railway upon the streets of a city refer exclusively to the company and not to the abutting owner; such owner does not have any interest in the fee of the street, and he cannot take steps to have his damages assessed by a sheriff's jury according to the provisions applicable where property is taken for right of way; therefore, he may bring action for damages without such proceeding: *Mulholland v. Des Moines, A. & W. R. Co.*, 60-740.

The provision with reference to assessing damages for laying a railroad track through the streets refers exclusively to the railroad company and not to the abutting owner. The latter cannot have his damages assessed in that manner: *Stough v. Chicago & N. W. R. Co.*, 71-641.

As the abutting property owner is not authorized to cause his damages to be assessed, and the corporation alone can institute the proceedings, an action by the property owner may be maintained for damages accruing to him before the assessment is made: *Wilson v. Des Moines, O. & S. R. Co.*, 67-509.

The property owner cannot take advantage of the method of procedure pointed out by this section for the purpose of having his damages from the construction of a railway in the street determined, but can only resort to an action to recover judgment: *Harbach v. Des Moines & K. C. R. Co.*, 80-593.

After such an assessment has been made, if the damage is not paid the company may be enjoined from occupying the street on the ground that it is a trespasser and maintaining a nuisance: *Ibid.*

The fact that the land-owner has brought an action at law for damages and recovered judgment does not preclude him from having an injunction in a proper proceeding to restrain the use of the street by the company: *Ibid.*

The fact that the railroad company is occupying the streets as the successor of another company under purchase of its franchise at foreclosure sale does not relieve it from being enjoined at the suit of a property owner who recovered judgment against the former company, and the successor cannot plead that the former company occupied by the consent of the land-owner, that defense having been merged in the judgment against such former company: *Ibid.*

A right of action for injuries to an abutting property owner accrues at once and is entire, and must be brought in five years. Such a right of action does not pass to the grantee under conveyance made subsequently to the time when the right of action accrues, and without an assignment of such cause of action to him, grantee can maintain no action for such injuries: *Pratt v. Des Moines N. W. R. Co.*, 72-249; *Jolly v. Des Moines N. W. R. Co.*, 72-759.

Where a railway track is under ordinance of the city laid in a street or alley without compensation being made to the abutting owner, his right of action for damages accrues at once, and the railroad cannot be regarded as a continuing nuisance. An action to recover damages for such an injury must be brought within the statutory period from the time the street or alley is occupied: *Fowler v. Des Moines & K. C. R. Co.*, 91-533.

An approach on a street to a railroad crossing is part of the railroad and the property owner in front of whose premises such embankment is constructed is entitled to recover damages, although the track itself does not run in front of his premises: *Hitchcock v. Chicago, St. P. & K. C. R. Co.*, 88-242.

In determining whether the street is occupied in front of abutting property, not only the track, strictly speaking, but also any embankment made for the purpose of constructing the track, is to be taken into account, and also any embankment in the street for the purpose of constructing the railroad crossing: *Gates v. Chicago, St. P. & K. C. R. Co.*, 82-518.

Embankments forming the road-bed and approaches to highways or street crossings, rendered necessary by the construction of a railroad, are a part of the railway track, within the meaning of this section, and an owner, in front of whose property such an approach is constructed in the street, is entitled to damages: *Nicks v. Chicago, St. P. & K. C. R. Co.*, 84–27.

The compensaton provided for in this section is not for property taken, but for damages to abutting property: *Ibid.*

Under this section the owner is entitled to recover for injury to the land as well as to his improvments: *Ibid.*

The rule of damage is the difference in the value of the property before and after the construction of the track, approaches, etc: *Ibid.*

Where abutting lot owners join in an agreement that a railway track may be laid down in the street, and it is laid down and operated in accordance with that agreement, any such lot owner or grantee is estopped from questioning the right of the railroad to maintain such track: *Merchants' Union Barb Wire Co. v. Chicago, R. I. & P. R. Co.*, 79–613.

Damages: A railway company which so negligently builds its track over the streets of a city, or so occupies such streets, as to create a nuisance, is liable in damages to any one suffering therefrom special injuries not common to the whole public: *Park v. Chicago & S. W. R. Co.*, 43–636; *Frith v. Dubuque*, 45–406.

It is immaterial in such case whether the party injured owns the fee in the street or not: *Cadle v. Muscatine Western R Co.*, 44–11; *Frith v. Dubuque*, 45 406; *Cain v. Chicago, R. I. & P. R. Co.*, 54–255.

One who is not the owner of the fee in the street can recover only on proof of actual damages: *Cook v. Chicago, M. & St. P. R Co.*, 83–278.

If a railway, therefore, be constructed in a careless, improper and negligent manner, to the injury of an abutting property owner, he may recover damages, provided his injury be special: *Cain v. Chicago, R. I. & P. R. Co.*, 54–255.

So the city may, by ordinance, make and enforce reasonable restrictions, and the use of the street in violation of such restrictions will be a nuisance for which a person sustaining special damage may recover: *Ibid.*

The benefits to the property may be taken into account but will not entirely preclude recovery: *Enos v Chicago, St. P. & K. C. R. Co.*, 78–28.

In an action by a lot-owner for damages caused by a railway company constructing its road so that the rails were above the established grade, being so constructed on the theory that under the ordinances of the city the company was entitled to lay its tracks on the grade, *held*, that the company could not object that damages were assessed on the theory that such obstruction was permanent: *Eslich v. Mason City & Ft. D. R. Co.*, 75–443.

A witness may be asked whether the annual premium for insurance would be higher: *Ibid.*

The city is not liable for damages resulting from the laying down of tracks, etc., under permission granted by it: *Frith v. Dubuque*, 45–406.

Although a railway company is liable for negligence in failing to keep its crossings where the track intersects the street in proper condition, such liability does not relieve the city from liability for injuries arising from such defects in its streets: *Fowler v. Strawberry Hill*, 74–644.

As to the measure of damages in such cases, see *Cadle v. Muscatine W. R. Co.*, 44–11; *Frith v Dubuque*, 45–406; *O'Connor v. St. Louis, K. C. & N. R. Co.*, 56–735; *Kuchenan v. Chicago, C. & D. R. Co*, 46–336.

Equitable control: The doctrine of equitable control over the use of the streets by railway companies, which was recognized when such companies had the right to use the streets of cities for railway purposes without compensation to property owners or consent of the city, has now no application: *Heath v. Des Moines & St. L. R. Co.*, 61–11.

Street railways: Aside from any special provision in the city charter, it may be regarded as the doctrine of this state that the city may authorize the construction of a street railway in its streets: *Damour v. Lyons*, 44–276.

An elevated railway is not to be deemed a street railway within the provisions of this section, even though it receives and discharges passengers at street corners, and therefore damages for the construction of such railway must be paid to abutting property owners: *Freiday v. Sioux City Rapid Transit Co.*, 92–191.

The term street railway as used in the statute must be construed in accordance with the understanding of the use of such terms when the statute was enacted: *Ibid.*

The provision that a railway track can be located and laid down only upon damages to abutting owners being paid does not apply to street railways, and the city council may authorize the location of such tracks upon the streets without payment of damages caused thereby: *Sears v. Marshalltown St. R. Co.*, 65–742.

In the absence of special authority conferred by the legislature, the city has no power to authorize the use of a steam motor on a street railway, and it will be liable in damages for injuries resulting from the use of such motor on the streets under its permission: *Stanley v. Davenport*, 54–463.

As to right to permit use of streets by horse railway, see *O'Niel v. Lamb*, 53–725.

Under this section a city has the right to grant the exclusive privilege for a reasonable length of time to construct and operate a street railway over any and all streets of the city, but it could not make such exclusive grant in perpetuity. Such a grant to a company to operate a street railway by horse power will not, however, preclude the grant to another company of the right to operate a street railway by other power: *Des Moines St. R. Co. v. Des Moines Broad-Gauge St. R. Co.*, 73–513.

The right to grant an exclusive privilege to operate a street railway did not exist prior to the enactment of § 464 of the code of '73, but *held*, that an ordinance granting such exclusive privilege prior to that time was ratified by action of the city after this section was enacted: *Ibid.*

Under the decision as to the right of a street railway company under an exclusive charter to lay its track over the streets of a city, *held*, that acts of the officers of the city in attempting to prevent the company from doing so were a violation of the injunction in that case: *Des Moines St. R. Co. v. Des Moines Broad-Gauge St. R. Co.*, 74–585.

A grant to a street railway company of the exclusive right to operate a street railway over streets of the city by animal power does not prevent the grant to another company of the right to operate street cars by other power: *Teachout v. Des Moines Broad-Gauge St. R. Co.*, 75-722.

Where a street railway was, under its franchise, operating in the middle of the street with a single track, and the construction of a sewer in the same street was subsequently ordered, *held*, that a provision of the ordinance that such sewer should be constructed in the middle of the street was unreasonable in view of the fact that it might without serious inconvenience or injury to the abutting property be constructed at the side of the street, and thus avoid interference with the plaintiff's track: *Des Moines St. R. Co. v. Des Moines*, 90–770.

SEC. **768. Street car vestibules.** On and after November 1, 1898, every person, partnership, company or corporation owning or operating a street railway in this state shall, from November first of each year to April first following, provide all cars, except trailers, used for the transportation of passengers, with vestibules inclosing the front platform on at least three sides, for the protection of employes operating such cars. Any violation of this section shall be punished by a fine of not less than fifty dollars nor more than one hundred dollars for each day said cars are operated in violation hereof.

SEC. **769. Railway crossings—speed of trains.** Cities having a population of five thousand or more shall have power to compel railroad companies to erect, construct, maintain and operate, under such regulations as may from time to time be provided by the council, suitable gates upon public streets at railroad crossings; and cities and towns shall have power to regulate the speed of trains and locomotives on railways running over the streets or

through the limits of the city or town. [25 G. A., ch. 5; 22 G. A., ch. 16, § 1; C. '73, § 456; R., § 1057.]

An ordinance regulating the speed of trains must be reasonable in order to be valid, and the question of whether or not it is reasonable as applied to portions of the city where the track does not run through land platted and used for residence or business purposes, is for the court: *Myers v. Chicago, R. I. & P. R. Co.*, 57-555.

And this rule is applicable to an ordinance under the express authority of this section: *Burg v. Chicago, R. I. & P. R. Co.*, 90-106.

In a particular case, *held*, that the ordinance limiting the speed of trains within the city limits to ten miles an hour would not be deemed unreasonable with reference to a crossing three-fourths of a mile from the depot, it not appearing but that the crossing was one in general use, and a dangerous one if a higher speed should be permitted: *Larkin v. Burlington, C. R. & N. R. Co.*, 85-492.

A railway company is liable for injuries to persons at crossings when such injury is due to the train being run at a greater speed than allowed by city ordinance: *Ward v. Chicago, B. & Q. R. Co.*, 65 N. W., 999.

In an action to recover damages against a railway company for negligently causing the death of a person on its track, the fact that the engine of defendant was being operated within city limits at a higher rate of speed than allowed by the ordinance may be shown without proof that the accident was directly due to the train being operated at excessive speed: *McMarshall v. Chicago, R. I. & P. Co.*, 80-757.

In an action for injury received at a railway crossing from a train running at an unlawful speed, plaintiff may prove that he had knowledge of the ordinance: *Moore v. St. Paul & K. C. R. Co.*, 71 N. W., 569.

SEC. **770. Viaducts—when required.** Cities having a population of seven thousand or over shall have power to require any railroad company, owning or operating any railroad tracks upon or across any public streets of such city, to erect, construct, reconstruct, complete, and maintain, to the extent hereinafter provided, any viaduct upon or along such streets, and over or under such tracks, including the approaches thereto, as may be declared by ordinances of such city necessary for the safety and protection of the public. The approaches to any such viaduct shall not exceed a total distance of eight hundred feet, but no such viaduct shall be required on more than every fourth street running in the same direction, and no railroad company shall be required to build or contribute to the building of more than one such viaduct, with its approaches in any one year; nor shall any viaduct be required until the board of railroad commissioners shall, after examination, determine the same to be necessary for the public safety and convenience, and the plans of said viaduct, prepared as hereinafter provided, shall have been approved by said board. [22 G. A., ch. 32, § 1.]

SEC. **771. Assessment of damages.** When a viaduct shall be by ordinance declared necessary for the safety and protection of the public, the council shall provide for appraising, assessing and determining the damages which may be caused to any property by reason of the construction of the same and its approaches. The proceedings for such purpose shall be the same as are provided in case of taking private property for works of internal improvement, and the damages assessed shall be paid by the city out of the general bridge fund. [Same, § 2.]

SEC. **772. Specifications.** The width, height and strength of any viaduct and the approaches thereto, and the material and manner of construction thereof, shall be such as may be required by the board of public works and approved by the mayor and council, but if there is no board of public works, then such as may be required by the council. [Same, § 3.]

SEC. **773. Apportionment of cost—repairs.** When two or more railroad companies own or operate separate lines of track to be crossed by a viaduct, the proportion thereof, and the approaches thereto to be constructed by each, or the cost to be borne by each, shall be determined by the council. After the completion thereof, any revenue derived therefrom by the crossing thereon of street railway lines shall constitute a special fund, and shall be applied in making repairs to such viaduct. One-half of all ordinary repairs to such viaduct or its approaches shall be paid out of such fund, or be borne by the city, and the remaining half by the railroad company; and if the track of more than one company is crossed, the costs of such repairs shall be borne by such companies in the same proportion as was the original cost of construction. [Same, § 4.]

SEC. **774. Refusal to comply.** If any railroad company neglects or refuses, for more than thirty days after such notice as may be prescribed by ordinance, to comply with the requirements of any ordinance passed under the provisions of this chapter, the city may construct or repair the viaduct or approaches, or any portion thereof, which such railroad company was required to construct or maintain, and recover the cost thereof from such company. [Same, § 6.]

TITLE V, CHAPTER 7.

STREET IMPROVEMENTS, SEWERS, ETC.

SEC. **834. Assessments on railways and street railways.** All railway and street railway companies shall be required to make, reconstruct, and repair all paving, graveling, or macadamizing between the rails of their tracks, and one foot outside thereof, at their own expense, unless by ordinance of the city, or by virtue of the provisions or conditions of any ordinance of the city under which said railway or street railway may have been constructed or may be maintained, it may be bound to pave, gravel, or macadamize other portions of said street, and in that case said railway or street railway shall make, reconstruct and repair the paving, graveling or macadamizing of that part of the street specified by such ordinance; and such improvement, or the reconstruction or repair thereof, shall be of the material and character ordered by said city, and shall be done at the same time that the remainder of said improvement is made, reconstructed or repaired. When the same is made or completed, said company shall lay, in the best approved manner, such rail as the council may require. They shall keep the paving, graveling or macadamizing between said rails, and one foot outside thereof, or such other part as they are liable to construct or maintain, up to grade and in good repair, using for such purpose the

same material as is used for the original paving, graveling or macadamizing, or such other material as the council may order. If the owner of said railway or street railway shall fail or refuse to comply with the order of the council to make, reconstruct or repair such paving, graveling or macadamizing, such work may be done by the city, and the cost and expense thereof shall be assessed upon the real estate and personal property of said railway or street railway company within the corporate limits of said city, and against such railway or street railway company, in the manner hereinbefore provided for the assessment of such cost against abutting property and the owners thereof. [25 G. A., ch. 7, § 10; 23 G. A., ch. 9, § 1; 22 G. A., ch. 16, § 1; 20 G. A., ch. 20, § 6.]

The provision requiring paving of portions of the street outside of the tracks is not unconstitutional as applied to street railways incorporated when the statute only required pavement within its tracks. Such a change is within the power of the legislature with reference to the regulation of corporate franchises: *Sioux City St. R. Co. v. Sioux City*, 78-367; affirmed, 138 U. S., 98.

The provisions of this section are not invalid as applicable to a street car company whose franchise was granted before the law took effect: *Sioux City St. R. Co. v. Sioux City*, 78-742.

Under prior provisions, *held*, that it was optional with the city to require of a street railway company that it should bear the expense of paving its tracks, and if the city did not make such requirements an abutting property owner could not on that account claim that the assessment for such paving as against his property is void: *Lacey v Marshalltown*, 68 N. W., 726.

Also, *held*, that the city could not charge upon a street railway which had acquired the right to occupy the street the proportionate expense of paving already done: *Oskaloosa St. R. and Land Co. v. Oskaloosa*, 68 N. W., 808. [See now the provisions of the next section.]

SEC. **835. Cost of paving already laid.** Before any street railway company shall lay its tracks upon any street that has been paved, and which at the time is not being paved, it shall pay into the city treasury the value of all paving between its tracks, and one foot outside thereof, which value shall be determined by the city council, but in no case shall exceed the original cost of the paving, and the money thus paid shall be refunded to the abutting property owners on said street in proportion to the amounts originally assessed against the property abutting thereon.

SEC. **840. Enforcing assessment against railways and street railways.** All special assessments made under this chapter against any railway or street railway shall be a debt due personally from such railway. Such special assessments and each installment thereof, and certificates issued therefor when due, may be collected in the district or superior court by action at law, in the name of the city or town against such railway or street railway, or the lien thereof enforced against the property of such railway or street railway, on or against which the same has been levied, by action in equity, at the election of the plaintiff; and in any action at law where pleadings are required, it shall be sufficient to declare generally for work and labor done, or materials furnished, on the particular street, avenue, alley or highway, the levy of the tax and non-payment of the same; and in any action in equity, it shall be sufficient

to aver the same matters, together with a particular description of the property, or parts thereof, against which such lien is sought to be enforced. Such action may be maintained in the name of the city or town, for the use of any person entitled thereto or any part thereof, upon filing a bond conditioned to pay all costs adjudged against the plaintiff and protect it from all liability therefrom or damages growing out of the same; the amount of the bond to be fixed by the court, or a judge thereof in vacation, and the sureties thereon to be approved by the clerk of said court. [20 G. A., ch. 20, § 3; 20 G. A., ch. 25, § 9; 17 G. A., ch. 162, § 4; 15 G. A., ch. 51, § 4; C. '73, § 478; R., § 1068.]

TITLE V, CHAPTER 10.

OF CONDEMNATION AND PURCHASE OF LAND.

SEC. **885. Donation of sites for depots.** They, [cities and towns,] shall have power to acquire by purchase or condemnation for the purpose of donating and to donate to any railway company owning a line of railroad in operation or in process of construction in such city or town sufficient land for depot grounds, engine houses and machine shops for the construction and repair of engines, cars and other machinery necessary to the convenient use and operation said of railroad. [19 G. A., ch. 133, § 1.]

SEC. **886. Submission of question.** Such donation or appropriation of funds to procure lands therefor can only be made upon a petition to the council, signed by a majority of the resident freehold taxpayers of the city or town, asking the same and fixing the sum which shall be thus appropriated. Upon the presentation of the petition, the council shall call a special election, at which the question of the proposed donation shall be submitted to the voters. The clerk shall prepare the ballots and the election shall be held in the manner provided for in the chapter on elections. If there shall be a two thirds majority in favor of the donation, the council shall determine the lands to be donated by metes and bounds, the amount to be appropriated for procuring the same, not exceeding the sum named in the petition, and in the name of the city or town may acquire the same by purchase, or by the payment of the estimated damages in case the same or any part thereof shall be taken in the name of the railway corporation under condemnation proceedings as authorized by law; and the council may also vacate and convey all streets and alleys within boundaries of such site, and prescribe the terms and conditions upon which the grant is made, which shall be binding upon the company accepting it; but land set apart as a public park, square or levee shall not be thus donated, nor shall lands occupied with buildings used for business purposes or private residences be appropriated under the provisions of this section, without the consent of the owner or owners first obtained. [Same, § 2.]

TITLE V, CHAPTER 14.

CITIES UNDER SPECIAL CHARTERS.

SEC. **955. Water and gas works—electric light and power plants—street railway and telephone franchises.** Such cities shall have power to establish, erect, purchase, lease, maintain or operate, within or without the corporate limits, water works, gas works, electric light or electric power plants, with all the necessary reservoirs, mains, filters, streams, trenches, pipes, drains, poles, wires, burners, machinery, apparatus and other requisites of said works or plants; but no such works or plants shall be thus established, erected, purchased or leased unless a majority of the electors voting on such proposition shall vote in favor of the same, at a general or special election. They may also grant individuals or private corporations the authority to erect, maintain or purchase such works or plants, or railways, street railways or telephone systems, for the term of not more than twenty-five years, and may renew or extend the term of such grants for a period not exceeding twenty five years; but no exclusive franchise shall be thus granted, extended or renewed, and no franchise shall be granted or authorized, until after notice of the application therefor has been published once each week for four consecutive weeks in some newspaper published in such city. [23 G. A., ch. 11, § 1; 22 G. A., ch. 11, §§ 1, 2; 22 G. A., ch. 26; 14 G. A., ch. 78, §§ 2–5; C. '73, § 471.]

SEC. **956. Question submitted.** The council may order any of the questions, including the granting to individuals or corporations authority to erect, maintain or purchase water or gas works, electric light or power plants, or street railway or telephone systems, provided in the preceding section, submitted to a vote at a general election, or at one specially called for that purpose; or the mayor shall submit said question to such vote upon the petition of twenty-five property owners of each ward in the city. Notice of such election shall be given in two newspapers published in said city, if there are two, if not, then in one, once each week for at least four consecutive weeks. The party asking for a renewal or extension of such franchise shall pay the cost incurred in holding such election. [22 G. A., ch. 11, § 4.]

SEC. **964. Railways and street railways to maintain culverts and drains.** Such cities shall have power to order any railway or street railway to construct and maintain, under the direction and subject to the approval of the city engineer, culverts and drains across its right of way on any street, alley, highway or other public place as such council may deem necessary, and if any railway or street railway company neglect or refuse, for more than thirty days after such notice as may be prescribed by resolution, to comply with the requirements of any such order, the city may construct such culvert or drain and recover the cost thereof from such company.

TITLE VII, CHAPTER 1.

ASSESSMENT OF TAXES.

SEC. **1332. Line operated by railroad.** No telegraph line shall be assessed which is owned and operated by any railroad company exclusively for the transaction of its business, and which has been duly reported as such in its annual report under the laws providing for the taxation of railroad property. [17 G. A., ch. 59, § 6.]

SEC. **1334. Railway companies** On the first Monday in March in each year the executive council shall assess all the property of each railway corporation in the state, excepting the lands, lots, and other real estate belonging thereto not used in the operation of any railway, and excepting railway bridges across the Mississippi and Missouri rivers, and excepting grain elevators; and for the purpose of making such assessment its president, vice-president, general manager, general superintendent, receiver, or such other officer as the council may designate, shall, on or before the fifteenth day of February in each year, furnish it a verified statement, showing in detail, for the year ended December thirty-first next preceding:

1. The whole number of miles of railway owned, operated, or leased by such corporation or company within and without the state;
2. The whole number of miles of railway owned, operated, or leased within the state, including double tracks and side tracks, the mileage of the main line and branch lines to be stated separately, and showing the number of miles of track in each county;
3. A detailed statement, showing the amount of real estate owned or used by said railway in the operation thereof in each county within the state, including the right of way, roadbeds, bridges, culverts, depot grounds, station-houses, yards, section and tool-houses, roundhouses, machine and repair shops, water tanks, turn-tables, gravel beds and stone quarries, and for all other purposes, and the estimated value thereof, in such manner as may be required by the council;
4. A full and complete statement of the cost and actual present value of all the buildings of every description owned by said railway company within the state not otherwise assessed;
5. The total number of ties per mile used on all its tracks within the state;
6. The weight of rails per yard in main line, double tracks and side tracks;
7. The number of miles of telegraph lines owned and used within the state;
8. The total number of engines, and passenger, chair, dining, official, express, mail, baggage, freight, and other cars, including handcars and boarding cars used in constructing and repairing such railway, in use on its whole line, and the sleeping cars owned by it, and the number of each class on its line within the state, each class to be valued separately;

9. Any and all other movable property owned by said railway within the state, classified and scheduled in such manner as may be required by said council;

10. The gross earnings of the entire road, and the gross earnings in this state;

11. The operating expenses of the entire road, and the operating expenses within this state;

12. The net earnings of the entire road, and the net earnings within this state. [C. '73, §§ 810, 1317, 1318.]

Decisions under prior statutes: The sections relating to the taxation of railway property, *held* not unconstitutional as providing for the taxation of the property of a corporation otherwise than that of individuals: *Dubuque v. Chicago, D. & M. R. Co.*, 47–196.

But a former statutory provision releasing railway companies from payment of municipal taxes previously levied, *held* unconstitutional: *Davenport v. Chicago, R. I. & P. R. Co.*, 38–633.

However questionable may be the constitutionality of provisions exempting railway companies from all other burdens by the payment of a definite sum annually, whether that sum be greater or less than its share of taxation, it is clear that such an exemption does not render void the general tax levied on other property: *Muscatine v. Mississippi & M. R. Co.*, 1 Dillon, 536.

The order of the board of supervisors declaring the length of the main track and the assessed value of the railroad lying within each city, town, township, or lesser taxing district in the county, and transmitted to the city council or trustees of each city or incorporated town or township, becomes the basis for the levy of taxes upon the railroad property without such property being placed upon the assessment books of the township or city: *Sioux City & St. P. R. Co. v. Osceola County*, 45–168.

Although these sections relate to the assessment of the right of way, which is real property, and which, according to the general law as to assessments, would be assessed only once in two years, yet they are not unconstitutional, being applicable to all railway companies: *Central Iowa R Co. v. Board of Supervisors*, 67–199.

The provisions of this section are applicable to railway bridges in general, but those of § 1342 apply to those therein mentioned: *Missouri Valley & B. R. & B. Co. v. Harrison County*, 74–283.

As to taxation of property not used in operating the road, and of railway bridges over the Mississippi or Missouri rivers, see § 1342.

As to taxation of railway property in general, see notes to § 1308.

SEC. **1335. Operating expensss — amended statement.** There shall not be included in said operating expenses any payments for interest or discount, or construction of new tracks except needed sidings, for raising or lowering tracks above or below crossings at grade in cities or towns, for new equipment except replacements, for reducing any bonded or permanent debt, nor for any other item of operating expenses not fairly and reasonably chargeable as such in railway accounts. The council may demand, in writing, detailed, explanatory and amended statements of any of the items mentioned in the preceding section, or any other items deemed by it important, to be furnished it by such railway corporation within thirty days from such demand, in such form as it may designate, which shall be verified as required for the original statement. The returns, both original and amended, shall show such other facts as the council, in writing, shall require. [C. '73, § 1318.]

SEC. **1336. Valuation.** The said property shall be valued at its actual value, and the assessments shall be made upon the taxable value of the entire railway within the state, except as otherwise provided, and shall include the right of way, roadbed, bridges, culverts, rolling stock, depots, station grounds, shops, buildings, gravel beds, and all other property, real and personal, exclusively used in the operation of such railway. In assessing said railway and its equipments, said council shall take into consideration the gross earnings per mile for the year ending January first, preceding, and any and all other matters necessary to enable said council to make a just and equitable assessment of said railway property. If a part of any railway is without this state, then, in estimating the value of its rolling stock and movable property, they shall take into consideration the proportion which the business of that part of the railway lying within the state bears to the business of the railway without this state. [C. '73, § 1319.]

SEC. **1337. Statement sent county auditors.** On or before the twenty-fifth day of March of each year the council shall transmit to the county auditor of each county, through and into which any railway may extend, a statement showing the length of the main track within the county, and the assessed value per mile of the same, as fixed by a ratable distribution per mile of the assessed valuation of the whole property. [16 G. A. ch. 153; C. '73, § 1320.]

SEC. **1338. Levy and collection of tax.** At the first meeting of the board of supervisors held after said statement is received by the county auditor, it shall cause the same to be entered on its minute book, and make and enter therein an order stating the length of the main track and the assessed value of each railway lying in each city, town, township or lesser taxing district in its county, through or into which said railway extends, as fixed by the council, which shall constitute the taxable value of said property for taxing purposes; and the taxes on said property, when collected by the county treasurer, shall be disposed of as other taxes. The county auditor shall transmit a copy of said order to the council or trustees of the city, town, or township. [C. '73, § 1321.]

The order of the board becomes the basis for the levy of taxes on railway property for all purposes, and the assessment need not be placed upon the assessor's books: *Sioux City & St P. R. Co. v. Osceola County*, 45–168, 177.

The valuation upon which a railway company is to be taxed within any corporation or taxing district is to be determined from the number of miles of main track within the corporation or district, as determined by the order of the board of supervisors, and the value per mile as fixed by the executive council. The order of the board determining the number of miles of track is not, in any sense, an assessment of valuation, and the provision of statute exempting agricultural and horticultural lands lying within the limits of incorporated towns and cities from taxation for city purposes have no application to railway property. The taxes due from the railroad company for such purposes cannot be reduced by reason of the fact that the track runs for a portion of the way within the city limits through land that is not platted or laid out into lots: *Illinois Cent. R. Co. v. Hamilton County*, 73–313.

SEC. **1339. Rate.** All such railway property shall be taxable upon said assessment at the same rates, by the same officers and for

the same purpose as the property of individuals within such counties, cities, towns, townships and lesser taxing districts. [C. '73, § 1322.]

SEC. **1340. Number of sleeping and dining cars.** In addition to the matters required to be contained in the statement made by the company for the purpose of taxation, such statement shall show the number of sleeping and dining cars not owned by such corporation, but used by it in operating its railway in this state during each month of the year for which the return is made, the value of each car so used, and also the number of miles each month said cars have been run or operated on such railway within the state, and the total number of miles said cars have been run or operated each month within and without the state. [17 G. A., ch. 114, § 1.]

CHAPTER XLIV, TWENTY-EIGHTH GENERAL ASSEMBLY.

ASSESSMENT OF TAXES.

S. F. 148.

AN ACT to amend section thirteen hundred and forty (1340) of the code, relating to the assessment of taxes.

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

SECTION 1. **Statement to show average daily service.** That section thirteen hundred and forty (1340) of the code be amended by adding thereto the following:

"Such statement shall show the average daily sleeping car and dining car service or wheelage operated on each part or division of the line or system within the state, designating the points on the lines where variations occur, with the mileage of that part having the same daily service or wheelage."

Approved March 21, 1900.

SEC. **1341. Assessment by executive council.** The council shall, at the time of the assessment of other railway property for taxation, assess for taxation the average number of cars so used by such corporation each month, and the assessed value of said cars shall bear the same proportion to the entire value thereof that the monthly average number of miles such cars have been run or operated within the state shall bear to the monthly average number of miles such cars have been used or operated within and without the state. Such valuation shall be in the same ratio as that of the property of individuals, and shall be added to the assessed valuation of the corporation, fixed under the preceding section. [Same, §§ 2, 3.]

Prior provisions as to taxation of sleeping cars *held* constitutional, and not an interference with commerce: *Pullman Palace Car Co. v. Twombly*, 29 Fed., 658.

SEC. **1342. Real property of railways.** Lands, lots and other real estate belonging to any railway company, not used exclusively in the operation of the several roads, and all railway bridges across the Mississippi and Missouri rivers, and grain elevators,

shall be subject to assessment and taxation on the same basis as property of individua's in the several counties where situated. [C. '73, § 808.]

The right of the railway company to use the government bridge over the Mississippi river at Davenport, *held* not taxable, except as railroad property under § 1334: *Chicago, R. I. & P. R. Co v. Davenport*, 51–451.

The provisions of this section relate to the bridges mentioned, while those of § 1334 apply to other railway bridges. This section is not unconstitutional on the ground that it is not of uniform operation: *Missouri Valley & B. R. & B. Co. v. Harrison County*, 74–283.

These bridges are to be taxed as bridges and not as a part of the railroad, whether owned by the railroad or by private individuals: *Chicago, M. & St. P. R. Co. v. Sabula*, 19 Fed., 177.

While the United States supreme court has decided that it is the duty of the Union Pacific Railroad Company to operate its whole line, including the bridge at Council Bluffs, yet so much of the bridge as is in Iowa may be taxed under the Code of Iowa as a bridge, and not merely the bridge as a part of the road, more especially since that railroad enjoins in relation thereto all the substantial franchises of a bridge company: *Union Pacific R. Co. v. Pottawattamie County*, 4 Dillon, 497.

The portion of a railway bridge over the Mississippi river between Iowa and Illinois which is taxable in Iowa is determined by the middle of the main navigable channel or channel most used and not by the middle of the great bed of the stream as defined by the banks of the river: *Chicago & N. W. R. Co. v Clinton*, 88–188.

SEC. **1343. Water and gas works—electric plants—street railways.** The lands, buildings, machinery and mains belonging to individuals or corporations operating water works or gas works; the lands, buildings, machinery, tracks, poles and wires belonging to individuals or corporations furnishing electric light or power; the lands, buildings, machinery, poles, wires, overhead construction, tracks, cables, conduits and fixtures belonging to individuals or corporations operating railways by cable or electricity, or operating elevated street railways; and the lands, buildings, tracks and fixtures of street railways operated by animal power, shall be listed and assessed in the assessment district where the same are situated. But where any such property except the capital stock is situated partly within and partly without the limits of a city or town, such portions of the said plant shall be assessed separately, and the portion within the said city or town shall be assessed as above provided, and the portion without the said city or town shall be assessed in the district or districts in which it is located. All the personal property of such individuals and corporations used or purchased by them for the purposes of such gas or water works, electric light plants, electric or cable railways, elevated street railways or street railways operated by animal power, including the rolling stock of such railways and street railways, and the animals belonging to such street railways operated by animal power, shall be listed and assessed in the assessment district where usually housed or kept. The actual value of the capital stock over and above that of the above listed property shall be listed and assessed as prescribed in section thirteen hundred and twenty-three hereof.

SEC. **1344. Roadbeds and highways.** No real estate used by railway corporations for roadbeds shall be included in the assessment to individuals of the adjacent property, but all such real estate shall be the property of such companies for the purpose of taxation; nor shall any real estate occupied as a public road be assessed and taxed as part of adjacent lands. [C. '73, § 809.]

SEC. **1345. Express companies.** Any person or persons, joint stock association, company or corporation conveying to, from or through this state, or any part thereof, money, packages, gold, silver, plate, or other articles by express on contract with any railroad or steamboat company, or the managers, lessees, agent or receiver thereof, not including railroad or steamboat companies engaged in the ordinary transportation of merchandise and property in this state, shall be deemed to be an express company. [26 G. A., ch. 32, §1.]

SEC **1346. Statements.** Every such express company shall, on or before the first Monday in May of each year, make and deliver to the auditor of state a statement, verified by the oath of the officer or agent making such report, showing the entire receipts for business done within this state of each agent of such company doing business in this state, for the year then next preceding the first day of March, for and on account of such company, including its proportion of gross receipts for business done by such company in connection with other companies; but nothing herein contained shall release such express companies from the assessment and taxation of their tangible property in the manner that other tangible property is assessed and taxed. Such company making statement of such receipts shall include as such all sums earned or charged for the business done within this state for such preceding year, whether actually received or not. Such statement shall contain an abstract of the amount received in each county, and the total amount received for all the counties. In case of the failure or refusal of such express company to make such statement before the first Monday of May, it shall then be the duty of each local agent of such express company within this state annually, between the first day of May and the first day of June, to make out and forward to the auditor of state a similar verified statement of the gross receipts of his agency for the year then next preceding the first day of March. When such statement is made, such express company shall, at the time of making the same, pay into the treasury of the state the sum of one dollar on each one hundred dollars of such receipts. And any such express company failing or refusing for more than thirty days after the first day of June in each year to render an accurate account of its receipts in the manner above provided, and to pay the required taxes thereon, shall forfeit one hundred dollars for each additional day such statement and payment shall be delayed, to be recovered by an action in the name of the state of Iowa on the relation of the auditor of state in any court of competent jurisdiction, and the attorney-general shall conduct such prosecution; and such express company so failing or refusing shall be prohibited from carrying on said business in this state until such payment is made. [Same, § 2.]

CHAPTER 45.

TAXATION OF EXPRESS COMPANIES.

S. F. 66.

AN ACT providing for the taxation of the property of express companies and repealing sections thirteen hundred and forty-five (1345) and thirteen hundred and forty-six (1346) of the code, and chapter thirty-one (31) of the acts of the Twenty-seventh General Assembly.

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

SECTION 1. **Express companies—annual statement—what to contain.** Every company engaged in conveying to, from, through, in or across this state, or in any part thereof, money, packages, gold, silver, plate, merchandise, or any other article, by express, under a contract, express or implied, with any railroad company, or the managers, lessees, agents, or receivers thereof, provided such company is not a railroad company, a freight line company, nor an equipment company, shall be deemed and held to be an express company within the meaning of this act, and every such express company shall on or before the first Monday in May, 1900, and annually thereafter between the first day of February and the first day of March, make out and deliver to the auditor of state a statement verified by the oath of an officer or agent of said company, making such statement, with reference to the first day of January next preceding, showing:

First.—The name of the company, and whether a corporation, partnership, or person, and under the laws of what state or country organized.

Second.—The principal place of business, and the location of its principal office and the name and postoffice address of its president, secretary, and superintendent or general manager and the name and postoffice address of its principal officers or managing agent in Iowa.

Third.—The total capital stock of said company; (a) authorized; (b) issued.

Fourth.—The number of shares of capital stock issued and outstanding, and the par face value of each share, and in case no shares of stock are issued in what manner the capital stock thereof is divided, and in what manner such holdings are evidenced.

Fifth.—The market value of said shares of stock on the first day of January next preceding, and if such shares have no market value then the actual value thereof; and in case no shares of stock have been issued state the market value, or the actual value, in case there is no market value of the capital thereof, and the manner in which the same is divided.

Sixth.—The real estate, buildings, machinery, fixtures, appliances, and personal property owned by said company and subject to local taxation within the state of Iowa, and the location and actual value thereof in the county, township, or district where the same is assessed for local taxation.

Seventh.—The specific real estate, together with the improvements thereon, and all bonds, mortgages, and other personal property owned by said company, situated outside of the state of Iowa, and used exclusively outside the conduct of the business, with a specific description of all bonds, mortgages, and other personal property, and the cash value thereof, the purposes for which the same are used, and where the same are kept or deposited, and each piece of real estate, where located, the purpose for which the same is used, and the actual value thereof, in the locality where situated.

Eighth.—All mortgages upon the whole or any part of its property, together with the dates and amounts thereof.

Ninth.—The total length of lines or routes over which the company transports such merchandise, freight, or express.

(b.) The total length of such lines or routes as are outside of the state of Iowa.

(c.) The length of such lines or routes within each of the counties, townships, and assessment districts within the state of Iowa.

SEC. 2. **Statements—where and when filed—penalty.** Upon the filing of such statements, the auditor of state shall examine each of them, and if he shall deem the same insufficient, or in case he shall deem that other information is requisite, he shall require such officer or agent to make such other and further statements as said auditor of state may call for. In case of the failure or refusal of any company to make out and deliver to the auditor of state any statement or statements required by this act, such company shall forfeit and pay to the state of Iowa one hundred dollars for each day such report is delayed beyond the first Monday in May, 1900, and the first Monday in March annually thereafter, to be sued and recovered in any proper form of action in the name of the state of Iowa, on the relation of the auditor of state, and such penalty when collected shall be paid into the general fund of the state.

SEC. 3 **Assessment by executive council.** The executive council shall meet on the first Monday in May, 1900, and on the first Monday in March in each year thereafter, at which meeting the auditor of state shall lay such statements, with such information as may have been furnished him, before said executive council, and it shall thereupon value and assess the property of such company, in the manner hereinafter set forth, after examining such statements, and after ascertaining the actual value of the property of such company therefrom, and from such other information as it may have or obtain. For that purpose the executive council may require such company, by its agents or officers, to appear before said council with such books, papers, or other statements as the council may require, or it may require additional statements to be made by such company, and may compel the attendance of witnesses, in case said council shall deem it necessary, to enable it to ascertain the actual value of such property; any such company interested may, upon written application, appear before the executive council at such meeting, and be heard in the matter of the valuation of the property of such company for taxation.

SEC. 4. **Actual value—how ascertained.** The executive council shall first ascertain the actual value of the entire property owned by said company, from said statements or otherwise for that purpose taking the aggregate market value of all shares of capital stock, in case said shares have a market value, and in case they have none taking the actual value thereof or of the capital of said company, in whatever manner the same is divided, in case no shares of capital stock have been issued; provided, however, that in case the whole or any portion of the property of said company, shall be encumbered by a mortgage or mortgages, such council shall ascertain the actual value of such property by adding to the market value or the aggregate shares of stock or to the value of the capital, in case there shall be no such shares, the aggregate amount of the market or cash value of such mortgage or mortages, and the result shall be deemed and treated as the actual value of the property of such company. The executive council shall, for the purpose of ascertaining the actual value of the property within the state of Iowa, next ascertain, from such statements or otherwise, the actual value in localities where the same is situated, of the several pieces of real estate, and all bonds, mortgages, and other personal property situated without the state of Iowa, and used exclusively outside of the general business of such company, which said actual value shall be by the executive council deducted from the gross actual value of the property as above ascertained. The executive council shall next ascertain the actual value of the property of such company within the state of Iowa, and for that purpose may take into consideration the proportional value of the company's property without and within the state, and shall take, as a basis of the valuation of the company's property in this state, the proportion of the whole aggregate value of said company, as above ascertained after deducting the actual value of such real estate without the state, which the length of the routes within the state of Iowa bears to the whole length of the routes of such company, and such amount so ascertained shall be considered and taken to be the entire actual value of the property of said companies within the state of Iowa. From the entire actual value of the property within the state so ascertained, there shall be deducted by the said council the actual value of all the real estate, buildings, machinery, appliances, and personal property not used exclusively in the conduct of the business within the state that are subject to local taxation within the counties, townships, and other assessment districts as hereinbefore described in the sixth item of section one of this act.

SEC. 5. **Actual value per mile—taxable value.** The executive council shall thereupon ascertain the value per mile of the property within the state, by dividing the total value as above ascertained, after deducting the specific properties locally assessed within the state, by the number of miles within the state, and the result shall be deemed and held to be the actual value per mile of the property of such company within the state of Iowa. The assessed or taxable value shall be determined by taking that percentage

of the actual value so ascertained, as is provided by section thirteen hundred and five of the code, and such valuation and assessment shall be in the same ratio as that of the property of individuals.

SEC. 6. **Assessment in each county—how certified.** Said executive council shall thereupon, for the purpose of determining what amount shall be assessed by it to the said company, in each county of the state, through, across, into, or over which the route of said company extends, multiply the value per mile, as above ascertained, by the number of miles in each of such counties, as reported in said statements, or as otherwise ascertained, and the result thereof shall be by the said council certified to the auditor of state, who shall thereupon certify the same to the auditors respectively of the several counties through, into, over, and across which the routes of said company extend, together with a statement of the length of the routes in each township and assessment district in each county.

SEC. 7. **Levy and collection of tax—rates, etc.** At the first meeting of the board of supervisors held after such statement is received by the county auditor, it shall cause the same to be entered on its minute book and make and enter therein an order stating the length of the routes and the assessed value of each in each city, town, township, or other assessment district in its county, through or into which said routes extend, as fixed by the executive council, which shall constitute the taxable value of said property for taxing purposes, and the taxes on said property, when collected by the county treasurer, shall be disposed of as other taxes. The county auditor shall transmit a copy of said order to the councils of cities or towns, and to the trustees of each township, in the county. The county auditor shall also add to the value so apportioned the assessed value of the real estate, buildings, machinery, fixtures, appliances, and personal property not used exclusively in the conduct of the business situated in any township or assessment district as returned by the assessors thereof, and extend the taxes thereon upon the tax list as in other cases. All such property shall be taxable upon said assessment at the same rates, by the same officers, and for the same purposes as the property of individuals within such counties, townships, or assessment districts. The property so included in said assessment and the shares of stock in such companies so assessed shall not be taxed in this state except as provided in this act.

SEC. 8. **Penalty.** In case any such company shall fail or refuse to pay any taxes assessed against it in any county, township, or assessment district in the state, in addition to other remedies provided by law for the collection of taxes, an action may be prosecuted in the name of the state of Iowa by the county attorneys of the different counties of the state, on the relation of the auditors of the different counties of the state, and judgment in such action shall include a penalty of fifty per cent of the amount of the taxes so assessed and unpaid, together with reasonable attorney's fees for the prosecution of such action, which action may be prosecuted in any

county into, through, over, or across which the routes of any such company shall extend, or in any county where such company shall have an office or agent for the transaction of business.

SEC. 9. **"Company" defined.** The word "company," as used in this act, shall be deemed and construed to mean and include any person, co-partnership, association, corporation or syndicate that may own or operate, or be engaged in operating, any express route as herein defined, whether formed or organized under the laws of this state, any other state or territory, or of any foreign country.

SEC. 10. **Acts in conflict repealed.** The provisions of this act are intended to take the place of sections thirteen hundred and forty-five, and thirteen hundred and forty-six of the code, and such sections and each of them, and all other laws and parts of laws in conflict with this act are hereby repealed; provided, that all moneys now due the state on account of any assessment or charge made against any of such persons, co-partnerships, associations, corporations, or syndicates, and all penalties and charges thereon growing out of any of said repealed section[s], shall be paid and collected under the provisions of said repealed sections, the same as if said sections were not repealed, and it is hereby expressly provided that all rights of the state now accrued under said sections are hereby saved from the operation of the aforesaid repealing clauses.

SEC. 11. **In effect.** This act, being deemed of immediate importance, shall take effect and be in force from and after its publication in the Iowa State Register and Des Moines Leader, newspapers published at Des Moines, Iowa.

Approved April 7, 1900.

I hereby certify that the foregoing act was published in the Des Moines Leader April 13, 1900, and in the Iowa State Register April 14, 1900.

G. L. DOBSON,
Secretary of State.

SEC. **1357. Refusal to furnish statement.** If any corporation or person refuse to furnish the verified statements in this chapter required, or to list his property, or to take or subscribe the oath in this chapter required, the executive council, or assessor, as the case may be, shall proceed to list and assess such property according to the best information obtainable, and shall add to the taxable valuation one hundred per cent. thereof, which valuation and penalty shall be separately shown, and shall constitute the assessment; and if the valuation of such property shall be changed by any board of review, or on appeal therefrom, a like penalty shall be added to the valuation thus fixed. [17 G. A., ch. 59, § 7; C. '73, §§ 823, 1318; R., § 734.]

SEC. **1358. False statement.** Any person making any verified statement or return, or taking any oath required by this chapter, who knowingly makes a false statement therein, shall be guilty of perjury.

TITLE VIII, CHAPTER 3.

OF FERRIES AND BRIDGES.

SEC. **1582. Railway bridges across boundary rivers.** Any railway or bridge company incorporated under the laws of the state, or of Wisconsin, Illinois, Nebraska, Kansas or South Dakota, may construct a railway bridge across the Mississippi, Missouri or Big Sioux river, connecting with the eastern or western terminus, as the case may be, of any railway terminating on the Iowa bank of either of said rivers, at such place as shall be designated therefor by the board of supervisors of the county wherein such terminus is made, and extending toward a point on the opposite bank that may be selected by such company. [C. '73, § 1031.]

SEC. **1583. Plan to be approved.** No bridge shall be built under the provisions of the preceding section, until the plan thereof has been submitted to and approved by the board of supervisors of the county in which the bridge is to be partly located. [C. '73, § 1032.]

SEC. **1585. Railway ferry.** Any such company may establish a ferry across any of said rivers at or near the terminus of its road, for the sole purpose of crossing the freight and passengers of such roads until the bridge is ready for use. [C. '73, § 1034.]

SEC. **1586. Obstruction of navigation.** No bridge erected under the provisions of this chapter shall be so located or constructed as to unnecessarily impede, injure or obstruct the navigation of said rivers. [C. '73, § 1035.]

SEC. **1587. Bonds and stock.** Any such company may issue its bonds or obligations for an amount not exceeding the cost of such bridge, and of its roads in the state, and may secure the payment thereof by a mortgage on the same, and issue certificates of common and preferred stock; the preferred stock to be only on condition that the holders of the common stock give their written consent thereto. [C. '73, § 1036.]

SEC. **1588. Resident director—process.** Any company acting under the provisions of this chapter shall elect at least one director who shall be a citizen of and reside in this state, and such company shall be liable to be sued in any court of competent jurisdiction, and service of original notice on said resident director shall be sufficient notice to the company of the pendency of the action. [C. '73, § 1037.]

SEC. **1589. Ferries—license.** The board of supervisors may grant such ferry licenses as may be needed within its county, for a period not exceeding ten years, and prescribe the rates of ferriage, as well as the hours of the day or night during which the ferry must be attended, both of which may, from time to time, be changed at the discretion of the board. [C. '73, §§ 1011–12; R., §§ 1200–1; C. '51, §§ 712, 713.]

The rights of a riparian owner, at common law and under the statute, in relation to a ferry franchise, discussed; and *held* that a stranger has no right to land ferry-boats upon the soil of such owner, nor can he use a highway laid out across the land of such owner, without compensation to him: *Prosser v. Wapello County*, 18–327; *Prosser v. Davis*, 18–367.

A ferry franchise is not lost by the death of the party to whom it is granted, but passes to his personal representatives: *Lippencott v. Allander*, 27–460.

The revocation of a ferry license by a board of supervisors may be appealed from: *Lippencott v. Allander*, 25–445.

SEC. **1590. Exclusive privilege.** In granting a ferry license, the board of supervisors may make the privilege granted exclusive for a distance not exceeding one mile in either direction from it. After twenty days' notice to the person who has obtained such privilege, if it is made to appear to the board that the public good requires other ferries, a new license may issue therefor. The notice required must be served personally upon the owner, or on the person in charge of the ferry boat. [C. '73, § 1013; R., § 1202; C. '51, § 714.]

Grants of exclusive ferry licenses, even over navigable streams as the Mississippi river are upheld on grounds of public necessity or advantage: *Burlington, etc., Ferry Co. v. Davis*, 48–133; *United States ex. rel. v. Fanning*, Mor. 348.

The grant of a ferry franchise necessarily implies the right to exclusive privileges within the prescribed limits: *Phillips v. Bloomington*, 1 G. Gr., 498.

If a ferry license does not purport to confer an exclusive privilege, an exclusive right cannot be inferred: *McEwen v. Taylor*, 4 G. Gr., 532.

The use of a navigable river for a public highway is of paramount importance and will prevail over a privilege granted for a ferry. If the mode of operating the ferry is such as to encroach upon the free navigation of the stream, the owner of the ferry must yield to such free navigation, although the owner of a boat navigating the stream would be liable for any wilful injury done to the ferry: *Steamboat Globe v. Kurtz*, 4 G. Gr., 433.

A person not possessing a franchise may, within the limits of an exclusive franchise granted to the owner of the ferry, transport his own teams and conveyances, for instance, where he is a carrier of the United States mails, but he cannot make such private individual right the medium or cover for carrying passengers whose transportation legally belongs to the owner of the franchise: *Weld v. Chapman*, 2–524.

SEC. **1591. Preference.** In granting a ferry license, preference must be given to the keeper of a previous ferry at the same point, and, if a new one, to the owner of the land; but if there is none such, or if, after giving the same notice as is required by the last section, he fails to make application therefor, or if, in the opinion of the board, he is an improper person to receive the same, it may be conferred on any other proper applicant. [C '73, § 1014; R., § 1203; C. '51, § 715.]

SEC. **1592. Between different counties.** Where the opposite shores of a stream are in different counties, a license from either is sufficient, and the board of supervisors first exercising jurisdiction by granting a license will retain it during the term of such license. [C. '73, § 1015; R., § 1204; C. '51, § 716.]

SEC. **1598. Between different states.** Where but one shore of the river is within this state, the board of supervisors possesses the same power, so far as it is concerned, as though the river lay wholly within this state. [C. '73, § 1016; R , § 1205; C. '51, § 717.]

In such case the grant of a franchise gives no rights beyond the limits of the state: *Weld v. Chapman*, 2–524; *Burlington, etc., Ferry Co. v. Davis*, 48–133.

SEC. **1594. Bond.** The board of supervisors, upon being satisfied that the requirements of this chapter have been complied with, and that a ferry is needed at such place, and that the applicant is a suitable person to keep it, must grant the license; which, however, shall not issue until the applicant files a bond, with sureties to be approved by the board or auditor, in a penalty not less than one hundred dollars, with the condition that he will keep the ferry in proper condition for use, and attend the same at all times fixed by the board for running it; that he will neither demand nor take any illegal tolls; and that he will perform all other duties which are or may be enjoined on him by law, which shall be filed in the county auditor's office. [C. '73, § 1017; R., § 1207; C. '51, § 719.]

SEC. **1595. Public business—mail.** Every ferryman must transport the public expresses of the United States, and of this state, and the United States mail, at all hours. [C. '73, § 1018; R., § 1209; C. '51, § 721.]

A public ferryman is a common carrier and charged with the duties and liabilities of such: *Slimmer v. Merry*, 23-90.

SEC. **1596. License recorded.** All licenses for ferries and toll bridges must be entered upon the records of the board of supervisors, and shall contain the rates of toll allowed. [C. '73, § 1019; R., § 1208; C. '51, § 720.]

SEC. **1597. Posting rates.** The rates of toll must be conspicuously posted up at each extremity of the bridge, or, if a ferry, on the boat, door of the ferry house, or some other conspicuous place near the ferry. [C. '73, § 1020; R., §§ 1210, 1220; C. '51, §§ 722, 732.]

SEC. **1598. Penalty.** The failure to have such list posted up as above provided will justify any person in refusing the payment of tolls, and where such failure is habitual, the proprietor of such bridge or ferry shall be liable to pay a penalty of twenty-five dollars, to be recovered in the name of the county against him, or against him and the sureties on his bond; which amount, when recovered, shall be paid into the county treasury and credited to the school fund. [C. '73, § 1021; R., §§ 1211, 1220; C. '51, §§ 723, 732.]

SEC. **1599. Notice of application.** Before a license can be granted for either a bridge or ferry, notice thereof must be posted up in at least three public places on each side of the river, if both are within the state, and in the township and neighborhood in which the proposed bridge or ferry is to be erected or kept, at least twenty days prior to the making of such application. [C. '73, § 1022; R., §§ 1206, 1219; C. '51, §§ 718, 731.]

SEC. **1600. Penalty for taking illegal toll.** The taking of illegal toll by any licensee shall subject the offender to a penalty of twenty-five dollars for every such offense, to be recovered by action on his bond, or against him individually, by the person who paid the illegal toll, for his own benefit; or he may bring an action in the name of the county, in which case the proceeds shall go to the county treasurer. [C. '73, § 1023; R., § 1236; C. '51, § 748.]

SEC. **1601. Forfeiture.** A failure in other respects to substantially comply with the terms fixed by the board shall work a forfeiture of any of the licenses herein authorized, and shall subject the party guilty of such failure to damages for all injury resulting therefrom, for which he shall be liable on his bond. [C. '73, § 1024; R., § 1237; C. '51, § 749.]

SEC. **1602. Refusal to pay tolls—penalty.** Any person who refuses to pay the regular tolls established and posted up in accordance with the provisions of this chapter, or who shall run through or pass around the toll gates with a view of avoiding their payment, shall forfeit the sum of five dollars for every offense, which, together with costs, may be recovered by the person entitled to such toll; but nothing herein contained shall prevent a person from fording a stream across which a toll bridge or ferry has been constructed. [C. '73, § 1025; R., § 1238; C. '51, § 750.]

SEC. **1603. Rules established.** The proprietor of any bridge or ferry authorized by this chapter may establish reasonable rules for the regulation of passengers, travelers, teams and freight passing or traveling thereon. [C. '73, § 1026; R., § 1239; C. '51, § 751.]

SEC. **1604. Franchise sold.** Any of the franchises contemplated in this chapter are subject to execution, and may be sold as personal property, and be subject to the same rights and consequences, except that the purchaser may take immediate possession of the property, and the sale thereof shall carry with it all the material, implements, rights of way and works of whatever kind necessary for or ordinarily used in the exercise of such franchise. [C. '73, §§ 1027-8; R., §§ 1240-1; C. '51, §§ 752-3.]

SEC. **1605. Free ferry.** Nothing in this chapter contained shall be so construed as to prevent any company, person, city, town or village from establishing a free ferry at any point where a license to keep a ferry has been granted, but when such free ferry is established, such company, person, city, town or village shall pay a reasonable compensation to the persons owning the same for all boats, ropes and other material, if the same be fit for use; and when a free ferry is established at a point at or near where a license has been granted to an individual, such individual shall be exonerated from any further obligation to maintain it. Bond and security shall be given in like manner by the person or company establishing the free ferry as required in this chapter. [C. '73, § 1029; R., § 1245; C. '51, § 757.]

SEC. **1606. Mill owners.** Nothing in this chapter shall be so construed as to prevent owners of mills from crossing themselves or customers free of charge. [C. '73, § 1030; R., § 1246; C. '51, § 758.]

TITLE IX, CHAPTER 1.

CORPORATIONS FOR PECUNIARY PROFIT.

SEC. **1637. Foreign corporation—filing articles—process.** Any corporation for pecuniary profit, other than for carrying on mercantile or manufacturing business, organized under the laws of another state, or of any territory of the United States, or of any foreign country, which has transacted business in the state of Iowa

since the first day of September, 1886, or desires hereafter to transact business in this state, and which has not a permit to do such business, shall file with the secretary of state a certified copy of its articles of incorporation, duly attested, accompanied by a resolution of its board of directors or stockholders authorizing the filing thereof, and also authorizing service of process to be made upon any of its officers or agents in this state engaged in transacting its business, and requesting the issuance to such corporation of a permit to transact business in this state; said application to contain a stipulation that such permit shall be subject to the provisions of this chapter. Before such permit is issued, the said corporation shall pay to the secretary of state the same fee required for the organization of corporations in this state, and if the capital of such corporation is increased, it shall pay the same fee as is in such event required of corporations organized under the law of this state. Any corporation transacting business in this state prior to the first day of September, 1886, shall be exempt from the payment of the fees required under the provisions of this section. The secretary of state shall thereupon issue to such corporation a permit, in such form as he may prescribe, for the transaction of the business of such corporation, and upon the receipt of such permit said corporation shall be permitted and authorized to conduct and carry on its business in this state. Nothing in this section shall be construed to prevent any foreign corporation from buying, selling and otherwise dealing in notes, bonds, mortgages and other securities. [21 G. A. ch., 76, § 1.]

SEC. **1638. Permit.** No foreign corporation which has not in good faith complied with the provisions of this chapter and taken out a permit shall possess the right to exercise the power of eminent domain, or exercise any of the rights and privileges conferred upon corporations, until it has so complied herewith and taken out such permit. [Same, § 2.]

SEC. **1639. Penalty.** Any foreign corporation that shall carry on its business in violation of the provisions of this chapter in the state of Iowa, by its officers, agents or otherwise, without having complied with this statute and taken out and having a valid permit, shall forfeit and pay to the state, for each and every day in which such business is transacted and carried on, the sum of one hundred dollars, to be recovered by suit in any court having jurisdiction; and any agent, officer or employe who shall knowingly act or transact such business for such corporation when it has no valid permit as provided herein, shall be guilty of a misdemeanor, and for such offense shall be fined not to exceed one hundred dollars, or be imprisoned in the county jail not to exceed thirty days, or by both such fine and imprisonment, and pay all costs of prosecution. Nothing contained in this chapter shall relieve any person, company, corporation, association or partnership from the performance of any duty or obligation now enjoined upon or required of it, or from the payment of any penalty or liability created by the statutes heretofore in force, and all foreign corporations, and the officers and agents thereof, doing business in this state shall be subject to all the

liabilities, restrictions and duties that are or may be imposed upon corporations of like character organized under the general laws of this state, and shall have no other or greater powers. [Same, § 4.]

Where an Iowa corporation and a Nebraska corporation were organized to operate a joint enterprise and the Iowa corporation transferred its interest in the enterprise to the Nebraska corporation, which continued to operate the business in Nebraska and Iowa, *held*, that the Nebraska corporation was guilty of a violation of this statute in failing to procure a license under which to carry on the enterprise in Iowa, but that in view of the fact that it appeared not to have acted in bad faith it should have a reasonable time in which to comply with the statute before being ousted of its privileges and franchises: *State v. Omaha & C. B. R. & B. Co.*, 91-517.

The original statute containing a provision that the license should be forfeited on removal of a suit by the corporation to a federal court, *held* unconstitutional for the reason that it made the stipulation not to remove cases to the federal courts a condition for obtaining the permit to do business: *Barron v. Burnside*, 121 U. S., 186.

SEC. **1640. Dissolution—receiver.** Courts of equity shall have full power, on good cause shown, to dissolve or close up the business of any corporation, and to appoint a receiver therefor, who shall be a resident of the state of Iowa. An action therefor may be instituted by the attorney-general in the name of the state, reserving, however, to the stockholders and creditors all rights now possessed by them.

SEC. **1641. Ownership of property.** Corporations organized in any foreign country, or corporations organized in this country the stock of which is owned in whole or in part by aliens or non residents, shall have the same rights, powers and privileges with regard to the purchase and ownership of real estate in this state as are granted to nonresident aliens in section twenty-eight hundred and ninety, chapter one, title fourteen, of this code.

TITLE X, CHAPTER 2.

LEVEES, WATER COURSES, ETC.

SEC. **1948. Nuisance.** Any ditch, drain or water course which is now or may hereafter be constructed so as to prevent the surplus and overflow waters from the adjacent land from entering the same, is hereby declared a nuisance, and the same may be abated as such; and the diverting, obstructing, impeding, or filling up of such ditches, drains, or water courses, or breaking down of such levees in any manner by any person, without legal authority, is hereby declared a nuisance, criminally punishable as such. [21 G. A., ch. 139; 19 G. A., ch. 44, § 7; 16 G. A., ch. 140, § 4; C. '73, §§ 1214, 1216.]

SEC. **1951. Levees, ditches or drains in public highway.** Levees, ditches, drains and embankments may be located and constructed within the limits of public highways, on either or both sides of and along the same, to be so built as not materially to interfere with the public travel thereon, by taxation and assessment under the provisions of this chapter, and, when constructed, shall be under the control of the board of supervisors of the county in which they are situated; and it shall have power to grant a right of way thereon

to any railway that will maintain them while used by it, subject to any claim for damages against the company in any condemnation proceedings which shall be instituted, and the damages awarded, paid, or secured to be paid before possession shall be given, but the county shall not be required on account thereof or otherwise to keep up such improvements at its expense. [20 G. A., ch. 186, § 1.]

The board acquires jurisdiction of the proceedings to establish such drainage within the territory and through the land in question as it deems proper to effect the object of reclaiming all swamp and overflowed land in the locality to be drained: *Butts v. Monona County*, 69 N. W., 284.

If the right of appeal exists when the tax is levied the statute is not unconstitutional as to such tax: *Ibid: Yeomans v. Riddle*, 84-147.

TITLE X, CHAPTER 4.

OF TAKING PRIVATE PROPERTY FOR WORKS OF INTERNAL IMPROVEMENT.

SEC. **1995. By railway—limit of.** Any railway corporation organized in this state, or chartered by or organized under the laws of the United States or any state or territory, may take and hold under the provisions of this chapter so much real estate as may be necessary for the location, construction and convenient use of its railway, and may also take, remove and use for the construction and repair of said railway and its appurtenances, any earth, gravel, stone, timber or other materials on or from the land so taken. The land so taken, otherwise than by the consent of the owners, shall not exceed one hundred feet in width, except for wood and water stations, unless where greater width is necessary for excavation, embankment or depositing waste earth. [17 G. A., ch. 126; C. '73, § 1241; R., § 1314.]

Provisions constitutional: The use for which land appropriated for a right of way is taken is a public one although it is for private profit, and the provisions authorizing the taking of private property for such purpose upon compensation being made are therefore constitutional: *Stewart v. Board of Supervisors*, 30-9.

Nature and extent of right: The railway company procuring the right of way is the owner of its right of way so long as it is used for railway purposes, and the owner of the land taken has no right to go thereon for the construction of fences or other purposes: *Heskett v. Wabash, St. L. & P. R. Co.*, 41-467.

The company may take, remove and use for the construction and repair of its railway and appurtenances any earth, gravel, stone, timber or other material on or from the land condemned, and is not limited as to the quantity of such materials to be used in the construction and repair of its road. The limitation to so much as is necessary implied under this section relates to the quantity of land to be taken: *Winklemans v. Des Moines N. W. R. Co.*, 62-11.

It would seem that the company may sink wells on its right of way, for the purpose of supplying its engines with water, and would not be liable in damages for thus diverting percolating water from a spring upon the adjoining land of the person granting the right of way: *Hougan v. Milwaukee & St. P. R. Co.*, 35-55 [illegible].

Timber standing upon the property taken for right of way, other than that necessary for the construction of the railway, remains the property of the owner of the land: *Preston v. Dubuque & P. R. Co.*, 11-15.

The statute by express language authorizes the taking of material for the construction and use of the railway, but under a right of way deed granting an easement "for all purposes connected with the construction, use and occupation of the railway," *held*, that the railway company was not authorized to take sand for use in constructing a roundhouse, but the owner might take such sand so far as not interfering with the use of the land for railroad purposes: *Vermilya v. Chicago, M. & St. P. R. Co.*, 66 606.

By the condemnation proceedings a corporation acquires the right to the exclusive use of the surface of the land, and the condemnation is made on the theory that this use of the surface will be perpetual: *Hollingsworth v. Des Moines & St. L. R. Co.*, 63-443; *Cummings v. Des Moines & St. L. R. Co.*, 63-397; *Clayton v. Chicago, I. & D. R. Co.*, 67-238.

The conveyance to a railway of a right of way conveys only an easement: *Brown v. Young*, 69-625.

Constitutes an incumbrance: The right of way over land for a railway is an incumbrance for which a grantee of the land may recover on a covenant against incumbrances, although he knew of the existence of such right of way at the time of purchasing: *Barlow v. McKinley*, 24-69; *Jerald v. Elly*, 51-321; *Flynn v. White Breast Coal, etc., Co.*, 72-738.

The doctrine that the right of way for a railroad is an encumbrance on the premises from which it is taken for which a grantee may recover under a warranty deed though he has knowledge of such incumbrance is not applicable to a public highway: *Harrison v. Des Moines & Ft. D. R. Co.*, 91-114.

The mere use and exercise of a right of way over the property is not sufficient to establish such right or raise a presumption of its existence: *Jerald v. Elly*, 51-321.

Subject to foreclosure proceedings: Where a railway company takes a deed for a right of way, and enters into possession pending foreclosure proceedings against the property, it is bound by decree and sale thereunder, though not made a party: *Jackson v. Centerville, M. & A. R. Co.*, 64-292.

Width which may be taken: Under the statutory provision allowing the condemnation of a strip of land one hundred feet in width, the company is not limited to fifty feet on each side of its tracks, but the track may be located anywhere on the tract taken: *Stark v. Sioux City & P. R. Co.*, 43-501.

Additional width: Where a company has the power to build an additional lateral road auxiliary to the original road, the construction and maintenance of which is possible only upon an independent right of way, the right of way statute, limiting the width of right of way to one hundred feet, does not prevent the condemnation of land for such additional road; and the same power may be exercised by another corporation, even though it derives all its means from the first, and builds the road with the express design of leasing it: *Lower v. Chicago, B. & Q. R. Co.*, 59-563.

Where a company entered into possession of and constructed its road over a right of way thirty feet in width acquired by deed, and subsequent proceedings to condemn a right of way seventy feet wide were instituted, *held*, that the subsequent proceedings must be considered as intended to secure a right of way in addition to that acquired by deed: *Gray v. Burlington & M. R. R. Co.*, 37-119.

When a railway company applies for a hundred feet or less in width for a right of way it must be conclusively presumed that the amount applied for is necessary, and the fact that the company owns land on one side of such right of way will not limit the amount which it may condemn: *Stark v. Sioux City & P. R. Co.*, 43-501.

Depot grounds: Under a previous statute, *held*, that a company had no right to condemn additional land for depot grounds, and that therefore any proceedings for that purpose might be enjoined: *Forbes v. Delashmutt*, 68-164. See now § 1998.

Use by another road: Where right of way over land has been acquired by one railroad the owner cannot have an injunction against another road for using such right of way under agreement with the road to which it belongs: *Holbert v. St. Louis, K. C. & N. R. Co.*, 38-315.

Appropriation of right of way by another company: The easement acquired by a railroad company is acquired to public use, and is in the nature of a grant from the state for the use and purposes provided by law, and when the company fails to carry out the purposes of the grant the legislature may transfer the easement to another company upon making compensation to the former company: *Noll v. Dubuque, B. & M. R. Co.*, 32-66; *Central Iowa R. Co. v. Moulton & A. R. Co.*, 57-249.

Transfer to another road: Where a right of way has been deeded to one railway company in consideration of the benefit to be derived from the construction of its line, such right of way cannot be transferred by that company to another proposing to construct a different line not running in the same direction: *Crosbie v. Chicago, I. & D. R. Co.*, 62–189.

Who entitled to condemn: It is sufficient under the statute to allege that the party seeking to secure a right of way is a corporation duly organized, and engaged in building a railroad: *Chicago, N. & S. W. R. Co. v. Mayor of Newton*, 36–299.

A foreign corporation could not, before the amendment of this section, procure right of way by condemnation proceedings, and might be restrained by injunction from using property for right of way until the right was in some other manner procured: *Holbert v. St. Louis, K. C. & N. R. Co.*, 45–23.

Before the change in the statute allowing foreign corporations to condemn land for right of way, *held*, that where nothing appeared to the contrary it would be presumed that the condemnation was properly made on behalf of the corporation duly authorized to institute the proceedings: *Kostendader v. Pierce*, 37–645.

Horse railways: The provisions for condemning right of way for the use of railway companies are applicable to railways operated by animal power as well as those operated by steam: *Clinton v. Clinton & L. H. R. Co.*, 37–61.

Railways in cities: By § 767 the method of assessing damages for right of way is made applicable to damages caused to abutting owners from the construction of a railway upon the streets of a city, and such proceedings can be instituted only by the company, and not by the property owner, who may have an action for damages without regard to the method of assessment thus provided: *Mulholland v. Des Moines, A. & W. R. Co.*, 60–740.

Further as to the right of railway companies to construct their tracks over the streets of cities and towns, see notes to § 767.

Parol license: Where the company by parol license enters upon ground to construct its railway the subsequent payment of the damages assessed gives it an easement by contract, which, though arising upon parol, cannot be revoked: *Slocumb v. Chicago, B. & Q. R. Co.*, 57–675.

In such case a subsequent purchaser takes subject to the right of way, whatever it is, if it does not exceed the statutory width, and cannot set up non-user by the company of a portion, and adverse possession thereof, to defeat its rights: *Ibid.*

Presumption: Where a railway company is conceded to be in rightful possession of a right of way it will be presumed that it has an easement acquired either by condemnation or purchase: *Drake v. Chicago, R. I. & P. R. Co.*, 63–302.

Subsequent condemnation: Where the compensation for the right of way has not only been agreed upon, but also paid to the land owner by the corporation and he has conveyed the right of way, proceedings to condemn such right of way cannot be instituted, and would be entirely void for want of jurisdiction: *Council Bluffs & St. L. R. Co. v. Bentley*, 62–446.

In an action against a railroad by an adjacent owner for damages for the occupation of a street in which such adjacent owner holds the fee, it is error to reject a deed from such owner to the company for right of way over his premises: *Frith v. Dubuque*, 45–406.

The occupation of premises taken for right of way cannot be enjoined for failure to pay therefor under proceedings which have been declared void where the company has a deed granting it a right of way substantially the same as that occupied: *Bentley v. Wabash, St. L. & P. R. Co.*, 61–229.

Where a railway company having a right of way thirty feet in width instituted proceedings to condemn a right of way seventy feet in width, *held*, that such proceedings must be considered as intended to secure an additional right of way, and that payment of the damages assessed in such proceedings did not cancel the obligation entered into by the company accepting the deed: *Gray v. Burlington & M. R. R. Co.*, 37–119.

SEC. **1996. For reservoirs.** It may also take and hold additional real estate at its water stations, for the purpose of constructing dams and forming reservoirs of water to supply its engines.

Such real estate shall, if the owner requests it, be set apart in a square or rectangular shape, including all the overflowed land, by the commissioners as hereafter provided; but the owner of the land shall not be deprived of access to the water or use thereof, in common with the company, on his own land. And the dwelling, outhouse, orchards, and gardens of any person shall not be overflowed or otherwise injuriously affected by any proceeding under this section. [C. '73, § 1242.]

SEC. **1997. Pipes.** Any such railway corporation may lay down pipes through any land adjoining the track of the railway, not to a greater distance than three-fourths of a mile therefrom, unless by consent of the owners of the land through which the pipes may pass beyond that distance, and maintain and repair such pipes, and thereby conduct water for the supply of its engines from any running stream; and shall, without unnecessary delay after laying down or repairing such pipes, cover the same so as to restore the surface of the land through which they may pass to its natural grade, and, as soon as practicable, replace any fence that it may be necessary to open in laying down or repairing such pipes; and the owner of the land through which the same may be laid shall have a right to use the land through which such pipes pass in any manner so as not to interfere therewith. Said pipes shall not be laid to any spring, nor be used so as to injuriously withdraw the water from any farm. Such corporation shall be liable to the owner of any such land for any damages occasioned by laying down, regulating, keeping open or repairing such pipes, to be recoverable, from time to time, as they may approve. [C. '73, § 1243.]

SEC. **1998. Additional depot grounds.** Any railway corporation owning or operating a completed railway shall have power to condemn lands for necessary additional depot grounds in the same manner as is provided by law for the condemnation of the right of way. Before any proceedings shall be instituted therefor, the company shall apply to the railway commissioners, who shall give notice to the land owner, and examine into the matter, and report by certificate, to the clerk of the district court in the county in which the land is situated, the amount and description of the additional lands necessary for the reasonable transaction of the business, present and prospective, of such company; whereupon the company shall have the power to condemn the lands so certified by the commissioners. [20 G. A., ch., 190, § 1.]

The railroad commissioners are authorized to allow the condemnation of additional land for depot purposes although there be no depot or station yet established at that place, and therefore as yet no "depot grounds:" *Jager v. Dey*, 80–23.

It is competent for a city to extend a street through the depot grounds of the railroad company, under proceedings for condemnation: *Chicago, M. & St. P. R. Co. v. Starkweather*, 66 N. W., 87.

using for that purpose only, any earth, gravel, stone, timber, etc., on or from the land taken, and the right to make cuts, embankments, etc., and includes the rights incident to rapid locomotion as against the owner of the fee. It seems that the right of way is intended to be in perpetuity: *Henry v. Dubuque & P. R. Co.*, 2-288.

The question as to the proper measure of damages in such cases discussed and the true measure declared to be the difference between the market value of the land entire, and its market value after the right of way is carved out: *Ibid.; Sater v. Burlington, etc., Plank Road Co.*, 1-386.

The amount of damages to be allowed is what will compensate plaintiff for the appropriation of the right of way. It may be more or less than the value of the property taken: *Gear v Chicago, C. & D. R. Co.*, 39-23.

Where the damages to a leasehold estate are to be assessed, the proper measure of damages is the difference in value of the annual use of the property, before taking and after: *Renwick v Davenport & N. W. R. Co.*, 49-664.

The land owner is entitled to the full and fair value of the land appropriated-and, in addition thereto, to such sum as will compensate him for the depreciation in value of his adjoining land by reason of the right of way, irrespective of any benefits of the road to the land; but speculative, contingent or future damages, not affecting the market value, cannot be allowed: *Smalley v. Iowa Pacific R. Co.*, 36-571.

Increased danger of injury to or destruction of the property by reason of exposure to fire or other dangers incident to the operation of a railroad are elements of damage for which compensation should be made: *Small v Chicago, R. I. & P. R. Co.*, 50-338, 334; *Dreher v. Iowa Southwestern R. Co.*, 59-599; *Dudley v. Minnesota & N. W. R. Co.*, 77-408. But increase in rate of insurance on farm buildings should not be considered: *Pingery v. Cherokee & D. R. Co.*, 78-438.

It is error to take into account the value of special property, such as a grove or house, which might be destroyed by fire: *Lance v. Chicago, M. & St. P. R. Co.*, 57-636.

The value of growing crops upon the right of way to be taken may be considered in assessing the compensation: *Ibid.*

The question whether, because of the construction of the road, the land is made more wet than it otherwise would be is a proper one, it not being sought to show that such damages were a result of the improper construction of the road: *Britton v. Des Moines, O. & S. R. Co.*, 59-540.

The fact that the road-bed is constructed in a cut is a proper fact to be shown in estimating damages: *Cummins v. Des Moines & St. L. R. Co.*, 63-397.

While the land owner is not entitled to prove the proximity of the depot or the number of tracks as independent elements of damage, yet such evidence may be admissible in determining the extent to which the company would probably use the ground taken in carrying on its business: *Ibid.*

As the company acquires the right to occupy and use the whole of the right of way, it cannot have the damages assessed on the theory that it will in fact use but part, and therefore that the occupation of buildings situated upon the right of way will not be disturbed. *Ibid.*

Unless it appears that the reversionary right of the land owner is of some value, as, for instance, by reason of the land being underlaid by coal or mineral, it is not error to disregard such reversionary interest and assess the damages at the market value of the property taken: *Ibid.; Hollingsworth v. Des Moines & St. L. R. Co*, 63-443.

The company may take, remove and use for the construction and repair of its railway and appurtenances any earth, gravel, stone, timber or other material on or from the land condemned, and is not limited as to the quantity of such materials to be used in the construction and repair of its road. The limitation to so much as is necessary, implied under this section, relates to the quantity of land to be taken: *Winklemans v. Des Moines N. W. R. Co.*, 62-11.

Although the right of way taken is an easement and the fee remains in the owner, yet, unless it is made to appear that the fee burdened with the easement is of some determinable value, the assessment of damages should be based on the full value of the land actually taken, and it is not error to refuse to instruct the jury on the theory that the fee remains in the owner, and that at some time in

CHAPTER 70, TWENTY-EIGHTH GENERAL ASSEMBLY.

CONDEMNATION OF ADDITIONAL GROUNDS FOR RAILWAY PURPOSES.

S. F. 274.

AN ACT to amend section nineteen hundred and ninety-eight (1998) of the code, relating to condemnation of additional ground for railway purposes.

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

SECTION 1. **Additional grounds for yards, etc.** That section nineteen hundred and ninety-eight (1998) of the code be amended by inserting in the third line thereof after the word "grounds" the following words: "Or yards, for additional or new right of way for constructing double track, reducing or straightening curves, changing grades, shortening or relocating portions of the line, for excavations, embankments, or places for depositing waste earth." And by striking out after the word "for" in the ninth line the words, "the reasonable transaction of the business," and insert in lieu thereof the words, "such purposes."

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

Approved April 3, 1900.

I hereby certify that the foregoing act was published in the Iowa State Register and the Des Moines Leader, April 5, 1900.

G. L. DOBSON,
Secretary of State.

SEC. **1999. Manner of condemnation.** If the owner of any real estate necessary to be taken for either of the purposes mentioned in this chapter refuses to grant the right of way or other necessary interest in said real estate required for such purposes, or if the owner and the corporation cannot agree upon the compensation to be paid for the same, the sheriff of the county in which such real estate may be situated shall, upon written application of either party, appoint six freeholders of said county, not interested in the same or a like question, who shall inspect said real estate, and assess the damages which said owner will sustain by the appropriation of his land for the use of said corporation, and make report in writing to the sheriff of said county; and, if the corporation shall, at any time before it enters upon said real estate for the purpose of constructing said railway, pay to the sheriff, for the use of the owner, the sum so assessed and returned to him as aforesaid, it may construct and maintain its railway over and across such premises. [C. '73, §§ 1244-5; R., §§ 1317-18.]

Measure of damages: The damages contemplated are the "just compensation" provided for by Const., art. I, § 18. The owner is to have a fair equivalent in money for the injury done him by the taking of his property. It is the right of way which is appropriated, not the fee in the land; but the right of way is such as is peculiar to a railroad, and is the right to all freedom in locating, constructing, using and repairing such road and its appurtenances, and taking and

the future the land may cease to be used for railway purposes and revert to such owner: *Clayton v. Chicago, I. & D. R. Co*, 67–238.

Where a railway company was seeking to condemn a right of way between the property of a riparian owner and the Mississippi river, *held*, that the owner was entitled to damages caused to an embankment constructed by him, extending out to a crib in the river: *Renwick v. Davenport & N. W. R. Co.*, 94–664.

The owner is not invested with the right to cross the right of way after its appropriation at his pleasure. Whatever right he has in that respect is subservient to that of the company using the road for the running of its trains: *Ibid.*

The question of the right of passage, as affected by the taking of the right of way, may be shown as affecting the damages: *Bell v. Chicago, B. & Q. R. Co.*, 74–343.

Various items of damage *held* properly taken into account by a witness in testifying as to the market value of land after taking the right of way: *Smalley v. Iowa Pacific R. Co.*, 36–571.

The prices at which other lands in the vicinity of the premises had been sold about the time of the commencement of the proceedings is not receivable in the absence of evidence that there was any similarity between the lots in question and those which it was claimed had been sold: *Cummins v. Des Moines & St. L. R. Co.*, 63–397; *Hollingsworth v. Des Moines & St. L. R. Co.*, 63–443.

It is proper for the court to state the law governing damages in such cases as found in the constitution and statutes of the state, no matter what evidence is introduced: *Ball v. Keokuk & N. W. R. Co.*, 74–132.

The recovery of the property owner is not limited to the damages which he has sustained if the property were to be used only for the purposes to which it is devoted when such proceedings are had, but the value of the property for any purpose for which it is available may be considered. Therefore, *held*, that the value of the land as coal land might be taken into account, it not being attempted to show the value of the coal underlying the right of way: *Doud v. Mason City & Ft. D R. Co.*, 76–438.

Damages which have resulted from an improper construction of the road cannot be considered in assessing the damage for right of way already taken. Therefore, *held*, that in such case the fact that the railroad company had excavated for a considerable distance through plaintiff's premises outside of its right of way could not be shown: *Ibid.*

The damages contemplated by the law to be allowed are the same before as after the road was built, except that in the latter case interest may be allowed. *Ibid.*

The proper rule in estimating the amount of damages is to confine the damages recoverable to those which naturally result from the taking and rightful use of the right of way and the proper construction of the road: *Ibid.*

The fact that different portions of the land are adapted to different uses, and only one of such portions is covered by the right of way, will not preclude the whole of the premises being considered in determining the damages: *Ibid.*

Market value: In determining the damages the proper rule is to first ascertain the fair market value of the premises over which the proposed improvement is to pass, irrespective of the improvement, and also the like value of the same, in the condition in which the premises will be after the land for the improvement has been taken, irrespective of the benefit which will result from the improvement, and the difference in value will constitute the measure of compensation: *Sater v. Burlington, etc., Plank Road Co.*, 1–386.

The owner may be a witness generally as to the value of the land before and after appropriation, leaving the opposite party, by his right of cross-examination, to learn the ability of the witness to judge in the premises and what he takes into consideration in making up his judgment: *Ibid.*

It is improper to ask the plaintiff what the damage was to him by the taking of the right of way. A witness who is shown to be properly qualified may be allowed to give an opinion as to the value of property, but not as to the amount of damage: *Hartley v. Keokuk & N. W. R. Co.*, 85–455.

In determining the amount of damage the witness may be allowed to testify as to the value immediately before the right of way was taken and immediately after, not taking into consideration the benefit to the land: *Harrison v. Iowa Midland R. Co.*, 36–323.

The opinion of a witness as to the value before taking is admissible: *Henry v. Dubuque & P. R. Co.*, 2–288, 311.

It is usual to take the testimony of the witness upon questions of the value of property when he states under oath that he knows its value or that he knows the value of like property: *Ball v. Keokuk & N. W. R. Co.*, 74–132.

Witnesses who were shown to be farmers, and acquainted with the land in question and the value of lands in that county, *held* to be competent to testify as to the value of land before and after location of the road: *Pingery v. Cherokee & D. R. Co.*, 78–438.

Evidence as to the value of land which is taken for right of way is to be considered in assessing the damages: *Ibid.*

Evidence as to the character of netting or screens used in the smoke-stacks of the company's engines is not admissible: *Ibid.*

Evidence as to the belief of the company or its mistake with reference to the ownership of the land is immaterial: *Ibid.*

The question as to whether the company will or will not furnish proper and suitable crossings cannot be considered: *Ibid.*

It is not proper in such proceedings to show by evidence at what price the purchase of right of way from adjoining tracts has been secured, unless it is shown that such tracts were of like character or that the right of way had a uniform and marketable value in that neighborhood: *King v. Iowa Midland R. Co.*, 34–458.

In ascertaining the damages to land used, improved and occupied together as one farm, witnesses cannot be asked as to the value of detached parcels: *Winklemans v. Des Moines, N. W. R. Co.*, 62–11.

Witnesses who were jurors for the assessment of damages in the first instance cannot be required to state on a trial of the case on appeal whether their report of the assessment made to the sheriff correctly expressed their judgment as to the amount of damages sustained: *Ibid.*

The fact that on the prior assessment the land owner made no claim for damages which were afterwards assessed upon appeal, *held* not objectionable, as it did not appear on the original assessment that such damages would result from the taking of the right of way: *Ibid.*

While it is competent to show the situation and general surroundings of the land, its character and the roads leading thereto, etc., yet where the land was situated beyond the limits of a city and was not in the market as residence property, *held*, that evidence as to the character of improvements being made upon the street leading toward the land, but which would not if extended come within eighty yards of it, was improper in determining the damages caused to the land: *La Mont v. St. Louis, D. M. & N. R. Co.*, 62–193.

The inquiry is not as to any special value of the property to the owner growing out of ownership of other distinct and separate property, nor that of the particular premises over which the road passes as intended to be put in the future to a particular use in connection with other distinct and separate pieces of land. Regard must be had to the immediate and not the remote damages of the appropriation: *Fleming v. Chicago, D. & M. R. Co*, 34–353.

Evidence of increased fire risk in connection with the use of the premises intended to be made in the future cannot be taken into account: *Ibid.*

It is not competent to show the assessed valuation of the property, and although the assessor may be a competent witness, he must be introduced as such: *Dudley v. Minnesota & N. W. R. Co.*, 77–408.

And in a particular case a verdict of $1,700 damages to a farm of three hundred and eighty acres, *held* not excessive: *Ibid.*

Entire premises: Damages to the entire premises necessarily and properly used by the owner in his business should be estimated, although such premises are divided by a street or highway: *Renwick v. Davenport & N. W. R. Co.*, 49–664.

Where the right of way passes through a farm the owner may show as damages depreciation in value of the whole farm, and is not limited to the damages to the governmental subdivision through which the road runs: *Hartshorn v. Burlington, C R. & N. R. Co.*, 52–613; *Ham v. Wisconsin, I. & N. R. Co.*, 61–716.

The whole tract is to be taken into account in the consideration of the damages, although the notice may specify only a portion of such tract: *Ellsworth v. Chicago & I. W. R. Co.*, 91–386.

Although the property is unimproved it may have a special value as a whole and there may be occasion to take into account the damages to the whole tract although the right of way covers only one subdivision thereof. Whether or not there are such special damages to the whole tract will be a question for the jury: *Ibid.*

Evidence showing the effect which the building of a railway will have upon a tract as a farm and the manner of carrying it on, may be competent, and, therefore, evidence showing the cuts and fills which the construction of the railroad will require and their effect upon farming operations is admissible: *Ibid.*

The doctrine that where a portion of a tract of land which is owned and used together is taken for right of way the damages are to be assessed with reference to the injury to the entire tract is not applicable to a case where the right of way of a railway is crossed at one or more points by the track of another company and the former company is not entitled by way of damages to the depreciation in value of its entire right of way due to the construction of the second road: *Chicago, I. & D. R. Co. v. Cedar Rapids, I. F. & N. W. R. Co.*, 86–500.

If a railway company applies to have the damages assessed, and, in its application, designates the land known as the farm of the adverse party, or if the jury is called under an agreement of both parties, and it is therein specified that the damages to the land owner in consequence of the location across his farm shall be assessed, the railway company will afterwards be estopped from confining the assessment to the immediate portion of land over which the railroad crosses, and also from denying defendant's ownership of such land, the damages to which they have agreed shall be assessed: *Mississippi & M. R. Co. v. Byington*, 14–572.

Where different portions of land belonging to the same owner were adapted to different uses, and only one of such portions was crossed by the right of way, *held*, that the portion not crossed could not be taken into consideration in determining the damages: *Haines v. St. Louis, D. M. & N. R. Co.*, 65–216.

Several parcels: Where farm land is crossed by a railroad, the owner is not limited in his right of recovery to the subdivision of land crossed or touched by the right of way, but the entire farm, if it is in one tract, may be considered in the assessment of damages and the same rule is applicable to town lots: *Cox v. Mason City & Ft. D. R. Co.*, 77–20.

And where plaintiff, in an application for the appraisement of damages, asked that they might be assessed on his lots, caused by the location of the railroad of defendant across certain lots designated by number, *held*, that he asked the assessment of all legal damage resulting therefrom and did not limit his claim to the damage to the lots designated: *Ibid.*

Where plaintiff owned all the lots in a block, and several of them were crossed by the railroad, *held*, that he was entitled to recover for damage to the whole block, and testimony tending to show such damage was properly admitted: *Ibid.*

Where a right of way through parcels of real estate treated as an entirety is sought to be taken by statutory proceedings, the landowner's right of recovery is not limited to the land through which the right of way is to pass, but extends to all the tracts as a whole: *Peden v. Chicago, R. I. & P. R. Co.*, 78–131.

Therefore, *held*, by analogy, that where a right-of-way deed for a strip of land through a certain eighty-acre tract provided that the grantee should carry off the water in a certain manner, a breach of such contract entitled the grantor or his grantees to damages to the entire tract of which the eighty acres formed but a part: *Ibid.*

Where two lots are improved and used as one property and a notice of proceedings to condemn a right of way to one lot only is given, and the right of way is taken entirely from such lot, nevertheless the commissioners may properly include both lots in their assessment and return: *Cummins v. Des Moines & St. L. R. Co.*, 63–397.

In such cases it will be presumed that the title to both lots is in the owner against whom the proceedings with reference to one lot is instituted, without proof on his part of that fact, the finding of the commissioners as to the ownership of the property not having been questioned on appeal: *Ibid.*

Cost of fencing: The cost of building additional fence and keeping the same in repair should not be allowed as part of the damages: *Henry v. Dubuque & P. R. Co.*, 2–288; *Kennedy v. Dubuque & P. R. Co.*, 2–521; *Hanrahan v. Fox*, 47–102.

Although the cost of fencing is not to be taken directly into account, yet, if the land was before fenced, and, by the taking of the right of way, it is thrown open and left in a manner unfenced, this fact will be taken into consideration in arriving at the depreciated value of the remaining premises: *Henry v. Dubugue & P. R. Co.*, 2–288, 310.

Damages for improper construction: The damages to be awarded include those only from the appropriation and lawful use of the premises taken, and do not embrace injuries which may result from unlawful acts for which the company would be liable to the party injured: *Fleming v. Chicago, D. & M. R. Co.*, 34–353.

Damages consequent upon the negligent construction of the road are not to be considered. Only such damages are to be included as arise from its proper construction: *King v. Iowa Midland R. Co.*, 34–458; *Miller v Keokuk & D. M. R. Co.*, 63–680.

Obstruction of highway: The obstruction of a public highway is not a proper element of compensation to the owner of the property in this proceeding: *Gear v. Chicago, C. & D. R. Co.*, 43–83; *Fleming v. Chicago, D. & M. R. Co.*, 34–353.

Trespass: If a subcontractor in constructing the road, without authority from the company, goes outside of the right of way and commits trespass on land not condemned, the company is not thereby rendered liable. In order to render the company liable it must be made to appear, in some way, that it consented to the trespass or had such knowledge of it at the time it was done that its consent might be presumed: *Waltemeyer v. Wisconsin, I. & N. R. Co.*, 71–626.

Diversion of watercourse, etc.: The right which the owner of land has to a watercourse flowing over it is a freehold right which cannot be taken from him for public use either directly or by diminution or diversion from its natural channel without adequate compensation: *McCord v. High*, 24–336.

The fact that a right of way is asked across land crossed by a stream of water does not authorize the assessment of damages for the diversion of the stream from its natural channel when such diversion would not be absolutely necessary. The mere fact that such diversion would be convenient or advantageous in the construction of the road will not authorize the implication that the company desires to acquire the right to make such diversion and pay the damage therefor rather than construct its road by bridging or otherwise, so as to render such diversion unnecessary: *Stodghill v. Chicago, B. & Q. R Co.*, 43–26.

The right to obstruct the passage of surface water is not presumed to be acquired in a condemnation proceeding, and the damages assessed do not cover damages resulting from such stoppage. The owner is not presumed to have been paid therefor, upon the theory that the company preferred to protect him against this incidental injury, and the enjoyment of the easement carries with it from day to day the obligation to furnish this protection: *Drake v. Chicago, R. I. & P. R. Co.*, 63–302. And see *S. C*, 70–59.

Where in violation of the stipulations of a right of way deed the surface water was thrown by the railway company upon plaintiff's premises, *held*, that it was competent to show by witnesses how much more the land of plaintiff would have been worth if the water had been kept off plaintiff's land: *Peden v. Chicago, R. I. & P. R Co.*, 78–131.

Damages resulting from overflows caused by the negligent construction of a culvert cannot be considered as having been included in the damages for right of way: *Hunt v. Iowa Cent. R. Co.*, 86–15.

Interference with wells: Where a railway company had acquired right of way over land, *held*, that in connection with such right of way it might dig wells and would not be liable for thereby interfering with the percolation of water supplying springs upon the premises of the land owner: *Hougan v. Milwaukee & St. P. R. Co.*, 35–558.

The fact that the construction of a railway destroys a valuable spring may be shown in evidence in determining the amount of damages It will not be presumed that the spring was unnecessarily destroyed in the absence of evidence to that effect: *Winklemans v. Des Moines N. W. R. Co.*, 62–11.

Consequential damages: Regard must be had only to the immediate and not to the remote consequences of the appropriation. The value of the remaining premises is not to be depreciated by heaping consequence on consequence: *Sater v. Burlington, etc., Plank Road Co.*, 1–386.

Damages are not limited to the value of the land taken, but include such damages as result proximately from the use for which it is taken: *Kucheman v. Chicago, C. & D. R. Co.*, 46–366, 376.

Obstructing a view or interfering with the owner's privacy, and the noises of approaching trains, are matters for which the land owner may have compensation. As to such matters he is not injured merely as a member of the community in general: *Ham v. Wisconsin, I. & N. R. Co.*, 61–716.

Evidence in regard to how the railroad affects a farm over which it passes, aside from the mere value of the land taken, is admissible: *Dreher v. Iowa Southern R. Co.*, 59–599.

Incidental injury from smoke and dust and the noise of moving trains gives no right for the recovery of damages where there is no other injury to which the smoke, etc., is incident. So *held* where the land condemned had not yet been actually occupied or interfered with by the railway company: *Dimmick v. Council Bluffs & St. L. R. Co.*, 58–637.

Damages not connected with the taking of land: Whatever inconvenience a property owner may suffer by the construction of a railway upon the property of another, no carelessness or negligence in such construction appearing, such injuries will not entitle such property owner to compensation in damages: *Barr v. Oskaloosa*, 45–275.

When assessment proper: While the statute only contemplates an assessment where the owner refuses to grant the right of way, or when the parties cannot agree as to the compensation, yet where it appears that the land owner contests the right of the company to take his land on the terms fixed by the appraisers and attacks the regularity of the proceedings of such appraisers, and that the appraisers were only to assess damages in cases where the owners had refused to grant the right of way, *held*, that the refusal to grant the right of way sufficiently appeared to show the jurisdiction of the court: *Mississippi & M. R. Co. v. Rosseau*, 8–373.

Where the compensation for the right of way has not only been agreed upon, but also paid to the land owner by the corporation, and he has conveyed the right of way, proceedings to condemn such right of way cannot be instituted, and would be entirely void for want of jurisdiction: *Council Bluffs & St. L. R. Co. v. Bentley*, 62–446.

The phrase "owner of any real estate" includes a mortgagee, and if not made a party to the proceedings he is not bound thereby: *Severin v. Cole*, 38–463.

This section refers to land taken and appropriated for right of way. The provisions of § 767, with reference to assessing damages to the abutting property owner by reason of the construction of a railroad track along the streets of a city, do not authorize such abutting property owner to have his damages assessed in this manner: *Stough v. Chicago & N. W. R. Co.*, 71–641.

Respective interests of joint owners: Where the respective interests of tenants in common appear of record or can be conveniently ascertained, the company, if it applies for the appointment of commissioners to assess damages, should by its application cause such damages to be assessed separately to each owner: *Ruppert v Chicago, O. & St. J. R. Co.*, 43–490.

A sheriff's jury cannot apportion the damages between the owner and the person holding a mortgage upon the land. They are to estimate the right of way only, and where the mortgagee is not made a party he may voluntarily assert his right to the money in the hands of the sheriff: *Sawyer v. Landers*, 56–422.

Who may recover: Where land is mortgaged and the mortgage debt remains unpaid and the land is not sufficient to pay it and the mortgagor is insolvent, damages assessed for a right of way may be recovered by the morgagee, and the lien of the mortgagee is superior to that of an attaching creditor: *Schafer v. Schafer*, 75–349.

Where a party in interest appears in the proceeding and prosecutes an appeal he cannot object for want of notice served upon him or upon the person from whom he derives his right to the property: *Ellsworth v. Chicago & I. W. R. Co.*, 91–386.

Under particular circumstances, *held*, that the claimant for damages was the owner of the property in such sense as to be entitled to receive whatever the company was liable to pay for the right of way. *Hartley v. Keokuk & N. W. R. Co.*, 85–455.

Forclosure of railroad mortgage: Also *held*, that it did not appear that the company had ever acquired a right of way by virtue of proceedings commenced by another company: *Ibid.*

Also *held*, that the foreclosure deed made to defendant while the proceeding was pending, the claimants in such proceeding not having been made parties to the forclosure, was of no effect as determining the rights of such parties: *Ibid.*

Enforcement of payment: Where it had been agreed that the compensation to be paid for the right of way should be fixed by a third person, and under such agreement the railway company went into possession, but the amount of compensation was never fixed, *held*, that the land owner might, by condemnation proceedings, enforce payment of the compensation to which he was entitled: *Corbin v. Wisconsin, I. & N. R. Co.*, 66–269.

The agreement between the parties in such case as to the amount of damages might be interposed as a defense to the claim for damages in excess of the amount agreed upon, but such agreement need not be specially pleaded: *Ibid.*

New assessment: Where, upon condemnation of a right of way over agricultural college land, the damages assessed were deposited with the sheriff, *held*, that without return of the amount thus deposited the grantee of the land could not have another assessment of damages for the use of the premises by another railway company without a return of the money thus deposited: *Chicago, M. & St. P. R. Co. v. Bean*, 69–257.

Even though the land owner is seeking to set aside a deed previously made, on the ground of fraud or otherwise, he cannot disregard the previous transaction and have a new assessment: *Council Bluffs & St. L. R. Co. v. Bentley*, 62–446.

A land owner who has received compensation which has not been refunded by him cannot recover the second time: *Dubuque & D. R. Co. v. Diehl*, 64–635.

Homestead exemption: Damages assessed for a right of way over the homestead are exempt from execution to the same extent that the homestead is: *Kaiser v. Seaton*, 62–463.

Liability of commissioners: The commissioners should not be put to costs for doing in a regular and legal way what they are required to do, and in a *certiorari* proceeding to review their action an answer setting out the notice in the proceeding under which they were acting is sufficient: *Forbes v. Delashmutt*, 68–164.

Nature of proceeding: Where plaintiff sought to enjoin defendants from prosecuting an *ad quod damnum* proceeding to recover the value of certain land occupied in the construction of plaintiff's railroad, *held*, that plaintiff had an adequate remedy at law, as all questions involved in the issue could have been determined in the *ad quod damnum* proceeding: *Keokuk & N. W. R. Co. v. Donnell*, 77–221.

A refusal by the owner to grant a right of way is not necessary to confer upon the sheriff and jury power to act. The land owner is authorized to institute a proceeding after the railway has completed its road, and when there is no intention of treating the company as a mere trespasser, and it is sufficient in such case to allege that the owner and the company could not agree upon the compensation to be paid: *Hartley v. Keokuk & N. W. R. Co.*, 85–455.

Dismissal of proceedings: Where the company has not entered upon the land to construct the road, no right to the amount of damages assessed becomes vested in the land owner until the decision on the appeal, and pending the appeal the company may dismiss the proceedings: *Burlington & M. R. Co. v. Sater*, 1–421.

A proceeding for the condemnation of land for a railway simply fixes the price upon payment of which, within a reasonable time, the company may take the right of way. The company cannot be compelled to pay the damages and take the way, but may waive the rights acquired by the proceedings, being liable, however, for costs and for any damages actually suffered by the land owner: *Gear v. Dubuque & S. C. R. Co.*, 20–523.

Judgment for the amount of damages, even though entered in the usual form of a judgment in an action of debt, passes no title to the company before payment, nor does it compel the acceptance of or payment for the land: *Ibid.*

Where, in proceedings to assess the damages for a right of way already occupied, the amount assessed is paid to the sheriff, and an appeal is afterwards

taken, the railroad company cannot, by abandoning its right of way, defeat the land owner's right to the amount so paid, but such abandonment may be considered in determining the damages to which the land owner shall be entitled upon the trial of such appeal, and it would be error to enter a judgment for additional damages contingent upon the re-occupation of the land by the company; and *held*, that such re-occupation should not be made without a new assessment of damages: *Hastings v. Burlington & M. R. R. Co.*, 38-316.

A proceeding instituted by a railway company to condemn a right of way may be dismissed as any other action without prejudice, and will not defeat a subsequent proceeding of the same character to condemn the right of way over such property: *Corbin v. Cedar Rapids, I. F. & N. W. R. Co.*, 66-73.

Remedies of land owner: The proceedings may be instituted by the land owner after the railway is completed: *Hibbs v. Chicago & S. W. R. Co.*, 39-340.

The method provided for ascertaining and compelling the payment of the damages is exclusive, and none other can be pursued. But the owner is not deprived of his right to bring action for the possession of his property when taken without compensation: *Daniels v. Chicago & N. W. R. Co.*, 35-129.

A party has, by appeal, an adequate remedy against any irregularities which may occur in the proceedings or any injustice which may be done him in the award, and if he has personal notice this remedy is exclusive as to all such matters, and he cannot rely upon irregularities as a ground for restraining the construction of the road in accordance with such proceedings: *Phillips v. Watson*, 63-28.

If the company enters upon the land before the damages are paid it may be treated as a trespasser. The owner is not compelled to resort to an injunction or an action for the amount: *Henry v. Dubuque & P. R. Co.*, 10-540.

Where the occupancy of a right of way is commenced and continued without right, the company is a mere trespasser, and the land owner or his grantee may maintain an action for damages for the occupation of the land: *Donald v. St. Louis, K. C. & N. R. Co.*, 52-411.

If the company enters before payment of the damages assessed it may be held liable in damages as for a tort. *Dimmick v. Council Bluffs & St. L. R. Co.*, 62-409.

In an action to recover possession of land occupied without condemnation by the company, plaintiff may recover damages for the use of the premises. It is not necessary that such damages be assessed in a condemnation proceeding: *Birge v. Chicago, M. & St. P. R. Co.*, 65-440; *Rush v. Burlington, C. R. & N. R. Co.*, 57-201.

On failure of the company which is already in possession and use of the premises for right of way to pay the amount assessed, it may be restrained by injunction from further using the premises: *Henry v. Dubuque & P. R. Co.*, 10-540; *Richards v. Des Moines Valley R. Co.*, 18-259.

The question whether the land is subject to condemnation for right of way may be raised in the condemnation proceedings and therefore an injunction to prevent such proceeding being instituted against the premises on the ground that they are otherwise appropriated to the public use will not lie: *Waterloo Water Co. v. Hoxie*, 89-317.

While equity will not interfere by injunction with condemnation proceedings where the right of the parties can be properly determined in such proceeding, yet where by such proceeding one railway was seeking to secure the right to cross another at grade, *held*, that a court of equity might interfere upon a showing that such crossing would improperly obstruct the business of the company, and might make provision for an under or over crossing: *Chicago, B. & Q. R. Co. v. Chicago, Ft. M. & D. M. R. Co.*, 91-16.

The same right to an injunction will accrue to the land owner in case he institutes proceedings for assessing the damages: *Hibbs v. Chicago & S. W. R. Co.*, 39-340.

The land owner is not estopped from maintaining proceedings to recover compensation for land taken for right of way by the fact that he has allowed the railway company to go upon and use his land for that purpose, and make improvements thereon: *Ibid.*

In such cases he may maintain an injunction restraining defendant from further using the right of way without making compensation, or maintain ejectment for the possession of the premises, if it appears that damages have been assessed and nothing but payment is wanting to entitle the company to the continued use of its right of way. It is proper to provide that no execution for the possession of the premises under such circumstances shall issue in the action of ejectment if the damages are paid within a limited time: *Conger v. Burlington & S. W. R. Co.*, 41-419.

By agreement of parties an appeal was taken from the assessment of damages and judgment for the amount assessed was entered in such appeal, and execution thereon was stayed for two years, and the railroad was constructed through the property without objection. *Held*, that upon failure to pay the amount of the judgment at the time specified, the owner could proceed by injunction to restrain any further use of his property until compensation should be made: *Irish v. Burlington & S. W. R. Co.*, 44-380.

A railway company may be dispossessed of its right of way by a judicial sale in a proceeding to enforce the land owner's right So *held*, where the owner of land had agreed to give the right of way in consideration of the performance of certain conditions by the company which had not been performed, and action was brought by the owner to foreclose his vendor's lien. Also, *held*, that the vendor's lien in such case was superior to the title of the purchaser of the railroad at foreclosure sale: *Varner v. St. Louis & C. R. R. Co.*, 55-677.

No provision is made for the determination of the question whether the owner refuses to grant the right of way or whether the owner and the corporation cannot agree upon the compensation to be paid. If the parties appear in the condemnation proceedings it is an indication that they could not agree; but at any rate the finding in the condemnation proceeding cannot be attacked on the ground that these preliminary facts did not exist: *Carlile v. Des Moines & K. C. R. Co.*, 68 N. W., 784.

Deposit of damages assessed: The fact that the company deposits the sum found due with the sheriff will not prevent the land owner from recovering, on appeal, the actual damage to the property and interest thereon from the time it is taken, even though the amount of the original damages is found to be less than that assessed by the sheriff's jury: *Noble v. Des Moines & St. L. R. Co.*, 61-637.

The sheriff, in receiving the money deposited as security, cannot be regarded as the agent of the owner, but he is the agent of the railway company, and if, through the unfaithfulness or mistake of the sheriff, the money is lost before reaching the hands of the land owner, such loss does not fall upon him but upon the company making the deposit: *White v. Wabash, St. L. & P. R. Co*, 64-281.

For moneys paid to a sheriff by the company the land owner may maintain action against him at any time after the expiration of the thirty days allowed for appeal. The statute of limitations, therefore, runs against such an action from that time, and the fact that the land owner has refused the money and attempted by injunction to restrain the taking of his land will not prevent the running of the statute: *Lower v. Miller*, 66-408.

SEC. **2000. Assessment of damages—notice.** The freeholders appointed shall be the commissioners to assess all damages to the owners of real estate in said county, and said corporation, or the owner of any land therein, may, at any time after their appointment, have the damages assessed in the manner herein prescribed, by giving the other party ten days' notice thereof in writing, if a resident of this state, specifying therein the day and hour when such commissioners will view the premises, which shall be served in the same manner as original notices. [C. '73, § 1245; R., § 1318.]

Where a mortgage upon the property appears of record, notice must be given to the mortgagee, or he will not be bound by the proceedings: *Severin v. Cole*, 38-463. And see *Cochran v. Independent School Dist.*, 50-663.

Where the proceedings are based upon the assumption that the owner is a nonresident and unknown, such assumption will be deemed true on *certiorari* unless the contrary is made to appear: *Everett v. Cedar Rapids & M. R. R. Co.*, 28-417.

The notice must name the person whose land is affected by the proceedings. It is not sufficient that it be directed to all persons having an interest in certain described property: *Birge v. Chicago, M. & St P. R. Co.*, 65–440.

Where a right of way over agricultural college land in possession of a lessee was condemned in proceedings to which the college was a party, and afterwards, the lessee's right being forfeited, the premises were sold to another, *held*, that the condemnation proceedings were binding on the subsequent purchaser of the premises: *Chicago, M. & St. P. R. Co. v. Bean*, 69–257.

SEC. **2001. Minor or insane owner**. If the owner of any lands is a minor, insane, or other person under guardianship, the guardian of such minor, insane or other person may, under the direction of the judge of the district court, agree and settle with said corporation for all damages by reason of the taking of such lands for any of the purposes aforesaid, and may give valid conveyances of such land. [C. '73, § 1246; R., § 1316.]

SEC. **2002. Nonresident owner.** If the owner of such lands is a nonresident of this state, no demand of the land for a right of way or other purpose shall be necessary, except the publication of a notice, which may be in the following form:

Notice for the appropriation of lands for railway purposes:

To (here name each person whose land is to be taken or affected) and all other persons having any interest in or owning any of the following real estate (here describe the land by its congressional numbers in tracts not exceeding one-sixteenth of a section, or, if the land consists of lots in a town or city, by the numbers of the lot and block).

You are hereby notified that the ..... has located its railway over the above described real estate, and desires the right of way over the same, to consist of a strip or belt of land ..... feet in width, through the center of which the center line of said railway will run, together with such other land as may be necessary for bermes, waste banks and borrowing pits, and for wood and water stations (or desires the same for any other purpose for which property is authorized by this chapter to be taken), and unless you proceed to have the damages as to the same appraised on or before the ..... day of ...., A. D..... (which time must be at least four weeks after the publication of the notice), said company will proceed to have the same appraised on the ..... day of ....., A. D..... (which must be at least eight weeks after the first publication of the notice), at which time you can appear before the appraisers that may be selected.

By ..... Attorney, or ..... Agent, ...Railway Company.

[C. '73, § 1247.]

Where proceedings were based upon the assumption that the owner was a nonresident and unknown, *held*, *on certiorari*, that the contrary not being made to appear, the proceedings were not irregular: *Everett v. Cedar Rapids & M. R. R. Co.*, 28–417.

The notice must name the person whose land has been taken or affected. It is not sufficient that it is directed to all other persons having an interest in the property described: *Birge v. Chicago, M. & St. P. R. Co.*, 65–440.

SEC. **2003. Notice published.** Said notice shall be published in some newspaper in the county, if there is one, if not, then in a newspaper published in the nearest county through which the proposed railway is to be run, for at least eight successive weeks prior to the day fixed for the appraisement at the instance of the corporation. [C. '73, § 1248.]

SEC. **2004. Appraisement.** At the time fixed for either of the aforesaid notices, the appraisement of the lands described may be made and returned; but the appraisement and return may be in parcels larger than forty acres belonging to one person and lying in one tract, unless the agent or attorney of the corporation or the commissioners have actual knowledge that the tract does not belong wholly to the person in whose name it appears of record; and in case of such knowledge the appraisement shall be made of the different portions as they are known to be owned. [C. '73, § 1249.]

That damages to the entire premises of a property owner, and not merely to the goverment subdivision through which the road passes, are to be assessed, see notes to § 1999.

SEC. **2005. Dwelling-house, garden, or orchard.** If it appears from the finding of the commissioners that the dwelling-house, outhouse, orchard or garden of the owner of any land taken will be overflowed or otherwise injuriously affected by any dam or reservoir to be constructed as authorized by this chapter, such dam shall not be erected until the question of such overflowing or other injury has been determined in favor of the corporation upon appeal. [C. '73, § 1250.]

SEC **2006. Vacancies filled.** In case of the death, absence, neglect or refusal of any of said freeholders to act as commissioners as aforesaid, the sheriff shall summon other freeholders to complete the panel. [C. '73, § 1251; R., § 1319.]

SEC. **2007. Costs.** The corporation shall pay all the costs of the assessments made by the commissioners and those occasioned by the appeal, including reasonable attorney fees to be taxed by the court, unless on the trial thereof the same or a less amount of damages is awarded than was allowed by the commissioners. [C. '73, § 1252; R. § 1317.]

Where the damages allowed on the appeal are less than those awarded in the assessment, in the absence of any showing that either party has made an offer, the costs should be apportioned: *Noble v. Des Moines & St. L. R. Co.*, 61–637.

If, on the trial of an appeal by the land owner, a less amount of damages is given than was awarded by the commissioners, the court is not bound to tax all the costs of appeal to him, but may distribute them according to the general rules of law without reference to this section: *Jones v. Mahaska County Coal Co.*, 47–354.

The purchaser of a railroad pending an appeal from allowance of damages for right of way becomes liable for the payment of costs incurred in such proceeding: *Frankel v. Chicago, B. & P. R. Co.*, 70–424.

Where the costs were taxed to one party, and the court was not asked to make an apportionment, *held*, that the order of the court would not be disturbed upon appeal: *Cox v. Mason City & Ft. D. R. Co.*, 77–20.

SEC. **2008. Report recorded.** The report of the commissioners, where the same has not been appealed from, and the amount of damages assessed and costs has been deposited with the sheriff, or if an appeal is taken and the amount of damages assessed on the trial thereof has been paid to the sheriff, may be recorded in the records of deeds in the county where the land is situated, and such record shall be presumptive evidence of title in the corporation of the property so taken, and shall constitute constructive notice of the rights of such corporation therein. [C. '73, § 1253.]

The company cannot be compelled to pay the damages assessed and take the right of way, but may waive the rights acquired by the proceedings, being liable, however, for costs, and any damages actually suffered by the land owner: *Gear v. Dubuque & S. C. R. Co.*, 20–523.

The recording of the award, if done by mistake, does not pass any title to the company so as to raise an implied contract to pay the amount of the award; certainly not until the fact of the mistake has become known to the company and it has had a reasonable time to correct it: *Dimmick v. Council Bluffs & St. L. R. Co.* 58–637.

Where a portion of plantiff's land was included in the right of way condemned, but the road was not actually constructed over any portion of his land, which remained fenced and was not entered upon, *held*, that an appropriation did not appear, and title to the right of way did not pass to the company until it had made payment: *Ibid.* And see *S. C.*, 62–409.

SEC. **2009. Appeals—how taken.** Either party may appeal from such assessment to the district court, within thirty days after the assessment is made, by giving the adverse party, or, if such party is the corporation, its agent or attorney, and the sheriff notice in writing that such appeal has been taken. The sheriff shall thereupon file a certified copy of so much of the appraisement as applies to the part appealed from, and said court shall try the same as in an action by ordinary proceedings. The land owner shall be plaintiff and the corporation defendant. [C. '73, §1254; R., § 1317.]

Waiver: Objections to the jurisdiction of the sheriff's jury are not waived by appearance on appeal: *Stough v. Chicago & N. W. R. Co.*, 71–641.

Exclusive remedy: The remedy by appeal is conclusive of all other remedies as to the manner and method of taking advantage of irregularities in the proceeding: *Phillips v. Watson*, 63–28.

An appeal is a plain, adequate and speedy remedy when the claim is that insufficient damages are given. Irregularities in the proceeding cannot be corrected by *certiorari: Cedar Rapids, I. F. & N. W. R. Co. v. Whelan*, 64–694.

Joint assessment: Where the damages are assessed jointly in favor of two owners, one of them cannot properly prosecute an appeal without joining the other as appellant or making him a party to the proceedings by notice. Upon failure to do so the appeal should be dismissed on motion: *Chicago, R. I. & P. R. Co. v. Hurst*, 30–73.

A subsequent settlement with a part of the owners in common where the assessment is not apportioned, will not defeat an appeal by those not settled with: *Ruppert v. Chicago, O. & St. J. R. Co.*, 43–490.

By mortgagee: The owner may take an appeal without joining a mortgagee therein, although an award has been made in favor of the owner and mortgagee jointly: *Lance v. Chicago, M. & St. P. R. Co.*, 57–636.

Where damages for right of way are awarded jointly to the owner and the mortgagees of the land, upon notice to all of them, the mortgagor may maintain an appeal from the award without making the mortgagees parties thereto: *Dixon v. Rockwell S. & D. R. Co.*, 75–367.

By person not party: A person not a party to the proceedings, although interested in the property, cannot appeal Such person might perhaps, make himself a party before the commissioners, but he cannot make himself a party merely by appealing: *Connable v. Chicago, M & St. P. R. Co*, 60–27; *Cedar Rapids, I. F. & N. W. R. Co. v. Chicago, M. & St. P. R Co.*, 60–35.

Whether, where publication of notice is authorized to be made to parties interested, all persons interested are to such an extent parties as that they may appeal, *quœre: Ibid.*

As to part of damages: Where the assessment covers the entire damage to two contiguous tracts used together and owned by the same person, an appeal cannot be taken from an assessment as to one tract only. *Cedar Rapids, I. F. & N. W. R. Co. v. Chicago, M. & St. P. R. Co.*, 60–35.

The sheriff is not a party to the condemnation proceedings, and is not disqualified from serving notice of appeal therein: *Ibid.*

Notice: Whether the giving of notice to the deputy-sheriff would be sufficient, *quœre: Waltmeyer v. Wisconsin, I. & N. R. Co.*, 64–688.

But where it appeared that notice was brought to the sheriff's attention and he directed the deputy to accept service, *held*, that the notice was sufficient: *Ibid.*

Notice of appeal may be properly served on the engineer in charge of the survey and location of the railroad, and transacting business connected with securing the right of way in the county where the appeal is taken: *Jamison v. Burlington & W. R. Co.*, 69–670.

Where the notice of appeal describes the premises in the same way as they are described in the application for condemnation, the land owner is not limited in his recovery of damages accruing to the portion of his premises described, but may show the damages to his entire farm: *Dudley v. Minnesota & N. W. R. Co.*, 77–408.

The time for taking the appeal begins to run from the time the assessment is in fact made, reduced to writing, and made public, or in some legitimate manner comes to the knowledge of the parties interested: *Ibid.*

Upon motion being made to dismiss the appeal because not taken in time, affidavits of jurors for making the assessment are receivable to show when the assessment was actually made: *Ibid.*

Filing papers: Where the appeal has properly been taken by notice, the appellant should not be prejudiced by a failure of the officer to file the papers at the time required by statute: *Robertson v. Eldora R., etc., Co.*, 27–245.

Change of venue may be had on the appeal the same as in civil actions: *Whitney v. Atlantic Southern R. Co.*, 53–651.

Assessment of damages on appeal: On appeal the question of damages is to be determined upon its merits, and the regularity of prior proceedings, such as the selection of commissioners, etc., is not to be called in question. That can only be done by *certiorari: Mississippi & M. R. Co. v. Rosseau*, 8–373. And see *Runner v. Keokuk*, 11–543.

The assessment of damages upon appeal is to be made without any reference to that appealed from: *Hahn v. Chicago, O. & St. J. R. Co*, 43–333.

The notice of appeal is presumptive evidence of an assessment from which an appeal can be taken: *Ibid.*

An appeal by the land owner from the assessment of the commissioners cures any defect in regard to giving notice of the assessment to such owner: *Borland v. Mississippi & M. R. Co.*, 8–148.

In the proceedings on appeal an offer to confess judgment may be made with the consequences provided in § 3818, with reference to costs: *Harrison v. Iowa Midland R. Co.*, 36–323.

The company may dismiss the proceedings at any time before judgment upon payment of costs: *Burlington & M. R. Co. v. Sater*, 1–421.

It would seem that a land owner appealing need not give bond; but even if that be necessary, the failure to give bond at the time the appeal is taken ought not to work the dismissal of the appeal: *Robertson v. Eldora R., etc., Co.*, 27–245.

Judgment: Where, under the provisions of a previous statute, general judgment was rendered against the company on the appeal, *held*, that it could have no greater effect than assessment of damages: *Gear v. Dubuque & S. C. R. Co.*, 20–523.

Allowance of Interest: In case of an appeal by the railway company the proper measure of damages is the value of the land at the time of its appropriation, with interest thereon to the date of judgment: *Daniels v. Chicago, I. & N. R. Co.*, 41–52.

Interest may be allowed on the damages awarded from the time of condemnation, provided the damages are greater than those allowed by the sheriff's jury: *Hartshorn v. Burlington, C. R. & N. R. Co.*, 52–613.

Interest on the assessment does not begin to run from the time of assessment but only from the time of taking possession: *Haye v. Chicago, M. & St. P. R. Co.*, 64–753.

In estimating the damages upon appeal the jury may consider the injury as originally sustained, and the interest which the original sum would have borne during the delay: *Noble v. Des Moines & St. L. R. Co.*, 61–637.

Where the court simply directed the jury to allow plaintiff the market value of the land taken at the time that it was taken, *held*, that such instruction was proper, and that interest should be allowed on the amount of the verdict from the time of the appropriation: *Hollingsworth v. Des Moines & St. L. R. Co.*, 63–443.

The damages are to be assessed as of the date of the assessment by the sheriff's jury, and then upon the rendition of the verdict the court should make the proper order touching the question of interest. Such order should fix the date when the interest begins to run, which should be when the company deprives the property owner of the use of his property: *Reed v. Chicago, M. & St. P. R. Co.*, 25 Fed., 886.

After a final adjudication of the claim for damages on an appeal to the district court and payment of the amount awarded the claimant cannot maintain an original action to recover interest on the amount thus awarded nor can the cause be redocketed for that purpose: *Jamison v. Burlington & W. R. Co.*, 87–265.

In the proceeding all the rights of the parties should be adjusted, and the land owner is not entitled after appeal to bring another action to recover interest on the money deposited in accordance with the condemnation proceedings: *Jamison v. Burlington & W. R. Co*, 78–562.

SEC. **2010. Deposit—acceptance.** An appeal shall not delay the prosecution of work upon said railway, if said corporation pays or deposits with the sheriff the amount assessed. The sheriff shall not pay such deposit over to the person entitled thereto after the service of notice of appeal, but shall retain the same until the determination thereof. An acceptance by the land owner of the damages awarded by the commissioners shall bar his right to appeal. [C. '73, §§ 1255–6; R., § 1317.]

If an appeal is taken to the lower court and the damages awarded are greater than were allowed by the commissioners, the company desiring to appeal to the supreme court must deposit the additional amount with the sheriff, and is not relieved from the obligation to do so by giving a *supersedeas* bond: *Downing v. Des Moines N. W. R. Co.*, 63–177.

The right of the owner to receive the amount so deposited is suspended until the appeal is decided. The property is not taken, in an absolute sense, until the final assessment is paid, and the section is, therefore, not unconstitutional: *Peterson v. Ferreby*, 30–327.

The sheriff holds the deposit not as agent of the owner, but as agent of the company, and if it does not come into the hands of the owner, or is for any reason lost or misappropriated, such loss must be sustained by the company: *White v. Wabash, St. L. & P. R. Co.*, 64–281.

For moneys paid to a sheriff the land owner may maintain action against him at any time after the expiration of thirty days allowed for appeal. The statute of limitations, therefore, runs against such action from that time, and the fact that the land owner has refused the money and has attempted by injunction to restrain the taking of his land will not prevent the running of the statute: *Lower v. Miller*, 66–408.

The fact that the owner of the property accepts the money awarded will defeat an appeal by him, but not an appeal by the company; on an appeal by the latter the owner is not estopped from claiming any increased amount of damage to which he may appear to be entitled: *Burns v. Chicago, Fort M. & D. M. R. Co.*, 70 N. W., 728.

Before there was any statutory provision on the subject, it was held that acceptance of the damages awarded would bar an appeal by the land owner: *Mississippi & M. R. Co. v. Byington*, 14–572.

SEC. **2011. Trial—judgment—costs.** On the trial of the appeal, no judgment shall be rendered except for costs. The amount of damages shall be ascertained and entered of record, and if no money has been paid or deposited with the sheriff, the corporation shall pay the amount so ascertained, or deposit the same with the sheriff, before entering upon the premises. Should the corporation decline to take the property and pay the damages awarded on final determination of the appeal, then it shall pay, in addition to the costs and damages actually suffered by the land owner, reasonable attorney's fees, to be taxed by the court. [C. '73, § 1257.]

Under the Revision (which contained no similar provision), *held*, that where a general judgment was rendered against the company on appeal, it could have no greater effect than an assessment of damages as contemplated by the statute: *Gear v Dubuque & S. C. R. Co.*, 20–523.

Interest may be allowed on the damages awarded from the time of condemnation, provided such damages are greater than as found by the sheriff's jury: *Hartshorn v. Burlington, C. R. & N. R. Co.*, 52–613.

Further as to interest, see notes to § 2009. In such a proceeding no judgment can be rendered except for costs. After the assessment, the company, by paying the costs and damages, may relieve itself from further liability. Therefore the statute of limitations does not apply to such a proceeding: *Hartley v. Keokuk & N. W. R. Co.*, 85–455.

SEC. **2012. Additional deposit.** If, on the trial of the appeal, the damages awarded by the commissioners are increased, the corporation shall pay or deposit with the sheriff the whole amount of damages awarded before entering on, or using or controlling, the premises. The sheriff, upon being furnished with a certified copy of the assessment, may remove said corporation, and all persons acting for or under it, from said premises, unless the amount of the assessment is forthwith paid or deposited with him. [C. '73, § 1258.]

Where the amount of damages awarded by the commissioners is paid to the sheriff and the company enters upon the land, if upon appeal by the land owner a larger sum is awarded, the company may be enjoined from further use of the property until it pays such further sum: *Richards v. Des Moines Valley R. Co.*, 18–259.

The federal court will not order its marshal to oust the railway company from the possession of the premises for non-payment of damages for the right of way fixed in that court of appeal, when the remedy of the statute, by application to the sheriff, is open to the property owner: *Reed v. Chicago, M. & St. P. R. Co.*, 25 Fed., 886.

If appeal is taken from the award and the damages awarded are greater than were allowed by the commissioners, the company desiring to appeal to the supreme court must deposit the amount with the sheriff, and is not relieved from the obligation by giving a *supersedeas* bond: *Downing v. Des Moines N. W. R. Co.*, 63–177.

SEC. **2013. Damages reduced.** If the amount awarded by the commissioners is decreased on the trial of the appeal, the reduced amount only shall be paid the land owners. [C. '73, § 1259.]

SEC. **2014. Channels or ditches along right of way.** In any case where it would have the right to dig a channel or cut a ditch, so as to change and straighten the course of a stream or water course too frequently crossed by such road, for the purpose of protecting the right of way and road-bed, or promoting safety and convenience in operation of the road, it may, if it cannot agree with the owners of the land to be crossed by such channel or ditch, either as to its location or the price to be paid for land taken, condemn an amount sufficient and convenient for such purpose, in the same manner that lands for the right of way for the road-bed may be condemned; and such condemnation shall be made with the same rights of appeal as in other cases of condemnation of land for right of way uses. Nothing in this section shall give the corporation the right to change the course of any stream or water course where such right does not otherwise exist, nor to turn such stream or water course off from any cultivated meadow, or pasture lands, when it only touches such lands at one point, unless the owner or owners thereof consent to such diversion. [18 G. A., ch. 191.]

This section, at least in so far as it applies to cases where the right of way is taken, as provided for the purpose of promoting the safety of the traveling public, is not unconstitutional as authorizing the taking of private property for other than a public purpose: *Reusch v. Chicago, B. & Q. R. Co.*, 57–687.

SEC. **2015. Non-user of right of way.** Where a railway constructed in whole or in part has ceased to be operated for more than five years; or where the construction of a railway has been commenced and work on the same has ceased and has not, in good faith, been resumed for more than five years, and remains unfinished; or where any portion of any such railway has not been operated for four consecutive years, and the rails and rolling stock have been wholly removed therefrom; it shall be treated as abandoned, and all rights of the person or corporation constructing or operating any such railway, over so much as remains unfinished or from which the rails and rolling stock have been wholly removed, may be entered upon and appropriated as provided in the next section. If the railway or any part thereof shall not be used or operated for a period of eight years, or if, its construction having been commenced, work on the same has ceased and has not been in good faith resumed for eight years, the right of way, including the road-bed, shall revert to the owner of the land from which said right of way was taken. [18 G. A., ch. 15; 15 G. A., ch. 65; C. 73, § 1260.]

This section defines what shall be regarded as an abandonment of a right of way, and nothing less than non-user for eight years will authorize the owner of the land from whom the right of way was taken to retake possession. If he does so, the company may at any time within eight years enter upon the land again and resume its use: *Fernow v. Chicago, M. & St. P. R. Co.*, 75–526.

These provisions apply to the case of a railroad which has been commenced and abandoned before the enactment of the statute. The time which had expired before the enactment and after the abandonment of the work is to be taken into account in computing the eight years. A railroad company has no vested right by contract to hold a right of way which it has abandoned, and the section is not unconstitutional in that respect: *Skillman v. Chicago, M. & St. P. R. Co.*, 78–404.

In the absence of statute non-user for any length of time would not work a forfeiture, but if without intention to resume the use it would constitute an abandonment; and therefore under this section mere non-user, without other evidence of intention to abandon, will not constitute an abandonment unless it has continued for eight years, when it will constitute an abandonment without regard to the intent: *McClain v. Chicago, R. I. & P. R. Co.*, 90–646.

But the statute does not apply to an agreement between the parties for forfeiture upon other terms than those provided in it and a stipulation that abandonment shall follow if the grantor shall cease permanently to use the right of way for the purposes for which it is conveyed will be effectual without regard to the length of time of non use: *Ibid.*

The easement being acquired by express grant is not barred by a failure to use the same for ten years, and a possession of the property, during that time, by the original owner, in the absence of any act of his preventing the use: *Barlow v. Chicago, R. I. & P. R. Co.*, 29–276; *Noll v. Dubuque, B. & M. R. Co*, 32–66.

A land owner who has received damages for a right of way and has entered into an agreement by which another company has taken and used such right of way is not in position to rely on an abandonment by the first company: *Marling v. Chicago, C. R. & N. R. Co.*, 67–331.

A portion of a line may become abandoned. Whether it is so or not is a question of fact: *Central Iowa R. Co. v. Moulton & A. R. Co.*, 57–249.

SEC. **2016. Condemning abandoned right of way.** In case of abandonment, as provided in the preceding section, any other corporation may enter upon such abandoned work, or any part thereof, and acquire the right of way over the same, and the right to any unfinished work or grading found thereon, and the title thereto, by proceeding as near as may be in the manner provided in this chapter; but parties who have previously received compensation in any form for the right of way on the line of such abandoned railway, which has not been refunded by them, shall not be permitted to recover the second time. The value of such roadbed and right of way, excluding the work done thereon, when taken for a new company, shall be assessed for the benefit of the former company or its legal representative. [C. '73, § 1261.]

Where, upon condemnation of right of way over agricultural college land, the damages assessed were deposited with the sheriff, *held*, that without return of the amount thus deposited the grantee of the agricultural college could not have another assessment of damages for the use of the premises by another railway company: *Chicago, M. & St. P. R. Co. v. Bean*, 69–257.

A land owner who has received compensation which has not been refunded by him cannot recover the second time: *Dubuque & D. R. Co. v. Diehl*, 64–635.

SEC. **2017. Raising or lowering highways.** Any such corporation may raise or lower any turnpike, plank road or other road for the purpose of having its railway cross over or under the same, and in such cases said corporation shall put such road, as soon as may be, in as good repair and condition as before such alteration. [19 G. A., ch. 122; 15 G. A., ch. 47; C. '73, § 1262; R., § 1321.]

This section as it originally stood, authorizing a railway corporation to raise or lower a highway "for the purpose of having its railway pass over or under the same," was construed to confer upon railway companies the right to construct their tracks upon the public highways, including the streets of a city, without compensation to an abutting property owner, where he did not own the fee in

the highway or street: *Milburn v. Cedar Rapids*, 12-246; *Gear v. Chicago, C. & D. R. Co.*, 39-23.

But as now amended, by substituting "cross" "for pass," it cannot be construed as authorizing such use of highways or streets without other express legislative authority: *Stanley v. Davenport*, 54-463.

The objection imposed by the statute upon a railway company constructing and operating its railway, to construct at all points where the highway crosses it sufficient and safe crossings, is binding upon all corporations using railways in the state: *Farley v. Chicago, R. I. & P. R. Co.*, 42-234.

The embankment constructed as necessary approach to the crossing is a part of the crossing and the company is required to keep it in repair: *Ibid.*

The company is bound to keep crossings in a safe condition, and this obligation extends to the approaches to a bridge: *Newton v. Chicago, R. I. & P. R. Co.*, 66-422.

The company is under obligation to build and keep in repair an overhead crossing and the approaches thereto, provided the grade crossing is unsuitable and the overhead crossing is necessary to put the street in proximately as good repair and condition as before the railroad was built. *Ibid.*

The burden of putting the highway into proper condition is imposed upon the railway company and attaches when the railway is constructed and the burden is so connected with the right to maintain and operate the railway that liens acquired by creditors on the railway property are subject to it: *Ft. Dodge v. Minneapolis & St. L. R. Co.*, 87-389.

In a proceeding by mandamus to compel the railroad company to put in an overhead crossing, the company being in the hands of a receiver appointed by the same court, may be directed by the court as to the plans and specifications in accordance with which such crossing shall be constructed: *Ibid.*

As the railway has the right to raise or lower highways at crossings, an indictment charging the company with obstructing the public highway with digging, plowing, and scraping such highway, throwing up embankments and making excavations, etc., at points where the railway crosses such highway, does not state facts sufficient to constitute the crime of obstructing the highway: *State v. Chicago, B. & P. R. Co.*, 63-508.

In an action for personal injuries received at a public crossing, the fact that the crossing is not as good as the highway was before the construction of the railway is admissible for the purpose of showing what vigilance was required of the railway as to the use of signals and the operation of trains in approaching such crossing: *Funston v. Chicago, R. I. & P. R. Co.*, 61-452.

Where by reason of there not being sufficient service of notice a highway which is located across the right of way is not legally established the company is not under obligation to put in a crossing: *State ex rel. v. Iowa Cent. R. Co.*, 91-275.

The company has no right to cross a street in a city or town diagonally without making compensation to abutting property owners for damages as required by § 767: *Enos v. Chicago, St. P. & K. C. R. Co.*, 78-28.

A railroad may cross a street in a city without the consent of the city council required by § 767: *Gates v. Chicago, St. P. & K. C. R Co.*, 82-518.

The company may raise or lower the highway for the purpose of having its road cross over or under the same, but not for the purpose of making a grade crossing higher or lower than the grade of the highway: *Ibid.*

While the company may raise a highway crossing for the purpose of having its railway pass under, it is required to put such highway in as good condition as before the alteration. This authority does not exempt the company from damages for which it is otherwise liable under the provisions of § 767, with reference to the construction of railways in streets: *Nicks v. Chicago, St. P. & K. C. R. Co.*, 84-27.

The owner of property abutting on a street over which a railway is constructed under the provisions of § 767, not being the owner of the fee of the street, cannot recover unless he can show actual damages: *Cook v. Chicago, M. & St. P. R. Co.*, 83-278.

And see notes to § 767, as to damages to abutting owners where the track is laid in a street.

The railway has no right to fence its track where it crosses streets or alleys properly laid out, whether they have been improved and used by the public or not: *Lathrop v. Central Iowa R. Co.*, 69-105. And see notes to § 2055.

Highways may be laid out across the right of way: *Chicago, M. & St. P. R. Co. v. Starkweather*, 66 N. W., 87.

But the company cannot be compelled to construct a viaduct crossing: *Albia v. Chicago, B. & Q. R. Co.*, 71 N. W., 541.

SEC. **2018. Further repairs.** If the supervisors, trustees, city council, or other person having jurisdiction over such road, require further or different repairs or alterations made thereon, or if the same, in their opinion, is unsafe, they shall give notice thereof in writing to any agent or officer of the corporation, and, if the parties are unable to agree respecting the same, either may apply by petition, setting out the facts, to the district court or judge thereof, and such court or judge shall cause reasonable notice to be given the adverse party of the application. The petition shall be filed in the clerk's office, and may be answered as in other cases. The court shall determine the matter in a summary way, and make the necessary orders in relation thereto, giving such corporation, if found at fault, a reasonable time to comply therewith, and, upon failure to do so, it may enjoin the corporation from using so much of its road as interferes with any such roads, and may award costs in favor of the prevailing party. [C. '73, § 1263; R., §§ 1322-3.]

SEC. **2019. Temporary ways.** Every such corporation, when employed in raising or lowering any road, or in making any other alteration by means of which the same may be obstructed, shall provide and keep in good order suitable temporary ways to enable travelers to avoid or pass such obstructions. [C. '73, § 1264; R., § 1324.]

SEC. **2020. Crossing railways, canals, etc.** Any such corporation may construct and carry its railway across, over or under any railway, canal or water course, when it may be necessary in the construction of the same, and in such cases it shall so construct its crossings as not unnecessarily to impede the travel, transportation or navigation upon the railway, canal or stream so crossed. Said corporation shall be liable for the damages occasioned to any person injured by reason of said crossing. [C. '73, § 1265; R., § 1325.]

The requirement of § 2073, that trains should come to a full stop at crossings of other railroads, necessarily renders crossings on grade an impediment, to some extent, to travel and transportation, but the inconvenience and delay arising from their use must be borne by the company. The company constructing an intersecting line is required to so construct the crossing as not to unnecessarily interfere with the crossing of the other road. Whether such crossing shall be made at grade, or over or under the other, must depend upon circumstances; and under particular facts, *held*, that a requirement that an under-crossing be constructed was not unreasonable: *Humeston & S. R. Co. v. Chicago, St. P. & K. C. R. Co.*, 74-554.

The right of a railway to cross another is subject to the limitation that the crossing shall be so made as not unnecessarily to interfere with the use of the railway crossed and where such interference is plain it is within the jurisdiction of a court of equity to prescribe the method and conditions under which such

crossing may be made: *Chicago, B. & Q. R. Co. v. Chicago, Ft. M. & D. M. R. Co.*, 91-16.

SEC. **2021. Bridges—damages.** Every such corporation shall maintain and keep in good repair all the bridges, with their abutments, which it may construct for the purpose of enabling its railway to pass over or under any turnpike, road, canal, water course or other way, and shall be liable for all damages sustained by any person in consequence of any neglect or violation of the provisions of this chapter. [C. '73, §§ 1266–7; R., §§ 1326–7.]

The provisions of this section do not extend the liability of the corporation to the acts of those not its agents or servants: *Callahan v. Burlington & M. R. R. Co.*, 23-562.

SEC. **2022. Private crossings.** When any person owns land on both sides of any railway, the corporation owning the same shall, when requested so to do, make and keep in good repair one cattle-guard, and one causeway or other adequate means of crossing the same, at such reasonable place as may be designated by the owner. [C. '73, § 1268; R., § 1329.]

When required: It is evident that the provisions of this section are not intended to apply to streets in cities and towns: *Gates v. Chicago, St. Paul & K. C. R. Co.*, 82-518.

The company need not provide a crossing unless the land owner requires it: *Henderson v. Chicago, R. I. & P. R. Co.*, 48-216.

The obligation to erect a private crossing by reason of the provisions of this section, and not under contract between the parties, is a public obligation of such a nature that the board of railroad commissioners has jurisdiction to investigate the question and make an order with reference thereto: *State v. Mason City & Ft. D. R. Co.*, 85-516.

The remedy by *mandamus* in such a case is not exclusive: *Ibid.*

The duty of the company to construct a private crossing may be enforced by *mandamus: Boggs v. Chicago, B. & Q. R. Co.*, 54-435.

And in the particular case, *held*, that a request of the person owning land on both sides of the railway track, for an open crossing at a particular point, was not unreasonable, and compliance therewith might be enforced: *Ibid.*

The owner of land is authorized to designate the place where the crossing for his benefit shall be made, and the limitation put upon his choice of location is that the place designated shall be a reasonable one: *Van Vrankin v. Wisconsin, I. & N. R. Co.*, 68-516.

The location and character of a crossing must be determined with due regard for all the interests involved in its construction and maintenance, and the reasonable use which the land owner desires to make of it, its expense and the effect it will have upon the operation of the railroad and the safety of life and property, and in a particular case, *held*, that while a crossing would be a great convenience to the land owner, yet the inconvenience and danger to the operation of trains by the company was such that it should not be required: *Truesdale v. Jensen*, 91-312.

Where the only means a citizen has of reaching a highway is across the railway, he may insist that an open crossing be provided for him by means of which he may reach the highway without stopping to open gates or remove bars: *Gray v. Burlington & M. R. R. Co*, 37-119.

Where a party owning land on opposite sides of a highway maintains a lane and fences in such manner as to indicate that he prefers an open crossing instead of one closed by gates, the company will not be liable to him for failure to maintain such gates: *Tyson v. Keokuk & D. M. R. Co.*, 43-207.

Where a railroad passes through a pasture the owner is not, as a matter of course, entitled to an open crossing for his stock, regardless of any other means

of crossing. To entitle him to such a crossing it must appear that there is no provision for passing from one part of the field to the other, which is adequate under the circumstances: *Curtiss v. Chicago, M. & St. P. R. Co.*, 62-418.

The words "one cattle guard" do not mean a single structure on one side of the causeway, but such guard as will prevent stock from going over the causeway on to the track on either side: *State ex rel. v. Burlington, C. R. & N. R. Co.*, 68 N. W., 819.

One grade crossing for each land owner whose land is divided by the right of way with gates and grade is the rule in this state, and it is only when a grade crossing is inadequate that other or additional means may be ordered. Therefore, *held*, that where the only objection to such crossing was the inconvenience of opening and closing the gates it was error for the commissioners to order the railroad to construct an under grade crossing: *Ibid.*

While there may be cases where an overhead crossing can properly be required, yet in view of the fact that grade crossings are the rule, it would require a strong case to warrant the court in holding an overhead crossing to be reasonable and just: *State v. Chicago, M. & St. P. R. Co.*, 86-304.

A company required to maintain and construct proper cattle-guards cannot by contract with another company, whose road it purchases, relieve itself from the right or obligation to do so: *Downing v. Chicago, R. I. & P. R. Co.*, 43-96. As to cattle-guards, see also notes to § 2054

Gates and bars at private crossings: If the company undertakes to and does construct fences, gates, crossings and cattle-guards, etc., for a private owner, a request for their construction may be presumed, and the company will be required to keep them in repair: *Miller v. Chicago, R. I. & P. R. Co.*, 66-546.

Under the provisions of a previous statute, differing from the present one as to private crossings, *held*, that a company had a right to construct fences at such crossings, but must provide the same with gates: *McKinley v. Chicago, R. I. & P. R. Co.*, 47-76, 78.

The duty to maintain gates at private crossings is a part of the duty to fence, and the company will be liable for damages to stock injured by reason of failure to construct such gates or keep them in repair: *Ibid.; Mackie v. Central R. of Iowa*, 54-540.

Where the claim was that stock escaped upon the track by reason of the gate at a private crossing being insufficient, as originally constructed, *held*, that no evidence of knowledge of the defective condition was necessary, as it would have been in the case of a failure to repair: *Morrison v. Burlington, C. R. & N. R. Co.*, 84-663.

A land owner driving cattle in through the gate at one crossing and along the right of way for the purpose of turning them out at the gate at another crossing is guilty of negligence; and in a particular case, *held*, that there was not such negligence on the part of the employes of the company after they were aware of the cattle being on the track as to render them liable for damage in killing some of the cattle: *Davidson v. Central Iowa R. Co.*, 75-22.

As to the liability for failure to fence in general, see § 2055.

Where it is the duty of a railway company to keep closed a gate in a fence of its right of way it will be liable for injury to stock due to negligence in performing that duty: *Manwell v. Burlington, C. R. & N. R. Co.*, 89-708.

The obligations imposed upon the company to fence and to provide private crossings are correlative, and if it does each as well as it can consistently with the other it is not liable: *Henderson v. Chicago, R. I. & P. R. Co.*, 39-220.

Where the company is required to put in a private crossing and erect proper gates and bars, it will not be liable for negligence of a person for whom the crossing is constructed in habitually leaving such gates or bars open, further than that it must use reasonable diligence and care in keeping them closed: *Ibid.*

But the company is not responsible in the absence of negligence, although it knows that the land owner or other persons are in the constant or usual habit of leaving the gates open: *Henderson v. Chicago, R. I. & P. R. Co.*, 43-620.

Where the company nailed up the gates at a private crossing for the reason that they had been habitually left open, and the land owner tore down the fence so that the gates should be open, *held*, that it was error to instruct the jury as to the effect of the abandonment by the land owner of his crossing: *Ibid.*

The sufficiency of the gates provided at a private crossing is a question of fact for the jury; and *held*, that it was error to instruct the jury that such gates were sufficient in view of the fact that the land owner gave no notice to the company of objection thereto, and himself believed them sufficient: *McKenly v. Chicago, R. I. & P. R. Co.*, 43–641.

Under particular facts, *held*, that it was not sufficiently shown that injury to stock resulted from defect in the gate through which they escaped upon the track: *Bothwell v. Chicago, M. & St. P. R. Co*, 59–192.

In an action for injuries to stock from failure to maintain a gate at a private crossing in good condition, evidence of the condition of the gate two or three days after the accident, it not being shown that its condition as to security was different from what it was at the time of the accident, was held proper: *Mackie v. Central R. of Iowa*, 54–540.

Where the company constructs a gate at a private crossing without fastenings, and in such manner that it may be blown open by the wind, it is not proper to charge the jury that the responsibility for keeping the gate closed is upon the person for whose convenience it is constructed, and that he cannot recover for injuries to his stock coming upon the track through such gate: *Hammond v. Chicago & N. W. R. Co.*, 43–168.

Where it appeared that a gate at a private crossing had been constructed without fastenings and the wind had sometimes blown it open, *held*, that it was improper to exclude from the jury the question as to whether the company was guilty of negligence in thus constructing it, and that the proof of the habit of an adjoining owner to leave the gate open would not preclude recovery on account of such negligence in the original construction, it not appearing that it had been left open by such owner in the particular instance when the damage occurred: *Ibid.*

A company may be liable without knowledge of the defect in the fence if, in the exercise of reasonable care, such knowledge would have been acquired. If the fence was originally defective the company is chargeable with knowledge thereof without express notice: *Ibid.*

The company is only liable for negligence in failing to put up the bars at a private crossing, which have been left down, after acquiring knowledge of their condition, or in not ascertaining their condition, and the burden of proving such negligence is upon the plaintiff: *Perry v. Dubuque Southern R. Co.*, 36–102.

Proof of the mere fact that bars have been left down by some person, and that through them cattle have strayed upon the track and been injured, does not make a *prima facie* case of liability on the part of the company. Such liability, if it exists at all, arises from the conduct of the company after the bars have been left down, either in failing to put them up after acquiring knowledge that they were down, or in neglecting to use reasonable diligence to ascertain such condition: *Ibid.*

Where the employes have closed a gate at a crossing they may assume that it will not be opened by persons passing through without right and the company is not liable for injuries to stock escaping on the track through such gate subsequently left open, the employes not having notice as to such gate being open: *Harding v. Chicago, M & St. P. R. Co.*, 69 N. W., 1019.

And as to a like rule in regard to failure to repair fences, see notes to § 2055.

It is erroneous to instruct the jury that a person whose stock has been injured upon the track makes a *prima facie* case against the company by showing that the gate through which stock came upon the track was out of repair previous to the accident. Proof of such fact does not cast upon defendant the burden of showing that the accident did not result by reason of the gate being open. Such fact would be a circumstance tending to show that it was open through defendant's fault which might have much or little weight according to circumstances; but the burden of proof would remain upon plaintiff to show negligence of defendant causing the injury: *Johnson v. Chicago, R. I. & P. R. Co.*, 55–707.

The fact that the bars are left down by the land owner will not as to third persons discharge the company from its obligation to keep them closed: *Bartlett v. Dubuque & S. C. R. Co.*, 20–188.

But the land owner could not recover for injuries resulting therefrom, and might be liable to a third person injured by such bars being open: *Russell v. Hanley*, 20–219.

If, by reason of the act of the land owner in wrongfully removing a gate at a private crossing on his land, stock of a third person gets upon the track and is injured, and the company is held liable therefor, it may recover from such land owner the amount which it has been compelled to pay: *Chicago & N. W. R. Co. v. Dunn*, 59–619.

SEC. **2023. Right of way for canal, turnpike, or bridge.** When any corporation or person desires to construct a canal, turnpike, graded, macadamized or plank road, or a bridge, such corporation or person may take such private property as may be necessary for right of way, not exceeding one hundred feet in width, by pursuing the course prescribed in this chapter. [C. '73, § 1269; R., §§ 1278–88; C. '51, §§ 759–779.]

This section does not authorize the taking of private property for landings for a public ferry: *Sanford v. Martin*, 31–67.

SEC. **2026. Street railways over highways.** Any corporation organized under the laws of this state to operate a street railway in any city or town may, for the purpose of extending its railway beyond the limits thereof, locate, build and operate, by animal or other power, its road over and along any portion of the public road which is one hundred feet or more wide. It shall as soon as practicable put the road in as good repair as it was before its use for such railway. Boards of supervisors are authorized to accept for road purposes conveyances of land adjoining any such road or part thereof sufficient to increase the same to the width of one hundred feet; but in any county in which such company desires to operate its line of railway over a road not less than sixty feet in width, for a distance not over two miles beyond the limits of a city or town to any state institution, the board of supervisors may grant the right to it to operate its line over said road, not exceeding two miles, under such rules and regulations as said board may prescribe. The board shall have the power to rescind or modify such grant, rules and regulations at any time. [18 G. A., ch. 32, § 1.]

SEC. **2027. Damages to abutting owners.** Unless the owners of the land abutting each side of said road shall consent to such use, the railway company shall pay all damages sustained by the land owners caused by building said road, which shall be ascertained and paid in the same manner as is provided for taking private property for works of internal improvement, and it shall also be liable for all damages resulting from the carelessness of its officers, agents or servants in the construction or operation of its railway. [24 G. A., ch. 22; 23 G. A., ch. 21; 18 G. A., ch. 32.]

The last provision of this section would be unnecessary if § 2071 were to be construed as applicable to street railways, but that section and other sections of the same chapter were evidently enacted without having in contemplation their application to street railways: *Manhattan Trust Co. v. Sioux City Cable R. Co.*, 68 Fed., 82.

SEC. **2028. Ways to lands which have none.** Any person, corporation or copartnership owning or leasing any land not having a public or private way thereto, may have a public way to any railway station, street or highway established over the land of another,

not exceeding forty feet in width, to be located on a division line or immediately adjacent thereto, and not interfering with buildings, orchards, gardens or cemeteries; and when the same shall be constructed it shall, when passing through inclosed lands, be fenced on both sides by the person or corporation causing it to be established. [25 G. A., ch. 18; 15 G. A., ch. 34, § 1.]

No authority is given by this act to construct a private way. The way, when condemned, is to be a public one, and the act is therefore not invalid: *Jones v. Mahaska, etc., Coal Co.*, 47–35.

A road or way established under the provisions of this statute is a public way, in the sense that the public may use and enjoy it in the manner in which roads and highways are ordinarily used by it, and the mine owner who procured it to be established must use the special privilege which the act confers on him in such a way as not to destroy this right of the public or prevent its enjoyment, and the statute is therefore constitutional. Nor can the construction of the railway in accordance with these provisions be enjoined on the ground that it prevents the owner of the land from constructing a railway thereon for his own use: *Phillips v. Watson*, 63–28.

11 G. A., ch. 127, which provided for the establishment of private ways was held unconstitutional; but, *held, arguendo*, that to afford an outlet to a citizen or access to mineral wealth, a public way might properly be established: *Bankhead v. Brown*, 25–540.

SEC. **2029. Proceedings to condemn.** If the owner of any real estate necessary to be taken refuses to grant the right of way, if he and the person, partnership or corporation asking its establishment cannot agree upon the compensation to be paid therefor, the sheriff of the county in which said real estate is situated shall, upon the application of either party, appoint six freeholders of the county, not interested in the same or a like question, who shall assess the damage which said owner will sustain, and make report thereof in writing to the sheriff, and, if the applicant for such way shall, before entering upon said real estate for the purpose of constructing such way, pay to the sheriff for the use of the owner the sum assessed, said road may be at once constructed and maintained. [15 G. A., ch. 34, § 2.]

SEC. **2030. Provisions applicable.** The application to the sheriff, and all other proceedings relating thereto, the result of non-user, and the rights and duties as to other roads, shall be the same as provided in this chapter in relation to the taking of private property for the right of way of railroads, the effect of non-user or abandonment of such rights of way and road-beds, and in the chapter or chapters of this code relating to roads, except that the report of the commissioner and the record thereof shall confer no title upon the applicant for the land so taken, but shall be presumptive evidence of the establishment of such way. [Same, § 3]

SEC. **2031. Railway established.** Any owner, lessee or possessor of lands having coal, stone, lead or other mineral thereon, who has paid the damages assessed for roads established as above provided, may construct, use and maintain a railway thereon, for the purpose of reaching and operating any quarry or mine on such land and of transporting the products thereof to market. In giving the notices required in such cases, the applicant shall state whether a railway is to be constructed and maintained on the way sought to be established, and, if it be so stated, the jury shall consider that fact in the assessment of damages. [Same, § 4.]

SEC. **2032. Rights of riparian owners.** All owners and lessees of lands or lots situated upon the Iowa banks of the Mississippi or Missouri rivers, upon which any business is carried on which is in any way connected with the navigation of either of said rivers, or to which such navigation is a proper or convenient adjunct, are authorized to construct and maintain, in front of their property, piers, cribs, booms and other proper and convenient erections and devices for the use of their respective pursuits, and the protection and harbor of rafts, logs, floats and other water crafts, in such manner as to create no material or unreasonable obstruction to the navigation of the stream, or to a similar use of adjoining property. [15 G. A., ch. 35, § 1.]

SEC. **2033. Construction of railroad.** No person or corporation shall construct or operate any railroad or other obstruction between such lots or lands and either of said rivers, or upon the shore or margin thereof, unless the injury and damages to owners or lessees occasioned thereby shall be first ascertained and compensated in the manner provided in this chapter for taking private property for works of internal improvement. [Same, § 2.]

Whether the preceding section is in conflict with act of congress (U. S. Rev. Stat., § 5234), relating to the construction of cribs, piers, etc., on the Mississippi river, *quære*. But even if it is, this section is not thereby rendered void. If a riparian owner is engaged in business connected with the navigation of the river it is not essential to his right to recover under this section that he should have erected a crib or pier in front of his property. The rule recognized in *Tomlin v. Dubuque, B. & M. R. Co.*, 32–106, is no longer applicable, Revision, § 1328, being now repealed: *Renwick v. Davenport & N. W. R. Co.*, 49–664; *S. C.* 102 U. S., 108.

CHAPTER

OF THE CONSTRUCTION AND OPERATION OF RAILWAYS.

SECTION **2034. Change of name.** □ Any corporation organized under the laws of this state for the purpose of constructing and operating a railway may, with the consent of two-thirds of all the stockholders in interest, change the corporate name thereof, but no such change shall be complete until the president and secretary shall file in the office of the secretary of state a statement under oath showing the consent of the stockholders thereto and the new name adopted, with a certified copy of the proceedings in relation thereto as appears in the records thereof, and from that time the corporation by its new name shall be entitled to all the rights, powers and franchises that it possessed under the old one, and by such new name shall be liable upon all contracts and obligations entered into by or binding upon such corporation under the old name to the same extent and in the same manner as if no change had been made. [C. '73, § 1273.]

SEC. **2035. Record.** The secretary of state shall immediately record in the proper book in his office matter filed under the preceding section, making references to the record of the articles of incorporation. [C. '73, § 1274.]

SEC. **2036. May join or consolidate.** Any such corporation may join, intersect and unite its railway with that of any other corporation at such point upon the boundary line of this state as may be agreed upon, and, with the consent of three-fourths in interest of all the stockholders, by purchase, sale or otherwise, may merge and consolidate the stock, property, franchises and liabilities of such corporations, making the same one corporation, upon such terms as may be agreed upon, not in conflict with law. [C. '73, § 1275; R., § 1332.]

A railroad corporation organized under the general law may, after constructing a line, sell the property and continue the object of its incorporation by the construction of a new line: *Mahaska County R. Co. v. Des Moines Valley R. Co.*, 28–437.

Where the articles of incorporation of the company provided for the sale of the property with the limitation that "no sale shall be valid until all debts of the company shall be paid or arranged for," *held*, that the indebtedness being a very inconsiderable sum, if anything, and the purchaser having inquired if there were any debts, and being always ready to pay any that might be established, a sale under such circumstances was valid: *Ibid.*

Where a railway company through its directors sold its property to another company and the directors and stockholders of the former stood by with knowledge of all the facts and saw the latter company make large expenditures on the property, *held*, that they were estopped from seeking a recovery of the property because of an irregularity in the sale: *Ibid.*

A company buying in the franchise of property of a railroad at a foreclosure sale does not become privy to any agreement on the part of the original company except so far as it may be incorporated into the deeds of conveyance under which the title is held: *Close v. Burlington, C. R. & N. R. Co.*, 64–149.

Where two railroad companies were consolidated under the arrangement that stock in the new company should be issued to stockholders in the old companies, and the new company should acquire the property of the old, *held*, that a stockholder in one of the old companies did not, by such transfer of property, acquire a vendor's lien thereon: *Cross v Burlington & S. W. R. Co*, 58–62.

The purchaser of a railway at foreclosure sale acquires no better rights than the company whose franchise it purchases, and where the predecessor had occupied the streets of a city by its track without having paid damages assessed to an abutting property owner, and such property owner had recovered judgment for damages, *held*, that he might maintain an action against the successor to enjoin it from the use of the streets until payment of such judgment: *Harbach v. Des Moines & K. C. R. Co.*, 80–593

The fact that the previous company was allowed to occupy the street by the property owner without payment of damages would be a favor to it only and not a right passing to its successor by a foreclosure sale: *Ibid.*

SEC. **2037. Connections.** Any such corporation which has constructed or may construct its railway so as to meet or connect with another railway in an adjoining state at the boundary line of this state, may make such contracts and agreements therewith for the transportation of freight and passengers, or the use of its railway, as the board of directors may see proper, and not inconsistent with law. [C, '73, § 1276; R., § 1334.]

SEC. **2038. Extension.** Any such corporation organized for the purpose of constructing a railway from a point within the state may construct or extend the same into or through any other state, under such regulations as may be prescribed by the laws of such state, and its rights and privileges over said extension in the construction and use thereof, and in controlling and applying the assets, shall be the same as if its railway was constructed wholly within the state. [C. '73, § 1277; R., § 1333.]

SEC. **2039. Duties and liabilities of lessees.** All the duties and liabilities imposed by law upon corporations owning or operating railways shall apply to all lessees or other persons owning or operating such railways as fully as if they were expressly named herein, and any action which might be brought or penalty enforced against any such corporation by virtue of any provisions of law may be brought or enforced against such lessees or other persons. [C. '73, § 1278.]

The obligation to fence (under § 2055) rests upon the lessee as much as upon the lessor, and the lessee is liable to damages done by its train, although as between it and the lessor the duty of fencing rests upon the latter: *Clary v. Iowa Midland R. Co.*, 37–344.

Where the owner and a lessee each runs trains over the road, each is liable only for stock injured by its own trains by reason of the failure to fence: *Stephens v. Davenport & St. P. R. Co*, 36–327.

The remedy given against the lessees by statute is merely cumulative, and the right of action for negligence causing the injury of a passenger exists as against the company in whose name the road is being operated, although it may, in fact, have been leased to and be under the control of a lessee: *Bower v. Burlington & S. W. R. Co.*, 42–546.

Prior to express statutory provision, *held*, that the statute imposing a liability for injuries to stock where the right of way is not fenced was not applicable to a lessee: *Liddle v. Keokuk, Mt. P. & M. R. Co.*, 23–378.

But further, *held*, under the same statutory provision, that where the lessee had the exclusive right to run, operate and control the road, and had built and maintained fences along the road, and had the same power to protect itself that the lessor would have, it was liable for injury to stock to the same extent as though it were owner of the road: *Stewart v. Chicago & N. W. R. Co.*, 27–282.

The company whose engines set out fire are liable for damages from the fire thus set out, although the line is owned and operated by another company and fire starts on the right of way by reason of combustible material allowed to accumulate thereon by such other company: *Slossen v. Burlington, C. R. & N. R. Co.*, 60–215.

Where a railway company incorporated under the laws of Iowa leases its road to a foreign corporation, the lessor is a necessary party to an action for breach by the lessee of a contract entered into originally with the lessor. The statutory provision as to the liability of a lessee does not discharge lessor from liability, but in effect makes both the lessor and the lessee jointly liable: *Chicago & N. W. R. Co. v. Crane*, 113 U. S., 424.

A lessee of a railroad can exercise no right that its lessor could not, and if the lessor was subject to injunction against operating its road at the suit of the land owner whose property had been taken without compensation, the lessee is subject to the same restriction: *Hibbs v. Chicago & S. W. R. Co.*, 39–340.

The company owning a railroad, and in whose name it is being operated, is liable in an action for personal injuries received thereon, although the road is leased to and operated by a lessee: *Bower v. Burlington & S. W. R. Co.*, 42–546.

Where a railroad was leased to defendant under a contract by which he was to manage the same and apply the profits, after paying operating expenses, to the payment of certain advances made by him, etc., *held*, that he was a trustee and was not individually liable as lessee for operating expenses: *United States Rolling Stock Co. v. Potter*, 48–56.

The receiver of a railroad, and not the company, is liable for injuries to stock, under the provisions of § 2055: *Brockert v. Central Iowa R. Co.*, 82-369; *Schurr v. Omaha & St. L. R. Co.*, 67 N. W., 280.

A receiver operating a railway under direction of the court is liable to judgment for personal injuries received by an employe from the negligence of other employes engaged in the operation of the road, under the statutory provision on such subject: *Sloan v. Central Iowa R. Co.*, 62-728.

For similar provisions, see § 2066.

SEC. **2040. Offices.** The offices of secretary and treasurer or assistant treasurer and general superintendent of railway corporations organized under the laws of the state shall be where its principal place of business is or is to be, in which the original record, stock and transfer books and all the original papers and vouchers thereof shall be kept. Such treasurer or assistant treasurer shall keep a record of the financial condition of the corporation, which shall be open to inspection by any stockholder, or any committee appointed by the general assembly, at all reasonable times. It may keep a transfer office in any other state, with a duplicate transfer book, but no transfer of shares of stock shall be legal or binding until the same is entered in the one kept in the state. The secretary and treasurer or assistant treasurer and general superintendent shall reside in this state. [C. '73, § 1279.]

It is the absolute right of any person under this section to examine the stock and transfer books of a company, whether he shows himself interested therein or not and especially has a stockholder the right at all reasonable hours to inspect the records showing the financial condition of the corporation. Perhaps he has not the right to examine the original papers and vouchers, but as to the original record, stock, and transfer books and the record of the financial condition of the company the right is unquestionable, unless it clearly appears that the purpose of asking such examination is to perplex, annoy, or harass the officers of the company having the records in charge. The stockholder may have the assistance of his attorney and the clerk of such attorney in making examination of such records: *Ellsworth v. Dorwart*, 63 N. W., 588.

SEC. **2041. Bonds—mortgages.** Any such corporation may issue its bonds for the construction and equipment of its railway in sums of not less than fifty dollars, payable to bearer or otherwise, with interest not exceeding eight per cent per annum, and making them convertible into stock, and sell the same at such prices as is thought proper. If such bonds are sold below par they shall, nevertheless, be valid, and no plea of usury shall be allowed in any action or proceeding brought to enforce the collection thereof. Such corporation may also secure the payment of the bonds by mortgages or deeds of trust upon the whole or any part of its property and franchises. [C. '73, § 1283; R., § 1339.]

SEC. **2042. After-acquired property.** Such mortgages or deeds of trust may by their terms include and cover not only the property of the corporation making them, owned at the time of their date, but all property real and personal which may thereafter be acquired, and they shall be as valid and effectual for that purpose as if the property was in possession at the time of their execution. [C. '73, § 1284; R., § 1340.]

SEC. **2043. Execution of mortgages.** They shall be executed in the manner the articles of incorporation or the by-laws of the corporation may provide, and be recorded in each county through which the railway of the company may be located, or in which any property mortgaged or conveyed may be situated, and when recorded shall be constructive notice of the rights of all parties thereunder, and for this purpose the rolling stock and personal property of the company belonging to the road shall be deemed a part thereof, and such mortgages and deeds so recorded shall protect the lien of the mortgagee or grantee upon personal property to the same extent that it does upon real estate thus mortgaged or conveyed. [C. '73, § 1285; R., § 1341.]

The rolling stock of a railroad is not personal property in such sense as to be subject to a landlord's lien under a lease of terminal facilities used by such railroad: *Trust Co. v. Manhattan Trust Co.*, 77 Fed., 82.

Whether the rolling stock of a railroad is subject to a landlord's lien in favor of the owner of terminal facilities which are leased to the company owning the rolling stock, *quære: Manhattan Trust Co. v. Sioux City & N. R. Co.*, 68 Fed., 72.

SEC. **2044. Preferred stock.** Any such corporation, with the consent of the holders of two-thirds of all its stock, having no funds with which to pay the interest on its bonded debt or the principal thereof, or of other debts, may issue preferred stock equal to its bonded debt and ten thousand dollars per mile upon its completed road, and exchange the same for its bonds at par, and pay its other debts therewith at par, and such stock shall be entitled to such annual dividends as the directors may determine, not exceeding eight per cent, payable from the net profits of the business of the road each year; but the earnings of any one year shall not be used in whole or in part to pay dividends on any past or future year, nor shall the dividends be paid thereon until all the interest on its interest bearing indebtedness not represented by such stock shall have been paid. The dividends at the rate determined by the directors shall be paid on such stock before any can be paid on the common stock. [15 G. A., ch. 20; C. '73, § 1286.]

SEC. **2045. Conversion into common stock.** Such preferred stock and any income or mortgage bond of the corporation shall, at the option of the holder, be convertible into common stock on such terms as the board of directors may prescribe, but the aggregate amount of the common and preferred stock shall not exceed the total amount of stock which the corporation may be authorized by law, or the articles of incorporation, to issue. [C. '73, § 1287.]

SEC. **2046. Selection of directors by bondholders.** Any railway corporation organized under any law of the state, including consolidated corporations created pursuant to the laws of this and any adjoining state, may in such manner, under such regulations, and to such an extent as may be prescribed by its board of directors, and consented to by at least two-thirds of the capital stock then outstanding, confer upon the holders of its bonds or other evidences of indebtedness, or upon the holder of any particular class of such bonds or evidences of indebtedness, the right to vote for directors thereof, one or more of whom may be chosen from among such bondholders. [25 G. A., ch. 23.]

SEC. **2047. Corporation may own stock.** Any railway corporation organized under the laws of the state, or operating a road therein under the authority of the laws thereof, may acquire, own and hold either the whole or any part of the stock, bonds or other securities of any other railroad company of this or any adjoining state. [25 G. A., ch. 24.]

SEC. **2048. Foreign railway companies—privileges.** Any railway corporation organized or created by or under the laws of any other state, owning and operating a line or lines of railroad in such state, may build its road or branches into this state, and shall possess all the powers and privileges, and be subject to the same liabilities, as like corporations organized and incorporated under the laws of this state, if it shall file with the secretary of state a copy of its articles of incorporation, if incorporated under a general law of such state, or a certified copy of the statute incorporating it where the charter thereof was granted by statute. [18 G. A., ch. 128.]

A foreign railroad company doing business in Iowa may be sued in the federal courts in Iowa as a foreign corporation, service of process being made upon an agent of the company: *Dinzy v. Illinois Central R. Co*, 61 Fed., 49.

A railway company complying with these requirements is not entitled to personal service of notice in a proceeding to locate a highway over its land where its ownership thereof does not appear by the transfor books. It is no better position than a domestic railway company in this respect: *State v. Chicago, M. & St. P. R. Co.*, 80-589.

SEC. **2049. Bonds secured by mortgage.** Any railway corporation organized under the laws of the state may mortgage its property and franchises, in whole or in part, to secure bonds issued by it to pay or refund its indebtedness, to improve or develop its property, or for the purpose of effecting the object of its incorporation, to be issued in such amounts, run for such length of time, be payable within or without the state, and bear such rate of interest, not to exceed the legal rate in the state at the time of issue, as the company issuing the same shall determine. [25 G. A., ch. 26, § 1.]

SEC. **2050. Mortage to secure bonds of lessee.** Any railway corporation organized under the laws of the state may mortgage its property and franchises, in whole or in part, to secure bonds issued by any other railway corporation of this or any other state, which, at the time, is operating the road of such mortgagor under lease thereof, such bonds to be issued to refund or to secure the means to pay the indebtedness of such lessor, or improve or develop its property, for the purpose of effecting the object of its incorporation. Such bonds may be issued in such amounts, run for such length of time, be made payable within or without the state, and bear such rate of interest, not exceeding the legal rate in this state at the time they are issued, as may be determined by and be acceptable to such lessee. The lessee may secure the bonds issued by it for any of the purposes aforesaid by a mortgage of its leasehold interest in the property and franchises of the lessor. [Same, § 2.]

SEC. **2051. Conditional sale or lease of equipment or rolling stock.** In any contract for the sale of railroad or street railway equipment or rolling stock it may be agreed that the title thereto, although possession thereof be delivered immediately or at any time or times subsequently, shall not vest in the purchaser until the purchase price shall be fully paid, or that the seller shall have and retain a lien thereon for the unpaid purchase money. In any contract for the leasing or hiring of such property, it may be stipulated for a conditional sale thereof at the termination of such contract, and that the rentals or amounts to be received under such contract may, as paid, be applied and treated as purchase money, and that the title to the property shall not vest in the lessee or bailee until the purchase price shall have been paid in full, and until the terms of the contract shall have been fully performed, notwithstanding delivery to and possession by such lessee or bailee; but no such contract shall be valid as against any subsequent judgment creditor, or subsequent *bona fide* purchaser for value without notice, unless:

1. The same shall be evidenced by an instrument executed by the parties and acknowledged by the vendee, or lessee, or bailee, as the case may be, in the same manner as deeds are acknowledged or proved;
2. Such instrument shall be filed for record in the office of the secretary of state;
3. Each locomotive engine or car sold, leased, or hired as aforesaid shall have the name of the vendor, lessor, or bailor plainly marked on each side thereof, followed by the word "owner," "lessor," or "bailor," as the case may be. [25 G. A., ch. 28, § 1.]

SEC. **2052. Recording.** The contracts herein authorized shall be recorded by the secretary of state in a book of records to be kept for that purpose, and, on payment in full of the purchase money and the performance of the terms and conditions stipulated in any such contract, a declaration in writing to that effect may be made by the vendor, lessor, or bailor, or his or its assignee, which declaration may be made on the margin of the record of the contract, duly attested, or it may be made by a separate instrument, to be acknowledged by the vendor, lessor, or bailor, or his or its assignee, and recorded as aforesaid. For such services the secretary of state shall be entitled to a fee of one dollar for recording each of the contracts and each of said declarations, and a fee of one dollar for noting such declaration on the margin of the record. [Same, § 2.]

SEC. **2053. Prior contracts.** The two preceding sections shall not be held to invalidate or affect in any way any contract of the kind referred to in the last preceding section but one, made prior to April 24, 1894, and any such contract made before said date may, upon compliance with these provisions, be recorded as herein provided. [Same, § 3.]

SEC. **2054. Cattle-guards — crossings — signs.** Every corporation constructing or operating a railway shall make proper

cattle-guards where the same enters or leaves any improved or fenced land, and construct at all points where such railway crosses any public road good, sufficient, and safe crossings and cattle guards, and erect at such points, at a sufficient elevation from such road as to admit of free passage of vehicles of every kind, a sign with large and distinct letters placed thereon, to give notice of the proximity of the railway, and warn persons of the necessity of looking out for trains. Any railway company neglecting or refusing to comply with the provisions of this section shall be liable for all damages sustained by reason of such refusal or neglect, and it shall only be necessary, in order to recover, for the injured party to prove such neglect or refusal. [C. '73, § 1288; R., § 1331.]

Cattle-guards: This section makes it necessary that cattle-guards be constructed not only where the track goes through outside fences, but also at division fences: *Smith v. Chicago, C. & D. R. Co.*, 38–518.

Where the track passes through the lands of two owners fenced in common, and subsequently a division fence is constructed, it is the duty of the company upon notice to put in a cattle-guard, and it will be liable for the value of crops destroyed by reason of the failure to do so: *Danald v. St. Louis, K. C. & N. R. Co.*, 44–157.

Where a railroad is constructed across unimproved or uninclosed land, and the land is afterwards improved or inclosed, the railway company is under obligation to construct cattle-guards just as it would have been under obligation to do if the land had been inclosed at the time the road was constructed: *Heskett v. Wabash, St. L. & P. R. Co.*, 61–467.

Whether notice of the company to construct cattle-guards is necessary after the land has been thus inclosed, *quære;* but, if necessary, the service of notice upon the station agent is sufficient: *Ibid.*

This provision as to cattle-guards applies to cases where the corporation fences its right of way. When it does so there is fenced land, and upon entering or leaving, the law requires a cattle guard: *Robinson v. Chicago, R. I. & P. R. Co.*, 67–292.

The statute is imperative, and the court will not engraft an exception upon it relieving a company from obligation to put in a cattle-guard on the ground that it is not fit, proper and suitable to do so in a particular case: *Mundhenk v. Central Iowa R. Co.*, 57–718.

Where it appeared that plaintiff's horses were put temporarily in a field, from which they escaped through a defective fence, and were injured by reason, as alleged, of an insufficient cattle-guard, in a county where cattle were not allowed to run at large, *held*, that the facts did not necessarily show contributory negligence defeating plaintiff's right to recover: *Timins v. Chicago, R. I. & P. R. Co.*, 72–94.

There is nothing in this section requiring a company to make cattle-guards at a *private* crossing: *Bartlet v. Dubuque & S. C. R. Co.*, 20–188. (But see § 2022.)

A railroad company is required to use ordinary care and diligence to keep the cattle-guards on its track free from snow and ice, after it has notice, or could have acquired notice in the exercise of ordinary care, that they are obstructed thereby: *Grahlman v. Chicago, St. P. & K. C. R Co.*, 78–564; *Robinson v. Chicago, R. I. & P. R. Co.*, 79-495; *Giger v. Chicago & N. W. R. Co.*, 80–492.

Method of construction: The term cattle-guard as used in the statute imports a guard or protection extending the whole width of the right of way. The owner is under no obligation to construct a fence up to the track upon the right of way: *Mundhenk v. Central Iowa R. Co.*, 57–718; *Heskett v. Wabash, St. L. & P. R. Co.*, 61–467.

The fact that an animal passes over the cattle-guard is not of itself evidence of improper construction or insufficiency: *Barnhart v. Chicago, M. & St. P. R. Co.*, 66 N. W., 902.

Under the facts of a particular case, *held*, that there was no negligence shown in the construction of a cattle-guard of ties laid on stringers over a pit, although

such cattle-guards may be no longer in general use: *Strong v. Chicago & N. W. R. Co.*, 63 N. W., 699.

The duty of connecting a cattle-guard with the right of way fence devolves upon the company, and is implied in the duty to construct the guard itself: *Miller v. Chicago, R. I. & P. R. Co.*, 66–546.

Where the right of way and public highway intersect obliquely, the company should fence to the point where the highway crosses the track, and construct the cattle-guard there, and not at the point where the highway intersects the right of way: *Andre v. Chicago & N. W. R. Co.*, 30–107.

As to liability of company for defect in cattle-guard causing injury to employe, see *Ford v. Chicago, R. I. & P. R. Co*, 71 N. W., 332.

Further as to cattle-guards, see notes to § 2022.

Crossings: Where a railway impinged upon a highway some twenty rods from the place where it finally crossed it, *held*, that all the intervening highway was not to be deemed a part of the crossing, within the meaning of this section: *Beatty v. Central Iowa R. Co.*, 58–242.

It is the duty of the company to repair the crossings and keep them in a safe condition: *Farley v. Chicago, R. I & P. R. Co.*, 42–234.

The embankment constructed as a necessary approach to the crossing is a part of the crossing, and the company is required to keep it in repair: *Ibid.*

These provisions have reference to grade crossings and do not require the company to construct a viaduct where a highway crosses its track: *Albia v. Chicago, B. & Q. R. Co.*, 71 N. W., 541.

Purchasers of a road at judicial sale take subject to any oral obligations to maintain crossings, etc., made by the former company in connection with the acquisition of the right of way: *Swan v. Burlington, C. R. & N. R. Co.*, 72–650.

Negligence: Where plaintiff's cow was injured by a wild-train at a highway crossing, *held*, that it was a question for the jury whether it was negligence in the plaintiff to allow his cow to be at such crossing at the time when no regular train was due: *Courson v. Chicago, M & St P. R. Co.*, 71–28.

While the language of this section seems to preclude proof of contributory negligence as a defense in an action to recover for personal injuries at a defective highway crossing (that is, negligence of plaintiff contributing, with that of defendant, to cause the injury), it does not preclude defendant from showing that the injury was due to plaintiff's fault and not to the defective condition of the crossing: *McKelvy v. Burlington, C. R. & N. R Co.*, 84–455.

Contributory negligence is a defense in an action brought for injuries at a crossing where the company has been guilty of neglect in maintaining a safe crossing, or in operating its trains: *Reeves v. Dubuque & S. C. R. Co.*, 92–32.

In an action for an injury received by reason of a defective crossing defendant has the right to show negligence of the injured party as a defense to the action. *McKelvy v. Burlington, C. R. & N. R. Co*, 58 N. W., 1068.

Perhaps the degree of care required of one in attempting to cross a street railway track is not the same as that required in crossing steam railways and what would amount to negligence in the latter case might not be so regarded in the former. In the former case the question is peculiarly one of fact for the jury: *Orr v. Cedar Rapids & M. C. R. Co.*, 62 N. W., 851.

Evidence in a particular case, *held* sufficient to sustain a verdict against a railroad company for injury to a horse at a cattle-guard: *Meade v. Kansas City, St. J. & C. B. R. Co.*, 45–699.

Evidence in a particular case that the crossing was so constructed as to permit the hoof of a horse to catch between the rail and the plank, *held* sufficient to support a verdict for damages for the death of a horse killed at such crossing: *Criss v. Chicago, N. W. R. Co.*, 88–741.

Where the sufficiency of a cattle-guard was in question, *held*, that the fact that a similar guard situated on other premises was sufficient to, and did, keep out stock, was not material or relevant: *Downing v. Chicago, R. I. & P. R. Co.*, 43–96.

Under the evidence in a particular case, *held*, that it was for the jury to say whether or not the cattle-guard was reasonably sufficient for the purpose for which it was constructed: *Timins v. Chicago, R. I. & P. R. Co*, 72 94.

Measure of damages: As the owner of the land has no legal right to construct cattle-guards across the track, he is not bound to do so in order to protect himself from damages for want thereof, but may recover whatever damages he

may sustain by reason of his land being left open and unfenced: *Raridon v. Central Iowa R. Co.*, 65-640; *Downing v Chicago, R. I. & P. R. Co.*, 43-96.

To make out a *prima facie* case against the railway under this section for an animal killed at a crossing, it must appear that the animal was killed at such crossing and not at a place where the company had the right to fence, and unless such fact is shown the company is not liable, even if it should appear that the crossing is defective: *Croddy v. Chicago, R I. & P. R. Co.*, 91-598.

The fact that stock has previously been killed at the same crossing prior to the accident in question, is not admissible: *Ibid.*

Measure of damages for failure to erect a cattle-guard at a partition fence between two fields, one of which might have been used for pasture, *held* to be the difference between the value of the pasture in the condition in which the inclosure was left by the company and what the value would have been if the cattle-guards had been maintained: *Raridon v. Central Iowa R. Co.*, 69-527.

Where the land owner seeks to recover the entire value of a crop which he alleges to have been totally lost by reason of the failure of the company to construct cattle-guards, the question of how much less value the crop is by reason of such failure is a question of proof. The fact that a claim is made for the entire loss will not prevent the owner from recovering whatever loss is suffered: *Raridon v. Central Iowa R. Co.*, 65-640.

The measure of damage for crops destroyed by reason of failure to put in a cattle-guard where a partition fence is erected subsequently to the completion of the road is the value of the crop destroyed by reason of such failure: *Donald v. St. Louis, K. C. & N. R. Co.*, 44-157.

Double damages: A cattle-guard is not to be deemed a part of the fence required by other statutory provisions, and the company is not liable in double damages for failure to construct such cattle-guard as it is in case of failure to construct a fence: *Moriarity v. Central Iowa R. Co.*, 64-696; *Rhines v. Chicago & N. W. R. Co.*, 75-597.

Contract: A company required to maintain and construct proper cattle-guards cannot, by contract with another company whose road it purchases, relieve itself from the right or obligation to do so: *Downing v. Chicago, R. I. & P. R. Co.*, 43-96.

Signs: This section only renders the company liable for damages sustained by reason of the failure to erect such signs: *Lang v. Holiday Creek R. etc., Co.*, 49-469

The failure to erect a sign renders the company absolutely liable in a case wherein it is shown that a person was injured at a crossing. Evidence of the injury and of the company's neglect to erect the sign establishes its liability, and it is not necessary for plaintiff to show his own care. (As the case arose, however, under a previous statute, this point was not involved): *Payne v. Chicago, R. I. & P. R. Co.*, 44-236.

Under a previous statute which did not contain the provision that proof of the neglect to erect a sign should be sufficient to entitle the injured party to recover for injuries received at such crossing, *held*, that proof of failure to erect a sign established negligence on the part of the company, but did not relieve plaintiff of the necessity of showing that his own negligence did not contribute to the injury: *Dodge v. Burlington, C. R. & M. R Co.*, 34-276; *Correll v. Burlington, C. R. & M. R. Co.*, 38-120; *Payne v. Chicago, R. I. & P. R. Co.*, 39-523; *S. C.*, 44-236.

SEC. **2055. Failure to fence—liability for stock killed—speed at depots.** Any corporation operating a railway, and failing to fence the same against live stock running at large and maintain proper and sufficient cattle-guards at all points where the right to fence or maintain cattle-guards exists, shall be liable to the owner of any stock killed or injured by reason of the want of such fence or cattle-guards for the full amount of the damages sustained by the owner on account thereof, unless it was occasioned by his wilful act or that of his agent; and to recover the same it shall only be

necessary for him to prove the loss of or injury to his property. If such corporation fails or neglects to pay such damages within thirty days after notice in writing that a loss or injury has occurred, accompanied by an affidavit thereof, served upon any officer or station or ticket agent employed by said corporation in the county where such loss or injury occurred, such owner shall be entitled to recover from the corporation double the amount of damages actually sustained by him. No law of the state or any local or police regulations of any county, township, city or town, relating to the restraint of domestic animals, or in relation to the fences of farmers or land owners, shall be applicable to railway tracks, unless specifically so stated in such law and regulation. Upon depot grounds necessarily used by the public and the corporation, the operating of trains at a greater rate of speed than eight miles an hour where no fence is built shall be negligence, and shall render such corporation liable for all damages occasioned thereby, in the same manner and to the same extent, except as to double damages, as in cases where the right to fence exists. [C. '73, § 1289.]

Failure to fence: This section makes the fact of the injury or destruction of stock on the railway track *prima facie* evidence of negligence on the part of the corporation, and the burden of proof is upon the defendant to establish the building of a good and sufficient fence: *Brentner v. Chicago, M. & St. P. R. Co.*, 68-530.

In order to render the company liable for injury to stock, negligence must be shown, but it is sufficient to make out a *prima facie* case to show the injury and that it occurred by reason of the omission to fence. Thereupon the burden is upon the company to show freedom from negligence in the matter of a fence: *Small v. Chicago, R. I. & P. R. Co.*, 50-338.

It is error to instruct the jury with reference to negligence of the agents or employes of a railroad company when the question is simply as to whether the stock was killed by reason of the failure to fence: *Wall v. Des Moines & N. W. R. Co.*, 89-193.

The statute is not designed to dispense with all proofs on the part of the owner excepting as to injury or destruction of his property, and it is error to quote the language of the statute in such way as to give that impression to the jury: *Ibid.*

If a railroad company fails to fence its road it is absolutely liable for stock injured, in the absence of wilful act of the owner: *Aylesworth v. Chicago, R. I. & P. R. Co.*, 30-459.

Liability for injury under this section attaches where the want of a fence in connection with some act of the company is the proximate cause of the injury. If it is claimed that defendant is liable for negligence in so constructing a bridge as to render it dangerous for stock running at large, such negligence must be directly alleged: *Asbach v Chicago, B. & Q. R. Co.*, 74-248.

Before the enactment of this statute it was held that to permit cattle to run at large did not impute negligence on the part of the owner, and that cattle would not be trespassers if found upon the unfenced track of a railway; that if the track was unfenced the company would be held to the use of ordinary care and diligence in running its trains to avoid injuring such stock, but if its track was fenced it would only be liable for injury resulting from gross or wilful negligence: *Cussell v. Hanley*, 20-219; *Alger v. Mississippi & M. R. Co.*, 10-268.

The railroad company is required to fence its track for the protection of "crazy" horses as well as for the protection of animals possessing good "horse sense." The fact that the animal is injured by reason of failure to leave the track through want of natural intelligence will not show that the injury did not result from want of a fence: *Liston v. Central Iowa R. Co.*, 70-714.

This section does not require railway companies to fence their roads, but subjects them to certain liabilities if they fail to do so. Failure to fence cannot,

Pleading: In an action before a justice of the peace for killing stock for which the company is liable in double damages, the notice and affidavit may be introduced in evidence though not mentioned in the pleadings, as no petition need be filed: *Brandt v. Chicago, R. I. & P. R. Co.*, 26-114.

On the trial of an action against the company to recover double damages, the fact that the notice required by statute was not attached to the petition must be raised by demurrer, if at all, and cannot be raised as an objection when the notice is offered in evidence: *McKinley v Chicago, R. I. & P. R. Co.*, 47-76

Where the case is tried on the theory that defendant was liable if its employes had failed to close a gate after it was left open by some unknown person, the sufficiency of such statement of the cause of action not having been raised by demurrer, cannot be afterward questioned: *Foley v. Hamilton*, 89-686.

While a railroad is not liable for stock killed by reason of its failure to properly fence where the stock is not running at large, yet where that fact is assumed and no objection on account of the failure to plead or prove it is taken, it will be deemed waived: *Daugherty v. Chicago, M. & St. P. R. Co.*, 87-276.

Question for jury: Although the sufficiency of the service of the notice is a question of law for the court, yet where the fact of service is an issue its determination may properly be left to the jury: *Cole v. Chicago & N. W. R Co.*, 38-311.

Fencing at depot grounds: The company is not required to fence where it would not, in view of public convenience, be fit, proper or suitable for it to do so. Depot and station grounds may be left unin closed when the business of the road and the interests of the public so require: *Latty v. Burlington, C. R & N. R. Co.*, 38-250; *Smith v. Chicago, R. I. & P. R. Co*, 34-506; *Davis v Burlington, & M. R. R. Co.*, 26-549; *Rogers v. Chicago & N. W. R. Co.*, 26-558; *Durand v. Chicago & N. W. R. Co.*, 26-559.

Whether the public convenience and interest of the road require that grounds used in connection with the depot but not the ordinary place for receiving and delivering freight shall be left uninclosed is a question of fact properly submitted to the jury: *Rhines v. Chicago & N. W. R. Co.*, 75-597.

In the absence of proof of want of ordinary care, a company is not liable for stock killed on depot grounds: *Packard v. Illinois Cent. R. Co.*, 30-474.

Where it appeared that stock was killed one and one-fourth miles from a station, *held*, that it might be presumed that the place at which it was killed was not within depot grounds in the absence of any evidence upon the question: *Smith v. Chicago, M. & St. P. R. Co.*, 60-512.

The burden is upon the company to show that the place where stock is injured and where there is no fence is a portion of the station grounds. The fact that a switch is there maintained will not necessarily give it that character: *Comstock v. Des Moines Valley R Co.*, 32-376.

Where the company has its depot grounds surveyed and allotted, the survey or allotment and use constitute a very strong presumptive proof of their necessary boundaries: *Cole v. Chicago & N. W. R. Co.*, 38-311.

The fixing of cattle-guards at long distances beyond the switches and failing to fence between such guards and the switches cannot be regarded as setting apart that part of the main line as station or depot grounds, unless it be necessary for the purpose of transaction of business with the public that such part of the line remain unfenced. It is no reason for not fencing beyond such switch that in the operation of the trains it would be inconvenient and possibly more hazardous to couple and uncouple cars if the track beyond the switches was fenced and provided with a cattle-guard: *Peyton v. Chicago, R. I. & P. R. Co.*, 70-522.

Negligence at depot grounds: As between the owner of cattle and the company, the latter cannot be required to keep a watch or guard at depot grounds, any more than it can be required to fence the same: *Smith v. Chicago, R. I. & P. R. Co.*, 34-506.

Speed at depot grounds. By this section a railroad company is liable for all stock killed on depot grounds by trains when running at a rate of speed greater than eight miles per hour; but if the stock is killed at a place where the company has a right to fence, although nearly adjacent to the depot grounds, the provisions as to the rate of speed have no application, and it is not negligence in the company that its trains are running at a higher rate of speed, even at such

rate that they must necessarily enter on the depot grounds running faster than eight miles an hour: *Monahan v Keokuk & D. M. R. Co.*, 45-523.

The provision making the company liab'e for stock killed on depot grounds by trains running at a greater rate of speed than eight miles an hour applies only to cases where the stock is killed on such grounds: *Ibid.*

The fact that a train running at a higher rate of speed than is allowed at depot grounds runs into a team which is being driven across the track in such grounds will not render the company liable in double damages: *Johnson v. Chicago & N. W. R. Co*, 75-157.

Evidence in a particular case *held* sufficient to show that the train of defendant causing injury to stock was running at the depot grounds at a greater rate of speed than eight miles per hour: *Story v. Chicago, M. & St. P. R. Co*, 79-402.

If by excessive speed upon the station grounds animals are stampeded and run upon the track, and without checking the speed are run down and killed, the cause and effect are so closely connected that it may be said that the unlawful speed of the train is the proximate cause of the injury, although the animals are not actually killed or injured upon the depot grounds: *Ibid.*

If the train comes upon the depot grounds at a greater rate of speed than eight miles per hour, a verdict for damages for stock killed may be sustained, although at the time of the injury to the stock the train had nearly stopped. The jury might be authorized in such case to find that the train would have been stopped entirely if it had entered the grounds at a speed not exceeding the lawful rate: *Miller v. Chicago & N. W. R. Co.*, 59-707.

The provisions in this section with reference to speed at depot grounds have reference only to cases where there is injury in such depot grounds to animals running at large by reason of the running of trains at a greater rate of speed than that specified and do not render the company liable for injuries to persons or animals not running at large by reason of the greater rate of speed where such rate is not in itself negligent. The regulation of speed at depot grounds for other purposes than with reference to animals running at large is for the city under § 769: *Cohoon v. Chicago, B. & Q. R. Co.*, 90-169.

As to what rate of speed will be negligent aside from statutory provisions is a question of fact under the circumstances of each case: *Ibid.*

An ordinance regulating the rate of speed of cars within city limits is applicable to the switch yards of the company, and is not to be limited to places where the public have a right to travel: *Crowley v. Burlington, C. R. & N. R. Co.*, 65-658.

Fencing at highway crossings: The company is not required to fence where its track crosses a public highway, whether such highway be one *de jure* or only *de facto*: *Soward v. Chicago & N. W. R. Co.*, 33-386.

The company has no right to fence its line so as to obstruct a public street, whether such street is actually opened for public travel or not: *Long v. Central Iowa R. Co.*, 64-657.

A railway company has not the right to fence across platted streets and alleys within city or town limits, even though such streets or alleys are not opened or used: *Lathrop v. Central Iowa R. Co.*, 69-105.

A railroad corporation does not have a right to fence its track in cities and towns where it is intersected and crossed by streets and alleys: *Blanford v. Minneapolis & St. L. R. Co.*, 71-310.

But the company has the right to fence within the corporate limits of a town so far as its line runs through lands situated beyond streets or other highways, and it will be liable in damages for injuries to stock at such places if it has failed to fence: *Coyle v. Chicago, M. & St P. R. Co.*, 62-518.

In a particular case, *held*, that an instruction that if the animal killed was the property of plaintiff, was running at large, and was injured by defendant outside of the station grounds, plaintiff would be entitled to recover, was erroneous, it not appearing but that the animal might have been killed at some point outside of the station grounds where defendant had no right to fence: *Smith v. Kansas City, St. J. & C. B. R. Co*, 58-622.

Negligence at highway crossings or depot grounds: The company is bound to use ordinary and reasonable care to avoid injuring stock at points where it is not required to fence: *Whitbeck v. Dubuque & P. R. Co.*, 21-103; *Balcom v. Dubuque & S. C. R. Co.*, 21-102.

In a particular case, *held*, that it did not appear that the employes of a railway were negligent, after discovering animals which had come upon the track through the fence, in not avoiding injury to such animals: *Ibid.*

Where the claim was that stock escaped upon the track by reason of the gate at a private crossing being insufficient, as originally constructed, *held*, that no evidence of knowledge of the defective condition was necessary, as it would have been in the case of failure to repair: *Morrison v. Burlington, C. R. & N. R. Co.*, 84–663.

While it is not necessary that the railroad company fence all of its right of way yet where it leaves a portion unfenced and in such form as to prove a trap to animals outside of the fence it may be liable in damages for injury resulting therefrom: *McCracken v. Chicago, R. I. & P. R. Co.*, 91–711.

The fence must not only be sufficient to turn horses and cattle, but must be sufficient to turn swine, or the company will be liable for swine killed: *Fritz v. Milwaukee & St P. R. Co.*, 34–337.

The fence must be sufficient to turn live stock of any kind in order to exonerate the company from liability for injuri es to such live stock. It is not sufficient that the fence be such as is described by statute as a lawful fence: *Lee v. Minneapolis & St. L. R. Co.*, 66–131.

A bluff, a hedge, a trench, a wall, a trestle, or the like, may constitute a sufficient fence. The question whether the fence is sufficient is for the jury: *Hilliard v. Chicago & N. W. R. Co* , 37–442

The fact that the fences and track are so constructed that stock having once entered upon the right of way cannot, when frightened and driven before the engine, find a safe place to leave the track will not render the company liable: *Gilman v. Sioux City & P. R. Co.*, 62–299.

The fact that the fastening of a gate in the fence is placed on the inside may be a proper matter to be considered by the jury in determing whether the fence is sufficient: *Butler v Chicago & N. W. R. Co.*, 71–206.

As to negligence of company with reference to gates at private crossings, see notes to § 2022.

Replacing fences destroyed: The allegation that the road is unfenced at the time of the accident is supported by proof of the removal or destruction of the fence before the accident: *Fritz v. Kansas City, C. B & St. J. R. Co.*, 61–323.

Where the fences were swept away by a flood, failure to rebuild them within two months after the road was repaired and operated, *held*, sufficient to render the company liable: *Ibid.*

If a fence constructed by the company falls by reason of its insufficiency, it is immaterial that it was not down such length of time before the animal passed through that the company might, in the exercise of due diligence, have had knowledge thereof: *Libby v. Chicago, M. & St. P. R. Co.*, 60–323.

Where a railway was fenced only upon one side, and the animal injured was confined in a field inclosed in part by such fence, and escaped therefrom by reason of the fence being blown down by a storm, *held*, that the railroad not being fenced as required, the company was liable without regard to whether it was negligent in repairing the fence which was blown down, for the reason that the road was not properly fenced, and the animal after escaping from the inclosure was running at large: *Tredway v. Sioux City & St. P. R. Co.*, 43–527.

Failure to repair fences: While the company is liable for stock injured or killed on its track by reason of its failure to keep in repair the fences which it has erected on the line of its road, yet before such liability will attach the company must have knowledge, either express or implied, that the fence is out of repair, and a reasonable time after such notice to put it in repair: *Aylesworth v. Chicago, R. I. & P. R. Co.*, 30–459; *Hilliard v. Chicago & N. W. R. Co.*, 37–442.

Knowledge that the fence is out of repair may be shown by the lapse of such time as to afford reasonable presumption thereof: *Aylesworth v. Chicago, R I. & P. R. Co* , 30–459; *Davis v. Chicago, R I & P. R. Co.*, 40–292.

The company having constructed a sufficient fence is only liable for failure to exercise reasonable care and diligence in maintaining it: *Lemmon v. Chicago & N. W. R Co* , 32–151.

It is error to instruct the jury that the company would be liable if it failed to erect and maintain a fence sufficient to keep cattle from its right of way, and the cattle were injured by reason of such failure. The jury must be allowed to consider whether the defect in the fence was occasioned by want of repair, and if so, whether the company had discovered that it was out of repair, or should have discovered it in the exercise of reasonable care, and had had a reasonable time afterward to make the repair: *Brentner v. Chicago, M. & St. P. R. Co.*, 58–625.

Where the track has been properly fenced and the fence has been destroyed, the company is liable, in case of a failure to use reasonable and ordinary diligence and care in rebuilding it. Reasonable time must be allowed: *McCormick v. Chicago, R. I. & P. R. Co* , 41–193.

Burden of proof: Liability of the company for injuries caused by bars being left down at private crossings exists, if at all, either in failing to put them up after acquiring knowledge that they are down, or neglect to use reasonable diligence in ascertaining such condition, and the burden of proving these facts is upon the plaintiff seeking to recover damages for such negligence: *Perry v. Dubuque Southwestern R. Co* , 36–102.

In case of an injury to stock by reason of a gate being open the burden is on plaintiff to show that the gate became open by defendant s fault. The fact that the gate was defectively constructed, unless it became open by reason of such construction, is not sufficient to entitle plaintiff to recover: *Butler v. Chicago & N. W. R. Co.*, 71–206.

A railway is required to exercise due care to keep gates closed and obtain knowledge of their condition If it fails to exercise such care and through its negligence remains ignorant of the fact that a gate is open, it will be chargeable with having knowledge of that fact which due care would have given it. It is the duty of the company in such cases to close a gate after gaining knowledge that it is open, whether left open by its own employes or others. The question whether it should have had knowledge is for the determination of the jury: *Wait v. Burlington, C. R. & N. R. Co* , 74–207.

Further as to gates and bars at private crossings, see § 2022 and notes.

An instruction to the effect that defendant was not liable unless there was neglect in failing to repair the fence within a reasonable time after notice of the defective condition, *held* proper, as the jury must have understood therefrom that the burden of showing neglect rested upon the party seeking to recover: *Dunn v. Chicago & N. W. R. Co.*, 58–674.

Where issue is taken upon the facts as to the place where the stock was killed or injured, and the right to fence at such place, and whether the stock was running at large, the burden is on the plaintiff to sustain the averments of his petition by proofs: *Taylor v. Chicago, St. P. & K C. R. Co.*, 76–753.

But where defendant in an action for such damages admitted that six of the seven animals claimed to have been injured were killed by trains operated on its road, and added a general denial as to the facts not admitted, pleading a tender as to the animals killed, *held*, there was no issue except as to the injury of the seventh animal: *Ibid.*

Instructions in a particular case as to what the jury must find in order to return a verdict for plaintiff, *held* to sufficiently indicate the rule as to burden of proof: *Scott v. Chicago, M. & St. P. R. Co.*, 78–199.

Evidence of the condition of the fence subsequent to the time of the injury is admissible only where it is shown that there had been no change in the condition: *Brentner v. Chicago, M. & St. P R. Co.*, 58–625.

Evidence of the condition of the fence at the time of the accident is admissible for the purpose of showing that the company was negligent in allowing it to get out of repair, and such evidence need not be confined to the particular portion of the fence through which the stock escaped: *Lemmon v. Chicago & N. W. R. Co.*, 32–151.

Where damages are claimed by reason of the injured stock having escaped upon the right of way by reason of the fastening of a gate in the fence of the company being defective, evidence is admissible to show that other like fastenings have proved insufficient, and it is not competent for defendant to show that the fastening used was of the kind generally in use: *Payne v. Kansas City, St. J. & C. B. R. Co.*, 72–214.

Facts in a particular case considered on the question whether the animals killed were struck on a crossing or on a portion of the track where the company had the right to fence: *King v Chicago, R. I. & P. R. Co.*, 88–704; *Daugherty v. Chicago, M. & St. P. R. Co.*, 87–276.

Ownership of stock: In an action against a railway company for damages for stock killed by its train, the ownership of the stock is an issuable fact, and while possession might make out a *prima facie* case of ownership, yet there must be such proof of possession or other proof of ownership to entitle plaintiff to recover: *Welch v. Chicago, B. & Q. R. Co.*, 53-632

The administrator of the estate is the owner of the anima's belonging to the estate, within the meaning of this section: *Morrison v. Burlington, C. R. & N. R. Co.*, 84-663.

Proof of tender by the company made to plaintiff, *held* sufficient to show plaintiff's ownership: *Scott v. Chicago, M. & St. P. R. Co*, 78-199.

Stock running at large: The company is only liable for injuries to stock "running at large," and not when it is in charge of the owner and being driven by him at the time of the injury: *Smith v. Chicago, R. I. & P. R. Co.*, 34-96.

Where the driver of a team became so intoxicated that he had no control over the animals, and they wandered out of the road and upon a railway track, where it was not fenced as it should have been, *held*, that the animals were not running at large in such sense that the owner could recover double damages: *Grove v. Burlington, C. R. & N. R. Co.*, 75-163.

Where colts escaped from a pasture through a defective gate upon defendant's track, the gate having been carelessly and negligently constructed by defendant, in an unskillful manner and of unsound and unsafe material, *held*, that such colts were running at large within the provisions of this section: *Morrison v Burlington, C. R. & N. R. Co.*, 84-663.

Stock which escapes from the inclosure of the owner upon the track of the company is "running at large:" *Hinman v. Chicago, R I. & P. R. Co.*, 28-491.

And so, too, is stock which is in a field through which the railway passes and where the company has failed to fence: *Swift v. North Missouri R. Co.*, 29-243.

The words "running at large" mean "not under control of the owner." A mule which had escaped from its owner, and which he was unable to catch, *held*, to be running at large: *Hammond v. Chicago & N. W. R. Co.*, 43-168.

Allegations in a petition that the animal injured escaped upon the railroad track, *held* to be in effect an allegation that he was running at large: *Liston v. Central Iowa R. Co.*, 70-714.

A horse may be regarded as running at large where he has escaped from the control of his owner and cannot be caught by him So *held* where the horse injured had on a bridle and an untied halter rope: *Welsh v. Chicago, B. & Q. R. Co.*, 53-632.

Where a person in charge of a herd of cattle left them temporarily, and before the person who was to succeed him in their care took possession of them one of them escaped from the herd and was very soon afterwards killed on defendant's railway track, not having been missed from the herd, *held*, that such animal was running at large within the meaning of this section: *Valleau v. Chicago, M. & St. P. R. Co.*, 73-723.

A suckling colt may be considered as running at large within the provisions of the statute, although its mother is under the control of the owner: *Smith v. Kansas City, St. J. & C. B. R. Co.*, 58-622.

A team of horses hitched to a wagon and which have escaped from the control of their owner are, within the terms of this statute, "live stock running at large:" *Inman v. Chicago, M. & St. P. R. Co.*, 60-459.

It is error to instruct the jury that it is the duty of the company to build and maintain fences sufficient to keep cattle off the track under all ordinary circumstances, and that it is liable for all injury to cattle occasioned by its failure to perform that duty. The instructions should be qualified by limiting the liability to injuries caused to animals running at large: *Brentner v. Chicago, M. & St. P. R. Co.*, 68-530.

Proof of injury: When stock is killed at a place where the company has failed to fence, it will be presumed, *prima facie*, that the injury occurred "by reason of the want of such fence:" *Spence v. Chicago & N. W. R. Co.*, 25-139.

The evidence in a particular case as to stock killed by a train, having been struck by the train going in a particular direction and carried upon a bridge, *held* sufficient to support a verdict for damages: *Martin v. Central Iowa R. Co.*, 59-411.

In an action against the company for injury to stock, there being no direct evidence as to whether the injury was caused by defendant's train, the jury may consider the character of the injury for that purpose, but evidence that when animals are struck by moving trains there is always some indication left along the track of the collision is not proper: *Clark v. Kansas City, St. L. & N. R. Co*, 55-455.

To entitle the stock owner to recover, he must do more than merely prove the injury or destruction to his property, but the statute enables him to make a *prima facie* case by proving fewer facts than would be necessary were it not for the statutory provision: *Karr v. Chicago, R. I. & P. R. Co.*, 87-298.

It is the duty of the plaintiff in an action for injury to stock to allege and prove *prima facie* the failure of the company on which reliance is placed for recovery. It is not sufficient to prove merely that the stock went upon the company's right of way and was there killed by a locomotive: *Schmitt v. Chicago, St. P. & K. C. R. Co*, 68 N. W., 715.

Where from the evidence it appears that the gate through which the stock injured came upon the right of way was open and it does not appear that the gate was in any way defective, liability of the company is not shown: *Koenigs v. Chicago, M. & St. P. R. Co.*, 65 N. W., 314; *S. C.* 67 N. W., 399.

Double damages; constitutionality: The provisions as to double damages is constitutional. It is uniform in its operation as to all persons or companies pursuing a particular business: *Jones v. Galena & C. U. R. Co.*, 16-6; *Welsh v. Chicago, B. & Q. R. Co.*, 53-632.

The provision as to double damages is not unconstitutional as authorizing a person to be deprived of his property without due process of law or denying him the equal protection of the law: *Minneapolis & St. L. R. Co. v. Beckwith*, 129 U. S., 26.

The provisions for double damages being penal in its character will not be considered as applicable to any case not coming clearly within its provisions. Therefore, *held*, that double damages could not be recovered for injuries resulting from failure to construct and keep in repair a proper cattle-guard as required by the statute with reference to cattle-guards: *Chines v. Chicago & N. W. R. Co.*, 75-597.

Nor does such provision deny to railway companies, or persons operating railways, equal protection of the laws: *Tredway v. Sioux City & St. P. R. Co.*, 43-527.

Where the owner of stock expends time and money in proper effort to heal the injured animals he is entitled to recover double damages with reference to such injuries, as well as with reference to the loss in value: *Manwell v. Burlington, C. R. & N. R. Co.*, 80-662.

This provision does not conflict with the constitutional guaranties for the protection of property: *Mackie v. Central Railroad of Iowa*, 54-540.

Payment: Where the owner of stock killed and the agent of the railroad company agreed as to the amount of damages, and the agent gave to the owner a due-bill for that amount, which he said would be paid in a few days, and the due-bill remained unpaid, and no demand of payment thereof was made, *held*, that the owner could not maintain an action against the company for double damages, and in such action no recovery could be had on the due-bill: *Shaw v. Chicago, R. I. & P. R. Co.*, 82-199.

There is no obligation upon the person claiming damages for injuries to stock, who has served his notice upon the company, to remain in readiness for each of the thirty days elapsing after the giving of the notice to meet the agent of the company and negotiate a settlement of such loss. The fact that the agent of defendant calls at the residence of claimant to pay the amount of damage, and does not make such payment by reason of not finding him at home, does not excuse the defendant as against the claim for double damages: *Hammans v. Chicago, R. I. & P. R. Co.*, 83-287.

Not a penalty: The statute giving the owner double damages is not unconstitutional, as in conflict with the provision that all fines and penalties shall be paid into the school fund. Such damages are not a fine or penalty, and the legislature may determine the measure of damages to be recovered as in other particular cases: *Ibid.*

No part of the double damages is a statute penalty in such sense as to bring the action therefor within the provisions of the statute of limitations as to actions to recover such penalties. The period of limitation for such action is five years: *Koons v. Chicago, & N. W. R. Co.*, 23-493.

Not applicable in other cases: The provision for double damages being penal in its character will not be considered applicable to any case not coming clearly within its provisions. Therefore, *held*, that double damages could not be recovered for injuries resulting from failure to construct and keep in repair a proper cattle-guard as required by the section with reference to cattle-guards: *Moriarty v. Central Iowa R. Co*, 64-696.

Neither can the provisions be construed so as to authorize the recovery of double damages for injuries to stock on depot grounds where the company has no right to fence, caused by negligence in operating trains thereon: *Miller v. Chicago & N W. R. Co.*, 59-707.

Double damages can be recovered only when stock has been injured or killed by reason of the want of a fence, and not when the injury results by reason of the company having fenced where it should not: *Davis v. Chicago, R. I. & P. R. Co*, 40-292.

For failure to repair: A railway company is liable in double damages for injuries caused by negligence in failing to keep a fence in repair as well as by reason of failure to fence: *Bennett v. Wabash, St. L. & P. R Co*, 61-355; *Payne v. Kansas City, St. J. & C. B. R Co.*, 72-2 4.

In a particular case, *held*, that there was negligence on the part of the railroad in not putting its fences in repair after the destruction thereof by a storm: *Peet v. Chicago, M. & St. P. R. Co.*, 88-520.

Interest: As this statutory provision establishes the measure of recovery in the cases contemplated, the court or jury cannot, in addition to the damages authorized, allow interest on the amount of recovery from the time of the accident, or from the time of the expiration of the thirty days allowed after notice in which to pay the damages: *Brentner v. Chicago, M. & St. P. R. Co*, 68-530.

Assignment: The right of the owner to recover double damages may be assigned, and the assignee may serve the notice and affidavit required to authorize such recovery: *Everett v. Central Iowa R. Co.*, 73-442.

Laws of another state: An action for double damages may be maintained in the courts of the state for injury occurring in another state which has a statute authorizing the recovery of such double damages: *Boyce v. Wabash R. Co*, 63-70.

Tender: Where stock was killed and before suit tender was made and kept good of a sum less than the value of the stock as found by the jury on the trial, such tender being made as in full payment, *held*, that plaintiff was entitled to double damages in the full amount found by the jury, and that a tender to be sufficient must be of an amount large enough to discharge defendant's full liability: *Brandt v. Chicago, R. I. & P. R. Co.*, 26-114.

Where a gross sum is tendered by the railway company in payment of damages caused by injuries to two different animals of the same owner, but it does not make a separate tender as to each, and the jury finds the aggregate damage to be greater than the amount tendered, such tender cannot be considered as sufficient for either: *Shuck v. Chicago, R. I & P. R. Co.*, 73-333.

Notice and affidavit: The written notice required by statute to entitle the owner to recover double damages is only necessary when double damages are sought: *Rodemacher v. Milwaukee & St. P. R. Co.*, 41-297.

The statute is silent as to the method of service, and such service may be made by reading the original and delivering a copy: *Van Slyke v. Chicago, St. P. & K. C. R. Co.*, 80-620.

The notice should advise the corporation of the loss of which complaint is made and of the demand of the person injured on account of it, and in an action in such a case to recover double damages plaintiff's recovery should be limited to double the amount named in the notice: *Manwell v. Burlington, C. R. & N. R. Co.*, 80-662.

The service of a notice in a particular case, *held* sufficient; and *held*, that there being no conflict as to the facts, the question of whether the service of notice was sufficient or not was for the court and not for the jury: *Brockert v. Central Iowa R. Co.*, 82-369.

The affidavit required to entitle a party to double damages may be made by any one acquainted with the facts: *Henderson v. St. Louis, K. C. & N. R. Co.*, 36-387.

It is not necessary that the affidavit designate the place of the injury: *Mundhenk v. Central Iowa R Co.*, 57-718.

The notice and affidavit need not be separate. If the notice contains the statements necessary in the affidavit, and is sworn to, that is sufficient: *Mendell v. Chicago & N. W. R. Co.*, 20-9.

It is only necessary that the notice be such as to inform the company of the injury. It need not be stated therein that the animals were running at large or were destroyed without the wilful act of the owner: *Mackie v. Central R. of Iowa*, 54-540.

The fact that the amount claimed in the notice is greater than the value of the animal as stated in the petition is not sufficient in itself to show bad faith. If defendant claims that plaintiff's demand was made in bad faith such fact should be pleaded and issue joined thereon, and the same submitted to the jury: *Valleau v. Chicago, M. & St. P. R. Co.*, 73-723.

A notice addressed to the company by the initials of its name, the body of which, however, states the name of the company in full, is sufficient: *Anderson v. Chicago, R. I. & P. R. Co*, 61 N. W., 1058.

A return stating service of the notice upon a person named, "being the station agent of said road," etc., sufficiently shows service upon the station agent, "employed in the management of the business of the corporation," as provided for by statute: *Welsh v. Chicago, B. & Q R. Co.*, 53-632; *Schlengener v. Chicago, M. & St. P. R. Co.*, 61-235.

An amendment to an affidavit for the purpose of perfecting the jurat may be allowed, but the company will not become entitled to the thirty days after the amendment in which to pay the claim and escape double damages, where it is clear that there was a *bona fide* attempt on the part of the owner to bring himself within the provisions of the statute, and it was so understood by defendant: *Mundhenk v. Central Iowa R. Co.*, 57-718.

The original of the affidavit and notice of loss should be delivered to the agent upon whom service is made. The delivery of a copy is not sufficient: *McNaught v. Chicago & N. W. R. Co.*, 30-336; *Campbell v. Chicago, R. I. & P. R Co.*, 35-334.

The original of the affidavit must be served upon the company or its agent and a copy thereof introduced in evidence. The introduction in evidence of a paper similar to that served upon the company is not sufficient: *Kyser v. Kansas City, St. J. & C. B. R Co.*, 56-207.

The officer making service may, by oral testimony show that he served the original, although his return states the service of a copy: *Liston v. Central Iowa R. Co.*, 70-714.

Service of the affidavit and notice should be made by delivering them to the agent of the company. It is not necessary to read them and deliver a copy: *Mendell v. Chicago & N. W. R. Co.*, 20-9.

As the statute does not prescribe the manner of service, a service by simply delivering the notice and affidavit to the person upon whom service is to be made is sufficient: *Brentner v. Chicago, M. & St. P. R. Co.*, 68-530.

Service of the affidavit may be made by the claimant or any other person: *Mundhenk v. Central Iowa R. Co.*, 57-718.

Whether proof of service of notice and affidavit upon the company can be made by an *ex parte* affidavit, *quære: Brentner v. Chicago, M, & St P. R. Co.*, 58-625.

The notice and affidavit will be admissible as proof of service if the return of the officer serving the same be regularly endorsed thereon; *Brandt v. Chicago, R. I. & P. R. Co.*, 26-114.

Evidence that a paper was read and given to the agent similar to that introduced in evidence is a sufficient proof of service of the notice of which the paper introduced is a copy: *Keyser v. Kansas City, St. J. & C. B. R Co.*, 56-440.

The original of notice and affidavit of loss which have been served upon defendant's agent are not evidence of such service in such sense that notice upon the defendant to produce them must be shown before other evidence thereof can be introduced to show double liability of the company: *Brentner v. Chicago, M. & St P. R Co.*, 58-625; *Smith v. Kansas City, St. J. & C. B. R. Co.*, 58-622; *McLenon v. Kansas City, St. J. & C. B. R. Co.*, 69-320.

Pleading: In an action before a justice of the peace for killing stock for which the company is liable in double damages, the notice and affidavit may be introduced in evidence though not mentioned in the pleadings, as no petition need be filed: *Brandt v. Chicago, R. I. & P. R. Co.*, 26–114.

On the trial of an action against the company to recover double damages, the fact that the notice required by statute was not attached to the petition must be raised by demurrer, if at all, and cannot be raised as an objection when the notice is offered in evidence: *McKinley v Chicago, R. I. & P. R. Co.*, 47–76

Where the case is tried on the theory that defendant was liable if its employes had failed to close a gate after it was left open by some unknown person, the sufficiency of such statement of the cause of action not having been raised by demurrer, cannot be afterward questioned: *Foley v. Hamilton*, 89–686.

While a railroad is not liable for stock killed by reason of its failure to properly fence where the stock is not running at large, yet where that fact is assumed and no objection on account of the failure to plead or prove it is taken, it will be deemed waived: *Daugherty v. Chicago, M. & St. P. R. Co.*, 87–276.

Question for jury: Although the sufficiency of the service of the notice is a question of law for the court, yet where the fact of service is an issue its determination may properly be left to the jury: *Cole v. Chicago & N. W. R. Co.*, 38–311.

Fencing at depot grounds: The company is not required to fence where it would not, in view of public convenience, be fit, proper or suitable for it to do so. Depot and station grounds may be left unincloscd when the business of the road and the interests of the public so require: *Latty v. Burlington, C. R & N. R. Co.*, 38–250; *Smith v. Chicago, R. I. & P. R. Co.*, 34–506; *Davis v Burlington, & M. R. R. Co.*, 26–549; *Rogers v. Chicago & N. W. R. Co.*, 26–558; *Durand v. Chicago & N. W. R. Co.*, 26–559.

Whether the public convenience and interest of the road require that grounds used in connection with the depot but not the ordinary place for receiving and delivering freight shall be left unincloscd is a question of fact properly submitted to the jury: *Rhines v. Chicago & N. W. R. Co.*, 75–597.

In the absence of proof of want of ordinary care, a company is not liable for stock killed on depot grounds: *Packard v. Illinois Cent. R. Co.*, 30–474.

Where it appeared that stock was killed one and one-fourth miles from a station, *held*, that it might be presumed that the place at which it was killed was not within depot grounds in the absence of any evidence upon the question: *Smith v. Chicago, M. & St. P. R. Co.*, 60–512.

The burden is upon the company to show that the place where stock is injured and where there is no fence is a portion of the station grounds. The fact that a switch is there maintained will not necessarily give it that character: *Comstock v. Des Moines Valley R Co.*, 32–376.

Where the company has its depot grounds surveyed and allotted, the survey or allotment and use constitute a very strong presumptive proof of their necessary boundaries: *Cole v. Chicago & N. W. R. Co.*, 38–311.

The fixing of cattle-guards at long distances beyond the switches and failing to fence between such guards and the switches cannot be regarded as setting apart that part of the main line as station or depot grounds, unless it be necessary for the purpose of transaction of business with the public that such part of the line remain unfenced. It is no reason for not fencing beyond such switch that in the operation of the trains it would be inconvenient and possibly more hazardous to couple and uncouple cars if the track beyond the switches was fenced and provided with a cattle-guard: *Peyton v. Chicago, R. I. & P. R. Co.*, 70–522.

Negligence at depot grounds: As between the owner of cattle and the company, the latter cannot be required to keep a watch or guard at depot grounds, any more than it can be required to fence the same: *Smith v. Chicago, R. I. & P. R. Co.*, 34–506.

Speed at depot grounds. By this section a railroad company is liable for all stock killed on depot grounds by trains when running at a rate of speed greater than eight miles per hour; but if the stock is killed at a place where the company has a right to fence, although nearly adjacent to the depot grounds, the provisions as to the rate of speed have no application, and it is not negligence in the company that its trains are running at a higher rate of speed, even at such rate that they must necessarily enter on the depot grounds running faster than eight miles an hour: *Monahan v Keokuk & D. M. R. Co.*, 45–523.

The provision making the company liab'e for stock killed on depot grounds by trains running at a greater rate of speed than eight miles an hour applies only to cases where the stock is killed on such grounds: *Ibid.*

The fact that a train running at a higher rate of speed than is allowed at depot grounds runs into a team which is being driven across the track in such grounds will not render the company liable in double damages: *Johnson v. Chicago & N. W. R. Co.*, 75–157.

Evidence in a particular case *held* sufficient to show that the train of defendant causing injury to stock was running at the depot grounds at a greater rate of speed than eight miles per hour: *Story v. Chicago, M. & St. P. R. Co.*, 79–402.

If by excessive speed upon the station grounds animals are stampeded and run upon the track, and without checking the speed are run down and killed, the cause and effect are so closely connected that it may be said that the unlawful speed of the train is the proximate cause of the injury, although the animals are not actually killed or injured upon the depot grounds: *Ibid.*

If the train comes upon the depot grounds at a greater rate of speed than eight miles per hour, a verdict for damages for stock killed may be sustained, although at the time of the injury to the stock the train had nearly stopped. The jury might be authorized in such case to find that the train would have been stopped entirely if it had entered the grounds at a speed not exceeding the lawful rate: *Miller v. Chicago & N. W. R. Co.*, 59–707.

The provisions in this section with reference to speed at depot grounds have reference only to cases where there is injury in such depot grounds to animals running at large by reason of the running of trains at a greater rate of speed than that specified and do not render the company liable for injuries to persons or animals not running at large by reason of the greater rate of speed where such rate is not in itself negligent. The regulation of speed at depot grounds for other purposes than with reference to animals running at large is for the city under § 769: *Cohoon v. Chicago, B. & Q. R. Co.*, 90–169.

As to what rate of speed will be negligent aside from statutory provisions is a question of fact under the circumstances of each case: *Ibid.*

An ordinance regulating the rate of speed of cars within city limits is applicable to the switch yards of the company, and is not to be limited to places where the public have a right to travel: *Crowley v. Burlington, C. R. & N. R. Co.*, 65–658.

Fencing at highway crossings: The company is not required to fence where its track crosses a public highway, whether such highway be one *de jure* or only *de facto: Soward v. Chicago & N. W. R. Co.*, 33–386.

The company has no right to fence its line so as to obstruct a public street, whether such street is actually opened for public travel or not: *Long v. Central Iowa R. Co.*, 64–657.

A railway company has not the right to fence across platted streets and alleys within city or town limits, even though such streets or alleys are not opened or used: *Lathrop v. Central Iowa R. Co.*, 69–105.

A railroad corporation does not have a right to fence its track in cities and towns where it is intersected and crossed by streets and alleys: *Blanford v. Minneapolis & St. L. R. Co.*, 71–310.

But the company has the right to fence within the corporate limits of a town so far as its line runs through lands situated beyond streets or other highways, and it will be liable in damages for injuries to stock at such places if it has failed to fence: *Coyle v. Chicago, M. & St P. R. Co.*, 62–518.

In a particular case, *held*, that an instruction that if the animal killed was the property of plaintiff, was running at large, and was injured by defendant outside of the station grounds, plaintiff would be entitled to recover, was erroneous, it not appearing but that the animal might have been killed at some point outside of the station grounds where defendant had no right to fence: *Smith v. Kansas City, St. J. & C. B R. Co.*, 58–622.

Negligence at highway crossings or depot grounds: The company is bound to use ordinary and reasonable care to avoid injuring stock at points where it is not required to fence: *Whitbeck v. Dubuque & P. R. Co.*, 21–103; *Balcom v. Dubuque & S. C. R. Co.*, 21–102.

The company is not liable in double damages under the statute for cattle killed at a place where it has no right to fence its track: *Soward v. Chicago & N. W. R. Co.*, 30-451.

Where an animal is killed on the depot grounds, negligence must be shown on the part of the company in order to make it liable: *Cleveland v. Chicago & N. W. R Co.*, 35-220; *Plaster v. Illinois Cent. R. Co.*, 35-449.

In an action to recover for stock killed upon a railway the burden rests upon plaintiff to show that the injury was caused at a point where the company is required to fence its track: *Kyser v. Kansas City, St. J. & C. B. R. Co.*, 56-207; *Comstock v. Des Moines Valley R. Co.*, 32-376.

Evidence considered and *held* sufficient to show that the animal killed was struck at a highway crossing, and not in the field where the marks of blood were found: *Sullivan v. Wabash, St L & P. R. Co.*, 58-602.

In case of the killing of stock at a point where the railway has not the right to fence, the burden of proof is upon plaintiff to show negligence of the company: *Schneir v. Chicago, R. I. & P. R. Co*, 40-337.

The failure to give signals at crossings does not in itself establish negligence on the part of the company nor render it liable for stock killed at such crossings. In such cases it is necessary, in order to hold the company liable, that the jury find that the failure to give signals, under the circumstances, constituted negligence, and also that such negligence, if any, was the cause of the injury: *Jackson v. Chicago & N. W R. Co*, 36-451.

Under particular facts, *held* that the company was not guilty of any negligence in connection with the injury received from its train to stock, at its crossing, and was, therefore, not liable: *Plaster v. Illinois Cent. R. Co.*, 35-449; *Schneir v. Chicago, R. I. & P R. Co.*, 40-337.

In a particular case, *held*, that there was not such absence of proof of negligence causing the injury to stock at a crossing, on the part of the company, as to require the setting aside of a verdict against it for damages: *Lawson v. Chicago, R. I. & P. R Co*, 57-672.

The fact that an engineer, in the exercise of his judgment, believes he can frighten stock from the track without reversing his engine or stopping the train, will not show that there is not negligence unless it appears that he possesses and exercises ordinary judgment: *Parker v. Dubuque Southwestern R Co.*, 34-399.

In an action for negligence causing injuries to stock at a place where the company was not entitled to fence, *held*, that it was not improper to instruct the jury that, if defendant's employes saw the animal upon the track, and so near that it might reasonably be supposed, under all the circumstances, that the animal would be in danger, and could, by the use of ordinary care and prudence, have avoided the injury, and did not do so, the defendant was liable: *Edson v. Central R. Co*, 40-47.

The question whether negligence is shown under such circumstances is one of fact for the jury: *Ibid.*

Negligence or wilful act of stock owner: Contributory negligence of stock owner, not amounting to a wilful act, will not defeat his right to recover for stock injured where the company has a right to fence: *Inman v. Chicago, M. & St. P. R. Co.*, 60-459.

The mere fact that the owner, by his voluntary act, exposes the animal to danger, will not necessarily make the act wilful. If the act of the owner was for a lawful purpose, and the danger was merely incidental, it should not be considered wilful so as to defeat recovery: *Smith v. Kansas City, St. J. & C. B. R. Co.*, 58-622.

The provisions of this section of the statute exclude all defenses in such cases except such as arise from the wilful act of the owner. This implies something more than mere negligence. It is an act in some way connected with the injury, such as driving live stock upon the track, or permitting the animals to escape for the purpose of going upon the track: *Ibid*

The fact that the owner of swine allows the animals to run at large on his premises, in close proximity to the railroad track, does not constitute a wilful act such as to defeat his recovery: *Lee v. Minneapolis & St L. R. Co.*, 66-131.

The act of the owner in permitting stock to run at large is not evidence of contributory negligence: *Whitbeck v. Dubuque & P. R. Co.*, 21-103; *Evans v. Burlington & M. R. R. Co.*, 21-374; *Stewart v. Burlington & M. R. R. Co.*, 32-561; *Searles v. Milwaukee & St. P. R. Co*, 35-490.

The liability of the company for stock killed where it has a right to fence exists regardless of the negligence of the owner. It is only upon a showing that the injury is the result of the wilful act of the owner or his agent that the company is excused from liability: *Spence v. Chicago & N. W. R. Co.*, 25-139.

It is contributory negligence on the part of the owner of cattle to allow them to frequent places of danger such as depot grounds: *Smith v. Chicago, R. I. & P. R. Co.*, 34-506.

But where plaintiff allowed a blind horse to run at large and it was killed by defendant's train on its depot grounds, *held*, that the question whether plaintiff was guilty of contributory negligence was for the jury, and that such act was not, as a matter of law, negligence sufficient to defeat recovery: *Hammond v. Sioux City & P. R. Co*, 49-450

The fact that a party knowingly allows his animals to be upon and frequent depot and station grounds does not necessarily constitute contributory negligence such as to defeat recovery for injury to such animals: *Miller v. Chicago & N. W. R. Co.*, 59-707.

That a stock owner allows his stock to run at large with the knowlege that a crossing is dangerous, and that his animals frequent such crossing, does not constitute negligence even though the statute makes the owner liable for all damage resulting from his animals being at large: *Kuhn v. Chicago, R. I. & P. R. Co.*, 42-420

Where the owner of stock turned it loose upon the portion of his farm which was fenced, and it broke through the fence and strayed upon the railroad track, and it did not appear that the fence was reasonably sufficient, *held*, that plaintiff having no knowledge that his animals had escaped until they were killed, could not be considered guilty of contributory negligence: *Moriarty v. Central Iowa R. Co*, 64-696.

Stock unlawfully at large: The fact that sheep and swine are not allowed to run at large will not defeat the owner's right to recover for injuries to such animals: *Spence v. Chicago & N. W. R. Co*, 25-139; *Stewart v. Chicago & N. W. R. Co.*, 27-282; *Fernow v. Dubuque & S. W. R. Co.*, 22-528; *Lee v. Minneapolis & St. L. R. Co*, 66-131.

Where animals allowed to run at large in violation of a city ordinance, come upon the track they are trespassers, and the company owes no duty with reference to them and is not liable for injuries received by them, even though occasioned by a train running at greater speed than eight miles per hour, it not appearing that such improper speed was wanton or reckless: *Vanhorn v. Burlington, C. R. & N. R. Co.*, 59-33; *S. C*, 63-67.

To defeat recovery from a railroad company for killing on its depot grounds an animal which it is unlawful to allow to run at large, it is necessary to show that the animal is at large by the owner's sufferance: *Pearson v. Milwaukee & St. P. R. Co.*, 45-497.

The fact that plaintiff's horse was at large in the night-time on the premises of another in violation of the herd law in force in the county, and was killed by defendant's train without fault or negligence of defendant, at a point where defendant had a right to fence, but did not, *held* not sufficient to defeat plaintiff's right of recovery: *Krebs v. Minneapolis & St L. R. Co.*, 64-670.

It is not contributory negligence sufficient to defeat the owner's right of recovery that the animal is at large within the city limits in violation of an ordinance of the city, if it is at large by accident and not intentionally: *Doran v. Chicago, M. & St. P. R. Co.*, 73-115.

Operation of the road; construction train: The railway company is liable for stock killed by a construction train by reason of the failure to fence, although the road is not completed: *Glandon v. Chicago, M. & St. P. R. Co*, 68-457.

Receiver: Where a railroad is being operated by a receiver, the receiver, and not the company, is liable under the provisions of this section: *Brockert v. Central Iowa R. Co.*, 82-369; *Schurr v. Omaha & St. L. R. Co.*, 67-280.

SEC. **2056. Damages by fire.** Any corporation operating a railway shall be liable for all damages sustained by any person on account of loss of or injury to his property occasioned by fire set

out or caused by the operation of such railway. Such damages may be recovered by the party injured in the manner set out in the preceding section, and to the same extent, save as to double damages. [C. '73, § 1289.]

Setting out fires: The effect of this section is not to make the company absolutely liable for damages from fires set out, but to render the injury *prima facie* proof of negligence on part of the company, which may be rebutted by showing freedom from such negligence: *Small v. Chicago, R. I. & P. R Co.*,50-338; *Slosson v. Burlington, C. R. & N. R. Co.*, 51-294; *Libby v. Chicago, R. I. & P. R. Co.*, 52-92.

The negligence of the company is presumed if the fire proceeds from one of its engines, and it is not necessary for the plaintiff in the first instance to prove more than that it did so proceed: *Rose v. Chicago & N. W. R. Co.*, 72-625.

Plaintiff in the reasonable attempt to save the property of another from destruction by a fire set out by defendant's negligence received severe personal injuries. *Held*, that such injuries were so far the proximate result of defendant's negligence in setting out the fire that recovery could be had therefor: *Liming v. Illinois Cent. R. Co.*, 81-246.

In an action to recover damages for destruction of property by fire set out by an engine of a railroad company, *held*, that the question to be determined was whether the engine of the defendant set out the fire, and if so, whether it was properly constructed and operated, and in good condition: *Metzgar v. Chicago, M. & St. P. R. Co.*, 76-387.

And *held*, that the duty of the railroad company to use the best devices available to prevent the escape of fire would not depend in any manner upon the usage of other roads; and evidence that the same kind of an engine as that setting out the fire was in general use on other roads was not admissible: *Ibid*

In an action to recover for loss of property destroyed by fire from an engine, *held*, that the petition need not allege negligence on the part of the defendant, as the fact that the fire was set out in the operation of its railroad was *prima facie* evidence of negligence sufficient to authorize a recovery in the absence of evidence overcoming the legal presumption: *Seska v. Chicago, M. & St. P. R. Co.*, 77-137.

In case of damages from fires, the presumption is that the corporation operating the road is guilty of negligence. It is not necessary for plaintiff to allege negligence, nor will such unnecessary allegation of negligence change the rule of proof: *Engle v. Chicago, M. & St. P. R Co* , 77-661.

Where part of an instruction, considered alone, appeared to hold a railroad company liable for the consequences of slight negligence in setting out a fire, but where the whole instruction considered together expressed the rule that it was held only to ordinary care and diligence, *held*, that the objectionable clause was no ground for reversal: *Ibid.*

It is sufficient for plaintiff suing in such cases to set forth in his pleading simply the occurrence of the injury. The presumption of liability arising from the occurrence itself is not necessarily overcome by the proof merely that the company was not guilty of negligence in the matters which were the immediate cause of the injury, as permitting combustible material to accumulate and remain on the right of way. The burden of proving such fact is not upon the plaintiff even though he may allege it in his petition: *Ibid.*

This *prima facie* evidence may be rebutted by defendant, the effect of the statute being simply to change the burden of proof. As to whether the rebutting evidence showing due care, etc., on the part of the company is sufficient is a question for the jury and not for the court: *Babcock v. Chicago & N. W. R. Co.*, 62-593.

The good condition of the engine, the diligence of defendant's employes and other facts are evidence of care. When such evidence is introduced on the part of the defendant after the fact of the injury is proven by plaintiff, a conflict in the evidence arises which may be determined by the jury: *Ibid.*

The burden is upon defendant, upon proof that the fire originated from its engine, to show that it was free from negligence and in a particular case *held* that the evidence was not sufficient to show such fact: *Hockstedler v. Dubuque & S. C. R. Co.*, 88-236.

The fact that the right of way is procured from the owner of the land does not preclude recovery of damages for fires set out in the operation of the railway to fences not then built and timber situated a mile from the track. Such damages could not have been considered in estimating damages in proceedings for condemning the right of way: *Rodemacher v. Milwaukee & St. P. R. Co.*, 41-297.

A railroad company is liable for damages from fire communicated by its negligence to a building of a third person and from such building to buildings of plaintiff, and negligence of the third person owning the intermediate building in not keeping it in the proper condition will not defeat plaintiff's right to recover: *Small v. Chicago, R. I. & P. R. Co.*, 55-582.

This section does not render invalid a contract between the railroad company and a person who is given a license to erect any building on its right of way relieving the railroad company from liability for injury to such building by fire caused by negligence of its employes: *Griswold v Illinois Central R. Co* , 90-265.

Company operating road: The company whose engine sets out the fire is liable for the damages resulting although it is operating a line owned and used by another company, and the fire orginates on the right of way by reason of combustible matter allowed to accumulate thereon by such other company: *Slossen v Burlington, C R. & N. R. Co.*, 60-215.

Contributory negligence: If, by plowing around stacks in a field or otherwise protecting them, the owner could have prevented destruction of them by reason of fire originally set out by sparks from a locomotive spreading to such stacks, and the omission to protect them was negligence, then plaintiff cannot recover for their destruction; the question whether failure to thus plow around the stacks for their protection was negligence being a question for the jury: *Kesee v. Chicago & N W. R. Co.*, 30-78.

It is not, as a matter of law, contributory negligence on the part of the owner of grain stacked upon the open prairie to fail to take certain precautions to guard against the approach of fire, as by plowing around it, etc. The question whether such omission constitutes negligence in a particular case is one of fact for the jury: *Garrett v. Chicago & N. W. R Co* , 36-121.

The right of recovery for an injury caused by fire set out in the operation of a railroad is not defeated by the mere contributory negligence of the injured party: *West v. Chicago & N. W. R. Co.*, 77-654; *Engle v. Chicago, M. & St. P. R. Co.*, 77-661.

Whether, under the section as it now stands, differing from the provisions under which preceding cases were decided, it is necessary for plaintiff suing to recover damages to his property for fire set out by an engine to prove absence of contributory negligence on his part, *quære*: *Ormond v. Central Iowa R. Co* , 58-742:

Evidence as to whether other farmers had plowed around their stacks at the time plaintiff's stacks were destroyed by fire, *held*, not admissible: *Ibid.; Slossen v. Burlington, C. R. & N. R. Co.* 60-215.

Held, also, that it was error to instruct the jury in such cases that plaintiff's act in stacking his wheat in a field where it was grown and adjacent to a railroad, without plowing around his stacks, would not constitute negligence defeating his recovery unless the act was such as ordinarily prudent and cautious men would not have done in like manner under similar surrounding circumstances: *Slossen v. Burlington, C. R. & N. R. Co.*, 60-215.

The party from whose land the right of way is taken would not be negligent, as a matter of law, in sowing wheat upon the right of way and allowing the stubble to remain there after the wheat was removed: *Ibid.*

Constitutional: These peculiar provisions as to liability of railway companies for damages from fires are not in conflict with the constitution, being applicable alike to all persons or companies engaged in such business: *Rodemacher v. Milwaukee & St. P. R. Co.*, 41-297.

Evidence: The frequent occurrence of fires caused by the same engine on the same trip may be shown for the purpose of proving that it was defective in its construction, or that it was out of repair or negligently handled: *Slossen v. Burlington, C. R. & N. R. Co* , 60-215; *Lanning v. Chicago, B. & Q. R Co.*, 68-502; *West v. Chicago & N. W. R'y Co.*, 77-654; *Johnson v. Chicago & N. W. R Co* , 77-666.

But in such a case, it is not competent to show that other fires occurred along the right of way in the same vicinity shortly after the engine passed over the

road and before the fire that destroyed plaintiff's property: *Bell v. Chicago, B. & Q. R. Co.*, 64-321.

Plaintiff in introducing evidence to rebut the evidence of the railway company tending to show want of negligence on its part causing fire set out by its locomotives, may do so by facts of a circumstantial character, as it is not usually possible to introduce witnesses who can testify from personal knowledge. Therefore evidence which might not be free from difficulties in other cases open to clearer proofs, might be considered sufficient: *Babcock v. Chicago & N. W. R Co.*, 62-593.

There being no question as to where and how the fire originated, and it not being alleged as negligence that the right of way was in an improper condition, *held*, error to refuse an instruction to the effect that the question as to whether or not the right of way was clean and free from grass and other combustible matter was immaterial: *Comes v. Chicago, M. & St. P. R. Co.*, 78-391.

In an action to recover damages from defendant for fire claimed to have been communicated to plaintiff's premises, either directly or indirectly from defendant's engine, *held*, that evidence that charred shingles, after the fire and on the same day, were found a quarter of a mile beyond the house burned and in the direction the wind was blowing, was admissible to show that the fire was communicated from the defendant's engine, or burning timbers on defendant's right of way about four hundred feet distant: *Knight v. Chicago, R. I. & P. R. Co.*, 81-310.

Where it was shown that large cinders were thrown out through the smoke-stack of the engine, and that the spark-arrester of the engine, permitting such cinders to escape, was out of repair, *held*, that the jury might infer that the employes operating the engine observed such cinders and sparks and were thereby informed of the defective condition of the engine: *Ibid.*

Proof that fire started in a field about one hundred and sixteen feet from the railroad track a few minutes after a train had passed, *held* evidence that such fire originated from such engine: *Greenfield v. Chicago & N. W. R. Co.*, 83-270.

Proof of damage in such case is *prima facie* evidence of negligence on the part of the company: *Ibid.*

In order that the company may negative its negligence in such case so as to escape liability, it must negative every fact the proof of which would justify the finding of negligence: *Ibid.*

Evidence of the occurrence of the fire may be sufficient to discredit the testimony of the engineer as to the engine being in good condition: *Ibid.*

Evidence in a particular case, *held* sufficient to sustain a verdict for damages caused by fire on the theory that such fire was set out by the locomotive engine of the defendant: *Hemmi v. Chicago G. W. R. Co.*, 70 N. W., 746.

Where there is a *prima facie* case of negligence on the one side and the direct evidence of the defendant as to care and diligence on the other, the conflict should be submitted to the jury: *Ibid.*

Sufficiency of evidence in particular cases considered: *Johnson v. Chicago & N. W. R. Co.*, 77-666; *Fish v. Chicago, R. I. & P. R. Co.*, 81-280.

As to admissibility of the record of inspection of engines, see *Tyler v. Chicago & N. W. R. Co.*, 71 N. W., 536.

Measure of damages: The measure of damage for property destroyed by such a fire is the difference between the value before and the value after the fire, so that in regard to damage to growing timber, *held*, that it was the loss of value of the growing timber, as growing, and not the value it would have had as cut up into cord-wood, that was the measure of damage: *Greenfield v. Chicago & N. W. R. Co.*, 83-270.

In an action to recover the value of trees destroyed by fire set out by defendant's engines, *held*, that a witness was properly permitted to testify that it would be difficult to grow trees in the place of those destroyed, by reason of the shade of other trees, as such evidence would have a bearing upon the value of the trees destroyed: *Leiber v. Chicago M. & St. P. R. Co*, 84-97.

Where damages were claimed for injuries to meadow, grass and trees, *held*, that evidence might properly be received as to the depreciation in value of the meadow, trees, etc., by reason of the fire, and that the cost of restoration was not the proper measure: *Hamilton v. Des Moines & K. C. R. Co.*, 84-131.

The measure of damages to an orchard destroyed by fire, is the difference between the fair market value of the farm upon which it is situated, immediately before the fire, and such value immediately after the fire. In such a case plaintiff may, in an examination in chief of a witness, show the value of the land before and after the fire; and may, at his election, show the facts upon which the witness based his judgment as to such values: *Rowe v. Chicago & N. W. R. Co.*, 71 N. W., 409.

Since the enactment of the provisions relating to liability for damages from fires, contributory negligence of the person injured cannot be shown as a defense: *West v. Chicago & N. W. R. Co.*, 77-654; *Engle v. Chicago, M. & St. P. R. Co*, 77-661; *Johnson v. Chicago & N. W. R. Co.*, 77-666.

Title of property: Where it appeared that plaintiff had as a trespasser cut and stacked hay upon the land of another which he had no title to, and of which he was not in possession, *held*, that he could not maintain an action against a railroad company for its negligence resulting in the destruction thereof by fire: *Murphy v. Sioux City & P. R. Co*, 55-473; *Lewis v. Chicago, M. & St. P. R. Co.*, 57-127; *Comes v Chicago, M. & St. P. R. Co.*, 78-391.

Where hay destroyed in such a fire had been cut by plaintiff upon uninclosed prairie land, under a license, *held*, that he had sufficient title to recover damages for the destruction thereof although the license thereof was given by one who had no authority to convey an interest in the land: *Metzgar v. Chicago, M. & St. P. R. Co.*, 76-387; *Bullis v. Chicago, M. & St. P. R. Co.*, 76-680.

Where plaintiff suing to recover for destruction of hay by fire set out by defendant in the operation of its road showed that such hay was cut and stacked upon land leased by him from the person claiming to be owner thereof, *held*, that he was entitled to recover without proving title in his landlord, there being no adverse claim made: *Johnson v. Chicago & N. W. R. Co.*, 77-666.

In an action by the tenant to recover the value of a crop destroyed by fire set out by the company's engines, it appearing that plaintiff did not pay cash rent, *held* error to refuse to allow plaintiff to be cross-examined as to whether he was to give a share of the grain for rent: *Ormond v. Central Iowa R. Co*, 58-742.

Where it does not appear that title to the premises injured is in dispute, oral evidence of such title not objected to may be sufficient to show plaintiff's title to recovery, and an objection to such evidence of plaintiff's title, not made until by motion to take the case from the jury, is too late: *Fish v. Chicago, R. I. & P. R. Co.*, 81-280.

Negligence: Before the enactment of this statutory provision it was held that the burden of proof in an action against the company for such damages was upon plaintiff to show negligence of the company, and that proof of the injury alone was not sufficient to make out a *prima facie* case: *Gandy v. Chicago & N. W. R. Co.*, 30-420; *McCummons v. Chicago & N. W. R. Co.*, 33-187; *Garrett v. Chicago & N. W. R. Co.*, 36-121.

But in such case, *held*, that as in the nature of the case plaintiff must labor under difficulties in making proof of the fact of negligence, and as that fact itself is always a relative one, it might be satisfactorily established by evidence of circumstances bearing more or less directly upon the fact of negligence, and which might not be satisfactory in other cases, free from difficulty and open to clear proof: *Gandy v Chicago & N. W. R. Co.*, 30-420.

A party using a dangerous instrument, body or element will be held to use greater care and prudence than when using a less destructive agency. Fire being a destructive element, persons using it are required to exercise all reasonably careful precautions against its spread, and the care and prudence required by law to prevent the spread of fire from a locomotive are not deemed to be exercised unless some proper precautions are used for that purpose: *Jackson v. Chicago & N. W. R. Co.*, 31-176.

Ordinary care and prudence require the use of the best contrivances known, and unless such are used it will be considered negligence; but what amounts to negligence in such cases is a question of fact for the jury: *Ibid.*

Also *held*, that to allow dried grass, weeds, and other matter, the natural accumulations of the soil, to remain upon the right of way, was not negligence *per se*, but there might be such peculiar or unusual circumstances in a given case as that such acts would amount to negligence in fact, and that when such circum-

stances existed they might properly be submitted to the jury to establish the fact of negligence: *Kesee v. Chicago & N. W. R. Co.*, 30-78.

Also *held*, that the question of negligence, such as to render the company liable for damages resulting from such fires, was to be determined by the jury, and that it was not proper to enumerate facts and circumstances which as a matter of law would be sufficient to charge the company with negligence: *McCormick v. Chicago, R. I. & P. R. Co.*, 41-193.

SEC. **2057. Fences required.** All railway corporations owning or operating a line of railway within the state shall construct, maintain and keep in repair a suitable fence of posts and barb wire or posts and boards, or any other fence which the fence viewers shall determine to be equivalent thereto, on each side of the track thereof, so connected with cattle-guards at all public road crossings as to prevent cattle, horses and other live stock from getting on the railroad tracks. Such tracks shall be fenced within six months after the completion of the same or any part thereof. Such fences, when of barb wire, shall be of five wires securely fastened to posts set not more than twenty feet apart, the top wires to be not less than fifty-four inches high; or of five boards securely nailed to posts set not more than eight feet apart, the fence to be not less than fifty-four inches high. Fences repaired or rebuilt shall conform to the foregoing provisions. Nothing in this or the two following sections shall be construed to compel a railway company operating a third-class line to fence its road through the land of any farmer or other person who, by written agreement with such company, waives the fencing thereof. [22 G. A., ch. 30, § 1.]

Where the only repairs made after 1888 in a railroad fence which had never been fifty-four inches high, consisted in nailing on loose boards and replacing defective boards with others brought from another portion of the fence, *held*, that such acts did not constitute a repairing of the fence within the meaning of this section so as to render it necessary that the fence should be made of the statutory height: *Moeckley v. Chicago & N. W. R. Co.*, 92-748.

As to fencing in general see notes to § 2055.

SEC. **2058. Penalty—killing of stock.** If the corporation, officer thereof or lessee owning or engaged in the operation of any railroad in the state refuses or neglects to comply with any provision of this chapter relating to the fencing of the tracks, such corporation, officer or lessee shall be guilty of a misdemeanor, and upon conviction fined in a sum not exceeding five hundred dollars for each offense, and every thirty days' continuance of such refusal or neglect shall constitute a separate and distinct offense; but nothing herein contained shall be construed to relieve the corporation from liability arising from the killing or maiming of live stock on said track or right of way by its negligence or that of its employes, nor shall anything in this chapter interfere with the right of open or private crossings, or with the right of persons to such crossings, nor in any way limit or qualify the liability of any corporation or person owning or operating a railway that fails to fence the same against live stock running at large for any stock injured or killed by reason of the want of such fence. [23 G. A., ch. 20; 22 G. A., ch. 30, §§ 2, 3.]

SEC. **2059. Railway crossings near Mississippi river.** When, in the construction of a railway, it becomes necessary to cross another railway near the shore of the Mississippi river, each shall be so constructed and maintained at the point of crossing that the respective roadbeds thereof shall be above high water in such river, but where the crossing occurs within the limits of cities containing six thousand or more inhabitants, the council thereof may establish the crossing grade. [C. '73, § 1290.]

SEC. **2060. Interlocking switches.** When in any case two or more railroads cross each other at a common grade, or a railroad crosses a stream by swing or draw bridge, they may be equipped thereat with an interlocking switch system, or other suitable safety device rendering it safe for engines or trains to pass thereover without stopping, and if such interlocking switch system or other safety device shall have been approved by the railroad commissioners, then the engines and trains of such railroad or railroads may pass over such crossings or bridge without stopping, the provisions of any other law to the contrary notwithstanding, and the provisions of the three following sections also are not applicable in such a case. [25 G. A., ch. 25, §§ 1, 6.]

SEC. **2061. Proceedings to establish.** In any case where the tracks of two or more railroads cross each other at a common grade, any company owning one of such tracks and desiring to unite with others in protecting the crossing with interlocking or other safety device, and being unable to agree with such others thereon, may file in the district court of the county in which the crossing is located a petition, stating the facts and asking the court to order such crossing to be protected by interlocking or other safety device. Said petition shall be accompanied by a plat showing the location of all tracks and switches, and upon the filing thereof notice shall be given by the petitioner to every other company or person owning or operating any track involved in such crossing. The court, or a judge thereof if the petition is filed in vacation, shall thereupon appoint a commissioner to examine into the necessity for such a system, and report the facts and his recommendation in such time as the court or judge may direct, and, as soon as practicable thereafter, the court or judge shall appoint a time and place for the hearing of such petition. The proceedings shall be in equity, and subject to all the rules of equity practice, except that the court shall require the issue to be made up at the first term after the petition is filed, and give the proceeding precedence over other civil business and try the action thereat, if possible. [Same, § 2.]

SEC. **2062. Decree.** After allowing all parties full opportunity to show cause why such system should or should not be ordered thereat, the court shall, if it is found the plaintiff should prevail, enter its decree ordering the establishment of such system as it may prescribe, the time within which it shall be begun and finished, and the proportion of the expense thereof to be paid by each company or person interested in the crossing, and make such division of the costs as may be equitable. [Same, § 2.]

SEC. **2063. Proposed crossing.** In case one railway company desires to cross with its tracks those of another at grade, and such companies cannot agree to the terms thereof, the company desiring to cross shall, upon the application of the company whose track it is desired to cross, in a proceeding instituted as provided in the two preceding sections, be compelled to interlock such crossing, and the court therein shall make such orders and decree as may be required to secure public safety and the preservation of the properties of the roads, and prescribe the terms upon which such crossing shall be maintained after being made. The provisions of this and the two preceding sections shall not apply to side tracks. [Same, § 3.]

SEC. **2064. Apportionment of costs.** If in any case contemplated in the three preceding sections the crossings shall be of two railroads only, then the court shall not apportion to either less than one-third of the cost, and if more than two roads are involved, the court shall not apportion to any one less than two-thirds of an equal share of such cost. [Same, § 4.]

SEC. **2065. Modification of decree.** Any decree made pursuant to the four preceding sections shall be subject to changes or modifications at any subsequent term, on due cause shown therefor, upon a petition filed in the same proceedings, setting forth the reasons therefor and arising subsequent to entry of the decree therein. [Same, § 5.]

SEC. **2066. Sale or lease of railroad property—joint arrangement.** Any railway corporation may sell or lease its property and franchises to, or make joint running arrangements not in conflict with law with, any corporation owning or operating any connecting railway, and any corporation operating the railway of another shall be liable in the same manner and extent as though such railway belonged to it. [C. '73, § 1300.]

Where a line of road has been built by aid of taxes levied for that purpose, the line in aid of which the tax is voted must be operated as a whole, and a portion thereof cannot be leased and operated separately to the injury of any locality on the line. Any railroad company availing itself of such aid assumes relations to the public different from those resulting from a mere private contract: *State v. Central Iowa R. Co.*, 71–410.

Further as to this section, see *Treadway v. Chicago & N. W. R. Co.*, 21–351; and, in general, notes to § 2036.

SEC. **2067. Mortgage of contract or lease.** Any contract, lease or benefit derived under the authority given in the preceding section may be mortgaged for the purpose of securing construction bonds in the same manner as other property of the corporation. [C. '73, § 1301.]

Where a railroad has been constructed by the aid of taxes the obligation to operate it as an entire line attaches to it in the hands of a purchaser thereof at sale under foreclosure: *State v. Central Iowa R. Co*, 71–410.

Where a railroad was bought in by a new corporation at foreclosure sale under a mortgage, *held*, that such purchaser could be compelled to comply with the decree rendered against the former company, while in the hands of a receiver, directing the operation of its road between certain points: *State v. Iowa Cent. R. Co.*, 83–720.

Under a contract for the transfer of a line of railroad from one company to another, *held*, that the transferee assumed any liability existing against the transferrer for injury to an employe: *Knott v. Dubuque & S. C. R. Co.*, 84–462.

SEC. **2068. Effect of change of name.** If any railway company is organized under a corporate name, and has made contracts for payments to it upon delivery of stock therein, and shall subsequently thereto change its corporate name, or if the real ownership in the property, rights, powers and franchises has passed legally or equitably into any other company, no such contracts shall be enforced until tender or delivery of stock in such last named corporation or company is made. [C. '73, § 1302.]

Cases are contemplated in this section where payments are to be made to the company upon delivery of stock, and it also contemplates that the ownership of property rights, powers and franchises may legally pass to another company while such contracts for payments exist. The section embraces obligations for payment of taxes voted, and also voluntary conveyances by one company to another, in which the delivery of stock to taxpayers shall be provided for. Therefore, *held*, that a transfer by the company in whose favor a tax was voted to another company did not forfeit the tax voted, stock in the new company of equal or greater value than that of the company to whom the tax was voted being offered to the taxpayer: *Cantillon v. Dubuque & N. W. R. Co.*, 78–48.

SEC. **2069. Report.** When any railway has been completed and opened for use, the corporation owning, operating or constructing it shall report under oath to the next general assembly the total cost thereof, specifying the amount expended for construction, engines, cars, depots and other buildings, and the amount of all other expenses, together with the length of the railway, the number of planes with their inclination to the mile, the greatest curvature, the average width of road-bed, and the number of ties per mile. [C. '73, § 1303.]

SEC. **2070. Rights reserved.** All contracts, stipulations and conditions regarding the right of controlling and regulating the charges for freight and passengers upon railways, heretofore made in granting land and other property or voting taxes to aid in the construction of or franchises to railway corporations, are expressly reserved, continued and perpetuated in full force and effect, to be exercised by the general assembly whenever the public good or the public necessity requires such exercise thereof. [C. '73, § 1306.]

SEC. **2071. Liability for negligence or wrongs of employes.** Every corporation operating a railway shall be liable for all damages sustained by any person, including employes of such corporation, in consequence of the neglect of the agents, or by any mismanagement of the engineers or other employes thereof, and in consequence of the wilful wrongs, whether of commission or omission, of such agents, engineers or other employes, when such wrongs are in any manner connected with the use and operation of any railway on or about which they shall be employed, and no contract which restricts such liability shall be legal or binding. [C. '73, § 1307.]

In general: Without this statutory provision the company would not be liable to an employe for injuries resulting from negligence of a co-employe, and

the intention of the statute is merely to give to the employe a right of action in such cases, and not to change the degree of care necessary, which is, as between master and servant, that of ordinary care and diligence only: *Hunt v. Chicago & N. W. R. Co*, 26-363.

The company is liable to an employe for damages resulting from the negligence of a co-employe whose duty it was to keep a bridge in order, in the performance of such duty: *Locke v. Sioux City & P. R. Co.*, 46-109.

A railway company cannot avoid liability for the negligence of its employes by requiring of an employe injured by reason of such negligence more than reasonable care in the discharge of his duties: *Scagel v. Chicago, M. & St. P. R. Co.*, 83-380.

It seems that this section is not applicable to street railways: *Manhattan Trust Co. v. Sioux City Cable R. Co.*, 68 Fed., 82.

These provisions are entirely immaterial as applied to a case where the evidence fails to show any negligence on the part of the railroad company: *Hamilton v. Chicago, R. I. & P. R. Co.*, 61 N. W., 415.

Person or company operating railway: A receiver who is managing a railway under the direction of a court is within this section and may be charged, and a recovery obtained against him, as a person operating a railway. And though his liability could not be personal, a judgment against him might be satisfied out of the property in his hands if the court by whom he was appointed should so direct: *Sloan v. Central Iowa R. Co.*, 62-728.

The fact that a lessee may be held liable under this section does not prevent recovery against the owner of the road. The actions are cumulative: *Bower v. Burlington & S W. R. Co.*, 42-546.

The running of special trains over the railway by a construction company in constructing it is operating a railroad within the meaning of the statutory provision: *McKnight v. Iowa & M. R. Constr. Co*, 43-406.

Persons not employes: The language of the section is so broad that it includes any and all persons, employes and others, who may be injured by the negligence of the agents or servants of the railway company or persons operating the railway: *Rose v. Des Moines Valley R. Co.*, 39-246.

If the act of the employe is within the scope of his authority the company is liable for injuries therefrom to a third person even though the act is wilfully wrongful: *Marion v. Chicago, R. I. & P. R. Co.*, 64-568.

If the employes perform their duty in operating a train in a manner so unusual or reckless as to endanger lives of persons upon the train they are guilty of negligence, and if in direct consequence of such negligence a person is injured the company will be liable even though the person was on the train without right. This section renders the company liable for all damages sustained by any person in consequence of the neglect of agents, etc.: *Way v. Chicago, R. I. & P. R. Co.*, 73-463.

It is not material that plaintiff, claiming to recover by virtue of this section, was not employed in the operation of the road. It is sufficient if it appears that he was injured by the operation of the road and by negligence of the parties charged with responsibility with respect to the movement of trains: *Pierce v. Central Iowa R. Co.*, 73-140.

One riding on a train by fraud or stealth without payment of fare takes upon himself all the risk of the ride and if injured by an accident not due to recklessness and wilfulness on the part of the company, he cannot recover notwithstanding the provisions of this section: *Condran v. Chicago, M. & St. P. R. Co.*, 67 Fed., 522.

Employes engaged in operating road: This section affords a remedy only to such employes as are employed, at the time of receiving the injury, in the business of operating a railroad: *Malone v. Burlington, C. R. & N. R. Co.*, 65-417.

So that to entitle an employe to recover against the company for injuries which he has sustained, he must show, first, that he belonged to the class of employes to whom the statute affords a remedy, and second, that the company which occasioned the injury was of a class of companies for which the remedy is given: *Ibid.*

Therefore, *held*, that an employe whose duty was to wipe off engines, open and close the doors of the engine house, and remove snow from the turn-table and tracks and operate the turn-table, and who was injured by reason of the negligence of a co-employe causing the door of the engine house to fall upon him, was not engaged in the operation of the road in such a sense as to be within the statutory provisions: *Ibid.*

The change from the common law made by this section extends no further than to employes engaged in the business of operating a railway, and not to persons employed by the corporation without regard to the nature of their employment. Such corporation may be engaged in any other business, which may be within the scope of their organization, but not at all, or very remotely, connected with the use of their road, and in such cases employes by whom such affairs are conducted acquire no rights under the statutory provision, as their occupation does not expose them to the hazards incident to the use of railways, and the statute was not designed for their protection and benefit: *Schroeder v. Chicago, R. I. & P. R. Co.*, 41-344.

It is error for the court to instruct the jury that, as a matter of law, the nature of plaintiff's service and employment bring him within the terms of the statute. The character of his employment, whether in connection with the use of defendant's railroad, or whether thereby he is brought within the provisions of the statute, are questions of fact to be determined by the jury: *Ibid.*

These provisions apply no further than to employes engaged in the business of operating a railroad, and do not apply to employes in a machine-shop of the company. In such case the common-law rule exempting the employer from liability for injury to an employe resulting from the negligence of a co-employe is still in force: *Potter v. Chicago, R. I. & P. R. Co.*, 46-399.

The words "where such wrongs are in any manner connected with the operation or use of any railway" apply not only to wilful wrongs, but also to negligence of agents, etc., and in order to entitle an employe to recover for injuries received from a co employe, it must appear that he was engaged in a service connected with the use and operation of the railroad: *Foley v. Chicago, R. I. & P. R. Co.*, 64-644.

Therefore, *held*, that an employe whose duty it was to repair cars while standing upon the track and side track of the company, while not in motion, and who was sometimes required to ride on the trains of the company from place to place for the purpose of making such repairs at different places, was not employed in the operation of the road in such sense as to bring him within the protection of the provision: *Ibid.*

Injuries to one employe by reason of negligence of another, both engaged in the work of repairing a track, such injury not resulting from the operation of the railroad, *held* not within the provisions of the statute: *Matson v. Chicago, R. I. & P. R. Co.*, 68-22.

Employes engaged in hoisting coal in a coal-house for the purpose of filling a car are not so engaged in the hazardous business of operating a railroad as that one can recover for injuries caused by the negligence of the other: *Luce v. Chicago, St. P., M. & O. R. Co.*, 67-75.

In order to render a company liable for injuries to an employe by reason of negligence of a co-employe, the negligence complained of must be that of an employe and affect a co-employe, who are in some manner performing work for the purpose of moving a train, as loading or unloading it, or superintending, directing or aiding its movement. The persons must be connected in some manner with the moving of trains. Work preparatory thereto, which may be done away from the train, is not connected with its movement: *Stroble v. Chicago, M. & St. P. R. Co.*, 70-555.

Therefore, *held*, that where employes were engaged about elevating coal to a platform to supply the engine, their duties were not so connected with the use and operation of the railroad as that one of them could recover for injuries received from negligence of the other: *Ibid.*

Where a section hand was injured by the negligence of a co-employe while engaged in loading a car, *held*, that it did not sufficiently appear that his employment was of such character as to entitle him to recover: *Smith v. Burlington, C. R. & N. R Co.*, 59-73.

Where an employe was injured by appliances connected with the round house, *held*, that it was not error to instruct the jury that if they found it was a part of plaintiff's duty to keep such appliances in a safe condition, or that it was the duty of another employe of the same kind to do so, and that they both, or

either of them, neglected to do so, then the plaintiff could not recover, the employes not being engaged in the operation of the road: *Manning v. Burlington, C. R. & N. R. Co.*, 64-240.

An employe in the round house engaged in putting a spring into an engine is not engaged in the operation of the road within the meaning of this section: *Hathaway v. Illinois Central R. Co.*, 92-337.

One who is employed in a round house as clinker man, and in the course of his duty is injured while coupling together tanks in the round house, moved by engines, is within the terms of this section and can recover for injury done to him, due to the negligence of a co-employe: *Butler v. Chicago, B. & Q. R. Co.*, 87-206.

A person engaged in working on a bridge of the company and required, in the course of his employment, to ride on its trains, is within the statutory provision: *Schroeder v. Chicago, R. I. & P. R Co.*, 47-375.

And so is a section hand: *Frandsen v. Chicago, R. I & P. R. Co.*, 36-372.

And so is a hand engaged in shoveling gravel from a gravel train: *McKnight v. Iowa & M. R. Constr. Co*, 43-406.

Or a hand engaged in connection with the operation of a dirt train: *Deppe v. Chicago, R. I. & P. R. Co.*, 36-52.

Where the plaintiff was employed on a train used for hauling sand, and was injured by the falling of a bank of sand where he had been shoveling, *held*, that the case was within the provisions of this section: *Handelun v. Burlington, C. R. & N. R. Co.*, 72-709.

An employe required to go upon a train for the purpose of unloading cars is within the scope of this section and may recover for injuries received by reason of negligence of a co employe: *Raben v. Central Iowa R. Co.*, 73-579.

Where the employe was injured while engaged in operating a derrick situated on a flat car, the operation of which involved the movement of the car upon the track, *held*, that he was within the scope of this section: *Nelson v. Chicago, M. & St. P. R. Co.*, 73-576.

A section foreman whose work is along and on a track on which trains are operated, and has reference to train movements in the keeping of the track in repair and in condition therefor, is engaged in the operation of the road in such sense as to come within the provisions of this section: *Haden v. Sioux City & P. R. Co.*, 92-226.

A private detective injured while walking along the track, in accordance with directions of the company, to a certain place where he was to try to detect persons accustomed to place obstructions on the track, and who, while so walking to the place designated, was prostrated by sunstroke on the track and negligently run over and injured by defendant's engine, *held* to be so engaged as to subject him to the hazard peculiar to the business of operating the railway, and to be within the protection of the statutory provision: *Pyne v. Chicago, B. & Q. R. Co.*, 54-223.

Where a "wiper" is in temporary charge of an engine, the railroad company is liable for his negligence resulting in injury to a brakeman in coupling cars: *Whalen v. Chicago, R. I & P. R. Co.*, 75-563.

And it is immaterial in such case whether the train was being made up at the usual and proper time or not: *Ibid.*

A workman employed to shovel snow for the clearing of the track, and being transported on defendant's train for the purpose of performing such service, is engaged in the operation of the road in such sense as entitles him to recover for injuries received by reason of negligence of employes operating the train: *Smith v. Humeston & S. R Co.*, 78-583.

A section-hand, while riding on a handcar holding a shovel for the purpose of clearing snow from the rail, is engaged in the operation of the road within the provision of this section, so as to be entitled to recover for injuries received by reason of negligence of the foreman in charge of the car: *Chicago, M. & St. P. R. Co. v. Artery*, 137 U. S., 507.

This statute is upheld on the ground that it is applicable to all employes of a certain class; that is, those engaged in employment which exposes them to the peculiar dangers and perils of the operation of a railroad, and it has not been limited to train crews only. It applies to section men who have nothing to do

with the movement of trains by which they are injured, and to other like employes: *Keatley v. Illinois Central R. Co.*, 63 N. W., 560.

Therefore, *held* that it was applicable in case of injury to one of the gang of section men engaged in constructing an abutment who was injured by the employes of the defendant negligently running a train at a dangerous rate of speed upon an unfinished, insecure and unsafe bridge, by reason of which the cars left the track and caused the death of such employe: *Ibid*

Recovery by an employe for injuries due to negligence by co-employe is not limited to cases where the injury was received by movement of cars or engines on the track, nor even to cases where the employe who was injured was engaged in the operative department of the road: *Canon v. Chicago, M. & St. P. R. Co.*, 70 N. W., 755.

Therefore, *held*, that a car inspector whose business was to inspect the cars of a train while stanning on the track might recover for injuries caused by the cars being moved while he was discharging his duty, and that his right of recovery was not defeated by the fact that he had consented that some of the cars of the train might be taken out: *Ibid.*

Injury to foreman from negligence of subordinate: The fact that an employe of a railroad company is the foreman of a crew of workmen with power to direct the men under him in their work and to hire and discharge them at will does not prevent his being a co-employe with such workmen, within the meaning of this section, and he may recover for injuries received from the negligence of the men in his employ: *Houser v. Chicago, R. I. & P. R. Co.*, 60-230.

Contributory negligence: This statutory provision does not exonerate the injured party from the necessity of exercising reasonable care. Its purpose is to extend the liability of railroads to injuries to employes for which, at the common law, they were not liable: *Murphy v. Chicago, R. I. & P. R Co.*, 45-661.

In case of death: Where the injury results in death, the company is liable to the personal representatives of deceased: *Philo v. Illinois Cent R. Co.*, 33-47.

Constitutionality: This provision is not unconstitutional, as subjecting railroad corporations to penalties and liabilities other than those imposed on other business corporations engaged in a like business; being applicable to all persons or corporations engaged in a peculiar business it is not open to such objection: *McAunich v. Mississippi & M R. Co.*, 20-338; *Deppe v. Chicago, R. I & P. R. Co.*, 36-52; *Bucklew v. Central Iowa R. Co.*, 64-603; *Pierce v. Central Iowa R. Co.*, 73-140; *Raben v. Central Iowa R. Co.*, 73-579.

Liability of company for negligence of superior or inferior employe: If the employe of a railroad company is injured while riding on a hand-car, through the negligence of the boss in charge thereof, the company is liable: *Hoben v. Burlington & M. R. R. Co.*, 20-562.

Instructions based upon the hypothesis that a person for whose death damages were sought to be recovered from the company for injuries received while acting in obedience to the directions of an employe having authority to control him, *held* applicable where deceased was a fireman accompanying the engineer and discharging his duty while upon the engine under the control of such engineer: *Cooper v. Central R. of Iowa*, 44-134.

Where an accident by which an employe is injured is caused by the act of an inferior employe acting under the direction of such superior, the latter cannot recover for an injury received: *Dewey v. Chicago & N. W. R. Co.*, 31-373.

Where the foreman of a crew of men employed by the company in the repair of bridges brought action against the company for injury received from negligence of one of the men under his control, *held*, that the fact that he was in charge of the workman did not defeat his right to recover for such negligence under this section, giving a right of action for the negligence of a co-employe: *Houser v. Chicago, R. I. & P. R. Co*, 60-230.

It may be that a mere foreman, as the word is generally understood, that is, a laborer with power to superintend the labor of those working with him, is a co-employe so far as his own mere labor is concerned, but it is error to exclude from the jury the consideration of the question whether there is negligence of such foreman, acting as a superior: *Baldwin v. St. Louis, K & N. R. Co*, 68-37.

A person who has charge and full control of a timber-yard of a railroad company is to be regarded as a vice-principal, and one who has the care and management of the business in his absence is a temporary vice-principal, and the rail-

road company is liable for injuries to a subordinate employe caused by the negligence of either of these persons: *Baldwin v. St. Louis, K. & N. W. R. Co.*, 75–297.

And notice to the person temporarily in charge of the yard of the defective piling of the timber which caused the injury would be notice to the company, regardless of the fact as to whether or not such person in charge of the business was charged with any duty in regard to piling the timber: *Ibid.*

Release of claim: A written release of all claim for damages resulting from an injury, executed for a consideration will be binding on the person injured in the absence of fraud, even though it is not read over by him before signing it: *Gulliher v. Chicago, R. I. & P. R. Co.*, 59–416.

Contract: A written contract between a company and an employe by which he agrees to hold the company harmless for injuries received in doing certain acts which he is advised are dangerous is admissible for the purpose of showing the existence of the rule on the subject, and notice of it to the employe and also notice to the employe of such danger: *Sedgwick v. Illinois Cent. R. Co.*, 73–158.

A contract between the employe and the company by which a privilege which the employe has of enjoying, on payment of dues, participation in a benefit fund conditioned on his not prosecuting an action against the company for injuries received in its employ, is not a contract which is invalid under this section. Such contract does not limit the right of action against the company, but relates only to the participation in the benefit fund: *Donald v. Chicago, B. & Q. R. Co.*, 61 N. W., 971.

The condition on which the benefit of the fund is to be enjoyed operates against the legal representatives of one whose death is caused by injuries as well as against the beneficiary himself: *Ibid.*

SEC. **2072. Signals at road crossings.** A bell and a steam whistle shall be placed on each locomotive engine operated on any railway, which whistle shall be twice sharply sounded at least sixty rods before a road crossing is reached, and after the sounding of the whistle the bell shall be rung continuously until the crossing is passed; but at street crossings within the limits of cities or towns the sounding of the whistle may be omitted, unless required by ordinance or resolution of the council thereof; and the company shall be liable for all damages which shall be sustained by any person by reason of such neglect. Any officer or employe of any railway company violating any of the provisions of this section shall be punished by fine not exceeding one hundred dollars for each offense. [20 G. A., ch. 104.]

This section imposes a duty, the omission of which is negligence; but before the person injured by it can recover, he must show that his negligence did not contribute to the injury: *Sala v. Chicago, R. I. & P. R. Co.*, 85–678.

Where there is failure to ring the bell upon approaching a crossing and an injury results, such failure will be negligence for which defendant will be liable unless exonerated by some negligence of plaintiff: *Reed v. Chicago, St. P., M. & O. R. Co*, 74–188; *Case v. Chicago, M & St. P. R. Co.*, 69 N. W., 538.

The whistle should be sounded and the bell rung as a warning before reaching the crossing and a danger signal after the danger to a person attempting to cross is discovered is not sufficient: *Hughes v. Chicago, St. P. & K. C. R. Co.*, 88–404.

The ringing should be continued from the time of reaching the sixty-rod limit until the crossing is reached: *Lapsley v. Union Pacific R. Co.*, 50 Fed., 172.

A party about to cross the railroad track has the right to proceed upon the assumption that the signals for the highway crossing will be given: *Harper v. Barnard*, 68 N. W., 599.

The signal is not only for the benefit of persons who are on or about to cross the track, but for those who are lawfully using teams near the track: *Lonergan v. Illinois Cent. R Co.*, 87–755; *Ward v. Chicago, B. & Q. R. Co.*, 65 N. W., 999.

If a traveler about to cross the track, who has looked and listened within a reasonable distance from the crossing without seeing or hearing an approaching train is run upon and injured by reason of negligence to blow the statutory whistle, the company is liable: *Winey v. Chicago, M. & St. P. R. Co.*, 92–622.

SEC. **2073. Stopping at railway crossings.** All trains run upon any railroad in this state which intersects or crosses any other railroad upon the same level shall be brought to a full stop at a distance of not less than two hundred nor more than eight hundred feet from the point of intersection or crossing, before such intersection or crossing is passed, except as otherwise provided in this chapter. Any engineer violating the provisions of this section shall forfeit one hundred dollars for each offense, to be recovered in an action in the name of the state for the benefit of the school fund, and the corporation on whose road such offense is committed shall forfeit the sum of two hundred dollars for each offense, to be recovered in like manner. [20 G. A., ch. 163.]

SEC **2074. Contract or rule limiting liability.** No contract, receipt, rule or regulation shall exempt any railway corporation engaged in transporting persons or property from the liability of a common carrier, or carrier of passengers, which would exist had no contract, receipt, rule or regulation been made or entered into. [C. '73, § 1308.]

A contract such as is prohibited by this section is void whether it is with or without consideration: *Brush v. Sabula, A. & D. R. Co*, 43–554.

A contract limiting the amount of recovery for loss of baggage is invalid: *Davis v. Chicago, R. I. & P. R Co*, 83–744.

Where a bill of lading was executed in Dakota, valid according to the laws of Dakota, for the transportation of goods from that state into Iowa, *held*, that stipulations therein relating to liability for loss of the goods would be recognized in an Iowa court with reference to the loss occurring in Iowa, although contrary to the Iowa statute: *Hazel v Chicago, M. & St. P. R. Co.*, 82–477.

Whether this section would be applicable to a contract made in Iowa but to be wholly performed in another state, *quære;* but it was held applicable to a contract to transport cattle from Clinton to Chicago, on the ground that it was to be partly performed in Iowa: *McDaniel v. Chicago & N. W. R. Co.*, 24–412.

This section is not invalid as to a contract made within the state although such contract relates to transportation of a person to a point without the state: *Solan v. Chicago, M. & St. P. R Co.*, 63 N. W., 692.

A company is not prohibited from providing by contract that it shall not be liable beyond the terminus of its road: *Mulligan v. Illinois Cent. R. Co.*, 36–181, 187

The common law liability of a common carrier attaches to a carrier of live stock, so far as the rule is not inapplicable by reason of the peculiar character of the property. Responsibility for the carriage of stock cannot therefore be restricted by contract: *McCoy v. Keokuk & D. M. R Co.*, 44–424.

A rule or custom limiting liability for injury to all stock, including such as is of especial value as being blooded, to the value of common stock, is void: *McCune v Burlington, C. R & N. R. Co.*, 52–600

This section does not render the carrier liable for loss occurring by the act of the owner: *Hart v. Chicago and N. W. R. Co.*, 69–485.

Whether a carrier, in the absence of any statute restricting his powers, can, by rule, regulation or contract, limit the amount for which he will be liable in case of loss of the property, *quære*. But the statutory provision prohibits the making of such contract: *Ibid.*

This statutory provision is applicable to contracts for transportation from a point within to a point without the state, and is not unconstitutional in that respect: *Ibid.*

This section has no application to the case where the railroad company grants to a person a license to erect a building on its right of way for business purposes with the stipulation that it shall not be liable for injury to such building by fire caused by negligence in its employes in the operation of its road: *Griswold v. Illinois Central R. Co.*, 90-265.

SEC. **2075. Lien of judgment.** A judgment against any railway corporation, or any street railway corporation or copartnership, for an injury to any person or property shall be a lien within the county where recovered on the property of such corporation, and such lien shall be prior and superior to the lien of any mortgage or trust deed executed since the fourth day of July, 1862, and prior and superior to the lien of any street railway mortgage or trust deed executed after the adoption of this code. [C. '73, § 1309.]

Where action is brought for recovering from the company damages for breach of a contract under which the right of way was conveyed to it, the judgment may be made a lien on the portion of the line conveyed: *Varner v. St. Louis & C. R. R. Co.*, 55-677.

A judgment for damages for breach of contract by a railway company for failure to fence its right of way and construct cattle guards becomes a lien on the property of the company, but the party is not entitled to such lien for damages caused by negligent construction of the road causing an overflow of his land, nor for trespass in going upon his land outside the right of way: *Hull v. Chicago, B. & P. R. Co.*, 65-713.

A right of action, or an action pending for such injury, is not a lien, and a purchaser of the road before the rendition of judgment takes it free from the lien of such judgment when rendered: *Burlington, C. R. & N. R. Co. v. Verry*, 48-458; *White v. Keokuk & D. M. R. Co.*, 52-97.

This section is not applicable to street railways: *Manhattan Trust Co. v. Sioux City Cable R. Co.*, 68 Fed., 82.

A company buying in a railroad at foreclosure sale, does not take it subject to any obligation to pay debts of the former company not reduced to judgment, nor in any way preserved at the time the deed is made, nor does the receipt from the receiver of the former company of the balance of the proceeds of the management of the property under the receivership, render the new company liable for such claim although reduced to judgment against the receiver before the payment by him of the balance of the funds in his hands: *Brockert v. Iowa Central R. Co.*, 61 N. W., 405.

On foreclosure of the mortgage the new company became entitled to the funds in the receiver's hands as a portion of the property: *Ibid.*

This section is not unconstitutional: *Central Trust Co. v. Sloan*, 65-655.

SEC. **2076. Rates of fare and freight.** All railway corporations doing business in this state, their trustees, receivers or lessees shall be limited in their maximum charges to the rates of compensation for the transportation of passengers and freight herein prescribed. All railroads in the state shall be classified according to the gross amount of their several annual earnings within the state, per mile, for the preceding year, as follows: Class "A" shall include those whose gross annual earnings per mile shall be four thousand dollars or more; class "B" shall include those whose gross annual earnings per mile shall be three thousand dollars or any sum in excess thereof less than four thousand dollars; class "C" shall include those whose gross annual earnings per mile shall be less than three thousand dollars. [15 G. A., ch. 68, § 1; C. '73, § 1305.]

The state cannot by statute regulate rates of transportation under one entire contract from a point within to a point without the state. Such regulation would be an interference with the power of the federal government to regulate interstate commerce: *Carton v. Illinois Cent. R. Co*, 59-148; *Kesler v. Illinois Cent. R. Co.*, 5 McCrary, 496.

Where the railway obligates itself to carry to another point within the state and deliver to a connecting carrier, its contract is not one for transportation to a point beyond the state: *Heiserman v. Burlington, C. R. & N. R. Co.*, 63-732.

The regulation by a board of railroad commissioners that rates of transportation from a point without to a point within the state shall conform to like distances within the state is unconstitutional and interferes with interstate commerce: *State v. Chicago & N. W. R. Co*, 70-162.

Where a contract for transportation by a carrier provided for transportation of the goods from one point within the state to another point also within the state, and the rates of transportation were in excess of those fixed by statute, *held*, that the excess of charges paid might be recovered back, although it was shown that the intention was that the property should be delivered by the carrier receiving it to a connecting carrier and continuously transported to a point without the state, although the charge for the entire transportation would have been a reasonable one: *Heiserman v. Burlington, C. R. & N. R Co.*, 63-732.

Where the statute defines the charges which can lawfully be made by a railway company, charges in excess of those prescribed are unlawful and may be recovered back in an action for the excess. The amount fixed by statute will be conclusively presumed to be the limit of reasonable compensation: *Ibid.*

The enactment of a statute imposing penalties for excessive charges recoverable by the party injured, and providing a punishment against the agent of a carrier for exacting and collecting excessive charges, does not take away the right existing at common law to recover money paid in excess of a reasonable charge: *Ibid.*

In such case an action will not be barred in two years under the provision relating to suits to recover a statute penalty, but will stand on the same footing as any action on implied contract: *Ibid.*

In an action to recover excessive charges paid, the plaintiff need not show objection or protest prior to or at the time of making payment which is in excess of a reasonable compensation: *Ibid.*

Under a statute imposing upon any railway company charging excessive rates a forfeiture to be recovered by the person injured, and providing that any agent or officer of such corporation violating or being a party to the violation of any of the provisions of the act should be guilty of a misdemeanor and punished accordingly, *held*, that where an agent was himself a shipper and accounted and turned over to the company charges for shipments made by him at illegal rates, he and the company were *in pari delicto* as to such charges, and that he could not recover the same in an action against the company: *Steever v. Illinois Cent. R. Co*, 62-371.

Such regulations, held not an impairment of the charter of a railroad granted before its enactment, for the reason that as the charter of the company did not establish the maximum charges, it was competent for the legislature to do so afterward. Nor is such legislation unconstitutional by reason of not being of uniform operation: *Chicago, B. & Q. R. Co. v. Iowa*, 94 U. S., 155.

SEC. **2077. Maximum rates of fare.** All railroad corporations according to their classifications as herein prescribed shall be limited to compensation per mile for the transportation of any person with ordinary baggage not exceeding one hundred pounds in weight, as follows: Class "A" three cents; class "B" three and one-half cents; class "C" four cents, and for children twelve years of age or under, one-half the rate above prescribed. A charge of ten cents may be added to the fare of any passenger when the same is paid upon the cars, if a ticket might have been procured within a reasonable time before the departure of the train. [15 G. A., ch. 68, § 2.]

The regulation that a passenger shall pay full rate upon failure to procure and present a ticket which he might have purchased from the agent at a reduced rate is not unreasonable: *State v. Chovin*, 7–204.

The carrier may make a regulation requiring passengers to procure a ticket before taking passage in a caboose car attached to a freight train, and may eject from the car, in a proper place and manner, any person failing to comply with such regulation: *Law v. Illinois Cent. R. Co.*, 32–534.

A railroad company is allowed to collect an additional sum over the regular rate of fare from passengers who fail to purchase tickets, and the reasonableness of such regulation is not a question for the jury: *Hoffbauer v. Davenport & N. W. R. Co.*, 52–342.

In an action to recover for being ejected from a train for want of a ticket, where the plaintiff claimed that he was not able to procure such ticket on account of the failure of the company to have its ticket office open before the starting of the train, *held*, that it was proper to allow defendant to introduce evidence of the character of the station and whether the facilities extended to the traveling public to purchase tickets were such as required for the convenience of the public. While it is required that the office should be open for business a sufficient time before the departure of the train, in order to enable the passengers to procure their tickets, receive and count their change, if any, and prepare to board the train, without unnecessary interference with each other, yet it is not required that the office shall remain open up to the instant the train moves off. Unfitness of the station cannot be relied on as an excuse for not procuring a ticket, that reason not having been alleged to the conductor: *Everett v. Chicago, R. I. & P. R. Co.*, 69–15.

The failure of the company to sell a ticket to a passenger before entering the cars cannot be made a ground for recovery of damages where the passenger afterward tenders with his fare to the conductor the extra amount required on account of not having a ticket: *Curl v. Chicago, R. I & P. R. Co.*, 63–417.

SEC. **2078. Annual statement.** Each railway corporation operating a railroad in the state shall annually, during the month of January, make and return to the governor a statment, verified by its president and superintendent, showing the gross receipts on its entire road within the state for the preceding year ending the thirty-first day of December, and a detailed exhibit of the entire receipts for transporting freight and passengers, and all other sources of income of the road. A failure to comply with this section shall subject the corporation to a penalty of one hundred dollars per day for each and every day after the report is due until it is made, to be recovered in an action in the name of the state for the benefit of the school fund. If the executive council upon examination shall be satisfied of its correctness, it shall be the duty of the council to classify the different railroads as hereinbefore provided, and the governor, when there shall be any change in classification, shall issue a certificate to any corporation or corporations affected by such change, certifying the class to which they are respectively assigned; and any change of rates by any railroad corporation pursuant to any change of classification shall take effect and be in force from and after the fourth day of July following such changes. [Same, § 7.]

As to annual statement for purposes of taxation, see § 1334.

AUTOMATIC COUPLERS AND BRAKES.

SEC. **2079. On new or repaired cars.** No corporation, company or person operating any line of railroad within this state, or any car manufacturer or transportation company using or leasing cars therein, shall put in use any new car or any old one that has been to the shop for general repairs to one or both of its drawbars, that is not equipped with automatic couplers so constructed as to enable any person to couple or uncouple them without going between them. [24 G. A., ch. 23, § 1; 23 G. A., ch. 18, § 1.]

SEC. **2080. On all cars.** After January 1, 1898, no corporation, company, or person operating a railroad, or any transportation company using or leasing cars, shall have upon any railroad in this state any car that is not equipped with such safety automatic coupler. [Same, § 2.]

(Section 2080 amended by adding thereto "provided that the board of railroad commissioners shall have power upon a showing which it shall deem reasonable, to extend the time within which any such corporation shall be required to comply with the provisions of this section; but no such extension shall be made beyond January 1, 1900." Laws of 28 G. A., ch. 50, § 1.)

SEC. **2081. Driver brake on engines.** No corporation, company, or person operating any line of railroad in the state shall use any locomotive engine upon any railroad or in any railroad yard in the state that is not equipped with a proper and efficient power brake, commonly called a "driver brake." [Same, § 3.]

SEC. **2082. Power brake on cars.** No corporation, company or person operating a line of railroad in the state shall run any train of cars that shall not have therein a sufficient number of cars with some kind of efficient automatic or power brake to enable the engineer to control the train without requiring brakemen to go between the ends or on top of the cars to use the hand brake. [Same, § 4.]

SEC. **2083. Penalty.** Any corporation, company or person operating a railroad in this state and using a locomotive engine, or running a train of cars, or using any freight, way or other car contrary to the provisions of the four preceding sections, shall be guilty of a misdemeanor, and shall be subject to a fine of not less than five hundred nor more than one thousand dollars for each and every offense; but such penalties shall not apply to companies hauling cars belonging to railroads other than those of this state which are engaged in interstate traffic. Any railway employe who may be injured by the running of such engine, train or car contrary to the provisions of said sections shall not be considered as waiving his right to recover damage by continuing in the employ of the corporation, company or person operating such engine, train or cars. [23 G. A., ch. 18, § 6.]

TAXES IN AID OF RAILROADS.

SEC. **2084. May be voted.** Taxes not exceeding five per cent on the assessed value of any township, town or city may be voted to aid any railway company which is or may become incorporated under the laws of the state, to aid in the construction of a projected railroad within the state, as hereinafter provided. [25 G. A., ch. 27; 24 G. A., ch. 18; 20 G. A., ch. 159, § 2.]

Constitutionality: Under the constitution of 1846, *held*, that counties might, by a public vote, be authorized to issue bonds in aid of a railway to be constructed through the county: *Dubuque County v. Dubuque & P. R. Co.*, 4 G. Gr., 1.

Also, *held*, under the provisions of code of '51, that counties had authority by popular vote to issue bonds in subscription for stock of a railway: *Clapp v. Cedar County*, 5–15; *Ring v. Johnson County*, 6–265.

Where such bonds were issued, *held*, that they were valid in the hands of a purchaser, and he need not go behind the records of the county to ascertain whether authority had been properly conferred upon the county officers to issue such bonds: *Clapp v. Cedar County*, 5–15.

Under the cases holding that the county had authority to subscribe for stock in aid of railway corporations, *held*, that irregularities in submitting the proposition to subscribe to such stock to the electors of the county might be cured by a legalizing act of the legislature: *McMillen v. Boyles*, 6–304; *S. C.*, 6–391.

Held, also, that the county might vote taxes in aid of railroads: *Games v. Cobb*, 8–193.

Where a county voted the issuance of bonds in aid of a railroad under the agreement that the county should receive certificates of stock of like amount, *held*, that delivery of such certificates was not a condition precedent to the delivery of the bonds: *State ex rel. v. County Judge*, 9–288.

It was held also that the power to subscribe for stock of a railroad and issue bonds in payment therefor might be conferred upon the county by the legislature, and, if conferred, the bonds issued in pursuance of such authority, or duly legalized if issued originally without authority, would be valid: *Stokes v. Scott County*, 10–166.

But, *held*, that a county had no authority without legislative grant to issue bonds in subscription for stock of a railway company; *Ibid.*

And, *held*, that the cases above cited, upholding the authority of the county to issue bonds or vote a tax in aid of railroads, were erroneously decided, and that such power was not conferred by the provisions of the code of '51: *Ibid.*

Therefore, *held*, that where, in the pursuance of the submission of such a proposition to vote, and the adoption thereof by the voters of the county, bond were being issued which had not yet passed into the hands of purchasers, an injunction should be granted to restrain their issuance: *Ibid.*; *State ex rel. v. Wapello County*, 13–388.

Further, *held*, that the legislature had no constitutional power to authorize the levy of taxes by counties, cities, or townships in aid of railroads: *State ex rel. v. Wapello County*, 13–388; *McMillan v. Boyles*, 14–107; *Smith v. Henry County*, 15–385; *Ten Eyck v. Mayor of Keokuk*, 15–486; *Hanson v. Vernon*, 27–28; *King v. Wilson*, 1 Dillon, 555.

But under a subsequent similar statute, *held*, that such provisions were not unconstitutional, overruling the previous cases: *Stewart v. Board of Supervisors*, 30–9; *McGregor & S. C. R. Co. v. Birdsall*, 30–255; *Bonnifield v. Bidwell*, 32–419; *Renwick v. Davenport & N. W. R. Co.*, 47–511.

The present statute to the same effect is also upheld: *Snell v. Leonard*, 55–553; *Chicago, M. & St. P. R. Co. v. Shea*, 67–728.

The fact that the company in favor of which the tax is voted is organized as a railroad and telegraph company will not affect its validity: *Snell v. Leonard*, 55–553.

Repeal of statute: Where, prior to the repeal of the act authorizing the levy of taxes in aid of a railroad in pursuance of a popular vote, the company in favor of which the tax is voted has expended money in constructing its road, relying upon such tax, it has a right notwithstanding the repeal of the statute, to have the tax levied and collected in its favor: *Burges v. Mabin*, 70–633.

Where a tax was voted in December, 1883, and the law under which it was voted was repealed in April following, and after the voting of the tax the company engaged as actively in the preparation for the work of construction as it could well do at that season of the year, and in the opening of the spring prosecuted its work with energy and complied with the contract on its part, *held*, that the expenditures and work on the faith of the tax voted were sufficient to entitle the company to such tax: *Cantillon v. Dubuque & N. W. R. Co.*, 78–48.

The right to the tax and penalties and interest thereon is not taken away by the repeal of the statute under which the tax is voted, but repeal of the statute terminates the right to additional penalties: *Tobin v. Hartshorn*, 69–648.

The statute of limitations, as against an action to enforce a tax voted under a statute afterward repealed, *held* to commence to run only in accordance with the provisions of new statute: *Harwood v. Brownell*, 48–657.

Where a railroad was constructed by another corporation than that in whose behalf the tax was voted, and it did not appear that such construction was made in reliance upon the tax voted, or that the right to the tax was transferred to the other contracting road, *held*, that such tax could not be levied or collected after repeal of statute under which it was voted: *Barthel v. Meader*, 72–125.

Cities under special charter may vote a tax as here provided: *Bartmeyer v. Rohlfs*, 71–582.

As to taxation of railroads, see §§ 1334–1341.

SEC. **2085. Petition—notice—submission—certificate—levy—collection.** When a petition is presented to the trustees of any township or the council of any town or city, signed by a majority of the resident freehold taxpayers of such township, town or city, asking that the question of aiding any railroad company incorporated under the laws of the state in the construction of a projected railroad within it be submitted to the voters thereof, it shall be the duty of the trustees or council, as the case may be, immediately to give notice of a special election, by publication in some newspaper printed in said township, town or city, if any there be, and, if not, then in some newspaper published in the county, and also by posting copies of said notice in five public places in such township, town or city at least ten days before such election, which shall state the time and place of holding the same, the name of the company, and the line of the road proposed to be aided, the rate per cent of the tax to be levied, whether one-half thereof shall be collected the first year and one-half the following year, or whether the whole is to be collected in one year, the amount of work required to be done and when and where the same shall be done, to what point said railroad shall be fully completed, and any other conditions which shall be performed before such tax or any part thereof shall become due; and in no case shall such tax become due until such railroad is fully completed according to the conditions in said notice. The trustees or council, as the case may be, shall cause to be prepared the form of the proposition to be submitted. The proposition shall be printed and placed upon the ballots and the election shall be conducted in the same manner as provided with respect to like or similar propositions in the chapter on elections; and if a majority of the votes polled be for the adoption of the proposition, then the clerk of the township, city or town, or the clerk of election, shall

forthwith certify to the county auditor the result thereof, the rate per cent of tax voted, the year or years during which the same is be collected, the name of the company to which voted, and the time, terms and conditions upon which the same, when collected, is to be paid under the conditions and stipulations in said notice, together with an exact copy of the notice under which the election was held, which the county auditor shall at once cause to be recorded in the office of the recorder of deeds; the expense thereof, and of publishing the notice, and all the expenses of the election, shall be paid by the railway company to which it is proposed to vote the tax. When such certificate has been made and recorded, the board of supervisors of the county shall, at the time of levying the ordinary tax next following, levy such taxes as are voted under the provisions hereof, as shown by said certificate, and cause the same to be placed on the tax lists of the proper township, town or city, indicating in their order thereupon when and in what proportion the same are to be collected, and upon what conditions the same are to be paid to the railway company, a certified copy of which order shall accompany the tax lists. The taxes shall be collected at the time or times specified in the order, and in the same manner, and subject to the same laws after they are collectible, as other taxes, or as may be stated in the petition and notices for the election, except as otherwise provided. [20 G. A., ch. 159, § 3.]

Petition for tax: A resident taxpayer of the township may sign the petition for an election by the township to vote a tax in aid of a railroad, although he is also a resident and a voter of an incorporated town or city within the limits of such township: *Ryan v. Varga*, 37–78.

Under a previous statute, *held*, that one-third of the taxpayers and not one-third of the resident taxpayers must sign the petition: *Zorger v. Township of Rapids*, 36–175.

Action of trustees: The action of the township trustees in calling an election in pursuance of the petition, *held* to be of a judicial or *quasi*-judicial character, so that the question whether such action was illegal or without jurisdiction might be determined on *certiorari*: *Jordan v. Hayne*, 36–9.

The trustees may decide this question upon their own knowledge: *Ibid.*

Where a proper petition was presented and acted upon at a called meeting of the trustees of which one member had no notice on account of being out of the township, *held*, that the action of the majority was valid: *Young v. Webster City & S. W. R. Co.*, 75–140.

Although the petition is not signed by the requisite number of taxpayers, if the trustees have decided it to be sufficient and ordered an election, and the tax has been voted and levied, the validity of the tax cannot be assailed for such defect in the petition. The defect can only be taken advantage of in some method provided for direct review: *Ryan v. Varga*, 37–78; *West v. Whitaker*, 37–598.

But where the finding of the trustees was that the petition was signed by one-half of the resident freehold taxpayers, when the statute required that it be signed by a majority, *held*, that although they ordered an election, subsequent proceedings were void: *Slack v. Blackburn*, 64–373.

Township embracing incorporated town: If the township embraces an incorporated town, and it is proposed that a township shall aid in the construction of the road, the voters in the corporation are entitled to vote at such election: *Chicago, M. & St. P. R. Co. v. Shea*, 67–728.

Notice: The statute provides that the notice shall specify to what point the road shall be fully completed before the tax can be collected, and if the notice does not so specify the election will be void: *Allard v. Guston*, 70–731.

The statute prescribes no time during which the publication shall be made; it is to be done immediately, but the time will depend upon the day of the issue of the paper. The statute does not require the newspaper publication to be made ten days before the election: *Johnson v. Kessler*, 76–411.

Where the notice specified that the road should be built between a certain city and a point on another road so as to make a continuous line of railroad from said city to certain coal mines of the latter road, *held*, that the construction of a road from the city to the junction with the other road was all that was required: *Young v. Webster City & S. W. R. Co.*, 75–140.

Where the notice does not state to what point the road is to be fully completed before the tax shall become due and payable, it is not sufficient: *Kleise v. Galusha*, 78–310.

Ballots: Where the ballots upon the question of voting a tax in aid of a railroad were "taxation" and "no taxation," *held*, that the form of ballots was sufficient: *West v. Whitaker*, 37–598.

In a particular case, *held*, that the ballots were sufficient although they contained matter not necessary: *Cattell v. Lowry*, 45–478.

Undue influence at election: Where it appeared that an agent authorized by the company for whom the tax was being voted to represent it in procuring the voting of the tax for a compensation agreed upon made promise to voters that all resident taxpayers who voted for the tax would receive fifty cents on the dollar on their certificates when issued, and thereby induced some of the voters to change their minds as to the vote which they would cast with reference to such tax, *held*, that the tax was thereby rendered illegal: *Chicago, M. & St. P. R. Co. v. Shea*, 67–728.

Where the submission of the proposition and its adoption are procured by false statements and fraudulent representations of the company and its agents the tax cannot be enforced: *Sinnett v. Moles*, 38–25.

Expenses of election in townships for the purpose of voting aid to railroads are not chargeable to the county: *McBride v. Hardin County*, 58–219.

Certificate as to result of election: The certificates of the clerk of election required by the statute in order to authorize the board of supervisors to levy a tax should set out the conditions under which the tax was voted, and it is not sufficient to attach and refer to the notice of the election in which such conditions are stated: *Minnesota & I. S. R. Co. v. Hiams*, 53–501.

Where the township clerk filed with the county auditor such records of proceedings as showed what was required to be certified by such clerk, *held*, that the certificate was sufficient to support the tax, although not contained in one paper; a substantial compliance with the law being deemed sufficient: *Shontz v. Evans*, 40–139.

Where there is a certificate which is defective, and the board of supervisors has determined that the certificate sufficiently complies with the law, the correctness of such decision cannot be collaterally attacked by an action to enjoin the collection of the tax: *Chicago, M & St. P. R. Co. v. Shea*, 67–728.

Where by mistake of the clerk the certificate has been improperly issued the collection of the tax may be restrained by injunction: *Cattell v. Lowry*, 45–478.

Levy: Where certain taxes were properly voted and certified, and the board of supervisors levied "all * * * railroad taxes that have been certified according to law," and the railroad tax in question was accordingly placed upon the tax list, *held*, that the levy was sufficient: *Casady v. Lowry*, 49–523.

The levy of a railroad aid tax *held* sufficient in a particular case, it being mentioned in the resolution enumerating the different taxes as "railroad tax," and being made certain as to amount by reference to the proper records of proceedings of the township for voting such tax: *Shontz v. Evans*, 40–139.

Where a committee of the board of supervisors recommended in a report that certain taxes be levied, which included the tax in question, and it appeared from the record that the report was adopted, the names of those voting in favor thereof being given, *held*, that the levy was sufficient: *West v. Whitaker*, 37–598.

A levy of taxes in different townships is to be considered as distinct, even though such separate levies are made by one resolution: *Woodworth v. Gibbs*, 61–398.

The action of the board in making the levy is not judicial but purely ministerial; their action in so doing may be questioned in a collateral proceeding, and

held void for want of power to do it at the time it was done: *Scott v. Union County*, 63–583

Authority to vote and levy the tax rests upon a substantial compliance with the requirements of the statute in the performance of the conditions upon which the authority is granted: *Allard v. Guston*, 70–731.

Under 12 G. A., ch. 48, *held*, that no levy by the board of a tax properly voted by a township was necessary, and that therefore such levy could not be compelled by *mandamus*: *Chicago, D. & M. R. Co. v. Olmstead*, 48–316.

Where a tax in aid of a railway was voted in March, *held*, that the levy was properly made upon the assessment of the same year, although the books were not returned until after that date: *Parsons v. Childs*, 36–108.

Without fixing any definite rule for all cases the court *held* (by a majority opinion) that where a tax was voted in December, 1883, it was properly levied on the assessment of that year: *Cantillon v. Dubuque & N. W. R. Co.*, 78–48.

As to levy, see *Bartemeyer v. Rohlfs*, 71–582.

Entry of tax on tax list, *held* not necessary under 12 G. A., ch. 48: *Harwood v. Brownell*, 48–657.

Validity: Where the validity of such a tax has been adjudicated in an action against the treasurer and the board of supervisors by parties claiming the tax, it cannot, in the absence of collusion or fraud, be again called in question in an action by a taxpayer against the treasurer to enjoin its collection; *Lyman v. Faris*, 53–498.

Collection of tax: Although it may be the duty of the treasurer to proceed to collect the tax when due, he could not, under previous statutes, be compelled by the company to do so until it had showed itself entitled thereto: *Harwood v. Case*, 37–692.

Under a subsequent statute the tax did not become delinquent until the company was entitled to the tax and the whole amount thereof, and as to taxes levied before the passage of such act, *held*, though retrospective, it was not invalid: *Ibid.*

Where it appears that the company was entitled to only a part of the tax, and such part was not claimed merely as an installment, *held*, that the part claimed would not be regarded as an installment, but in satisfaction of the whole tax, and as such might be collected: *Casady v. Lowry*, 49–523.

The county has no interest in the tax collected, and if it is to be refunded it should be refunded by the treasurer without any warrant or order of the board of supervisors. In the case of misappropriation by the treasurer the loss would not fall upon the county: *Barnes v. Marshall County*, 56-20.

A claim for the refunding of a portion of the tax is against the fund and not against the county: *Ibid.*

The county cannot be made liable for any part of a railroad tax paid into the county treasury. Where a railroad tax illegally collected remains in the treasury the proper officer may be compelled to refund the same by an action against him, but an action for the amount cannot be maintained against the county: *Eyerly v. Jasper County*, 72–149.

Where such taxes do not remain in the hands of the treasurer as a distinct fund, but have been placed in the general fund and expended in paying ordinary indebtedness of the county, judgment may be rendered against the county therefor: *Merrill v. Marshall County*, 74–24.

In an action of *mandamus* to compel a county treasurer to pay over to plaintiff certain taxes collected for its use by his predecessor in office, and transferred by such predecessor to the county fund by order of the board of supervisors, *held*, that the transfer to the county fund was such an appropriation of the money as to release defendant from all liability to plaintiff on account of it: *Minneapolis & St. L. R. Co. v. Becket*, 75–183.

As to the effect of alienation of the road upon the right to a tax, see notes to § 2088.

Conditions and stipulations: No contract, stipulation or reservation could, under the previous act, be set up to defeat the tax unless it was in writing: *Muscatine Western R. Co. v. Horton*, 38–33; *Harwood v. Quinby*, 44–385.

The omission to state in the levy the condition upon which it is to be paid to the company will not render the levy invalid when the condition was complied with before the levy: *Burges v. Mabin*, 70–633.

Where a condition on which the taxes in aid of a railroad was that "the road should be built and in operation" by the time fixed, *held*, that such condition was sufficiently complied with if the trains were running by the time specified, although it was necessary in order to the completion of the road that it be ballasted and additional ties put in: *Muscatine Western R. Co. v. Horton*, 38–32.

Where the road is completed in accordance with the conditions of a written contract between the company and the township voting the tax, a failure of the company to comply with the just expectations of the voters which have not been embodied in such contract will not forfeit the tax: *Ibid.*

Where one of the conditions on which a tax was voted was that the road should be constructed and operated, and a depot located within a town named, on or before a certain day, and by that date the depot was partially erected and a track was laid for the distance of a mile from such depot, and the road was operated, although not in a first-class manner, the track not being ballasted, *held*, that there was a sufficient compliance with the conditions of the tax to entitle the railway to the same: *Chicago, M. & St. P. R. Co. v. Shea*, 67–728.

In a particular case, *held*, that the construction of the road was not such as to constitute a compliance with the conditions on which the aid tax had been voted: *Cox v. Forest City & S. R. Co.*, 66–289.

Where a tax was voted to be expended in three townships mentioned, *held*, that it appearing that more than the amount of tax voted had been expended in the township in question, the company was entitled to the tax in that township although nothing had been expended in the other two townships: *Merrill v. Welsher*, 50–61.

Also, *held*, that the fact that the line of the road was changed so that that it did not pass through one of the townships specified would not prevent the collection of the tax in the township through which it did pass: *Ibid.*

Also, *held*, under a special statute that a mere suspension of work and failure to build the road for the period of four years mentioned in such statute was not the non-fulfillment of a special contract or agreement as therein specified, and did not amount to a forfeiture of the tax: *Ibid.*

Where the articles of incorporation of the company declared its purpose to be to construct a railroad by the way of Newton, in Newton township, and the petition and notice for the voting of a tax in that township specified that it was for the purpose of aiding in the construction of the road to be expended in Newton and another township named, *held* that without the construction of the line to Newton the tax in Newton township could not be enforced, although double the amount of such tax had been expended in the other township: *Lamb v. Anderson*, 54–190.

Where the articles of a corporation in whose favor a tax was voted specified its objects to be to construct, operate and maintain a railroad from Dubuque in a westerly and northwesterly direction through Iowa, Minnesota and Dakota to a junction with the Northern Pacific, and the road was accordingly constructed, extending from Dubuque to St. Paul, the reaching of the point specified not being a condition of the payment of the tax, *held*, that there was not such failure to comply with conditions as to work a forfeiture: *Cantillon v. Dubuque & N. W. R. Co.*, 78–48.

It is a sufficient designation of the terminal point of a proposed line to state that it is to run in a certain direction to the connection with another line. It is sufficient completion of the line that the track is laid and cars run thereon: *Yarish v. Cedar Rapids, I. F. & N. W. R. Co.*, 72–556.

Where a paper was signed by the president of the company, bearing the seal of the corporation, and was circulated among the electors on the day of election, containing certain stipulations in regard to the construction of the road for which the tax was being voted, *held*, that the provisions of such paper became binding upon the company: *Meeker v. Ashley*, 56–188.

Where the president of the company made statements at a public meeting called to discuss the voting of a tax in aid of a railway, which tended to induce taxpayers to believe that the road, if built, would be located upon a line already surveyed and known to them, and afterwards the road was built upon a different line, less advantageous to the taxpayers, *held*, that the collection of the tax could be enjoined: *Curry v. Supervisors*, 61–71.

A taxpayer cannot restrain the collection of taxes voted in aid of the construction of the road on the ground that the company has not complied with the conditions of the notice, and completed the road within the time prescribed: *Johnson v. Kessler*, 76–411.

When a railroad company expends large sums of money in the construction of its road, taxpayers, before the completion of the road, having made no objection, are estopped to deny the validity of the tax: *Ibid.*

As to notice, see *Bartemeyer v. Rohlfs*, 71–582.

Narrow gauge: Where a tax was voted in aid of a railroad between certain *termini* and a narrow gauge road was constructed, *held*, that that fact would not defeat the company's right to the tax, it not having been specified in the notice of election what the gauge of the road should be, and it appearing that the road as constructed answered the purpose of the taxpayers: *Meader v. Lowry*, 45–684.

And in such case, *held*, that the township trustees were not guilty of any fraud in certifying the construction of the road as contemplated in the notice submitting the question of levying the tax: *Ibid.*

The construction of a narrow gauge road having sufficient capacity for all the business to be done, and capable of doing it as economically as a road of any other gauge, is a sufficient compliance with the provisions for the voting of the tax, where no stipulation as to the gauge is made, to entitle the company to the tax voted: *Casady v. Lowry*, 49–523.

Estoppel: Where conditions and representations have not been complied with, the taxpayer will not be estopped from enjoining the collection of the tax by the fact that the road has been built, where it appears that notice was given to the company before the construction of the road upon the new line that the tax would be contested on the ground of fraud and false representations: *Curry v. Supervisors*, 61–71.

Where it is not shown that the party objecting to the validity of a railroad aid tax had any knowledge thereof at the time it was expended, he will not be estopped from questioning its validity afterwards: *Truesdell v. Green*, 57–215.

Purchase or leasing of another road: The leasing or purchase and operation of a line of road as a part or whole of the line for the construction of which the tax is voted will not constitute a compliance with the agreement to construct such road: *Lamb v. Anderson*, 54–190; *Meeker v. Ashley*, 56–188; *Iowa, M. & N. P. R. Co. v. Schenck*, 56–628; *Lawrence v. Smith*, 57–701.

Alienation: Where the company to which a tax has been voted has, upon the faith of the tax, constructed the road and put it in operation, such company becomes entitled to the tax, and this right is not forfeited by a subsequent alienation of the road to another company: *Parsons v. Childs*, 36–108.

The fact that a road in aid of which taxes are voted is sold at or before the time of its completion to another company will not defeat the right of the company in whose favor the tax is voted to receive the same: *Muscatine Western R. Co. v. Horton*, 38–33.

The alienation of the road before the payment of the tax, so that shares of stock in the road for which the tax was voted can no longer be issued to those holding certificates for the payment of such taxes as provided by statute, is a ground for setting such tax aside and releasing the taxpayer from his burden: *Manning v. Mathews*, 66–675; *Blunt v. Carpenter*, 68–265.

The right of the taxpayer to receive such certificates of stock in exchange for his receipts for taxes paid cannot be set aside by agreement or waiver: *Blunt v. Carpenter*, 68–265.

But a consolidation under terms securing to the taxpayer equivalent stock in the consolidated company will not avoid the tax (see § 2068): *Cantillon v. Dubuque & N. W. R. Co.*, 78–48.

But the lease of the road in favor of which the tax is voted in perpetuity to another road, by which the latter agrees to operate the line and pay the lessor company a per cent of the gross earnings, it not appearing that the contract of lease is inequitable or not beneficial to the company constructing the road, will not deprive the company of the right to the tax: *Chicago, M. & St. P. R. Co. v. Shea*, 67–728.

The county having collected a railroad aid tax cannot resist payment of it to the company on the ground that the company has sold and conveyed its property and franchises. Such a defense can only be interposed by the taxpayer: *Merrill v. Marshall County*, 74–24.

Change of line: The fact that, after a tax in aid of a railroad is voted, the location of the line in a part of its course is changed, which change, however, is not in conflict with any of the conditions upon which the tax is voted, will not affect its validity: *Shontz v. Evans*, 40–139.

A private individual cannot, on account of private injuries to him alone, maintain an action of *mandamus* to compel a railway company which has received the benefit of taxes voted by the public to operate its line as it was originally located: *Crane v. Chicago & N. W. R. Co.*, 74–330.

SEC. **2086. Notice—conditions—limit of tax.** The stipulations and conditions in the notices prescribed in this chapter must conform to those set forth in the petition asking for the election; and the aggregate amount of tax voted in any city, town or township shall not exceed five per cent of the assessed value of the property therein, respectively. [25 G. A., ch. 27; 24 G. A., ch. 18; 20 G. A., ch. 159, § 4.]

Under the statutory provision that a township, town or city, having voted a tax to the amount of five per centum upon its taxable property in aid of railroads, cannot impose another tax upon property for that purpose, *held*, that the power conferred to levy such taxes ceases upon a levy of taxes to that amount, but that taxes duly levied which have been abandoned or become uncollectible, cannot be taken into account: *Dumphy v. Supervisors of Humboldt County*, 58–273.

An increase in value of taxable property after levy of the five per centum of taxes does not confer the power to make an additional levy: *Ibid.*

Taxes levied under a prior act providing for such taxation, although such act contained the same limitation as the present act, cannot be taken into account in determining whether the limit fixed in the present act has been exceeded: *Scott v. Union County*, 63–583.

Where, at the time of voting the tax under one act, a prior tax of five per cent stood uncanceled, but before the levy of the tax thus voted the prior tax was canceled, *held*, that the second tax was valid. The statute should be construed as if it provided that the aggregate amount of tax to be voted and levied shall not exceed five per cent: *Williams v. Poor*, 65–410.

Penalties accruing on a railroad aid tax are not to be taken into account in determining whether the amount of the tax exceeds the limit fixed by statute: *Tobin v. Hartshorn*, 69–648; *Chicago, M. & St. P. R. Co. v. Hartshorn*, 30 Fed., 541.

SEC. **2087. Money paid out—certificate.** The moneys collected under the provisions of this chapter shall be paid out by the county treasurer to the treasurer of the railway company for whom the same was voted, upon the orders of the president or managing director thereof, at any time after the trustees of such township or council of such town or city voting the same, or a majority thereof, shall have certified to the county treasurer that the conditions required of the railway company and set forth in the notice for the special election have been complied with, which certificate said township trustees or council of such town or city shall make when conditions have been sufficiently complied with to entitle the railway company thereto, or when the conditions are fully complied with on the part of the railway company; but if the costs and expenses of holding the election and of recording the certificates have not been paid, then the treasurer shall first deduct from the moneys collected the amount thereof, and pay same to the parties entitled thereto. [20 G. A., ch. 159, § 5.]

Fee for collection: The treasurer is not authorized to deduct from the tax collected three per cent for its collection. Section 490 does not authorize such deduction: *Merrill v. Marshall County*, 74–24.

Certificate: The certificate of the township trustees of the compliance of the company with the terms on which the tax is voted need only be properly signed. It need not appear that there is a previous resolution or order authorizing its issuance: *Merrill v. Welsher*, 50–61.

Under a certificate in such case that the company had "so complied with the act as to entitle it to draw the sum of," etc., *held*, that as the company could not have been entitled to draw any sum until it had complied with the act, the certificate was sufficient: *Casady v. Lowry*, 49–523.

The certificate of the trustees is not a judicial act and is not conclusive, its only purpose being to authorize the treasurer to pay over the funds collected. It has nothing to do with the treasurer's right to collect the tax: *Lamb v. Anderson*, 54–190.

The duty of the trustees as to giving a certificate of completion of a road is only to determine whether it is completed, and they should not refuse to give it on the ground of fraud in the election or in the certificate of the engineers: *Harwood v. Quinby*, 44–385.

An action to enforce the duty imposed on the trustees to make such certificate does not become barred as to a tax already voted until three years after the passage of the act limiting the time for making such certificate: *Ibid.*

The fact that the certificate of the trustees is given at a place outside of their township will not render it absolutely void: *Meader v. Lowry*, 45–684.

Also, *held*, that the proper trustees to make the certificate were those of the township which had voted the tax, although afterward portions of the township were organized into or transferred to another township: *Ibid.*

Assignment: The claim for a railroad aid tax is assignable: *Merrill v. Welsher*, 50–61.

The assignment of such a tax does not discharge the assignee of the equities between the company in favor of which the tax was voted and the taxpayers, and in a suit by a taxpayer to invalidate such a tax because of the non-fulfillment of conditions precedent on the part of the railroad company, the company in whose favor the tax was voted and the assignee of such tax are necessary parties. So, also, the township trustees and the county treasurer are to be made parties defendant: *Sully v. Drennan*, 113 U. S., 287.

Trust fund: Where money is paid in aid of the construction of railroads, such money in the hands of the treasurer is a trust fund, and the taxpayer and the railroad company are beneficiaries: *Eyerly v. Supervisors of Jasper County*, 77–470.

And where an action was commenced to test the legality of a tax as voted in aid of a railroad, *held*, that while such action was pending, the statute of limitations did not commence to run against an action of *mandamus* to compel the supervisors to refund the money: *Ibid.*

A railroad company entitled to the proceeds of a tax paid into the treasury may recover the amount thereof on the bond of the treasurer to whom the money was paid: The company cannot maintain *mandamus* against the successor of such treasurer, who has never received the money collected: *Cedar Rapids, I. F. & N. R. Co. v. Cowan*, 77–535.

SEC. **2088. Certificates of taxes exchangeable for stock or bonds.** The county treasurer when required shall, in addition to a tax receipt, issue to each taxpayer, on the payment of any taxes voted under the provisions of this chapter, a certificate showing the amount of tax paid, the name of the railway company entitled thereto, and when the same was paid; and he may charge twenty-five cents for each certificate issued. Said certificates shall be assignable, and, when presented by any person holding the legal title thereto to the president, managing director, treasurer or secretary of the railroad company receiving the taxes paid, as shown by such certificates, in sums of one hundred dollars or more of taxes,

it shall issue or cause to be issued to said person the amount of stock of the company desiring the benefit from said taxes, to the amount of said certificate or certificates, and if the taxes paid as shown by said certificate or certificates amount in the aggregate to more or less than any certain number of shares of stock, then the holder thereof shall be entitled to receive the full number of shares of stock covered by said certificates, and may make up in money the balance of any share when the certificates held by him are not equal to one full share of such stock, which stock for such purpose shall be estimated at par. When it shall be proposed in the petition and notice calling an election to issue first mortgage bonds not exceeding the sum of eight thousand dollars per mile for a railroad of three feet gauge, and not exceeding the sum of eighteen thousand and five hundred dollars per mile for the ordinary four feet eight and one-half inch gauge in lieu of stock, it shall be lawful to issue bonds of the denomination of one hundred dollars, in the same manner as is provided for the issue of stock, and in such case the petition and notice shall state the amount of bonds per mile to be issued, the rate of interest, and the time of payment of the interest and principal thereof. [23 G. A., ch. 19, § 1; 20 G. A., ch. 159, § 6.]

If the company to which a tax has been voted transfers its property and franchises so that the taxpayer cannot secure the stock to which he is entitled, the collection of the tax cannot be enforced. The taxpayer cannot be compelled to take stock in another corporation, even though more valuable: *Manning v. Matthews*, 66–675; *Blunt v. Carpenter*, 68–265.

The taxpayer must be held to a knowledge of the law at the time the tax was voted by which (§ 2068) the company has the right to transfer the road, and therefore the obligation of payment by taxpayers will depend upon the readiness of the purchasing company to deliver the stock, where there is a condition in the contract of transfer by which stock in the consolidated line of equal or greater value than that in the company in whose favor the tax is voted is to be issued: *Cantillon v Dubuque & N. W. R. Co.*, 78–48

An action by taxpayers who are entitled to stock for taxes paid to declare stock and bonds issued by the company fraudulent must be brought within five years after knowledge of the issuance of such stock and bonds; and as to the bonds a recording of the mortgage securing them will impart notice of their issuance: *Allen v. Wisconsin, I. & N. R. Co.*, 90–473.

SEC. **2089. Liability of directors.** The board of directors of any railway company receiving taxes voted in aid thereof under the provisions of this chapter, or any member thereof, who shall vote to bond, mortgage or in any manner incumber said road to an amount exceeding the sum of eight thousand dollars per mile for a railroad of three feet gauge, or exceeding the sum of eighteen thousand five hundred dollars per mile for the ordinary four feet eight and one-half inch gauge, not including in either case any debt for ordinary operating expenses, shall be liable to the stockholders or either of them for double the amount, estimated at its par value, of the stock by him held, if the same should be rendered of less value or lost thereby. [23 G. A., ch. 19, § 2; 20 G. A., ch. 159, § 7.]

Incumbrances placed on a road prior to the payment of taxes by the taxpayers might be a ground for refusing to pay such taxes, but are not prohibited by this section, which is intended to apply to cases where bonds are issued in excess of

the limits named after the company has received taxes voted in its aid, and in which, therefore, the stockholder has no other remedy: *Walker v. Birchard*, 82–388.

Under particular facts, *held*, that any fraud on the part of the officers of the company in issuing stock or bonds might have been discovered by due diligence of taxpayers who were entitled to stock and that delay in bringing action for the statutory period would bar recovery: *Allen v. Wisconsin, I & N. R. Co.*, 90–473.

SEC. **2090. Forfeiture of tax.** Should the taxes voted in aid of any railroad under the provisions of this chapter remain in the county treasury for more than one year after the same have been collected, the right to them by the railroad company shall be forfeited, and the persons who paid the same entitled to receive back from the county treasurer their *pro rata* shares thereof remaining, and in all cases where any taxes have been voted or levied upon the real or personal property in any township, town or city to aid in the construction of any railroad, and the road in aid of which they were voted or levied has not been built, completed or operated into or through such township, town or city, it shall be the duty of the board of supervisors of the county where said taxes have been voted and levied and still remain on the tax books to give the railway company in aid of which the tax was voted at least thirty days' notice in writing, to be served like original notices, of their intention to cancel such taxes, and thereupon to cause the same to be canceled and stricken from the tax books of the county, which cancellation shall remove all liens created by the levy thereof. In all cases where the railway company to whom taxes have been voted neglects or refuses to receive such taxes, or to require or permit the same to be collected and certificates therefor to be issued, for the period of one year after they became due and collectible, and in all cases where taxes have been voted in aid of any railroad, and the conditions upon which the same were voted have not in fact been complied with, and the time in which said conditions were to be fulfilled has expired, the same shall be forfeited, and the county officers of the county in which they have been levied and entered upon the tax books shall enter cancellation thereof upon the proper records; and in all cases where any taxes to aid in the construction of any railroad may be voted upon the inducement or promise offered on the part of said railroad company, or any duly authorized agent thereof, for any rebates or exemptions from the said tax or any part thereof, or any agreed price to be paid for the stock that may be issued in lieu of said tax, or a division of said tax, or any portion or percentage thereof, with any of the voters or taxpayers as an inducement to procure said tax to be voted, all taxes so procured to be voted shall be void. [20 G. A., ch. 159, § 8.]

The fact that a portion of the tax voted in aid of the railroad has been paid, and, after having lain in the treasury two years uncalled for, has been refunded to the taxpayer as provided by statute, does not operate as a forfeiture of taxes not so paid: *Merrill v. Welsher*, 50–61.

Where the road has been completed and there has been a continuing demand of taxes received by the treasurer, the right to recover taxes received will not be defeated by the fact that they have remained in the treasury more than two years. The provision was intended to secure the speedy and prompt building of the road: *Merrill v. Marshall County*, 74–24.

Under a former statute, *held*, that the county had no interest in the tax collected; that it was to be paid to the county treasurer, and in proper case should be refunded by him without any warrant or order of the board of supervisors; that in case of misappropriation by the county treasurer the loss would not fall upon the county, and that the claim of plaintiff for the refunding of his proportion of the tax forfeited was strictly against the fund, and not against the county: *Barnes v. Marshall County*, 56–20.

In a particular case, *held*, that the evidence did not show that taxpayers were induced to sign the petition and to vote for the tax, upon any offer or promise of exemption from payment: *Young v. Webster City & S. W. R. Co.*, 75–140.

Where the county treasurer having in his hands money paid by the taxpayers under the levy of a railroad aid tax, disbursed the same in part to the railroad company and in part to a person claiming to be the assignee of such company and then went out of office, *held*, that an action of *mandamus* against the board of supervisors was not the proper remedy, the taxes not having been paid into the county fund nor used by the county: *Eyerly v. Board of Supervisors*, 81–189.

Under a previous statute, *held*, that the provision that taxes remaining in the treasury more than two years after collection should be deemed forfeited was applicable equally in a case where the company had complied with the conditions of the vote, by building its road, as to a case where such taxes remained uncalled for by reason of a failure to perform such conditions: *Cedar Rapids, I. F. & N. W. R. Co. v. Elseffer*, 84–510.

Held, also, that the courts would not hesitate in upholding such a provision on the ground that it was in the nature of a forfeiture, it not being a forfeiture in the usual signification of that term: *Ibid.*

Also, *held*, that under the facts of the case, the company could not be relieved from the provisions of the statute on the ground of a mistake on the part of the officers of the company as to its being entitled to the tax: *Ibid.*

Also *held*, that this provision of the statute was not repealed by a subsequent statute on the same subject: *Ibid.*

SEC. **2091. Taxes paid in labor or supplies.** Nothing contained in this chapter shall preclude any taxpayer who may contract with a railroad company for which taxes may be voted to pay his tax, or any part thereof, in labor upon the line of said railroad, or in material for its construction, or supplies furnished or money paid for the construction thereof, in pursuance of the terms and conditions stitpulated in the notices of election, in lieu of a payment to the county treasurer. Upon presenting to the county treasurer a receipt from such railroad company or its duly authorized agent, specifying the amount of such payment, the same shall be credited by the treasurer on his tax, with the same effect as though paid to him in money, and when such receipts have been presented and credited they shall have the same validity in his settlement with the board of supervisors as the orders from the railroad company provided for in this chapter. Laborers shall have a lien upon any tax voted in aid of a railroad company for the amount due them for labor performed in the construction of said railroad. [Same, § 9.]

Where the company issued to a taxpayer a receipt for taxes paid directly to the company, to be presented to the county treasurer in payment of the taxes, *held*, that such receipts were in the nature of advance receipts for the taxes, and that no action thereon against the company or the assignor of such instrument could be maintained thereon, at least until demand had been made on the treasurer that they be received for taxes: *Lisle v. Iowa, M. & N. P. R. Co.*, 54–499.

RELOCATION OF LINE.

SEC. **2092. Petition.** Any railroad desiring to change or remove the line of its road, after the same has been permanently located and constructed, may file a petition in the district court in any county wherein the change or removal is proposed to be made, describing with reasonable accuracy that portion of its line which it seeks to have changed or removed, and asking the court to grant authority to make such change or removal. All trustees, mortgagees and other lien holders, and all townships, cities and counties which have aided by taxation to build the road, must be made defendants and served with notice as in other actions. [16 G. A., ch. 118, § 1.]

SEC. **2093. Notice.** A public notice to all whom it may concern of the time of filing such petition, the object thereof, and the term of court at which the application will be made for authority to make the change, and requiring all persons desiring the repayment of money or return of property, as in this chapter provided, to appear and present their claims therefor, must be published in a newspaper printed in each county in which the change is to be made, for a period of ten successive weeks before the term of court at which the application is to be heard. The court may order any additional notice or publication that it may think proper. [Same, § 2.]

SEC. **2094. Conditions.** No railway company shall be allowed to change or remove its line of road, after a permanent location and construction, without repaying all moneys, and restoring all property or its value, which were donated to the company building the same exclusively in consideration of said railroad being located and constructed on such line, to the parties donating the same, their heirs or assigns, nor without first procuring the consent of all parties having liens upon the railroad, and of any township, city or county that by taxation or by the issuing of bonds has contributed money to aid in the construction thereof; but the consent of such township, city or county shall be necessary only with reference to the change to be made within its own territorial limits. [Same, § 3.]

The obligation to operate a railway is incurred by accepting taxes: *State v. Central Iowa R. Co.*, 71-410.

SEC. **2095. Order of court.** If the court finds that notice has been given, and the consent of the proper parties has been obtained, it shall ascertain the amount of money or property contributed to the company by any person or party thereto or appearing therein that was so contributed exclusively in consideration that the road should be located on the line from which it is proposed to remove it, which shall be repaid in case of money, and returned if property, or its value fixed, and in either case shall render judgment therefor, and may also enter a decree authorizing, if the public interest demands it, the removal of or change in the line of said road upon condition that all judgments above provided for be first paid or satisfied, and foreclosing all persons or parties not appearing in the action, and forever barring them from asserting any claim against such company on account of the contributions or donations herein mentioned. [Same, § 4.]

SEC. **2096. Effect.** All mortgage liens or other incumbrances on the line of road which the company is authorized by the court to change shall attach to the line to which said road is removed, and have the same priority over other liens that they held on the original line. [Same, § 5.]

SEC. **2097. Notice to township trustees—vested rights.** For the purpose of this chapter, the trustees of each township shall be served with notice and shall represent and act for it. No vested right of any person or persons living on and along the line of any railroad thus removed shall be defeated or affected by the removal. [Same, § 6.]

SEC. **2098. Cuts and banks.** When any railway company shall take up its track and relocate the same under the provisions of this chapter, it shall within two years therefrom fill up the cuts and level down the banks, or cause the same to be done; but the provisions of this section shall not apply to any railroad which has its initial point in any town upon the Mississippi river, and which had in the year 1859 sixty-three miles and no more of completed track from such initial point, and this exemption shall only apply to the sixty-three miles of road from the initial point thereof. [17 G. A., ch. 152, § 1; 16 G. A., ch. 118, § 7.]

UNION RAILWAY DEPOTS.

SEC. **2099. Corporations formed.** Any number of persons or railway corporations, or both persons and railway corporations, may form a body corporate under the laws of this state relating to corporations for pecuniary profit, for the purpose of acquiring, establishing, constructing and maintaining at any place in the state union station houses or depots for freight or passengers, or both, with necessary offices for express, baggage or postal rooms in the same or separate buildings, and railroad tracks and other appurtenances of such depots. Any railroad company operating a road in the state, or interested therein, whether organized under its laws or elsewhere, may become a stockholder in such corporation. A copy of the by-laws, if any are adopted, shall be posted in the passenger or waiting rooms of the depot and in the office of the company. [20 G. A., ch. 139, § 1.]

SEC. **2100. Powers.** Every corporation formed under the provisions of the preceding section shall have power to take and hold, for the purposes therein mentioned, such real estate as may be found necessary by the railroad commissioners for the location of its depot and approaches, which it may acquire by purchase or condemnation as provided for the taking of private property for works of internal improvement. [Same, § 2.]

SEC. **2101. Connecting tracks.** Such corporations, with the consent of the council of any city or town in which any such depot is located, shall have the right to lay its tracks to make necessary

connection with all railways desiring to use such depot, upon the streets or alleys of such city or town, and, by and with the consent of the council, may erect such depot upon or across any street or alley; but no railway track can thus be located, nor can any such depot be so erected, until after the injury to property abutting upon the streets or alleys thus appropriated has been ascertained and paid in the manner provided for taking property for works of internal improvement. [Same, § 3.]

SEC. **2102. Liability for damages.** Nothing in this chapter contained, or in the articles of incorporation or by-laws of such corporation, shall release the railroad companies using such union depots, tracks or appurtenances from the same liability for all damages on account of injuries to persons, stock, baggage or freight, or for the loss of baggage or freight in or about such union depot grounds, as they would be under if said depot tracks and appurtenances belonged to and were operated by the railway companies using the same. [Same, § 4.]

STATION-HOUSES AT CROSSINGS.

SEC. **2103. At joint expense—connecting tracks.** All railway corporations shall, at all points of connection, crossings or intersection with the roads of other corporations, unite therewith in establishing and maintaining suitable platforms and station-houses for the convenience of passengers desiring to transfer from one road to the other, and for the transfer of passengers, baggage or freight, whenever the same shall be ordered by the railroad commission; and shall, when ordered by it, keep such depot or passenger house warmed, lighted and opened a reasonable time before the arrival, and until after the departure, of all trains carrying passengers; and said railway companies shall stop all trains at said depots for the transfer of passengers, baggage and freight when so ordered by the commission. The expense of constructing and maintaining such station-houses and platforms shall be paid by such corporations in such proportions as may be fixed by the commission. Such corporations whose roads so connect or intersect shall, when ordered by the commission, so unite and connect the tracks of the several roads as to permit the transfer of cars from the tracks of one to that of the other. [20 G. A., ch. 24, § 1; 15 G. A., ch. 18; C. '73, §§ 1292-6]

The provisions of 20 G. A., ch. 24, § 1, leaving the matter to the discretion of the commissioners superseded prior provisions on the subject: *Smith v. Chicago, R. I. & P. R. Co.*, 86-202.

As to whether the commissioners have authority to require the establishment or maintenance of stations elsewhere than at crossings, *quære*: *State v. Des Moines & K. C. R. Co.*, 87-644.

SEC. **2104. Penalty.** Any railway corporation or company which, after having received ninety days' notice from the commissioners, shall neglect or refuse to comply with the provisions of the preceding section shall, for every day it fails, neglects or refuses to comply therewith, forfeit and pay the sum of twenty-five dollars, which may be recovered in the name of the state for the use of the school fund of the county wherein such crossing or intersection is situated, and the county attorney of such county shall prosecute the same. [20 G. A., ch. 24, § 2.]

CHANGING NAMES OF STATIONS.

SEC. **2105. By commissioners.** In all cases where any railway company shall fail or refuse to make the name of the railway station conform to the name of the village, incorporated town or city within the limits of which it is situated, it shall be the duty of the railway commissioners of the state to order a change of the name of said railway station to effect such uniformity, within sixty days after a petition in writing by the town council of said incorporated town or city, or, in the case of a village, by the township trustees, asking for such order, is filed with said railway commissioners. [26 G. A., ch. 35; 24 G. A., ch. 26; 22 G. A., ch. 31, § 1.]

SEC. **2106. Notice.** When the commissioners shall order a change in the name of a railway station, they shall give the company owning or operating the same notice of such order, and if it is not complied with within thirty days from the date of service of such notice, the commissioners shall notify the attorney-general thereof, who shall begin proceedings in the proper court to compel the enforcement of said order. [22 G. A., ch. 31, § 2.]

SEC. **2107. Penalty.** A failure to comply with the order of the commissioners within thirty days from service of such notice shall also be a misdemeanor, for which said company shall be subject to a fine of one thousand dollars, and non-compliance for each thirty days thereafter shall constitute a separate and distinct offense, subject to a fine of one thousand dollars. [Same, § 3.]

TERMINAL OFFICES.

SEC. **2108. General offices.** All railroads terminating in the state shall establish and maintain at such terminus general freight and passenger offices, and express or telegraph offices when operating an independent express or telegraph company, at localities accessible and convenient to the public, and there keep for sale tickets over their respective roads, and, in advertising, correctly set forth their true connections, starting or terminal points, time-tables, and freight tariffs. [16 G. A., ch. 68, § 1.]

SEC. **2109. For sale of sleeper tickets.** All railroad and sleeping car companies, running or operating sleepers or sleeping cars within the state upon railroads terminating therein, shall establish, maintain and keep open to the public, at such termini, ticket offices at accessible and convenient places, in which they shall keep a diagram of the births and staterooms in such sleepers or sleeping cars, and shall at all times during the daytime keep them open for the sale of tickets for such berths and state rooms. [18 G. A., ch. 169, § 1.]

SEC. 2110. **Penalty.** If any officer, agent or employe of any such company, or any lessee, engaged in operating any sleeper or sleeping car line terminating or operated within the state, shall neglect or refuse to comply with any of the provisions of the two preceding sections, he shall be guilty of a misdemeanor, and, upon conviction thereof, fined in a sum not exceeding five hundred dollars, and imprisoned not more than six months. [18 G. A., ch. 169, § 2; 16 G. A., ch. 68, § 2.]

CHAPTER 6.

OF THE BOARD OF RAILROAD COMMISSIONERS.

SECTION 2111. **Election—organization.** The board of railroad commissioners shall consist of three persons having the qualifications of electors, who shall be elected in the same manner as other state officers, and shall each hold his office for three years. Immediately after the new member has qualified, the board shall organize by electing one of its members as chairman, and appointing a secretary who shall take the same oath as the commissioners; but this, or a part of this, may be done at a subsequent meeting. Any person ineligible to the office of commissioner shall be ineligible to the office of secretary of the board. The board shall have power to employ such additional clerical help as it may find necessary. No person in the employ of any carrier, or owning any bonds, stock or property in any railroad company, or who is in any way or manner pecuniarily interested in any railroad corporaton, shall be eligible to the office of railroad commissioner, and the entering into the employ of any common carrier, or the acquiring of any stock or other interest in any common carrier by any officer under this chapter, after his election or appointment, shall disqualify him to hold the office and to perform the duties thereof. [22 G. A., ch. 29, § 2; 17 G. A., ch. 77, § 2.]

SEC. 2112. **Supervision.** The board shall have the general supervision of all railroads in the state operated by steam, express companies, car companies, sleeping car companies, freight and freight line companies, and any common carrier engaged in the transportation of passengers or freight by railroad, street railroads excepted, and shall investigate any alleged neglect or violation of the laws of the state by any railroad corporation doing business therein, or by the officers, agents or employes thereof. [17 G. A., ch. 77, § 3.]

SEC. 2113. **Powers and duties.** It shall from time to time carefully examine into and inspect the condition of each railroad, its equipment, and the manner of its conduct and management with regard to the public safety and convenience in the state; make semi-annual examination of its bridges and report the condition thereof

to the company to which they belong; and if found by it unsafe it shall immediately notify the railroad company whose duty it is to put the same in repair, which shall be done by it within ten days after receiving such notice. If any corporation fails to perform this duty, the board may forbid and prevent it from running trains over the same while unsafe. When, in the judgment of the board, any railway corporation fails in any respect to comply with the terms of its charter or articles of incorporation or the laws of the state; or when in its judgment any repairs are necessary upon its road; or any addition to its rolling stock, or addition to or change in its stations or station-houses, or change in its rates of fare for transporting freight or passengers, or change in the mode of operating its road or conducting its business, is reasonable and expedient in order to promote the security, convenience, and accommodation of the public, the board shall serve a notice upon such corporation, in the manner provided for the service of an original notice in a civil action, which notice shall be signed by its secretary, of the improvements and changes which it finds to be proper; and a report of such proceedings shall be included in its annual report to the governor as provided in the next section; but nothing in this section shall be so construed as relieving any railroad company from its present responsibility or liability for damage to person or property. [Same.]

While there is here no provision for commissioners making orders other than in an advisory way, yet the commissioners have authority to consider whether a railroad should put in a private crossing for a land owner whose land is divided by the right of way: *State v. Mason City & Ft. D. R. Co.*, 85-516.

The commissioners may act on a matter within their jurisdiction on the petition of the party aggrieved or on their own motion and in the absence of any complaint, but whether their action is based on complaint or upon facts within their knowledge, their record should show what the complaint is so the company may be able to make answer thereto and the court before which an action is brought to enforce the order of the commissioners in such matter may be properly advised as to the subject of the investigation. New grounds of complaint are not to be introduced into the proceedings in the court: *State v. Chicago, M. & St. P. R. Co.*, 86-641.

SEC. 2114. **Report.** The board shall annually, on or before the first Monday in December, make a report to the governor of its doings for the preceding year, containing such facts, statements, and explanations as will disclose the working of such systems of railroad transportation in the state, and their relation to the general business and prosperity of the citizens thereof, with such suggestions and recommendations in respect thereto as may to the board seem appropriate. Said report shall also contain, as to every railroad corporation doing business in this state:

1. The amount of its capital;
2. The amount of its preferred stock, if any, and the condition of its preferment;
3. The amount of its funded debt and the rate of interest;
4. The amount of its floating debt;
5. The cost and actual present cash value of its road equipment, including permanent way, buildings and rolling stock, all real estate

used exclusively in operating the road, and all fixtures and conveniences for transacting its business;

6. The estimated value of all other property owned by it, with a schedule of the same, not including lands granted in aid of its construction;

7. The number of acres originally granted it by the United States or this state in aid of the construction of its road;

8. The number of acres of such land remaining unsold;

9. A list of its officers and directors, with their respective places of residence;

10. Such statistics of the road and of its transportation business for the year as may, in the judgment of the commissioners, be necessary and proper for the information of the general assembly or as may be required by the governor;

11. The average amount of tonnage that can be carried over each road in the state with an engine of given power.

Which report shall exhibit and refer to the condition of such corporation on the first day of July of each year, and the details of its transportation business transacted during the year ending June thirtieth. [Same, § 4.]

SEC. **2115. Examinations.** The board shall have power, in the discharge of its duties, to examine any of the books, papers or documents of any railway corporation, or to examine, under oath or otherwise, any officer, director, agent or employe thereof; to issue subpœnas,—the cost thereof as well as the investigation to be first paid by the state, upon the certificate of the board,—and to enforce obedience thereto in the performance of its duties as courts of law may. Any person who shall wilfully obstruct it or its members in the performance of their duties, or who shall refuse to give any information within his possession that may be required by them within the line of their duty, shall be guilty of a misdemeanor, and upon conviction be fined not exceeding one thousand dollars, in the discretion of the court. [Same, § 9.]

SEC. **2116. Duty of railroad to transport.** Every railway corporation shall, when within its power to do so, and upon reasonable notice, furnish suitable cars to any and all persons who may apply therefor, for the transportation of any and all kinds of freight, and receive and transport such freight with all reasonable dispatch, and provide and keep suitable facilities for the receiving and handling thereof at any depot on the line of its road; and shall also receive and transport in like manner the empty or loaded cars furnished by any connecting road, to be delivered at any station or stations on the line of its road, to be loaded or discharged or reloaded and returned to the road so connecting; and for compensation it shall not demand or receive any greater sum than is accepted by it from any other connecting railroad for a similar service. [Same, § 10.]

The duty of one railway to transport the cars of another road may be enforced by mandatory injunction, and the fact that the receiving of such cars by the former road will cause a strike of its employes will constitute no defense: *Chicago, B. & Q. R. Co v. Burlington, C. R. & N. R. Co.*, 34 Fed., 481.

A railroad company, being under obligations to carry animals when offered on proper terms is not liable in damages for bringing into the state an animal affected with Texas fever where it does so without negligence, § 5021 making such action a misdemeanor and rendering the company liable for damages resulting only makes the act *prima facie* proof of negligence which may be rebutted by the company: *Furley v. Chicago, M. & St. P. R. Co.*, 90-149.

For construction of prior provisions, see *Bond v. Wabash, St. L. & P. R. Co.*, 67-712.

SEC. **2117. Examination of rates.** The board shall, upon the application of the mayor and council of any city or town, or the trustees of any township, make an examination of the rate of passenger fare or freight tariff charged by any railroad company, and of the condition or operation of any railroad, any part of whose location lies within the limits of such city, town, or township; and if twenty five or more voters of any city, town, or township shall by written petition request the mayor and council of such city or town, or the trustees of such township, to make the said complaint and application, and they refuse, they shall state the reason therefor in writing upon the petition, and return the same to the petitioners, who may thereupon, within ten days from the date of such refusal and return, present the same to the board of commissioners, who shall, if it thinks the public good demands the examination, proceed to make it in the same manner as if called upon by the mayor and council of any city or town, or the trustees of any township. Before proceeding to make such examination, it shall give to the petitioners and the corporation reasonable notice, in writing, of the time and place of entering upon the same. If, upon such an examination, it shall appear to the board that the complaint is well founded, it shall, within ten days, inform the corporation operating such railroad of its finding, and shall report its doings to the governor. [Same, § 15.]

SEC. **2118. Cumulative.** Nothing in this or the succeeding chapter shall be construed to estop or hinder any persons or corporations from bringing action against any railway company for any violation of the laws of the state for the government of railroads. [Same, § 17.]

SEC. **2119. Orders of commissioners enforced.** The district courts of this state shall have jurisdiction to enforce, by proper decrees, injunctions and orders, the rulings, orders and regulations affecting public rights, made or to be made by the board, such as are now, or may hereafter be, authorized to be made by them for the future direction and observance of railroads in this state. The proceedings therefor shall be by equitable action in the name of the state of Iowa, and shall be instituted by the attorney-general, whenever advised by the board that any railway corporation, or person operating a line of road in this state, is violating and refusing to comply with any rule, order or regulation made by the board, and applicable to such railroad or person. It shall be the duty of the court in which any such cause shall be pending to require the issue to be made up at the first term of the court to which such cause is brought, which shall be the trial term, and to give the same precedence over other civil business. If the court shall

find that such rule, regulation or order is reasonable and just, and that in refusing compliance therewith said railway company is failing and omitting the performance of any public duty or obligation, the court shall decree a mandatory and perpetual injunction, compelling obedience to and compliance with such rule order, or regulation by said railroad company, or other person, its officers, agents, servants and employes, and may grant such other relief as may be deemed just and proper. All violations of such decree shall render the company, persons, officers, agents, servants and employes who are in any manner instrumental in such violation, guilty of contempt of court, and the court may punish such contempt by a fine not exceeding one thousand dollars for each offense, and may imprison the person guilty of contempt until he shall sufficiently purge himself therefrom. And such decree shall continue and remain in effect and be enforced until the rule order or regulation shall be modified or vacated by the board. [20 G. A., ch. 133, § 1.]

The statute clearly contemplates that only such orders of the railroad commissioners as are reasonable and just shall be enforced. And the reasonableness and justness of such an order can only be for the determination of the courts, when it is made by the commissioners, and proceedings are taken for its enforcement. The proceeding in the courts for the enforcement of such an order is an equitable one, and the reasonableness or the justness of the order is to be determined from equitable considerations. So far as the public are concerned, the judgment of the commissioners is conclusive: *State v. Des Moines & Ft. D. R. Co.*, 84-419.

In a particular case, *held*, that an order of commissioners requiring the rebuilding of a portion of the track of a road which had received a land grant for the construction of such road was unreasonable, where it appeared that by means of the operation of a leased track, parallel with the track washed away, the road was furnishing the same accommodations to the public that it would furnish if such portion of its track should be rebuilt: *Ibid.*

Where a decree was entered during the time a railroad was in the hands of a receiver, compelling such railroad and its officers, etc., to operate a certain part of the line, and afterwards another company purchased the franchise and property on the foreclosure of a mortgage, *held*, that the decree could be enforced as against such purchaser: *State v. Iowa Central R. Co.*, 83-720.

A decision of the railroad commissioners with reference to the obligation of a company to put in a private crossing for one whose land is divided by the right of way is a ruling affecting a public right within the meaning of this section: *State v. Mason City & Ft. D. R. Co.*, 85-516.

While *mandamus* is a proper remedy in such a case, it is not exclusive: *Ibid.*

The finding of the railroad commissioners in a particular case that an overhead crossing was proper and should be constructed, *held* not supported by sufficient evidence, such crossing not being usual: *State v. Chicago, M. & St. P. R. Co.*, 86-304.

Where the case presented to the commissioners is not such as to call for any exercise of their powers, an order made by them should not be enforced on application to the court: *Ibid.*

The court being required to determine whether the orders of the commissioners are just and equitable must do so upon the record presented to it in an action to enforce such orders, although the commissioners may have had in mind and acted upon facts not appearing in such record: *Ibid.*

In general as to enforcement of orders, see *State v. Central Iowa R. Co.*, 71-410.

SEC. **2120. Costs—attorney's fees.** Whenever a decree shall be entered against a railroad company or person under the preceding section, the court shall render judgment for costs, and attorney's fees for counsel representing the state. [Same, § 2.]

SEC. **2121. Salaries.** The board shall keep an office in the capitol at the seat of government, and each commissioner shall receive a salary of twenty-two hundred dollars a year. The secretary of the board shall receive a salary of fifteen hundred dollars a year. [17 G. A., ch. 77, § 6.]

CHAPTER 7.

OF THE REGULATION OF CARRIERS BY RAILWAY.

SECTION **2122. To what applicable.** The provisions of this chapter shall apply to the transportation of passengers and property, and to the receiving, delivering, storing and handling of property wholly within this state, and shall apply to all railroad corporations, express companies, car companies, sleeping car companies, freight or freight line companies, and to any common carrier engaged in this state in the transportation of passengers or property by railroad therein, and to shipments of property made from any point within the state to any point within the state, whether the transportation of the same shall be wholly within this state or partly within this state and partly within an adjoining state The term "railroad" and "railway" as used in this chapter shall include all bridges and ferries used or operated in connection with any railroad, and also all the road in use by any corporation, receiver, trustee or other person operating a railroad, whether owned or operated under contract, agreement lease or otherwise; and the term "transportation" shall include all instrumentalities of shipment or carriage; and the term "railway corporation" shall mean all corporations, companies or individuals owning or operating any railroad in whole or in part in this state; and the provisions of this chapter shall apply to all persons, firms and companies, and to all associations of persons, whether incorporated or otherwise that shall do business as common carriers upon any of the lines of railway in this state, street railways excepted, the same as to railroad corporations herein mentioned. [22 G. A., ch. 28, § 1; 17 G. A., ch. 77, § 16.]

The jurisdiction of the commissioners extends to regulating rates for the transportation of goods between two places in the state over a line of railroad which between those points passes out of the state: *Campbell v. Chicago, M. & St. P. R Co.*, 86-587.

SEC. **2123. Charges to be reasonable.** All charges made for any service rendered or to be rendered in the transportation of passengers or property in this state, or for the receiving, delivering, storage or handling of such property, shall be reasonable and just, and every unjust and unreasonable charge for such service is prohibited and declared to be unlawful. [22 G. A., ch. 28, § 2.]

In an action to recover overcharges from a railway company where it appears that the rates in fact charged did not exceed the rates specified in the commissioners' schedule of rates, but were, in fact, excessive, it was held that the rates

fixed by the commissioners were, both as to the shipper and carrier, only presumptively reasonable, and if such commissioners' rates are in fact excessive, such overcharges may be recovered by the shipper: *Barris v. Chicago, B. & Q. R. Co.*, 71 N. W., 339.

The law requires reasonable rates, and the defendant may show that the rate fixed by the commission is unreasonable. The *prima facie* evidence that it is reasonable will not prevail when it is shown that it is in fact not so: *Burlington, C. R. & N. R. Co. v. Dey*, 82-312.

SEC. **2124. Unjust discrimination.** If any common carrier subject to the provisions of this chapter shall directly or indirectly, by any special rate, rebate, drawback or other device, charge, demand, collect or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property subject to the provisions of this chapter, than it charges, demands, collects or receives from any other person or persons for doing for him or them a like contemporaneous service in the transportation of a like kind of traffic, such common carrier shall be guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful; but this section shall not be construed as prohibiting a less rate per one hundred pounds in a car-load lot than is charged, collected or received for the same kind of freight in less than a car-load lot. [Same, § 3.]

As to construction of provisions against unjust discriminations in a former statute, see *Paxton v. Illinois Cent. R. Co.*, 56-427.

Under prior provisions, *held*, that a cause of action to recover unreasonable and excessive charges accrued when the charges were paid and not when the discrimination was discovered: *Carrier v. Chicago, R. I. & P. R. Co.*, 79-80.

But where the company had fraudulently concealed the fact that the amount paid by plaintiff was unreasonable and in excess of that paid by other shippers, *held*, that the statute of limitations did not begin to run until the fact was discovered: *Ibid.*

As to treble damages see § 2130.

SEC. **2125. Undue preferences—switching charges.** It shall be unlawful for any common carrier subject to the provisions of this chapter to make or give any preference or advantage to any particular person, company, firm, corporation or locality, or any particular description of traffic, in any respect whatsoever; or subject any particular person, company, firm, corporation or locality, or any particular description of traffic, to any prejudice or disadvantage in any respect whatsoever; but this shall not be construed to prevent any common carrier from giving preference as to time of shipment of live stock, uncured meats, or other perishable property. All common carriers subject to the provisions of this chapter shall, according to their respective powers, afford all reasonable, proper and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding and switching of cars, and for the receiving, forwarding and delivering of passengers and property to and from their several lines, and to and from other lines and places connected therewith; and shall not discriminate in their accommodations, rates and charges between such connecting lines. Any common carrier may be required to switch and transfer

cars for another, for the purpose of being loaded or unloaded, upon such terms and conditions as may be prescribed by the board of railroad commissioners. [Same, § 4; 15 G. A., ch. 18; C. '73, § 1292-6.]

Switching charges cover movement of cars within the yard limits or outside of such limits where the engine and cars may be run without orders from the train dispatcher but such service does not include the running of switch engine and cars on the main track where they must be controlled by the regulations relating to the operation of regular and special trains: *State v. Chicago, M. & St. P. R. Co.*, 88-445.

SEC. **2126. Long and short haul—fair rate.** It shall be unlawful for any common carrier subject to the provisions of this chapter to charge or receive any greater compensation in the aggregate for the transportation of passengers or a like kind of property for a shorter than for a longer distance over its railroad, all or any portion of the shorter haul being included within the longer, and shall charge no more for transporting freight to or from any point on its railroad than a fair and just rate, compared with the price it charges for the same kind of freight transportion to or from any other point. [22 G. A., ch. 24, § 5.]

SEC. **2127. Pooling contracts.** It shall be unlawful for any common carrier subject to the provisions of this chapter to enter into any contract, agreement or combination with any other common carrier or carriers for the pooling of freight of the different and competing railroads, or divide between them the aggregate or net proceeds of the earnings of such railroads, or any portion thereof; and in case of an agreement for the pooling of freights as aforesaid, each day of its continuance shall be a separate offense. [22 G. A., ch. 28, § 6; C. '73, §§ 1297-9.]

SEC. **2128. Schedules of rates and fares.** Every common carrier subject to the provisions of this chapter shall print and keep for public inspection schedules showing the rates, fares and charges for the transportation of passengers and property which it has established, and which are in force at the time upon its railroad. The schedules shall plainly state the places upon its roads between which property and passengers will be carried, and shall contain the classification of freight in force upon such road, stating separately any terminal charges, and any rules and regulations which in anywise change, affect or determine any part of the aggregate of such rates, fares and charges. Such schedules shall be plainly printed in large type, of at least the size of ordinary pica, and a copy for the use of the public shall be kept in every freight office and passenger station on such road, where it can be conveniently inspected; and it shall keep a printed notice posted in every such freight office and passenger station indicating where therein the same can be found. No advance shall be made in the rates, fares and charges which have been established and published as aforesaid by any common carrier except after ten days' public notice, which shall plainly state the changes proposed to be made in the schedules then in force, and the time when the increased rates, fares or charges will go into effect; which proposed changes shall be shown

by printing new schedules, or shall be plainly indicated upon the schedules in force at the time and kept for public inspection. Reduction in such published rates, fares or charges may be made without previous public notice, but when made notice thereof shall be immediately and publicly posted, and such changes made public by printing new schedules, or be plainly indicated upon the schedules at the time in force and kept for public inspection. When any such common carrier shall have established and published its rates, fares and charges, it shall not charge, demand, collect or receive from any person or persons a greater or less compensation for the transportation of passengers or property, or for any services in connection therewith, than is specified in such published schedule of rates, fares and charges as may at the time be in force. Every common carrier subject to the provisions of this chapter shall file with the board of railroad commissioners copies of its schedules of rates, fares and charges established and published, and shall promptly notify said board of all changes made in the same. Every such common carrier shall also file with the board copies of all contracts, agreements or arrangements with other common carriers in relation to any traffic affected by the provisions of this chapter to which it may be a party. If passengers and freight pass over continuous lines or routes in this state, operated by more than one common carrier, and the several common carriers operating such lines or routes have established joint tariffs of rates, fares or charges for such continuous lines or routes, copies of such joint tariffs shall also be filed with the board. Such joint rates, fares and charges on such continuous lines shall be made public by such common carriers, when directed by said board, in so far as in its judgment may be practicable, and it shall also from time to time prescribe the measures of publicity which shall be given to such rates, fares and charges, or to such part thereof as it may think practicable for such common carriers to publish, and the places in which they shall be published; but no common carrier, party to any such joint tariff, shall be liable for the failure of any other party thereto to observe and adhere to the rates, fares or charges thus made and published. If any such common carrier shall neglect or refuse to file or publish its schedule or tariffs of rates, fares and charges, or any part of the same, it shall, in addition to other penalties herein prescribed, be subject to a writ of mandamus, to be issued by any district court of this state in the judicial district wherein its principal office is situated, or wherein such offense may be committed. If such common carrier be a foreign corporation, then such writ may be issued by any district court in the judicial district where it accepts traffic and has an agent to perform such service, to compel compliance with the provisions of this section—such writ to issue in the name of the state, at the relation or upon the petition of the board of railroad commissioners; and the failure to comply with its requirement shall be punishable as for a contempt, and shall make said corporation liable to a penalty of five hundred dollars for each day's failure to comply therewith; and when any such writ of mandamus shall be applied for no bond shall be required. [22 G. A., ch. 28, § 7; C '73, § 1304]

A former statute, similar to this section, considered and *held* not to be in conflict with the U. S. Const., as being an attempt to regulate commerce between the states: *Fuller v. Chicago & N. W. R. Co.*, 31-187.

Under such statute, *held*, also, that the receiving of higher rates than those posted, subjected the company to the penalties imposed by the statute without it being shown that such overcharge was wilful: *Fuller v. Chicago & N. W. R. Co.*, 31-211.

SEC. **2129. Continuous shipments.** It shall be unlawful for any common carrier subject to the provisions of this chapter to enter into any combination, contract or agreement, expressed or implied, to prevent, by change of time schedules, carriage in different cars, or, by other means or device, the carriage of freights from being continuous from place of shipment to the place of destination in the state; and no break of bulk, stoppage or interruption made by such common carrier shall prevent the carriage of freights from being treated as one continuous carriage from the place of shipment to the place of destination, unless such break, stoppage or interruption was made in good faith for some necessary purpose, and without any intent to avoid or unnecessarily interrupt such continuous carriage, or to evade any of the provisions of this chapter. [22 G. A., ch. 28, § 8.]

SEC. **2130. Penalty in treble damages.** In case any common carrier subject to the provisions of this chapter shall do, cause, or permit to be done anything herein prohibited or declared to be unlawful, or shall omit to do anything in this chapter required to be done, it shall be liable to the person or persons injured thereby for three times the amount of damages sustained in consequence, together with costs of suit, and a reasonable attorney's fee to be fixed by the court, on an appeal or otherwise, which shall be taxed and collected as part of the costs in the case; but in all cases demand in writing shall be made for the money damages sustained before action is brought for a recovery under this section, and no action shall be brought until the expiration of fifteen days after such demand. [Same, § 9; 17 G. A., ch. 77, § 13.]

This section is not applicable to interstate commerce: *Cook v. Chicago, R. I. & P. R Co.*, 75-169.

In an action brought to recover excessive charges for interstate transportation, *held*, that plaintiff might by amendment abandon the claim therefor under this section and ask the relief to which he would be entitled at common law: *Ibid.*

The legislature may constitutionally prescribe rules permitting recovery of attorney's fees in a particular class of cases and denied in all others: *Burlington, C. R. & N. R Co. v Dey*, 82-312.

In an action to recover excessive charges evidence is not admissible showing the charges for carrying like commodities on other roads: *Hopper v. Chicago, M. & St. P R Co.*, 91-639.

While juries are allowed to give three times the actual damage, they are not to include in the verdict an additional sum: *Ibid.*

In an action for unjust and unreasonable charges under the common law, aside from statute, plaintiff cannot recover on proving that another person carrying on a similar business in connection with the railroad was allowed to have goods carried free: *Kelley v. Chicago, M. & St. P. R. Co.*, 61 N. W., 957.

The penalty in treble damages is not applicable to a case of refusal to furnish under § 2116: *Bond v. Wabash, St. L & P. R. Co.*, 67-712.

As to the penalty this provision is not to be extended by implication: *Ibid.*

As to recovery of excessive charges paid, see notes to § 2123.

SEC. **2131. Remedy—evidence.** Any person claiming to be damaged by any common carrier subject to the provisions of this chapter may either make complaint to the board of railroad commissioners, or may bring action in his own behalf for the recovery of damages for which any such common carrier may be liable under the provisions hereof; but he shall not have the right to pursue both of said remedies at the same time. In any such action, the court before whom the case shall be pending may compel any director, officer, receiver, trustee or agent of the corporation or company defendant in such suit to attend as a witness and to testify, and may compel the production of the books and papers of such corporation or company; and the claim that any such testimony or evidence may tend to criminate the person giving the same shall not excuse him from testifying or producing said books and papers, but no person shall be prosecuted or subjected to any penalty or forfeiture for and on account of any transaction, matter or thing concerning which he may testify or produce evidence, documentary or otherwise; provided that no person so testifying shall be exempted from prosecution and punishment for perjury committed in so testifying. [22 G. A., ch. 28, § 10.]

SEC. **2132. Criminal liability.** Except as otherwise specially provided for in this chapter, and unless relieved from the consequences of a violation of the law as provided herein, any common carrier subject to the provisions hereof, or, when such common carrier is a corporation, any director or officer thereof, or any receiver, trustee, lessee, agent or person acting for or employed by such corporation, who, alone or with any other corporation, company, person or party shall wilfully do or cause to be done, or shall wilfully suffer or permit to be done any act, matter or thing in this chapter prohibited or declared to be unlawful, or who shall aid or abet therein, or shall wilfully omit or fail to do any act, matter or thing in this chapter required to be done, or shall cause or willingly suffer or permit any act, matter or thing, so directed or required by the provisions of this chapter to be done, not to be so done, or shall aid or abet any such omission or failure, or shall be guilty of any infraction of the provisions of this chapter, or shall aid and abet therein, shall be guilty of a misdemeanor, and shall, upon conviction thereof, be fined not more than five thousand nor less than five hundred dollars for each offense. [Same, § 11.]

SEC. **2133. Inquiry by commissioners.** The board of railroad commissioners shall inquire into the management of the business of all common carriers subject to the provisions of this chapter, and keep itself informed as to the manner and method in which the same is conducted, and have the right to obtain from them full and complete information necessary to enable the board to perform its duties and carry out the object for which it was created; shall have power to require the attendance and testimony of witnesses, the production of all books, papers, tariffs, schedules, contracts, agreements and documents relating to any matter under investigation; and may invoke the aid of any court of this state in requiring the attendance and testimony of witnesses and the production of books, papers and documents; and any court within the jurisdiction of which such inquiry is carried on shall, in case of refusal to obey a subpœna or other proper process issued to any common carrier or person subject to the provisions hereof, issue an order requiring such carrier or person to appear before said board and produce books and papers, if so ordered, and testify touching, or in relation to, the matter in question; and a failure to obey such orders of the court shall be punished as for a contempt thereof. The claim that any such testimony or evidence may tend to criminate the person giving it shall not excuse him from testifying, but no person shall be prosecuted or subjected to any penalty or forfeiture for and on account of any matter or thing concerning which he may testify or produce evidence, documentary or otherwise; provided that no person so testifying shall be exempted from prosecution and punishment for perjury committed in so testifying. [Same, § 12.]

SEC. **2134. Complaint.** Any person, firm, corporation or association, or any mercantile, agricultural or manufacturing society, or any body politic or municipal organization, complaining of anything done or omitted to be done by any common carrier subject to the provisions of this chapter in contravention thereof, may apply to said board by petition, briefly stating the facts; whereupon a copy of the complaint with the damages, if any are claimed, shall be forwarded by the board to such carrier, who shall be requested to satisfy the complaint, or answer the same in writing within a reasonable time to be fixed by the board. If such carrier within the time specified shall make reparation for the injury alleged to have been done, or shall correct the wrong complained of, it shall be relieved of liability to the complainant for the particular violation complained of. If it shall not satisfy the complaint within the time fixed, or there shall appear to be any reasonable ground for investigating the complaint, the board shall inquire into the matters complained of in such manner and by such means as it shall think proper. Whenever it has sufficient reason to believe that any carrier is violating any provision of this chapter, it shall at once institute an inquiry, as though complaint had been made. No complaint shall at any time be dismissed because of the absence of direct damage to the complainant. [Same, § 13.]

The grounds of complaint, whether made to the commissioners or considered by the commissioners on their own motion, must appear in their record. The mere statement that the complainant desires a portion of the right of way for coal sheds, without showing the facts entitling him thereto, does not show any ground of complaint against the company, and if other grounds do not appear on the commissioners' records, the proceeding in court to enforce an order of the commissioners, based on such defective complaint, can not be maintained: *State v. Chicago, M. & St. P. R. Co.*, 86-641.

SEC. **2135. Investigations—report.** When an investigation is made by the board after notice, it shall make a report in writing, stating its conclusions, which shall include the findings of fact upon

which the conclusions are based, together with its recommendations or orders as to what reparation, if any, shall be made by the carrier to any party who may be found to have been injured; and such finding shall thereafter in all judicial proceedings be *prima facie* evidence of every fact found. All reports of investigations made by the board shall be entered of record, and a copy furnished to the party who complained, and any other person directly interested, and to any carrier that may have been complained of. [Same, § 14.]

SEC. **2136. Orders.** If in any case in which an investigation shall be made by the board it shall be made to appear to the satisfaction of such board, either by the testimony of witnesses or other competent evidence, that anything has been done or omitted to be done, in violation of the provisions of this chapter, or of any law cognizable by the board, by any common carrier, or that any injury or damage has been sustained by the party complaining, or by other parties, in consequence of any such violation, it shall be the duty of the board forthwith to cause a copy of its report in respect thereto to be delivered to such carrier, together with a notice to it to cease from such violation, or to make reparation for the injury found to have been done, or both, within a reasonable time, to be fixed by the board. And if within the time fixed it shall be made to appear to the board that such carrier has ceased from such violation of law, and has made reparation for the injury found to have been done, in compliance with the report and notice of the board, or to the satisfaction of the party complaining, a statement to that effect shall be entered of record by it, and the carrier shall thereupon be relieved from further liability or penalty for such particular violation of law. [Same, § 15.]

SEC. **2137. Enforcement of orders.** Whenever any common carrier as defined in this chapter shall violate or refuse or neglect to obey any lawful order or requirement of the board, it shall be the duty of the board, and lawful for any company or person interested in such order or requirement, to apply, in a summary way, by petition, to the district or superior court in any county of this state in which the common carrier complained of has its principal office, or in any county through which its line of road passes or is operated, or in which the violation or disobedience of such order or requirement shall happen, alleging such violation or disobedience, as the case may be; and the said court shall have power to hear and determine the matter, on such short notice to the common carrier complained of as the court shall deem reasonable; and such notice may be served on such common carrier, his or its officers, agents or servants, as the court shall direct; and said court shall proceed to hear and determine the matter speedily as a court of equity, and without the formal pleadings and proceedings applicable to ordinary suits in equity, but in such manner as to do justice in the premises; and, to this end, such court shall have power, if it think fit, to direct and prosecute, in such mode and by such persons as it may appoint, all such inquiries as the court may think needful to enable it to form a just judgment in the matter of such petition; and on

such hearing the report of the board shall be *prima facie* evidence of the matter therein, or in any order made by them, stated; and if it be made to appear to such court on such hearing, or on the report of any such person or persons, that the order or requirement of the board drawn in question has been violated or disobeyed, it shall be lawful for such court to issue a writ of injunction, or other proper process, mandatory or otherwise, to restrain such common carrier from further continuing such violation or disobedience of such order or requirement of the board, and enjoining obedience to the same, and in case of any disobedience of any writ of injunction or other proper process, mandatory or otherwise, it shall be lawful for such court to issue a writ of attachment, or any other process of said court incident or applicable to writs of injunction or other proper process, mandatory or otherwise, against such common carrier, and, if a corporation, against one or more of the directors, officers or agents of the same, or against any owner, lessee, trustee, receiver or other person failing to obey such writ of injunction or other proper process, mandatory or otherwise; and said court may, if it think fit, make an order directing such common carrier or other person so disobeying such writ of injunction or other proper process, mandatory or otherwise, to pay any sum of money, not exceeding for each carrier or person in default the sum of one thousand dollars for every day, after a day to be named in the order, that such carrier or other person shall fail to obey such injunction or other proper process, mandatory or otherwise; and such moneys shall, upon order of the court, be paid into the treasury of the county in which the action was commenced, and one-half thereof shall be transferred by the county treasurer to the state treasury; and the payment thereof may, without prejudice to any other mode of recovering the same, be enforced by attachment or order, in the nature of a writ of execution, in like manner as if the same had been recovered by a final decree *in personam* in such court, saving to the board and any other party or person interested in the right of appeal to the supreme court of the state, under the same regulations now provided by law in relation to appeals to said court as to security for such appeal, except that in no case shall security for such appeal be required when the same is taken by the board; but no appeal to said supreme court shall operate to stay or supersede the order of the court, or the execution of any writ or process thereon; and such court may in every such matter order the payment of such costs and attorney and counsel fees as shall be deemed reasonable. Whenever any such petition shall be filed or presented, or be prosecuted by the board, or by their direction, it shall be the duty of the attorney-general of the state to prosecute the same, and in such prosecution he shall have the right to have the assistance of any county attorney of the county in which any such proceedings are instituted, and it is hereby made the duty of any such county attorney to render such assistance; and the costs and expenses, on the part of the board, of any such prosecution shall be paid out of the appropriations for the expenses of the board. [Same, § 16.]

In all cases instituted by the board of railroad commissioners to enforce orders and rulings made by them, the action should be brought in the name of the state: *State v. Chicago, B. & Q. R. Co.*, 90-594.

But in a particular case, *held*, that the fact that the action was brought by the commissioners would be disregarded, they being permitted to amend by substituting the state as plaintiff: *Ibid*; *Smith v. Chicago, M. & St. P. R. Co.*, 86-202.

The owners of the road should not be interfered with in regard to the location and change of stations unless it appears that the patrons of the road have been deprived of reasonable facilities for transacting business with it: *State v. Des Moines & K. C. R. Co*, 87-644.

SEC. **2138. Commissioners' schedules of rates—effect.** The schedules of reasonable maximum rates of charges for the transportation of freight and cars, together with the classification of such freights now in effect, shall remain in force until changed by the board according to law, which, in all actions brought against railway corporations, wherein there are involved the charges thereof for the transportation of any freight or cars, or any unjust discrimination in relation thereto, shall be taken as *prima facie* evidence in all courts that the rates fixed therein are reasonable and just maximum rates of charge for which said schedules have been prepared. The board shall from time to time, and as often as circumstances may require, change and revise such schedules, but the rates fixed shall not be higher than established by law. The board shall give notice of its intention to revise or change such schedules by publishing a notice thereof in two weekly newspapers published at the seat of government, for two consecutive weeks, and the last publication of such notice shall be at least ten days before the time fixed for considering the matter, and such notice shall contain, in general terms, a statement of the matters the board proposes to consider, and the date when and the place where the matter will be taken up, and shall be addressed to all persons interested therein. When any schedule is thus revised the board must cause notice thereof to be published for two successive weeks in some public newspaper printed at the seat of government, which shall state the date of the taking effect thereof, and it shall take effect at the time so stated. A printed copy of such revised schedule shall be conspicuously posted by said common carrier in each freight office and passenger depot upon all lines affected thereby, and, when certified by the board that the same is a true copy prepared by it for the railway company or corporation therein named, and that notice thereof had been published as required by law, shall be received in evidence in all actions as *prima facie* the schedule of such board. [Same, § 17.]

A schedule of rates having been adopted by the commissioners remains in force until the publication of a change in rates as herein provided: *Hopper v Chicago, M. & St. P. R. Co.*, 91-639.

The certificate provided for to authorize the receipt in evidence of the schedule may be made by the secretary of the commission under its seal: *Ibid.*

The original schedule went into effect without publication of notice: *Ibid.*

As to whether the schedule of rates established under the previous provisions on the subject were valid and could be enforced, see *Chicago & N. W. R. Co. v. Dey*, 35 Fed, 866; *Chicago, B. & Q. R. Co. v. Dey*, 38 Fed., 656.

SEC. **2139. Complaint of violation of schedule.** When any person in his own behalf, or in behalf of a class of persons similarly situated, or a firm, corporation or association, or any mercantile, agricultural or manufacturing society, or any body politic or municipal organization, shall make complaint to the board of railway commissioners that the rate charged or published by any railway company, or the maximum rates fixed by the board in the schedule of rates made by it, or the maximum rate fixed by law, is unreasonably high or discriminating, the board shall investigate the matter, and, if the charge appears to be well founded, fix a day for hearing the same, giving the railway company notice of the time and place thereof by mail, directed to any division superintendent, general or assistant superintendent, general manager, president or secretary of such company, which notice shall contain the substance of the complaint, also the person or persons complaining. [Same, § 18.]

SEC. **2140. Hearing—evidence.** Upon the hearing the board shall receive any evidence and listen to any arguments offered or presented by either party relevant to the matter under investigation, and the burden of proof shall not be upon the person or persons making the complaint; but it shall add to the showing made at such hearing whatever information it may then have, or can obtain from any source, including schedules of rates actually charged by any railway company for substantially the same kind of service, in this or any other state. The lowest rates published or charged by any railway company for substantially the same kind of service whether in this or another state, shall, at the instance of the person or persons complaining, be accepted as *prima facie* evidence of a reasonable rate for the services under investigation; and if the railway company complained of is operating a line of railroad beyond the state, or has a traffic arrangement with any such railway company, the same shall be taken into consideration in determining what is a reasonable rate; if it be operating a line of railway beyond the state, the rate charged or established for substantially a similar or greater service by it in another state shall also be considered. [Same, § 19.]

SEC. **2141. Determination.** After such hearing and investigation, the board shall fix and determine the maximum charges to be thereafter made by the railroad company or common carrier complained of, which charge shall in no event exceed the one now or hereafter fixed by law; and the board shall render their decision in writing, and shall spread the same at length in the record to be kept for that purpose; such decision shall specifically set out the sums or rate which the railroad company or common carrier so complained of may thereafter charge or receive for the service therein named, and including a classification of such freight; and the board shall not be limited in their said decision and the schedule to be contained therein to the specific case or cases complained of, but it shall be extended to all such rates between points in this state, and whatever part of the line of railway of such company or common carrier within this state may have been fairly within the scope of such investigation; and any such decision so made and entered on record

of the board, including any such schedules and classifications, shall, when duly authenticated, be received and held in all suits brought against any such railroad corporation or common carrier, wherein is in any way involved the charges of any such corporation or carrier mentioned in said decisions, in any of the courts of this state, as *prima facie* evidence that the rates therein fixed are reasonable maximum rates, the same as the schedule made by the board as provided in section twenty-one hundred and thirty-eight hereof; and the rates and classifications so established, after such hearing and investigation, shall, from time to time thereafter, upon complaint duly made, be subject to revision by the board, the same as any other rates and classifications. [Same, § 20.]

SEC. **2142. Proceedings of commissioners.** The board may in all cases conduct its proceedings, when not otherwise prescribed by law, in such manner as will best conduce to the proper dispatch of business and the attainment of justice. A majority of the board shall constitute a quorum for the transaction of business, but no commissioner shall participate in any hearing or proceeding in which he has any pecuniary interest. It may from time to time make or amend such general rules or orders as may be necessary for the preservation of order and the regulation of proceedings before it, including forms of notice and the service thereof, which shall conform as nearly as may be to those in use in the courts of the state. Any party may appear before it and be heard in person or by attorney. Every vote and official action thereof shall be entered of record, and, upon the request of either party or person interested, its proceedings shall be public. It shall have a seal of which courts shall take judicial notice. [Same, § 21.]

SEC. **2143. Annual reports from companies.** The board shall require annual reports from all common carriers subject to the provisions of this chapter to be made at the same time they make report to the executive council, to cover the same period, and prescribe the manner in which specific answers to all questions upon which it may need information shall be made. Such report shall show in detail the amount of capital stock issued, the amounts paid therefor, and manner of payment; the dividends paid; surplus fund, if any; number of stockholders; the funded and floating debts and the interest paid thereon; the cost and value of the carrier's property, franchises and equipment; the number of locomotive engines and cars used in the state, and the number supplied with automatic safety couplers, and the kind and number of brakes used, and the number of each; the number of employes and the salaries paid each class; the amounts expended for improvements each year, how and where expended and the character of such improvements; the earnings and receipts from each branch of business and from all sources; the operating and other expenses; the balance of profit and loss, and a complete exhibit of financial operations thereof each year, including an annual balance sheet. Such reports shall also contain such information in relation to rates or

regulations concerning fares or freights, or agreements, arrangements or contracts with other carriers, and other statistics of the road and its transportation, as the board may require; and it may prescribe uniformity and methods of keeping accounts, as near as may be, and fix a time when such regulations shall take effect. The board may also require of any and all common carriers subject to the provisions of this chapter such other reports, and fix the time for filing the same, as in its judgment shall be necessary and reasonable, which reports shall be in such form, and concerning such subjects, and be from such sources as it shall direct, except as otherwise provided herein. Any corporation, company or individual owning or operating a railway within the state, neglecting or refusing to make the required reports by the date fixed, or fixed by the board, shall be subject to a penalty of one hundred dollars for each and every day of delay in making the same after the date thus fixed. [24 G. A., ch. 27; 23 G. A., ch. 18; 22 G. A., ch. 28, § 22; 17 G. A., ch. 77, §§ 5–7; C. '73, §§ 1280–2.]

SEC. **2144. Extortion—penalty.** If any railway corporation or carrier subject to the provisions of this chapter shall charge, collect, demand or receive more than a fair and reasonable rate of toll or compensation for the transportation of passengers or freight of any description, or for the use and transportation of any railway car upon its track or any of the branches thereof, or upon any railroad within the state which it has the right, license or permission to use, operate or control or shall make any unjust and unreasonable charge prohibited in this chapter, it shall be deemed guilty of extortion, and be dealt with as hereinafter provided; and if any such railroad corporation or common carrier shall be found guilty of any unjust discrimination as defined in this chapter, it shall upon conviction thereof, be dealt with as hereinafter provided. [22 G. A., ch. 28, § 23; 17 G. A., ch. 77, §§ 12, 13.]

SEC. **2145. Discrimination—punishment.** If any such railway corporation shall charge, collect or receive for the transportation of any passenger or freight of any description upon its railroad, for any distance within the state, a greater amount of toll or compensation than is at the same time charged, collected or received for the transportation in the same direction of any passenger or like quantity of freight of the same class, over a greater distance of the same railway; or if it shall charge, collect or receive at any point upon its road a higher rate of toll or compensation for receiving, handling or delivering freight of the same class and quantity than it shall at the same time charge, collect or receive at any other point upon the same railway; or if it shall charge, collect or receive for the transportation of any passenger or freight of any description over its railway a greater amount as toll or compensation than shall at the same time be charged, collected or received by it for the transportation of any passenger or like quantity of freight of the same class being transported in the same direction over any portion of the same railway of equal distance; or if it shall charge, collect or receive from any person a higher or greater

amount of toll or compensation than it shall at the same time charge, collect or receive from any other person for receiving, handling or delivering freight of the same class and like quantity at the same point upon its railway; or if it shall charge, collect or receive from any person for the transportation of any freight upon its railway a higher or greater rate of toll or compensation than it shall at the same time charge, collect or receive from any other person or persons for the transportation of the like quantity of freight of the same class being transported from the same point in the same direction over equal distances of the same railway; or if it shall charge, collect or receive, from any person for the use and transportation of any railway car or cars upon its railroad for any distance, a greater amount of toll or compensation than is at the same time charged, collected or received from any other person for the use and transportation of any railway car of the same class or number, for a like purpose, being transported in the same direction over a greater distance of the same railway; or if it shall charge, collect or receive from any person for the use and transportation of any railway car or cars upon its railway a higher or greater compensation in the aggregate than it shall, at the same time, charge, collect or receive from any other person for the use and transportation of any railway car or cars of the same class for a like purpose, being transported from the same original point in the same direction, over an equal distance of the same railway; all such discriminating rates, charges, collections or receipts, whether made directly or by means of any rebate, drawback, or other shift or evasion, shall be received as *prima facie* evidence of the unjust discriminations prohibited by this chapter; and it shall not be a sufficient excuse or justification thereof on the part of said railway corporation that the station or point at which it shall charge, collect or receive less compensation in the aggregate for the transportation of such passenger or freight, or for the use and transportation of such railway car the greater distance than for the shorter distance, is a station or point at which there exists competition with another railway or other transportation line. This section shall not be construed so as to exclude other evidence tending to show any unjust discrimination in freight or passenger rates. The provisions of this section shall apply to any railway, the branches thereof, and any road or roads which any railway corporation has the right, license or permission to use, operate or control, wholly or in part, within this state; but shall not be so construed as to prevent railway corporations from issuing commutation, excursion or thousand-mile tickets, if the same are issued alike to all applying therefor. [22 G. A., ch. 28, § 24.]

SEC. **2146. Discrimination as to quantity.** No such common carrier shall charge, collect, demand or receive more for transporting a car of freight than it at the same time charges, collects, demands or receives per car for several cars of a like class of freight over the same railway, for the same distance, in the same

direction; nor charge, collect, demand or receive more for transporting a ton of freight than it charges, collects, demands or receives per ton for several tons of freight under a carload of a like class over the same railway, for the same distance, in the same direction; nor charge, collect, demand or receive more for transporting a hundred pounds of freight than it charges, collects, demands or receives per hundred for several hundred pounds of freight, under a ton, of a like class, over the same railway, for the same distance, in the same direction; and all such discriminating rates, charges, collections or receipts, whether made directly or by means of any rebate, drawback, or other shift or evasion, shall be received as *prima facie* evidence of the unjust discrimination prohibited by this chapter; but for the protection and development of any new industry within the state, such railway company may grant concessions or special rates for any agreed number of carloads, which rates shall first be approved by the board of commissioners, and a copy thereof filed in its office. [Same, § 25.]

SEC. **2147. Penalty for discrimination.** Any such corporation guilty of extortion, or of making any unjust discrimination as to passenger or freight rates, or the rates for the use and transportation of railway cars, or in receiving, handling or delivering freights, shall, upon conviction thereof, be fined in any sum not less than one thousand nor more than five thousand dollars for the first offense, and for each subsequent offense not less than five thousand nor more than ten thousand dollars,—such fine to be imposed in a criminal prosecution by indictment; or shall be subject to the liability prescribed in the next succeeding section, to be recovered as therein provided. [Same, § 26.]

SEC. **2148. Forfeiture.** Any such railway corporation guilty of extortion, or of making any unjust discrimination as to passenger or freight rates, or the rates for the use and transportation of railway cars, or in receiving, handling or delivering freights, shall forfeit and pay to the state not less than one thousand nor more than five thousand dollars for the first offense, and not less than five thousand nor more than ten thousand dollars for each subsequent offense, to be recovered in a civil action in the name of the state; and the release from liability or penalty provided for in this chapter shall not apply to a criminal prosecution under the last preceding section, or to a civil action under this section. [Same, § 27.]

SEC. **2149. Suits by commissioners.** When the board has reason to believe that any railway corporation or carrier subject to the provisions of this chapter has been guilty of extortion or unjust discrimination, it shall immediately cause actions to be commenced and prosecuted against such railway corporations or carrier, which may be brought in any county of the state through or into which the line of the corporation sued may extend, and it may on behalf of the state employ counsel to assist the attorney-general in conducting such actions. No actions thus commenced shall be dismissed unless they and the attorney-general consent thereto. The court in

its discretion may give preference to such actions over all other business, except criminal cases. [Same, § 28.]

SEC. **2150. Free transportation or reduced rates.** Nothing in this chapter shall apply to the transportation, storage or handling of property free or at reduced rates for the United States, this state, or municipal governments, by common carriers, nor for charitable purposes, or to and from fairs and expositions for exhibition thereat, nor for the employes thereof or their families, or private property or goods for the family use of such employes, nor from giving reduced rates to the quartermaster-general of Iowa for the transportation of officers or enlisted men of Iowa national guard, when traveling under the orders of the commander-in-chief, or to ministers of religion, nor from giving free transportation to their own officers and employes, and their families dependent upon them for support, nor to persons in charge of live stock being shipped, from point of shipment to destination and return, nor to prevent the officers of any railway company from exchanging passes or tickets with other railroad companies for their officers and employes; and nothing in this chapter shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions thereof are in addition to such remedies. [26 G. A., ch. 34; 22 G. A., ch. 28, § 29.]

SEC. **2151. Commissioners transported free.** The commissioners and their secretary shall be carried free, while performing their duties, on all railroads and trains in the state, and may take with them experts or other agents, who shall be carried free. [22 G. A., ch. 28, § 30.]

SEC. **2152. Joint rates.** The preceding sections of this chapter shall not be construed to prohibit the making of rates by two or more railway companies for the transportation of property over two or more of their respective lines within the state; and a less charge by each of said companies for its portion of such joint shipment than it charges for a shipment for the same distance wholly over its own line within the state shall not be considered a violation of said chapter, and shall not render such company liable to any of the penalties thereof; but the provisions of this section shall not be construed to permit railway companies establishing joint rates to make thereby any unjust discrimination between the different shipping points or stations upon their respective lines between which joint rates are established, and any such unjust discrimination shall be punished in the manner and by the penalties provided by this chapter. [23 G. A., ch. 17, § 1.]

SEC. **2153. Connecting lines.** All railway companies doing business in this state shall, upon the demand of any person or persons interested, establish reasonable joint through rates for the transportation of freight between points upon their respective lines within this state, and shall receive and transport freight and cars over such route or routes as the shipper shall direct. Car-load lots shall be transferred without unloading from the cars in which such shipments were first made, unless such unloading into other cars shall be done without charge therefor to the shipper or receiver of

such cars lots, and unless such transfer be made without unreasonable delay; and less than car-load lots shall be transferred into the connecting railway's cars at cost, which shall be included in and made a part of the joint rate adopted by such railway companies, or established as provided in this chapter. [Same, § 2.]

This provision relating to the establishment of joint rates over connecting lines within the state, *held* not unconstitutional: *Burlington, C. R. & N. R. Co. v. Dey*, 82-312.

It will be presumed that the railroad commissioners will rightly discharge their duties, and will fix reasonable and just joint through rates. If these officers fail in their duty, from errors of judgment or from other causes, the railroads may cause their action to be reviewed and corrected: *Ibid.*

The railroad companies are not compelled to enter involuntarily into contract relations with each other, but the statute simply provides that in case of failure to adopt joint rates, the railroad commissioners shall prescribe them, and the company shall not be permitted to charge more: *Ibid.*

SEC. **2154. Reasonable through rates—no discrimination.** When shipments of freight to be transported between different points within the state are required to be carried by two or more railway companies operating connecting lines, such railway companies shall transport the same at reasonable through rates, and shall at all times give the same facilities and accommodations to local or state traffic as they give to interstate traffic over their lines of road. [Same, § 2.]

SEC. **2155. Schedules of joint rates.** In the event that said railway companies fail to establish through joint rates, or fail to establish and charge reasonable rates for such through shipments, it shall be the duty of the board of railroad commissioners, upon the application of any person interested, to establish such rates for the shipment of freight and cars over two or more connecting lines of railroad in the state; and in the making thereof, and in changing or revising the same, they shall be governed, as nearly as may be, by the provisions of the preceding sections of this chapter, and shall take into consideration the average of rates charged by said railway companies for shipments within this state for like distances over their respective lines, and rates charged by the railway companies operating such connecting lines, for joint interstate shipments for like distances. The rates established by the board shall go into effect within ten days after the same are promulgated, and from and after that time a schedule thereof shall be *prima facie* evidence in all the courts of this state that the rates therein fixed are just and reasonable for the joint transportation of freight and cars upon the railroads for which such schedules have been fixed. [24 G. A., ch. 25; 23 G. A., ch. 17, § 3.]

The joint rates fixed by commissioners are not absolute, but *prima facie* evidence only of their reasonableness and justness: *Burlington, C. R. & N. R. Co. v. Dey*, 82-312.

A rate fixed to govern two or more roads as to the shipment which passes over all of them is in legal effect a joint rate and a schedule for such rates is to be adopted in pursuance of the provisions of these sections and not under other sections authorizing the commissioners to establish a general schedule: *State v. Chicago, B. & Q. R. Co.*, 90-594.

Therefore a schedule of such joint rates can be adopted on notice only as required by these sections and cannot be treated as an amendment or modification of the schedule of rates under the general sections providing for a schedule even though the rates under the joint rate schedule are simply a proportion of the rates under the general schedule: *Ibid.*

SEC. 2156. **Division of joint rates.** Before the promulgation of such rates, the board shall notify the railroad companies interested of the schedule of joint rates fixed, and give them a reasonable time thereafter to agree upon a division of the charges provided for therein. If such companies fail to agree upon a division, and to notify the board thereof, it shall, after a hearing of the companies interested, decide the same, taking into consideration the value of terminal facilities and all the circumstances of the haul, and the division so determined by it shall, in all controversies or actions between the railway companies interested, be *prima facie* evidence of a just and reasonable division thereof. [23 G. A., ch. 17, § 4.]

SEC. 2157. **Unreasonable charges—penalty.** Every unjust and unreasonable charge for the transportation of freight and cars over two or more railroads in this state is prohibited, and every company making such unreasonable and unlawful charges, or otherwise violating the provisions of this chapter, shall be punished as provided in this chapter for the making of unreasonable charges for the transportation of freight and cars over a single line of railroad by a single railway company. [Same, § 5.]

CHAPTER 71, LAWS 28 G. A.

SALE AND REDEMPTION OF PASSENGER TICKETS.

To regulate the sale, and require the redemption of, passenger tickets by common carrters. (Amending chapter 7, title X of the code.)

SECTION 1. **Common carriers to redeem tickets.** It shall be the duty of every railroad company, corporation, person or persons acting as common carriers of passengers in the state of Iowa, to provide for the redemption, at the place of purchase and at the general passenger agent's office of said carrier of the whole or any integral part of any passenger ticket or tickets that such carrier may have sold, as the purchaser or owner has not used for passage or received transportation for which such ticket should have been surrendered; and said carrier shall there redeem the same at a rate which shall equal the difference between the price paid for the whole ticket and the cost of a ticket between the points for which said ticket has been actually used, and no carrier shall limit the time in which redemption shall be made to less than ten days from date of sale at the place of purchase and six months from sale at general passenger agent's office.

SEC. 2. **Notice posted.** No railroad company, corporation, person or persons doing business in the state of Iowa, as common carrier of passengers, whose rate of fare is regulated by statute of this state, shall sell or issue to any person at the maximum rate allowed by law, any ticket or tickets bearing any condition or limitation as to the time of use, or as to transferability, without first providing for the redemption of said ticket, as directed by the preceding section hereof, and also having notice of such provision and privilege of redemption conspicuously posted at each place where sales of tickets are made by such common carriers in this state. A failure to provide for the redemption of such ticket or to give notice as above provided shall make all conditions and limitation as to time of use or transferability of no force or effect.

SEC. 3. **Penalty.** Any railroad company, corporation, person or persons, who as common carriers shall sell or issue tickets as set forth in the preceding sections, and shall refuse or neglect to redeem the same, as by said sections provided, within ten days of date of demand, shall forfeit and pay to the owner of such ticket the purchase price of said ticket, and the further sum of one hundred dollars.

SEC. 4. **Mileage books.** Nothing in this act shall prohibit the sale of mileage books or tickets, at less than the maximum rates allowed by law, bearing reasonable conditions of limitation as to the right of use for passage.

Approved April 4, 1900.

CHAPTER 8.

OF TELEGRAPH AND TELEPHONE LINES.

SECTION 2158. **Right of way.** Any person or firm, and any corporation organized for such purpose, within or without the state, may construct a telegraph or telephone line along the public roads of the state, or across the rivers or over any lands belonging to the state or any private individual, and may erect the necessary fixtures therefor. When any road along which said line has been constructed shall be changed, the person, firm or corporation shall, upon ninety days' notice in writing, remove said lines to said road as established. The notice may be served upon any agent or operator in the employ of such person, firm or corporation. [19 G. A., ch. 104; C. '73, § 1324; R., § 1348; C. '51, § 780.]

Both telegraph and telephone are used for distant communication by means of wire stretched over different jurisdictions. The fundamental principle in each, by which communication is procured, is the same, and prior to any mention of telephone companies it was held that the statutes with reference to telegraph companies were in general applicable to telephone companies: *Iowa Union Telephone Co v. Board of Equalization*, 67–250; *Franklin v. Northwestern Telephone Co.*, 69–97.

As to taxation of such companies, see §§ 1328–1332.

SEC. **2159. How constructed.** Such fixtures shall not be so constructed as to incommode the public in the use of any road or the navigation of any stream; nor shall they be set up on the private grounds of any individual without paying him a just equivalent for the damage he thereby sustains. [C. '73, § 1325; R., § 1349; C. '51, § 781.]

SEC. **2160. Damages assessed.** If the person over whose lands such telegraph or telephone line passes claims more damages therefor than the proprietor of such line is willing to pay, the amount thereof may be determined in the same manner as provided for taking private property for works of internal improvement. [C. '73, § 1326; R., § 1350; C. '51, § 782.]

SEC. **2161. Liability for refusing to transmit messages.** If the proprietor of any telegraph or telephone line within the state, or the person having the control and management thereof, refuses to furnish equal facilities to the public and to all connecting lines for the transmission of communications in accordance with the nature of the business which it undertakes to carry on, or to transmit the same with fidelity and without unreasonable delay, the law in relation to limited partnerships, corporations, and to the taking of private property for works of internal improvement, shall not longer apply to them, and property taken for the use thereof without the consent of the owner may be recovered by him. [C. '73, § 1327; R., § 1351; C. '51, § 783.]

SEC. **2162. Penalty.** Any person employed in transmitting messages by telegraph or telephone must do so with fidelity and without unreasonable delay, and if any one wilfully fails thus to transmit them, or intentionally transmits a message erroneously, or makes known the contents of any message sent or received to any person except him to whom it is addressed, or his agent or attorney, or wilfully and wrongfully takes or receives any telegraph or telephone message, he is guilty of a misdemeanor. [C. '73, § 1328; R., § 1352; C. '51, § 784.]

This does not excuse an operator from producing the telegrams which have passed between parties when subpœnaed as a witness in an action between them as to the transaction to which they relate: *Woods v. Miller*, 55–168.

SEC. **2163. Liable for mistakes.** The proprietor of a telegraph or telephone line is liable for all mistakes in transmitting or receiving messages made by any person in his employment, or for any unreasonable delay in their transmission or delivery, and for all damages resulting from failure to perform the foregoing or any other duty required by law, the provisions of any contract to the contrary notwithstanding. [C. '73, § 1329; R., § 1353; C. '51, § 785.]

A telegraph company enjoys a public use and eminent domain may be exercised in its behalf, and its rates may be regulated by legislation. Also it is bound to serve all alike and to exercise due care in the discharge of its duties: *Mentzer v. Western Union Tel. Co.*, 62 N. W., 1.

While it is not an insurer of the delivery of messages, it is liable for negligence in transmitting or delivering, and this liability is either in contract or tort: *Ibid.*

Whether the action against the company is founded in contract or in tort, it is liable for mental suffering which could reasonably have been anticipated as the consequence of the negligent failure to deliver a message: *Ibid.*

A company may insert, in a contract under which a message is sent, a condition exempting it from liability for mistake made from unavoidable causes, provided proper instruments have been used and proper care and skill exercised by the company's employes to avoid or prevent mistake; but it cannot make general printed regulations which shall have the effect to relieve it from liability for improper conduct or negligence of its servants: *Sweatland v. Ill. and Miss. Tel. Co.*, 27–433; *Manville v. Western Union Tel. Co.*, 37–214.

Where the company has been released from liability except for its own negligence the party seeking to recover from it must make out such negligence: *Ibid.*

A telegraph company may contract to restrict its liability, but it cannot contract against its own negligence in failing to transmit and deliver a message: *Harkness v. Western Union Tel. Co.*, 73–190.

A telegraph company cannot, by contract, excuse itself from liability for negligent failure to transmit a message: *Garrett v. Western Union Tel. Co.*, 83–257.

Where the company failed to send a message directing that the markets be forwarded to the sender, he being a cattle buyer, *held*, that the company was liable for loss of the sender incurred in the purchase of cattle by reason of not being advised as to the market price: *Ibid.*

To entitle a party to recover for a mistake in the transmission of a message he must prove something more than mistake and damage. He must show that the mistake was caused by the fault of the company, and that it might have been avoided if defendant's instruments had been good ones and its agents had been skillful operators and exercised the proper diligence in respect to the transmission and receipt of the message in question: *Aikin v. Western Union Tel. Co.*, 69–31.

An instruction imposing liability upon a company upon proof of a mistake without evidence of negligence, and also the burden of proving that there was no negligence by reason of the mistake occurring through uncontrollable causes, *held* erroneous: *Ibid.*

In an action to recover damages for mistake in the transmission of a message, *held*, that the plaintiff to whom the message was delivered might testify as to what the message directed, as tending to show his good faith in acting thereunder, such evidence bearing upon the question whether the plaintiff, in the exercise of ordinary diligence and intelligence was authorized to interpret the language of the dispatch as he did: *Ibid.*

An action for mistake in the transmission of a message from a broker to his principal may be brought by the principal in his own name: *Ibid.*

Where an agent sends or receives a telegram for the benefit and use of an undisclosed principal, such principal may recover damages sustained by reason of the negligence or delay of the company in delivering it, and the recovery cannot be limited to the amount which the agent could have recovered for damages sustained by him individually: *Harkness v. Western Union Tel. Co.*, 73–190.

The action against a telegraph company for non-delivery of a message may be brought by the person to whom the message is addressed: *Mentzer v. Western Union Tel. Co.*, 62 N. W., 1.

The person to whom a dispatch is sent, even though sent by one under no obligation to send it, may recover from the telegraph company damages caused by delay in the transmission: *Herron v. Western Union Tel. Co.*, 90–129.

Knowledge that a telegram relates to a proposed sale of property will charge the company with notice of any damages resulting from failure or delay to deliver it: *Ibid.*

The property proposed to be sold not having a market value, the damage will be the difference between what the property might have been sold for if the telegram had been promptly delivered and what it was actually sold for afterward in the exercise of reasonable diligence to effect a sale, the expense of keeping the property until such sale is effected being added: *Ibid.*

Failure to deliver promptly under the circumstances of the case, *held*, to have been the result of negligence on the part of the agent charged with delivering it: *Ibid.*

Where a person telegraphed a commission firm with which he was in the habit of doing business and with which he had an arrangement that when he telegraphed for market reports a failure to respond should indicate that there were no changes since the previous report, *held*, that there having been negligence on the part of the company in failing to deliver the telegram and the market having fallen the company was liable for the loss estimated on the basis of the fall of the market price, it having been known to the agent of the company that the plaintiff was in the business of buying cattle and was in the habit of telegraphing for the price on which to base such purchases: *Garrett v. Western Union Tel. Co.*, 92-449.

Also *held*, that the damage should be based on the difference in price in the Chicago market for which the cattle were bought and not on the prices in the Kansas City market, where the cattle were actually purchased: *Ibid.*

SEC. **2164. Negligence presumed—notice of claim.** In any action against any telegraph or telephone company for damages caused by erroneous transmission of a message, or by unreasonable delay in delivery of a message, negligence on the part of the telegraph or telephone company shall be presumed upon proof of erroneous transmission or of unreasonable delay in delivery, and the burden of proof that such error or delay was not due to negligence upon its part shall rest upon such company; but no action for the recovery of such damages shall be maintained unless a claim therefor is presented in writing to such company, officer or agent thereof, within sixty days from time cause of action accrues. [26 G. A., ch. 108.]

CHAPTER 9.

OF EXPRESS COMPANIES.

SECTION **2165. Subject to regulations.** All express companies operating and doing business in this state are hereby declared to be common carriers, and all laws, so far as applicable, now in force or hereafter enacted, regulating the transportation of property by railroad companies, shall apply with equal force and effect to express companies. [26 G. A., ch. 33, § 1.]

As to taxation of such companies, see §§ 1345, 1346.

SEC. **2166. Supervision by railroad commissioners—schedule of rates.** The railroad commissioners of this state shall have general supervision of all express companies operating and doing business in this state; and shall inquire into any unjust discrimination, neglect or violation of the laws of this state governing common carriers, by any express company doing business therein, or by the officers, agents or employes thereof; and said railroad commissioners are empowered and directed to make for each express company doing business in this state, as soon as practicable, a schedule of reasonable maximum charges or rates for transporting any kind of property carried by such express company. [Same, § 2.]

TITLE XII, CHAPTER 6.

OF INTOXICATING LIQUORS.

SEC. **2396. Transportation (intoxicating liquors) by permit holder.** Every permit holder is hereby authorized to ship to registered pharmacists and manufacturers of proprietary medicines intoxicating liquors to be used by them for the purpose authorized by law. All railway, transportation and express companies and other common carriers are authorized to receive and transport the same upon presentation of a certificate from the clerk of the district or superior court of the county where the permit holder resides, that such person is permitted to ship intoxicating liquors under the law of this state. [23 G. A., ch. 35, § 14.]

SEC. **2419. Transportation to one not holding permit.** If any express or railway company, or any common carrier, or person, or any one as the agent or employe thereof, shall transport or convey to any person within this state any intoxicating liquors, without first having been furnished with a certificate from the clerk of the court issuing the permit, showing that the consignee is a permit holder and authorized to sell liquors in the county to which the shipment is made, such company, common carrier, person, agent or employe thereof, shall, upon conviction, be fined in the sum of one hundred dollars for each offense and pay the costs of prosecution, including a reasonable attorney's fee to be taxed by the court. The offense herein created shall be held committed and complete and to have been committed in any county in the state in which the liquors are received for transportation, through which they are transported, or in which they are delivered. The defendant in a prosecution under this section may show by a preponderance of the evidence as a defense that the character, circumstances and contents of the shipment were not known to him, or that the person to whom the shipment was made had complied with the provisions of this chapter relating to the mulct tax. [22 G. A., ch. 73, § 6; 21 G. A., ch. 66, § 10; 20 G. A., ch. 143, § 14; C. '73, § 1553; R., § 1580.]

A prior similar provision was held unconstitutional so far as it applied to the bringing of liquor from another state because an interference with interstate commerce: *Bowman v. Chicago & N. W. R. Co.*, 125 U. S., 465.

The statute does not forbid the transportation of liquors out of the state, but it does forbid the manufacture of liquors for purposes other than for sale according to the provisions of the statute. This construction does not render the statute unconstitutional as an interference with interstate commerce: *Pearson v. International Distillery*, 72-348.

A person employed by a wholesale dealer, not as a mere servant, but as the owner of means of transportation, to deliver liquor sold to purchasers, is a carrier within the meaning of this section: *State v. Campbell*, 76-122.

The right to bring liquor into the state in pursuance of interstate commerce involves also the right to sell the same in original packages: *Leisy v. Hardin*, 135 U. S., 100. As to selling in original packages, see notes to § 2382.

Liquors which are in the hands of the carrier for transportation into the state ceases to be exempt from seizure, as a part of interstate commerce, when they are placed by the carrier in a warehouse for delivery to consignee: *State v. Creeden*, 78-556.

Where it appears that a railway agent received at the railway platform and put into the depot a package which he had reasonable grounds to believe contained intoxicating liquor not shipped according to law, *held*, that he was properly convicted under this section: *State v. Rhodes*, 90-496.

Under the statute of the United States liquor shipped from another state becomes subject to state legislation with reference to the keeping and sale of intoxicating liquors the moment it crosses the boundary and enters the state: *Ibid.*

SEC. **2420. False statements.** If any person, for the purpose of procuring the shipment, transportation, or conveyance of any intoxicating liquors within this state, shall make to any company, corporation or common carrier, or to any agent thereof, or other person, any false statement as to the character or contents of any box, barrel or other vessel or package containing such liquors; or shall refuse to give correct and truthful information as to the contents of any such box, barrel or other vessel or package so sought to be transported or conveyed; or shall falsely mark, brand or label such box, barrel or other vessel or package in order to conceal the fact that the same contains intoxicating liquors, for the purposes aforesaid; or shall by any device or concealment procure or attempt to procure the conveyance or transportation of such liquors as herein prohibited, he shall, upon conviction, be fined for each offense one hundred dollars and costs of prosecution, and the costs shall include a reasonable attorney fee to be taxed by the court, which shall be paid into the county fund, and be committed to the county jail until such fine and costs are paid. Any peace officer of the county under process or warrant to him directed shall have the right to open any box, barrel or other vessel or package for examination, if he has reasonable ground for believing that it contains intoxicating liquors, either before or while the same is being so transported or conveyed. [21 G. A , ch., 66, § 11.]

SEC. **2421. Packages labeled.** It shall be unlawful for any common carrier or other person to transport or convey by any means, within this state, any intoxicating liquors, unless the vessel or other package containing such liquors shall be plainly and correctly labeled or marked, showing the quantity and kind of liquors contained therein, as well as the name of the party to whom they are to be delivered. And no person shall be authorized to receive or keep such liquors unless the same be marked or labeled as herein required. The violation of any provision of this section by any common carrier, or any agent or employe of such carrier, or by any other person, shall be punished the same as provided in the second preceding section, and liquors conveyed or transported or deliveree without being marked or labeled as herein required, whether in thn hands of the carrier or some one to whom they shall have beed delivered, shall be subject to seizure and condemnation, as liquors kept for illegal sale. [22 G. A., ch. 73, § 7.]

CHAPTER 11.

SECTION **2508. Penalty—damages—transporting oils—use of oils for lighting passenger cars.** If any person, company or corporation, or agent thereof, shall sell, or attempt to sell, any product of petroleum for illuminating purposes which has not been inspected and branded as in this chapter provided, or shall falsely brand any barrel or package containing such petroleum product, or shall refill with products of petroleum barrels or packages having the inspector's brand thereon, without erasing such brand and having the contents thereof inspected, and the barrel or package rebranded, or shall purchase, sell or dispose of any empty barrel or package without thoroughly removing the inspection brand, or shall knowingly or negligently sell, or cause to be sold, or shall use or cause to be used, any product of petroleum mentioned in this chapter not inspected and tested, except as otherwise authorized herein; or if any person shall adulterate with any substance for the purpose of sale or use any product of petroleum to be used for illuminating purposes in such a manner as to render it dangerous, or shall sell or offer for sale, or use any product of petroleum for illuminating purposes which will emit a combustible vapor at a temperature of less than one hundred and five degrees, standard Fahrenheit thermometer, closed test, except as otherwise provided in this section for illuminating railway cars, boats and public conveyances, and except that the gas or vapor thereof shall be generated in closed reservoirs outside the building to be lighted thereby, and except the lighter products of petroleum at a specific gravity of not less than seventy nor more than seventy-five degrees, when used in the Welsbach hydro-carbon incandescent lamp, and for street light by street lamps, or if any common carrier shall receive for transportation or transport in the state as freight any oil or fluid, whether composed wholly or in part of petroleum or its products, or of any substance which will ignite at a temperature of three hundred degrees Fahrenheit thermometer, open test; or if any such carrier of passengers shall burn any oil or fluid which will ignite at a temperature of three hundred degrees, for lighting any lamp, vessel or fixture of any kind in any railway passenger, baggage, mail or express car or boat or street railway car, stage coach, or other means of public conveyance; or if any inspector shall falsely brand any barrel or package, or shall practice any fraud or deceit in office, or be guilty of any official misconduct or culpable negligence to the injury of another, or shall deal or have any pecuniary interest, directly or indirectly, in any oils or fluids sold for illuminating purposes while holding such office, he or such person, company, corporation or agent shall be liable in a civil action for all damages which may be sustained on account thereof, and such inspector shall be fined in a sum not less than ten dollars nor more than one thousand dollars, or imprisoned in the county jail not exceeding six months, or be punished by both fine and imprisonment. [21 G. A., ch. 149, § 3; 20 G. A., ch. 185, §§ 1, 6, 7, 8, 10, 11, 13.]

To render an inspector liable in damages for injury resulting from falsely branding oil as of a certain grade when it was of a lower grade, it must appear that the inspector acted wilfully or negligently: *Hatcher v. Dunn*, 71 N. W., 343.

CHAPTER 12.

OF THE INSPECTION OF PASSENGER BOATS.

SECTION **2511. Inspectors.** The governor shall appoint one or more suitable persons as inspectors of passenger boats, to hold office for two years from the first Monday in May in each even-numbered year, unless sooner removed, who shall qualify by taking an oath, to be indorsed upon the certificate of appointment, faithfully and honestly to discharge the duties of the office. [22 G. A., ch. 107, § 2.].

SEC. **2512. Certificates—fees.** Any inspector, on the request of the owner, agent or master of any sail or steamboat upon the inland waters of the state having a carrying capacity of five or more passengers, shall carefully and thoroughly inspect such boat, its appliances and machinery, and, if found in proper condition and safe for the carriage of persons or passengers, give his certificate thereof, including therein the number of persons or passengers that may be carried, and on what waters; which certificate, or a copy thereof, shall be posted in a conspicuous place on the boat, and any boat so inspected and certified shall be entitled to run for the season following the date thereof. In like manner, upon the request of any pilot or engineer for a license as such, the inspector shall forthwith investigate the competency of the applicant, his acquaintance with and experience in his business, his habits as to sobriety, and other qualifications, and, if found capable of performing well his duties, and of good habits, he shall issue his certificate authorizing him to act as pilot or engineer, as the case may be, for five years from the date thereof, unless sooner revoked for cause, which revocation when made shall take effect upon approval by the governor. The inspector may charge and require advance payment for inspection, for each sailboat, one dollar, each steamboat with a capacity of not more than twenty persons, five dollars, those of greater capacity, ten dollars, and for each applicant for license as pilot or engineer, three dollars. [Same, §§ 3–5.]

SEC. **2513. Penalties.** If any owner, agent or master of any sail or steamboat, having a capacity of carrying five or more persons, plying the inland waters of the state, shall hire, or offer to hire, such sail or steamboat for the carrying of persons, or receive persons thereon for hire, without first obtaining annually, before the boating season, a certificate as in this chapter required, or if such owner, agent or master, having obtained such certificate, shall permit or receive for carriage on such boat a greater number of persons

than authorized therein, or if any person shall act as pilot or engineer on any boat mentioned for which inspection and license are herein required, without first obtaining a license therefor, or if, having such license, he continues to follow such avocation after the same has been revoked, or has expired, he shall be fined in a sum not exceeding one thousand dollars, or imprisoned in the county jail not exceeding one year, or punished by both fine and imprisonment; but the provisions of this chapter shall not apply to vessels licensed by authority of the United States. [Same, §§ 1, 3, 4.]

SEC. **2514. Reports.** Each inspector annually, on or before the first day of January, shall report to the governor the number and date of licenses granted pilots or engineers, to whom issued, the date thereof, the number of sail and steamboats inspected, the time and place of inspection, upon what waters to be used, and such other matters as may be considered useful or of general interest, with the total amount of fees received from all sources. [Same, § 6.]

By chapter 84, laws of the Twenty-eighth General Assembly, section 2512 amended by striking out in second line the words "any sail or steamboat" and inserting "boat other than rowboat;" also in twenty-first line striking out word "steamboat" and inserting "boat propelled by other power." Other sections made to conform to these amendments.

CHAPTER 13.

SHIPPING IMITATION BUTTER OR CHEESE.

SECTION **2516. Imitation butter or cheese.** Every article, substitute or compound, save that produced from pure milk or cream from milk of cows, made in the semblance of or designed to be used for and in the place of butter, is imitation butter; and every article, substitute or compound, save that produced from pure milk or cream from milk of cows, made in the semblance of or designed to be used for and in the place of cheese, is imitation cheese. No one shall manufacture, have in his possession, offer to sell or sell, solicit or take orders for delivery, ship, consign or forward by any common carrier, public or private, and no common carrier shall knowingly receive or transport, any such imitation butter or cheese, except in the manner and subject to the regulations in this chapter provided. [25 G. A., ch. 46, §§ 2, 5; 21 G. A., ch. 52, §§ 1, 3; 19 G. A., ch. 170, § 4.]

SEC. **2517. Substitute for butter or cheese—regulations as to sale and use—transportation.** A substitute for butter and cheese, not having a yellow color nor colored in imitation of butter and cheese as prohibited in the next section, may be manufactured, kept in possession, offered for sale, sold, shipped, consigned or forwarded by common carriers, public or private, if each tub, firkin, box or other package in which the same is kept, offered for sale, sold, shipped, consigned or forwarded shall have branded, stamped

or marked on the side or top thereof in the English language, in a durable manner, the words, "substitute for butter" or "substitute for cheese," as the case may be, the letters of the words to be not less than one inch in length by one-half inch in width. The defacing, erasure, canceling or removal of this brand or mark, with intent to mislead, deceive, or violate any provision of this chapter, is prohibited. Such substitute for butter or cheese may be kept, used or served as a food or for cooking in hotels, restaurants, lunch counters, boarding houses or other places of public entertainment, only in case the proprietor or person in charge of such place shall display and keep constantly posted a card opposite each table or other place where the guests or others are served with the same, which card shall be white, at least ten by fourteen inches in size, the words, "substitute for butter used here," or "substitute for cheese used here," as the case may be, printed in black Roman letters of the same size as herein required to be placed upon the tubs, firkins, boxes or other package in which substitute for butter or cheese is kept, and no other words or figures shall be printed thereon. No substitute for butter or cheese shall be offered for sale in the manufacturer's original package under the name of or for true butter or cheese made from the milk or cream of cows, nor shall any substitute for butter or cheese be offered for sale or sold unless the purchaser at the time was informed thereof, and, in addition, furnished with a printed statement in the English language in prominent type that the substance sold is such substitute, and giving the name and place of business of the maker. Nothing herein contained, however, shall be so construed as to prohibit the transportation of imitation butter or cheese through and across the state. [25 G. A., ch. 46, §§ 4, 7, 8; 25 G. A., ch. 45, § 1; 21 G. A., ch. 52, §§ 2, 5, 6, 9.]

CHAPTER 15.

FISH, BIRDS AND GAME,

SECTION **2555. Shipping out of state.** No person, company or corporation shall at any time ship, take or carry out of this state any of the birds or animals named in this chapter; but it shall be lawful for any person to ship to any person within this state any game birds named, not to exceed one dozen in any one day, during the period when the killing of such birds is not prohibited; but he shall first make an affidavit before some person authorized to administer oaths that said birds have not been unlawfully killed, bought, sold or had in possession, are not being shipped for sale or profit, giving the name and post-office address of the person to whom shipped, and the number of birds to be so shipped. A copy of such affidavit, indorsed "a true copy of the original" by the person administering the oath, shall be furnished by him to the affiant,

who shall deliver the same to the railroad agent or common carrier receiving such birds for transportation, and the same shall operate as a release to such carrier or agent from any liability in the shipment or carrying of such birds. The original affidavit shall be retained by the officer taking the same, and may be used as evidence in any prosecution for violation of the sections of this chapter relating to game. Any person knowingly and wilfully swearing falsely to any material fact of said affidavit shall be guilty of perjury. [17 G. A., ch. 156, § 6.]

SEC. **2557. Receiving for transportation.** If any railway or express company or other common carrier, or any of their agents or servants, receive any of the fish, birds or animals mentioned or referred to in this chapter for transportation or any other purpose, during the period hereinbefore limited and prohibited, or at any other time except in the manner provided in this chapter, he or it shall be punished by a fine of not less than one hundred nor more than three hundred dollars, or by imprisonment in the county jail for thirty days, or by both such fine and imprisonment.

TITLE XIV, CHAPTER 6.

CONVEYANCE OF REAL ESTATE.

SECTION **2939. Recording land grants.** Every railroad company which owns or claims to own real estate in this state, granted by the government of the United States or this state to aid in the construction of its railroads, where it has not already done so, shall place on file and cause to be recorded, in each county wherein the real estate granted is situated, evidence of its title or claim of title, whether the same consists of patents from the United States, certificates from the secretary of the interior, or governor of this state, or the proper land office of the United States or this state. Where no patent was issued, reference shall be made in said certificate to the act or acts of congress, and the acts of the legislature of this state, granting such lands, giving the date thereof, and date of their approval under which claim of title is made; but where the certificate of the secretary of the interior or the patents contain real estate situated in more than one county, the secretary of state shall, upon the application of any railroad company or its grantee, prepare and furnish, to be recorded, a list of all the real estate situated in any one county so granted, patented or certified; and all such evidences of title shall be entered by the auditor upon the index, transfer and plat books. [18 G. A., ch. 186, § 1.]

SEC. **2940. Notice.** Such evidence of title shall be filed with the recorder of deeds of the county in which the real estate is situated, who shall record the same, and place an abstract thereof

upon the index of deeds, so as to show the evidence of title; and the recording thereof shall be constructive notice to all persons, as provided in other cases of entries upon said index, and the recorder shall receive the same fees therefor as for recording other instruments. [Same, § 2.]

TITLE XV, CHAPTER 8.

MECHANICS' LIENS.

SEC. **3091. Lien on work of internal improvement.** When such material has been furnished or labor performed in the construction, repair or equipment of any railroad, canal, viaduct or other similar improvements, the lien therefor shall attach to the erections, excavations, embankments, bridges, road-bed, and all land upon which the same may be situated, and the rolling stock and other equipment belonging to any such railroad, canal, viaduct or other company, all of which, except the easement or right of way, shall constitute the building, erection or improvement provided and mentioned in this chapter. [16 G. A., ch. 100, § 5.]

CHAPTER 10.

OF WAREHOUSEMEN, CARRIERS, HOTELKEEPERS.

SECTION **3122. Elevator or warehouse certificates.** All persons, firms or corporations engaged in owning or dealing in grains, seeds or other farm products; the slaughtering of cattle, sheep and hogs, and dealing in the various products therefrom; the buying or selling of butter, eggs, cheese, dressed poultry or other commodities; who own or control the buildings wherein any such business is conducted, or such commodities stored, may issue elevator or warehouse certificates for any of such commodities actually on hand and in store, the property of the person, firm or corporation issuing such certificate, and may by such method sell, assign, transfer, pledge or incumber such commodity to the amount described in such certificate. Such certificates shall contain the name and address of the person, firm or corporation using them, and the name and address of the party to whom issued, the location of the elevator, warehouse, building or other place where the commodity therein described is stored, the date of the issuance of such certificate, the quantity of each commodity therein mentioned, the brands or marks of identification thereon, if any, and be signed by the person or firm issuing the same, unless issued by a corporation, in which case they shall be signed by such corporation by its secretary or business manager, if it has such manager other than its secretary. [25 G. A., ch. 48; 24 G. A., ch. 44, § 1; 21 G. A., ch. 165, § 1.]

SEC. **3123. Declaration.** Before any such person, firm or corporation is authorized to issue such elevator or warehouse certificates, he or it must file in the office of the recorder of deeds, in the county where any such elevator, warehouse or other building is situated, a written declaration, giving the name and place of residence or location of such person, firm or corporation, that he or it designs keeping or controlling an elevator, warehouse, crib or other place for the sale and storage of commodities mentioned in the preceding section, an accurate description of the elevator, warehouse, crib or other building to be kept or controlled, and where the same is or is to be located, the name or names of any person, other than the one making such declaration, who has any interest in such elevator, warehouse or other building, or in the land on which it is situated, such declaration to be signed and acknowledged by the party making the same before some officer authorized to take acknowledgments of instruments, and recorded in the chattel mortgage record, the party making such declaration to be treated as the vendor in indexing such declaration, and the public as vendee. [21 G. A., ch., 165, § 1.]

SEC. **3124. Effect of certificate—assignment.** Each certificate issued by any person firm or corporation shall have printed on the back thereof a statement that the party issuing it has complied with the requirements of the preceding section, giving the book, page and name of the county where the record of such declaration may be found; and, when such certificate is so issued and delivered, it shall have the effect of transferring to the holder thereof the title to the commodities therein described or enumerated, and shall be assignable by written indorsement thereon, signed by the lawful holder thereof, which shall transfer the title of commodities therein enumerated, and be presumptive evidence of ownership in such holder. No record or other notice shall be necessary to protect the rights of the holder of the certificate as against subsequent purchasers of the property. [24 G. A., ch. 44, §§ 1, 4; 21 G. A., ch. 165, § 2.]

SEC. **3125. Registration of certificates and transfers.** All certificates given under the provisions of this chapter shall be registered by the party issuing them in a book kept for that purpose, showing the date thereof, the number of each, the name of the party to whom issued, the quantities and kinds of commodities enumerated therein, and the brands or other distinguishing marks thereon, if any, which book shall be open to the inspection of any person holding any of the certificates that may be outstanding and in force, or his agent or attorney; and when any commodity enumerated in any such certificate is delivered to the holder thereof, or it in any other manner becomes inoperative, the fact and date of such delivery or other termination of such liability shall be entered in such register, in connection with the original entry of the issuance thereof. [24 G. A., ch. 44, § 2; 21 G. A., ch. 165, § 3.]

SEC. **3126. Property subject to certificate.** No person, firm or corporation shall issue any elevator or warehouse certificate for any of the commodities enumerated in this chapter unless such property is actually in the elevator or warehouse or other

building mentioned therein as being the place where such commodity is stored, and it shall remain there until otherwise ordered by the lawful holder of such certificate, subject to the conditions of the contract between the warehouseman and the person to whom such certificate was issued, or his assignee, as to the time of its remaining in store; and no second certificate shall be issued for the same property or any part thereof while the first is outstanding and in force, nor shall any such commodities be by the warehouseman sold, incumbered, shipped, transferred or removed from the elevator, warehouse or other building where the same was stored at the time such certificate was issued, without the written consent of the holder thereof. [24 G. A., ch. 44, § 5; 21 G. A., ch. 165, § 4; C. '73, §§ 2172–4.]

Under similar provisions, *held*, that a warehouse receipt for grain, issued merely as collateral security for a loan of money, was in contravention of the statute and invalid: *Sexton v. Graham*, 53–181.

Whether a warehouse receipt will be valid if the intention in executing it is to create a mere lien, *quære: Lowe & Young*, 59–364.

SEC. **3127. Damages.** Any one injured by the violation of any of the provisions of this chapter may recover his actual damages sustained on account thereof, and, if wilfully done, in addition thereto, exemplary damages in any sum not exceeding double the actual damages, which actual damages shall be found and returned by special verdict. [24 G. A., ch. 44, § 6; C. '73, § 2176.]

SEC. **3128. Penalties.** Any person who shall wilfully alter or destroy any register of certificates provided for in this chapter, or issue any receipt or certificates without entering and preserving in such book the registered memorandum; or who shall knowingly issue any certificate herein provided for the commodity or commodities therein enumerated are not in fact in the building or buildings it is certified they are in; or shall, with intent to defraud, issue a second or other certificate for any such commodity, for which, or for any part of which, a former valid certificate is outstanding and in force; or shall, while any valid certificate for any part of the commodities mentioned in this chapter is outstanding and in force, sell, incumber, ship, transfer or remove from the elevator, warehouse or building where the same is stored, any such certified property, or knowingly permit the same to be done, without the written consent of the holder of such certificate; or if any person knowingly receives any such property or helps to remove the same, —he shall, upon conviction, be punished by fine not exceeding ten thousand dollars, or by imprisonment in the penitentiary not exceeding five years. [24 G. A., ch., 44, §§ 2, 3, 5; 21 G. A., ch. 165, §§ 3–5; C. '73, § 2175.]

Where a depositor received only scale tickets showing the amount of grain weighed, but did not receive any warehouse receipt, and the warehouseman shipped away the grain deposited until there was no grain remaining to answer for the claim of the depositor, *held*, that such scale tickets were not warehouse receipts, and that a person taking an assignment of the depositor's claim would be subject to the warehouseman's right to set off against the depositor's claim an indebtedness due from such depositor, which he could not have done if receipts had been issued and transferred: *Cathcart v. Snow*, 64–584.

SEC. **3129. Certificate as evidence—lien.** All warehouse certificates or other evidences of the deposit of property, issued by any warehouseman, wharfinger or other person engaged in storing property for others, shall be in the hands of the holders thereof presumptive evidence that the title to the property therein described is in the holder of such instrument. Such property shall remain in store until otherwise ordered by the holder of such certificate or other evidence of deposit, and shall not be removed by such warehouseman, or knowingly suffered to pass from his control, without the written consent of the depositor or his assignee, and shall be subject to all just charges for storage thereof; and such warehouseman or other depositary shall have a lien thereon for such charges, and may retain possession thereof until they are paid. [C. '73, §§ 2171, 2173.]

A warehouse receipt which expresses a contract of bailment cannot be varied by parole evidence of a custom or usage or understanding for the purpose of showing that the intention of the parties was that the transaction should be regarded as a sale: *Marks v. Cass County Mill, etc., Co.*, 43–146; *Sexton v. Graham*, 53–181.

SEC. **3130. Unclaimed property—lien for charges.** Property transported by, or stored or left with, any forwarding and commission merchant, express company, carrier, or bailee for hire shall be subject to a lien for the lawful charges thereon for the transportation and storage thereof, or charges and services thereon or in connection therewith; and if any such property shall remain in the possession, unclaimed, of any of the persons named in this section for three months, with the just charges thereon due and unpaid, such person shall first give notice of the amount of the charges thereon to the owner or consignee thereof, if his whereabouts is known, if not, he shall go before the nearest justice of the peace and make an affidavit, stating the time and place where such property was received, the marks or brands by which the same is designated, if any, and, if not, then such other description as may best answer the purpose of indicating what the property is, and the probable value of the same, and to whom consigned, also the charges paid thereon, accompanied by the original receipt for such charges and by the bill of lading, also any other charges due and unpaid, and whether the whereabouts of the owner or consignee is known to the affiant, and whether such notice was first given to him as herein provided; which affidavit shall be filed by the justice for the inspection of any one interested therein, and an entry made in the estray book of the substance of the affidavit, and a statement when, where and by whom made. [26 G. A., ch. 107; C. '73, §§ 2177–8.]

SEC. **3131. Sale—notice.** If the property remains unclaimed and the charges unpaid, the person in possession, if the probable value does not exceed one hundred dollars, shall advertise the same for fourteen days, by posting notices in five of the most public places in the city or locality where said property is held, giving such description as will indicate what is to be sold; if the goods

exceed the probable value of one hundred dollars, the length of notice shall be four weeks, and there shall be a publication thereof for the same length of time in some newspaper of general circulation in the locality where the property is held, if there be one, and, if not, then in the next nearest newspaper published in the neighborhood, at the end of which period, if the property is still unclaimed or charges unpaid, it may be sold by him at public auction, between the hours of ten o'clock a. m. and four o'clock p. m., for the highest price the same will bring, which sale may be continued from day to day, by public announcement to that effect at the time of adjournment, until all the property is sold; and from the proceeds thereof all charges, costs and expenses of the sale shall be paid, which sale shall be conducted after the manner of sheriffs' sales, and like costs taxed for like services. [C. '73, § 2179.]

SEC. **3132. Perishable property.** Fruit, fresh oysters, game and other perishable property thus held shall be retained twenty-four hours, and, if not claimed within that time and charges paid, after the proper affidavit is made as required by the second preceding section, may be sold either at public or private sale, in the discretion of the party holding the same, for the highest price that the same will bring, and the proceeds of the sale disposed of as provided in the last preceding section. In either case, if the owner or consignee of said unclaimed property resides in the same city, town or locality in which the same is held, and is known to the agent or party having the same in charge, then personal notice shall be given to him in writing that the goods are held subject to his order on payment of charges, and that, unless he pays the same and removes the property, it will be sold as provided by law. [C. '73, § 2180.]

SEC. **3133. Disposition of proceeds.** After the charges on the property and the costs of sale have been taken out of the proceeds, the seller shall deposit the excess with the county treasurer of the county where the goods were sold, subject to the order of the owner, take a receipt therefor, and deposit the same with the county auditor. At the same time he shall also file a verified schedule of the property with the treasurer, giving the name of the consignee or owner, if known, of each piece of property sold, the sum realized from the sale of each separate package, describing the same, together with a copy of the advertisement hereinbefore provided for, and a full statement of the receipts of the sale, and the amount disbursed to pay charges and expenses of sale, which shall all be filed and preserved in the treasurer's office for the inspection of any one interested in the same. [C. '73, § 2181.]

SEC. **3134. Duty of treasurer—refunding to owner.** If the money remains in the hands of the treasurer unclaimed, he shall place the same to the credit of the county in his next settlement, and if it so remains unclaimed for one year, it shall be paid to the school fund; but any claimant therefor may at any time within ten years appear before the board of supervisors and establish his right to the same by competent legal evidence, in which case the original sum deposited shall be paid him out of the county treasury. [C. '73, § 2182.]

SEC. **3135. Common carriers—liability for baggage.** Omnibus and transfer companies or other common carriers, and their agents, shall be liable for damages occasioned to baggage or other property belonging to travelers through careless or negligent handling while in the possession of said companies or carriers, and, in addition to the damages, the plaintiff shall be entitled to an allowance of not less than five dollars for every day's detention caused thereby, or by action brought to recover the same. [C. '73, § 2183.]

This section gives a remedy for damages to baggage, and for detention caused thereby. It does not authorize a recovery on account of detention of baggage or failure to deliver the same, nor for detention of the traveler unless it be on account of damages done to baggage: *Anderson v. Toledo, W. & W. R. Co.*, 32-86.

SEC. **3136. Cannot limit liability.** No contract, receipt, rule or regulation shall exempt any corporation or person engaged in transporting persons for hire from the liability of a common carrier, or carrier of passengers, which would exist had no contract, receipt, rule or regulation been made. [C. '73, § 2184.]

See, also, § 2074, applicable to railway companies.

TITLE XVIII, CHAPTER 4.

PLACE OF BRINGING ACTION.

SEC. **3497. Against common carriers.** An action may be brought against any railway corporation, the owner of stages, or other line of coaches or cars, express, canal, telegraph and telephone companies, and the lessees, companies or persons operating the same, in any county through which such road or line passes or is operated. [C. '73, § 2582.]

A railway company has a residence in any county through which its road passes and in which it transacts business: *Baldwin v. Mississippi & M. R. Co.*, 5-518; *Richardson v. Burlington & M. R. R. Co.*, 8-260.

A railroad, operating a line of road in the county at the time suit is commenced against it there, is subject to jurisdiction of the courts of that county: *Knott v. Dubuque & S. C. R. Co.*, 84-462.

A railway company doing business in the state so that action might be commenced against it as here provided cannot claim advantages of the provisions of the statute of limitations as to nonresidents: See notes to § 3451.

An action against a foreign railway company not operating a line of railway nor having any office in the state cannot be brought in the state on a cause of action arising out of business not transacted within the state by means of service of notice on an agent found within the state: *Elgin Canning Co. v. Atchison, T. & S. F. R. Co.*, 24 Fed., 866.

Bringing cars within the state with a patent air brake for purposes of exhibition does not authorize service upon the foreign corporation owning such cars: *Carpenter v. Westinghouse Air Brake Co.*, 32 Fed., 434.

Corporations operating railways within the state are subject to the jurisdiction of our courts the same as any person resident within the state: *Mooney v. Union Pacific R. Co.*, 60–346.

The provision as to telegraph companies was held applicable to telephone companies, before they were expressly mentioned, and authorized the bringing of action against such a company before a justice of the peace in any county through which the line of the company passed or was operated: *Franklin v. Northwestern Telephone Co.*, 69–97.

SEC. **3498. Against construction companies.** An action may be brought against any corporation, company or person engaged in the construction of a railway, canal, telegraph or telephone line, on any contract relating thereto or to any part thereof, or for damages in any manner growing out of the work thereon, in any county where such contract was made, or performed in whole or in part, or where the work was done out of which the damage claimed arose. [C. '73, § 2583.]

Under this section, *held*, that where an action was brought by a subcontractor entitled to a mechanic's lien against the contractor for the construction of the railway on an agreement to pay the amount of such lien, such action was properly brought in the county through which the road was being constructed, and could not be removed, on the application of defendant, to the county of his residence: *Vaughn v. Smith*, 58–553.

The facts showing that the contract has been performed or the work done in the county in which suit is brought may be established by affidavit on the hearing of the motion, if defendant seeks to change the place of trial to the county of his residence: *Jordan v. Kavanaugh*, 63–152.

On motion for a change of venue the question as to plaintiff's right of recovery against a portion of defendants cannot be raised, as such a question must be determined upon demurrer: *Ibid.*

SEC. **3500. Office or agency.** When a corporation, company or individual has an office or agency in any county for the transaction of business, any actions growing out of or connected with the business of that office or agency may be brought in the county where such office or agency is located. [C. '73, § 2585; R., § 2801; C. '51, § 1705.]

These provisions are permissive and not mandatory, and the suit, if against a nonresident, may be brought in the usual manner of commencing actions against nonresidents: *Dean v. White*, 5–266.

This section merely fixes the county in which suit shall be brought; it does not define the manner in which jurisdiction over the person is to be acquired: *Centennial Mut. L. Ass'n v. Walker*, 50–75.

One who accepts the benefits of a sale by a person claiming to act as his agent, or who accepts the benefits of a proposition made through and forwarded by him, thereby ratifies the transaction, so that an action arising therefrom may be brought in the county of such agency: *Milligan v. Davis*, 49–126.

A certain method of doing business between a firm and defendant, *held* such as to constitute the firm agents for defendant, and authorize an action against defendant growing out of the business of such agency to be brought in the county where the agency was located: *Ibid.*

An action by the agent against the principal for services as agent is connected with the business of the agency in such sense that suit against the principal may be brought in the county of such agency: *Ockerson v. Burnham*, 63–570.

The section does not limit the right to commence a suit in the county where the agency is located to the time during which the agency exists: *Ibid.*

This provision is also applicable to suits against a partnership brought in a justice's court, and the partnership may be considered a resident of the county in which the business is transacted, although none of its members are residents of such county: *Fitzgerald v. Grimmell*, 64–261.

A partnership may be considered as having a residence in the county in which it does business, though neither partner resides in such county: *Ruthven v. Beckwith*, 84–715.

The office or agency referred to is one established for the purpose of carrying on the business for which the corporation is organized. A foreign corporation does not subject itself to suit here by sending here an agent to advertise, make contracts, etc.: *Carpenter v. Westinghouse Air Brake Co.*, 32 Fed., 434.

Where it appeared that the business out of which the suit arose did not pertain to the agency, *held*, that the provisions of this section were not applicable in determining the place of bringing suit: *King v. Blair*, 69 N. W., 261.

This section has no reference to an agency which is not located, and applies to the place of business of the agent rather than to the relation between the principal and the agent; and where it appeared that if there was an agency it had no relation to any particular locality, *held*, that place of action could not be determined by the provisions of this section: *Wickens v. Goldstone*, 66 N. W., 896.

The state may prescribe as a condition on which a foreign insurance company may do business within the state that service upon an agent of the company shall give the courts of the state jurisdiction in an action against such company: *Fred Miller Brewing Co. v. Council Bluffs Ins. Co.*, 63 N. W., 565.

Where an insurance agent in Wisconsin was directed by the owner of property to secure insurance thereon, and negotiated for such insurance through another agent outside of the state who placed the insurance in defendant company which was not regularly doing business in that state without any direction on the part of the first agent as to the company in which the insurance should be secured, *held*, that the agent in Wisconsin to whom the application was made became the agent of the defendant company in the procuring of such insurance, and that under the laws of Wisconsin, service on such agent would give the court of that state jurisdiction of an action against the company: *Ibid.*

The issuing of policies of insurance outside of the state on property within it is the doing of business within the state such as to subject the company to statutory regulation: *Ibid.*

CHAPTER 6.

MANNER OF COMMENCING ACTIONS.

SEC. **3529. On agent of corporation.** If the action is against any corporation or person owning or operating any railway or canal, or any telegraph, telephone, stage, coach or car line, or against any express company, or against any foreign corporation, service may be made upon any general agent of such corporation, company or person, wherever found, or upon any station, ticket or other agent or person transacting the business thereof or selling tickets therefor in the county where the action is brought; if there is no such agent in said county, then service may be had upon any such agent or person transacting said business in any other county. [C. '73, § 2611; C. '51, § 1727.]

Service upon the trackmaster of a railroad, *held* not sufficient to constitute service upon the company: *Richardson v. Burlington & M. R. R. Co.*, 8–260.

A railway corporation not operating a line of railway within the state, and not having any office or agency within the state, out of the business of which the cause of action arises, is not within the jurisdiction of the state or federal courts of Iowa, and a service upon one of its agents who may be found within the state will not confer jurisdiction: *Elgin Canning Co. v. Atchison, etc., R. Co.*, 24 Fed., 866.

A foreign corporation doing business in the state in such a way that it may be served with the notice under statutory provision cannot be deemed a nonresident in such sense that the statute of limitations will not run in its favor: *Wall v. Chicago & N. W. R. Co.*, 69–498.

The service here referred to is sufficient in an action in the federal court against a foreign railroad company doing business in Iowa: *Dinzy v. Illinois Cent. R. Co.*, 61 Fed., 49.

SEC. **3532. On agent, as to business of office or agency.** When a corporation, company or individual has, for the transaction of any business, an office or agency in any county other than that in which the principal resides, service may be made on any agent or clerk employed in such office or agency, in all actions growing out of or connected with the business of that office or agency. [C. '73, § 2613; R., § 2827; C. '51, § 1705.]

Service cannot be made upon another agent of the same party than that who transacts the business out of which the action arises, and whose agency is of a different scope. In such cases the services must be made upon some one connected with the business out of which the action grows, and if made upon an agent not connected with such business, it is a case not of defective service, but of entire want of service: *State Ins. Co. v. Granger*, 62–272.

This section allows service upon the agent in a suit against the principal in matters connected with the agency, but the principal is not required to respond to service upon the agent of a notice of garnishment of the principal in a proceeding for the collection of a debt from the agent in no manner connected with the agency: *Upton Mfg. Co. v. Stewart*, 61–209.

Service on an agent of an insurance company whose businsse is to solicit and forward risks and whose residence is in the county is sufficient to constitute service upon the company. It is not necessary that he should be a general agent, have an office, or transact all business of the company in the county: *Farmers' Ins. Co. v. Highsmith*, 44–330.

A local insurance agent is not so employed in the general management of the business of the company that service can be made upon him in a suit against the company relating to a transaction not growing out of the business of his agency: *State Ins. Co. v. Waterhouse*, 78–674.

Where service was made upon one who had become agent for a nonresident corporation by a written contract, by the terms of which his agency had expired, but was still acting as agent for the completion of the business, *held*, that notice of an action brought to recover upon a breach of warranty in a sale made by the corporation through such agent was properly served upon him: *Gross v. Nichols*, 72–239.

This section does not authorize service upon a general agent, but upon any agent or clerk employed in an office or agency which the defendant may have for the transaction of its business: *Winney v. Sandwich Mfg. Co.*, 86–608.

If the agency for the prosecution of the business out of which the contract arose is discontinued, and the agent's authority revoked, service of process cannot be made upon such agent, though defendant keeps an agent in the same place for the transaction of other business: *Ibid.*

In a particular case, *held*, that it appeared that defendant maintained in the state such an agency as that service on the agent employed therein might be made with reference to the actions growing out of the business of such agency: *Bellows v. Litchfield*, 83–36.

Where service of an original notice was made on an agent, and the sufficiency of the service was questioned *held*, that, as the trial court had determined its sufficiency, it could not be attacked in a collateral proceeding: *Schneitman v. Noble*, 75–120.

TITLE XXIV, CHAPTER 3.

OFFENSES AGAINST PROPERTY.

SEC. **4780. Burning mills, locks, dams, depots, etc.** If any person wilfully and maliciously burn, either in the night or daytime, any warehouse, store, manufactory, mill, railroad depot, barn, stable, shop, office, outhouse or any building whatsoever of another, other than is mentioned in the preceding sections of this chapter, or any bridge, lock, dam or flume, he shall be imprisoned in the penitentiary not exceeding ten years. [C. '73, § 3884; R., § 4226; C. '51, § 2602.]

An indictment charging defendant with burning a certain "building, etc., *called a barn*," *held* sufficient, though in fact the building was not a barn but only a shed: *State v. Smith*, 28–565.

SEC. **4781. Setting fire with intent to burn.** If any person set fire to any building, boat or vessel mentioned in the preceding sections of this chapter, or to any material with intent to cause any such building, boat or vessel to be burnt, he shall be imprisoned in the penitentary not exceeding five years, or be fined not exceeding one thousand dollars and imprisoned in the county jai not more than one year. [C. '73, § 3885; R., § 4227; C. '51, § 2603.]

Where an indictment charged the setting of fire to material with intent to burn a building and also alleged the burning of the building, *held*, that the latter allegation was not a charge of a distinct crime under the preceding section, but was a statement of facts showing the intent, and the indictment did not therefore charge two offenses: *State v. Hull*, 83–112

The time of day is not an element of the offense provided for in this section: *State v. Tennebom*, 92–551.

SEC. **4794. Breaking and entering car.** If any person unlawfully break and enter any freight or express car which is sealed or locked, in which any goods, merchandise or other valuable things are kept for use, deposit or transportation, he shall be imprisoned in the penitentiary not more than five years, or be fined not exceeding one hundred dollars and imprisoned in the county jail not more than one year. [26 G. A., ch. 36.]

CHAPTER 4.

MALICIOUS MISCHIEF AND TRESPASS.

SEC. **4807. To highways, bridges, railways, telegraph lines, etc.** If any person maliciously injure, remove, or destroy

any bridge, rail or plank road; or place or cause to be placed any obstruction on such bridge or road; or wilfully obstruct or injure any public road or highway; or maliciously cut, burn or in any way break down, injure or destroy any telephone or telegraph post, or in any way cut, break or injure the wires or any apparatus thereto belonging, he shall be imprisoned in the penitentiary not more than five years, or be fined not exceeding five hundred dollars and imprisoned in the county jail not exceeding one year. [C. '73, § 3979; R., § 4320; C. '51, § 2680.]

[Chapter 162, Acts 28 G. A.]

To amend section forty-eight hundred and seven (4807) of the code, relating to malicious mischief and trespass.

SEC. 1. **Malicious injury to electric light and electric railway post or wires.** That section four thousand eight hundred and seven (4807) of the code be amended as follows: By inserting in the fourth line thereof between the words "any " and "telephone" the words "electric light, electric railways."

Approved February 24, 1900.

SEC. **4809. Placing obstructions on railways.** If any person shall wilfully and maliciously place any obstruction on the track of any railroad in the state, or remove any rail therefrom, or in any other way injure such railroad, or do any other thing thereto whereby the life of any person is or may be endangered, he shall be imprisoned in the penitentiary for life, or for any term not less than two years. [C. '73, § 3990; R., § 4331.]

It being found that the defendant knew the railroad was being used for the purpose of carrying freight and passengers, and intended to place the obstruction on the road, malice will be implied: *State v. Hessenkamp*, 17–25.

The fact that the land where the obstructions were placed on the track belonged to defendant, and the railroad company had no right of way over it or had violated the covenants of its contract with respect thereto, would be no defense in an action under this section: *Ibid.*

In a prosecution for obstructing the track of a railway, it is not necessary to allege or prove that the obstruction did actually obstruct and hinder trains *State v. Clemens*, 38–257.

See, also, § 4807 and notes.

[Chapter 127, Acts of 28 G. A., Relative to Railway Train Robbers.]

SEC. 1. **Train robbery—penalty.** That if any person shall stop or attempt to stop any railway passenger train, with intent to rob any person thereon, or to rob any coach attached thereto, or to rob any mail pouch, express safe, or box on such train; or shall wreck or attempt to wreck, derail or attempt to derail, any such train, by any means whatever, with intent to commit such robbery;

or shall obstruct or detain such train, or any locomotive, tender, coach, or car attached thereto, with such intent, or shall place upon any railway track, or under any engine, tender, coach, or car any explosive substance, with intent to obstruct, stop, detain, derail, or wreck such train, for the purpose of committing such robbery, or remove any spike, fish-plate, frog, rail, switch, tie, stringer, or appliance used on such railway, with intent to obstruct, stop, detain, derail, or wreck such train for the purpose of committing such robbery; or shall enter any locomotive, tender, coach, or car attached to such train and take or attempt to take possession thereof, for the purpose of committing such robbery; or shall rifle any coach, car, safe, box, or mail-pouch on such train; or shall with force and arms take and carry away any valuable thing whatever from such train, or from any person thereon; or shall intimidate, injure, wound, or maim any person thereon with intent to commit such robbery, he shall, upon conviction thereof, be imprisoned in the penitentiary at hard labor, for life, or for any term not less than ten years.

SEC. **4810. Shooting or throwing at train.** If any person throw any stone or other substance whatever, or present or discharge any gun, pistol or other firearm at any railroad train, car or locomotive engine, he shall be guilty of a misdemeanor. [16 G. A., ch. 148, § 1.]

SEC. **4811. Jumping off cars in motion.** If any person not employed thereon, or not an officer of the law in the discharge of his duty, without the consent of the person having the same in charge, get upon or off any locomotive engine or car of any railroad company while the same is in motion, or elsewhere than at the established depots of such company, or get upon, cling to or otherwise attach himself to any such engine or car for the purpose of riding upon the same, intending to jump therefrom when such engine or car is in motion, he shall be guilty of a misdemeanor. [Same, § 2.]

Where a person wrongfully jumps from a train in motion in violation of this section, the law will presume that an injury sustained by such act is the result of his own negligence: *Herman v. Chicago, M. & St. P. R. Co.*, 79–161.

Violation of this section will not constitute such contributory negligence as to defeat recovery on the part of the passenger injured in getting off of a moving train if the act is with the consent of the employe in charge of the train: *Galloway v. Chicago, R. I. & P. R Co.*, 87–458.

A brakeman is in charge of a train in such sense as just referred to: *Ibid.*

Where the recovery for injury received while getting off of a train while in motion is sought to be defeated on the ground that such act was unlawful and constituted contributory negligence, plaintiff may, under allegation of freedom from contributory negligence, prove that the act was with the consent of the conductor: *Raben v. Central Iowa R. Co.*, 74–732.

One who is injured in attempting to get on board a train in motion and relies as an excuse for such act upon the permission of the conductor, must show that the conductor had authority to give such permission under the rules of the company: *Young v. Chicago, M. & St. P. R. Co.*, 69 N. W., 682.

SEC. **4812. Uncoupling locomotive or cars.** If any person shall wilfully and maliciously uncouple or detach the locomotive or tender or any of the cars of any railroad train, or in any manner aid, abet or procure the doing of the same, such person shall be imprisoned in the penitentiary not exceeding five years, or fined not exceeding one thousand dollars, or both, at the discretion of the court. [19 G. A., ch. 112, § 1.]

SEC. **4813. Seizing and running locomotive.** If any person shall unlawfully seize upon any locomotive, with or without any express, mail, baggage or other car attached thereto, and run the same upon any railroad, or aid, abet or procure the doing of the same, such person shall be imprisoned in the penitentiary not exceeding ten years, or fined not exceeding two thousand dollars, or both fined and imprisoned. [Same, § 2.]

SEC. **4814. Wrongfully running hand-car.** If any person shall, without permission from the proper authority, wrongfully take or run any hand-car upon any railroad in this state, he shall be guilty of a misdemeanor; and if by such unlawful use of any hand-car any locomotive or car is thrown from the track, or a collision produced, or any person injured, he shall be imprisoned in the penitentiary for a term of not more than five years; and if thereby any person is killed, such person so offending shall be guilty of manslaughter. [Same, § 3.]

SEC. **4815. Interference with air-brake or bell-rope—arrest.** If any person not an employe upon the railroad shall wrongfully interfere with any automatic air-brake or bell-rope upon any railroad car, or use the same for the purpose of stopping or in any way controlling the movement of the train, he shall be subject to the penalty provided in the preceding section; and any conductor or brakeman on a railroad train shall have power to arrest a person so offending and deliver him to some peace officer on the line of the railroad. [Same, § 4.]

SEC. **4816. Tapping telegraph or telephone wires.** Any person who shall wrongfully or unlawfully tap or connect a wire with the telephone or telegraph wires of any person, company or association engaged in the transmission of messages on telephone or telegraph lines between the states or in this state, shall be fined not more than five hundred dollars, or imprisoned in the county jail not exceeding six months.

CHAPTER 5.

EEBEZZLEMENT.

SEC. **4844. Embezzlement by carrier or person intrusted.** If any carrier or other person to whom any money, goods or other property which may be the subject of larceny has been delivered to be carried for hire, or if any other person intrusted with such property, embezzle or fraudulently convert to his own use any such money, goods or other property, either in the mass as the same were delivered or otherwise, and before the same were delivered at the place or to the person where and to whom they were to be delivered, he is guilty of larceny. [C. '73, § 3910; R., § 4245; C. '51, § 2620.]

The offense here defined can only be committed upon property which "has been delivered to be carried for hire:" *State v. Stoller*, 38-321.

CHAPTER 9.

OFFENSES AGAINST MORALITY.

SEC. **4970. Cruelty to animals by railways, when transporting.** No railway company in this state, in the carrying or transportation of cattle, sheep, swine or other animals, shall confine the same in cars for a longer period than twenty-eight consecutive hours, unless delayed by storm or other accidental cause, without unloading for rest, water and feeding for a period of at least five consecutive hours. In estimating such confinement, the time the animals have been confined without such rest on connecting railways from which they are received shall be computed, it being the intention of this section to prevent their continuous confinement beyond twenty-eight hours, except upon the contingencies before stated; and animals unloaded for rest, water and feeding shall be properly fed, watered and sheltered during such rest by the owners or persons in custody thereof, or, in case of their default in so doing, then by the railway company transporting them, at the expense of said owners or persons in custody thereof, and said company shall have a lien upon such animals for food, care and custody furnished, and shall not be liable for any detention of such animals authorized by this section. But when such animals shall be carried in cars in which they shall and do have proper food, water, space and opportunity for rest, the foregoing provisions in regard to their being unloaded shall not apply. Any railway company, owner or custodian of such animals, who shall fail to comply with the provisions of this section, shall, for each and every such offense, be liable for and forfeit and pay a penalty of not less than one hundred nor more than five hundred dollars. [C. '73, § 4032.]

CHAPTER 10.

OFFENSES AGAINST PUBLIC HEALTH.

SEC. **4978. Putting infected person on public conveyance.** If any person shall place or put, or aid or abet in placing or putting, any person upon any railroad car, steamboat or other public conveyance, knowing such person to be infected with diphtheria, smallpox or scarlet fever, he shall be fined not more than one hundred dollars, or be imprisoned in the county jail not more than thirty days. [20 G. A., ch. 102; C. '73, § 4039; R , § 4375; C. '51, § 2729.]

CHAPTER 11.

OFFENSES AGAINST PUBLIC POLICY.

SEC. **5020. Bringing diseased cattle into state.** Any person driving any cattle into the state, or any agent, servant or employe of any railroad or other corporation who shall carry, transport or ship any cattle into this state, or any railroad company or other corporation or person who shall carry, ship or deliver any cattle into this state, or the owner, controller, lessee or agent or employe of any stock yard, receiving into such stock yard, or in any other inclosure for the detention of cattle in transit or shipment or reshipment or sale any cattle brought or shipped in any manner into this state, which at the time they were either driven, brought, shipped or transported into this state, were in such condition as to infect with or to communicate to other cattle pleuro-pneumonia, or splenitic or Texas fever, shall be fined not less than three hundred and not more than one thousand dollars, or be imprisoned in the county jail not exceeding six months, or both. [21 G. A., ch. 156, § 2; C. '73, § 4058]

SEC **5021. Action for damages.** Any person who shall be injured or damaged by any acts prohibited in the preceding section, in addition to the remedy therein provided, may recover the actual damages sustained by him from the person, agent, employe or corporation therein mentioned, and neither said criminal proceeding nor said civil action shall be a bar to a conviction or to a recovery in the other. [21 G. A., ch. 156, § 3; C. '73, § 4059.]

The liability for damages under this section does not arise where there is no negligence on the part of the carrier, and the presumption of negligence arising from injury may be rebutted by showing that there was in fact no such negligence: *Furley v. Chicago, M. & St. P. R. Co.*, 90–149.

SEC. **5027. Blacklisting employes.** If any person, agent, company or corporation, after having discharged any employe from his or its service, shall prevent or attempt to prevent, by word or writing of any kind, such discharged employe from obtaining employment with any other person, company or corporation, except

by furnishing in writing on request a truthful statement as to the cause of his discharge, such person, agent, company or corporation shall be punished by a fine not exceeding five hundred nor less than one hundred dollars, and shall be liable for all damages sustained by any such person. [22 G. A. ch. 57, § 1.]

SEC. **5028. Same by agents.** If any railway company or other company, partnership or corporation shall authorize or allow any of its or their agents to blacklist any discharged employe, or attempt by word or writing or any other means whatever to prevent such discharged employe, or any employe who may have voluntarily left said company's service, from obtaining employment with any other person or company, except as provided for in the preceding section, such company or copartnership shall be liable in treble damages to such employe so prevented from obtaining employment. [Same, § 2.]

CHAPTER 13.

CHEATING.

SEC. **5054. Fraudulent destruction of boats, etc.** If any person cast away, sink or otherwise destroy any raft, boat or vessel, within any county, with intent to defraud any owner or insurer thereof, or the owner or insurer of any property laden on board the same, or of any part thereof, he shall be imprisoned in the penitentiary not exceeding five years, or fined not exceeding two thousand dollars and imprisoned in the county jail not exceeding one year. [C. '73, § 4082; R., § 4403; C. '51, § 2753.]

SEC. **5055. Fitting out for that purpose.** If any person lade, equip or fit out, or assist in lading, equipping or fitting out, any raft, boat or vessel, with intent that the same be cast away, burnt, sunk or otherwise destroyed, to injure or defraud any owner or insurer thereof, or of any property laden on board the same, he shall be fined not exceeding one thousand dollars and imprisoned in the county jail not exceeding one year. [C. '73, § 4083; R., § 4404; C. 51, § 2754.]

SEC. **5056. Making false bills of lading.** If any owner of any boat or vessel, or of any property laden or pretended to be laden on board the same, or if any other person concerned in the lading or fitting out such boat or vessel, make out and exhibit, or cause to be made out and exhibited, any false estimate of any goods or property laden or pretended to be laden on board such boat or vessel, with intent to injure or defraud any insurer of such boat or vessel or property, or of any part thereof, he shall be fined not exceeding one thousand dollars, or imprisoned in the penitentiary not more than three years. [C. '73, § 4084; R., § 4405; C. '51, § 2755]

SEC. **5057. Making false affidavits or protests.** If any master or other officer of any boat or vessel make, or cause to be made, any false affidavit or manifest, or if any owner or other person concerned in such boat or vessel, or in the goods or property laden on board the same, procure any such false affidavit or manifest to be made, or exhibit the same, with intent to injure, deceive or defraud any insurer of such boat or vessel, or of the goods or property laden on board of the same, he shall be imprisoned in the penitentiary not exceeding five years, or be fined not exceeding three thousand dollars and imprisoned in the county jail not exceeding one year. [C. '73, § 4085; R., § 4406; C. '51, § 2756.]

SEC. **5060. Pools and trusts.** Any corporation organized under the laws of this or any other state or country for transacting or conducting any kind of business in this state, or any partnership, association or individual, creating, entering into or becoming a member of or a party to any pool, trust, agreement, contract, combination, confederation or understanding with any other corporation, partnership, association or individual, to regulate or fix the price of any article of merchandise or commodity, or to fix or limit the amount or quantity of any article, commodity or merchandise to be manufactured, mined, produced or sold in this state, shall be guilty of a conspiracy. [23 G. A., ch. 28, § 1.]

SEC. **5061. Corporation not to enter.** No corporation shall issue or own trust certificates, and no corporation, nor any agent, officer, employe, director or stockholder of any corporation, shall enter into any combination, contract or agreement with any person or corporation, or with any stockholder or director thereof, for the purpose of placing the management or control of such combination or combinations, or the manufactured product thereof, in the hands of any trustee or trustees, with intent to limit or fix the price or lessen the production or sale of any article of commerce, use or consumption, or to prevent, restrict or diminish the manufacture or output of any such article. [Same, § 2.]

SEC. **5062. Penalty.** Any corporation, company, firm or association violating any of the provisions of the two preceding sections shall be fined not less than one per cent. of its capital or amount invested in such corporation, company, firm or association, nor more than twenty per cent. of the same; and any president, manager, director, officer, agent or receiver of any corporation, company, firm or association, or any member of any corporation, company, firm or association, or any individual, found guilty of a violation thereof, shall be fined not less than five hundred nor more than five thousand dollars, or be imprisoned in the county jail not to exceed one year, or both. [Same, § 3.]

SEC. **5063. Contracts void.** All contracts or agreements in violation of any provisions of the three preceding sections shall be void. [Same, § 4.]

SEC. **5064. Defense.** Any purchaser of any article or commodity from any individual, company or corporation transacting business contrary to any provisions of the four preceding sections shall not be liable for the price or payment thereof, and may plead such provisions as a defense to any action for such price or payment. [Same, § 5.]

SEC. **5065. Forfeiture of charter.** Any corporation created or organized by or under the law of this state, which shall violate any provision of the five preceding sections, shall thereby forfeit its corporate right and franchise, as provided in the next section. [Same, § 6.]

SEC. **5066. Notice by secretary of state.** The secretary of state, upon satisfactory evidence that any company or association of persons incorporated under the laws of this state have entered into any trust, combination or association in violation of the provisions of the six preceding sections, shall give notice to such corporation that, unless it withdraws from and severs all business connection with said trust, combination or association, its articles of incorporation will be revoked at the expiration of thirty days from date of such notice. [Same, § 7.]

SEC. **5067. Proceedings—inquiry by grand jury.** County attorneys, in their counties, and the attorney-general shall enforce the provisions of a public nature in the seven preceding sections, and any county attorney or the attorney general securing a conviction under the provisions thereof shall be entitled, in addition to such fee or salary as by law he is allowed for such prosecution, to one-fifth of the fine recovered. When the attorney general and county attorney act in conjunction in the prosecution of any action under such provisions, they shall be entitled to one-fourth of the fine recovered, which they shall divide equally between them, where there is no agreement to the contrary. It shall be the duty of the grand jury to inquire into and ascertain if there exists any pool, trust or combination within their respective counties. [Same, § 8.]

SEC. **5068. False warehouse receipts.** If any person sell, transfer or dispose of any receipt or voucher, given or purporting to have been given by any person for property in store, knowing that such person has not in his possession such property, or any part thereof, he shall be fined not exceeding one thousand dollars and imprisoned in the penitentiary not exceeding five years. [C. '73, § 4088.]

It is not competent for a defendant charged with crime under this section to show that the shipment or disposal of the property was with the knowledge or verbal consent of the person holding the receipt. The provision is intended for the protection of the community as well: *State v. Stevenson*, 52–701.

SEC. **5072. Swindling by three card-monte.** Whoever by means of three-card-monte, so called, or any other form or device, sleight-of-hand, or other means whatever, by use of cards or instruments of like character, obtains from another person any money or other property, shall be guilty of swindling, and be fined not less than two hundred nor more than two thousand dollars, or be imprisoned in the penitentiary not less than two nor more than five years, or both. All persons aiding, encouraging, advising or confederating with, or knowingly harboring or concealing, any

such person or persons, or in any manner being accessory to the commission of the above described offense, or confederating together for the purpose of playing such games, shall be deemed prineipals therein, and punished accordingly. [16 G. A., ch. 102, § 1.]

This act embraces any "sleight-of-hand" performance, whether done by the use of cards or other devices: *State v. Quinn*, 47–368.

SEC. **5073. Who may make arrest for.** Any person may, and every conductor and other employe on any railroad car or train, every captain, clerk and other employe on any boat, every station agent at any railway depot, the officers of any fair or fair grounds, and the proprietor of any place of public resort and his employes, shall, with or without warrant, arrest any person found in the act of committing any of the offenses mentioned in the preceding section, or any person whom he or they may have good reason to believe to be guilty of the commission of any such offense. [Same § 3.]

SEC. **5074. Duty of conductor, captain, etc.** Any conductor, captain, hotel or saloon keeper, proprietor or manager of any public conveyance or place of public resort, and the officers of any fair or fair grounds, shall eject from his car, train, boat, hotel, saloon, public conveyance, fair grounds or place of public resort any person known to him or whom he has good reason to believe to be a three-card monte man, or who offers to wager or bet money or other valuable thing upon what is commonly known as three-card-monte, or bet on any trick or game with cards or other gaming device, and any failure, neglect or refusal to do so, or to suppress or prevent a violation of the second preceding section, shall be a misdemeanor. [16 G. A., ch. 102, § 1.]

SEC. **5075. Posting copy of law.** Any person or company operating any public conveyance by which passengers are carried shall keep posted up in such conveyance a copy of the three preceding sections. [Same, § 4.]

INDEX TO LAWS.

Page

Abandonment of right of way 390
Abandoned right of way, condemning 391
Access to railway station and highways, right of person to 397
Actions against railway and construction companies, where may be brought, manner of commencing, how notice may be served 493, 497, 498
Advance in rates, what necessary before 463
Agreements, railways may make with connecting roads 400
Air-brakes, interference with, penalty for 502
see, also, *Brakes*.
Annual reports, see Reports.
ASSESSMENTS of railways and street railways 351
of railroads for taxation 355
Automatic couplers and brakes 439
Baggage, liability of carrier for 495
Bell rope, interference with, penalty for 502
Bills of lading, making false, penalty for 505
Blacklisting employes prohibited 504, 505
BOARD OF RAILROAD COMMISSIONERS must approve interlocking switches 427
may order depots at railroad crossings 454
may order tracks of railways crossing one another to be connected by means of a wye 454
must order railway companies to change name of stations to conform to name of postoffice, etc 455
election, organization, qualifications of 456
supervision of, over railroads 456
powers and duties 456
carriers must make annual report to 457
may examine the books, papers, etc., of carriers 458
shall examine into rates charged and report to the governor 459
order of may be enforced by the district courts 459
salaries of 461
complaint may be made to, concerning freight rates, etc 466
shall inquire into the manner and methed of railroad companies in conducting their business 466
complaint may be made by any person, firm, corporation, etc., concerning violation of law 467
shall report its findings in writing 467
shall issue orders to railway companies 468
orders may be enforced through the courts 468
shall make a maximum schedule of rates and classification of freights 470
complaints in reference to violation of schedule 471
may take evidence, swear witnesses, etc 471
after hearing shall fix the maximum rate to be charged 471
proceedings in cases before the board 472
annual reports of carriers to board required 472
may bring suit to enforce provisions of law 475
may fix joint rates 477
may apportion division of joint rates as between the various companies 478
jurisdiction over express companies 482

Page

Boats, passenger, regulations concerning ... 486
fraudulent destruction of, penalty ... 505
BONDS may be issued by railway companies ... 402
secured by mortgage ... 404
or stock, tax certificates may be exchanged for ... 448
Brakes, driver, on engines ... 439
power, and automatic couplers ... 439
Breaking and entering car ... 499
Bridges across boundary rivers, railway, etc ... 366
Butter and cheese, imitation, shipping of ... 487
Canals, right of way for ... 397
Car, breaking and entering, penalty for ... 499
CARS, duty to furnish and transport ... 458
getting on or off while in motion ... 501
lighting of by oil lamps, provisions concerning ... 495
Carloads of freight transferred from one road to another ... 476
Cattle, diseased, transportation of prohibited ... 504
Cattle guards at public crossings, etc ... 405
Change in location of railway line ... 452, 453
of name of railway company, effect of ... 429
Changing name of railway stations to conform to name of postoffice ... 455
Channels or ditches along right of way ... 390
Charges unpaid, lien on property for ... 493, 494, 495
Charges, unlawful, penalty for making ... 478
Complaints of violation of law, etc., may be made to the board by any person ... 467
Condemning abandoned right of way ... 391
Condemnation proceedings:
for right of way ... 372
for reservoirs ... 374
additional depot grounds ... 375
additional right of way, etc ... 376
manner of ... 376
assessment of damages ... 383
notice to property owners ... 383, 384, 385
appraisement ... 385
report recorded ... 386
appeals, how taken ... 386
deposits, etc ... 388, 389
Connecting lines, transferring carloads from one to the other ... 476
Connecting tracks in cities ... 453, 454
Continuous shipments, contracts in restraint of prohibited ... 465
CONTRACTS in violation of the law prohibiting pools and trusts void ... 506
leases, etc., may be mortgaged ... 428
limiting lawful liability of railway companies not valid ... 435
Corporations for pecuniary profit ... 369, 370, 371
Costs in suits, and attorneys' fees ... 460
Couplers, automatic, and brakes on cars ... 439
Criminal liability of common carriers for violation of law ... 466
CROSSINGS, HIGHWAY, railways raising or lowering ... 391
and railway, provisions for ... 405
railroads must give signals ... 434
CROSSINGS, RAILWAY, speed of trains ... 349
station houses at ... 454
proposed, provisions for ... 428
trains must stop before crossing ... 435
near Mississippi river ... 427
Cruelty to animals while being transported, penalty ... 503
Culverts, street railways to maintain ... 354
Damages, treble, for violation of provisions of law ... 465, 466

Page

DEPOTS, sites for, donated ... 353
submission of, to voters ... 353
additional ground for ... 375
burning or attempted burning of, penalty ... 499
at railroad crossings ... 454
union, corporations formed for ... 453
Dining cars, report concerning, to the executive council ... 358
Directors of railway companies, selection by bondholders ... 408
DISCRIMINATION, unjust, prohibited ... 462
defined and prohibited ... 473, 474
punishment for ... 473, 475
in through rates prohibited ... 477
Dividends, rate on preferred stock ... 403
DRAINS, street railways to maintain ... 354
in public highway ... 371
DRAINAGE laws ... 371
channels or ditches along right of way ... 390
Election of commissioners ... 456
Elevator and warehouse certificates ... 490, 491, 492
Embezzlement of goods or money by carriers, penalty for ... 502
EMINENT domain, right of way for railways ... 372
for reservoirs ... 374
EMPLOYES, blacklisting of prohibited ... 504, 505
companies responsible for negligence of ... 429
Express companies, what deemed ... 360, 361
statements and reports to auditor ... 360, 361
assessment of by executive council ... 362
actual value, how ascertained ... 363
taxable value ... 363
levy and collection of taxes ... 364
refusal to furnish statements, and false statements ... 365
subject to regulation ... 482
under supervision of railroad commissioners ... 482
rates for to be fixed by railroad commissioners ... 482
Extortion by railway companies, prohibited—penalty ... 473
False bills of lading, penalty for making ... 505
warehouse receipts, penalty for making ... 507
Fares, passenger ... 436, 437
FENCING right of way, failure of company in ... 408
at highway crossings, notes ... 419
depot grounds, notes ... 418
Fences required ... 426
Ferries, free ... 369
public ... 366, 367, 368, 369
railway ... 366
Fire set out by engines, damage from ... 421
Fish, birds and game, shipping out of state ... 488, 489
Foreign railway companies, privileges in Iowa ... 404
Forfeiture by railway company for violation of law ... 475
Forfeiture of charter by corporation entering pool or trust ... 507
Free transportation or reduced rates may be granted under certain circumstances ... 476
Gambling on trains or boats prohibited, conductors, etc., may arrest for ... 507, 508
Game, fish, etc, shipping out of state ... 488, 489
Gates at railway crossings ... 349
Getting on or off cars while in motion ... 501
Hand-car, wrongfully running ... 502

Page

HIGHWAYS, drains in ... 371
raising or lowering by railroads ... 391
street railways over ... 397
damages to abutting property owners ... 397
right of person to access to through land of another ... 397
proceedings to condemn ... 398
provisions of law for ... 405
signals must be given by railways at ... 434
See, also, *Crossings, Highway.*
Infected person, placing on public conveyance, penalty for ... 504
INTERLOCKING SWITCHES at railroad crossings ... 426
provisions for establishing ... 427
apportionment of cost of ... 428
Intoxicating liquors, transportation of ... 483, 484
Investigations and inquiries by the board ... 466, 467
Joint arrangements for running trains, etc ... 428
Joint rates. See *Rates.*
Judgments against railway companies where may be recovered ... 436
Land grants, recording of ... 489
Lease of equipment or rolling stock ... 405
Lessees of railways, duties of ... 401
Levees, etc ... 371
Liability of railway company for stock killed ... 403
Liability of railway companies, legal liability cannot be limited by contract ... 435
Live stock, killing of, liability of company for ... 408, 426
Locomotives, seizing and running ... 502
Long and short haul, no greater charge shall be made for shorter than longer haul ... 463
Maliciously injuring bridges, railways, telegraph lines, etc., penalty ... 499
Mechanics' liens on railroads ... 490
Mileage books not interfered with by provisions of law for redemption of tickets ... 479
Name of station must be same as postoffice ... 455
Negligence of employes, companies responsible for ... 429
New railroads must make report to general assembly ... 429
Non-use of right of way ... 390
Nuisance, preventing drainage ... 371
Obstructions on railways, placing, penalty for ... 500
Offices of railway companies organized in Iowa must remain in Iowa ... 402
Orders of commissioners may be enforced in the courts ... 458
Orders of commissioners, how enforced ... 468
Organization of board ... 456
Passenger boats, regulation of ... 486
Passenger fares ... 436, 437
Paving, street railways and railways compelled to ... 351, 352, 353
Penalties for violation of law, treble damages ... 465, 466
Pipes, right of railway companies to lay ... 375
Pooling contracts prohibited ... 463
Pools and trusts prohibited ... 506
Powers and duties of board ... 456
Preferred stock may be issued ... 403
Proceedings before the board, how conducted ... 472
Property unclaimed, carrier has lien on, for unpaid charges ... 493, 494, 495
Railway companies, liability for negligence of employes ... 429
"RAILWAY corporation," meaning of the term ... 461
laws applicable to ... 369, 370, 371
RAILWAYS, right of way for ... 372
right to condemn land for reservoirs ... 374
right to lay pipes ... 375
right to condemn additional land for depot grounds ... 375
right to condemn additional ground for double track, etc ... 376
may be established to quarries, mines, etc ... 398
construction of along river banks ... 399
change of name of ... 399

Page

RAILWAYS, record of ... 400
may join or consolidate ... 400
may connect with other railroads and make agreements ... 400
may extend their lines through other states ... 401
may issue bonds for construction and equipment ... 402
companies organized in Iowa, offices must be maintained in the state ... 402
may own bonds and stock ... 404
organized in other states, privileges in Iowa ... 404
state may exercise full jurisdiction over ... 429
newly constructed, must report to general assembly ... 429
change in location of ... 452, 453
street—see *Street Railways.*
crossings near Mississippi river ... 427
crossings, trains must stop before crossing ... 435
crossings, station houses at ... 454
Railway crossings—see *Crossings, Railway.*
Rates of fare may be made by state for railways ... 429
RATES, fare for passengers ... 436, 437
examination of by commissioners ... 459
for passengers and freight must be reasonable ... 461
must be fair ... 463
schedules must be published ... 463
commissioners' schedule of ... 470
may be revised, proceedings in ... 470
commissioners' schedule of, complaint of violation of ... 471
hearing and evidence in ... 471
determination of by board ... 471
reduced, may be granted for fairs, ministers, etc ... 476
joint, may be made by the railway companies ... 476
must be granted by railroad companies upon request ... 476
to be fixed by railroad commissioners ... 477
joint, each company's proportion of ... 478
unreasonable, penalty for making ... 478
for express companies, to be fixed by railroad commission ... 482
Relocation of line of railway ... 452, 453
REPORTS of railroad companies to executive council ... 355, 356
annual, of railway companies to governor ... 438
annual, required to be made to the board ... 457
annual, to railroad commissioners required of railway companies ... 472
Reservoirs, right to condemn land for ... 374
River banks, construction of railways along ... 399
RIGHT OF WAY for railways ... 372
additional, right to condemn ... 376
non-use of ... 390
condemning when abandoned ... 391
for canals, turnpikes or bridges ... 397
for telegraph and telephone lines ... 479
damages assessed ... 480
how such lines shall be constructed ... 480
Roadbeds of railroads shall not be assessed against adjacent property owners ... 360
Robbing trains, penalty for ... 500
Salaries of members of the board and secretary ... 461
Sale, conditional, or lease of equipment or rolling stock ... 405
Sale or lease of railroad property, liability of lessees, etc ... 428
SCHEDULES of rates and fares must be published ... 463
commissioners' ... 470
Seizing and running locomotives, penalty for ... 502
Shooting or throwing at train, penalty for ... 501
Signals at highway crossings ... 434
Signs of warning at railway crossings ... 405
Sleeping cars, report concerning to executive council ... 358

Page

SLEEPER TICKETS, general provisions concerning 455, 456
must be sold at terminal stations 455, 456
Speed of trains, regulation of 349
through towns (Sec. 2055) 409, 418
STATIONS, railway, right of public to access to 397
depots at railroad crossings 454
name must be same as postoffice 455
STOCK KILLED, liability of company for 408
liability for, on account failure to fence 408
penalty for 426
STOCK, preferred, may be issued and converted into common 403
railway companies may own 404
or bonds, tax certificates may be exchanged for 448
Streams, changing course of 390
Streets, railway and street railway tracks on 345
STREET RAILWAYS, laying tracks on streets 345
cars must be supplied with vestibules 349
cities may own 354
or grant franchises 354
to maintain culverts and drains 554
taxation of property belonging to 359
over highways 397
Suits may be brought by commissioners 475
Suits against carriers, place of bringing action 495
Suits agains construction companies 496
Switching charges and service 462
Tapping telegraph or telephone lines, penalty for 502
Taxes paid in labor or supplies 451
Tax, forfeiture of 450
TAXES in aid of railroads may be voted 440
proceedings in 441, 447, 449
Tax certificates may be exchanged for stock or bonds 448
Taxes, railways and street railways 351
TAXATION of railroads 355, 356, 357
of sleeping cars and dining cars 358
of property belonging to street railways 359
Telegraph and telephone lines, right of way for 479
how constructed 480
damages assessed 480
liability for refusing to transmit messages—penalty 480
liability for mistakes in transmitting 480
negligence presumed in erroneous transmission of messages, etc 482
tapping of, penalty for 502
Terminal offices must be maintained by railways terminating in Iowa 455
Three-card monte, cheating by, conductor of train may make arrest for 507, 508
Throwing or shooting at train, penalty for 501
Tickets unused must be redeemed by carriers of passengers 478
notice posted concerning 479
penalty for refusal to redeem 479
mileage books not interfered with 479
Tracks on streets, steam and railway 345
Track connections in towns or cities 453, 454
Trains, speed of, regulation of 349
Train robbery, penalty for 500
Train, shooting or throwing at, penalty for 501
TRANSPORTATION of intoxicating liquors 483, 484
of diseased cattle 504
Trusts and pools prohibited 506
Unclaimed property, lien for transportation charges 493, 494, 495
Uncoupling cars unlawfully, penalty for 502
Undue preferences prohibited 462

Page

Union railway depots 453
Unreasonable charges, penalty for making 478
Vestibules on street cars 349
Viaducts, when required 350
assessment of damages 350
specifications of 351
apportionment of cost and repairs of 351
refusal of railway companies to comply with order 351
Warehousemen, and elevator, certificates 490, 491, 492
Warehouse receipts, false, penalty for making 507
Whistle and bell must be sounded at highway crossings 434
Wyes, at railroad crossings, may be required 454
Y's may be ordered constructed by railroad commissioners at railroad crossings 454